CASE NO. 69801

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,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE **HONORABLE ROB BARE,**

Appellees,

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,

Real Parties In Interest.

APPELLANT'S OPENING BRIEF

On appeal from the Eight Judicial District Court,
Clark County, Nevada
District Court Case No. A-15-723045-C
The Honorable Rob Bare

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May 27, 2016

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that he has filed his NRAP 26.1 Disclosure separately under seal, as allowed for pursuant to NRAP 26.1(a).

DATED this 27th day of May, 2016.

HAFTERLAW

By: _____

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Nev.R.App.P. 3A(b)(1), as the order appealed granted summary judgment in favor of Respondents on all claims, and Nev.R.App.P. 3A(b)(3), as the order appealed also was a Motion for Preliminary Injunction.

The order being appealed was issued on or about February 4, 2016, by the Honorable Rob Bare of the Eighth Judicial District Court for the State of Nevada. Joint Appendix ("App") Vol. 3_459-497.

Appellants timely filed a Notice of Appeal on February 22, 2016. App. Vol. 3_540-542.

A Case Appeal Statement was filed on February 22, 2016. App. Vol. 3_543-593.

NRAP 28(a)(5) ROUTING STATEMENT

ISSUES PRESENTED

This case raises various constitutional issues of first impression related to the Medical Marijuana Registry (the "Registry"), as set forth in NRS Chapter 453A, pursuant to Nevada Constitution, Art. IV, Section 38.

1. Does the Registry violate the Fifth Amendment privilege against self-incrimination by forcing patients who pursue physician recommended medical marijuana, as authorized by state law, to admit that they are violating federal law as a pre-requisite to participation in the Registry?
2. Do Nevadans, under the Due Process Clause of the 14th Amendment, have a fundamental right to access the health care which their physicians, in their professional capacity, recommend for them?
3. If Nevadans have such a fundamental right, does the Registry violate that right under the Equal Protection Clause of the 14th Amendment?
4. Did the district court err in not providing injunctive relief?
5. Did the district court err in dismissing Appellant's state law tort claims?
6. Did the district court err in not allowing Appellant to amend his complaint to name the Administrator of the Registry for Purposes of §1983 Declaratory and Injunctive Relief?

STATEMENT OF THE CASE

This is an appeal from an order granting summary judgment, on all counts, to Respondents, and denying injunctive relief, and granting Respondents final judgment. The order and judgment was issued by the Honorable Rob Bare, of the Eighth Judicial District Court.

STATEMENT OF THE PERTINENT FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

In 2001, the people of the Great State of Nevada amended its Constitution to allow 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 for which, in the physician's opinion, the plant would have some medical benefit. Nev. Const. Art. IV, 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***[1] criminal prosecution. See Nev. Rev. Stat. Chapter 453A. The Legislature distinguished "medical marijuana" from street marijuana by

[1] The State cannot legislate away a crime set forth under federal law.

creating standards for testing, purity and labeling of marijuana. The State also created the Registry through which all persons wishing to use medical marijuana must be included. Nev. Const. Art. IV, Sec 38, (1)(d) ("The legislature shall provide by law for: … 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."); NRS Chapter 453A.

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 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 created the concept of a "medical marijuana dispensary." See 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

[2] Query how one can grow their own without obtaining seeds from a legal source, as none existed at the time.

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 re-applied to renew their registration card; Appellant is one of those people.

In order to obtain the registration card, the patient must pay a fee to the State, NRS §453A.740 and 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.[3] A registration card is only valid for one year. NRS §453A.220(4).

While the Program has been accepting the fees for the registration cards since 2001, and have been issuing cards, the Program has done so with the knowledge that up through the time of the filing of the Complaint there was no place within Southern Nevada for a patient to legally purchase seeds, plants or plant derivatives, as neither the State nor the related agencies had approved a dispensary for business.[4] Accordingly, for approximately three years,

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[3] This is conducted through the private market and can cost as much as $500.

[4] Interestingly, within a week of the filing of the Complaint in this case, the State and other regulatory agencies started licensing dispensaries.

Appellant, and those similarly situated to him, repeatedly[5] completed the application process, including seeking (and paying for) a physician evaluation and recommendation, and submitting forms in quadruplicate and paying various fees, only to receive a card that never provided him and others with access to legally regulated medical marijuana.[6] The reality is, without access to a dispensary, the registration cards were worthless in facilitating Nevada patients to access medical marijuana – something that was known to Respondents; and, yet, the State still took money from Appellant (and others similarly situated), year after year, issuing, each time, 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, the Program continued to issue cards for only one year, knowing that their utility

[5] As inclusion in the Registry is only good for one (1) year, participants are required to renew their registration each year.

[6] 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.

is minimal, at best.[7]

SUMMARY OF ARGUMENT

While this case was brought, in part, to compensate Nevada's patients who have been paying hundreds of dollars in state fees without receiving any benefits, the core of this case involves multiple challenges to the constitutionality of this Registry as a result of the State's interference in this health care option. Specifically, Appellant, a Nevadan who is a member of the Registry, challenges the constitutionality of the Registry under the Fifth Amendment as well as the 14th Amendment of the US Constitution.

Appellant claims that the Registry is a violation of Fifth Amendment privilege against self-incrimination because the Registry requires patients who are following the medical recommendations of their physicians to first clear a hurdle set forth by the State – apply for the Registry. In doing so, the patient must submit an application to the State which includes an admission

[7] Respondents 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.

that the applicant is growing and/or using medical marijuana – acts which are illegal under federal law. This is a compelled disclosure which is a violation of our Fifth Amendment privilege against self-incrimination.

Appellant also raises concerns about the Registry's implication on the 14th Amendment. First, as a precursor to this challenge, Appellant asks this Court to find that Nevadans have a fundamental right to access the health care that their doctor recommends under the Due Process Clause.

It is important for this Court to recognize, from the outset of this case, that Respondents will try, vigorously, to re-cast this issue as a constitutional right to have medical marijuana; **that is not Appellant's claim.** Appellant sets forth compelling case law from the U.S. Supreme Court to demonstrate that Nevadans have a fundamental right to access the health care recommended to them by their licensed physicians.[8] Just as courts have enumerated several fundamental rights which flow from the Due Process Clause of the 14th Amendment, this Court must recognize that access health

[8] This is separate and distinct from a constitutional right to health care. A Constitutional right to health care would implicate a broad and wide sweeping obligation of the health care system to provide care, as a right, regardless of ability to pay or other system delivery pre-requisites. Access to health care, on the other hand, is simply that – access; the focus here is the elimination of government barriers to receiving health care, such as, in this case, having to obtain special permission from the government for a particular treatment (i.e., medical marijuana).

care that one's physician recommends for him is a fundamental right inherent in those health care related rights which have already been enumerated by the Courts. It is an inherent part of the privacy rights which the Supreme Court have already found to exist, such, the right to an abortion, right to withhold life-saving medical care, right to use contraceptives, and the right to consent to medical care. In light of that argument, the fee-based Registry is an improper interference with such right.

Because Appellate has set forth compelling arguments as to why the Registry is unconstitutional, this Court is also asked to find that the district court's denial of injunctive relief, dismissal of Appellant's state law claims, and dismissal of the §1983 declaratory and injunctive claims were also erroneous.

STANDARD OF REVIEW

"Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (alteration in original) (*quoting* NRCP 56(c)). "[W]hen reviewing a motion for summary judgment, the evidence, and any

reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Id.

A district court order granting a preliminary injunction is an independently appealable determination. See NRAP 3A(b)(3). A preliminary injunction is available when it appears from the complaint that the moving party has a reasonable likelihood of success on the merits and the nonmoving party's conduct, if allowed to continue, will cause the moving party irreparable harm for which compensatory relief is inadequate. NRS §33.010; Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). As a constitutional violation may be difficult or impossible to remedy through money damages, such a violation may, by itself, be sufficient to constitute irreparable harm. See Monterey Mech. Co. v. Wilson, 125 F.3d 702, 715 (9th Cir.1997). Whether to grant or deny a preliminary injunction is within the district court's discretion. Nevadans for Sound Gov't, 120 Nev. at 721, 100 P.3d at 187. In the context of an appeal from a preliminary injunction, we review questions of law de novo and the district court's factual findings for clear error or a lack of substantial evidentiary support. Id.

