

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.

Electronically Filed
May 27 2016 12:20 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

JOINT APPENDIX VOLUME 4

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

HAFTERLAW
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May 27, 2016

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JOHN DOE,	.	CASE NO. A-15-723045-C
	.	
Plaintiff,	.	DEPT. NO. XXXII
	.	
vs.	.	TRANSCRIPT OF
	.	PROCEEDINGS
STATE OF NEVADA, et al.,	.	
	.	
Defendants.	.	
.	

BEFORE THE HONORABLE ROB BARE, DISTRICT COURT JUDGE

ALL PENDING MOTIONS

TUESDAY, DECEMBER 8, 2015

APPEARANCES:

FOR THE PLAINTIFF:	JACOB L. HAFTER, ESQ.
FOR THE DEFENDANTS:	KEVIN C. POWERS, ESQ.
	LINDA C. ANDERSON, ESQ.
	GREGORY L. ZUNINO, ESQ.

COURT RECORDER:

CARRIE HANSEN
District Court

TRANSCRIPTION BY:

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Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

1 LAS VEGAS, NEVADA, TUESDAY, DECEMBER 8, 2015, 9:09 A.M.

2 THE COURT: Okay. Everybody ready to go?

3 MR. HAFTER: Yes, Your Honor.

4 MR. POWERS: Yes, Your Honor.

5 THE CLERK: A-723045, John Doe, plaintiff, vs. State
6 of Nevada, defendants.

7 THE COURT: And if everyone can make their
8 appearances, please.

9 MR. HAFTER: Good morning, Your Honor. Jacob
10 Hafter, 9303, for plaintiff.

11 MR. POWERS: Good morning, Your Honor. Kevin Powers
12 for the defendant, Nevada Legislature.

13 MR. ZUNINO: Your Honor, Gregory Zunino for Governor
14 Sandoval.

15 THE COURT: All right. Would you spell your last
16 name for me, please?

17 MR. ZUNINO: It is spelled Z-u-n-i-n-o.

18 MS. ANDERSON: And finally, Linda Anderson on behalf
19 of the Department of Health and Human Services.

20 THE COURT: All right. Well, welcome, everyone.

21 Sorry about coming in here about ten minutes late
22 today. Just so you know, I had to make a cup of coffee at
23 10:00 o'clock last night, and at about 2:00 A.M., I said, I
24 have to stop, got up, and kept reading everything this
25 morning.

1 And so, I just wanted to look at a couple things
2 before I came into court, so that kept me this morning, too.

3 So, anyway, we're ready to go. I think we're going
4 to have a good hearing.

5 What I want to do is sort of start off with putting
6 things in context to the best of my ability, and so that will
7 take a little while, maybe up to a half-hour. And then after
8 that, we'll get into the hearing practice.

9 I mean, both sides have motions, some of which are
10 dispositive motions. And so, anyway, I'm just going to sort
11 of go over it all, and give me a minute or two to put some of
12 the paperwork out here that I've dog-eared and stuff. That'll
13 take another minute or so.

14 Okay. All right. Interrupt me at any time if I say
15 something that you think is incorrect factually. All right.
16 We're here as the -- the legislature has a Motion for Summary
17 Judgment, the Department of Health and Human Services has a
18 Motion to Dismiss, the Governor has a Motion to Dismiss, the
19 plaintiffs have a Motion for Partial Summary Judgment, and are
20 asking for a preliminary injunction, and have a Countermotion
21 for Summary Judgment on Fourteenth Amendment claims.

22 You all, and I've seen it in here, have a
23 Stipulation and Order which allowed the plaintiff to file a
24 Second Amended Complaint, and agreeing not to file -- or
25 request, I guess, a class certification until I enter a

1 written order resolving the dispositive motions.

2 And so we do have the Second Amended Complaint
3 filed, alleges fraud against the Department, unjust enrichment
4 against the Department, violation of equal protection with
5 respect to fees charged to obtain the registration card having
6 to do with medical marijuana, that's against all defendants;
7 violation of equal protection with respect to the registration
8 required against all defendants, violation of Fifth Amendment
9 with respect to registration, and also -- well, the Complaint
10 in Cause of Action 6 mentioned imposition of claim concerning
11 an imposition of a nonuniform or unequal tax.

