IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

JOHN DOE, et al.
Appellant,

v.

STATE OF NEVADA EX REL., et al.,
Respondents

No. 69801

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Judicial District Department XXXII

County Clark County Judge Rob Bare

District Ct. Case No. A-15-723045-C

2. Attorney filing this docketing statement:

Attorney Jacob L. Hafter, Esq. Telephone (702) 405-6700

Firm HAFTERLAW

Address 6851 West Charleston Blvd.
Las Vegas, NV 89117

Client(s) John Doe, on his own behalf and on behalf of a class of those similarly situated

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Kevin C. Powers, Esq. Telephone (775) 684-6830

Firm Legislative Counsel Bureau, Legal Division

Address 401 S. Carson St.
Carson City, NV 89701

Client(s) Legislature of the State of Nevada

Attorney Linda Anderson, Esq. Telephone (775) 684-1237

Firm Office of the Attorney General

Address 555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101

Client(s) State of Nevada and Department of Health and Human Services

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☒ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify): _____
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☐ Other disposition (specify): _____

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Not Applicable

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Not Applicable

8. Nature of the action. Briefly describe the nature of the action and the result below:

This action seeks to challenge the legitimacy of the Medical Marijuana Registry ("Registry"), on the basis of the 5th Amendment and 14th Amendments of the U.S. Constitution. Specifically, this action alleges that the application process for the Registry is a compelled disclosure which violates the applicant's privilege against self-incrimination. Additionally, this Court is asked to enunciate a basic fundamental right which, while not expressed previously by the Courts, is implicit within all of the Supreme Court's fundamental rights opinions – the fundamental right to access the health care which your physician recommends. In doing so, as Nev Const Art 4 Sec 38, recognize medical marijuana as a health care option, the Registry violates our equal protection rights. This action also alleges that the Defendants purposefully took payments from citizens of this State to be included in the Registry, when the Defendants knew or should have known that the a person who is on the Registry could not enjoy the benefits of the Registry, as there were no dispensaries available during the one year term of a person's inclusion in the Registry. This action seeks to compensate the class of people who were in the Registry.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Did the District Court err in its granting the Defendants' motions for summary judgment on all issues?

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☐ N/A

☒ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is presumptively retained by the Supreme Court pursuant to Rule 17(a)(10) because this action concerns an question of first impression involving the United State Constitution and Nevada Constitution, as well as a question of statewide public importance. See NRAP 17(a)(10).

14. Trial. If this action proceeded to trial, how many days did the trial last? 0

Was it a bench or jury trial? not applicable

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

Not Applicable

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from February 5, 2015

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served February 5, 2015

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. ***See*** **AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed February 22, 2016

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

Not applicable

20. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

NRAP 4(a)(2).

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)	☐ NRS 38.205
☐ NRAP 3A(b)(2)	☐ NRS 233B.150
☐ NRAP 3A(b)(3)	☐ NRS 703.376
☐ Other (specify)	

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) allows appeals to be taken from a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered. The District Court entered a final judgment on February 5, 2016; accordingly, NRAP 3A(b)(1) provides authority to the Appellant to appeal the final Judgment.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiff John Doe, on his own behalf and on behalf of a class of those similarly situated;

Defendant State of Nevada ex rel. The Legislature of the 77th Session of the State of Nevada, Defendant State of Nevada Department of Health and Human Services; Defendant The Honorable Brian Sandoval, in his official capacity as Governor of the State of Nevada.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Not Applicable

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

Not Applicable

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

John Doe, et al
Name of appellant

Jacob L. Hafter, Esq.
Name of counsel of record

March 10, 2016
Date

Signature of counsel of record

State of Nevada, Clark County
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 10th day of March, 2016, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Kevin C. Powers, Esq.
Legislative Counsel Bureau, Legal Div.
401 S. Carson Street
Carson City, NV 89701

Gregory Zunino, Esq.
Office of the Attorney General
100 N. Carson St.
Carson City, NV 89701

Linda Anderson, Esq.
Office of the Attorney General
555 E. Washington Ave., Suite 3900
Carson City, NV 89101

Dated this 10th day of March, 2016

Signature

COMP
JACOB L. HAFTER, ESQ.
Nevada State Bar No. 9303
HAFTERLAW
6851 West Charleston Boulevard
Las Vegas, Nevada 89117
Tel: (702) 405-6700
Fax: (702) 685-4184

Counsel for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

STATE OF NEVADA

JOHN DOE, on his own behalf and on behalf of a class of those similarly situated;

Plaintiff,

vs.

STATE OF NEVADA ex rel. THE LEGISLATURE OF THE 77th SESSION OF THE STATE OF NEVADA; STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; THE HONORABLE BRIAN SANDOVAL, in his official capacity as Governor of the State of Nevada; DOES 1-100, inclusive; and ROE CORPORATIONS 1-100, inclusive;

Defendants.

Case No.: A-15-723045-C

Dept. No. XXXII

SECOND AMENDED CLASS ACTION COMPLAINT FOR:

1. **Fraud** (Against DHHS)
2. **Unjust Enrichment** (Against DHHS)
3. **Violation of Equal Protection as actionable under 42 U.S.C. §1983 with Respect to Fees Charged to Obtain a Registration Card** (Against All Defendants)
4. **Violation of Equal Protection as actionable under 42 U.S.C. §1983 with Respect to Registration Required to Obtain a Registration Card** (Against All Defendants)
5. ***Violation of Fifth Amendment as actionable under 42 U.S.C. §1983 with Respect to Registration Required to Obtain a Registration Card*** *(Against All Defendants)*
6. **Imposition of Non-Uniform and Unequal Taxation and Assessment in Violation of Article 10, Section 1 of the Nevada Constitution** (Against Defendants Legislature and Sandoval)

(Arbitration Exemption: Damages in excess of $50,000, Significant Issue of Public Policy, and Declaratory Relief Sought)

(*changes are in italics and underline*)

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COMES NOW, Plaintiff **JOHN DOE**[1], individually, on his own behalf and on behalf of a class of those similarly situated, by and through his attorney of record, **JACOB HAFTER, Esq.**, of **HAFTERLAW**, and hereby files this Complaint against Defendants the **STATE OF NEVADA ex rel. THE LEGISLATURE OF THE 77th SESSION OF THE STATE OF NEVADA; STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES**; and **THE HONORABLE BRIAN SANDOVAL**, in his official capacity as Governor of the State of Nevada; DOES 1-100, inclusive; and ROE CORPORATIONS 1-100, inclusive, and here alleges as follows:

INTRODUCTION

In 2001, the people of the Great State of Nevada amended its Constitution to all the "use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of" various medical condition which, in the physician's opinion would have some medical benefit. Nev. Const. Art. 4, Sec. 38. In doing so, the Legislature created a new section of the Nevada Revised Statutes to create a mechanism for patients to be able to obtain and use medical marijuana without fear of state criminal prosecution. See Nev. Rev. Stat. Chapter 453A. In doing so, the State distinguished "**medical** marijuana" from street marijuana by creating standards for testing, purity and labeling of marijuana.

In 2013, recognizing that the State failed to adequately provide for a safe and legal method for obtaining **medical** marijuana, save and except for either growing one's own[2] or

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[1] Plaintiff has brought this action under the pseudonym of "JOHN DOE" to protect his identity due to the sensitivity of the issue. Plaintiff recognizes that exposure of his true identity may have significant adverse consequences, ranging from losing his job to federal prosecution. Plaintiff should not have to suffer such collateral damage because he desires to access this Court to resolve the matters in controversy discussed herein. Once the case is assigned to a specific department, Plaintiff will file a motion for leave to file a disclosure of his true identity to the Court and opposing counsel. The concern for confidentiality of medical marijuana patients has even been validated by the Legislature, in that the identity of people who have applied for a registry identification card shall be maintained confidential. NRS §453A.070.

[2] Query how one can grow their own without either obtaining seeds from a legal source, as none exists.

purchasing non-medical marijuana from the local street corner drug dealer, the Legislature reformed Chapter 453A to expand access through the regulation and licensure of dispensaries. Under this reform, the Legislature defined a "medical marijuana dispensary" as a "business that 1. Is registered with the Division pursuant to NRS 453A.322; and 2. Acquires, possesses, delivers, transfers, transports, supplies, sells or dispenses marijuana or related supplies and educational materials to the holder of a valid registry identification card." NRS §453A.210. Under law, only a person who has a valid registration card can do business with a dispensary. NRS §453A.115.

Recognizing that the Legislature corrected a major hole in the medical marijuana regulatory scheme – namely how a person who is unable or incapable of growing medical marijuana can obtain such in a safe and legal manner – after the 2013 legislative session, numerous people applied to obtain a new registration card, or applied to renew their registration card. In order to obtain the registration card, the patient must pay a fee to the State, NRS §453A.740; NAC §453A.140, and must pay to obtain an examination by a physician who must acknowledge that the patient meets the clinical conditions for use of medical marijuana under the law. A registration card is only valid for one year. NRS §453A.220(4).

While Defendant DHHS has been accepting the fees for the registration cards, and have been issuing such, they have done so with the knowledge that there is no place within Southern Nevada for a patient to legally purchase seeds, plants or plant derivatives. Accordingly, Plaintiff, and those similarly situated to him, completed the application process, including seeking a physician evaluation and recommendation, submitting forms in quadruplicate and paying various fees, only to receive a card; they still do not have access to legally regulated medical marijuana.[3] In other words, without access to a dispensary, the registration cards are worthless in facilitating Nevada patients to access medical marijuana; and, yet, Defendant DHHS still took (and are taking) the money from Plaintiff (and others similarly situated), and

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[3] The Legislature made sure to distinguish medical marijuana from all other forms of marijuana by creating arduous testing and labeling requirements so that patients can know, with certainty, the concentration of various components of the marijuana that they are receiving. See, e.g., NRS §453A.358.

issued one or more cards with a one year duration, despite their failure to license a dispensary in Southern Nevada. Rather than extending the expiration date of a registration card for a period that would end one year from when the first dispensary was licensed, their continue to issue cards for only one year, knowing that their utility is minimal, at best.[4] Accordingly, Defendant DHHS has engaged in fraud by enticing patients with compromised health to pay for registration cards which have no utility in facilitating Nevada patients to access medical marijuana. Defendant DHHS has also be unjustly enriched by taking the registration fees from Plaintiff, and others similarly situated, without giving them access to **ANY** legal source for obtaining **medical** marijuana. This suit seeks declaratory relief and compensatory relief from such torts.

This lawsuit, however, goes beyond the pursuit of justice for such torts. This lawsuit also raises critical constitutional questions about health care and the equal protection of our citizens' access to health care. First, this lawsuit seeks declaratory relief finding that the fees associated with the registration card are a violation of the Equal Protection Clause of the U.S. Constitution, in so much as no patient has to pay a tax in order to be able to receive any other treatment regime prescribed or recommended by a licensed physician. Second, the case seeks declaratory relief finding that the creation of a registry of patients who are seeking to obtain a physician recommended treatment for their chronic condition and/or disability, is a violation of the Equal Protection Clause of the U.S. Constitution, in so much as no patient has to register with the State in order to be able to receive any other treatment regime prescribed or recommended by a licensed physician. *Third, this action seeks a ruling from this Court as to whether the registry violates a person's Fifth Amendment right against self-incrimination*. Finally, this action seeks a declaration that the payment of the registration fees are an unconstitutional taking of private property, which violates the Equal Protection Clause of the United States Constitution and Nevada's constitutional mandate of uniform and equal taxation

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[4] Defendants may argue that a registry card is also beneficial in that it provides an affirmative defense for prosecution for possession of marijuana. This is a baseless argument, given the fact that the Nevada Constitution required that patients be allowed to access medical marijuana and one cannot purchase "medical marijuana" from any other sources, and one cannot grow "medical marijuana" from scratch.

and assessment, and contravenes fundamental principles of law and equity.

Ultimately, in addition to the above, as a part of the third and fourth causes of action, this case will require this Court to address the next fundamental rights question - whether access to health care, in whole or in part, is a fundamental constitutional right.

GENERAL ALLEGATIONS

PARTIES, JURISDICTION AND VENUE

1. At all times material hereto, Plaintiff **JOHN DOE** was a resident of Las Vegas, Clark County, Nevada and currently resides in Las Vegas, Clark County, Nevada.

2. Defendant, the **LEGISLATURE**, is the holder of the legislative authority of the State of Nevada. The LEGISLATURE convened the 77th Session of the Nevada Legislature on February 4, 2013, and adjourned sine die on June 3, 2013.

3. Defendant, the **STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES** ("DHHS"), is a branch of the state government, constituted by the Constitution of the State of Nevada.

4. Defendant **THE HONORABLE BRIAN SANDOVAL**, is named herein in his official capacity as the duly elected Governor of the State of Nevada

5. Defendants DOES 1-100, inclusive, are not known at this time and are therefore identified by the fictitious designation of DOES 1-100. Defendants ROE CORPORATIONS 1-100, inclusive, are not known at this time and are therefore identified by the fictitious designation of ROE CORPORATIONS 1-100. Once the true identities and capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as DOES 1-100, inclusive, and ROE CORPORATIONS 1-100, inclusive, are known, Plaintiff will ask leave of this Court to amend this Complaint for Injunctive and Declaratory Relief and for Damages to insert the true names and capacities of DOES 1-100, and ROE CORPORATIONS 1-100 and join said Defendants in this action; Plaintiff is informed and believes, and thereon alleges, that each of the Defendants designated herein as DOE or ROE CORPORATION are responsible in some manner for the events and happenings referred to herein and caused damages to Plaintiff

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as herein alleged.

6. All of the acts complained of herein occurred in the State of Nevada.

7. Jurisdiction is proper in this Court pursuant to the Article 6 of the Nevada Constitution, and NRS Chapter 3.

8. Declaratory relief is authorized, in part, by 28 U.S.C. §§ 2201 and 2202.

9. This action is brought, in part, pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution and laws of the United States.

10. Venue is properly conferred on this Court pursuant to NRS Chapter 13 because the Defendants are subject to personal jurisdiction in this District and because a substantial part of the events giving rise to the claims alleged herein took place in this District.

GENERAL ALLEGATIONS

11. Plaintiff is a 42 year old male.

12. Plaintiff has a history of migraine headaches.

13. Plaintiff has had migraines since he was 15 years old.

14. Plaintiff's migraines are severe, and are associated with additional side effects, such as photophobia and nausea.

15. Plaintiff has tried all of the traditional medical treatments for his migraines, however, none resolve the severe nausea and other associated side effects of the migraines.

16. Plaintiff's physician has made a recommendation that he try medical marijuana for his migraines and associated side effects.

17. Plaintiff has used medical marijuana for his migraines and associated side effects.

18. Medical marijuana has been effective in resolving his migraine associated nausea, when no other drug has been efficacious.

19. Recognizing that marijuana was illegal, Plaintiff did not want to grow his own marijuana or use marijuana that had not been certified as "medical" marijuana, as such is tested

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for THC content and purity.

20. During the 2013 Legislative Session, the Nevada Legislature dramatically re-vamped the legislative regulation of medical marijuana in Nevada.

21. As part of the legislative reform, the Legislature created a statutory basis for businesses to "[a]cquire[], possess[], deliver[], transfer[], transport[], suppl[y], sell[] or dispense[] marijuana or related supplies and educational materials to the holder of a valid registry identification card." NRS §453A.210(2).

22. In 2013, Plaintiff applied for his registration card from the DHHS.

23. When Plaintiff applied for his registration card, there were dozens of applications already submitted to the Defendants from companies who sought to operate dispensaries throughout the State of Nevada.

24. Plaintiff paid for the various fees to receive his registration card.

25. Plaintiff was issued a registration card which expired one year from issuance.

26. Plaintiff has renewed his card.

27. Notwithstanding having a registration card, Plaintiff has never able to access or use medical marijuana, as no dispensaries have opened in Southern Nevada.

28. To date, there are no dispensaries operating in southern Nevada.

29. Notwithstanding the lack of access to any "medical" marijuana, Defendants repeatedly took Plaintiff's money and, in return, issued him multiple registration cards.

CLASS ACTION ALLEGATIONS

30. Plaintiff brings this action on his own behalf and on behalf of a class of those similarly situated pursuant to Rule 23(b)(2) of the Nevada Rules of Civil Procedure.

31. The class is defined as:

> All patients who are residents of Clark County, Nevada, who applied and paid for a medical marijuana registration card from the State of Nevada.

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32. As defined the class meets all the requirements of Rule 23(a) of the Nevada Rules of Civil Procedure. Specifically:

a. The class is so numerous that joinder of all members is impractical. At this point the current size of the class is not known, but it is believed to be over 6,700 patients.

b. There are questions of law or fact common to the class:

i. whether the Defendants engaged in fraud by collecting fees and issuing registration cards when they had not licensed, nor had they planned on licensing dispensaries during the time covered by the cards that were issued;

ii. whether the Defendants were unjustly enriched by taking the fees paid to obtain the registration cards without licensing dispensaries;

iii. whether the fees charged for the registration cards violate the Equal Protection Clause of the United States Constitution and Nevada's constitutional mandate of uniform and equal taxation and assessment, as it taxes patients who seek to obtain one medical intervention, when no other medical interventions require such that patients jump through such hurdles.

c. The claims of the representative party are typical of those of the class.

d. The representative party will fairly and adequately protect the interests of the class.

33. The further requirements of Rule 23(b)(2) of the Nevada Rules of Civil Procedure are met in this cause in that the Defendants, at all times, have acted or had refused to act in a manner generally applicable to the class, thereby making final declaratory relief appropriate with respect to the class as a whole.

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FIRST CLAIM FOR RELIEF

(Fraud)

(AGAINST DHHS)

34. Plaintiff realleges the aforementioned paragraphs as though fully set forth.

35. In order to state a claim for fraud in Nevada, a plaintiff must allege that (1) the defendant made a false representation; (2) the defendant knew or believed the representation to be false; (3) the defendant intended to induce plaintiff to rely on the misrepresentation; and (4) the plaintiff suffered damages as a result of his reliance. Barmettler v. Reno Air, Inc., 114 Nev. 441, 956 P.2d 1382, 1386 (Nev. 1998).

36. While Nevada generally does not recognize an action for fraud based on nondisclosure, courts have previously held that the tort of negligent misrepresentation by nondisclosure may be upheld in some circumstances due to Nevada's adoption of the Restatement (Second) of Torts in developing its common law governing deceit torts. In re Agribiotech, Inc., 291 F.Supp.2d 1186, 1191 (D. Nev. 2003) (*citing* Dow Chem. Co. v. Mahlum, 970 P.2d 98, 111-114 (Nev. 1998)) and Epperson v. Roloff, 102 Nev. at 212-13, 719 P.2d at 803 (defendant may be found liable for misrepresentation even when he/she "does not make an express misrepresentation, but instead makes a representation which is misleading because it partially suppresses or conceals information.").

37. Under this line of reasoning, the Nevada Supreme Court, in Epperson v. Roloff, recognized a cause of action for fraud by nondisclosure where a special relationship between the parties imposes a duty to speak. 719 P.2d at 804.

38. Additionally, Nevada courts have previously found that tort liability may be extended to those who negligently fail to disclose material facts where a special relationship imposes a duty to disclose. In re Agribiotech, Inc., 291 F.Supp.2d at 1192.

39. Defendant DHHS established an application process for patients to obtain a medical marijuana registry card.

40. With the legislative changes in 2013, DHHS was given the charge of registering dispensaries – the only source for obtaining "**medical**" marijuana in Nevada.

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41. The DHHS worked quickly to promulgate regulations which would be used for the registration process of dispensaries.

42. In order to operate a dispensary, a company is required to obtain a registration from the DHHS and a local business license.

43. To date, while various registrations and licenses have been issued, there are no places in Southern Nevada where a person can legally buy seeds so that they can grow their own medical marijuana.

44. To date, while various registrations and licenses have been issued, there are no places in Southern Nevada where a person can legally buy medical marijuana plants or extracts.

45. Without a legal venue to purchase seeds, a person who has been issued a medical marijuana registry card cannot legally grow their own medical marijuana.

46. Without operating dispensaries in Clark County, there are no places where a patient can obtain medical marijuana plants or extracts, despite the fact that the patient's own physician has already made a medical determination that such may be medically beneficial for a patient.

47. And, yet, despite the lack of any legal means by which a patient can obtain medical marijuana, either seeds, plants or extracts, Defendant DHHS has continued to accept applications and collect fees from Plaintiff and other patients similarly situated as Plaintiff for a registration card.

48. Worse, Defendant DHHS issued and continues to issue the registration cards for a limited duration of one year, knowing that no dispensary would be operational during that time.

49. Accordingly, Plaintiff, and others similarly situated, was induced to apply for and pay for the registration cards which were useless in facilitating access to medical marijuana seeds, plants or extract.

50. Defendant DHHS knew or should have known that no dispensaries would be open in Southern Nevada within the one year period covered by Plaintiff's card, and, yet,

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notwithstanding, still accepted his application for a card and took his application fee.

51. As a result, Plaintiff, and others similarly situated, lost the money that was paid to obtain the registration card.[5]

52. Plaintiff suffered further damages in that he has been unable to obtain the medical recommendation made by his physician, causing prolonged pain and suffering.

53. Plaintiff, on behalf of himself and the putative class, hereby seeks any and all declarative relief available to him and the putative class, as a result of the Defendant's fraudulent actions.

54. Plaintiff, on behalf of himself and the putative class, hereby requests judgment against the Defendant for the following relief:

a. Compensatory relief for payments made in relation to the acquisition of a registration card;

b. Declaratory relief;

c. Actual costs and attorneys fees; and

d. Any other relief this Court deems appropriate.