ARGUMENT

A. THE REGISTRY VIOLATES NEVADAN'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

1. Background on the Fifth Amendment Privilege Against Self-Incrimination

The Fifth Amendment protects a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This protection extends not only to criminal proceedings, but any proceeding in which the answers ***might*** incriminate the individual in a ***future*** criminal proceeding. See Allen v. Illinois, 478 U.S. 364, 368, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986). "[T]he Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." Balt. Dep't of Social Servs. v. Bouknight, 493 U.S. 549, 556, 110 S.Ct. 900, 107 L.Ed.2d 992 (1990). "It is a shield that prevents one from being convicted out of his own mouth by anything short of voluntary statements." Lewis v. United States, 348 U.S. 419, 421, 75 S.Ct. 415, 99 L.Ed. 475 (1955). In other words, it applies to statements known as "compelled disclosures."

Not all compelled disclosures will be deemed a violation of the Fifth

Amendment, even when such disclosure incriminates a citizen. In 1927, the Supreme Court held that an application of the Fifth Amendment privilege was not warranted with respect to tax filings. United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927). In that case, a bootlegger was prosecuted for failure to file an income tax return. He claimed that the privilege against compulsory self-incrimination afforded him a complete defense because filing a return would have tended to incriminate him by revealing the unlawful source of his income. Speaking for the Court, Mr. Justice Holmes rejected this claim on the ground that it amounted to "an extreme if not an extravagant application of the Fifth Amendment." Id., at 263—264, 47 S.Ct., at 607.

In order to invoke the Fifth Amendment privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with "substantial hazards of self-incrimination." The components of this requirement were articulated in a string of cases in the late 1960's, beginning with Albertson v. SACB, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965), and later in Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and then in Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), and, again, in Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968).

In Albertson the Court held that an order requiring registration by individual members of a Communist organization violated the 5th Amendment privilege. There, the Court took the opportunity to distinguish the permissive compelled disclosure in Sullivan (tax returns) with circumstances when such compelled disclosures are not permitted. The Court stated:

> In Sullivan the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a ***highly selective group inherently suspect of criminal activities***. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the * * * questions in context might involve the petitioners in the admission of a crucial element of a crime.

382 U.S., at 79, 86 S.Ct., at 199 (***emphasis added***).

Albertson was followed by Marchetti. Here, the Court noted that "[t]he constitutional [Fifth Amendment] privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it." 390 U.S. at 51.

This was followed by Haynes where petitioner had been prosecuted for failure to register a firearm as required by federal statute. The prosecution

was overturned when the Court found that compliance with the statutory disclosure requirements would confront the petitioner with "substantial hazards of self-incrimination." Marchetti, *supra*, 390 U.S., at 61. In all of these cases involved compelled disclosures from a "highly selective group inherently suspect of criminal activities." See, e.g., Albertson, *supra*; Marchetti, *supra*.

The term after the Court decided Marchetti, it decided the case of Leary v. United States, 395 U.S. 6, 23 L.Ed.2d 57, 89 S..Ct. 1532 (1969). The Supreme Court granted certiorari in Leary to address, in part, "whether petitioner's conviction for failing to comply with the transfer tax provisions of the Marihuana Tax Act violated his Fifth Amendment privilege against self-incrimination." Id. The Supreme Court found that:

> If read according to its terms, the Marihuana Tax Act compelled petitioner to expose himself to a 'real and appreciable' risk of self-incrimination, within the meaning of our decisions in Marchetti, Grosso, and Haynes. Sections 4741—4742 required him, in the course of obtaining an order form, to identify himself not only as a transferee of marihuana but as a transferee who had not registered and paid the occupational tax under §§ 4751—4753.

Leary, at 16. The Court further found that "[i]t follows that the class of possessors who were both unregistered and obliged to obtain an order form constituted a 'selective group inherently suspect of criminal activities.' Since

compliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination." Id. at 18.

2. The Registry Violates the Fifth Amendment

The U.S. Supreme Court has stated that "[w]henever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly." California v. Byers, 402 U.S. 424, 427, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971).

Appellant does recognize that certain limitation and burdens imposed on the constituents of a society, including certain compelled disclosures, are legal. As noted by the U.S. Supreme Court in Byers:

> An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of

> consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.
>
> In each of these situations there is some possibility of prosecution—often a very real one—for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be a link in the chain of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of disclosure called for by statutes like the one challenged here.

402 U.S. at 427-28.

Using the balancing analysis between public need for a compelled disclosure, on the one hand, and the individual claim to constitutional protections, on the other, (a test set forth by Supreme Court in Byers, *supra*, 402 U.S. at 430), this Court is asked to determine whether the Registry violates a person's Fifth Amendment privilege.

Again, to invoke the privilege against self-incrimination, a claimant must show "that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'" Id. at 429, 91 S.Ct. at 1538 (*quoting* Sullivan, *supra*, 274 U.S. at 259). A corollary to this

principle is that "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." Baltimore City Dept. of Social Services v. Bouknight, 493 U.S. 549, 554, 110 S.Ct. 900, 905, 107 L.Ed.2d 992 (1990).

In determining whether a compelled disclosure threatens self-incrimination, several factors are to be considered:

> (1) whether the disclosure requirement targets a "highly selective group inherently suspect of criminal activities," rather than the public generally, Byers, 402 U.S. at 430, 91 S.Ct. at 1539 (*citing* Albertson, *supra*, 382 U.S. at 79);
>
> (2) whether the requirement involves "an area permeated with criminal statutes," rather than "an essentially noncriminal and regulatory area of inquiry," Id. (*citing* Albertson, 382 U.S. at 79, 86 S.Ct. at 199); *and*
>
> (3) whether compliance would compel disclosure of information that "would surely prove a significant 'link in a chain' of evidence tending to establish [ ] guilt," Marchetti, *supra*, 390 U.S. at 48 (citation omitted), rather than disclosing "no inherently illegal activity." Bouknight, 493 U.S. at 557, 110 S.Ct. at 906 (internal quotations and

citations omitted).

a) Highly Selective Group Inherently Suspect of Criminal Activities

Marijuana is illegal under federal law.

In 1970, as part of the "war on drugs", Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub.L. No. 91-513, 84 Stat. 1236. As part of this Act, a comprehensive drug enforcement regime called the Controlled Substances Act, 21 USC § 801-971, was codified.

Through the Controlled Substances Act, Congress established five "schedules" of "controlled substances." See 21 USC § 802(6). Controlled substances are placed on a particular schedule based on their potential for abuse, their accepted medical use in treatment, and the physical and psychological consequences of abuse of the substance. See 21 USC § 812(b). Marijuana is a Schedule I controlled substance, as it has been alleged that it: (1) "has a high potential for abuse"; (2) "has no currently accepted medical use in treatment in the United States"; and (3) that "[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 USC § 812(b)(1); see also, 21 USC § 812(c), Sched. I(c)(10).

Under the Controlled Substances Act, it is unlawful to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," except as otherwise provided in the statute. 21 USC § 841(a)(1). Possession of a controlled substance, except as authorized under the Controlled Substances Act, is also unlawful. See 21 USC § 844(a). As federal law will pre-empts state law with respect to the Controlled Substances Act, U.S. Const. Art. VI, cl. 2, the possession of marijuana is illegal under federal law.

While the foregoing is valuable background, this Court does not need to engage in any new legal analysis to resolve this prong of the test; the U.S. Supreme Court already did so for us in Leary, *supra*. The Supreme Court found, with respect to the tax provisions of the Marihuana Tax Act, because the Act only dealt with those who possess marijuana – a federally illegal activity - "the class of possessors who were both unregistered and obliged to obtain an order form[9] constituted a 'selective group inherently suspect of criminal activities.'" Id., 395 U.S. at 18.

[9] In Leary, the scrutiny was placed on compliance with certain tax requirements for those who possessed marijuana. Under these requirements, in order to comply with the tax requirements, one had to order a form from the government. A fee was charged for ordering the form. This is no different than what a Nevada patient must do under Nevada law.

