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.

JOINT APPENDIX VOLUME 3

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

HAFTERLAW
JACOB L. HAFTER, Esq.
Nevada Bar Number 9303
6851 West Charleston Blvd.
Las Vegas, Nevada 89117

May 27, 2016

INDEX TO JOINT APPENDIX

Electronically Filed
02/05/2016 08:56:32 AM

CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

ORDER AND JUDGMENT

INTRODUCTION

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

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

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

PROCEDURAL BACKGROUND

A. Parties and claims.

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

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

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

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

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

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

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

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

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

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

B. Dispositive motions.

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

necessary for the medical use of the patient to treat his or her specific medical condition;

(3) Because of illness or lack of transportation, the holder and his or her primary caregiver are unable reasonably to travel to a medical marijuana dispensary; or

(4) No medical marijuana dispensary was operating within 25 miles of the residence of the holder at the time he or she first applied for his or her registration card.

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

registry identification card or letter of approval.

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

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

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

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

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

B. Standards of review.

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

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

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

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

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

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

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

C. Federal constitutional claims for money damages.

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

D. Federal constitutional claims for declaratory and injunctive relief.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Fourteenth Amendment claims.

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

---

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

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

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

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

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

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

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

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

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

Id. (footnotes omitted).

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

selling a controlled substance."

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

F. Fifth Amendment claim.

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

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

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

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

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

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

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

Id. at 311.

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

G. State-law tort claims.

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

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

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

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

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

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

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

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

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

ORDER AND JUDGMENT

IT IS ORDERED AND ADJUDGED THAT:

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

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

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

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

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

DATED: This 9 day of February, 2016.

ROB BARE
DISTRICT JUDGE

Respectfully submitted by:

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

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

GREGORY L. ZUNINO, Chief Deputy Attorney General
Nevada Bar No. 4805
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 89701
Tel: (775) 684-1237; Fax: (775) 684-1180; E-mail: gzunino@ag.nv.gov
Attorneys for Defendant State of Nevada ex rel. the Governor

NEOJ
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 Street
Carson City, NV 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
E-mail: kpowers@lcb.state.nv.us
Attorneys for Defendant Legislature of the State of Nevada

Electronically Filed
02/05/2016 11:42:54 AM

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

NOTICE OF ENTRY OF ORDER AND JUDGMENT

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

//

//

DATED: This 5th day of February, 2016.

Respectfully submitted,

BRENDA J. ERDOES
Legislative Counsel

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

CERTIFICATE OF SERVICE

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

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

ADAM PAUL LAXALT, ESQ.
Attorney General
LINDA C. ANDERSON, ESQ.
Chief Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave. Ste. 3900
Las Vegas, NV 89101
landerson@ag.nv.gov
GREGORY L. ZUNINO, ESQ.
Chief Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 89701
gzunino@ag.nv.gov
Attorneys for Defendants State of Nevada, Department of Health and Human Services and Governor Sandoval

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

Exhibit A

Electronically Filed
02/05/2016 08:56:32 AM

CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

ORDER AND JUDGMENT

INTRODUCTION

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

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

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

PROCEDURAL BACKGROUND

A. Parties and claims.

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

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

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

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

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

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

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

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

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

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

B. Dispositive motions.

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

necessary for the medical use of the patient to treat his or her specific medical condition;

(3) Because of illness or lack of transportation, the holder and his or her primary caregiver are unable reasonably to travel to a medical marijuana dispensary; or

(4) No medical marijuana dispensary was operating within 25 miles of the residence of the holder at the time he or she first applied for his or her registration card.

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

registry identification card or letter of approval.

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

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

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

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

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

B. Standards of review.

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

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

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

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

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

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

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

C. Federal constitutional claims for money damages.

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

D. Federal constitutional claims for declaratory and injunctive relief.

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

E. Fourteenth Amendment claims.

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

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

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

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

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

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

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

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

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

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

Id. (footnotes omitted).

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

selling a controlled substance."

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

F. Fifth Amendment claim.

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

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

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

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

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

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

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

Id. at 311.

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

G. State-law tort claims.

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

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

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

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

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

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

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

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

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

ORDER AND JUDGMENT

IT IS ORDERED AND ADJUDGED THAT:

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

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

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

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

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

DATED: This 4 day of February, 2016.