SECOND CLAIM FOR RELIEF

(Unjust Enrichment)

(AGAINST DHHS)

55. Plaintiff realleges the aforementioned paragraphs as though fully set forth.

56. "Unjust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another." Nevada Industrial Dev. v. Benedetti, 103 Nev. 360, 363 n.2, 741 P.2d 802, 804 n.2 (1987). -

57. Plaintiff, and others similarly situated, paid for a registration card so that they could access "**medical**" marijuana legally in the State of Nevada.

58. Defendant DHHS accepted the application fees for the registration cards, and,

[5] The amount of the fees may vary within the class, as such fees range from the application fee to the fee charged by a physician to evaluate the patient for the recommendation.

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yet never licensed any dispensaries during the time that the registrations cards were valid.

59. Accordingly, Plaintiff and others similarly situated never obtained the benefit that they intended to receive from purchasing the registration cards.

60. Nonetheless, Defendant DHHS retained the fees paid for by Plaintiff, and others similarly situated.

61. Defendant DHHS should have refunded the fees paid for by Plaintiff and others similarly situated, or made the expiration date of the cards issues such that they did not expire until one year after the first dispensary was licensed for operations in Clark County.

62. As a result of Defendant's actions, Plaintiff, and others similarly situated, lost the money that was paid to obtain the registration card.[6]

63. Plaintiff suffered further damages in that he has been unable to obtain the medical recommendation made by his physician, causing prolonged pain and suffering.

64. Plaintiff suffered further damages in that he has been unable to obtain the medical recommendation made by his physician, causing prolonged pain and suffering.

65. Plaintiff, on behalf of himself and the putative class, hereby seeks any and all declarative relief available to him and the putative class, as a result of the Defendant's unjust enrichment.

66. Plaintiff, on behalf of himself and the putative class, hereby requests judgment against the Defendant for the following relief:

a. Compensatory relief for payments made in relation to the acquisition of a registration card;

b. Declaratory relief;

c. Actual costs and attorneys fees; and

d. Any other relief this Court deems appropriate.

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[6] The amount of the fees may vary within the class, as such fees range from the application fee to the fee charged by a physician to evaluate the patient for the recommendation.

THIRD CLAIM FOR RELIEF

(Violation of Equal Protection as actionable under

42 U.S.C. §1983 with Respect to Fees)

(AGAINST ALL DEFENDANTS)

67. Plaintiff realleges the aforementioned paragraphs as though fully set forth.

68. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

69. The U.S. Supreme Court has long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." Washington v. Glucksberg, 521 U.S. 702, 719, 138 L. Ed. 2d 772, [120 S.Ct. 2060] 117 S. Ct. 2258 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." 521 U.S. at 720; see also Reno v. Flores, 507 U.S. 292, 301-302, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993).

70. The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See Duncan v. Louisiana, 391 U. S. 145, 147-149 (1968).

71. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., Eisenstadt v. Baird, 405 U. S. 438, 453 (1972); Griswold v. Connecticut, 381 U. S. 479, 484-486 (1965).

72. "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." Obergefell v. Hodges, ____ U.S. _____ (2015).

73. That responsibility, however, "has not been reduced to any formula," Poe v. Ullman, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting); rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See ibid.

74. As a result, fundamental rights have been expanded from the specific freedoms protected by the Bill of Rights, to many additional "libert[ies]" specially protected by the Due

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Process Clause, including the rights to marry, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to marry someone of the same sex, Obergefell v. Hodges, ___ U.S. _____, _____ S. Ct. _____ (2015); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, ibid; Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), to abortion, Planned Parenthood v. Casey, 505 U.S. 833 (1992); and to refuse unwanted lifesaving medical treatment. Cruzan v. Director, MDH, 497 U.S. 261, 278-279, 110 S.Ct., at 2851-2852 (1990).

75. In formulating new rights, the Supreme Court first looks to Due Process Clause to specially protect those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," e.g., Moore v. East Cleveland, 431 U.S. 494, 503 (plurality opinion); Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). The Court then looks to ensure that there is a "careful description" of the asserted fundamental liberty interest. E.g., Reno v. Flores, 507 U.S. 292, 302.

76. Access to healthcare and, more specifically, medical treatments recommended by a physician are deeply rooted in America's history and tradition. Such expectations to access to health care have gone so far as to require that Congress mandate such care, for example, when patients have not been able to access life saving screening and stabilization, Congress has taken steps to mandate such. See, e.g., the Emergency Medical Treatment and Active Labor Act ("EMTALA") of 1986, 42 USC 1395dd et seq.

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77. Further, state law can also be the source of a fundamental right. See Cleveland Board of Education v. Laudermill, 470 U.S. 532 (1985) (*citing* Board of Regents v. Roth, 408 U.S. 564, 576 -578 (1972) ("Property interests are not created by the Constitution, [rather] 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law ...'").

78. In Nevada, the right to access medical marijuana has been integrated into our Constitution. See Nev. Const. Art. IV, Sec 38.

79. Accordingly, any burdens to access this right must be Constitutional in nature and comply with the Equal Protection and Due Process Clauses of the U.S. Constitution.

80. Fees that interfere with a protected right, or, otherwise create an added burden to obtain such right have been found unconstitutional. See, e.g., voter tax, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); election filing fees, Bullock v. Carter, 405 U.S. 134, 144, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

81. That being said, it is recognized that a State may exact fees from citizens for many different kinds of licenses, however, such must be uniform across the population. See Harper v. Virginia State Board of Elections Butts v. Harrison, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169, 1965 WL 130114 (1966).

82. The fee which is charged by the Defendants to obtain a registration card for the Medical Marijuana program, however, is the only fee a patient in Nevada must pay to the State to obtain a treatment recommendation from a physician.

83. There is no other medical treatment in Nevada which requires that a patient first pay a fee to the State before such treatment can be obtained.

84. Hence, the payment of the fees to obtain a medical marijuana registration card in Nevada creates a schism amongst patients; those who want to use a natural plant to treat their illness must pay $100, plus various other costs associated with the acquisition of a medical recommendation, as opposed to those who use processed pharmacological agents, such as substances which are deemed controlled substances, such as narcotics, where no such fee is required.

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85. This schism violates the Equal Protection Clause, in that a tax is added to the acquisition of only one very specific therapeutic treatment which has been recommended by a licensed physician.

86. Further, it is well known that those who have a chronic disability or health conditions are often of less affluence than those who are not burdened by such ailments.

87. The fee for obtaining a medical marijuana registration card therefore places an undue financial burden on patients who are trying to follow their physician's medical recommendations.

88. As a result of the violation of the Equal Protection Clause, Plaintiff, and others similarly situated, have suffered damages by having to pay a tax to obtain a medical treatment when no such tax is required from any other patients obtaining any other treatments.

89. Plaintiff, on behalf of himself and the putative class, hereby seeks any and all declarative relief available to him and the putative class, that the fees required to obtain the registration card violate the Equal Protection Clause of the Constitution.

90. Plaintiff, on behalf of himself and the putative class, hereby requests judgment against the Defendant for the following relief:

a. Nominal damages;

b. Compensatory relief for payments made in relation to the acquisition of a registration card;

c. Declaratory relief;

d. Actual costs and attorneys fees under 42 U.S.C. §1988; and

e. Any other relief this Court deems appropriate.

FOURTH CLAIM FOR RELIEF

(Violation of Equal Protection as actionable

under 42 U.S.C. §1983 with Respect to Registration)

(AGAINST ALL DEFENDANTS)

91. Plaintiff realleges the aforementioned paragraphs as though fully set forth.

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92. Never before the imposition of NRS Chapter 453A has a patient had to register with the State in order to receive a medically indicated or recommended treatment.

93. Prior to the enactment of NRS Chapter 453A, no medical treatment has been deemed so dangerous that registration with the State has been required as a pre-requisite to treatment.

94. In Nevada, a patient can inject poison into themselves under the auspice of treating cancer, without first registering with the State.

95. In Nevada, a patient can obtain a Schedule II drug, such as a highly addicting and devastating narcotic, without first registering with the State.

96. In Nevada, a patient can obtain a Schedule I drug, such as cocaine, for the treatment of epistaxis, without first registering with the State.

97. However, under NRS Chapter 453A, despite the Nevada Constitution's right to access medical marijuana, a patient cannot obtain such without first registering with the State.

98. The registration requirements under NRS Chapter 453A create an unnecessary burden to patients' acquisition of a single medically indicated treatment – medical marijuana – where no other such registration requirement exists for any other medical condition.

99. The registration requirement under NRS Chapter 453A violates the Equal Protection Clause of the US Constitution in that it creates a barrier to obtain a single medically indicated therapy, where no such barrier exists for any other medical treatment.

100. As a result of the violation of the Equal Protection Clause, Plaintiff, and others similarly situated, have suffered damages by having to register with the State to obtain a medical treatment when no such registration is required from any other patients obtaining any other treatments.

101. Plaintiff, on behalf of himself and the putative class, hereby seeks any and all declarative relief available to him and the putative class, that the fees required to obtain the registration card violate the Equal Protection Clause of the Constitution.

102. Plaintiff, on behalf of himself and the putative class, hereby requests judgment against the Defendant for the following relief:

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a. Nominal damages;

b. Compensatory relief for payments made in relation to the acquisition of a registration card;

c. Declaratory relief;

d. Actual costs and attorneys fees under 42 U.S.C. §1988; and

e. Any other relief this Court deems appropriate.

FIFTH CLAIM FOR RELIEF

(Violation of 5th Amendment Right against Self-Incrimination as actionable under 42 U.S.C. §1983 with Respect to Registration)

(AGAINST ALL DEFENDANTS)

103. Plaintiff realleges the aforementioned paragraphs as though fully set forth.

104. Never before the imposition of NRS Chapter 453A has a patient had to register with the State in order to receive a medically indicated or recommended treatment.

105. Both the Constitutional Amendment which was ratified in 2001, and NRS Chapter 453A require that a patient seeking to obtain legal access to medical marijuana take certain steps to register with the State of Nevada.

106. By Registering with the State of Nevada, a patient is admitting to the State that they intent to use medical marijuana.

107. Despite Nevada's efforts to increase accessibility of medical marijuana to its citizens, the possession, sale, distribution and use of marijuana is still illegal under federal law.

108. The Fifth Amendment to the U.S. Constitution guarantees the right of a person not to have to take any action which may incriminate that person.

109. By registering with the State pursuant to NRS Chapter 453A, a person is admitting that they are engaging in an act that is illegal under federal law.

110. The Registry, therefore, is a violation of the Fifth Amendment of the U.S. Constitution.

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111. *As a result of the violation of the Fifth Amendment, Plaintiff, and others similarly situated, by having to register with the State to obtain a medical treatment of marijuana, have had their Fifth Amendment right against self-incrimination violated.*

112. *Plaintiff, on behalf of himself and the putative class, hereby seeks any and all declarative relief available to him and the putative class confirming that the Registry violates the Fifth Amendment of the Constitution.*

113. *Plaintiff, on behalf of himself and the putative class, hereby requests judgment against the Defendant for the following relief:*

a. *Nominal damages;*
b. *Compensatory relief for payments made in relation to the acquisition of a registration card;*
c. *Declaratory relief;*
d. *Actual costs and attorneys fees under 42 U.S.C. §1988; and*
e. *Any other relief this Court deems appropriate.*

SIXTH CLAIM FOR RELIEF

(Imposition of Non-Uniform and Unequal Taxation and Assessment in Violation of Article 10, Section 1 of the Nevada Constitution)

(AGAINST DEFENDANTS LEGISLATURE AND SANDOVAL)

114. Plaintiff realleges the aforementioned paragraphs as though fully set forth.

115. Article 10, Section 1 of the Nevada Constitution requires the Nevada Legislature to provide "for a uniform and equal rate of assessment and taxation."

116. The fees required under NRS §453A.740 and, related thereto under NAC §453A.1406, impose a de facto tax upon patients who seek to follow their physician's recommendations that medical marijuana would be beneficial for them by requiring a fee to access a medically recommended treatment.

117. The de facto tax imposed by NRS §453A.740 and, related thereto under NAC

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§453A.1406, is non-uniform and unequal in its effect as it applies only to patients who seek to use medical marijuana for their chronic disability or medical condition, and not to any other similarly situated person or entity in the State of Nevada who seeks to use any other medical treatment for the same medical condition or disability.

118. The non-uniform and unequal tax imposed by the Defendants and approved by GOVERNOR SANDOVAL in his signing of SB375 has proximately caused damages to Plaintiff, and all other class members who are similarly situated to Plaintiff.

119. Plaintiff, on behalf of himself and the putative class, hereby seeks any and all declarative relief available to him and the putative class, as a result of the Defendant's imposition on the non-uniform and unequal tax.

ATTORNEY FEES

As a result of the Defendants' actions as set forth above, Plaintiff has been required to retain **HAFTERLAW** to prosecute this action and has incurred and will continue to incur costs and attorney fees for which the Plaintiff is entitled to a separate award pursuant to NRS §18.010, 42 USC §1988, as well as any other applicable statute or rule, in an amount to be determined by the Court.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays for judgment against the Defendant as follows:

120. For declarative relief that:

a. Defendant DHHS engaged in fraud;

b. Defendant DHHS engaged in unjust enrichment;

c. The registration card fees are a violation of the Equal Protection Clause of the U.S. Constitution as well as Nevada's constitutional mandate of uniform and equal taxation and assessment; and

d. The Registry violates a patient's Fifth Amendment right against self

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incrimination.

121. For an award of compensation for all fees and costs associated with the acquisition of a registration card;

122. For an award of compensation for all fees and costs associated with the acquisition of a registration card;

123. For an award of compensation for pain and suffering associated with the inability to obtain, legally, medical marijuana in Nevada, despite the people's ratification of a constitutional amendment in 2001, permitting such;

124. For an award of attorney fees and costs pursuant to NRS §18.0101, 42 U.S.C. §1988, or other permissible basis, to the Plaintiff for the reasonable attorney's fees, court costs and necessary disbursements incurred in connection with this lawsuit; and,

125. For such other and further relief as the Court deems just and equitable.

JURY DEMAND

Plaintiff hereby requests a that this case be heard before a jury at trial.

Dated this 4th day of September, 2015.

HAFTERLAW

By: _____

JACOB L. HAFTER, ESQ.
Nevada Bar Number 9303
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
Counsel for Plaintiff

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HAFTERLAW, and that on this 21st day of September, 2015, I served a copy of the foregoing ***SECOND AMENDED CLASS ACTION COMPLAINT*** as follows:

☒ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below.

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An employee of HAFTERLAW

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ORDR

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JOHN DOE, on his own behalf and on behalf of a class of those similarly situated,

Plaintiff,

vs.

STATE OF NEVADA ex rel. THE LEGISLATURE OF THE 77th SESSION OF THE STATE OF NEVADA; STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; THE HONORABLE BRIAN SANDOVAL, in his official capacity as Governor of the State of Nevada; DOES 1-100, inclusive; and ROE CORPORATIONS 1-100, inclusive,

Defendants.

Case No. A-15-723045-C
Dept. No. XXXII

ORDER AND JUDGMENT

INTRODUCTION

This case involves several claims under federal and state law relating to the validity and operation of the provisions of Nevada's medical marijuana laws which establish the medical marijuana registration program and prescribe procedures and fees to apply for and obtain a registration card for purposes of using medical marijuana as authorized by Article 4, Section 38 of the Nevada Constitution and NRS Chapter 453A. For the reasons explained herein, the Court concludes that the medical marijuana registration program does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment or the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution. The Court also concludes that Plaintiff cannot recover on his state-law tort claims.

In reaching its conclusions, the Court sympathizes with Plaintiff and other patients who have a choice to make regarding whether to disclose their identities in order to participate in the registration program and whether to undergo the steps necessary to apply for and obtain a registration card. Nevertheless, the judicial branch may not find the registration program unconstitutional "simply because [it] might question the wisdom or necessity of the provision under scrutiny." *Techtow v. City Council of N. Las Vegas*, 105 Nev. 330, 333 (1989). Indeed, it is well established that "an act should not be declared void because there may be a difference of opinion as to its wisdom." *Damus v. Clark Cnty.*, 93 Nev. 512, 518 (1977).

Consequently, the Court may not judge the wisdom or necessity of the registration program because the Court is not the policy maker. That constitutional function is assigned to the people's elected representatives in the Legislature. The Court's constitutional function is to determine whether the policy determinations made by the Legislature in the laws governing the registration program result in any of the constitutional violations alleged in Plaintiff's complaint. Having found no such constitutional violations, the Court's judicial review is at an end, and the Court may not judge the wisdom or necessity of the registration program because "matters of policy or convenience or right or justice or hardship or questions of whether the legislation is good or bad are solely matters for consideration of the legislature and not of the courts." *King v. Bd. of Regents*, 65 Nev. 533, 542 (1948). Therefore, given the Court's order and judgment in this case, the best avenue of redress is through the Legislature, not the courts.

PROCEDURAL BACKGROUND

A. Parties and claims.

On August 13, 2015, Plaintiff John Doe filed a class action complaint, on his own behalf and on behalf of a class of those similarly situated, against Defendants State of Nevada ex rel. the Legislature of the State of Nevada (Legislature), the Department of Health and Human Services (Department) and the

Honorable Brian Sandoval in his official capacity as Governor of the State of Nevada (Governor). On August 20, 2015, Plaintiff filed a first amended class action complaint pursuant to NRCP 15(a), and on September 21, 2015, Plaintiff filed a second amended class action complaint pursuant to a stipulation and order approved by the Court on September 23, 2015. In his second amended complaint, Plaintiff alleges state-law tort claims, federal constitutional claims and a state constitutional claim relating to the validity and operation of the provisions of Nevada's medical marijuana laws which establish the registration program and prescribe procedures and fees to apply for and obtain a registration card.

Plaintiff states that he brought this action under the pseudonym "John Doe" to protect his identity due to the sensitivity of the issues. (Compl. p.2 n.1.)[1] Plaintiff alleges that he is a resident of the City of Las Vegas and Clark County, Nevada, that he is a 42-year-old male who has a history of severe migraine headaches and associated side effects, such as photophobia and nausea, and that he has tried all the traditional medical treatments for his migraines but those treatments do not resolve the severe nausea and other associated side effects of the migraines. (Compl. ¶¶ 1, 11-15.) Plaintiff alleges that his physician has recommended that he use medical marijuana to treat his migraines and associated side effects, that Plaintiff has used medical marijuana to treat his migraines and associated side effects and that medical marijuana has been effective in resolving his migraines and associated side effects when no other drug has been efficacious. (Compl. ¶¶ 16-18.)

Plaintiff alleges that he applied for his registration card from the Department, that he paid various fees to receive his registration card, that he was issued a registration card that expired one year after its issuance and that he renewed his registration card. (Compl. ¶¶ 22, 24-26.) Plaintiff alleges that when he applied for his registration card, there were dozens of applications submitted to the Department from companies that sought to operate medical marijuana dispensaries throughout the State but that Plaintiff has not been able to access or use medical marijuana, despite having his registration card, because no

[1] All parenthetical citations are to the Second Amended Complaint.

dispensaries have opened in Southern Nevada. (Compl. ¶¶ 23, 27-28.) Plaintiff alleges that, despite the lack of access to medical marijuana in Southern Nevada, the Department repeatedly took his money and, in return, issued him multiple registration cards. (Compl. ¶ 29.)

In his first claim for relief, Plaintiff brings a state-law tort claim against the Department for fraud alleging that the Department fraudulently induced Plaintiff to apply and pay fees for the registration cards which were useless in facilitating access to medical marijuana because the Department knew or should have known that no dispensaries would be open in Southern Nevada within the one-year period covered by the registration cards. (Compl. ¶¶ 39-51.) In his second claim for relief, Plaintiff brings a state-law tort claim against the Department for unjust enrichment alleging that he never obtained any benefit from the registration cards because the Department never licensed any dispensaries during the period that the registration cards were valid and that the Department unjustly accepted and retained his fees for the registration cards. (Compl. ¶¶ 58-62.)

In his third and fourth claims for relief, Plaintiff brings federal constitutional claims under the federal civil rights statute, 42 U.S.C. § 1983, against all Defendants under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. Plaintiff alleges that because "[a]ccess to healthcare and, more specifically, medical treatments recommended by a physician are deeply rooted in America's history and tradition," the Due Process Clause recognizes and protects a substantive and fundamental right to access healthcare recommended by a physician. (Compl. ¶¶ 67-79.) Plaintiff alleges that the registry and associated application process and fees impose an unnecessary, undue and unreasonable burden and barrier on the exercise of a person's fundamental right to access healthcare recommended by a physician in violation of the Equal Protection Clause because the registry and associated application process and fees apply only to persons who seek to use medical marijuana for their medical condition but do not apply to similarly situated persons who seek to use any other medical treatment for the same medical condition. (Compl. ¶¶ 80-101.)

In his fifth claim for relief, Plaintiff brings a federal constitutional claim under the federal civil rights statute, 42 U.S.C. § 1983, against all Defendants under the Self-Incrimination Clause of the Fifth Amendment. Plaintiff alleges that persons who register with the State under the medical marijuana laws are compelled by state law to admit that they intend to use medical marijuana and that by making such an admission, they are compelled to incriminate themselves in violation of the privilege against self-incrimination protected by the Fifth Amendment because they are admitting that they are engaging in acts illegal under federal law. (Compl. ¶¶ 104-110.)