Just like in Leary, here, the Registry only targets people who are engaging in a federal crime – users and growers of marijuana.

Accordingly, this prong of the test has been met.

b) "An Area Permeated With Criminal Statutes" Rather Than "An Essentially Noncriminal and Regulatory Area of Inquiry"

The Registry requires that a patient who intends to follow their physician's recommendation for treatment of their medical condition must (a) identify themselves to the state, and (b) admit that the applicant intends to expressly violate federal law; these disclosures are then available to law enforcement officers. Under the very language of the Nevada Constitution the Registry is intended to be made available to "law enforcement officers" for purposes of their verification that a person has been "authorized to use" medical marijuana pursuant to NRS Chapter 453A. Nev. Const. Art. IV, Sec. 38(1)(d). The term "law enforcement officers" is not limited to state actors under the Nevada Constitution.[10]

As the Registry is intended solely to address law enforcement and

[10] For purposes of candor to the Court, this term in defined in the state statute, NRS §453A.410 (referring to the definition set forth in NRS §239C.030); however, such creations of the Legislature cannot be applied to limit language in the Nevada Constitution.

prosecution issues, this component of the test for the application of the Fifth Amendment privilege is met.

c) Compliance Would Compel Disclosure of Information that "Would Surely Prove a Significant 'Link in a Chain' of Evidence Tending to Establish [ ] Guilt"

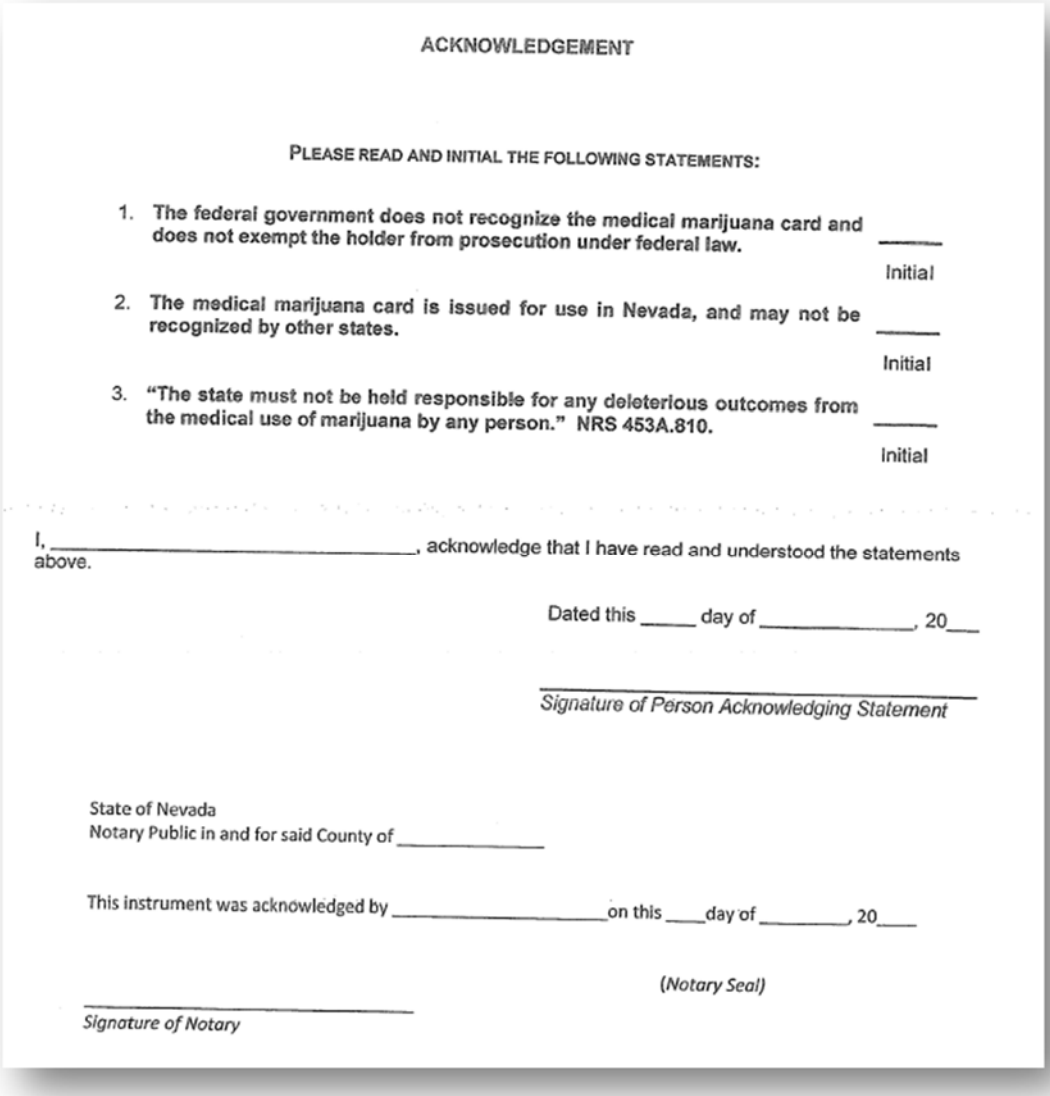
Finally, this Court must determine whether compliance with the Registry would compel disclosure of information that "would surely prove a significant 'link in a chain' of evidence tending to establish [ ] guilt" – where, guilt, in this case would be a violation of federal law.[11]

For that, we must look to the Registry. As a creature of statute, it mandates that medical marijuana users in Nevada fill out and return various forms and related documentation which discloses to the government the identity of a person who intends to possess and use marijuana. ***Only*** users of medical marijuana (or their caretakers) – both of whom are engaging in an act that is illegal under federal law – are obligated to apply for inclusion in the

[11] It is noted for this Court that the evidence must only be a link – not comprehensive evidence. The link in this case is the identity of a person who admits to violating federal law through their possession and use of marijuana for medical purposes. From this admission, the law enforcement agent has sufficient probable cause to obtain a warrant from a federal judge for a person's home, and engage in a search of the home. Based on the fact that the person has already admitted to possession and use of medical marijuana, the likelihood of a seizure of contraband is substantial.

Registry.

In fact, looking at the application to be included in the Registry, it is clear that the application process acknowledges that illegality and tries to



ACKNOWLEDGEMENT

PLEASE READ AND INITIAL THE FOLLOWING STATEMENTS:

1. **The federal government does not recognize the medical marijuana card and does not exempt the holder from prosecution under federal law.** _____ Initial

2. **The medical marijuana card is issued for use in Nevada, and may not be recognized by other states.** _____ Initial

3. **"The state must not be held responsible for any deleterious outcomes from the medical use of marijuana by any person." NRS 453A.810.** _____ Initial

I, _____, acknowledge that I have read and understood the statements above.

Dated this _____ day of _____, 20___

_____
Signature of Person Acknowledging Statement

State of Nevada
Notary Public in and for said County of _____

This instrument was acknowledged by _____ on this ____day of _____, 20____

(Notary Seal)

_____
Signature of Notary

ensure that the applicant realizes that medical marijuana is still illegal under federal law in Nevada. App. Vol. 1_226 - 235. Specifically, the last page of the application includes the following acknowledgment:

App. Vol. 1_235.

The fact that the State of Nevada requires a person to acknowledge, under notary verification, that the federal government does not recognize the medical marijuana card and does not exempt a holder from prosecution under federal law is the State's recognition that the class of people subject to the Registry is a highly selective class of people who are engaging in criminal activities.

Further, the State goes farther in its compelled disclosure as part of the actual application. The application requires that an applicant complete a section which has the following directions:

> Participants in the Nevada Medical Marijuana Registry (MMR) must designate their physical address as their grow site. The only exception is when a participant has a primary caregiver or designates a dispensary.

See App. Vol. 3_232 (see subsection "C" – "Plans for Growing Marijuana – REQUIRED"). In light of these excerpts of the application, it is clear that the district court erred in saying that it "has examined the Division's application packet, and… 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…" App. Vol. 3_491.