12 So let me ask Mr. Hafter, have you acquiesced to the
13 defendant's position on that? Are you withdrawing that or
14 what is the status having to do just with the tax claims?

15 MR. HAFTER: Yes, Your Honor, we're withdrawing it.
16 And may I have permission to just remain seated, at least
17 during the interplay at this part before you, when I talk?

18 THE COURT: Sure. If you need to stay seated for
19 the whole thing for some reason, that's fine with me.

20 MR. HAFTER: I don't know if I can argue sitting
21 down, but just for this --

22 THE COURT: No problem.

23 MR. HAFTER: -- I don't mean any disrespect by not
24 getting up just now.

25 THE COURT: Oh, I understand that. No problem.

1 MR. HAFTER: No, we concede that --

2 THE COURT: Okay.

3 MR. HAFTER: -- that was done in error, that that
4 only really relates to the property tax.

5 THE COURT: All right, so we have five causes of
6 action that I've described.

7 All right. On the factual front the, I guess,
8 somewhat purported or putative class representative, this John
9 Doe, claims he's a 42-year-old male with a history of migraine
10 headaches he's had about -- for 15 years, and he's -- in 2013,
11 he applied for a registration card from the Department
12 concerning the medical marijuana.

13 He alleges that when he applied for the registration
14 card, there were dozens of applications already submitted to
15 the Department -- or to the defendants, as alleged, from
16 companies who sought to operate dispensaries throughout
17 Nevada. He alleges that he paid various fees to receive the
18 registration card. He was issued a registration card that
19 expired one year from its issuance and then he renewed his
20 card.

21 He basically alleges that notwithstanding the
22 registration card, he's never been able to actually access or
23 use the medical marijuana here in Nevada, as during all
24 relevant times no dispensaries were operating in Southern
25 Nevada.

1 All right. So I do have the causes of action
2 outlined under Nevada law here. In other words, you can talk
3 to me all you want during the argument about the various
4 causes of action and what their elements are. I have them
5 here, of course.

6 But as it applies to the specific Complaint, I've
7 paraphrased from the Complaint and tied what I think are the
8 factual predicates to what's alleged here. So I'm going to
9 cover that now.

10 The Complaint in regard to the first cause of
11 action, fraud, seems to me to allege that the Department
12 committed fraud by issuing these registration cards and
13 licenses even though the Department knew there's no legal
14 venue to purchase seeds or there's no operating dispensaries
15 to buy the marijuana from. And so, that's I think the sum and
16 substance of that. I'm sure there's probably going to be more
17 that you'll tell me about it, but I'm just giving you my
18 overview of what I see the Complaint to be.

19 Unjust enrichment, the second cause of action, you
20 know, that's a cause of action that stems in its root base in
21 the area of equity. The idea here, I think, as suggested by
22 the Complaint, is that the Department continued to accept
23 application fees for the registration cards, but at the same
24 time, never licensed any dispensaries during that time the
25 cards were valid. And so, I guess the theory is, in fairness,

1 how could they do that; why would they accept the fees, given
2 that the holder of a card really couldn't go get the marijuana
3 in any event?

4 MR. HAFTER: Your Honor, can I make a distinction on
5 that?

6 THE COURT: Sure

7 MR. HAFTER: It's not just that the Department
8 didn't license, because they weren't in charge of all the
9 licensing.

10 THE COURT: Um-hum.

11 MR. HAFTER: It's also that they knew that no
12 dispensaries had been licensed, or probably would be licensed
13 within the period that the cards that they were issuing would
14 expire.

15 THE COURT: Okay. I saw that in here, and I
16 appreciate you clarifying or, you know, describing it that way
17 as well.

18 The third and fourth causes of action having to do
19 with the Fourteenth Amendment, it seems to me that what you're
20 alleging is that the right to access the medical marijuana has
21 been integrated into our Constitution and that -- yeah, I
22 forgot to bring all that out. The Nevada Constitution,
23 Article 4, Section 38, "Use of Plant of Genus Cannabis," and
24 of course I've got it here.

25 And so, in any event, I'm sure you'll talk to me

1 more about how you, Mr. Hafter, believe that that created a
2 right of some sort, and we'll talk about it. And so, maybe
3 I'll just leave it for argument on that, as I could cover the
4 whole constitutional provision and all the arguments, but that
5 might take a little bit of time. I just want you to know, of
6 course, I've got it here.

