IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN DOE, ON HIS OWN BEHALF AND ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED,

Appellant,

vs.

STATE OF NEVADA EX REL. THE LEGISLATURE OF THE 77TH SESSION OF THE STATE OF NEVADA; THE 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,

Respondents.

Electronically Filed
Apr 05 2016 10:46 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court Case No. 69801

Appeal from Eighth Judicial District Court, Clark County, Nevada, Case No. A-15-723045-C

RESPONDENTS' RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR INJUNCTIVE RELIEF

ATTORNEYS FOR RESPONDENTS

BRENDA J. ERDOES
Legislative Counsel
Nevada Bar No. 3644
KEVIN C. POWERS
Chief Litigation Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU,
LEGAL DIVISION
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830
Fax: (775) 684-6761
E-mail: kpowers@lcb.state.nv.us
Attorneys for Respondent State of Nevada ex rel. the Legislature of the State of Nevada

ADAM PAUL LAXALT
Attorney General
Nevada Bar No. 12426
LINDA C. ANDERSON
Chief Deputy Attorney General
Nevada Bar No. 4090
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave. Ste. 3900
Las Vegas, NV 89101
Tel: (702) 486-3420
Fax: (702) 486-3871
E-mail: landerson@ag.nv.gov
GREGORY L. ZUNINO
Chief Deputy Attorney General
Nevada Bar No. 4805
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 8970l
Tel: (775) 684-1237
Fax: (775) 684-1180
E-mail: gzunino@ag.nv.gov
Attorneys for Respondents State of Nevada ex rel. the Department of Health and Human Services and the Governor of the State of Nevada

RESPONSE

Pursuant to NRAP 27(a)(3), Respondents State of Nevada ex rel. the Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau (LCB) under NRS 218F.720, and the Department of Health and Human Services (Department) and the Governor of the State of Nevada (Governor), by and through their counsel the Office of the Attorney General (collectively the State), hereby jointly file the State's response in opposition to Appellant John Doe's motion for injunctive relief to enjoin the State's operation of the medical marijuana registration program on grounds that it violates the Fifth Amendment privilege against self-incrimination.

The State respectfully asks the Court to deny Doe's motion for the following reasons. First, as a matter of federal law under 42 U.S.C. § 1983 (section 1983), Doe cannot obtain injunctive relief on his Fifth Amendment claim because Doe has failed to sue the proper state official who is charged by state law with enforcing the registration program—the Administrator of the Division of Public and Behavioral Health (Division)—and therefore, no state agency or official who is a party to this appeal is suable for injunctive relief under federal law. For that reason alone, Doe's motion for injunctive relief must be denied.

Second, Doe failed to move first in the district court for an injunction pending appeal as required by NRAP 8(a)(1), and Doe has not shown that moving first in

the district court would be impracticable based on exceptional circumstances necessary to bypass the district court under NRAP 8(a)(2). Therefore, Doe's motion for injunctive relief must be denied.

Third, Doe has not established any of the factors to issue an injunction pending appeal. Instead, all the factors weigh in favor of the State, including the predominant factor that Doe is unlikely to prevail on the merits of his appeal because his Fifth Amendment claim has no merits as a matter of law. Therefore, Doe's motion for injunctive relief must be denied.

BACKGROUND

On February 5, 2016, the district court entered its order and final judgment granting the State summary judgment as a matter of law on all causes of action and claims for relief alleged in Doe's second amended complaint. (*A:38*.)[1] Because the State agrees with the procedural background and the history and overview of Nevada's medical marijuana laws set forth in the district court's order, the State will not restate that information here. (*A:2-18*.)

In its order, the district court correctly determined that: (1) the State was entitled to judgment as a matter of law on Doe's federal constitutional claims for money damages because the State and its agencies and officials acting in their

[1] Citations to "*A*" are to page numbers of the district court's order, which is attached to Doe's motion for injunctive relief as Exhibit A.

official capacities are absolutely immune from liability for money damages under section 1983; (2) the State was entitled to judgment as a matter of law on Doe's federal constitutional claims for declaratory relief and injunctive relief because Doe did not sue the proper state official—the Administrator of the Division—who is charged by state law with enforcing the registration program; (3) the State was entitled to judgment as a matter of law on Doe's federal constitutional claims that the registration program violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (4) the State was entitled to judgment as a matter of law on Doe's federal constitutional claim that the registration program violates the Self-Incrimination Clause of the Fifth Amendment; and (5) the State was entitled to judgment as a matter of law on Doe's state-law tort claims for money damages for fraud and unjust enrichment.