Moreover, even completing the application, in and of itself, is a compelled disclosure, as there is an implied disclosure which transcends the words of the application. Without the Registry, the government would have no knowledge of any patient who uses medical marijuana, save and except for those patients who actually get caught with marijuana in their possession; with the Registry, the government has knowledge as to the identity of every patient who intends to use medical marijuana under the laws of the State of Nevada, and, as such, the identify of its citizens who are violating federal law to do so. As a patient only enters the Registry through self-disclosure, the application to be included in the Registry is a direct admission that the person is, or is planning on violating federal law as a result of their medical use of marijuana. This admission would clearly be a "significant link in a chain of evidence".

Accordingly, the tests has been satisfied that the compelled disclosures required to obtain a medical marijuana card and be included in the Registry are a violation of the Appellant's (and others situated like him) Fifth Amendment privilege.

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B. NEVADANS HAVE A FUNDAMENTAL RIGHT TO ACCESS THE HEALTH CARE WHICH THEIR PHYSICIANS, IN THEIR PROFESSIONAL CAPACITY, RECOMMEND.

Few and far are the times when a Court is asked to enumerate a new fundamental right – this is one of those times.

The 14th Amendment includes both the Due Process Clause and the Equal Protection Clause. Generally, fundamental rights, such as those privacy rights, are established through the Due Process Clause, and are then upheld through the Equal Protection Clause.

The Due Process Clause of the Fourteenth Amendment declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word, as it applied to this case it "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, at least since Mugler v. Kansas, 123 U.S. 623, 660-661, 8 S.Ct. 273, 291, 31 L.Ed. 205 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions

regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." Whitney v. California, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). "[T]he guaranties of due process, though having their roots in Magna Carta's 'per legem terrae' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (*quoting* Hurtado v. California, 110 U.S. 516, 532, 4 S.Ct. 111, 119, 28 L.Ed. 232 (1884)).

1. Rights Created Through the 14th Amendment

The most familiar of the substantive rights (also referred to as "liberties") protected by the Fourteenth Amendment are those recognized by the Bill of Rights. The U.S. Supreme Court has held that the Due Process

Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 147-148, 88 S.Ct. 1444 1446, 20 L.Ed.2d 491 (1968). In doing so, the Court noted that rights are not limited to those expressly stated in the Constitution, but, rather, can be enumerated over time, as societal conditions demand. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

During the last term, in enumerating a new fundamental right related to same sex marriage, the Supreme Court stated that, in addition to the rights provided for within the Bill of Rights, the "liberties [protected by the Due Process Clause of the 14th Amendment] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." Obergefell v. Hodges, 576 US _, 135 S. Ct. 2071, 191 L. Ed. 2d 953 (2015) (*citing*, Eisenstadt v. Baird, 405 U. S. 438, 453 (1972); and Griswold v. Connecticut, 381 U. S. 479, 484–486 (1965)). The Supreme Court has been extremely clear that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter," Casey, *supra*, and health care is a major sector within this realm.

The Supreme Court has vindicated this principle on numerous

occasions. Marriage, for example, is mentioned nowhere in the Bill of Rights. Interracial marriage was illegal in most States in the 19th century. But the Court found interracial marriage to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817 1824, 18 L.Ed.2d 1010 (1967) (relying, in an opinion for eight Justices, on the Due Process Clause). Similar examples may be found in Turner v. Safley, 482 U.S. 78, 94-99, 107 S.Ct. 2254, 2265-2267, 96 L.Ed.2d 64 (1987) (addressing prisoners and the right to marry); in Carey v. Population Services International, 431 U.S. 678, 684-686, 97 S.Ct. 2010, 2015-2017, 52 L.Ed.2d 675 (1977)(matters of procreation); in Griswold, 381 U.S. at 481-482, as well as in the separate opinions of a majority of the Members of the Court in that case, id., at 486-488, 85 S.Ct., at 1682-1683 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (expressly relying on due process), id., at 500-502, 85 S.Ct., at 1690-1691 (Harlan, J., concurring in judgment) (same), id., at 502-507, 85 S.Ct., at 1691-1694 (WHITE, J., concurring in judgment) (same); in Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925) (choice of education for children); and in Meyer v. Nebraska, 262 U.S. 390, 399-403, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923)(finding law restricting foreign language education as

unconstitutional).

While various rights have been enumerated by the Courts, there are still rights which exist which have not been specifically ratified through the judiciary. This is because neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amend. 9. As the second Justice Harlan recognized:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. ***It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment***.

Poe v. Ullman, *supra*, 367 U.S., at 543, 81 S.Ct., at 1777 (Harlan, J., dissenting from dismissal on jurisdictional grounds) (***emphasis added***).

"The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." Obergefell, *supra.* That

responsibility, however, "has not been reduced to any formula." Id. (*citing* Poe, *supra*, 367 U. S. at 542 (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.

That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry ***but do not*** set its outer boundaries. See Lawrence v. Texas, 539 U. S. 558, 575 (2003). That method respects our history and learns from it without allowing the past alone to rule the present. It is because of this that the courts have established rights not always recognized by the law, at the time. These include the **right to marry**, Loving, *supra*; the **right to marry someone of the same sex**, Obergefell, *supra*; the **right to have children**, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); the **right 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); the **right to marital privacy**, Griswold, *supra*; the **right to use contraception**,

ibid; Eisenstadt, *supra*;[12] the **right to bodily integrity**, Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), the **right to abortion**, Casey *supra*; and the **right to refuse unwanted lifesaving medical treatment**. Cruzan v. Director, MDH, 497 U.S. 261, 278-279, 110 S.Ct., at 2851-2852 (1990).

In defining new fundamental rights, the Supreme Court states:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell, *supra*.

Conventional constitutional doctrine suggests that where reasonable people disagree the government can adopt one position or the other. See, e.g.,

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[12] Interestingly, the right to use contraception has its foundation in two different footholds of the 14th Amendment. In Griswold, the Supreme Court held that the Constitution does not permit a State to forbid a married couple to use contraceptives under the Due Process Clause. That same freedom was later guaranteed for unmarried couples under the Equal Protection Clause. See Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, the Supreme Court has ruled that a State may not compel or enforce one view or the other. See West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

2. The "Right" In this Case – The Right to Access Health Care

The transformation of marijuana from a recreational drug of abuse, primarily as a result of President Nixon's "war on drugs," to a medicinal option that is being recommended by licensed physicians for a plethora of indications is a paradigm shift that has taken decades to complete. Because of the long standing "war on drugs" and the propaganda surrounding it, it is easy to stigmatize marijuana.

This Court, however, need not make, nor should not make a value judgment as to the use of medical marijuana – such was already made by the

people of this great State. In 2001, based on the will of the people, Nevada amended its Constitution to allow the "use by a patient, upon the advice of his physician, [..] 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. While some may find the use of marijuana offensive to their most basic principles of morality, ***such that cannot control this Court's decision in this case***. As the Supreme Court stated when dealing with abortion, "[the Court's] obligation is to define the liberty of all, not to mandate our own moral code." Casey, *supra*.

Avoiding the stigma of marijuana, Appellant asks this Court to define the right which is essential to this case as, simply, the right to access health care; more precisely, the right to access the health care that our physicians recommend to us. Understanding the existence of this right, despite its lack of articulation through the judiciary to date, is quite simple. How can one have a right to have an abortion if they don't have a right to access the abortion procedure? Similarly, what good is a right to refuse medical treatment, if we do not have a right to access the medical treatment? What benefit is the right to contraception if we cannot access such? When phrased in such a manner, this new liberty – the right to access health care – seems obvious.

Again, our law already affords constitutional protection to personal

decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Carey, *supra*, 431 U.S., at 685, 97 S.Ct., at 2016. The Supreme Court has recognized and re-affirmed "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person." Eisenstadt, *supra*, 405 U.S., at 453, 92 S.Ct., at 1038. The Court has "respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). If matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, and they are central to the liberty protected by the Fourteenth Amendment, how much more so is the right to access health care?[13] As the Court said in Casey:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

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[13] The interests of the state, interestingly enough, are aligned with the interests of the people when understanding the right to access health care. It is undisputed that preservation of life is a state interest. In fact, the Nevada Supreme Court has expressly said that "[t]he State's interest in preserving life is both fundamental and compelling." McKay v. Bergstedt, 801 P.2d 617, 622 (Nev., 1990). Similarly, the reason why one would want unfettered access to health care is to preserve life. Only through access to health care can life be preserved.