Finally, in his sixth claim for relief, Plaintiff brings a state constitutional claim against the Legislature and the Governor alleging that the fees paid for the registration cards violate the Uniform and Equal Tax Clause of Article 10, Section 1(1) of the Nevada Constitution, which requires the Legislature to provide for "a uniform and equal rate of assessment and taxation." Plaintiff alleges that the fees paid for the registration cards impose a de facto tax upon persons who seek to use medical marijuana for their medical condition and that such a tax is non-uniform and unequal in its effect in violation of the Uniform and Equal Tax Clause because the fees apply only to persons who seek to use medical marijuana for their medical condition but do not apply to similarly situated persons who seek to use any other medical treatment for the same medical condition.[2] (Compl. ¶¶ 116-117.)

B. Dispositive motions.

Pursuant to the stipulation and order approved by the Court on September 23, 2015, the parties established a schedule for filing and briefing dispositive motions. The parties also agreed that if any party filed a dispositive motion, no motion for class certification would be filed pursuant to NRCP 23(c)

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[2] In his opposition to the Legislature's motion for summary judgment, Plaintiff conceded that the Uniform and Equal Tax Clause applies only to property taxes, and Plaintiff requested to strike that claim from his second amended complaint. (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 47.) At the hearing, Plaintiff conceded to dismissal of the claim. The Court finds dismissal is appropriate. Therefore, the Court dismisses Plaintiff's sixth claim for relief under the Uniform and Equal Tax Clause and will not discuss it further.

until the Court enters a written order resolving each such dispositive motion.[3] The parties filed and briefed the following dispositive motions: (1) Plaintiff's motion for partial summary judgment under NRCP 56 for judgment as a matter of law on his fifth claim for relief alleging violations of the Fifth Amendment privilege against self-incrimination and Plaintiff's motion for a permanent injunction based on that claim; (2) Plaintiff's counter-motion for summary judgment under NRCP 56 for judgment as a matter of law on his third and fourth claims for relief alleging violations of due process and equal protection under the Fourteenth Amendment; (3) the Department's motion to dismiss under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted; (4) the Governor's motion to dismiss under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted; and (5) the Legislature's motion for summary judgment under NRCP 56 for judgment as a matter of law on all causes of action and claims for relief alleged in Plaintiff's complaint.

On December 8, 2015, the Court held a hearing on the parties' dispositive motions, and the following counsel appeared on behalf of the parties at the hearing: Jacob L. Hafter, Esq., of HAFTERLAW, LLC, appeared on behalf of Plaintiff John Doe; Linda C. Anderson, Esq., Chief Deputy Attorney General, appeared on behalf of Defendant State of Nevada ex rel. the Department; Gregory L. Zunino, Esq., Chief Deputy Attorney General, appeared on behalf of Defendant State of Nevada ex rel. the Governor; and Kevin C. Powers, Esq., Chief Litigation Counsel, Legislative Counsel Bureau, Legal Division, appeared on behalf of Defendant State of Nevada ex rel. the Legislature.

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[3] It is well established that a district court may rule on dispositive motions before a class certification motion in order "to protect both the parties and the court from needless and costly further litigation." *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984); *Ressler v. Clay Cnty.*, 375 S.W.3d 132, 137-38 (Mo. Ct. App. 2012) ("Since the Ninth Circuit's decision in *Schock*, numerous other federal courts have held similarly, or have implicitly agreed with the rule of allowing dispositive proceedings as to individual claims prior to determination of certification."); *Christensen v. Kiewit–Murdock Inv. Corp.*, 815 F.2d 206, 214 (2d Cir. 1987) (holding that it is within a district court's discretion to reserve decision on a class certification motion pending disposition of a motion to dismiss).

In their dispositive motions, the parties have presented the Court with both motions to dismiss under NRCP 12(b)(5) and motions for summary judgment under NRCP 56. As a general rule, the standards for deciding motions to dismiss under NRCP 12(b)(5) are different from the standards for deciding motions for summary judgment under NRCP 56. *See Witherow v. State Bd. of Parole Comm'rs*, 123 Nev. 305, 307-08 (2007). However, when a district court reviews a motion to dismiss under NRCP 12(b)(5) and "matters outside the pleading[s] are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." NRCP 12(b). In other words, "when the court considers matters outside the pleadings, the court must treat the motion as one for summary judgment." *Witherow*, 123 Nev. at 307.

In this case, Plaintiff presented matters outside the pleadings by attaching a copy of the Nevada Division of Public and Behavioral Health Medical Marijuana Cardholder Application Packet (application packet) as an exhibit to his motions for summary judgment and his oppositions to the motions to dismiss. No party objected to the Court considering the application packet in reviewing the motions to dismiss. Therefore, because matters outside the pleadings were presented to and not excluded by the Court in reviewing the motions to dismiss, the Court must treat the motions to dismiss as motions for summary judgment. *Witherow*, 123 Nev. at 307-08.

Accordingly, having considered the pleadings, documents and exhibits in this case and having received the arguments of counsel for the parties, the Court rules on the dispositive motions as follows: (1) the Court denies Plaintiff's motion for partial summary judgment, motion for permanent injunction and counter-motion for summary judgment; (2) the Court grants the Department's motion to dismiss which is being treated as a motion for summary judgment; (3) the Court grants the Governor's motion to dismiss which is being treated as a motion for summary judgment; and (4) the Court grants the Legislature's motion for summary judgment. Having considered all causes of action and claims for relief alleged in Plaintiff's second amended complaint on the parties' dispositive motions, the Court

concludes that all Defendants are entitled to judgment as a matter of law on all such causes of action and claims for relief, and the Court enters final judgment in favor of all Defendants. Because the Court enters final judgment in favor of all Defendants, the issue of class certification is moot, and the Court is not required to determine whether this action can be maintained as a class action under NRCP 23(c). Based on the Court's resolution of the dispositive motions, the Court enters the following findings of fact, conclusions of law and order and judgment pursuant to NRCP 52, 56 and 58.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. History and overview of Nevada's medical marijuana laws.

In 2000, Nevada's voters approved a constitutional initiative adding Article 4, Section 38 to the Nevada Constitution which directs the Legislature to provide by law for the use of medical marijuana recommended by a physician for the treatment and alleviation of certain chronic or debilitating medical conditions. In full, Article 4, Section 38 provides:

> 1. The legislature shall provide by law for:
> (a) The use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple sclerosis and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment.
> (b) Restriction of the medical use of the plant by a minor to require diagnosis and written authorization by a physician, parental consent, and parental control of the acquisition and use of the plant.
> (c) Protection of the plant and property related to its use from forfeiture except upon conviction or plea of guilty or nolo contendere for possession or use not authorized by or pursuant to this section.
> (d) A registry of patients, and their attendants, who are authorized to use the plant for a medical purpose, to which law enforcement officers may resort to verify a claim of authorization and which is otherwise confidential.
> (e) Authorization of appropriate methods for supply of the plant to patients authorized to use it.
> 2. This section does not:
> (a) Authorize the use or possession of the plant for a purpose other than medical or use for a medical purpose in public.
> (b) Require reimbursement by an insurer for medical use of the plant or accommodation of medical use in a place of employment.

According to the ballot materials presented to the voters, "[t]he initiative is an attempt to balance the needs of patients with the concerns of society about marijuana use." *State of Nevada Ballot Questions 2000, Question No. 9* (Nev. Sec'y of State). As part of that balance, the voters were told that "[a] confidential registry of authorized users shall be created and available to law enforcement agencies to verify a claim of authorization," and that with such "safeguards included to protect the concerns of society, this proposal can make a difference in the lives of thousands of persons suffering from these serious illnesses." *Id.*

Considering the plain language of the initiative in conjunction with the information provided to the voters, the Court finds that the drafters and voters intended for the registry to operate as a central component of the initiative because when they authorized a patient's use of medical marijuana upon the recommendation of a physician, they also made the use of medical marijuana expressly subject to the initiative's provisions regarding the patient registry. Furthermore, under well-established rules of constitutional construction, the constitutional provisions regarding the patient's right to use medical marijuana stand on equal footing with the constitutional provisions regarding the patient registry, and none of the constitutional provisions take precedence over nor exist independently of the other constitutional provisions. *See Nevadans for Nev. v. Beers*, 122 Nev. 930, 944 (2006). Rather, each constitutional provision of the initiative must be read together as a whole, so as to give effect to and harmonize each provision *in pari materia* or in conjunction with each other provision. *Nevadans for Nev.*, 122 Nev. at 944 ("The Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision."); *State of Nev. Employees Ass'n v. Lau*, 110 Nev. 715, 718 (1994) (stating that when interpreting constitutional provisions "it is necessary to use canons of construction, and to give effect to all controlling legal provision[s] *in pari materia*.").

Reading the constitutional provisions of the initiative together as a whole, the Court finds that the initiative was not intended to create an unconditional or absolute right to use medical marijuana upon the

recommendation of a physician. To the contrary, the Court finds that the initiative was drafted to impose conditions and restrictions on the use of medical marijuana recommended by a physician in order to safeguard the concerns of society about marijuana use. To this end, the initiative expressly directs the Legislature to provide by law for: (1) "[a] registry of patients, and their attendants, who are authorized to use the plant for a medical purpose, to which law enforcement officers may resort to verify a claim of authorization and which is otherwise confidential"; and (2) "[a]uthorization of appropriate methods for supply of the plant to patients authorized to use it." Nev. Const. art. 4, § 38(1). Thus, the Court finds that although the initiative directs the Legislature to provide by law for the use of medical marijuana recommended by a physician, it invests the Legislature with the power to determine, as a matter of public policy, the appropriate methods to implement and carry out the conditions and restrictions on the use of medical marijuana authorized by the initiative.

In 2001, the Legislature exercised its power under the initiative by passing A.B. 453 which established Nevada's laws, codified in NRS Chapter 453A, regulating the use of medical marijuana. A.B. 453, 2001 Nev. Stat., ch. 592, §§ 2-33, at 3053-66. As required by the initiative, the Legislature created a registry of patients, and their attendants, who are authorized to use medical marijuana and established procedures for a person to apply for a registration card that identifies the person as exempt from state prosecution for engaging in the medical use of marijuana in accordance with law. *Id.*

The Legislature modeled Nevada's laws governing the registration program on the Oregon Medical Marijuana Act of 1999 (Oregon Act). *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 10, 2001). Since the Oregon Act's enactment in 1999, it has authorized only persons holding a valid registration card to use medical marijuana. *See* 1999 Or. Laws, ch. 4, § 4 & ch. 825, § 2 (enacting Or. Rev. Stat. § 475.309); *Emerald Steel Fabricators v. Bureau of Labor & Indus.*, 230 P.3d 518, 519 (Or. 2010) ("The Oregon Medical Marijuana Act authorizes persons holding a registry identification card to use marijuana for medical purposes.").

During hearings in the Nevada Assembly on A.B. 453, the bill's primary sponsor, Assemblywoman Giunchigliani, testified that "[t]he Oregon model would be adopted regarding registered cardholders being allowed to have a certain number of plants and quantity of useable marijuana," and that "[f]ollowing the Oregon model was a good choice." *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 12, 2001). She also testified that the registration program "maintained the safety and integrity of the measure the [voters] signed." *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 10, 2001). Before the bill was passed by the Assembly, Ms. Giunchigliani stated to the body that "I think the public knew very well what they voting on and recognized that under extreme medical conditions, they supported the issue of a registry card and allowing an individual to have access to this." *Assembly Daily Journal*, 71st Leg., at 41 (Nev. May 23, 2001). During hearings in the Nevada Senate, Ms. Giunchigliani emphasized that "only those who are registered are eligible for the program." *Hearing on A.B. 453 before Sen. Comm. on Human Res. & Facilities*, 71st Leg. (Nev. June 3, 2001).

When the Legislature passed A.B. 453, it explained in the preamble that it intended for the bill to "carry out the will of the people of this state and to regulate the health, medical practices and well-being of those people in a manner that respects their personal decisions concerning the relief of suffering through the medical use of marijuana." A.B. 453, 2001 Nev. Stat., ch. 592, preamble, at 3053. However, the Legislature also explained that it was enacting the registration program because "[m]any residents of this state have suffered the negative consequences of abuse of and addiction to marijuana, and it is important for the legislature to ensure that the program established for the distribution and medical use of marijuana is designed in such a manner as not to harm the residents of this state by contributing to the general abuse of and addiction to marijuana." *Id.* Thus, like the drafters of the initiative, the Legislature intended for A.B. 453 to balance the needs of patients with the concerns of society about marijuana use. To achieve that balance, the Legislature made a patient's use of medical

marijuana expressly subject to the medical marijuana laws regulating a patient's participation in the registration program. A.B. 453, 2001 Nev. Stat., ch. 592, §§ 2-33, at 3053-66.

As enacted in 2001, the medical marijuana laws provided that holders of valid registration cards were not allowed to possess, deliver or produce, at any one time, more than: (1) one ounce of usable marijuana; (2) three mature marijuana plants; and (3) four immature marijuana plants. A.B. 453, 2001 Nev. Stat., ch. 592, § 17, at 3055-56 (enacting NRS 453A.200). At the time, the Department of Agriculture was charged with administering and enforcing the laws governing the registry and registration cards. *Id.* § 19, at 3056-57 (enacting NRS 453A.210). However, the Department of Agriculture was not authorized by A.B. 453 to impose fees to carry out the registration program.

In 2003, the Legislature authorized the Department of Agriculture to impose fees to defray the costs of servicing the registration program, but the Legislature capped the fees at $50 for obtaining an application for a registration card and $150 for processing and issuing a registration card. 2003 Nev. Stat., ch. 281, § 8, at 1434-35 (amending NRS 453A.740). When the Legislature authorized the fees in 2003, the Acting Director of the Department of Agriculture, Don Henderson, testified regarding the need for the fees to defray the costs of servicing the registration program:

> Mr. Henderson explained that during the 2001 session the Legislature had implemented the Nevada Medical Marijuana Program without fee authority. The Department of Agriculture had taken direction from the Legislature and started the program in October 2001. Mr. Henderson stated it had been a successful program with approximately 300 participants. After one and a half years in the program, the Department had discovered a number of issues that needed revising. *The program also generated an expense to the Department.*
>
> In A.B. 503 some technical amendments had been proposed to the bill . . . A.B. 503 had passed through Committee, appeared to be doing well, and then died on the Floor. Mr. Henderson requested that if there was an interest, there were three key provisions in A.B. 503 that the Committee might add to A.B. 130. . . . *Section 12 of A.B. 503 would establish the fee authority for the Department of Agriculture to recover administrative costs for this program.*
>
> Mr. Henderson commented that the Department could probably handle the technical issues involved with the Medical Marijuana Program; however, *the Department would be unable to continue to service the program if fee authority was not granted.*

Hearing on A.B. 130 before Assembly Comm. on Ways & Means, 72d Leg. (Nev. May 12, 2003) (emphasis added).

In 2009, the Legislature transferred administration and enforcement of the registration program to the Health Division of the Department of Health and Human Services. 2009 Nev. Stat., ch. 170, at 617-28. The Administrator of the Division is the state officer who is charged with administering and enforcing the laws governing the registration program, subject to the administrative supervision of the Director of the Department. NRS 232.320; NRS 232.340; NRS 453A.210; NRS 453A.730; NRS 453A.740. In 2013, the Legislature changed the name of the Health Division to the Division of Public and Behavioral Health (Division). 2013 Nev. Stat., ch. 489, § 127, at 3062 (amending NRS 453A.090).

Also in 2013, the Legislature substantially revised the medical marijuana laws. 2013 Nev. Stat., ch. 547, at 3700-26. Under the 2013 revisions, the Legislature authorized the operation of medical marijuana dispensaries that must register with the Division to sell or dispense medical marijuana to holders of valid registration cards. *Id.* §§ 3-23, at 3700-24. The Legislature also provided that holders of valid registration cards are not allowed to possess, deliver or produce, at any one time, more than: (1) two and one-half ounces of usable marijuana in any one 14-day period; (2) twelve marijuana plants, irrespective of whether the marijuana plants are mature or immature; and (3) a maximum allowable quantity of edible marijuana products and marijuana-infused products as established by regulation of the Division. *Id.* § 22, at 3716-17 (amending NRS 453A.200). In addition, the Legislature provided that after a medical marijuana dispensary opens in the county of residence of the holder of a valid registration card, the holder or his or her primary caregiver are not authorized to cultivate, grow or produce marijuana unless one of the following exceptions apply:

> (1) The holder or his or her primary caregiver was cultivating, growing or producing marijuana in accordance with NRS Chapter 453A on or before July 1, 2013;
>
> (2) All the medical marijuana dispensaries in the county of residence of the holder or his or her primary caregiver close or are unable to supply the quantity or strain of marijuana

> necessary for the medical use of the patient to treat his or her specific medical condition;
>
> (3) Because of illness or lack of transportation, the holder and his or her primary caregiver are unable reasonably to travel to a medical marijuana dispensary; or
>
> (4) No medical marijuana dispensary was operating within 25 miles of the residence of the holder at the time he or she first applied for his or her registration card.

Id. § 22, at 3716-17 (amending NRS 453A.200).

In the 2013 revisions, the Legislature also reduced the maximum fees chargeable by the Division to $25 for obtaining an application for a registration card and $75 for processing and issuing a registration card. *Id.* § 24, at 3725 (amending NRS 453A.740). By regulation, the Administrator of the Division has set the fees at the maximum amounts allowed by law. NAC 453A.140.[4]

In 2015, the Legislature enacted further revisions to the medical marijuana laws that became effective before Plaintiff filed his original complaint on August 13, 2015. *See* 2015 Nev. Stat., ch. 401, §§ 29-34, at 2264-69 (effective July 1, 2015); 2015 Nev. Stat., ch. 495, §§ 1-3, at 2985-87 (effective June 9, 2015, with certain exceptions not relevant here); 2015 Nev. Stat., ch. 506, §§ 11-36, at 3091-3110 (effective July 1, 2015). As a general rule, when courts evaluate a facial constitutional claim, they ordinarily review the facial validity of the challenged statute "as it now stands, not as it once did." *Hall v. Beals*, 396 U.S. 45, 48 (1969); *Fusari v. Steinberg*, 419 U.S. 379, 379-87 (1975); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982). Consequently, it is usually the current version of the challenged statute that is applicable to a facial constitutional claim. *See, e.g., Deja Vu Showgirls of Las Vegas v. Nev. Dep't of Taxation*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 395-96 (2014) (reviewing the most recently amended version of the challenged statute in a facial constitutional claim, including statutory amendments made after the complaint was filed). Therefore, because the 2015 version is the current

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[4] All citations to the Division's regulations codified in NAC Chapter 453A are to the version that became effective on April 1, 2014. On December 18, 2015, the Division proposed amendments to its regulations. *See Proposed Regulation of Div. of Pub. and Behav'l Health of Dep't of Health and Human Servs.*, LCB File No. R148-15 (Dec. 18, 2015). However, those proposed amendments will not become effective until the Division completes the regulation-making process prescribed by the Nevada Administrative Procedure Act in NRS Chapter 233B. Therefore, those proposed amendments are not relevant to the Court's disposition of this matter.

version of the medical marijuana laws and because the 2015 version was in effect when Plaintiff filed his original complaint, the Court will apply the 2015 version of the medical marijuana laws when reviewing Plaintiff's facial constitutional claims.[5]

To apply for a registration card under the medical marijuana laws, an applicant must pay a fee of $25 to obtain an application packet from the Division. NRS 453A.740; NAC 453A.140(1). To complete the application packet, the applicant must provide certain identification, background and health information and submit certain verifying documentation to the Division, including: (1) the name, address, telephone number, social security number and date of birth of the applicant; (2) proof that the applicant is a resident of Nevada, including, without limitation, a photocopy of a driver's license or identification card issued by the Department of Motor Vehicles; (3) the name, address and telephone number of the applicant's attending physician; (4) a written statement signed by the applicant's attending physician stating that the applicant has been diagnosed with a chronic or debilitating medical condition, the medical use of marijuana may mitigate the symptoms or effects of that condition and the attending physician has explained the possible risks and benefits of the medical use of marijuana; (5) if the applicant elects to designate a primary caregiver, the name, address, telephone number and social security number of the designated primary caregiver and a written statement signed by the applicant's attending physician approving of the designation of the primary caregiver; and (6) a written statement signed by the applicant's attending physician verifying that the attending physician was presented with photographic identification of the applicant and any designated primary caregiver and that the applicant and any designated primary caregiver are the persons named in the application. NRS 453A.210(2); NAC 453A.100(1).

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[5] Under the 2015 version of the medical marijuana laws, there are specific provisions that apply only to applicants who are minors and to their custodial parents or legal guardians. Because Plaintiff is not a minor and because Plaintiff does not allege that he is a custodial parent or legal guardian of an applicant who is a minor, the Court does not need to discuss those specific provisions.

In addition, the applicant must sign an acknowledgment form and a medical marijuana program waiver and liability release form that are prescribed by the Division, and the applicant must provide any information required by the Department of Motor Vehicles which prepares and issues the registration card if the application is approved by the Division. NRS 453A.740(1); NAC 453A.100(1); NAC 453A.110(1).

The applicant also must submit to the Division any information required by the Central Repository for Nevada Records of Criminal History (Central Repository) to determine the criminal history of the applicant and any designated primary caregiver. NRS 453A.210(4); NAC 453A.100(1)-(2). The Division must submit a copy of the application to the Central Repository which must report to the Division its findings as to the criminal history of the applicant and any designated primary caregiver within 15 days after receiving a copy of the application. NRS 453A.210(4); NAC 453A.100(2). The Division may deny the application if the applicant and any designated primary caregiver has been convicted of knowingly or intentionally selling a controlled substance. NRS 453A.210(5).