On February 22, 2016, Doe filed a notice of appeal from the district court's order and final judgment. On February 23, 2016, Doe submitted a 34-page motion for injunctive relief and a request to file the motion in excess of the page limitation in NRAP 27. On March 9, 2016, this Court: (1) granted Doe's request to file the motion in excess of the page limitation; (2) directed the clerk to file the motion received on February 23, 2016; and (3) directed the State to file a response of no more than 34 pages. Pursuant to the Court's order, the State files this response in opposition to Doe's motion for injunctive relief.

ARGUMENT

I. As a matter of federal law under section 1983, Doe cannot obtain injunctive relief on his Fifth Amendment claim because Doe has not sued the proper state official—the Administrator of the Division—who is charged by state law with enforcing the registration program, and therefore no state agency or official who is a party to this appeal is suable for injunctive relief under federal law.

Doe asks the Court for injunctive relief to enjoin the State's operation of the registration program on grounds that it violates the Fifth Amendment privilege against self-incrimination. Doe's request for injunctive relief must be denied as a matter of federal law under section 1983 because no state agency or official who is a party to this appeal is suable for injunctive relief under federal law.

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 (9thCir.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."); Martinez v. Los Angeles, 141 F.3d 1373, 1382 (9thCir.1998); Azul-Pacifico v. Los Angeles, 973 F.2d 704, 705 (9thCir.1992). A civil rights action under section 1983 "must meet federal standards even if brought in state court." Madera v. SIIS, 114 Nev. 253, 259 (1998); Will v. Mich. Dep't State Police, 491 U.S. 58, 66 (1989).

Under section 1983, the State and its agencies, including the Legislature and the Department, are not "persons" who are subject to a civil rights action under section 1983. Will, 491 U.S. at 71; N. Nev. Ass'n Injured Workers v. SIIS, 107 Nev. 108, 114 (1991); State v. Dist. Ct., 118 Nev. 140, 153 (2002); Cuzze v. Univ. Sys., 123 Nev. 598, 605 (2007). Therefore, Doe cannot obtain any type of relief against the State and its agencies under section 1983, including declaratory and injunctive relief. 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) ("there is no support for the proposition that claims for injunctive relief may be brought under § 1983 against state agencies."). Consequently, as a matter of federal law under section 1983, Doe cannot obtain injunctive relief on his Fifth Amendment claim against the State, the Legislature and the Department.

The only other party to this appeal is the Governor. Because the Governor does not have a sufficiently direct connection under state law with the enforcement of the medical marijuana laws, Doe cannot obtain injunctive relief on his Fifth Amendment claim against the Governor under section 1983.

As a general rule under section 1983, a plaintiff may bring federal constitutional claims asking for prospective declaratory or injunctive relief against state officials acting in their official capacities to enjoin their enforcement of allegedly unconstitutional statutes. Ex parte Young, 209 U.S. 123, 155-56 (1908); L.A. Branch NAACP v. L.A. Unified Sch. Dist., 714 F.2d 946, 952 (9thCir.1983); N. Nev. Ass'n Injured Workers, 107 Nev. at 115-16. However, implicit in the right to sue state officials under section 1983 for prospective declaratory or injunctive relief is the requirement that the state officials must bear some connection to the enforcement of the challenged statutes. See Okpalobi v. Foster, 244 F.3d 405, 426 (5thCir.2001) (en banc) ("a plaintiff may not sue a state official who is without any power to enforce the complained-of statute."); Long v. Van de Kamp, 961 F.2d 151, 152 (9thCir.1992) ("under Ex parte Young, there must be a connection between the official sued and enforcement of the allegedly unconstitutional statute"); S. Pac. Transp. Co. v. Brown, 651 F.2d 613, 615 (9thCir.1980) ("when a state officer is sued to enjoin enforcement of state law, he must have 'some connection' with enforcement, or suit against him would be equivalent to suit against the state"). As further explained in Ex parte Young:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, *it is plain that such officer must have some connection with the enforcement of the act*, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