505 US 833.

Before the turn of the nineteenth century, the Supreme Court observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000 1001, 35 L.Ed. 734 (1891).

This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914). The informed consent doctrine has become firmly entrenched in American tort law. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 32, pp. 189-192 (Fifth ed. 1984); F. Rozovsky, Consent to Treatment, A Practical Guide 1-98 (2d ed. 1990). It is through this concept that the Supreme Court labelled the right to withhold life-saving medical treatment in Cruzan, *supra*, 497 U.S.

at 273, as a "right of self-determination." Is not access to such health care integral to one's self-determination?

The right to consent to treatment and the right of self-determination are nothing more than veiled promises if this Court were to say that we do not have the fundamental right to access these physician recommended treatments; clearly, we do. How can we have "life, liberty and the pursuit of happiness" in the Bill of Rights, and life and liberty, under the 14th Amendment, if we cannot access the health care that is recommended to us by our physicians? It is unfathomable, under this framework, that a person has a fundamental liberty right to refuse medical care or obtain an abortion, but they do not have the ***fundamental right*** to ***access those health care options,***[14]

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[14] Respondents have not only suggested that this case is LIMITED TO the right to use marijuana, they wrote it into the district court's order; that is NOT Appellant's position. The right to use marijuana has been established in Nevada's constitution. Nev. Const. Art. IV, Sec. 38. Respondents' position ignores Nevada's constitution. Respondents also argue that such right cannot exist relying on Washington v. Glucksberg, 521 U.S. 702 (1997), and Vacco v. Quill, 521 U.S. 793 (1997). In doing so, Respondents claim these cases have already resolved the issue that there is no fundamental right to use medical marijuana. The Respondents' analysis is flawed. Glucksberg dealt with physician assisted suicide. In that case, the Supreme Court refused to enumerate a new fundamental right allowing physician to aid in a person's suicide. In the end, the Supreme Court could not overcome the fact that the end result of the action for which the patients sought protection was death – the complete antithesis of the state's interest of preserving a life. Similarly, Vacco was nothing more than New York's attempt to pass a law that was the antithesis to that in Glucksburg – a ban on physician assisted suicide law; hence, Vacco upheld the New York law for the same reason that Glucksberg

specifically, a treatment which their licensed physician has recommended.

C. SINCE NEVADANS HAVE SUCH A FUNDAMENTAL RIGHT, THE REGISTRY VIOLATES THAT RIGHT UNDER THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT?

1. The Right to Access Health Care and the Equal Protection Clause

The 14th Amendment also brings with it the Equal Protection Clause, in which the Constitution commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws.'' Unlike the Due Process Clause, this provision creates no substantive rights. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33, 93 S.Ct. 1278, 1296-1297, 36 L.Ed.2d 16 (1973); id., at 59, 93 S.Ct., at 1310 (Stewart, J., concurring). Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382 2394, 72 L.Ed.2d 786 (1982) (""[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same''') (*quoting* Tigner v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940)). Generally speaking, laws that

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failed. This is far different than the fundamental right that is being arguing in this case.

apply evenhandedly to all "unquestionably comply'' with the Equal Protection Clause. New York City Transit Authority v. Beazer, 440 U.S. 568, 587, 99 S.Ct. 1355, 1366-1367, 59 L.Ed.2d 587 (1979); see Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 271-273, 99 S.Ct. 2282, 2292-2293, 60 L.Ed.2d 870 (1979) ("[M]any [laws] affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law'').

Applying the Equal Protection analysis to the Registry and the associated fees, it quickly becomes obvious that the Registry and imposition of annual fees burdens a fundamental right – namely, the right to access health care recommended by a person's physician. The practice of medicine is already regulated through the state. See, e.g., NRS Chapter 630 (allopathic physicians); and NRS Chapter 633 (osteopathic physicians). When a physician is licensed, they are empowered to practice medicine, a term that is defined by statute as "(1) [t]o diagnose, treat, correct, prevent or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, ***by any means or instrumentality***, including, but not limited to, the performance of an autopsy" as well as (2) "[t]o apply principles or techniques of medical science in the diagnosis or the prevention of any such conditions." NRS § 630.020 (***emphasis added***). The ability of a physician

to treat a specific disease, injury or condition is not limited under the law. Accordingly, physicians who are licensed in Nevada are permitted to diagnose, treat and correct, a variety of conditions including, without limitation, the cancer, glaucoma, AIDS, epilepsy and other disorders characterized by seizure, and multiple sclerosis and other disorders characterized by muscular spasticity. And, according to the definition of the practice of medicine in Nevada, they are to do it by "any means or instrumentality." NRS § 630.020(1). This includes treatments through the use of medical marijuana – a treatment that has been embraced by this State in its Constitution. When Article 4, Section 38 as added in 2001, it specifically included these exact diseases, conditions and ailments (in addition to all others approved by law) as the conditions for which patients shall be able to use "a plant of the genus Cannabis," upon the advice of a physician. Nev. Const. Art. IV, Sec. 38.

With the legalization of medical marijuana in our Constitution, come new treatment options for patients. Where, historically, for example, cancer patients with extreme pain accessed narcotics and benzodiazepines for their pain and anxiety, now, cancer patients may use marijuana instead, as marijuana has been shown to treat pain and anxiety without the same harsh adverse side effects and fear for overdose that is associated with the traditional

drugs. This diversity in treatment options empowers patients to choose between a "traditional" medical treatments, such as manufactured narcotics or benzodiazepines, and the use of naturally grown plants from the genus of "Cannabis".

The rub arises in that those patients who chose cannabis become a suspect class who are treated differently than those who elect traditional medicine options. Unlike those who choose traditional medicine, those who elect to use medical marijuana need to first register with the State (a process that can take weeks, if not months),[15] and pay various fees[16] in order to merely access this alternative lawfully. Those, however, who elect traditional medicine, have immediate access to their treatment without the time or effort

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[15] The Registry is not accessible to physicians or patients through an electronic interface. Accordingly, inclusion in the Registry becomes an arduous process that takes a substantial amount of time. First, a patient must send the DHHS a written request for an application along with a fee. This is mailed to Carson City, and cannot be completed online. Then, once the request is processed, an application is mailed back to the patient. The patient then takes the application to his or her physician. Once completed, the patient needs to mail back the paperwork with another fee. This is then processed and a letter is sent to the patients. Once the letter is received, the patient can then go to the DMV to obtain a picture identification card. The entire process can take weeks, if not months to complete.

[16] In addition to the annual fees charged by the State, a patient will also have to pay for a physician assessment and for the physician to complete the requisite paperwork. It is believed that the total costs related to the Registry equal about $500 per year.

it takes to register with the State and without having to pay any fees for such registration. In other words, two people with the same condition will be treated differently with respect to the State's interference with their access to health care depending simply on what medical treatment each person seeks, regardless of the fact that the care sought has already been recommended by a licensed physician. Ultimately, the Registry and the associated fees become a restriction, a hurdle, on our fundamental right of accessing health care.

The Legislature argues that the Ninth Circuit rejected the claim of a fundamental right to medical marijuana in Raich v. Gonzales (Raich II), 500 F. 3d 850, 866 (9thCir.2007). App. Vol. 1_153-154. Raich did not challenge a state law related to medical marijuana, but rather the federal government's ban on marijuana, in general. Id. In doing so, Raich defined her fundamental right as the "right to "mak[e] life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life." Id. The Ninth Circuit noted that "Raich's carefully crafted interest comprises several fundamental rights that have been recognized at least in part by the Supreme Court." Id. (*citing* Lawrence, *supra*, 539 U.S. at 574, 123 S.Ct. 2472 (recognizing that "the Constitution demands [respect] for the autonomy of the person in making [personal] choices"); Casey, *supra*, 505 U.S. at 849, 112 S.Ct. 2791 (noting importance of protecting "bodily

integrity") and at 852, 112 S.Ct. 2791 (observing that a woman's "suffering is too intimate and personal" for government to compel such suffering by requiring woman to carry a pregnancy to term). The Ninth Circuit, however, did not adopt her carefully crafted interest, saying, notwithstanding, that her claim was really to use marijuana. In doing so, the Court restated the issue to be "whether the liberty interest specially protected by the Due Process Clause embraces a right to make a life-shaping decision on a physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed." Id.