ROB BARE
DISTRICT JUDGE

Respectfully submitted by:

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

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

GREGORY L. ZUNINO, Chief Deputy Attorney General
Nevada Bar No. 4805
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 89701
Tel: (775) 684-1237; Fax: (775) 684-1180; E-mail: gzunino@ag.nv.gov
Attorneys for Defendant State of Nevada ex rel. the Governor

Electronically Filed
02/22/2016 07:29:59 AM

CLERK OF THE COURT

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

Counsel for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

STATE OF NEVADA

JOHN DOE, on his own behalf and on behalf of a class of those similarly situated; Plaintiff, vs. **STATE OF NEVADA ex rel. THE LEGISLATURE OF THE 77th SESSION OF THE STATE OF NEVADA; STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; THE HONORABLE BRIAN SANDOVAL**, in his official capacity as Governor of the State of Nevada; DOES 1-100, inclusive; and ROE CORPORATIONS 1-100, inclusive; Defendants.	Case No.: A-15-723045-C Dept. No. XXXII **NOTICE OF APPEAL**

Notice is hereby given that Plaintiff JOHN DOE, by and through Jacob L. Hafter, Esq., of **HAFTERLAW**, hereby appeals to the Supreme Court of Nevada, the following:

1) Order and Judgment, in the above referenced matter issued by the Eighth Judicial District Court of the State of Nevada on February 4, 2016;

Pursuant to Rule (3)(8)(1), the Case Appeal Statement is being filed concomitantly with this Notice of Appeal.

///

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

Dated this 22nd day of February, 2016.

HAFTERLAW

By: _____

Jacob L. Hafter, Esq.
Nevada Bar Number 9303
6851 West Charleston Blvd.
Las Vegas, Nevada 89117

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HAFTERLAW, and that on this 22nd day of February, 2016, I served a copy of the foregoing ***NOTICE OF APPEAL*** 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

☑ Electronic Service through the Court's electronic filing system. and/or

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

☐ Electronic Delivery—Pursuant to party stipulation, such was sent to the e-mail address as follows:

Kevin C. Powers, Esq.
J. Daniel Yu, Esq.
Legislative Counsel Bureau, Legal Div.
kpowers@lcb.state.nv.us
Dan.Yu@lcb.state.nv.us
Attorneys for Defendant:
Legislature of the State of Nevada

Adam Paul Laxalt, Esq.
Attorney General
Gregory Zunino, Esq.
Chief Deputy Attorney General
Linda Anderson, Esq.
Deputy Attorney General
Office of the Attorney General
GZunino@ag.nv.gov
LAnderson@ag.nv.gov
Attorneys for Defendant:
Department of Health and Human Services
State of Nevada and Governor Sandoval

/s/ Kelli Wightman
An employee of HAFTERLAW

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

Electronically Filed
02/22/2016 07:31:03 AM

CLERK OF THE COURT

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

Counsel for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

STATE OF NEVADA

JOHN DOE, on his own behalf and on behalf of a class of those similarly situated; Plaintiff, vs. **STATE OF NEVADA ex rel. THE LEGISLATURE OF THE 77th SESSION OF THE STATE OF NEVADA; STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; THE HONORABLE BRIAN SANDOVAL,** in his official capacity as Governor of the State of Nevada; DOES 1-100, inclusive; and ROE CORPORATIONS 1-100, inclusive; Defendants.	Supreme Court of NV Case No: District Ct. Case No.: A-15-723045-C Dept. No. XXXII **CASE APPEAL STATEMENT**

1. **Name of appellant(s) filing this case appeal statement:**

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

2. **Identify the judge issuing the decision, judgment, or order appealed from:**

HONORABLE ROB BARE

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

3. **Identify each appellant and the name and address of counsel for each appellant:**

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

Counsel for Appellant is:

Jacob L. Hafter, Esq.
HAFTERLAW
6851 West Charleston Blvd.
Las Vegas, Nevada 89117
Phone: 702-405-6700
Facsimile: 702-685-4184
jhafter@hafterlaw.com

4. **Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):**

- **STATE OF NEVADA** *ex rel.* **THE LEGISLATURE OF THE 77TH SESSION OF THE STATE OF NEVADA;**
- **STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES**; and
- **THE HONORABLE BRIAN SANDOVAL**, *in his official capacity as Governor of the State of Nevada.*

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

Counsel for Respondents:

Brenda J. Erdoes, Esq. - Legislative Counsel
Kevin C. Powers, Esq. – Chief Litigation Counsel
Legislative Counsel Bureau, Legal Division
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
kpowers@lcb.state.nv.us

Adam Paul Laxalt, Esq. – Attorney General
Gregory Zunino, Esq. – Chief Deputy Attorney General
Office of the Attorney General
100 N. Carson St.
Carson City, NV 89701
Tel: (775) 684-1237; Fax: (775) 684-1180
Attorneys for Defendants State of Nevada and Governor Sandoval
Email: gzunino@ag.nv.gov

Adam Paul Laxalt, Esq. – Attorney General
Linda Anderson, Esq. – Chief Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
Tel: (702) 486-3420; Fax: (702) 486-3871
Attorneys for Defendants State of Nevada and Department of Health and Human Services
Email: landerson@ag.nv.gov

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

Not applicable. All parties identified above are licensed in Nevada.