209 U.S. at 157 (emphasis added).

The connection necessary to trigger the Ex parte Young exception "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 (9thCir.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. Cnty. Bar Ass'n v. Eu, 979 F.2d 697, 704 (9thCir.1992). Thus, in cases where the constitutionality of a statute or rule is at issue, it is well established that "[a] person aggrieved by the application of a legal rule does not sue the rule *maker*—Congress, the President, the United States, a state, a state's legislature, the judge who announced the principle of common law." Quinones v. City of Evanston, 58 F.3d 275, 277 (7thCir.1995). Instead, to invoke the Ex parte Young exception, the aggrieved person must sue the state official who is charged by state law with enforcing the challenged statute or rule and whose official actions or threatened actions caused the aggrieved person's harm. See Fitts v. McGhee, 172 U.S. 516, 529-30 (1899); Long, 961 F.2d at 151; S. Pac. Transp., 651 F.2d at 615. If the plaintiff sues a state official who does not have a sufficiently direct connection under state law with the enforcement of the challenged statute or rule, then the plaintiff's federal constitutional claims for prospective declaratory or

injunctive relief fail as a matter of law. Confederated Tribes v. Locke, 176 F.3d 467, 469-70 (9thCir.1999); Snoeck, 153 F.3d at 986-88.

Based on these long-standing principles, it is well established that "[w]here the enforcement of a statute is the responsibility of parties other than the governor . . . the governor's general executive power [to enforce laws] is insufficient to confer jurisdiction [under Ex parte Young]." Women's Emer. Net. v. Bush, 323 F.3d 937, 949-50 (11thCir.2003); Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1stCir.1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute."); L.A. Branch NAACP, 714 F.2d at 953 ("the Governor's general duty to enforce California law under the circumstances of this case does not establish the requisite connection between him and the unconstitutional acts alleged by the [plaintiff]."); Confederated Tribes, 176 F.3d at 469-70 ("Because the governor lacks the requisite connection to the activity sought to be enjoined, he serves 'merely ... as a representative of the state,' and the Tribe is 'thereby attempting to make the state a party.'); Nat'l Audubon Soc'y v. Davis, 307 F.3d 835, 847 (9thCir.2002) ("we hold that suit is barred against the Governor and the state Secretary of Resources, as there is no showing that they have the requisite enforcement connection to [the challenged law]."). In other words, "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." Snoeck, 153 F.3d at 986. The reason for this rule has been explained by the U.S. Supreme Court as follows:

> [A]s we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons.

Fitts, 172 U.S. at 530.

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 Const. Law § 288 (WestlawNext 2015) ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner . . . and 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. 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 232.320, 232.340, 453A.210, 453A.730 and 453A.740. The Legislature did not expressly give the Governor statutory authority to exercise direct control over the Administrator's enforcement of those laws. As a result, because the Governor does not have a sufficiently direct connection under state law with the enforcement of the medical

marijuana laws, Doe cannot obtain injunctive relief on his Fifth Amendment claim against the Governor under section 1983.

Consequently, as a matter of federal law under section 1983, Doe cannot obtain injunctive relief on his Fifth Amendment claim because Doe has not sued the proper state official who is charged by state law with enforcing the registration program, and therefore no state agency or official who is a party to this appeal is suable for injunctive relief under federal law. For that reason alone, Doe's motion for injunctive relief must be denied.

II. Doe has not shown that moving first in the district court for an injunction pending appeal would be impracticable based on exceptional circumstances necessary to bypass the district court.

A party seeking an injunction pending appeal "must ordinarily move first in the district court for [such] relief." NRAP 8(a)(1). As explained by the Court, "NRAP 8(a) requires that an application for [an injunction] pending appeal be made to the district court in the first instance. This requirement is grounded in the district court's vastly greater familiarity with the facts and circumstances of the particular case." Nelson v. Heer, 121 Nev. 832, 836 (2005). However, in extraordinary circumstances, a party may bypass the district court and move for an injunction pending appeal directly with this Court, but the motion must "show that moving first in the district court would be impracticable." NRAP 8(a)(2).