7 I will call your -- everybody's attention to
8 something that I know I'm going to talk about, and that is, in
9 this constitutional amendment, Section 1(d), as in dog, talks
10 about registry. "A registry of patients, their -- their --
11 and their attendants, who are authorized to use the plant for
12 a medical purpose, to which law enforcement officers may
13 resort to verify a claim of authorization and which is
14 otherwise confidential." I want to talk about what that does,
15 in so many ways, as I think going into the hearing process,
16 that that's a key part of the Nevada Constitution as it
17 applies to our situation.

18 And then the Fifth Amendment, which is Cause of
19 Action 5, the idea of not being compelled in any criminal case
20 to be a witness against him or herself. The Complaint seems
21 to suggest the idea here is that by registering with the
22 State, a patient would be admitting to the State and to the
23 world in a public sort of way that, at a minimum, they intend
24 to use medical marijuana, but that medical marijuana or
25 marijuana in general, as it turns out, is still illegal under

1 federal law. And so, I guess more than in theory; in
2 actuality, patients could be prosecuted under federal law, is
3 the allegation.

4 And again, I won't mention anything having to do
5 with the tax issues as we -- we -- I was going to say
6 dispensed with that but that would be -- I don't know if
7 dispensary is a good word here today.

8 All right. Let me talk a lot -- and I say a lot
9 because it's going to take a little while to cover it. I did
10 the best I could to outline all the defense motions, and so
11 I'm going to cover what I think about them and characterize
12 them now, since I've talked in general about the plaintiff's
13 claims.

14 Defendants say a lot of things, of course, but they
15 tell me that they're entitled to a matter -- a judgment as a
16 matter of law on the constitutional claims as it pertains to
17 money damages. Now, I do want to say that I agree with that
18 going into the hearing process. In fact, Mr. Hafter, do you
19 think that you have a way to get money damages from any of
20 these defendants?

21 MR. HAFTER: It would have to be under the Nevada
22 Tort Claims Act or some kind of other relief. Under 1983, we
23 probably wouldn't be able to obtain money damages, but we
24 could still get declaratory and injunctive relief.

25 THE COURT: Okay. Yeah, I think that the --

1 MR. HAFTER: And if we --

2 THE COURT: I do think that the State of Nevada and
3 its agencies and officials acting in their official capacity
4 are immune from civil liability, money damages, under 42
5 U.S.C. 1983.

6 As it turns out, in a prior life, I was a lawyer for
7 a state agency, the State Bar of Nevada. And so I've had
8 plenty of cases, I went up to the Ninth Circuit, did all kinds
9 of federal stuff where I know -- happen to know that this is
10 the law. And I saw it in this case, too.

11 But even more than that, the way I always envisioned
12 it as a lawyer in the past was that if you sue the right state
13 actor, and I know that's another issue in here, you can get
14 what I always called prospective injunctive relief. In other
15 words, you can get some sort of a court finding that has a
16 view towards future governmental activity.

17 And so, I do think -- and I always called that
18 prospective injunctive relief. I actually think that in a
19 couple of cases I did -- I think it was Lloyd George that came
20 up with that, actually, and did some nice things for my
21 client. But in any event, that's what I think it is. The
22 plaintiffs can, at a minimum, look at the idea of prospective
23 injunctive relief if you name the right state actor.

24 And that's probably the next issue I should bring
25 up. The defense indicates that they're entitled to a judgment

1 here as a matter of law on the federal constitutionary --
2 constitutional claims for declaratory relief because the
3 plaintiffs did not sue -- or the plaintiff didn't sue the
4 proper state official. The defense says, well, it would be
5 the administrator of the Division -- Ms. Anderson, the
6 administrator of your -- the Division you represent, right?

7 MS. ANDERSON: It's actually -- I represent the
8 Department of Health and Human Services.

9 THE COURT: Okay.

10 MS. ANDERSON: And this is actually the
11 administrator of the Division of Public and Behavioral Health,
12 which is clearly set out in the statute.

13 THE COURT: Okay, there we go. And as that person
14 is charged by state law with enforcing the medical marijuana
15 laws, there's a whole bunch of statutes, I guess, that say
16 that.