The Division also must submit a copy of the application to the State Board of Medical Examiners, if the attending physician is licensed to practice medicine under NRS Chapter 630, or the State Board of Osteopathic Medicine, if the attending physician is licensed to practice osteopathic medicine under NRS Chapter 633. NRS 453A.210(4). Within 15 days after receiving a copy of the application, the licensing board must report to the Division its findings as to whether the attending physician is licensed to practice medicine in this State and whether the attending physician is in good standing. NRS 453A.210(4). The Division may deny the application if the attending physician is not licensed to practice medicine in this State or is not in good standing. NRS 453A.210(5).

The Division also may deny the application if: (1) the applicant fails to provide the information required to establish the applicant's chronic or debilitating medical condition or document the applicant's consultation with an attending physician regarding the medical use of marijuana in

connection with that condition; (2) the applicant fails to comply with regulations adopted by the Division; (3) the Division determines that the information provided by the applicant was falsified; (4) the Division has prohibited the applicant from obtaining or using a registration card under NRS 453A.300(2) because the Division has determined that the applicant has willfully violated a provision of NRS Chapter 453A or any regulation adopted by the Division to carry out that chapter; or (5) the Division determines that the applicant or the applicant's designated primary caregiver has had a registration card revoked pursuant to NRS 453A.225. NRS 453A.210(5).

If the Division approves the application, the applicant must pay a fee of $75 for the processing and issuance of the registration card. NRS 453A.740; NAC 453A.140(2). The applicant also must pay any fee authorized by NRS 483.810 to 483.890, inclusive, that is charged for the issuance of an identification card by the Department of Motor Vehicles. NRS 453A.740; NAC 453A.110(1). The registration card is valid for a period of 1 year, and it may be renewed in accordance with the regulations adopted by the Division and the payment of a fee of $75 for the processing and issuance of the renewed registration card and any fee authorized by NRS 483.810 to 483.890, inclusive, that is charged for the issuance of an identification card by the Department of Motor Vehicles. NRS 453A.220(5); NRS 453A.740; NAC 453A.110(1); NAC 453A.130; NAC 453A.140(2).

Finally, the medical marijuana laws require the Division to protect the confidentiality of information, documents and communications provided to the Division by applicants and information that is part of the registration program as follows:

> 1. Except as otherwise provided in this section, NRS 239.0115 and subsection 4 of NRS 453A.210, the Division shall not disclose:
>
> (a) The contents of any tool used by the Division to evaluate an applicant or its affiliate.
>
> (b) Any information, documents or communications provided to the Division by an applicant or its affiliate pursuant to the provisions of this chapter, without the prior written consent of the applicant or affiliate or pursuant to a lawful court order after timely notice of the proceedings has been given to the applicant or affiliate.
>
> (c) The name or any other identifying information of:
>
> (1) An attending physician; or
>
> (2) A person who has applied for or to whom the Division or its designee has issued a

registry identification card or letter of approval.

➥ Except as otherwise provided in NRS 239.0115, the items of information described in this subsection are confidential, not subject to subpoena or discovery and not subject to inspection by the general public.

2. Notwithstanding the provisions of subsection 1, the Division or its designee may release the name and other identifying information of a person to whom the Division or its designee has issued a registry identification card or letter of approval to:

(a) Authorized employees of the Division or its designee as necessary to perform official duties of the Division; and

(b) Authorized employees of state and local law enforcement agencies, only as necessary to verify that a person is the lawful holder of a registry identification card or letter of approval issued to him or her pursuant to NRS 453A.220 or 453A.250.

NRS 453A.700 (2015). With this history and overview of Nevada's medical marijuana laws in mind, the Court will address each of Plaintiff's remaining claims for relief.

B. Standards of review.

As discussed previously, Plaintiff and the Legislature have filed motions for summary judgment, and the Department and the Governor have filed motions to dismiss which the Court must treat as motions for summary judgment under NRCP 12(b) because matters outside the pleadings were presented to and not excluded by the Court. *See Witherow v. State Bd. of Parole Comm'rs*, 123 Nev. 305, 307-08 (2007). Therefore, the standards of review that apply to motions for summary judgment govern the parties' dispositive motions. *Id.*

A party is entitled to summary judgment under NRCP 56 when the allegations in the pleadings and evidence in the record "demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway*, 121 Nev. 724, 731 (2005). The purpose of granting summary judgment "is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment as a matter of law." *McDonald v. D.P. Alexander*, 121 Nev. 812, 815 (2005) (quoting *Coray v. Hom*, 80 Nev. 39, 40-41 (1964)).

A party is also entitled to summary judgment when the claims against the party are barred as a

matter of law by one or more affirmative defenses. *See Williams v. Cottonwood Cove Dev.*, 96 Nev. 857, 860-61 (1980). An affirmative defense is a legal argument or assertion of fact that, if true, prohibits prosecution of the claims against the party even if all allegations in the complaint are true. *Douglas Disposal v. Wee Haul*, 123 Nev. 552, 557-58 (2007). Such affirmative defenses include the statute of limitations and sovereign immunity. *See* NRCP 8(c); *Boulder City v. Boulder Excavating*, 124 Nev. 749, 754-55 (2008); *Kellar v. Snowden*, 87 Nev. 488, 491-92 (1971).

In addition, as a general rule, when the plaintiff pleads claims that a state statute is unconstitutional, the plaintiff's claims present only issues of law which are matters purely for the Court to decide and which may be decided on summary judgment where no genuine issues of material fact exist and the record is adequate for consideration of the constitutional issues presented. *See Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 506-09 (2009) (affirming district court's summary judgment regarding constitutionality of a statute and stating that "[t]he determination of whether a statute is constitutional is a question of law."); *Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 294-95 (1983) (holding that a constitutional claim may be decided on summary judgment where no genuine issues of material fact exist and the record is adequate for consideration of the constitutional issues presented).

Finally, in reviewing the constitutionality of statutes, the Court must presume the statutes are constitutional, and "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *List v. Whisler*, 99 Nev. 133, 137 (1983). The presumption places a heavy burden on the challenger to make "a clear showing that the statute is unconstitutional." *Id.* at 138. As a result, the Court must not invalidate a statute on constitutional grounds unless the statute's invalidity appears "beyond a reasonable doubt." *Cauble v. Beemer*, 64 Nev. 77, 101 (1947); *State ex rel. Lewis v. Doron*, 5 Nev. 399, 408 (1870) ("[E]very statute is to be upheld, unless plainly and without reasonable doubt in conflict with the Constitution."). Furthermore, it is a fundamental rule of constitutional review that "the judiciary will not

declare an act void because it disagrees with the wisdom of the Legislature." *Anthony v. State*, 94 Nev. 337, 341 (1978). Thus, in reviewing the constitutionality of statutes, the Court must not be concerned with the wisdom or policy of the statutes because "[q]uestions relating to the policy, wisdom, and expediency of the law are for the people's representatives in the legislature assembled, and not for the courts to determine." *Worthington v. Dist. Ct.*, 37 Nev. 212, 244 (1914).

C. Federal constitutional claims for money damages.

In his third, fourth and fifth claims for relief, Plaintiff asks for money damages on his federal constitutional claims under 42 U.S.C. § 1983 (section 1983) against the State of Nevada ex rel. the Legislature, the Department and the Governor acting in his official capacity. (Compl. ¶¶ 90, 102, 113.) The Court finds that Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for money damages because the State and its agencies and officials acting in their official capacities are absolutely immune from liability for money damages under section 1983.

To seek redress for an alleged violation of federal constitutional rights, a plaintiff must bring an action under the federal civil rights statutes codified in section 1983. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) ("[A] litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. § 1983."). A civil rights action under section 1983 "must meet federal standards even if brought in state court." *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 259 (1998); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989).

The United States Supreme Court has held that states and their officials acting in their official capacities are not "persons" who are subject to suit under section 1983 and they may not be sued in state courts for money damages under the federal civil rights statutes. *Will*, 491 U.S. at 62-71. Based on *Will*, the Nevada Supreme Court has held that state agencies and entities also are not "persons" who are subject to suit under section 1983 and they likewise may not be sued in state courts for money damages

under the federal civil rights statutes. *Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 605 (2007) ("The State of Nevada is not a 'person' for § 1983 purposes, and respondents are state entities. Thus, respondents cannot be sued under § 1983." (footnotes omitted)); *N. Nev. Ass'n Injured Workers v. State Indus. Ins. Sys.*, 107 Nev. 108, 114-15 (1991) ("Because SIIS is a state agency, appellants' cause of action has failed to state a claim under the federal civil rights statutes against SIIS. The same must be said for SIIS's officers and employees to the extent the cause of action seeks to impose liability for actions properly attributable to their official capacities."). Therefore, when a plaintiff's complaint alleges federal constitutional claims under section 1983 and asks for money damages from the State and its agencies and officials acting in their official capacities, "the complaint fails to state an actionable claim." *N. Nev. Ass'n Injured Workers*, 107 Nev. at 114.

In his briefing, Plaintiff conceded that he cannot seek money damages under section 1983 against the State, the Legislature and the Governor acting in his official capacity. (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 8 ("Plaintiff is not seeking monetary damages from the Legislature under these claims.")); (Pl.'s Opp'n to Gov.'s Mot. to Dismiss at 4 ("This case does not seek money from the Governor[.]")) Nevertheless, Plaintiff argues that the Department is "analogous to a municipality, not the State, allowing [the Department] to be held liable [for money damages] for purposes of § 1983." (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 6.) To support his argument, Plaintiff contends that the recovery of money damages against the Department would not affect the state treasury because "[w]hile DHHS received funding from the State's general fund, no state funds are used to fund the marijuana program within DHHS." *Id.*

The Court finds that the Department is not analogous to a municipality. Rather, based on the Department's treatment under state law, the Court finds that the Department is a state agency under all the factors considered by courts in civil rights action under section 1983. To determine whether an entity is a state agency for purposes of a civil rights action, courts first consider whether "a judgment

against the entity named as a defendant would impact the state treasury." *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 678 (9th Cir. 1991). If a court determines that a judgment against the entity would impact the state treasury, the entity is deemed a state agency as a matter of law, and it is absolutely immune from liability for money damages under section 1983 as a matter of law. *Id.* at 679 ("a determination that a judgment necessarily would have an impact on the state treasury would lead ineluctably to the conclusion that [the entity] is a state agency.").

In addition, even if a judgment against the entity would not necessarily have an impact on the state treasury, the entity still may be deemed a state agency if the entity is treated as a state agency under state law. *Id.* In making this determination, courts consider several factors, including: (1) the extent to which the entity is subject to governmental control and review by the legislative and executive branches; (2) the nature of the governmental powers delegated to the entity, such as the powers to conduct administrative hearings and adjudications and to issue regulations carrying the force of law; (3) whether the entity may sue or be sued on its own behalf or whether it must sue or be sued only in its official capacity on behalf of the State; and (4) whether the entity may hold property on its own behalf or whether it must hold property only on behalf of the State. *Id.* at 678-79. When "evaluating the force of these factors in a particular case, [courts] look to state law's treatment of the entity." *Id.* at 678.

Based on the Department's treatment under state law, the Court finds that the Department is a state agency under all these factors. First, the Court finds that a judgment against the Department would impact the state treasury because the money collected as fees under the medical marijuana registration program is state money that is deposited in and drawn from the state treasury only pursuant to appropriations made by law. As established by state law, the state treasury consists of all state money, whether the money is deposited in the state general fund or another state fund. NRS 226.115; NRS 353.249; NRS 353.321; NRS 353.323. State law requires the Administrator of the Division to deposit all money collected as fees under the registration program in the state treasury. NRS 353.250;

NRS 353.253; NRS 453A.730. After the money is deposited in the state treasury, it is drawn from the state treasury only pursuant to appropriations made by law to the Division to carry out the registration program. NRS 453A.730; Nev. Const. art. 4, § 19 ("No money shall be drawn from the treasury but in consequence of appropriations made by law.").[6] Thus, if Plaintiff recovered a judgment against the Department for money damages under section 1983, the judgment would have an impact on the state treasury because the judgment would be recovered from state money which is collected as fees under the program and which is deposited in and drawn from the state treasury only pursuant to appropriations made by law. For this reason alone, the Department is a state agency that may not be sued for money damages under section 1983.

Furthermore, even assuming that a judgment against the Department would not have an impact on the state treasury, the Department is still treated as a state agency under state law. The Department is created by NRS 232.300, which is part of NRS Chapter 232, entitled "State Departments," and NRS Title 18, entitled "State Executive Department." Thus, based on the codification of the Department's governing statutes in the provisions of NRS relating to the state executive branch, the Legislature intended for the Department to function as a state agency of the executive branch. *See Coast Hotels & Casinos v. Nev. State Labor Comm'n*, 117 Nev. 835, 841-42 (2001) ("The title of a statute may be considered in determining legislative intent."); *State ex rel. Masto v. Montero*, 124 Nev. 573, 577 n.8 (2008) (holding that the office of a district judge is a "state office" based on "several provisions in the Nevada Revised Statutes [which] refer to 'state office' in the title and mention 'state officer' in the text when explaining the provision.").

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[6] In 2015, the Legislature passed the Authorized Expenditures Act which authorizes the Division to expend $2,089,894 during Fiscal Year 2015-2016 and $2,980,802 during Fiscal Year 2016-2017 for the "Marijuana Health Registry." A.B. 490, 2015 Nev. Stat., ch. 484, § 1, at 2859; *Hearing on A.B. 490 before Sen. Comm. on Fin.*, 78th Leg. (Nev. June 1, 2015) ("The Authorized Expenditures Act provides authority to expend other monies not appropriated from the General Fund or Highway Fund. Those other monies include federal funds, *self-funded fee generating budget accounts* and interagency transfers." (testimony of Mark Krmpotic, Senate Fiscal Analyst (emphasis added))).

As a state agency of the executive branch, the Department is subject to extensive governmental control and review by the legislative and executive branches under Nevada state law. For example, the Department is subject to the State Personnel System in NRS Chapter 284, the State Purchasing Act in NRS Chapter 333 and the State Budget Act in NRS Chapter 353, and the Department is also subject to legislative reviews of its budget and operations under NRS Chapter 218E and legislative audits of its accounts, funds and other records under NRS Chapter 218G. The governmental powers delegated to the Department also indicate that the Legislature intended for the Department to function as a state agency of the executive branch because "[t]he Department is the sole agency responsible for administering the provisions of law relating to its respective divisions." NRS 232.300(3). Thus, the Department has been charged with carrying out and enforcing laws enacted by the Legislature, and to execute its state governmental functions, the Department has been given state governmental powers such as the powers to conduct administrative hearings and adjudications and to issue regulations carrying the force of law. *See* NRS 232.320; NRS Chapter 233B (APA); *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 298 & n.10 (2009) ("Under Article 5, Section 7 of the Nevada Constitution, the executive branch is charged with carrying out and enforcing the laws enacted by the Legislature."). Finally, the Department may not sue or be sued on its own behalf, but it must sue or be sued only in its official capacity on behalf of the State. *See* NRS 41.031; NRS 228.110; NRS 228.140; NRS 228.170. And the Department does not hold property on its own behalf, but such property is held only on behalf of the State under NRS Chapter 331.

Consequently, based on the Department's treatment under state law, the Court finds that the Department is a state agency that may not be sued for money damages under section 1983. Accordingly, the Court concludes that all Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for money damages because the State and its agencies and officials acting in their official capacities are absolutely immune from liability for money damages under section 1983.

D. Federal constitutional claims for declaratory and injunctive relief.

In his third, fourth and fifth claims for relief, Plaintiff asks for declaratory relief on his federal constitutional claims under section 1983 against the State of Nevada ex rel. the Legislature, the Department and the Governor acting in his official capacity. (Compl. ¶¶ 89-90, 101-102, 112-113.) In his motion for partial summary judgment and motion for permanent injunction, Plaintiff also asks for injunctive relief on his Fifth Amendment federal constitutional claim under section 1983 against the same Defendants. (Pl.'s Mot. for Partial Summ. Judgm't at 16-17.) The Court finds that Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for declaratory relief and injunctive relief because Plaintiff has not sued the proper state official, in this case the Administrator of the Division, who is charged by state law with enforcing the medical marijuana laws governing the registration program.

As a preliminary matter, the Court finds that Plaintiff cannot obtain declaratory relief or injunctive relief against the State and its agencies, in this case the Legislature and the Department, because the State and its agencies are not "persons" subject to a civil rights action under section 1983. *Allah v. Comm'r of Dep't Corr. Servs.*, 448 F. Supp. 1123, 1125 (N.D.N.Y. 1978) ("It is well established that state agencies are not 'persons' for purposes of the Civil Rights Acts. This is true whether the relief being sought is injunctive and declaratory relief or damages."); *Ill. Dunesland Pres. Soc'y v. Ill. Dep't Nat. Res.*, 461 F. Supp. 2d 666, 671 (N.D. Ill. 2006) ("[T]here is no support for the proposition that claims for injunctive relief may be brought under § 1983 against state agencies."). Therefore, the Court concludes that the State and the Legislature and the Department are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for declaratory relief and injunctive relief under section 1983.

Plaintiff contends that he sued the proper state official because the Governor serves as the organizational head of the Department and has ultimate responsibility for the Department's

administration of the registration program. (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 6-7.) Alternatively, Plaintiff asks for leave to amend his complaint to add the Director of the Department in his official or personal capacity as a Defendant to the federal constitutional claims.[7] (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 7-8.)

The Court finds that Plaintiff cannot obtain declaratory or injunctive relief against the Governor or the Director under section 1983 because the Governor and the Director do not have a sufficiently direct connection under state law with the enforcement of the medical marijuana laws. The Court also denies Plaintiff leave to amend his complaint to substitute the Administrator of the Division as the proper state official under section 1983 because leave to amend should not be granted when the proposed amendment would be futile. *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 42, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013). A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim. *Id.* The Court finds that allowing Plaintiff to amend his complaint to substitute the Administrator as the proper state official under section 1983 would be futile because Plaintiff's federal constitutional claims do not state a permissible or actionable claim on their merits as a matter of law.

As a general rule under *Ex parte Young*, 209 U.S. 123, 155-57 (1908), a plaintiff may bring federal constitutional claims under section 1983 asking for prospective declaratory or injunctive relief against state officials acting in their official capacities to enjoin their enforcement of allegedly unconstitutional statutes. *L.A. Branch NAACP v. L.A. Unified Sch. Dist.*, 714 F.2d 946, 952-53 (9th Cir.

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[7] Although Plaintiff asks for leave to add the Director in his personal capacity, Plaintiff cannot sue a state official for declaratory or injunctive relief under section 1983 in his personal capacity because a claim for such equitable relief may be brought under section 1983 only against a state official in his official capacity. *Hatfill v. Gonzales*, 519 F. Supp. 2d 13, 19 (D.D.C. 2007) ("there is no basis for suing a government official for declaratory and injunctive relief in his or her individual or personal capacity"); *Pascarella v. Swift Transp. Co.*, 643 F. Supp. 2d 639, 647 n.11 (D.N.J. 2009) ("the proper vehicle for seeking equitable relief against a government official involving that officer's official duties is an official capacity suit").

1983); *N. Nev. Ass'n Injured Workers v. State Indus. Ins. Sys.*, 107 Nev. 108, 115-16 (1991). However, a plaintiff cannot bring claims under *Ex parte Young* for prospective declaratory or injunctive relief against state officials unless the state officials have some direct connection under state law with the enforcement of the challenged statutes. *Young*, 209 U.S. at 157; *Fitts v. McGhee*, 172 U.S. 516, 529-30 (1899); *L.A. Branch NAACP*, 714 F.2d at 952-53.

The connection necessary to trigger *Ex parte Young* "must be determined under state law depending on whether and under what circumstances a particular defendant has a connection with the challenged state law." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). The connection "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). For example, when state law makes enforcement of the challenged statutes the responsibility of state officials other than the Governor, neither the Governor's general executive power to see that the laws are faithfully executed, nor the Governor's general executive power to appoint or supervise those other state officials, will subject the Governor to suit under *Ex parte Young* because the Governor will not have a sufficiently direct connection with the enforcement of the challenged statutes. *Women's Emergency Network v. Bush*, 323 F.3d 937, 949-50 (11th Cir. 2003); *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002); *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467, 469-70 (9th Cir. 1999); *L.A. Branch NAACP*, 714 F.2d at 952-53; *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979).

Because statutory enforcement powers are created by the Legislature, it is within the province of the Legislature to determine which state agency or officer will exercise those statutory enforcement powers and in what manner. *See* 16A Am. Jur. 2d *Constitutional Law* § 288 (2009) ("the legislature has constitutional power to allocate executive department functions and duties among the offices, departments, and agencies of state government."). If the Legislature grants statutory enforcement

powers to a state agency or officer other than the Governor, the exercise of those statutory enforcement powers by the state agency or officer is not subject to the Governor's direct control unless the Legislature expressly gives the Governor statutory authority to exercise such control. *See Kendall v. United States*, 37 U.S. 524, 610 (1838) (holding that Congress may "impose upon any executive officer any duty [it] may think proper . . . and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."); *Brown v. Barkley*, 628 S.W.2d 616, 623 (Ky. 1982) ("[W]hen the General Assembly has placed a function, power or duty in one place there is no authority in the Governor to move it elsewhere unless the General Assembly gives him that authority.").