Doe admits "a specific new motion for [injunctive] relief was not made to the district [court] upon the filing of the appeal." (Mot. at 3.) On the basis that the district court in its order and final judgment denied all claims for relief alleged in his second amended complaint, including his claim for injunctive relief, Doe contends it would be impracticable to move first in the district court for an injunction pending appeal because it "would be nothing but a waste of judicial resources as the district court already denied this relief." Id. Doe's contention is wrong as a matter of law.

In interpreting the federal counterpart to NRAP 8, federal courts have rejected the contention that the district court's denial of a party's request for injunctive relief during the litigation in the district court means, ipso facto, that the district court would deny the party's request for injunctive relief pending an appeal. See Bayless v. Martine, 430 F.2d 873, 879 n.4 (5thCir.1970) ("It does not follow from the refusal to grant a preliminary injunction pending a trial in the court below that the district court would refuse injunctive relief pending an appeal.").[2] Further, federal courts have stated "Rule 8(a) specifically contemplates that there will be *exceptional circumstances* in which it will be impracticable for an appellant to be

[2] Federal cases interpreting the Federal Rules of Appellate Procedure (FRAP) provide persuasive authority when this Court examines its own appellate rules. See Breeden v. Dist. Ct., 131 Nev.Adv.Op. 12, 343 P.3d 1242, 1243 (2015); Mahaffey v. Investor's Nat'l Sec. Co., 102 Nev. 462, 463 & n.2 (1986).

required to follow all of the guidelines set forth in Rule 8(a)." Moorhead v. Farrelly, 727 F.Supp. 193, 199 (D.V.I.1989) (emphasis added). The exceptional circumstances necessary to bypass the district court under Rule 8(a) generally require a showing of temporal urgency, such as an impending election, or some other imminent harm or emergency circumstances so "the need for relief is so immediate that application in the district court is not necessary in these circumstances." Populist Party v. Herschler, 746 F.2d 656, 657 n.1 (10thCir.1984).

Doe has not shown any exceptional circumstances necessary to bypass the district court under NRAP 8(a)(2). Doe's only reason for his failure to move first in the district court for an injunction pending appeal is that the district court denied his claim for injunctive relief during the litigation in the district court. However, because the district court's denial of injunctive relief was *before* Doe filed his appeal, it does not follow, ipso facto, that the district court would deny Doe's request for injunctive relief pending appeal. Doe has not shown any temporal urgency or other imminent harm or emergency circumstances making the need for relief so immediate that application in the district court would be impracticable. Therefore, because Doe has not shown that moving first in the district court would be impracticable based on exceptional circumstances necessary to bypass the district court under NRAP 8(a)(2), Doe's motion for injunctive relief must be denied.

III. Doe has not established any of the factors to issue an injunction pending appeal, and all the factors weigh in favor of the State, including the predominant factor that Doe is unlikely to prevail on the merits of his appeal because his Fifth Amendment claim has no merits as a matter of law.

To decide whether to issue an injunction while Doe's appeal is pending, the Court considers the following four factors: (1) whether the object of Doe's appeal will be defeated if the injunction is denied; (2) whether Doe will suffer irreparable or serious injury if the injunction is denied; (3) whether the State will suffer irreparable or serious injury if the injunction is granted; and (4) whether Doe is likely to prevail on the merits in the appeal. NRAP 8(c). In applying these four factors, the Court has indicated that in ordinary cases, no single factor "carries more weight than the others." Mikohn Gaming v. McCrea, 120 Nev. 248, 251 (2004). However, although the Court has not ascribed particular weights to any of the four factors in the civil context, it has "recognized that depending on the type of appeal, certain factors may be especially strong and counterbalance other weak factors." State v. Robles-Nieves, 129 Nev.Adv.Op. 55, 306 P.3d 399, 403 (2013). In this case, all four factors weigh in favor of the State.