17 And in response to that, I know that the plaintiffs
18 say, well, we appreciate that. Part of the argument I think
19 you're making here is, well, we named the Governor because the
20 Governor oversees whoever it is that would be the
21 administrator. But you also say, well, we'd like to amend --
22 an opportunity to amend -- name the correct state actor,
23 namely, this administrator.

24 And I will tell you this. If I were to find -- in a
25 denial sense, if I were to deny some -- some or relevant

1 defense motions, well, it would be my intention to allow you
2 to amend. But if I were to be of a mindset to grant defense
3 motions, then there's no sense in allowing the amendment
4 because it would be futile.

5 There's a state case called Halcrow that says that a
6 basis upon which a judge could deny an amendment request to a
7 Complaint would be if it were futile in any event. That's I
8 think the Halcrow case from 20 -- 2013. So, if -- you know,
9 again, if I find that there's -- that it would just be a
10 defense sort of outcome in the motion practice today, then
11 there's no sense in having it amended, but we'll see how that
12 goes.

13 All right. All right. In regard to equal
14 protection issues, the defense side indicates to me that I
15 should use a rational relation test, and that's something we
16 should talk about is what is the standard and what is the test
17 in this area.

18 And I know that -- I mean, you don't see this all
19 the time as a state court judge, but, you know, looking over
20 the pleadings, and remembering things, and thinking about the
21 past, even going far back as law school, the idea is, if you
22 have a suspect class or if you have a fundamental right.

23 So if the right to use -- or get a registration
24 card, use medical marijuana is somehow a fundamental right,
25 then I think the standard would be different. It would be a

1 heightened standard, a strict -- more strict scrutiny style
2 standard, whereas if it's not, I think you're looking at a
3 rational relation to a legitimate State interest, sort of a
4 test or standard having to do with this area. And so, we'll
5 talk about that, I'm sure.

6 The Fifth Amendment. I do want to talk about that
7 going into the hearing a little bit. The Exhibit A, Mr.
8 Hafter, that you have in here, and also this acknowledgment
9 document, you know, I think they're relevant and interesting
10 to me.

11 And I would say to you at some point, it'd be great
12 if you could show me in any of this where there's a specific
13 question that would call for an incriminating answer, because
14 I really think that's the law in this area, as I looked over
15 everything I saw; everything that you all did a real good job
16 bringing to my attention.

17 The question is, if you're in Nevada, if you're
18 asking the government for a registration card, are you as an
19 applicant being required to answer any official questions
20 asking whether you've grown, purchased, distributed, or
21 possessed marijuana? So it comes down to the specifics as to
22 what the government is requiring people to give answers to.

23 And I could -- I'll just say flat-out, I imagine
24 there could be a scenario in Nevada, I'll say -- it could
25 happen in any state, but I imagine there could be a scenario

1 where questions could be posed that would violate one's Fifth
2 Amendment right not to self-incriminate. The question is, is
3 do we have any of those here, given the registration scheme in
4 Nevada?

5 MR. HAFTER: And I think in the documents, we
6 pointed to page 6 of the application, Your Honor, for those
7 specific questions.

8 THE COURT: Okay. I'll give you time to show me
9 that, and I'm going to pull that up when you do that probably
10 and outline what you tell me and all, and we'll talk about it.

11 Let's see what else I was going to tell you. All
12 right. And the tax stuff, we don't need to talk about. The
13 thing is, I did 15 pages of notes, so that's why it's taking
14 me a little while to cover it all. All right, let's see if
15 there's something else to bring up.

16 Yeah, I guess one of the things I'd say, Mr. Hafter,
17 to you is I would appreciate how you think -- and I mean, I've
18 read the pleadings and all, but how you think the right to
19 medical marijuana is a fundamental right. I think that's an
20 important aspect of things.

21 I know you argued in here that courts have
22 established over time fundamental rights even though there
23 might not be a recognized, codified law at the time. You gave
24 me all these examples in here; the right to have children, the
25 right to direct the education of your children, marital

1 privacy, contraception, bodily integrity, abortion, and the
2 right to marry, which is, interestingly enough, the Loving
3 case. So, I don't know if it says in there that you have to
4 be in love to be married, but it's the Loving case.