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

6. **Indicate whether appellant was represented by appointed or retained counsel in the district court:**

Jacob Hafter, Esq., of HAFTERLAW, was retained counsel for Appellant in the district court.

7. **Indicate whether appellant is represented by appointed or retained counsel on appeal:**

This office, HafterLaw, will represent Appellant for the appeal on a retained basis.

8. **Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:**

Not applicable / None was granted.

9. **Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):**

The Complaint was filed in the district court on August 13, 2015.

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This action seeks to challenge the legitimacy of the Medical Marijuana Registry ("Registry"), on the basis of the 5th Amendment and 14th Amendments of the U.S. Constitution. Specifically, this action alleges that the application process for the Registry is a compelled disclosure which violates the applicant's privilege against self-incrimination. Additionally, this Court is asked to enunciate a basis fundamental right which, while not expressed previously by the Courts, is implicit within all of the Supreme Court's fundamental rights opinions – the fundamental right to access the health care which your physician recommends. In doing so, as the Constitutional provision allowing medical marijuana recognizes it as a health care option, the Registry violates our equal protection rights.

This action also alleges that the Defendants purposefully took payments from citizens of this State to be included in the Registry, when the Defendants knew or should have known that the a person who is on the Registry could not enjoy the benefits of the Registry, as there were no dispensaries available during the one year term of a person's inclusion in the Registry. This action seeks to compensate the class of people who were included in the Registry

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

once the legislative changes of 2013 were implemented, until the date of filing of this action, as no dispensaries were ever opened during this two year period.

The action was initiated on August 13, 2015. A First Amended Complaint was filed on August 20, 2015. On September 21, 2015, Plaintiff filed a motion for partial summary judgment and for preliminary injunction. A stipulation and order was entered setting a briefing schedule amongst the parties. Defendants filed numerous motions to dismiss and summary judgment motions. The Court entertained about 3 hours of oral argument on the motions on December 8, 2015.

On February 4, 2016, the district court entered an Order and Judgment. The Order denied all of Plaintiff's motions and granted all of Defendants' motions. The Notice of Entry of Order and Judgment was filed on February 5, 2016. See **Exhibit "A"**.

This appeal stems from that denial.

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:

Not applicable. Case has never been appealed.

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

12. Indicate whether this appeal involves child custody or visitation:

No.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

This is a case of first impression which involves political issues which are important to the people of this great State. While Appellant is willing to consider settlement discussions, it is unclear how a settlement can be reached without the Court's addressing the question of law presented.

DATED this 22nd day of February, 2016.

HAFTERLAW

By: _____

Jacob L. Hafter, Esq.
Nevada Bar Number 9303
6851 West Charleston Blvd.
Las Vegas, Nevada 89117

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HAFTERLAW, and that on this 22nd day of February, 2016, I served a copy of the foregoing ***CASE APPEAL STATEMENT*** 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

☑ Electronic Service through the Court's electronic filing system. and/or

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

☐ Electronic Delivery—Pursuant to party stipulation, such was sent to the e-mail address as follows:

Kevin C. Powers, Esq.
J. Daniel Yu, Esq.
Legislative Counsel Bureau, Legal Div.
kpowers@lcb.state.nv.us
Dan.Yu@lcb.state.nv.us
Attorneys for Defendant:
Legislature of the State of Nevada

Adam Paul Laxalt, Esq.
Attorney General
Gregory Zunino, Esq.
Chief Deputy Attorney General
Linda Anderson, Esq.
Deputy Attorney General
Office of the Attorney General
GZunino@ag.nv.gov
LAnderson@ag.nv.gov
Attorneys for Defendant:
Department of Health and Human Services
State of Nevada and Governor Sandoval

/s/ Kelli Wightman
An employee of HAFTERLAW

6651 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

EXHIBIT "A"

EXHIBIT "A"

NEOJ
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 Street
Carson City, NV 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
E-mail: kpowers@lcb.state.nv.us
Attorneys for Defendant Legislature of the State of Nevada

Electronically Filed
02/05/2016 11:42:54 AM

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

NOTICE OF ENTRY OF ORDER AND JUDGMENT

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

//

//

DATED: This 5th day of February, 2016.