A. The object of Doe's appeal will not be defeated if his motion for injunctive relief is denied.

With regard to his Fifth Amendment claim, the object of Doe's appeal is to have the Court declare that the registration program violates the Fifth Amendment privilege against self-incrimination and to enjoin the State's operation of the

registration program. If the Court denies the injunction pending appeal, Doe will still be able to make his Fifth Amendment arguments in the ordinary course of briefing on appeal, and if the Court agrees with his Fifth Amendment arguments, Doe will still have the opportunity to request injunctive relief to enjoin the State's operation of the registration program. In other words, Doe will not lose any potential appellate arguments or remedies if the injunction pending appeal is denied and this case proceeds in the ordinary course of briefing on appeal.

Further, if the Court considers the potential merits of Doe's Fifth Amendment claim on his motion for injunctive relief to the exclusion of the other claims and defenses in this appeal, the Court will undermine the well-established objective to "promote judicial economy and efficiency by avoiding piecemeal appellate review." Wells Fargo Bank v. O'Brien, 129 Nev.Adv.Op. 71, 310 P.3d 581, 582 (2013). Doe admits he is asking for piecemeal appellate review by stating "a ruling on this Motion may resolve one of the issues in this case; however, it will not be dispositive." (Mot. at 12 n.3.) Thus, Doe is asking the Court to engage in piecemeal appellate review that blindly ignores the potential merits of the other claims and defenses in this appeal. But under well-established rules of appellate review, such piecemeal appellate review is highly disfavored, and depending on how the Court resolves the other claims and defenses in the ordinary course of briefing on appeal, the Court may be able to resolve this appeal on narrower

grounds without making broad pronouncements that are unnecessary to the disposition of the appeal.

As a general rule of judicial restraint, the Court should not consider legal issues which are not necessary or essential to resolving the case. See Miller v. Burk, 124 Nev. 579, 588-89 (2008) ("we will not decide constitutional questions unless necessary"); Spears v. Spears, 95 Nev. 416, 418 (1979) ("This court will not consider constitutional issues which are not necessary to the determination of an appeal."). As stated by the High Court, "normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." Bond v. United States, 134 S.Ct. 2077, 2087 (2014) (quoting Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984)). Thus, the Court should strive to resolve this case on the narrowest grounds possible to avoid making broad pronouncements that are unnecessary to the disposition of the case. See Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999) ("It is, however, an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground."); Plaut v. Spendthrift Farm, 514 U.S. 211, 217 (1995) (resolving a case on "the narrower ground for adjudication of the constitutional questions in the case"); Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517, 531 (1991)

(Stevens, J., concurring) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available.").

If the Court denies the injunction pending appeal and this case proceeds in the ordinary course of briefing on appeal, the Court will promote judicial economy and efficiency by avoiding piecemeal appellate review, and the Court will ensure that all claims and defenses are properly briefed and evaluated on appeal so the Court can resolve this case on the narrowest grounds possible without making broad pronouncements that are unnecessary to the disposition of the case. Therefore, because denial of Doe's motion for injunctive relief will promote rather than defeat the objectives of good appellate practice, the object of Doe's appeal will not be defeated by the denial of his motion for injunctive relief.

B. Doe will not suffer irreparable or serious injury if his motion for injunctive relief is denied.

The purpose of an injunction pending appeal is to preserve the status quo pending the appellate determination. See McClendon v. Albuquerque, 79 F.3d 1014, 1020 (10thCir.1996). Because the public has an interest in ensuring that all laws passed by the voters or a legislative body are implemented, any injunction pending appeal that would enjoin the implementation of such laws would disturb rather than maintain the status quo. See Golden Gate Rest. Ass'n v. San Francisco, 512 F.3d 1112, 1116 (9thCir.2008); Int'l Franchise Ass'n v. Seattle, 97 F.Supp.3d

1256, 1286 (W.D.Wash.2015). Therefore, when an injunction pending appeal would disturb the status quo by enjoining implementation of state laws, the party seeking the injunction must make an especially strong showing that the party will suffer "substantial and immediate irreparable injury" from their implementation. See Int'l Franchise Ass'n, 97 F.Supp.3d at 1285 ("the need to show 'substantial and immediate irreparable injury' is especially strong when plaintiffs seek to enjoin the activity of a state or local government." (quoting Hodgers–Durgin v. de la Vina, 199 F.3d 1037, 1042 (9thCir.1999))).