5 All right. And let's see. Oh, yeah. Going back to
6 the comments I made that I imagine the application or
7 registration documents could run afoul of the Fifth Amendment,
8 I see that in the area of registration of firearms law, there
9 apparently have been times in law where that's happened. And
10 so, that gives me some insight that -- if it, you know, could
11 happen here when it -- when it comes to marijuana as well.

12 Oh, yeah. Something I thought was helpful was, Mr.
13 Hafter, you did not, unless you can show me, okay, because I
14 mean, I did the best I could. You didn't give me a definitive
15 case that sort of has this test in it.

16 Rather, it seemed like you made an argument that
17 there were a multitude of cases that lead you to an opinion
18 that if a court such as me were to be put in the position to
19 determine whether a compelled disclosure threatened
20 self-incrimination under the Fifth Amendment, the following
21 factors should be considered: One, whether the disclosure
22 requirement targets a highly sensitive group inherently
23 suspect of criminal activities rather than the public
24 generally; whether the requirement involves an area permeated
25 with criminal statutes rather than essentially a non-criminal

1 and regulatory area. I thought the next prong was the most
2 important one; whether compliance would compel disclosure of
3 information that would surely prove a significant link in a
4 chain of evidence intending to establish guilt, rather than
5 disclosing no inherently illegal activity.

6 And that's -- when I saw all that, I tell you, it
7 did sort of set with me that I think that my job on this one,
8 I mean, in part, is to really take a look at the documents
9 that members of the Nevada public are being asked to fill out
10 when they have a doctor saying, hey, you can go get medical
11 marijuana, and ask, are any of those questions in that type of
12 area that -- where it essentially would, you know, be a link
13 in a chain of evidence tending to establish guilt, would it go
14 that far?

15 And so, the bottom line is, I've said it a couple
16 times, I am of a mindset going into this hearing to take a
17 look at what people were being asked to do, and so let's be
18 specific in any references to the application in that regard.

19 All right. Let's see. All right. When I have
20 injunction requests, and there's an injunction request here, I
21 like to always spend time at the beginning of a hearing --
22 I've learned this in practice -- to make sure I know what it
23 is you want me to do by way of the injunctive activity. And
24 so, let's talk about that.

25 You want me to enjoin the ongoing use of the

1 registry in some way, it seems. You want a permanent
2 injunction preventing the State of Nevada from operating the
3 registry, and I guess you want me to order the defendants to
4 safeguard the registry, too.

5 I imagine that would presuppose that I would
6 somehow, at least in part, deny your first request, because if
7 the registry continued, you -- I guess you want me to do
8 something to somehow safeguard the information to prevent
9 disclosure to the federal government, since the federal
10 government, in theory, can still prosecute people.

11 So, let me stop on that. What do you want me to do
12 -- tell me specifically what you want me to do by way of
13 injunctive relief.

14 MR. HAFTER: The defendants asked that -- you know,
15 kind of made the position in some of their Oppositions that we
16 were seeking to throw out the whole program, or you should get
17 rid of the whole program in its entirety. That's not what
18 we're suggesting at all. The State -- excuse me, the
19 Constitution very clearly says, "The legislature shall provide
20 for," as under number 1 in Section 38 of Article 4.

21 THE COURT: All right.

22 MR. HAFTER: And so, clearly, the legislature has to
23 do certain things. Until the legislature acts though, I think
24 that would be the period that we're asking the injunction for,
25 and we're going to ask that the injunction be to stop the

1 registry. However, patients who want to use medical marijuana
2 pursuant to their physician's recommendations should still be
3 able to -- the stopping of the registry shouldn't interfere
4 with their ability to use that as an affirmative defense or
5 interfere with their ability to purchase marijuana at a
6 dispensary that's duly licensed.

7 So, the relief has to be crafted in such a way
8 where, basically, registries, as well as courts will simply
9 look at a physician's recommendation as sufficient to meet
10 those thresholds, and that's what we would ask the Court to
11 do.

12 So enjoin the use of the registry, and then perhaps
13 create some kind of declaratory relief for dispensaries and --
14 and for courts to say that a duly executed physician's
15 authorization shall be sufficient to substitute for a registry
16 card --

17 THE COURT: All right.

18 MR. HAFTER: -- until the legislature can act.

19 THE COURT: I know you'll be back up again talking,
20 but since you said what you just said by way of the injunctive
21 relief question, the statutory scheme requires when you fill
22 out the form that it be filled out in quintuplicate, which is
23 four. One of the four goes to the Central Repository for
24 Nevada Records of Criminal History, and then that agency, I
25 guess it is, the Central Repository, or that place, it says

1 shall report to the Division its findings on criminal history,
2 and it goes on from there.