In enacting the medical marijuana laws, the Legislature did not grant statutory enforcement powers to the Governor or the Director of the Department. Rather, the Legislature granted those powers to the Administrator of the Division who is responsible for administering and enforcing the laws governing the registration program. NRS 453A.210; NRS 453A.730; NRS 453A.740. The Legislature did not expressly give the Governor or the Director statutory authority to exercise direct control over the Administrator's enforcement of those laws. As a result, the Governor and the Director do not have a sufficiently direct connection under state law with the enforcement of the medical marijuana laws. Furthermore, even though the Director has general supervisory power over the Administrator under NRS Chapter 232, it is the Administrator, not the Director, who is responsible for enforcing the medical marijuana laws under NRS Chapter 453A.[8] Therefore, because the Director has only general supervisory power over the Administrator and because it is the Administrator, not the Director, who is charged by state law with enforcing the medical marijuana laws, the Court finds that it is the

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[8] Under NRS 232.320, the Director appoints the Administrator with the consent of the Governor, and the Director administers, "through the divisions of the Department," the provisions of law "relating to the functions of the divisions of the Department." Under NRS 232.340, the Administrator "[s]hall administer the provisions of law relating to his or her division, subject to the administrative supervision of the Director."

Administrator who is the proper state official to sue for declaratory and injunctive relief under section 1983. Consequently, the Court concludes that Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for declaratory relief and injunctive relief because Plaintiff has not sued the proper state official—the Administrator of the Division—who is charged by state law with enforcing the medical marijuana laws.[9]

When a plaintiff fails to sue the proper state official in a section 1983 action, the district court may permit the plaintiff to amend his complaint to add the proper state official as a party-defendant unless the proposed amendment would be futile. *See Cobb v. U.S. Dep't of Educ.*, 487 F. Supp. 2d 1049, 1055 (D. Minn. 2007). A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim. *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 42, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013). As discussed next, the Court finds that Plaintiff's federal constitutional claims do not state a permissible or actionable claim on their merits as a matter of law. Therefore, the Court denies Plaintiff leave to amend his complaint to substitute the Administrator of the Division as the proper state official under section 1983 because such a proposed amendment would be futile.

E. Fourteenth Amendment claims.

In his third and fourth claims for relief, Plaintiff alleges that because "[a]ccess to healthcare and, more specifically, medical treatments recommended by a physician are deeply rooted in America's history and tradition," the Due Process Clause recognizes and protects a substantive and fundamental right to access healthcare recommended by a physician. (Compl. ¶¶ 67-79.) Plaintiff alleges that the registry and associated application process and fees impose an unnecessary, undue and unreasonable

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[9] Because Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for money damages and for declaratory and injunctive relief under section 1983, Plaintiff cannot recover costs or attorney's fees under 42 U.S.C. § 1988 against Defendants as a matter of law. *Farrar v. Hobby*, 506 U.S. 103, 109 (1992); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

burden and barrier on the exercise of a person's fundamental right to access healthcare recommended by a physician in violation of the Equal Protection Clause because the registry and associated application process and fees apply only to persons who seek to use medical marijuana for their medical condition but do not apply to similarly situated persons who seek to use any other medical treatment for the same medical condition. (Compl. ¶¶ 80-101.)

The Court finds that there is no fundamental right under federal law to use medical marijuana. *See Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007) (holding that "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering.").[10] Moreover, the fact that medical use of marijuana is still illegal at the federal level weighs against such use being a fundamental right under federal law. *See Gonzales v. Raich*, 545 U.S. 1, 13-15 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490-92 (2001). At this time, medical use of marijuana is only an allowable legal option under state law. Article 4, Section 38 of the Nevada Constitution states that the Legislature "shall provide by law" for the use of medical marijuana by a patient for certain medical conditions and further provides that the Legislature "shall provide by law" for a "registry of patients, and their attendants, who are authorized to use [medical marijuana], to which law enforcement officers may resort to verify a claim of authorization and which is otherwise confidential." Given that the registry is part of Article 4, Section 38, the Court must assume that the voters approved this constitutional section because of the registry's inclusion within this section. Therefore, the Court finds that there is no fundamental right to use medical

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[10] *Accord Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 (9th Cir. 2014) (rejecting contention that "the Ninth Amendment and the substantive due process component of the Fifth Amendment together protect a fundamental right to 'distribute, possess and use medical cannabis' in compliance with California state law."); *United States v. Wilde*, 74 F. Supp. 3d 1092, 1095 (N.D. Cal. 2014) ("no court to date has held that citizens have a constitutionally fundamental right to use medical marijuana."); *Beasley v. City of Keizer*, No. CIV. 09-6256-AA, 2011 WL 2008383, at *4 (D. Or. May 23, 2011) ("there is no record of any court decision establishing a federal right to marijuana based on a state medical marijuana law; rather, courts have found no federal right to access or use marijuana in the context of state medical marijuana laws."), *aff'd*, 525 F. App'x 549 (9th Cir. 2013).

marijuana without the registry because the voters expressly required the Legislature to provide by law for the registry when they approved Article 4, Section 38.

To carry out its constitutional duty under Article 4, Section 38, the Legislature enacted the registration program in NRS Chapter 453A with the stated intent to establish the registry and regulate the use of medical marijuana to protect the health, safety and welfare of the public. A.B. 453, 2001 Nev. Stat., ch. 592, preamble, at 3053; *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 10, 2001); *Hearing on A.B. 453 before Sen. Comm. on Human Res. & Facilities*, 71st Leg. (Nev. May 30, 2001). In particular, the Legislature enacted NRS 453A.210 which directs the Division to establish and maintain the registration program for the issuance of registration cards to applicants who meet the requirements to use medical marijuana. Because the Court finds that there is no fundamental right to use medical marijuana, the Court must uphold the Legislature's statutory scheme against Plaintiff's Fourteenth Amendment challenge if the statutory scheme is rationally related to a legitimate state interest. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

In applying the rational-basis standard, the Court must remain mindful that "[s]tate legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." *Whalen v. Roe*, 429 U.S. 589, 597 (1977). Instead, "individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Id.* at 597-98. For example, in *Whalen*, the United States Supreme Court upheld a New York statute which provided that whenever a "Schedule II" drug was prescribed to a patient, the patient's name, address and age, along with the identity of the prescribed drug and its dosage, had to filed with the state department of health. *Id.* Applying the rational-basis standard, the Supreme Court upheld the patient-identification statute because it was rationally related to the legitimate state interest of protecting the health, safety and welfare of the public with regard to the distribution and abuse of dangerous drugs

for which there is both a lawful and an unlawful market. *Id.* As explained by the Supreme Court:

> The New York statute challenged in this case represents a considered attempt to deal with such a problem [of vital local concern]. It is manifestly the product of an orderly and rational legislative decision. It was recommended by a specially appointed commission which held extensive hearings on the proposed legislation, and drew on experience with similar programs in other States. There surely was nothing unreasonable in the assumption that the patient-identification requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs. For the requirement could reasonably be expected to have a deterrent effect on potential violators as well as to aid in the detection or investigation of specific instances of apparent abuse. At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control. . . . It follows that the legislature's enactment of the patient-identification requirement was a reasonable exercise of New York's broad police powers. The District Court's finding that the necessity for the requirement had not been proved is not, therefore, a sufficient reason for holding the statutory requirement unconstitutional.

Id. (footnotes omitted).

In this case, the Court finds that the registration program in NRS Chapter 453A is rationally related to the legitimate state interest of protecting the health, safety and welfare of the public because the registration program serves a legitimate public protection function with regard to the distribution and abuse of medical marijuana, which is a widely desired and dangerous drug for which there is both a lawful and an unlawful market. As approved by the voters, Article 4, Section 38 requires the Legislature to establish the registry to allow "law enforcement officers . . . to verify a [patient's] claim of authorization" to use medical marijuana. Like the patient-identification system upheld in *Whalen*, the registry is rationally related to a legitimate public protection function because the Legislature could reasonably believe that the registry would aid in the enforcement of Nevada's medical marijuana laws, have a deterrent effect on potential violators and assist in the detection or investigation of specific instances of apparent abuse. For example, the registration program attempts to protect the public against the illegal distribution and abuse of medical marijuana because NRS 453A.210(5) states in pertinent part that the Division may deny an application if "[t]he Division determines that the applicant, or the applicant's designated primary caregiver, if applicable, has been convicted of knowingly or intentionally

selling a controlled substance."

Therefore, because the Court finds that there is no fundamental right to use medical marijuana and because the Court finds that the registration program in NRS Chapter 453A is rationally related to the legitimate state interest of protecting the health, safety and welfare of the public, the Court must uphold the Legislature's statutory scheme against Plaintiff's Fourteenth Amendment challenge. Accordingly, the Court concludes that Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims that the registration program in NRS Chapter 453A violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

F. Fifth Amendment claim.

In his fifth claim for relief, Plaintiff alleges that the persons who register with the State under the medical marijuana laws are compelled by state law to admit that they intend to use medical marijuana and that by making such an admission, they are compelled to incriminate themselves in violation the privilege against self-incrimination in the Fifth Amendment because they are admitting that they are engaging in acts illegal under federal law. (Compl. ¶¶ 104-110.)

The Court has examined the Division's application packet, and the Court cannot find any violation of the Fifth Amendment privilege against self-incrimination. The Court finds that the Division's application packet does not require any incriminating admissions by applicants, and the Court finds that applicants are not compelled to give any incriminating information. Therefore, the Court concludes that there is no violation of the Fifth Amendment privilege against self-incrimination.

The Fifth Amendment privilege against self-incrimination provides that no person "shall be compelled in any criminal case to be a witness against himself." As a general rule, the Fifth Amendment privilege "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate

him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). However, the United States Supreme Court has held that the Fifth Amendment privilege does not apply unless the individuals are, in some way, "compelled" to make incriminating statements. *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 856-58 (1984). In *Selective Serv. Sys.*, the Supreme Court held that individuals are not "compelled" to make disclosures in violation of the Fifth Amendment privilege when those disclosures are required as part of a *voluntary* application for benefits which the individuals must file only if they want to be considered for the benefits. *Id.* In that case, the Supreme Court determined that the Fifth Amendment privilege did not apply when individuals submitted applications for federal educational aid and were required to disclose on their applications whether they registered for the draft as required by federal law. *Id.* The Supreme Court stated that the application's requirement that an individual disclose whether he failed to register for the draft—a federal criminal offense—did not violate the privilege against self-incrimination because an individual "clearly is under no compulsion to seek financial aid." *Id.* at 857.

Based on *Selective Serv. Sys.*, federal appellate courts have held that the Fifth Amendment privilege does not apply when the government asks individuals to disclose potentially incriminating information, such as information about past drug use, on questionnaires which the individuals file because they want to be considered for participation in government programs. *Nat'l Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 287, 291-93 (D.C. Cir. 1993); *Am. Fed'n of Gov't Employees v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 790, 794-95 (D.C. Cir. 1997). Furthermore, at least one federal district court has concluded that the Fifth Amendment privilege is not implicated when individuals apply to participate in the District of Columbia's medical marijuana program as cultivators or dispensary operators and are required to execute affidavits acknowledging that "[g]rowing, distributing, and possessing marijuana in any capacity . . . is a violation of federal laws" and that the "law authorizing the District's medical marijuana program will not excuse any registrant from any

violation of the federal laws governing marijuana." *Sibley v. Obama*, 810 F. Supp. 2d 309, 310-11 (D.D.C. 2011). As explained by the court:

> plaintiff here is clearly "under no compulsion to seek" a permit to grow and sell medical marijuana. Although plaintiff relies extensively on *Leary v. United States*, 395 U.S. 6, 16 (1969), that case addresses a situation, unlike here, where the defendant was actually compelled—he faced criminal charges for failure "to identify himself" as a drug purchaser under the relevant tax statute. Nothing in the District's medical marijuana laws requires plaintiff to apply to be a cultivator or to run a dispensary. Simply put, plaintiff need not seek to participate in the District's budding medical marijuana industry.

Id. at 311.

The Court finds that Nevada's medical marijuana registration program is a voluntary program and that nothing in Nevada's medical marijuana laws requires any person to request, complete or submit an application packet or register with the State, unless the person voluntarily elects to do so. Because Nevada's registration program is a voluntary program, the Court finds that the Fifth Amendment privilege simply does not apply to the registration program because a person is not "compelled" by the State to participate in the registration program. Furthermore, the Court finds that even if a person makes the voluntary choice to participate in the registration program and completes the Division's application packet, the application packet does not require the person to make any incriminating admissions about past acts which "might tend to show that he himself had committed a crime." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)). Therefore, the Court concludes that Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claim that the registration program in NRS Chapter 453A violates the Fifth Amendment privilege against self-incrimination.

G. State-law tort claims.

In his first claim for relief, Plaintiff brings a state-law tort claim against the Department for fraud alleging that the Department fraudulently induced Plaintiff to apply and pay fees for the registration cards which were useless in facilitating access to medical marijuana because the Department knew or

should have known that no dispensaries would be open in Southern Nevada within the one-year period covered by the registration cards. (Compl. ¶¶ 39-51.) In his second claim for relief, Plaintiff brings a state-law tort claim against the Department for unjust enrichment alleging that he never obtained any benefit from the registration cards because the Department never licensed any dispensaries during the period that the registration cards were valid and that the Department unjustly accepted and retained his fees for the registration cards. (Compl. ¶¶ 58-62.)

In response, the Department contends that Plaintiff's state-law tort claims for money damages are barred as a matter of law by the following affirmative defenses: (1) the voluntary payment doctrine; (2) the statute of limitations in NRS 11.190(5)(b); and (3) the State's sovereign immunity under NRS 41.032(1). (Dept.'s Mot. to Dismiss at 9-11.) The Department also contends that Plaintiff's state-law tort claims for money damages fail to state claims upon which relief can be granted because Plaintiff's allegations are not legally sufficient to establish the essential elements of fraud or unjust enrichment. (Dept.'s Mot. to Dismiss at 8-9.)

The Court finds that Plaintiff's state-law tort claims for money damages are barred as a matter of law by the affirmative defense of the State's sovereign immunity under NRS 41.032(1) and *Hagblom v. State Dir. of Mtr. Vehs.*, 93 Nev. 599, 601-04 (1977). Therefore, the Court does not need to address the other defenses and objections raised in the Department's motion to dismiss.

The State and its agencies and officials acting in their official capacities cannot be sued in state court for state-law tort claims for money damages unless the lawsuit and the type of relief being sought are both authorized by Nevada law. *See Arnesano v. State*, 113 Nev. 815, 820-24 (1997). Therefore, as a general rule, a plaintiff cannot bring a state-law tort claim for money damages against the State and its agencies and officials acting in their official capacities except as expressly authorized by the State's conditional waiver of its sovereign immunity in NRS 41.031 et seq. *Hagblom*, 93 Nev. at 601-04. The Legislature has expressly limited the State's conditional waiver of its sovereign immunity in

NRS 41.032(1), which provides in relevant part:

> [N]o action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:
>
> 1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction[.]

Under NRS 41.032(1), the State and its agencies and officials acting in their official capacities are absolutely immune from liability for state-law tort claims for money damages based on any acts or omissions in their execution and administration of statutory provisions which have not been declared invalid by a court of competent jurisdiction. *Hagblom*, 93 Nev. at 603-04. In *Hagblom*, the plaintiff brought claims for declaratory relief regarding the validity of a state agency's regulation and also claims for money damages based on the state agency's implementation of the regulation. The Nevada Supreme Court upheld dismissal of the claims for money damages based on NRS 41.032(1), which the court stated "provides immunity to all individuals implementing the new regulation since that policy, applied with due care and without discrimination, had not been declared invalid by a court of competent jurisdiction." *Id.* at 603.

In this case, the Court finds that Plaintiff's state-law tort claims for money damages against the Department are the exact types of claims that the State's sovereign immunity under NRS 41.032(1) is intended to prohibit because Plaintiff's claims are premised on alleged acts or omissions by a state agency in the execution and administration of the State's medical marijuana laws which have not been declared invalid by a court of competent jurisdiction. Therefore, because the Court finds that Plaintiff's state-law tort claims for money damages are barred as a matter of law by sovereign immunity under NRS 41.032(1) and *Hagblom*, the Court concludes that the Department is entitled to judgment as a matter of law on Plaintiff's state-law tort claims for money damages for fraud and unjust enrichment.

ORDER AND JUDGMENT

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiff's motion for partial summary judgment, motion for permanent injunction and counter-motion for summary judgment are DENIED.

2. Defendant State of Nevada ex rel. the Department's motion to dismiss, which is being treated as a motion for summary judgment, is GRANTED; Defendant State of Nevada ex rel. the Governor's motion to dismiss, which is being treated as a motion for summary judgment, is GRANTED; and Defendant State of Nevada ex rel. the Legislature's motion for summary judgment is GRANTED.

3. Having considered all causes of action and claims for relief alleged in Plaintiff's second amended complaint on the parties' dispositive motions, the Court concludes that all Defendants are entitled to judgment as a matter of law on all such causes of action and claims for relief, and the Court enters final judgment in favor of all Defendants.

4. Because the Court enters final judgment in favor of all Defendants, the issue of class certification is moot, and the Court is not required to determine whether this action can be maintained as a class action under NRCP 23(c).

5. Pursuant to NRCP 58, Defendant Legislature is designated as the party required to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order and judgment, upon each party who has appeared in this case; and (2) file such notice of entry with the Clerk of Court.

DATED: This 9 day of February, 2016.

ROB BARE
DISTRICT JUDGE

Respectfully submitted by:
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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JOHN DOE, on his own behalf and on behalf of a class of those similarly situated,

Plaintiff,

vs.

STATE OF NEVADA ex rel. THE LEGISLATURE OF THE 77th SESSION OF THE STATE OF NEVADA; STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; THE HONORABLE BRIAN SANDOVAL, in his official capacity as Governor of the State of Nevada; DOES 1-100, inclusive; and ROE CORPORATIONS 1-100, inclusive,

Defendants.

Case No. A-15-723045-C
Dept. No. XXXII

NOTICE OF ENTRY OF ORDER AND JUDGMENT

PLEASE TAKE NOTICE that on the **5th** day of February, 2016, the Court in the above-titled action entered an Order and Judgment in which final judgment was entered in favor of all Defendants on all causes of action and claims for relief alleged in Plaintiff's second amended complaint. A copy of the Order and Judgment is attached hereto as Exhibit A.

//

//

DATED: This **5th** day of February, 2016.

Respectfully submitted,

BRENDA J. ERDOES
Legislative Counsel

By: /s/ Kevin C. Powers
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **5th** day of February, 2016, pursuant to NRCP 5(b), the Nevada Electronic Filing Rules, the Eighth Judicial District Court Rules and the parties' stipulation and consent to service by electronic means, I served a true and correct copy of the foregoing Notice of Entry of Order and Judgment, by electronic means through the Eighth Judicial District Court's electronic filing system, on the following persons who are registered users on the electronic service list for this case:

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/s/ Kevin C. Powers
An Employee of the Legislative Counsel Bureau

Exhibit A

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ORDR

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JOHN DOE, on his own behalf and on behalf of a class of those similarly situated,

Plaintiff,

vs.

STATE OF NEVADA ex rel. THE LEGISLATURE OF THE 77th SESSION OF THE STATE OF NEVADA; STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; THE HONORABLE BRIAN SANDOVAL, in his official capacity as Governor of the State of Nevada; DOES 1-100, inclusive; and ROE CORPORATIONS 1-100, inclusive,

Defendants.

Case No. A-15-723045-C
Dept. No. XXXII

ORDER AND JUDGMENT

INTRODUCTION

This case involves several claims under federal and state law relating to the validity and operation of the provisions of Nevada's medical marijuana laws which establish the medical marijuana registration program and prescribe procedures and fees to apply for and obtain a registration card for purposes of using medical marijuana as authorized by Article 4, Section 38 of the Nevada Constitution and NRS Chapter 453A. For the reasons explained herein, the Court concludes that the medical marijuana registration program does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment or the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution. The Court also concludes that Plaintiff cannot recover on his state-law tort claims.

In reaching its conclusions, the Court sympathizes with Plaintiff and other patients who have a choice to make regarding whether to disclose their identities in order to participate in the registration program and whether to undergo the steps necessary to apply for and obtain a registration card. Nevertheless, the judicial branch may not find the registration program unconstitutional "simply because [it] might question the wisdom or necessity of the provision under scrutiny." *Techtow v. City Council of N. Las Vegas*, 105 Nev. 330, 333 (1989). Indeed, it is well established that "an act should not be declared void because there may be a difference of opinion as to its wisdom." *Damus v. Clark Cnty.*, 93 Nev. 512, 518 (1977).

Consequently, the Court may not judge the wisdom or necessity of the registration program because the Court is not the policy maker. That constitutional function is assigned to the people's elected representatives in the Legislature. The Court's constitutional function is to determine whether the policy determinations made by the Legislature in the laws governing the registration program result in any of the constitutional violations alleged in Plaintiff's complaint. Having found no such constitutional violations, the Court's judicial review is at an end, and the Court may not judge the wisdom or necessity of the registration program because "matters of policy or convenience or right or justice or hardship or questions of whether the legislation is good or bad are solely matters for consideration of the legislature and not of the courts." *King v. Bd. of Regents*, 65 Nev. 533, 542 (1948). Therefore, given the Court's order and judgment in this case, the best avenue of redress is through the Legislature, not the courts.

PROCEDURAL BACKGROUND

A. Parties and claims.

On August 13, 2015, Plaintiff John Doe filed a class action complaint, on his own behalf and on behalf of a class of those similarly situated, against Defendants State of Nevada ex rel. the Legislature of the State of Nevada (Legislature), the Department of Health and Human Services (Department) and the

Honorable Brian Sandoval in his official capacity as Governor of the State of Nevada (Governor). On August 20, 2015, Plaintiff filed a first amended class action complaint pursuant to NRCP 15(a), and on September 21, 2015, Plaintiff filed a second amended class action complaint pursuant to a stipulation and order approved by the Court on September 23, 2015. In his second amended complaint, Plaintiff alleges state-law tort claims, federal constitutional claims and a state constitutional claim relating to the validity and operation of the provisions of Nevada's medical marijuana laws which establish the registration program and prescribe procedures and fees to apply for and obtain a registration card.