To be considered substantial and immediate, the alleged injury "must be both certain and immediate, rather than speculative or theoretical." Mich. Coal. Radioactive Mat. Users v. Griepentrog, 945 F.2d 150, 154 (6thCir.1991). Injunctive relief "will not be granted 'against something merely feared as liable to occur at some indefinite time in the future.'" E. Greyhound Lines v. Fusco, 310 F.2d 632, 634 (6thCir.1962) (quoting Conn. v. Mass., 282 U.S. 660, 674 (1931)).

Doe admits that he has applied for, received and renewed his registration card for several years under the registration program. (*A:3-4.*) Doe fears his participation in the registration program could be used as incriminating evidence against him someday in a federal investigation or prosecution under federal marijuana laws. Doe, however, has not presented any evidence that the threat of federal investigation or prosecution is both certain and immediate, rather than

speculative or theoretical. At most, Doe is asking for injunctive relief against something merely feared as liable to occur at some indefinite time in the future. Such speculative and indefinite fears are inadequate to make the especially strong showing necessary to prove Doe will suffer substantial and immediate irreparable injury from his participation in the registration program. This is especially true given that Doe has participated in the registration program for several years and has not presented any evidence that the federal government has used his or anyone else's participation in the program as incriminating evidence in a federal investigation or prosecution under federal marijuana laws. See Doe v. Bryan, 102 Nev. 523, 525-26 (1986) (denying standing for declaratory relief when "[t]here is no indication that appellants are facing an immediate threat of arrest for violation of [the statute] or that the risk of prosecution is, to any degree, more than imaginary or speculative."). Therefore, Doe has not made the especially strong showing necessary to prove he will suffer irreparable or serious injury if his motion for injunctive relief is denied.

C. The State will suffer irreparable or serious injury if Doe's motion for injunctive relief is granted.

As noted previously, the public has an interest in ensuring that all laws passed by the voters or the Legislature are implemented. If the State's operation of the registration program is enjoined, the State will suffer irreparable or serious injury

because it will be enjoined from implementing a central component of the medical marijuana laws passed by the voters and the Legislature.

Article 4, Section 38 was added by a constitutional initiative approved by the voters in 2000. Nev. Ballot Questions 2000, Question 9 (Nev. Sec'y of State). According to the voters' ballot materials, "[t]he initiative is an attempt to balance the needs of patients with the concerns of society about marijuana use." Id. 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.

Thus, the voters intended for the registry to operate as a central component of the initiative because when they approved a patient's use of medical marijuana upon the recommendation of a physician, they also made the use of medical marijuana expressly subject to, conditioned by and contingent upon the initiative's requirement for the patient to be part of the registry. Therefore, the voters clearly did not intend for the initiative to be operative without the registration program.

Similarly, the Legislature did not intend for NRS Chapter 453A to be operative without the registration program. In 2001, when the Legislature enacted Nevada's medical marijuana laws in AB453, the Legislature modeled the bill after

the Oregon Medical Marijuana Act of 1999 (Oregon Act). Hearing AB453 Assemb. Comm. Judiciary, 71st Leg. (Nev. Apr. 10, 2001) ("The bill was modeled after the Oregon Medical Marijuana Act of 1999."). 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 Fab. v. Bur. 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 legislative hearings on AB453 in the Assembly, 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 AB453 Assemb. Comm. 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 AB453 Assemb. Comm. Judiciary, 71st Leg. (Nev. Apr. 10, 2001). Before the bill was passed by the Assembly, Ms. Giunchigliani rose in support of AB453 and 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 legislative hearings in the Senate, Ms. Giunchigliani emphasized that "only those who are registered are eligible for the program." Hearing AB453 Sen. Comm. Human Res. & Facilities, 71st Leg. (Nev. June 3, 2001).