3 And so, it seems like, correct me if I'm wrong, but
4 what you're saying is that you'd like for me to get to dispose
5 with the registry, which if I did that, it would then dispose
6 with this reporting to the repository concerning criminal
7 records.

8 And so, I guess what you're saying to me is that if
9 a -- you're telling me flat-out that if a doctor says medical
10 marijuana, then it shouldn't matter and we shouldn't have a
11 concern as a public as to what type of criminal history
12 somebody has. Is that what you're saying?

13 MR. HAFTER: That's exactly what we're saying, Your
14 Honor.

15 THE COURT: All right. All right. Okay. All
16 right, I think that's the overview at this point. And I'm
17 going to start with the defense side, because you guys have
18 all these dispositive Motions to Dismiss. I don't have a
19 preference as to who goes first, so you all can choose that on
20 your own.

21 MS. ANDERSON: We drew straws, Your Honor.

22 MR. POWERS: Thank you, Your Honor. For the record
23 again, Kevin Powers, chief litigation counsel, Legislative
24 Counsel Bureau on behalf of the defendant, the Legislature of
25 the State of Nevada.

1 I'm going to focus on the Section 1983 and the
2 federal constitutional claims, and then Mr. Zunino and Mr. --
3 Ms. Anderson will weigh in on the State, focusing mainly on
4 the state law tort claims, and they'll have their additional
5 comments they'll want to make on the federal claims as well.

6 THE COURT: Okay.

7 MR. POWERS: You obviously outlined the money
8 damages issue. I don't think we need to get any further into
9 that. The defendant -- I mean, the plaintiff seems to have
10 conceded that he cannot obtain money damages against any of
11 these defendants under any circumstances, including nominal
12 money damages, so I think that seems to be what the plaintiff
13 is conceding.

14 If he's not, I gladly will argue that under federal
15 law, Section 1983, he cannot obtain money damages against the
16 State, any agency of the State, or any official acting in the
17 official's official capacity.

18 THE COURT: All right. If you had the right
19 defendant name, do you think that this prospective injunctive
20 relief stuff I talked about is something that they have
21 standing to pursue?

22 MR. POWERS: If the right defendant is named, yes.
23 Under Section 1983 --

24 THE COURT: Okay.

25 MR. POWERS: -- it's clear that a court can enter

1 prospective injunctive and declaratory relief against the
2 state official charged with enforcing the law. They're not
3 considered a person that is exempt from Section 1983. They
4 are, in fact, executing the law, and the Court can enter in
5 prospective and declaratory injunctive relief to enjoin that
6 correct state official.

7 But here, the plaintiff did not name the correct
8 state official. Under state law, it's clear, it is the
9 administrator of the Division of Public Behavior and Health,
10 and that is the correct and proper defendant.

11 THE COURT: Okay.

12 MR. POWERS: None of the other defendants are
13 proper.

14 THE COURT: I understand that.

15 MR. POWERS: Yeah.

16 THE COURT: But I mean, I hope you can respect that,
17 if somehow the case survived your motion practice, I'd let
18 them amend at this point, if it survived.

19 MR. POWERS: Yes, we understand that.

20 THE COURT: So, we can --

21 MR. POWERS: And that's why we argued --

22 THE COURT: Yeah.

23 MR. POWERS: -- the merits, because --

24 THE COURT: Yeah.

25 MR. POWERS: -- whether or not the amendment would

1 be futile turns on whether or not there's any merit --

2 THE COURT: Right.

3 MR. POWERS: -- to the underlying federal
4 constitutional claims.

5 THE COURT: Okay, go ahead, Mr. Powers.

6 MR. POWERS: But I also want to emphasize on that
7 point, if it were to survive beyond this, the defendants; the
8 Governor, the legislature, and the Department would have to be
9 dismissed as a matter of law. They would be entitled to
10 judgment as a matter of law on the declaratory injunctive
11 relief.