Respectfully submitted,

BRENDA J. ERDOES
Legislative Counsel

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

CERTIFICATE OF SERVICE

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

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

ADAM PAUL LAXALT, ESQ.
Attorney General
LINDA C. ANDERSON, ESQ.
Chief Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave. Ste. 3900
Las Vegas, NV 89101
landerson@ag.nv.gov
GREGORY L. ZUNINO, ESQ.
Chief Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 89701
gzunino@ag.nv.gov
Attorneys for Defendants State of Nevada, Department of Health and Human Services and Governor Sandoval

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

Exhibit A

Electronically Filed
02/05/2016 08:56:32 AM

ORDR

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

ORDER AND JUDGMENT

INTRODUCTION

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

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

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

PROCEDURAL BACKGROUND

A. Parties and claims.

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

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

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

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

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

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

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

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

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

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

B. Dispositive motions.

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

necessary for the medical use of the patient to treat his or her specific medical condition;

(3) Because of illness or lack of transportation, the holder and his or her primary caregiver are unable reasonably to travel to a medical marijuana dispensary; or

(4) No medical marijuana dispensary was operating within 25 miles of the residence of the holder at the time he or she first applied for his or her registration card.

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

registry identification card or letter of approval.

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

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

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

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

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

B. Standards of review.

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

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

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

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

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

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

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

C. Federal constitutional claims for money damages.

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

D. Federal constitutional claims for declaratory and injunctive relief.

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

E. Fourteenth Amendment claims.

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

---

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

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

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

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

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

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

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

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

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

Id. (footnotes omitted).

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

selling a controlled substance."

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

F. Fifth Amendment claim.

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

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

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

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

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

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

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

Id. at 311.

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

G. State-law tort claims.

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

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

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

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

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

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

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

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

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

ORDER AND JUDGMENT

IT IS ORDERED AND ADJUDGED THAT:

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

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

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

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

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

DATED: This 9 day of February, 2016.

ROD BARE
DISTRICT JUDGE

Respectfully submitted by:

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

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

GREGORY L. ZUNINO, Chief Deputy Attorney General
Nevada Bar No. 4805
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 89701
Tel: (775) 684-1237; Fax: (775) 684-1180; E-mail: gzunino@ag.nv.gov
Attorneys for Defendant State of Nevada ex rel. the Governor

CLERK OF THE COURT

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

Counsel for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

STATE OF NEVADA

JOHN DOE, on his own behalf and on behalf of a class of those similarly situated; Plaintiff, vs. **STATE OF NEVADA ex rel. THE LEGISLATURE OF THE 77th SESSION OF THE STATE OF NEVADA; STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; THE HONORABLE BRIAN SANDOVAL,** in his official capacity as Governor of the State of Nevada; DOES 1-100, inclusive; and ROE CORPORATIONS 1-100, inclusive; Defendants.	Case No.: A-15-723045-C Dept. No. XXXII **NOTICE OF POSTING OF COST BOND**

TO: DEFENDANTS and their Counsel:

PLEASE TAKE NOTICE of the posting of the cost bond in the amount of $500.00 for the Bond for Costs on Appeal in Civil Cases pursuant to NRAP 7.

///

///

///

///

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

Dated this 22nd day of February, 2016.

HAFTERLAW

By: _____

Jacob L. Hafter, Esq.
Nevada Bar Number 9303
6851 West Charleston Blvd.
Las Vegas, Nevada 89117

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HAFTERLAW, and that on this 22nd day of February, 2016, I served a copy of the foregoing ***NOTICE OF POSTING OF COST BOND*** 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

☑ Electronic Service through the Court's electronic filing system. and/or

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

☐ Electronic Delivery—Pursuant to party stipulation, such was sent to the e-mail address as follows:

Kevin C. Powers, Esq.
J. Daniel Yu, Esq.
Legislative Counsel Bureau, Legal Div.
kpowers@lcb.state.nv.us
Dan.Yu@lcb.state.nv.us
Attorneys for Defendant:
Legislature of the State of Nevada

Adam Paul Laxalt, Esq.
Attorney General
Gregory Zunino, Esq.
Chief Deputy Attorney General
Linda Anderson, Esq.
Deputy Attorney General
Office of the Attorney General
GZunino@ag.nv.gov
LAnderson@ag.nv.gov
Attorneys for Defendant:
Department of Health and Human Services
State of Nevada and Governor Sandoval

/s/ Kelli Wightman
An employee of HAFTERLAW

6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
(702) 405-6700 Telephone
(702) 685-4184 Facsimile