Finally, when the Legislature enacted AB453, it explained in the preamble to the bill 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." AB453, 2001 Nev.Stat., ch.592, 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 voters who approved the initiative, the Legislature intended for the registration program to operate as a central component of the medical marijuana laws in NRS Chapter 453A because the Legislature made a patient's use of medical marijuana expressly subject to, conditioned by and contingent upon the statutory requirement for the patient to be part of the registration program.

Accordingly, based on the legislative history of AB453, it is clear the Legislature did not intend for the medical marijuana laws to be operative without the registration program.

Because the voters and the Legislature did not intend for the medical marijuana laws to be operative without the registration program, any injunctive relief enjoining the State's operation of the registration program would fatally undermine the medical marijuana laws passed by the voters and the Legislature. Therefore, the State will suffer irreparable or serious injury if Doe's motion for injunctive relief is granted.

D. Doe is unlikely to prevail on the merits of his appeal because his Fifth Amendment claim has no merits as a matter of law.

Doe contends 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 the privilege against self-incrimination because they are admitting that they are engaging in acts illegal under federal law. To support his Fifth Amendment claim, Doe relies upon the wrong line of cases from the U.S. Supreme Court.

Under those cases, the Supreme Court held that, under certain circumstances, a defendant may invoke the Fifth Amendment privilege against self-incrimination *as a defense in a criminal prosecution* which is based on the defendant's failure to

comply with a *criminal statute* whose elements compel the defendant to answer official questions disclosing illegal activities or face criminal penalties for failing to make the required disclosures. See, e.g., Marchetti v. United States, 390 U.S. 39 (1968) (holding that Fifth Amendment privilege was a defense to *prosecution* for failure to register and pay occupational tax on illegal wagering activities); Grosso v. United States, 390 U.S. 62 (1968) (holding that Fifth Amendment privilege was a defense to *prosecution* for failure to pay excise tax on illegal wagering activities); Haynes v. United States, 390 U.S. 85 (1968) (holding that Fifth Amendment privilege was a defense to *prosecution* for failure to register firearms acquired in illegal manner); Leary v. United States, 395 U.S. 6 (1969) (holding that Fifth Amendment privilege was a defense to *prosecution* for failure to pay transfer tax on illegal marijuana). In this line of cases, the very purpose of the criminal statutes is to compel the defendant to disclose illegal activities by punishing the defendant criminally if the defendant fails to make the required disclosures.

By contrast, the Supreme Court has held that a person is not *compelled* to make a disclosure in violation of the Fifth Amendment privilege when that disclosure is required as part of a *voluntary* application for benefits which the person must file only if the person wants to be considered for the benefits. 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 the Fifth Amendment

privilege did not apply when individuals submitted applications for federal educational aid and were required to disclose on the application whether they registered for the draft as required by federal law. 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., the D.C. Circuit held in several cases that the Fifth Amendment privilege does not apply when the government asks a person to disclose potentially incriminating information, such as information about past illegal drug use, on a questionnaire which the person files because the person wants to be considered for participation in a government program. Nat'l Fed'n Fed. Employees v. Greenberg, 983 F.2d 286, 287, 291-93 (D.C.Cir.1993) (holding that Fifth Amendment privilege did not invalidate a security clearance questionnaire which asked employees questions about past illegal drug use, including "their use of any controlled substances; their involvement with the illegal manufacture, production, purchase or sale of such drugs; their abuse of prescription drugs, or use of alcohol resulting in loss of their job or their discipline, arrest, or treatment."); Am. Fed'n Gov't Employees v. Dep't Hous. & Urban Dev., 118 F.3d 786, 790, 794-95 (D.C.Cir.1997) (same). In particular, the D.C. Circuit determined that the

Fifth Amendment privilege did not invalidate a security clearance questionnaire which asked employees the following questions about past illegal drug use:

> a. Have you ever tried or used or possessed any narcotic *(to include heroin or cocaine)*, depressant *(to include quaaludes)*, stimulant, hallucinogen *(to include LSD or PCP)*, or cannabis *(to include marijuana or hashish)*, or any mind-altering substance *(to include glue or paint)*, even one time or on an experimental basis, except as prescribed by a licensed physician?
>
> b. Have you ever been involved in the illegal purchase, manufacture, trafficking, production, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis?
>
> c. Have you ever misused or abused any drug prescribed by a licensed physician for yourself or for someone else?
>
> d. Has your use of alcoholic beverages *(such as liquor, beer, wine)* ever resulted in the loss of a job, disciplinary action, arrest by police, or any alcohol-related treatment or counseling *(such as for alcohol abuse or alcoholism)*?