Plaintiff states that he brought this action under the pseudonym "John Doe" to protect his identity due to the sensitivity of the issues. (Compl. p.2 n.1.)[1] Plaintiff alleges that he is a resident of the City of Las Vegas and Clark County, Nevada, that he is a 42-year-old male who has a history of severe migraine headaches and associated side effects, such as photophobia and nausea, and that he has tried all the traditional medical treatments for his migraines but those treatments do not resolve the severe nausea and other associated side effects of the migraines. (Compl. ¶¶ 1, 11-15.) Plaintiff alleges that his physician has recommended that he use medical marijuana to treat his migraines and associated side effects, that Plaintiff has used medical marijuana to treat his migraines and associated side effects and that medical marijuana has been effective in resolving his migraines and associated side effects when no other drug has been efficacious. (Compl. ¶¶ 16-18.)

Plaintiff alleges that he applied for his registration card from the Department, that he paid various fees to receive his registration card, that he was issued a registration card that expired one year after its issuance and that he renewed his registration card. (Compl. ¶¶ 22, 24-26.) Plaintiff alleges that when he applied for his registration card, there were dozens of applications submitted to the Department from companies that sought to operate medical marijuana dispensaries throughout the State but that Plaintiff has not been able to access or use medical marijuana, despite having his registration card, because no

[1] All parenthetical citations are to the Second Amended Complaint.

dispensaries have opened in Southern Nevada. (Compl. ¶¶ 23, 27-28.) Plaintiff alleges that, despite the lack of access to medical marijuana in Southern Nevada, the Department repeatedly took his money and, in return, issued him multiple registration cards. (Compl. ¶ 29.)

In his first claim for relief, Plaintiff brings a state-law tort claim against the Department for fraud alleging that the Department fraudulently induced Plaintiff to apply and pay fees for the registration cards which were useless in facilitating access to medical marijuana because the Department knew or should have known that no dispensaries would be open in Southern Nevada within the one-year period covered by the registration cards. (Compl. ¶¶ 39-51.) In his second claim for relief, Plaintiff brings a state-law tort claim against the Department for unjust enrichment alleging that he never obtained any benefit from the registration cards because the Department never licensed any dispensaries during the period that the registration cards were valid and that the Department unjustly accepted and retained his fees for the registration cards. (Compl. ¶¶ 58-62.)

In his third and fourth claims for relief, Plaintiff brings federal constitutional claims under the federal civil rights statute, 42 U.S.C. § 1983, against all Defendants under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. Plaintiff alleges that because "[a]ccess to healthcare and, more specifically, medical treatments recommended by a physician are deeply rooted in America's history and tradition," the Due Process Clause recognizes and protects a substantive and fundamental right to access healthcare recommended by a physician. (Compl. ¶¶ 67-79.) Plaintiff alleges that the registry and associated application process and fees impose an unnecessary, undue and unreasonable burden and barrier on the exercise of a person's fundamental right to access healthcare recommended by a physician in violation of the Equal Protection Clause because the registry and associated application process and fees apply only to persons who seek to use medical marijuana for their medical condition but do not apply to similarly situated persons who seek to use any other medical treatment for the same medical condition. (Compl. ¶¶ 80-101.)

In his fifth claim for relief, Plaintiff brings a federal constitutional claim under the federal civil rights statute, 42 U.S.C. § 1983, against all Defendants under the Self-Incrimination Clause of the Fifth Amendment. Plaintiff alleges that persons who register with the State under the medical marijuana laws are compelled by state law to admit that they intend to use medical marijuana and that by making such an admission, they are compelled to incriminate themselves in violation of the privilege against self-incrimination protected by the Fifth Amendment because they are admitting that they are engaging in acts illegal under federal law. (Compl. ¶¶ 104-110.)

Finally, in his sixth claim for relief, Plaintiff brings a state constitutional claim against the Legislature and the Governor alleging that the fees paid for the registration cards violate the Uniform and Equal Tax Clause of Article 10, Section 1(1) of the Nevada Constitution, which requires the Legislature to provide for "a uniform and equal rate of assessment and taxation." Plaintiff alleges that the fees paid for the registration cards impose a de facto tax upon persons who seek to use medical marijuana for their medical condition and that such a tax is non-uniform and unequal in its effect in violation of the Uniform and Equal Tax Clause because the fees apply only to persons who seek to use medical marijuana for their medical condition but do not apply to similarly situated persons who seek to use any other medical treatment for the same medical condition.[2] (Compl. ¶¶ 116-117.)

B. Dispositive motions.

Pursuant to the stipulation and order approved by the Court on September 23, 2015, the parties established a schedule for filing and briefing dispositive motions. The parties also agreed that if any party filed a dispositive motion, no motion for class certification would be filed pursuant to NRCP 23(c)

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[2] In his opposition to the Legislature's motion for summary judgment, Plaintiff conceded that the Uniform and Equal Tax Clause applies only to property taxes, and Plaintiff requested to strike that claim from his second amended complaint. (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 47.) At the hearing, Plaintiff conceded to dismissal of the claim. The Court finds dismissal is appropriate. Therefore, the Court dismisses Plaintiff's sixth claim for relief under the Uniform and Equal Tax Clause and will not discuss it further.

until the Court enters a written order resolving each such dispositive motion.[3] The parties filed and briefed the following dispositive motions: (1) Plaintiff's motion for partial summary judgment under NRCP 56 for judgment as a matter of law on his fifth claim for relief alleging violations of the Fifth Amendment privilege against self-incrimination and Plaintiff's motion for a permanent injunction based on that claim; (2) Plaintiff's counter-motion for summary judgment under NRCP 56 for judgment as a matter of law on his third and fourth claims for relief alleging violations of due process and equal protection under the Fourteenth Amendment; (3) the Department's motion to dismiss under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted; (4) the Governor's motion to dismiss under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted; and (5) the Legislature's motion for summary judgment under NRCP 56 for judgment as a matter of law on all causes of action and claims for relief alleged in Plaintiff's complaint.

On December 8, 2015, the Court held a hearing on the parties' dispositive motions, and the following counsel appeared on behalf of the parties at the hearing: Jacob L. Hafter, Esq., of HAFTERLAW, LLC, appeared on behalf of Plaintiff John Doe; Linda C. Anderson, Esq., Chief Deputy Attorney General, appeared on behalf of Defendant State of Nevada ex rel. the Department; Gregory L. Zunino, Esq., Chief Deputy Attorney General, appeared on behalf of Defendant State of Nevada ex rel. the Governor; and Kevin C. Powers, Esq., Chief Litigation Counsel, Legislative Counsel Bureau, Legal Division, appeared on behalf of Defendant State of Nevada ex rel. the Legislature.

---

[3] It is well established that a district court may rule on dispositive motions before a class certification motion in order "to protect both the parties and the court from needless and costly further litigation." *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984); *Ressler v. Clay Cnty.*, 375 S.W.3d 132, 137-38 (Mo. Ct. App. 2012) ("Since the Ninth Circuit's decision in *Schock*, numerous other federal courts have held similarly, or have implicitly agreed with the rule of allowing dispositive proceedings as to individual claims prior to determination of certification."); *Christensen v. Kiewit–Murdock Inv. Corp.*, 815 F.2d 206, 214 (2d Cir. 1987) (holding that it is within a district court's discretion to reserve decision on a class certification motion pending disposition of a motion to dismiss).

In their dispositive motions, the parties have presented the Court with both motions to dismiss under NRCP 12(b)(5) and motions for summary judgment under NRCP 56. As a general rule, the standards for deciding motions to dismiss under NRCP 12(b)(5) are different from the standards for deciding motions for summary judgment under NRCP 56. *See Witherow v. State Bd. of Parole Comm'rs*, 123 Nev. 305, 307-08 (2007). However, when a district court reviews a motion to dismiss under NRCP 12(b)(5) and "matters outside the pleading[s] are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." NRCP 12(b). In other words, "when the court considers matters outside the pleadings, the court must treat the motion as one for summary judgment." *Witherow*, 123 Nev. at 307.

In this case, Plaintiff presented matters outside the pleadings by attaching a copy of the Nevada Division of Public and Behavioral Health Medical Marijuana Cardholder Application Packet (application packet) as an exhibit to his motions for summary judgment and his oppositions to the motions to dismiss. No party objected to the Court considering the application packet in reviewing the motions to dismiss. Therefore, because matters outside the pleadings were presented to and not excluded by the Court in reviewing the motions to dismiss, the Court must treat the motions to dismiss as motions for summary judgment. *Witherow*, 123 Nev. at 307-08.

Accordingly, having considered the pleadings, documents and exhibits in this case and having received the arguments of counsel for the parties, the Court rules on the dispositive motions as follows: (1) the Court denies Plaintiff's motion for partial summary judgment, motion for permanent injunction and counter-motion for summary judgment; (2) the Court grants the Department's motion to dismiss which is being treated as a motion for summary judgment; (3) the Court grants the Governor's motion to dismiss which is being treated as a motion for summary judgment; and (4) the Court grants the Legislature's motion for summary judgment. Having considered all causes of action and claims for relief alleged in Plaintiff's second amended complaint on the parties' dispositive motions, the Court

concludes that all Defendants are entitled to judgment as a matter of law on all such causes of action and claims for relief, and the Court enters final judgment in favor of all Defendants. Because the Court enters final judgment in favor of all Defendants, the issue of class certification is moot, and the Court is not required to determine whether this action can be maintained as a class action under NRCP 23(c). Based on the Court's resolution of the dispositive motions, the Court enters the following findings of fact, conclusions of law and order and judgment pursuant to NRCP 52, 56 and 58.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. History and overview of Nevada's medical marijuana laws.

In 2000, Nevada's voters approved a constitutional initiative adding Article 4, Section 38 to the Nevada Constitution which directs the Legislature to provide by law for the use of medical marijuana recommended by a physician for the treatment and alleviation of certain chronic or debilitating medical conditions. In full, Article 4, Section 38 provides:

> 1. The legislature shall provide by law for:
>
> (a) The use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple sclerosis and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment.
>
> (b) Restriction of the medical use of the plant by a minor to require diagnosis and written authorization by a physician, parental consent, and parental control of the acquisition and use of the plant.
>
> (c) Protection of the plant and property related to its use from forfeiture except upon conviction or plea of guilty or nolo contendere for possession or use not authorized by or pursuant to this section.
>
> (d) A registry of patients, and their attendants, who are authorized to use the plant for a medical purpose, to which law enforcement officers may resort to verify a claim of authorization and which is otherwise confidential.
>
> (e) Authorization of appropriate methods for supply of the plant to patients authorized to use it.
>
> 2. This section does not:
>
> (a) Authorize the use or possession of the plant for a purpose other than medical or use for a medical purpose in public.
>
> (b) Require reimbursement by an insurer for medical use of the plant or accommodation of medical use in a place of employment.

According to the ballot materials presented to the voters, "[t]he initiative is an attempt to balance the needs of patients with the concerns of society about marijuana use." *State of Nevada Ballot Questions 2000, Question No. 9* (Nev. Sec'y of State). As part of that balance, the voters were told that "[a] confidential registry of authorized users shall be created and available to law enforcement agencies to verify a claim of authorization," and that with such "safeguards included to protect the concerns of society, this proposal can make a difference in the lives of thousands of persons suffering from these serious illnesses." *Id.*

Considering the plain language of the initiative in conjunction with the information provided to the voters, the Court finds that the drafters and voters intended for the registry to operate as a central component of the initiative because when they authorized a patient's use of medical marijuana upon the recommendation of a physician, they also made the use of medical marijuana expressly subject to the initiative's provisions regarding the patient registry. Furthermore, under well-established rules of constitutional construction, the constitutional provisions regarding the patient's right to use medical marijuana stand on equal footing with the constitutional provisions regarding the patient registry, and none of the constitutional provisions take precedence over nor exist independently of the other constitutional provisions. *See Nevadans for Nev. v. Beers*, 122 Nev. 930, 944 (2006). Rather, each constitutional provision of the initiative must be read together as a whole, so as to give effect to and harmonize each provision *in pari materia* or in conjunction with each other provision. *Nevadans for Nev.*, 122 Nev. at 944 ("The Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision."); *State of Nev. Employees Ass'n v. Lau*, 110 Nev. 715, 718 (1994) (stating that when interpreting constitutional provisions "it is necessary to use canons of construction, and to give effect to all controlling legal provision[s] *in pari materia*.").

Reading the constitutional provisions of the initiative together as a whole, the Court finds that the initiative was not intended to create an unconditional or absolute right to use medical marijuana upon the

recommendation of a physician. To the contrary, the Court finds that the initiative was drafted to impose conditions and restrictions on the use of medical marijuana recommended by a physician in order to safeguard the concerns of society about marijuana use. To this end, the initiative expressly directs the Legislature to provide by law for: (1) "[a] registry of patients, and their attendants, who are authorized to use the plant for a medical purpose, to which law enforcement officers may resort to verify a claim of authorization and which is otherwise confidential"; and (2) "[a]uthorization of appropriate methods for supply of the plant to patients authorized to use it." Nev. Const. art. 4, § 38(1). Thus, the Court finds that although the initiative directs the Legislature to provide by law for the use of medical marijuana recommended by a physician, it invests the Legislature with the power to determine, as a matter of public policy, the appropriate methods to implement and carry out the conditions and restrictions on the use of medical marijuana authorized by the initiative.

In 2001, the Legislature exercised its power under the initiative by passing A.B. 453 which established Nevada's laws, codified in NRS Chapter 453A, regulating the use of medical marijuana. A.B. 453, 2001 Nev. Stat., ch. 592, §§ 2-33, at 3053-66. As required by the initiative, the Legislature created a registry of patients, and their attendants, who are authorized to use medical marijuana and established procedures for a person to apply for a registration card that identifies the person as exempt from state prosecution for engaging in the medical use of marijuana in accordance with law. *Id.*

The Legislature modeled Nevada's laws governing the registration program on the Oregon Medical Marijuana Act of 1999 (Oregon Act). *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 10, 2001). Since the Oregon Act's enactment in 1999, it has authorized only persons holding a valid registration card to use medical marijuana. *See* 1999 Or. Laws, ch. 4, § 4 & ch. 825, § 2 (enacting Or. Rev. Stat. § 475.309); *Emerald Steel Fabricators v. Bureau of Labor & Indus.*, 230 P.3d 518, 519 (Or. 2010) ("The Oregon Medical Marijuana Act authorizes persons holding a registry identification card to use marijuana for medical purposes.").

During hearings in the Nevada Assembly on A.B. 453, the bill's primary sponsor, Assemblywoman Giunchigliani, testified that "[t]he Oregon model would be adopted regarding registered cardholders being allowed to have a certain number of plants and quantity of useable marijuana," and that "[f]ollowing the Oregon model was a good choice." *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 12, 2001). She also testified that the registration program "maintained the safety and integrity of the measure the [voters] signed." *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 10, 2001). Before the bill was passed by the Assembly, Ms. Giunchigliani stated to the body that "I think the public knew very well what they voting on and recognized that under extreme medical conditions, they supported the issue of a registry card and allowing an individual to have access to this." *Assembly Daily Journal*, 71st Leg., at 41 (Nev. May 23, 2001). During hearings in the Nevada Senate, Ms. Giunchigliani emphasized that "only those who are registered are eligible for the program." *Hearing on A.B. 453 before Sen. Comm. on Human Res. & Facilities*, 71st Leg. (Nev. June 3, 2001).

When the Legislature passed A.B. 453, it explained in the preamble that it intended for the bill to "carry out the will of the people of this state and to regulate the health, medical practices and well-being of those people in a manner that respects their personal decisions concerning the relief of suffering through the medical use of marijuana." A.B. 453, 2001 Nev. Stat., ch. 592, preamble, at 3053. However, the Legislature also explained that it was enacting the registration program because "[m]any residents of this state have suffered the negative consequences of abuse of and addiction to marijuana, and it is important for the legislature to ensure that the program established for the distribution and medical use of marijuana is designed in such a manner as not to harm the residents of this state by contributing to the general abuse of and addiction to marijuana." *Id.* Thus, like the drafters of the initiative, the Legislature intended for A.B. 453 to balance the needs of patients with the concerns of society about marijuana use. To achieve that balance, the Legislature made a patient's use of medical

marijuana expressly subject to the medical marijuana laws regulating a patient's participation in the registration program. A.B. 453, 2001 Nev. Stat., ch. 592, §§ 2-33, at 3053-66.

As enacted in 2001, the medical marijuana laws provided that holders of valid registration cards were not allowed to possess, deliver or produce, at any one time, more than: (1) one ounce of usable marijuana; (2) three mature marijuana plants; and (3) four immature marijuana plants. A.B. 453, 2001 Nev. Stat., ch. 592, § 17, at 3055-56 (enacting NRS 453A.200). At the time, the Department of Agriculture was charged with administering and enforcing the laws governing the registry and registration cards. *Id.* § 19, at 3056-57 (enacting NRS 453A.210). However, the Department of Agriculture was not authorized by A.B. 453 to impose fees to carry out the registration program.

In 2003, the Legislature authorized the Department of Agriculture to impose fees to defray the costs of servicing the registration program, but the Legislature capped the fees at $50 for obtaining an application for a registration card and $150 for processing and issuing a registration card. 2003 Nev. Stat., ch. 281, § 8, at 1434-35 (amending NRS 453A.740). When the Legislature authorized the fees in 2003, the Acting Director of the Department of Agriculture, Don Henderson, testified regarding the need for the fees to defray the costs of servicing the registration program:

> Mr. Henderson explained that during the 2001 session the Legislature had implemented the Nevada Medical Marijuana Program without fee authority. The Department of Agriculture had taken direction from the Legislature and started the program in October 2001. Mr. Henderson stated it had been a successful program with approximately 300 participants. After one and a half years in the program, the Department had discovered a number of issues that needed revising. *The program also generated an expense to the Department.*
>
> In A.B. 503 some technical amendments had been proposed to the bill . . . A.B. 503 had passed through Committee, appeared to be doing well, and then died on the Floor. Mr. Henderson requested that if there was an interest, there were three key provisions in A.B. 503 that the Committee might add to A.B. 130. . . . *Section 12 of A.B. 503 would establish the fee authority for the Department of Agriculture to recover administrative costs for this program.*
>
> Mr. Henderson commented that the Department could probably handle the technical issues involved with the Medical Marijuana Program; however, *the Department would be unable to continue to service the program if fee authority was not granted.*

Hearing on A.B. 130 before Assembly Comm. on Ways & Means, 72d Leg. (Nev. May 12, 2003) (emphasis added).

In 2009, the Legislature transferred administration and enforcement of the registration program to the Health Division of the Department of Health and Human Services. 2009 Nev. Stat., ch. 170, at 617-28. The Administrator of the Division is the state officer who is charged with administering and enforcing the laws governing the registration program, subject to the administrative supervision of the Director of the Department. NRS 232.320; NRS 232.340; NRS 453A.210; NRS 453A.730; NRS 453A.740. In 2013, the Legislature changed the name of the Health Division to the Division of Public and Behavioral Health (Division). 2013 Nev. Stat., ch. 489, § 127, at 3062 (amending NRS 453A.090).

Also in 2013, the Legislature substantially revised the medical marijuana laws. 2013 Nev. Stat., ch. 547, at 3700-26. Under the 2013 revisions, the Legislature authorized the operation of medical marijuana dispensaries that must register with the Division to sell or dispense medical marijuana to holders of valid registration cards. *Id.* §§ 3-23, at 3700-24. The Legislature also provided that holders of valid registration cards are not allowed to possess, deliver or produce, at any one time, more than: (1) two and one-half ounces of usable marijuana in any one 14-day period; (2) twelve marijuana plants, irrespective of whether the marijuana plants are mature or immature; and (3) a maximum allowable quantity of edible marijuana products and marijuana-infused products as established by regulation of the Division. *Id.* § 22, at 3716-17 (amending NRS 453A.200). In addition, the Legislature provided that after a medical marijuana dispensary opens in the county of residence of the holder of a valid registration card, the holder or his or her primary caregiver are not authorized to cultivate, grow or produce marijuana unless one of the following exceptions apply:

> (1) The holder or his or her primary caregiver was cultivating, growing or producing marijuana in accordance with NRS Chapter 453A on or before July 1, 2013;
> (2) All the medical marijuana dispensaries in the county of residence of the holder or his or her primary caregiver close or are unable to supply the quantity or strain of marijuana

> necessary for the medical use of the patient to treat his or her specific medical condition;
>
> (3) Because of illness or lack of transportation, the holder and his or her primary caregiver are unable reasonably to travel to a medical marijuana dispensary; or
>
> (4) No medical marijuana dispensary was operating within 25 miles of the residence of the holder at the time he or she first applied for his or her registration card.

Id. § 22, at 3716-17 (amending NRS 453A.200).