The Ninth Circuit did not adopt this right. In doing so, the Court said:

> We agree with Raich that medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law as well. ***But that legal recognition has not yet reached the point where a conclusion can be drawn that the right to use medical marijuana is "fundamental" and "implicit in the concept of ordered liberty."*** See Glucksberg, 521 U.S. at 720-21, 117 S.Ct. 2258 (citations omitted). For the time being, this issue remains in "the arena of public debate and legislative action." Id. at 720, 117 S.Ct. 2258; see also Gonzales v. Raich, 125 S. Ct. 2195, 162 L.Ed.2d 1, 545 U. S. 1 (2005).

Id. at 866 (***emphasis added***).

There are major differences between Raich II and this case. First, and

most important, unlike California, a state that initiated medical marijuana solely through statute, Nevada initiated it through a constitutional amendment. To that end, Nevada patients already have a CONSTITUTIONAL RIGHT under the Nevada Constitution to access medical marijuana. See Nev. Const. Art. IV, Sec. 38. This is a ***huge*** distinction.

Second, at the time the controversy arose in Raich II, California was the only state to have legalized medical marijuana. Being in such a minority, it is understandable that the Court could not show that such was deeply rooted in society. Raich II, 500 F. 3d at 864. Now, however, virtually half the states in the Union have legalized medical marijuana. Initiated through both ballot questions as well as through legislative action, as demonstrated through the following survey of state laws,[17] 23 states and the District of Columbia have legalized medical marijuana:

STATE	YEAR PASSED	HOW PASSED (YES VOTE)
California	1996	Proposition 215 (56%)
Alaska	1998	Ballot Measure 8 (58%)
Oregon	1998	Ballot Measure 67 (55%)
Washington	1998	Initiative 692 (59%)
Maine	1999	Ballot Question 2 (61%)
Colorado	2000	Ballot Amendment 20 (54%)
Hawaii	2000	Senate Bill 862 (32-18 H; 13-12 S)

[17] This survey is the original work product of Appellant's counsel, which was performed specifically for this case.

Nevada	2000	Ballot Question 9 (65%)
Montana	2004	Initiative 148 (62%)
Vermont	2004	Senate Bill 76 (22-7) HB 645 (82-59)
Rhode Island	2006	Senate Bill 0710 (52-10 H; 33-1 S)
New Mexico	2007	Senate Bill 523 (36-31 H; 32-3 S)
Michigan	2008	Proposal 1 (63%)
Arizona	2010	Proposition 203 (50.13%)
District of Columbia	2010	Amendment Act B18-622 (13-0 vote)
New Jersey	2010	Senate Bill 119 (48-14 H; 25-13 S)
Delaware	2011	Senate Bill 17 (27-14 H, 17-4 S)
Connecticut	2012	House Bill 5389 (96-51 H, 21-13 S)
Massachusetts	2012	Ballot Question 3 (63%)
Illinois	2013	House Bill 1 (61-57 H; 35-21 S)
New Hampshire	2013	House Bill 573 (284-66 H; 18-6 S)
Maryland	2014	House Bill 881 (125-11 H; 44-2 S)
Minnesota	2014	Senate Bill 2470 (46-16 S; 89-40 H)
New York	2014	Assembly Bill 6357 (117-13 A; 49-10 S)

And this is only going to grow. Currently, eleven (11) additional states are currently considering legalizing medical marijuana to some extent. Clearly, the role of medical marijuana in our culture and marketplace is much more established than it was over a decade ago when Raich II was before the Ninth Circuit. As we saw with gay marriage, this Country no longer needs to wait decades and decades to enunciate a new recognized fundamental right; with today's speed of information and connectivity, trends that used to take decades to be adopted, now can gain support in a matter of years.

Third, Raich II challenged the federal regulation of marijuana by the Controlled Substances Act; this case is challenging the Registry and

associated fees initiated by the Legislature in NRS Chapter 453A. Raich II challenged federal regulation because of the existence of state law, and, in doing so, ignited legal challenges under the Tenth Amendment of the U.S. Constitution. This case, however, has no Supremacy Clause or Tenth Amendment issues.

For these reasons, Raich II, is distinguishable from the instant case, and this Court should not be misled by the Respondents in their pursuit to have it adopted in this case.

2. Level of Scrutiny: Strict Scrutiny or Rational Basis?

Understanding that there is a barrier for those who elect to access medical marijuana, the question for this Court becomes is that barrier constitutional? When a state statute burdens a fundamental right or targets a suspect class, that statute receives heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause. Romer, *supra*, 517 U.S. at 631. Statutes that treat individuals differently based on their race, alienage, or national origin "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1986). Statutes infringing on fundamental rights are subject to

the same searching review. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (right to marry); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to interstate travel). When a fundamental right is recognized, substantive due process forbids the infringement of that right "at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (emphasis omitted); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (internal quotation marks omitted). Few laws survive such scrutiny.

As discussed above, we clearly have a fundamental right to access health care. As such, this Court must apply a strict scrutiny analysis – is the Registry and the associated fees narrowly tailored to serve a compelling state interest? The answer is no. There are far less intrusive manners to regulate marijuana ***as a drug***.

As discussed herein, the State already has a process for protecting the public from all dangerous drugs (as defined herein) and controlled substances without the need for a Registry or the associated fees. That process, primarily through the Board of Pharmacy, NRS Chapter 639, and through the Controlled Substances Act, NRS Chapter 453, relies on the profession of the pharmacist

to validate the physician recommendation for the particular drug, and keep track of those who receive such prescriptions. This is completed by the pharmacist receiving, verifying and storing a prescription. This process applies to the thousands of pharmaceuticals sold today.

Why, then, for this one and only medical option, specially, 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, does the State require the Registry and the associated fees? It should be noted that the Registry in nothing more than a preliminary hurdle to access medical marijuana. The Registry does not track or monitor the use of its registrants. The Registry does not regulate the dosage available to the registrants. The Registry does not prohibit over-use of medical marijuana, or the frequency of purchases by an applicant. Clearly, the Registry and associated fees are not narrowly tailored to serve the State's interest. .

Appellant suggests that the Registry should be analyzed under the same test used in NAACP v. Patterson, 357 U.S. 449, 461 (1958), and its progeny of cases. In NAACP, the Supreme Court struck down a requirement that the NAACP disclose its membership roster to the State. In that case, the Court noted that "[i]t is hardly a novel perception that compelled disclosure of

affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association." Id. at 462. The Court continued by noting that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." Id. (*citing* United States v. Rumely, 345 U.S. 41, 56-58, 73 S. Ct. 543 (1953)(concurring opinion)).

In completing its analysis in NAACP, the Court's final question was "[w]hether there was 'justification' in this instance turns solely on the substantiality of Alabama's interest in obtaining the membership lists." Id. at 464.

The Supreme Court used NAACP to strike the unilateral state imposed restrictions on contraceptives in Connecticut. See Griswold, *supra*. The Court in Griswold noted that the state was empowered to regulate the manufacture and sale of contraceptives, but not to forbid them. Id., 381 US at 485. The Court continued to suggest that a ban on contraceptives would result in "police [searching] the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." Id. The called such invasion of the home as "repulsive to the notions of privacy surrounding the marriage relationship." Id., 381 US at 486.

Similarly, this Court must look at the results of a Registry. There is no valid benefit of the Registry. It is nothing more than a gatekeeper, and a redundant one at that. Through the prescription system already in place, patients have a mechanism to demonstrate the validity of the medical recommendation for medical marijuana. Dispensaries can validate the recommendation directly through the office of the physician who made the recommendation. The only real difference is that those who require Registry inclusion, must make a compelled disclosure to the State, pay various fees to do so and wait a substantial amount of time before they are allowed to access their health care. And for what? Clearly, this creates an undue burden on patients who are trying to access one specific medical recommendation made by their physician. For this reason, the Registry should be struck as unconstitutional under a strict scrutiny standard.