Am. Fed'n, 118 F.3d at 790; Nat'l Fed'n, 983 F.2d at 287.

Furthermore, at least one federal court has concluded that the Fifth Amendment privilege is not implicated when an individual applies to participate in the District of Columbia's medical marijuana program as a cultivator or dispensary operator and is required to execute an affidavit 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.

Like the District of Columbia's medical marijuana program in Sibley and the security clearance programs reviewed by the D.C. Circuit in Nat'l Fed'n of Fed. Employees and Am. Fed'n of Gov't Employees, Nevada's medical marijuana registration program is a voluntary program, and nothing in Nevada's medical marijuana laws requires any person to submit an application or register with the State, unless the person voluntarily elects to do so. Because Nevada's program is a voluntary program, the Fifth Amendment privilege simply does not apply to the program, and the State may ask a person who wants to participate in the program to disclose potentially incriminating information, such as information about past illegal drug use, without violating the Fifth Amendment privilege against self-incrimination. Therefore, because a person is clearly under no compulsion to submit an application or register with the State, the person is not "compelled" to participate in the Nevada's medical marijuana registration program, and the Fifth Amendment privilege against self-incrimination does not invalidate the program or

the application for a registration card. Accordingly, Doe's Fifth Amendment claim has no merits as a matter of law.

In addition, even if a person makes the voluntary choice to participate in Nevada's medical marijuana registration program, the acts of submitting an application and registering with the State do not compel the person to answer any official questions where the answers might incriminate the person in future criminal proceedings. In submitting an application and registering with the State, a person is required to provide the Division with certain personal, medical and background information. (*A:15-18.*) However, the person is not required to answer any official questions asking whether the person has grown, purchased, distributed or possessed marijuana. Id. In the absence of such questions, the person is not compelled to give answers which might incriminate the person in future criminal proceedings because the person is not required to give answers 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, because the acts of submitting an application and registering with the State do not compel the person to answer any official questions where the answers might incriminate the person in future criminal proceedings, Doe's Fifth Amendment claim has no merits as a matter of law.

CONCLUSION

Based on the foregoing reasons, the State respectfully asks the Court to deny Doe's motion for injunctive relief.

DATED: This **1st** day of April, 2016.

Respectfully submitted,

By: /s/ Kevin C. Powers
KEVIN C. POWERS
Chief Litigation Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU,
LEGAL DIVISION
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830
Fax: (775) 684-6761
E-mail: kpowers@lcb.state.nv.us
Attorneys for Respondent State of Nevada ex rel. the Legislature of the State of Nevada

By: /s/ Linda C. Anderson
LINDA C. ANDERSON
Chief Deputy Attorney General
Nevada Bar No. 4090
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave. Ste. 3900
Las Vegas, NV 89101
Tel: (702) 486-3420
Fax: (702) 486-3871
E-mail: landerson@ag.nv.gov

By: /s/ Gregory L. Zunino
GREGORY L. ZUNINO
Chief Deputy Attorney General
Nevada Bar No. 4805
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 8970l
Tel: (775) 684-1237
Fax: (775) 684-1180
E-mail: gzunino@ag.nv.gov

Attorneys for Respondents State of Nevada ex rel. the Department of Health and Human Services and the Governor of the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **1st** day of April, 2016, pursuant to NRAP 25, NEFCR 8 and 9 and the parties' stipulation and consent to service by electronic means, I filed and served a true and correct copy of Respondents' Response in Opposition to Appellant's Motion for Injunctive Relief, by electronic means to registered users of the Nevada Supreme Court's electronic filing system and by electronic mail, directed to the following:

JACOB L. HAFTER, ESQ.
HAFTERLAW
6851 W. Charleston Blvd.
Las Vegas, NV 89117
jhafter@hafterlaw.com; kelli@hafterlaw.com
Attorney for Appellant

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