In the 2013 revisions, the Legislature also reduced the maximum fees chargeable by the Division to $25 for obtaining an application for a registration card and $75 for processing and issuing a registration card. *Id.* § 24, at 3725 (amending NRS 453A.740). By regulation, the Administrator of the Division has set the fees at the maximum amounts allowed by law. NAC 453A.140.[4]

In 2015, the Legislature enacted further revisions to the medical marijuana laws that became effective before Plaintiff filed his original complaint on August 13, 2015. *See* 2015 Nev. Stat., ch. 401, §§ 29-34, at 2264-69 (effective July 1, 2015); 2015 Nev. Stat., ch. 495, §§ 1-3, at 2985-87 (effective June 9, 2015, with certain exceptions not relevant here); 2015 Nev. Stat., ch. 506, §§ 11-36, at 3091-3110 (effective July 1, 2015). As a general rule, when courts evaluate a facial constitutional claim, they ordinarily review the facial validity of the challenged statute "as it now stands, not as it once did." *Hall v. Beals*, 396 U.S. 45, 48 (1969); *Fusari v. Steinberg*, 419 U.S. 379, 379-87 (1975); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982). Consequently, it is usually the current version of the challenged statute that is applicable to a facial constitutional claim. *See, e.g., Deja Vu Showgirls of Las Vegas v. Nev. Dep't of Taxation*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 395-96 (2014) (reviewing the most recently amended version of the challenged statute in a facial constitutional claim, including statutory amendments made after the complaint was filed). Therefore, because the 2015 version is the current

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[4] All citations to the Division's regulations codified in NAC Chapter 453A are to the version that became effective on April 1, 2014. On December 18, 2015, the Division proposed amendments to its regulations. *See Proposed Regulation of Div. of Pub. and Behav'l Health of Dep't of Health and Human Servs.*, LCB File No. R148-15 (Dec. 18, 2015). However, those proposed amendments will not become effective until the Division completes the regulation-making process prescribed by the Nevada Administrative Procedure Act in NRS Chapter 233B. Therefore, those proposed amendments are not relevant to the Court's disposition of this matter.

version of the medical marijuana laws and because the 2015 version was in effect when Plaintiff filed his original complaint, the Court will apply the 2015 version of the medical marijuana laws when reviewing Plaintiff's facial constitutional claims.[5]

To apply for a registration card under the medical marijuana laws, an applicant must pay a fee of $25 to obtain an application packet from the Division. NRS 453A.740; NAC 453A.140(1). To complete the application packet, the applicant must provide certain identification, background and health information and submit certain verifying documentation to the Division, including: (1) the name, address, telephone number, social security number and date of birth of the applicant; (2) proof that the applicant is a resident of Nevada, including, without limitation, a photocopy of a driver's license or identification card issued by the Department of Motor Vehicles; (3) the name, address and telephone number of the applicant's attending physician; (4) a written statement signed by the applicant's attending physician stating that the applicant has been diagnosed with a chronic or debilitating medical condition, the medical use of marijuana may mitigate the symptoms or effects of that condition and the attending physician has explained the possible risks and benefits of the medical use of marijuana; (5) if the applicant elects to designate a primary caregiver, the name, address, telephone number and social security number of the designated primary caregiver and a written statement signed by the applicant's attending physician approving of the designation of the primary caregiver; and (6) a written statement signed by the applicant's attending physician verifying that the attending physician was presented with photographic identification of the applicant and any designated primary caregiver and that the applicant and any designated primary caregiver are the persons named in the application. NRS 453A.210(2); NAC 453A.100(1).

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[5] Under the 2015 version of the medical marijuana laws, there are specific provisions that apply only to applicants who are minors and to their custodial parents or legal guardians. Because Plaintiff is not a minor and because Plaintiff does not allege that he is a custodial parent or legal guardian of an applicant who is a minor, the Court does not need to discuss those specific provisions.

In addition, the applicant must sign an acknowledgment form and a medical marijuana program waiver and liability release form that are prescribed by the Division, and the applicant must provide any information required by the Department of Motor Vehicles which prepares and issues the registration card if the application is approved by the Division. NRS 453A.740(1); NAC 453A.100(1); NAC 453A.110(1).

The applicant also must submit to the Division any information required by the Central Repository for Nevada Records of Criminal History (Central Repository) to determine the criminal history of the applicant and any designated primary caregiver. NRS 453A.210(4); NAC 453A.100(1)-(2). The Division must submit a copy of the application to the Central Repository which must report to the Division its findings as to the criminal history of the applicant and any designated primary caregiver within 15 days after receiving a copy of the application. NRS 453A.210(4); NAC 453A.100(2). The Division may deny the application if the applicant and any designated primary caregiver has been convicted of knowingly or intentionally selling a controlled substance. NRS 453A.210(5).

The Division also must submit a copy of the application to the State Board of Medical Examiners, if the attending physician is licensed to practice medicine under NRS Chapter 630, or the State Board of Osteopathic Medicine, if the attending physician is licensed to practice osteopathic medicine under NRS Chapter 633. NRS 453A.210(4). Within 15 days after receiving a copy of the application, the licensing board must report to the Division its findings as to whether the attending physician is licensed to practice medicine in this State and whether the attending physician is in good standing. NRS 453A.210(4). The Division may deny the application if the attending physician is not licensed to practice medicine in this State or is not in good standing. NRS 453A.210(5).

The Division also may deny the application if: (1) the applicant fails to provide the information required to establish the applicant's chronic or debilitating medical condition or document the applicant's consultation with an attending physician regarding the medical use of marijuana in

connection with that condition; (2) the applicant fails to comply with regulations adopted by the Division; (3) the Division determines that the information provided by the applicant was falsified; (4) the Division has prohibited the applicant from obtaining or using a registration card under NRS 453A.300(2) because the Division has determined that the applicant has willfully violated a provision of NRS Chapter 453A or any regulation adopted by the Division to carry out that chapter; or (5) the Division determines that the applicant or the applicant's designated primary caregiver has had a registration card revoked pursuant to NRS 453A.225. NRS 453A.210(5).

If the Division approves the application, the applicant must pay a fee of $75 for the processing and issuance of the registration card. NRS 453A.740; NAC 453A.140(2). The applicant also must pay any fee authorized by NRS 483.810 to 483.890, inclusive, that is charged for the issuance of an identification card by the Department of Motor Vehicles. NRS 453A.740; NAC 453A.110(1). The registration card is valid for a period of 1 year, and it may be renewed in accordance with the regulations adopted by the Division and the payment of a fee of $75 for the processing and issuance of the renewed registration card and any fee authorized by NRS 483.810 to 483.890, inclusive, that is charged for the issuance of an identification card by the Department of Motor Vehicles. NRS 453A.220(5); NRS 453A.740; NAC 453A.110(1); NAC 453A.130; NAC 453A.140(2).

Finally, the medical marijuana laws require the Division to protect the confidentiality of information, documents and communications provided to the Division by applicants and information that is part of the registration program as follows:

> 1. Except as otherwise provided in this section, NRS 239.0115 and subsection 4 of NRS 453A.210, the Division shall not disclose:
>
> (a) The contents of any tool used by the Division to evaluate an applicant or its affiliate.
>
> (b) Any information, documents or communications provided to the Division by an applicant or its affiliate pursuant to the provisions of this chapter, without the prior written consent of the applicant or affiliate or pursuant to a lawful court order after timely notice of the proceedings has been given to the applicant or affiliate.
>
> (c) The name or any other identifying information of:
>
> (1) An attending physician; or
>
> (2) A person who has applied for or to whom the Division or its designee has issued a

registry identification card or letter of approval.

➥ Except as otherwise provided in NRS 239.0115, the items of information described in this subsection are confidential, not subject to subpoena or discovery and not subject to inspection by the general public.

2. Notwithstanding the provisions of subsection 1, the Division or its designee may release the name and other identifying information of a person to whom the Division or its designee has issued a registry identification card or letter of approval to:

(a) Authorized employees of the Division or its designee as necessary to perform official duties of the Division; and

(b) Authorized employees of state and local law enforcement agencies, only as necessary to verify that a person is the lawful holder of a registry identification card or letter of approval issued to him or her pursuant to NRS 453A.220 or 453A.250.

NRS 453A.700 (2015). With this history and overview of Nevada's medical marijuana laws in mind, the Court will address each of Plaintiff's remaining claims for relief.

B. Standards of review.

As discussed previously, Plaintiff and the Legislature have filed motions for summary judgment, and the Department and the Governor have filed motions to dismiss which the Court must treat as motions for summary judgment under NRCP 12(b) because matters outside the pleadings were presented to and not excluded by the Court. *See Witherow v. State Bd. of Parole Comm'rs*, 123 Nev. 305, 307-08 (2007). Therefore, the standards of review that apply to motions for summary judgment govern the parties' dispositive motions. *Id.*

A party is entitled to summary judgment under NRCP 56 when the allegations in the pleadings and evidence in the record "demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway*, 121 Nev. 724, 731 (2005). The purpose of granting summary judgment "is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment as a matter of law." *McDonald v. D.P. Alexander*, 121 Nev. 812, 815 (2005) (quoting *Coray v. Hom*, 80 Nev. 39, 40-41 (1964)).

A party is also entitled to summary judgment when the claims against the party are barred as a

matter of law by one or more affirmative defenses. *See Williams v. Cottonwood Cove Dev.*, 96 Nev. 857, 860-61 (1980). An affirmative defense is a legal argument or assertion of fact that, if true, prohibits prosecution of the claims against the party even if all allegations in the complaint are true. *Douglas Disposal v. Wee Haul*, 123 Nev. 552, 557-58 (2007). Such affirmative defenses include the statute of limitations and sovereign immunity. *See* NRCP 8(c); *Boulder City v. Boulder Excavating*, 124 Nev. 749, 754-55 (2008); *Kellar v. Snowden*, 87 Nev. 488, 491-92 (1971).

In addition, as a general rule, when the plaintiff pleads claims that a state statute is unconstitutional, the plaintiff's claims present only issues of law which are matters purely for the Court to decide and which may be decided on summary judgment where no genuine issues of material fact exist and the record is adequate for consideration of the constitutional issues presented. *See Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 506-09 (2009) (affirming district court's summary judgment regarding constitutionality of a statute and stating that "[t]he determination of whether a statute is constitutional is a question of law."); *Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 294-95 (1983) (holding that a constitutional claim may be decided on summary judgment where no genuine issues of material fact exist and the record is adequate for consideration of the constitutional issues presented).

Finally, in reviewing the constitutionality of statutes, the Court must presume the statutes are constitutional, and "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *List v. Whisler*, 99 Nev. 133, 137 (1983). The presumption places a heavy burden on the challenger to make "a clear showing that the statute is unconstitutional." *Id.* at 138. As a result, the Court must not invalidate a statute on constitutional grounds unless the statute's invalidity appears "beyond a reasonable doubt." *Cauble v. Beemer*, 64 Nev. 77, 101 (1947); *State ex rel. Lewis v. Doron*, 5 Nev. 399, 408 (1870) ("[E]very statute is to be upheld, unless plainly and without reasonable doubt in conflict with the Constitution."). Furthermore, it is a fundamental rule of constitutional review that "the judiciary will not

declare an act void because it disagrees with the wisdom of the Legislature." *Anthony v. State*, 94 Nev. 337, 341 (1978). Thus, in reviewing the constitutionality of statutes, the Court must not be concerned with the wisdom or policy of the statutes because "[q]uestions relating to the policy, wisdom, and expediency of the law are for the people's representatives in the legislature assembled, and not for the courts to determine." *Worthington v. Dist. Ct.*, 37 Nev. 212, 244 (1914).

C. Federal constitutional claims for money damages.

In his third, fourth and fifth claims for relief, Plaintiff asks for money damages on his federal constitutional claims under 42 U.S.C. § 1983 (section 1983) against the State of Nevada ex rel. the Legislature, the Department and the Governor acting in his official capacity. (Compl. ¶¶ 90, 102, 113.) The Court finds that Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for money damages because the State and its agencies and officials acting in their official capacities are absolutely immune from liability for money damages under section 1983.

To seek redress for an alleged violation of federal constitutional rights, a plaintiff must bring an action under the federal civil rights statutes codified in section 1983. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) ("[A] litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. § 1983."). A civil rights action under section 1983 "must meet federal standards even if brought in state court." *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 259 (1998); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989).

The United States Supreme Court has held that states and their officials acting in their official capacities are not "persons" who are subject to suit under section 1983 and they may not be sued in state courts for money damages under the federal civil rights statutes. *Will*, 491 U.S. at 62-71. Based on *Will*, the Nevada Supreme Court has held that state agencies and entities also are not "persons" who are subject to suit under section 1983 and they likewise may not be sued in state courts for money damages

under the federal civil rights statutes. *Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 605 (2007) ("The State of Nevada is not a 'person' for § 1983 purposes, and respondents are state entities. Thus, respondents cannot be sued under § 1983." (footnotes omitted)); *N. Nev. Ass'n Injured Workers v. State Indus. Ins. Sys.*, 107 Nev. 108, 114-15 (1991) ("Because SIIS is a state agency, appellants' cause of action has failed to state a claim under the federal civil rights statutes against SIIS. The same must be said for SIIS's officers and employees to the extent the cause of action seeks to impose liability for actions properly attributable to their official capacities."). Therefore, when a plaintiff's complaint alleges federal constitutional claims under section 1983 and asks for money damages from the State and its agencies and officials acting in their official capacities, "the complaint fails to state an actionable claim." *N. Nev. Ass'n Injured Workers*, 107 Nev. at 114.

In his briefing, Plaintiff conceded that he cannot seek money damages under section 1983 against the State, the Legislature and the Governor acting in his official capacity. (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 8 ("Plaintiff is not seeking monetary damages from the Legislature under these claims.")); (Pl.'s Opp'n to Gov.'s Mot. to Dismiss at 4 ("This case does not seek money from the Governor[.]")) Nevertheless, Plaintiff argues that the Department is "analogous to a municipality, not the State, allowing [the Department] to be held liable [for money damages] for purposes of § 1983." (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 6.) To support his argument, Plaintiff contends that the recovery of money damages against the Department would not affect the state treasury because "[w]hile DHHS received funding from the State's general fund, no state funds are used to fund the marijuana program within DHHS." *Id.*

The Court finds that the Department is not analogous to a municipality. Rather, based on the Department's treatment under state law, the Court finds that the Department is a state agency under all the factors considered by courts in civil rights action under section 1983. To determine whether an entity is a state agency for purposes of a civil rights action, courts first consider whether "a judgment

against the entity named as a defendant would impact the state treasury." *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 678 (9th Cir. 1991). If a court determines that a judgment against the entity would impact the state treasury, the entity is deemed a state agency as a matter of law, and it is absolutely immune from liability for money damages under section 1983 as a matter of law. *Id.* at 679 ("a determination that a judgment necessarily would have an impact on the state treasury would lead ineluctably to the conclusion that [the entity] is a state agency.").

In addition, even if a judgment against the entity would not necessarily have an impact on the state treasury, the entity still may be deemed a state agency if the entity is treated as a state agency under state law. *Id.* In making this determination, courts consider several factors, including: (1) the extent to which the entity is subject to governmental control and review by the legislative and executive branches; (2) the nature of the governmental powers delegated to the entity, such as the powers to conduct administrative hearings and adjudications and to issue regulations carrying the force of law; (3) whether the entity may sue or be sued on its own behalf or whether it must sue or be sued only in its official capacity on behalf of the State; and (4) whether the entity may hold property on its own behalf or whether it must hold property only on behalf of the State. *Id.* at 678-79. When "evaluating the force of these factors in a particular case, [courts] look to state law's treatment of the entity." *Id.* at 678.

Based on the Department's treatment under state law, the Court finds that the Department is a state agency under all these factors. First, the Court finds that a judgment against the Department would impact the state treasury because the money collected as fees under the medical marijuana registration program is state money that is deposited in and drawn from the state treasury only pursuant to appropriations made by law. As established by state law, the state treasury consists of all state money, whether the money is deposited in the state general fund or another state fund. NRS 226.115; NRS 353.249; NRS 353.321; NRS 353.323. State law requires the Administrator of the Division to deposit all money collected as fees under the registration program in the state treasury. NRS 353.250;

NRS 353.253; NRS 453A.730. After the money is deposited in the state treasury, it is drawn from the state treasury only pursuant to appropriations made by law to the Division to carry out the registration program. NRS 453A.730; Nev. Const. art. 4, § 19 ("No money shall be drawn from the treasury but in consequence of appropriations made by law.").[6] Thus, if Plaintiff recovered a judgment against the Department for money damages under section 1983, the judgment would have an impact on the state treasury because the judgment would be recovered from state money which is collected as fees under the program and which is deposited in and drawn from the state treasury only pursuant to appropriations made by law. For this reason alone, the Department is a state agency that may not be sued for money damages under section 1983.

Furthermore, even assuming that a judgment against the Department would not have an impact on the state treasury, the Department is still treated as a state agency under state law. The Department is created by NRS 232.300, which is part of NRS Chapter 232, entitled "State Departments," and NRS Title 18, entitled "State Executive Department." Thus, based on the codification of the Department's governing statutes in the provisions of NRS relating to the state executive branch, the Legislature intended for the Department to function as a state agency of the executive branch. *See Coast Hotels & Casinos v. Nev. State Labor Comm'n*, 117 Nev. 835, 841-42 (2001) ("The title of a statute may be considered in determining legislative intent."); *State ex rel. Masto v. Montero*, 124 Nev. 573, 577 n.8 (2008) (holding that the office of a district judge is a "state office" based on "several provisions in the Nevada Revised Statutes [which] refer to 'state office' in the title and mention 'state officer' in the text when explaining the provision.").

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[6] In 2015, the Legislature passed the Authorized Expenditures Act which authorizes the Division to expend $2,089,894 during Fiscal Year 2015-2016 and $2,980,802 during Fiscal Year 2016-2017 for the "Marijuana Health Registry." A.B. 490, 2015 Nev. Stat., ch. 484, § 1, at 2859; *Hearing on A.B. 490 before Sen. Comm. on Fin.*, 78th Leg. (Nev. June 1, 2015) ("The Authorized Expenditures Act provides authority to expend other monies not appropriated from the General Fund or Highway Fund. Those other monies include federal funds, *self-funded fee generating budget accounts* and interagency transfers." (testimony of Mark Krmpotic, Senate Fiscal Analyst (emphasis added))).

As a state agency of the executive branch, the Department is subject to extensive governmental control and review by the legislative and executive branches under Nevada state law. For example, the Department is subject to the State Personnel System in NRS Chapter 284, the State Purchasing Act in NRS Chapter 333 and the State Budget Act in NRS Chapter 353, and the Department is also subject to legislative reviews of its budget and operations under NRS Chapter 218E and legislative audits of its accounts, funds and other records under NRS Chapter 218G. The governmental powers delegated to the Department also indicate that the Legislature intended for the Department to function as a state agency of the executive branch because "[t]he Department is the sole agency responsible for administering the provisions of law relating to its respective divisions." NRS 232.300(3). Thus, the Department has been charged with carrying out and enforcing laws enacted by the Legislature, and to execute its state governmental functions, the Department has been given state governmental powers such as the powers to conduct administrative hearings and adjudications and to issue regulations carrying the force of law. *See* NRS 232.320; NRS Chapter 233B (APA); *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 298 & n.10 (2009) ("Under Article 5, Section 7 of the Nevada Constitution, the executive branch is charged with carrying out and enforcing the laws enacted by the Legislature."). Finally, the Department may not sue or be sued on its own behalf, but it must sue or be sued only in its official capacity on behalf of the State. *See* NRS 41.031; NRS 228.110; NRS 228.140; NRS 228.170. And the Department does not hold property on its own behalf, but such property is held only on behalf of the State under NRS Chapter 331.

Consequently, based on the Department's treatment under state law, the Court finds that the Department is a state agency that may not be sued for money damages under section 1983. Accordingly, the Court concludes that all Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for money damages because the State and its agencies and officials acting in their official capacities are absolutely immune from liability for money damages under section 1983.

D. Federal constitutional claims for declaratory and injunctive relief.

In his third, fourth and fifth claims for relief, Plaintiff asks for declaratory relief on his federal constitutional claims under section 1983 against the State of Nevada ex rel. the Legislature, the Department and the Governor acting in his official capacity. (Compl. ¶¶ 89-90, 101-102, 112-113.) In his motion for partial summary judgment and motion for permanent injunction, Plaintiff also asks for injunctive relief on his Fifth Amendment federal constitutional claim under section 1983 against the same Defendants. (Pl.'s Mot. for Partial Summ. Judgm't at 16-17.) The Court finds that Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for declaratory relief and injunctive relief because Plaintiff has not sued the proper state official, in this case the Administrator of the Division, who is charged by state law with enforcing the medical marijuana laws governing the registration program.

As a preliminary matter, the Court finds that Plaintiff cannot obtain declaratory relief or injunctive relief against the State and its agencies, in this case the Legislature and the Department, because the State and its agencies are not "persons" subject to a civil rights action under section 1983. *Allah v. Comm'r of Dep't Corr. Servs.*, 448 F. Supp. 1123, 1125 (N.D.N.Y. 1978) ("It is well established that state agencies are not 'persons' for purposes of the Civil Rights Acts. This is true whether the relief being sought is injunctive and declaratory relief or damages."); *Ill. Dunesland Pres. Soc'y v. Ill. Dep't Nat. Res.*, 461 F. Supp. 2d 666, 671 (N.D. Ill. 2006) ("[T]here is no support for the proposition that claims for injunctive relief may be brought under § 1983 against state agencies."). Therefore, the Court concludes that the State and the Legislature and the Department are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for declaratory relief and injunctive relief under section 1983.

Plaintiff contends that he sued the proper state official because the Governor serves as the organizational head of the Department and has ultimate responsibility for the Department's

administration of the registration program. (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 6-7.) Alternatively, Plaintiff asks for leave to amend his complaint to add the Director of the Department in his official or personal capacity as a Defendant to the federal constitutional claims.[7] (Pl.'s Opp'n & Counter-Mot. for Summ. Judgm't at 7-8.)