However, if this Court rejects the request to recognize a new fundamental right, then this Court should apply a rational basis test to the Registry and the associated fees, and find it unconstitutional under such.

First, in order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately. City of Cleburne, *supra*, 473 U.S. at 439, 105 S.Ct. 3249; Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) ("The Equal Protection Clause ... keeps

governmental decision-makers from treating differently persons who are in all relevant respects alike."); Dillingham v. INS, 267 F.3d 996, 1007 (9th Cir.2001). The Registry and associated fees clearly treat people differently; namely, as discussed above, those people who have the same medical condition, but elect to use different treatments. The person who elects to use medical marijuana – a right conferred by the Nevada Constitution – will have substantial additional barriers to access that care, legally, than someone who elects ANY other medical treatment.

When assessing the validity of legislation under the rational-basis test, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne, *supra*, 473 U.S. at 439, 105 S.Ct. 3249; see also Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

The burden falls upon the party attacking a legislative classification reviewed under the rational-basis standard to demonstrate that there is no reasonable basis for the challenged distinction. When a statute is reviewed under the rational-basis test, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might

support it." Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (citation and quotation marks omitted); see also Mathews v. Lucas, 427 U.S. 495, 510, 96 S. Ct. 2755 (1976). The legislative record need not contain empirical evidence to support the classification so long as the legislative choice is a reasonable one. Beach Communications, *supra*, 508 U.S. at 315, 113 S.Ct. 2096; Nordlinger, *supra*, 505 U.S. at 15, 112 S.Ct. 2326 ("[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification."). Although the government is relieved of providing a justification for a statute challenged under the rational-basis test, such a justification must nevertheless exist, or the standard of review would have no meaning at all. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." Romer, *supra*, 517 U.S. at 632, 116 S.Ct. 1620.

In this case, in the Legislature's Motion for Summary Judgment, the Legislature sets forth its reasons for why the Registry and the associated fees meet the rational basis test. Respondents argument is limited to the following legitimate interests:

1) *Regulating a patient's use of potentially dangerous drugs in medical*

treatments to protect the public's health and safety. This is allegedly done by "requiring a patient to satisfy and submit proof of certain health and safety standards before the patient may engage in the use of medical marijuana." App. Vol. 1_155.

2) They also argue that "the fee and registration requirements also ensure that the State is able to operate and maintain the Registry to identify which patients are authorized to use medical marijuana so that, if necessary, the State may verify whether the patients are using medical marijuana in compliance with all health and safety standards required by state law." Id. at 140-142.[18]

In assessing this part of the test, this Court must first ask whether creating and maintaining a Registry of those people who elect to use medical marijuana is, in fact, a legitimate state interest. Since the Nevada Constitution established the use of "Cannabis" as medical, then this part of the test must look at the Registry and associated fees in context of how the State deals with other medicines.

[18] In essence, this is an admission that the Registry is for law enforcement purposes, making the Registry, as discussed above, a violation of the Fifth Amendment privilege against self-incrimination.

The fact is that there is NO purpose for the Registry BEYOND law enforcement activities. There is no Registry for Nevada patients who use narcotics for pain relief. There is no Registry for Nevada patients who use benzodiazepines for seizure control. There is no Registry for Nevada patients who use ANY OTHER TREATMENT BESIDES MARIJUANA 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."[19]

Appellant acknowledges that the State has an interest to regulate pharmaceuticals. The fact is that Nevada already has a system for regulating "dangerous drugs" in medical treatments – such occurs through the Nevada State Board of Pharmacy and its associated statutes and regulations. See NRS Chapter 639 (pharmacists and pharmacy) and NRS Chapter 453 (controlled substances), and NRS Chapter 454 (poisons, dangerous drugs and hypodermics). Through this pre-existing regulatory scheme, thousands of

[19] These are the permissive uses for medical marijuana as set forth in Article VI, Section 38 of the Nevada Constitution.

"dangerous drugs"[20] are regulated to ensure the safety and health of the public. To that end, the State already regulates "dangerous drugs" including narcotics, benzodiazepines, poisons, such as chemotherapies, and toxins, such as botox, as well as controlled substances, such as cocaine. Such regulation is completed without a Registry of patients or any associated fees. In fact, every day, patients are able to access various medications recommended to them by

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[20] The term "dangerous drug" is a bit misleading to those who may not understand the regulation of health care in this State. A "dangerous drug" is ANY prescription drug. This is deduced by NRS § 454.201 which defines "dangerous drug" as follows:

> any drug, other than a controlled substance, unsafe for self-medication or unsupervised use, and includes the following:
>
> 1. Any drug which has been approved by the Food and Drug Administration for general distribution and bears the legend: "Caution: Federal law prohibits dispensing without prescription";
>
> 2. Procaine hydrochloride with preservatives and stabilizers (Gerovital H3) in injectable doses and amygdalin (laetrile) which have been licensed by the State Board of Health for manufacture in this State but have not been approved as drugs by the Food and Drug Administration; or
>
> 3. Any drug which, pursuant to the Board's regulations, may be sold only by prescription because the Board has found those drugs to be dangerous to public health or safety."

their physicians, including narcotics, benzodiazepines, and even cocaine,[21] legally, without first having to clear various hurdles, such as being included in a state administered Registry, or paying a fee to be included in the Registry. Patients have such unfettered access to these drugs, despite their propensity for abuse.

The State has decade of experience of regulating drugs and medicines. It is not coincidental that all of the State's regulations are limited to the manufacture and distribution side of the industry, not the patient access side of the equation. For example, it is no secret that methamphetamine is a substantial danger to our community. When it was discovered that people were misusing pseudoephedrine to manufacture methamphetamine, the State imposed certain quantity restrictions on the purchase of pseudoephedrine. This was an appropriate effort that met the State's interest, while, at the same time, did not create undue barriers to access of pseudoephedrine for those who need that drug. And, yet, there is no State administered Registry for pseudoephedrine purchases. There are certainly no initial or annual fees required so that a person can obtain pseudoephedrine.

[21] Cocaine is used routinely in emergency rooms as part of a mixture of pharmaceuticals to treat severe epistaxis (or nosebleeds).

Similarly, despite the horrors of narcotic abuse and overdose in our State,[22] we do not have a Registry for people who take narcotics. Rather, we, as a community, are working to distribute naloxone hydrochloride, or, Narcan®, a narcotic antagonist which reverses the effects of a narcotic overdose almost instantaneously, throughout the community. In fact, Narcan® is now being dispensed without a prescription.

In fact, there are no other drugs or medical treatments for which a patient must first apply for State permission, wait for the application to be processed, and pay fees associated with the registration before that patient can obtain access to the drug or medical treatment. Surely, this is not because the regulation of other medicines and medical treatments are not an important

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[22] The abuse of prescription pain medications was recently addressed in an article in the Las Vegas Sun. The article noted that:

> Studies place Nevada in the top tier of states for the highest number of painkiller prescriptions written, the worst prescription painkiller abuse problems and the most deaths due to drug overdoses — the majority due to prescription drugs. Data from the state pharmacy board place Nevada second in the nation for number of prescriptions written for oxycodone, sold commercially as OxyContin and Percocet, and hydrocodone, sold as Lortab and Vicodin.

Megan Messerly, "We Have A Prescription Pill Problem," Las Vegas Sun, Sept.28, 2015.

state interest, but, rather, that a Registry and associated fees are not rationally related to serving that important state interest.

Moreover, as discussed above, the Registry has no other function but acting as an initial gatekeeper. It does not monitor the purchases of its registrants. It does not prevent, proactively, or retrospectively, excessive purchases by registrants. It does not identify abusers of the system, or prevent them from continuing to abuse the system. In fact, it does not even prevent children from accessing medical marijuana, as there are no age limits on the program!

The State's arguments for a rational basis for the Registry and fees are erroneous. There is no way that a fee-based Registry – one which an applicant applies for BEFORE they obtain the medical marijuana – can assure "compliance with all health and safety standards required by state law." What standards? That a physician recommended the medical marijuana? That is verified through the paper that the physician gives the patient. If the State has a question, inspection of that paper should be sufficient.