The Court finds that Plaintiff cannot obtain declaratory or injunctive relief against the Governor or the Director under section 1983 because the Governor and the Director do not have a sufficiently direct connection under state law with the enforcement of the medical marijuana laws. The Court also denies Plaintiff leave to amend his complaint to substitute the Administrator of the Division as the proper state official under section 1983 because leave to amend should not be granted when the proposed amendment would be futile. *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 42, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013). A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim. *Id.* The Court finds that allowing Plaintiff to amend his complaint to substitute the Administrator as the proper state official under section 1983 would be futile because Plaintiff's federal constitutional claims do not state a permissible or actionable claim on their merits as a matter of law.

As a general rule under *Ex parte Young*, 209 U.S. 123, 155-57 (1908), a plaintiff may bring federal constitutional claims under section 1983 asking for prospective declaratory or injunctive relief against state officials acting in their official capacities to enjoin their enforcement of allegedly unconstitutional statutes. *L.A. Branch NAACP v. L.A. Unified Sch. Dist.*, 714 F.2d 946, 952-53 (9th Cir.

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[7] Although Plaintiff asks for leave to add the Director in his personal capacity, Plaintiff cannot sue a state official for declaratory or injunctive relief under section 1983 in his personal capacity because a claim for such equitable relief may be brought under section 1983 only against a state official in his official capacity. *Hatfill v. Gonzales*, 519 F. Supp. 2d 13, 19 (D.D.C. 2007) ("there is no basis for suing a government official for declaratory and injunctive relief in his or her individual or personal capacity"); *Pascarella v. Swift Transp. Co.*, 643 F. Supp. 2d 639, 647 n.11 (D.N.J. 2009) ("the proper vehicle for seeking equitable relief against a government official involving that officer's official duties is an official capacity suit").

1983); *N. Nev. Ass'n Injured Workers v. State Indus. Ins. Sys.*, 107 Nev. 108, 115-16 (1991). However, a plaintiff cannot bring claims under *Ex parte Young* for prospective declaratory or injunctive relief against state officials unless the state officials have some direct connection under state law with the enforcement of the challenged statutes. *Young*, 209 U.S. at 157; *Fitts v. McGhee*, 172 U.S. 516, 529-30 (1899); *L.A. Branch NAACP*, 714 F.2d at 952-53.

The connection necessary to trigger *Ex parte Young* "must be determined under state law depending on whether and under what circumstances a particular defendant has a connection with the challenged state law." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). The connection "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). For example, when state law makes enforcement of the challenged statutes the responsibility of state officials other than the Governor, neither the Governor's general executive power to see that the laws are faithfully executed, nor the Governor's general executive power to appoint or supervise those other state officials, will subject the Governor to suit under *Ex parte Young* because the Governor will not have a sufficiently direct connection with the enforcement of the challenged statutes. *Women's Emergency Network v. Bush*, 323 F.3d 937, 949-50 (11th Cir. 2003); *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002); *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467, 469-70 (9th Cir. 1999); *L.A. Branch NAACP*, 714 F.2d at 952-53; *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979).

Because statutory enforcement powers are created by the Legislature, it is within the province of the Legislature to determine which state agency or officer will exercise those statutory enforcement powers and in what manner. *See* 16A Am. Jur. 2d *Constitutional Law* § 288 (2009) ("the legislature has constitutional power to allocate executive department functions and duties among the offices, departments, and agencies of state government."). If the Legislature grants statutory enforcement

powers to a state agency or officer other than the Governor, the exercise of those statutory enforcement powers by the state agency or officer is not subject to the Governor's direct control unless the Legislature expressly gives the Governor statutory authority to exercise such control. *See Kendall v. United States*, 37 U.S. 524, 610 (1838) (holding that Congress may "impose upon any executive officer any duty [it] may think proper . . . and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."); *Brown v. Barkley*, 628 S.W.2d 616, 623 (Ky. 1982) ("[W]hen the General Assembly has placed a function, power or duty in one place there is no authority in the Governor to move it elsewhere unless the General Assembly gives him that authority.").

In enacting the medical marijuana laws, the Legislature did not grant statutory enforcement powers to the Governor or the Director of the Department. Rather, the Legislature granted those powers to the Administrator of the Division who is responsible for administering and enforcing the laws governing the registration program. NRS 453A.210; NRS 453A.730; NRS 453A.740. The Legislature did not expressly give the Governor or the Director statutory authority to exercise direct control over the Administrator's enforcement of those laws. As a result, the Governor and the Director do not have a sufficiently direct connection under state law with the enforcement of the medical marijuana laws. Furthermore, even though the Director has general supervisory power over the Administrator under NRS Chapter 232, it is the Administrator, not the Director, who is responsible for enforcing the medical marijuana laws under NRS Chapter 453A.[8] Therefore, because the Director has only general supervisory power over the Administrator and because it is the Administrator, not the Director, who is charged by state law with enforcing the medical marijuana laws, the Court finds that it is the

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[8] Under NRS 232.320, the Director appoints the Administrator with the consent of the Governor, and the Director administers, "through the divisions of the Department," the provisions of law "relating to the functions of the divisions of the Department." Under NRS 232.340, the Administrator "[s]hall administer the provisions of law relating to his or her division, subject to the administrative supervision of the Director."

Administrator who is the proper state official to sue for declaratory and injunctive relief under section 1983. Consequently, the Court concludes that Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for declaratory relief and injunctive relief because Plaintiff has not sued the proper state official—the Administrator of the Division—who is charged by state law with enforcing the medical marijuana laws.[9]

When a plaintiff fails to sue the proper state official in a section 1983 action, the district court may permit the plaintiff to amend his complaint to add the proper state official as a party-defendant unless the proposed amendment would be futile. *See Cobb v. U.S. Dep't of Educ.*, 487 F. Supp. 2d 1049, 1055 (D. Minn. 2007). A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim. *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 42, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013). As discussed next, the Court finds that Plaintiff's federal constitutional claims do not state a permissible or actionable claim on their merits as a matter of law. Therefore, the Court denies Plaintiff leave to amend his complaint to substitute the Administrator of the Division as the proper state official under section 1983 because such a proposed amendment would be futile.

E. Fourteenth Amendment claims.

In his third and fourth claims for relief, Plaintiff alleges that because "[a]ccess to healthcare and, more specifically, medical treatments recommended by a physician are deeply rooted in America's history and tradition," the Due Process Clause recognizes and protects a substantive and fundamental right to access healthcare recommended by a physician. (Compl. ¶¶ 67-79.) Plaintiff alleges that the registry and associated application process and fees impose an unnecessary, undue and unreasonable

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[9] Because Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims for money damages and for declaratory and injunctive relief under section 1983, Plaintiff cannot recover costs or attorney's fees under 42 U.S.C. § 1988 against Defendants as a matter of law. *Farrar v. Hobby*, 506 U.S. 103, 109 (1992); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

burden and barrier on the exercise of a person's fundamental right to access healthcare recommended by a physician in violation of the Equal Protection Clause because the registry and associated application process and fees apply only to persons who seek to use medical marijuana for their medical condition but do not apply to similarly situated persons who seek to use any other medical treatment for the same medical condition. (Compl. ¶¶ 80-101.)

The Court finds that there is no fundamental right under federal law to use medical marijuana. *See Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007) (holding that "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering.").[10] Moreover, the fact that medical use of marijuana is still illegal at the federal level weighs against such use being a fundamental right under federal law. *See Gonzales v. Raich*, 545 U.S. 1, 13-15 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490-92 (2001). At this time, medical use of marijuana is only an allowable legal option under state law. Article 4, Section 38 of the Nevada Constitution states that the Legislature "shall provide by law" for the use of medical marijuana by a patient for certain medical conditions and further provides that the Legislature "shall provide by law" for a "registry of patients, and their attendants, who are authorized to use [medical marijuana], to which law enforcement officers may resort to verify a claim of authorization and which is otherwise confidential." Given that the registry is part of Article 4, Section 38, the Court must assume that the voters approved this constitutional section because of the registry's inclusion within this section. Therefore, the Court finds that there is no fundamental right to use medical

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[10] *Accord Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 (9th Cir. 2014) (rejecting contention that "the Ninth Amendment and the substantive due process component of the Fifth Amendment together protect a fundamental right to 'distribute, possess and use medical cannabis' in compliance with California state law."); *United States v. Wilde*, 74 F. Supp. 3d 1092, 1095 (N.D. Cal. 2014) ("no court to date has held that citizens have a constitutionally fundamental right to use medical marijuana."); *Beasley v. City of Keizer*, No. CIV. 09-6256-AA, 2011 WL 2008383, at *4 (D. Or. May 23, 2011) ("there is no record of any court decision establishing a federal right to marijuana based on a state medical marijuana law; rather, courts have found no federal right to access or use marijuana in the context of state medical marijuana laws."), *aff'd*, 525 F. App'x 549 (9th Cir. 2013).

marijuana without the registry because the voters expressly required the Legislature to provide by law for the registry when they approved Article 4, Section 38.

To carry out its constitutional duty under Article 4, Section 38, the Legislature enacted the registration program in NRS Chapter 453A with the stated intent to establish the registry and regulate the use of medical marijuana to protect the health, safety and welfare of the public. A.B. 453, 2001 Nev. Stat., ch. 592, preamble, at 3053; *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 10, 2001); *Hearing on A.B. 453 before Sen. Comm. on Human Res. & Facilities*, 71st Leg. (Nev. May 30, 2001). In particular, the Legislature enacted NRS 453A.210 which directs the Division to establish and maintain the registration program for the issuance of registration cards to applicants who meet the requirements to use medical marijuana. Because the Court finds that there is no fundamental right to use medical marijuana, the Court must uphold the Legislature's statutory scheme against Plaintiff's Fourteenth Amendment challenge if the statutory scheme is rationally related to a legitimate state interest. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

In applying the rational-basis standard, the Court must remain mindful that "[s]tate legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." *Whalen v. Roe*, 429 U.S. 589, 597 (1977). Instead, "individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Id.* at 597-98. For example, in *Whalen*, the United States Supreme Court upheld a New York statute which provided that whenever a "Schedule II" drug was prescribed to a patient, the patient's name, address and age, along with the identity of the prescribed drug and its dosage, had to filed with the state department of health. *Id.* Applying the rational-basis standard, the Supreme Court upheld the patient-identification statute because it was rationally related to the legitimate state interest of protecting the health, safety and welfare of the public with regard to the distribution and abuse of dangerous drugs

for which there is both a lawful and an unlawful market. *Id.* As explained by the Supreme Court:

> The New York statute challenged in this case represents a considered attempt to deal with such a problem [of vital local concern]. It is manifestly the product of an orderly and rational legislative decision. It was recommended by a specially appointed commission which held extensive hearings on the proposed legislation, and drew on experience with similar programs in other States. There surely was nothing unreasonable in the assumption that the patient-identification requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs. For the requirement could reasonably be expected to have a deterrent effect on potential violators as well as to aid in the detection or investigation of specific instances of apparent abuse. At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control. . . . It follows that the legislature's enactment of the patient-identification requirement was a reasonable exercise of New York's broad police powers. The District Court's finding that the necessity for the requirement had not been proved is not, therefore, a sufficient reason for holding the statutory requirement unconstitutional.

Id. (footnotes omitted).

In this case, the Court finds that the registration program in NRS Chapter 453A is rationally related to the legitimate state interest of protecting the health, safety and welfare of the public because the registration program serves a legitimate public protection function with regard to the distribution and abuse of medical marijuana, which is a widely desired and dangerous drug for which there is both a lawful and an unlawful market. As approved by the voters, Article 4, Section 38 requires the Legislature to establish the registry to allow "law enforcement officers . . . to verify a [patient's] claim of authorization" to use medical marijuana. Like the patient-identification system upheld in *Whalen*, the registry is rationally related to a legitimate public protection function because the Legislature could reasonably believe that the registry would aid in the enforcement of Nevada's medical marijuana laws, have a deterrent effect on potential violators and assist in the detection or investigation of specific instances of apparent abuse. For example, the registration program attempts to protect the public against the illegal distribution and abuse of medical marijuana because NRS 453A.210(5) states in pertinent part that the Division may deny an application if "[t]he Division determines that the applicant, or the applicant's designated primary caregiver, if applicable, has been convicted of knowingly or intentionally

selling a controlled substance."

Therefore, because the Court finds that there is no fundamental right to use medical marijuana and because the Court finds that the registration program in NRS Chapter 453A is rationally related to the legitimate state interest of protecting the health, safety and welfare of the public, the Court must uphold the Legislature's statutory scheme against Plaintiff's Fourteenth Amendment challenge. Accordingly, the Court concludes that Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claims that the registration program in NRS Chapter 453A violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

F. Fifth Amendment claim.

In his fifth claim for relief, Plaintiff alleges that the persons who register with the State under the medical marijuana laws are compelled by state law to admit that they intend to use medical marijuana and that by making such an admission, they are compelled to incriminate themselves in violation the privilege against self-incrimination in the Fifth Amendment because they are admitting that they are engaging in acts illegal under federal law. (Compl. ¶¶ 104-110.)

The Court has examined the Division's application packet, and the Court cannot find any violation of the Fifth Amendment privilege against self-incrimination. The Court finds that the Division's application packet does not require any incriminating admissions by applicants, and the Court finds that applicants are not compelled to give any incriminating information. Therefore, the Court concludes that there is no violation of the Fifth Amendment privilege against self-incrimination.

The Fifth Amendment privilege against self-incrimination provides that no person "shall be compelled in any criminal case to be a witness against himself." As a general rule, the Fifth Amendment privilege "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate

him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). However, the United States Supreme Court has held that the Fifth Amendment privilege does not apply unless the individuals are, in some way, "compelled" to make incriminating statements. *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 856-58 (1984). In *Selective Serv. Sys.*, the Supreme Court held that individuals are not "compelled" to make disclosures in violation of the Fifth Amendment privilege when those disclosures are required as part of a *voluntary* application for benefits which the individuals must file only if they want to be considered for the benefits. *Id.* In that case, the Supreme Court determined that the Fifth Amendment privilege did not apply when individuals submitted applications for federal educational aid and were required to disclose on their applications whether they registered for the draft as required by federal law. *Id.* The Supreme Court stated that the application's requirement that an individual disclose whether he failed to register for the draft—a federal criminal offense—did not violate the privilege against self-incrimination because an individual "clearly is under no compulsion to seek financial aid." *Id.* at 857.

Based on *Selective Serv. Sys.*, federal appellate courts have held that the Fifth Amendment privilege does not apply when the government asks individuals to disclose potentially incriminating information, such as information about past drug use, on questionnaires which the individuals file because they want to be considered for participation in government programs. *Nat'l Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 287, 291-93 (D.C. Cir. 1993); *Am. Fed'n of Gov't Employees v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 790, 794-95 (D.C. Cir. 1997). Furthermore, at least one federal district court has concluded that the Fifth Amendment privilege is not implicated when individuals apply to participate in the District of Columbia's medical marijuana program as cultivators or dispensary operators and are required to execute affidavits acknowledging that "[g]rowing, distributing, and possessing marijuana in any capacity . . . is a violation of federal laws" and that the "law authorizing the District's medical marijuana program will not excuse any registrant from any

violation of the federal laws governing marijuana." *Sibley v. Obama*, 810 F. Supp. 2d 309, 310-11 (D.D.C. 2011). As explained by the court:

> plaintiff here is clearly "under no compulsion to seek" a permit to grow and sell medical marijuana. Although plaintiff relies extensively on *Leary v. United States*, 395 U.S. 6, 16 (1969), that case addresses a situation, unlike here, where the defendant was actually compelled—he faced criminal charges for failure "to identify himself" as a drug purchaser under the relevant tax statute. Nothing in the District's medical marijuana laws requires plaintiff to apply to be a cultivator or to run a dispensary. Simply put, plaintiff need not seek to participate in the District's budding medical marijuana industry.

Id. at 311.

The Court finds that Nevada's medical marijuana registration program is a voluntary program and that nothing in Nevada's medical marijuana laws requires any person to request, complete or submit an application packet or register with the State, unless the person voluntarily elects to do so. Because Nevada's registration program is a voluntary program, the Court finds that the Fifth Amendment privilege simply does not apply to the registration program because a person is not "compelled" by the State to participate in the registration program. Furthermore, the Court finds that even if a person makes the voluntary choice to participate in the registration program and completes the Division's application packet, the application packet does not require the person to make any incriminating admissions about past acts which "might tend to show that he himself had committed a crime." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)). Therefore, the Court concludes that Defendants are entitled to judgment as a matter of law on Plaintiff's federal constitutional claim that the registration program in NRS Chapter 453A violates the Fifth Amendment privilege against self-incrimination.

G. State-law tort claims.

In his first claim for relief, Plaintiff brings a state-law tort claim against the Department for fraud alleging that the Department fraudulently induced Plaintiff to apply and pay fees for the registration cards which were useless in facilitating access to medical marijuana because the Department knew or

should have known that no dispensaries would be open in Southern Nevada within the one-year period covered by the registration cards. (Compl. ¶¶ 39-51.) In his second claim for relief, Plaintiff brings a state-law tort claim against the Department for unjust enrichment alleging that he never obtained any benefit from the registration cards because the Department never licensed any dispensaries during the period that the registration cards were valid and that the Department unjustly accepted and retained his fees for the registration cards. (Compl. ¶¶ 58-62.)

In response, the Department contends that Plaintiff's state-law tort claims for money damages are barred as a matter of law by the following affirmative defenses: (1) the voluntary payment doctrine; (2) the statute of limitations in NRS 11.190(5)(b); and (3) the State's sovereign immunity under NRS 41.032(1). (Dept.'s Mot. to Dismiss at 9-11.) The Department also contends that Plaintiff's state-law tort claims for money damages fail to state claims upon which relief can be granted because Plaintiff's allegations are not legally sufficient to establish the essential elements of fraud or unjust enrichment. (Dept.'s Mot. to Dismiss at 8-9.)

The Court finds that Plaintiff's state-law tort claims for money damages are barred as a matter of law by the affirmative defense of the State's sovereign immunity under NRS 41.032(1) and *Hagblom v. State Dir. of Mtr. Vehs.*, 93 Nev. 599, 601-04 (1977). Therefore, the Court does not need to address the other defenses and objections raised in the Department's motion to dismiss.

The State and its agencies and officials acting in their official capacities cannot be sued in state court for state-law tort claims for money damages unless the lawsuit and the type of relief being sought are both authorized by Nevada law. *See Arnesano v. State*, 113 Nev. 815, 820-24 (1997). Therefore, as a general rule, a plaintiff cannot bring a state-law tort claim for money damages against the State and its agencies and officials acting in their official capacities except as expressly authorized by the State's conditional waiver of its sovereign immunity in NRS 41.031 et seq. *Hagblom*, 93 Nev. at 601-04. The Legislature has expressly limited the State's conditional waiver of its sovereign immunity in

NRS 41.032(1), which provides in relevant part:

> [N]o action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:
>
> 1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction[.]

Under NRS 41.032(1), the State and its agencies and officials acting in their official capacities are absolutely immune from liability for state-law tort claims for money damages based on any acts or omissions in their execution and administration of statutory provisions which have not been declared invalid by a court of competent jurisdiction. *Hagblom*, 93 Nev. at 603-04. In *Hagblom*, the plaintiff brought claims for declaratory relief regarding the validity of a state agency's regulation and also claims for money damages based on the state agency's implementation of the regulation. The Nevada Supreme Court upheld dismissal of the claims for money damages based on NRS 41.032(1), which the court stated "provides immunity to all individuals implementing the new regulation since that policy, applied with due care and without discrimination, had not been declared invalid by a court of competent jurisdiction." *Id.* at 603.

In this case, the Court finds that Plaintiff's state-law tort claims for money damages against the Department are the exact types of claims that the State's sovereign immunity under NRS 41.032(1) is intended to prohibit because Plaintiff's claims are premised on alleged acts or omissions by a state agency in the execution and administration of the State's medical marijuana laws which have not been declared invalid by a court of competent jurisdiction. Therefore, because the Court finds that Plaintiff's state-law tort claims for money damages are barred as a matter of law by sovereign immunity under NRS 41.032(1) and *Hagblom*, the Court concludes that the Department is entitled to judgment as a matter of law on Plaintiff's state-law tort claims for money damages for fraud and unjust enrichment.

ORDER AND JUDGMENT

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiff's motion for partial summary judgment, motion for permanent injunction and counter-motion for summary judgment are DENIED.

2. Defendant State of Nevada ex rel. the Department's motion to dismiss, which is being treated as a motion for summary judgment, is GRANTED; Defendant State of Nevada ex rel. the Governor's motion to dismiss, which is being treated as a motion for summary judgment, is GRANTED; and Defendant State of Nevada ex rel. the Legislature's motion for summary judgment is GRANTED.

3. Having considered all causes of action and claims for relief alleged in Plaintiff's second amended complaint on the parties' dispositive motions, the Court concludes that all Defendants are entitled to judgment as a matter of law on all such causes of action and claims for relief, and the Court enters final judgment in favor of all Defendants.

4. Because the Court enters final judgment in favor of all Defendants, the issue of class certification is moot, and the Court is not required to determine whether this action can be maintained as a class action under NRCP 23(c).

5. Pursuant to NRCP 58, Defendant Legislature is designated as the party required to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order and judgment, upon each party who has appeared in this case; and (2) file such notice of entry with the Clerk of Court.

DATED: This 9 day of February, 2016.

ROB BARE
DISTRICT JUDGE

Respectfully submitted by:

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