There is no legitimate purpose served by adding a Registry requirement and annual fee in order for patients to access this one and only drug – a plant of the genus Cannabis.

Respondents further argue that it is the barrier to entry, itself, that promotes public safety, as it prevents those with felony records from participating in the Registry. The belief that preventing people with felony convictions from accessing medical marijuana promotes public safety is complete legal fiction. If someone is a criminal, it is not likely that they would participate in the Registry, as access to street marijuana is still plentiful and cheaper than what is available at the legal dispensaries (although having a criminal transition his marijuana acquisition from the black market to a regulated market, would actually be a benefit to the people of this State). Second, Respondents' position does not take into account why the person has the criminal conviction. For example, wouldn't Nevada want to welcome a stable, educated professional who decides to move his entire business to Nevada because he can now get legalized medical marijuana for his glaucoma, as opposed to his current state, where such is illegal (which is why he had a felony conviction)?

The only other basis for the Registry is to facilitate ***law enforcement*** confirmation of enrollment in the Registry if someone is found to be in possession of marijuana. However, this argument is nonsensical, also, as it is not law enforcement's job to be a trier of fact; rather, that is for the courts. If law enforcement finds someone with marijuana, and is concerned about

such, they should follow the law and issue a citation. It should then be the patient's burden to demonstrate how, at the time of the search, the patient had a valid recommendation from his or her physician.

Accordingly, under the 14th Amendment, we have a fundamental right to access the health care which is recommended to us by our physicians. The Registry and associated fees are an improper restriction on that right. Notwithstanding, given the State's ability to regulate all dangerous drugs and controlled substances since such regulation was first initiated, without a Registry and fees, the imposition of such in this case does not meet even a rational basis test.

Appellant, thus, the district court erred in denying Appellant's 14th Amendment claims.

D. THE DISTRICT COURT ERRED IN NOT PROVIDING INJUNCTIVE RELIEF.

"Broadly speaking, an injunction may issue to restrain a wrongful act that gives rise to a cause of action. Chateau Vegas Wine, Inc. v. Southern Wine & Spirits of America, Inc., 265 P.3d 680, 685 (Nev., 2012) (*citing* State Farm Mut. Auto. Ins. v. Jafbros Inc., 109 Nev. 926, 928, 860 P.2d 176, 178 (1993)). "Permanent injunctive relief may only be granted if there is no

adequate remedy at law, a balancing of equities favors the moving party, and success on the merits is demonstrated." Id.

The loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued. Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689-690 (1976). See, also, Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 979 (D. Ariz. 2011) (on-going "exposure to [an unconstitutional] policy is both itself an ongoing harm and evidence that there is 'sufficient likelihood' that Appellants' rights will be violated again" is a sufficient showing to grant a preliminary injunction.); Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (unlawful detention); LaDuke v. Nelson, 762 F.2d 1318, 1326 (9th Cir. 1985) (warrantless farm inspections); see also, New York Times Co.v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (the loss of First Amendment freedoms, for even minimal periods of time).

As discussed above, the Registry violates medical marijuana patient's Fifth Amendment privilege against self-incrimination, as well as the Equal Protection Clause of the 14th Amendment. If this Court believes that the Registry is a violation of these constitution rights, then the district court erred in not providing injunctive relief.

E. THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S STATE LAW TORT CLAIMS.

The district court dismissed Appellant's state law claims on the basis of sovereign immunity pursuant to NRS §41.032(1). In light of the above argument, this was erroneous.

"Like most states, Nevada has waived traditional sovereign immunity from tort liability, with some exceptions." Franchise Tax Bd. of State v. Hyatt, 335 P.3d 125, 130 Nev. Adv. Op. 71 (Nev., 2014) (*citing* NRS § 41.031). The relevant exception at issue in this appeal is discretionary-function immunity, which provides that no action can be brought against the state or its employee "[b]ased 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.***" NRS § 41.032(1) (***emphasis added***). By adopting discretionary-function immunity, our Legislature has placed a limit on its waiver of sovereign immunity. Discretionary immunity is grounded in separation of powers concerns and is designed to preclude the judicial branch from "second-guessing," in a tort action, legislative and executive branch decisions that are based on "social, economic, and political policy." Martinez v. Maruszczak, 123 Nev. 433, 446,

168 P.3d 720, 729 (2007) (internal quotations omitted); see also Bailey v. United States, 623 F.3d 855, 860 (9th Cir.2010).

However, the immunity sought is only applicable if a statute or regulation has not been declared invalid by a court of competent jurisdiction. NRS § 41.032(1). That is exactly the purpose of this case – to declare the laws requiring the fee-based registry unconstitutional. Should this Court find that the statutes in question are invalid, then the immunity set forth under NRS §41.032(1) shall not apply, and Appellant's state law claims should be re-animated.

F. THE DISTRICT COURT ERRED IN NOT ALLOWING APPELLANT TO AMEND HIS COMPLAINT TO NAME THE PROPER PARTIES FOR PURPOSES OF §1983 DECLARATORY AND INJUNCTIVE RELIEF.

The district court found that amendment of the pleadings to name the proper party for purposes of 42 USC §1983 declaratory and injunctive relief would be futile based on its decisions regarding the underlying legal principles. App. V3_525-529. For the same reasons as stated above,

Appellant has brought meritorious claims, and amendment should be allowed.[23]

[23] While it may appear that Nevada's declaratory relief statute would provide the same relief that §1983 could, such is not true §1983 comes with an attorneys' fee provision for a prevailing party under §1988. If Appellant is successful in bringing this case of first impression, especially one in which this Court enumerates a new fundamental right, he should be rewarded with the fee shifting statute which Congress intended under 42 USC §1988 for this very type of case.

CONCLUSION

Few and far are the genuine opportunities for a jurist or justice to make history by enumerating a fundamental right which, until that time, has not been defined; this is that time. A common theme amongst many of the court enumerated fundamental rights is healthcare. Whether it be the right to terminate life, the right to contraception, or the right to withhold life-sustaining hydration or nutrition, health care, and access thereto, envelopes these rights.

When the people of this Great State amended its Constitution in 2001 to provide a right to use the plant of the genus Cannabis, they also inferred that we have the right to access such as a treatment if our physicians so recommend. Such inference is essential because, while it has yet to be enumerated, we know that without access to health care, any such right, whether it be abortion, contraception, or medical marijuana, is meaningless.

Now is the time to stand up, and seize the opportunity to make our society even better through the clear enumeration of a right which we know exists, one which we have failed to enumerate – the right to access the health care which our physicians recommend.

By enumerating this known right, this Court should then strike the Registry as an improper burden on a fundamental right. Notwithstanding,

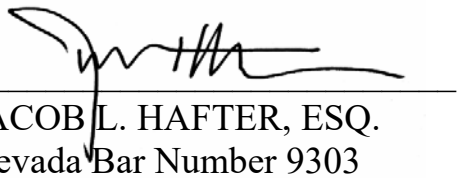
even on a rational basis test, because the Registry does not have any real protections to the public, besides just limiting access to those with felony convictions (without regard to the basis for the conviction), the Registry must also fail.

Further, because the Registry compels an incriminating disclosure under federal law, it should be struck as a violation of Nevadan's Fifth Amendment privilege against self-incrimination.

Finally, this Court should overturn the dismissal of the state law claims, the federal declaratory and injunctive claims, and the denial of injunctive relief.

DATED THIS 27th day of May, 2016.

HAFTERLAW

By: 

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CERTIFICATE OF COMPLIANCE

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[XX] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font; or

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies

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DATED THIS 27th day of May, 2016.

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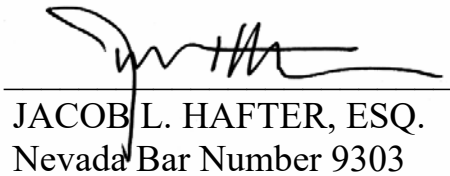
By: 

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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 27th day of May, 2016, I served a copy of the **APPELLANT'S OPENING BRIEF** 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

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