12 The Court can't be entering an injunction against
13 the legislature. That would be inappropriate under separation
14 of powers, and it's not authorized by federal law as well
15 under Section 1983. Turning then to the merits, because
16 essentially, that's what this boils down to --

17 THE COURT: I agree with all that, by the way.
18 Agree with all of it. So, I mean, you can -- Mr. Hafter, if
19 you want to tell me something different than that, you can at
20 some point. But I just want to say, because you haven't
21 talked about that specifically, I guess, but I agree with all
22 that. It's prospective injunctive relief concerning the
23 appropriate state actor that's not named yet, is what we have.

24 MR. POWERS: Thank you, Your Honor.

25 THE COURT: Okay.

1 MR. POWERS: Turning then to the merits of the
2 federal constitutional claims, I'm going to focus first on the
3 Fourteenth Amendment claim. The threshold question, as you
4 mentioned, is is there a fundamental right? Because that
5 determines what, obviously, standard or view the Court
6 applies. Under a fundamental right analysis, you're going to
7 apply a more strict scrutiny; however, if there's no
8 fundamental right involved, it's just standard economic or
9 social welfare legislation, it's the rational basis test.

10 And in this case, there is no fundamental right to
11 use medical marijuana recommended by a physician. The
12 plaintiff initially tries to broaden the right he's talking
13 about and says that it's a fundamental right to access all
14 healthcare, but there's absolutely no case law support for
15 that.

16 And the U.S. Supreme Court again and again has said,
17 particularly in the Washington vs. Glucksberg case, you have
18 to narrow the description of the fundamental right to the
19 facts and circumstances before the Court, because to grant the
20 fundamental right is to essentially take that area out of the
21 control of the legislature and have it in an unregulated area,
22 and the Court doesn't do that often because that's not the way
23 a democratic society works.

24 There's only a few very narrow fundamental rights
25 the Court has recognized, and it certainly has never

1 recognized a fundamental right to access all healthcare. If
2 it had, then there would be no possibility of regulation of
3 the medical field.

4 You couldn't regulate physicians prescribing any
5 drug; not just marijuana. It would be any drug, because if it
6 was a fundamental right to access healthcare, according to the
7 plaintiff, all you have to do is get your physician to
8 recommend it or prescribe it and the State cannot interfere
9 with it, regardless of the type of patient you are, regardless
10 of the consequences of the drug on society, regardless of the
11 consequences of the drug on the individual.

12 No court has recognized such a broad fundamental
13 federal right because it would be absurd, because the medical
14 profession then would not be regulated. You couldn't regulate
15 pharmacies, you couldn't regulate doctors, you couldn't
16 regulate any type of medical practice; not just drugs, but any
17 type of conceivable medical practice if there was a
18 fundamental right to access all healthcare, because you would
19 have to then meet strict scrutiny for every regulation.

20 And this isn't just medical marijuana. The courts
21 have dealt with this in the past. We cite a California case
22 from the early '80s. There, Laetrile was a drug that was
23 marketed as a cure for cancer, and a lot of doctors wanted to
24 prescribe this drug, this putative cancer cure, to as many
25 patients that they could, but federal and state law wouldn't

1 allow the drug to be prescribed as a cure for cancer.

2 In that case, the doctor was convicted under state
3 and federal law of violating those laws prohibiting him from
4 prescribing that cancer drug. He argued that he had a
5 fundamental right to recommend these drugs to his patients
6 because they had a fundamental right to access this
7 healthcare. The California Supreme Court rejected that out of
8 hand based on a broad body of federal case law. There's just
9 not a fundamental right to access healthcare.

10 What the court ultimately did in that California
11 case is they applied the rational basis test, and the court
12 concluded, based on health and safety standards, there's a
13 rational basis for regulating drugs because they're dangerous
14 to society and they're dangerous to individuals.

15 THE COURT: Okay. You put in here this U.S. vs.
16 Wilde case, Northern District of California case. No
17 constitutional fundamental right to use medical marijuana on
18 doctor's advice, and thus, strict scrutiny was not the
19 appropriate standard. And then there's -- the Supreme Court
20 of California case I think you might be talking about is from
21 1979?

22 MR. POWERS: Yes, correct, Your Honor.

23 THE COURT: That's the People vs. -- well --

24 MR. POWERS: Exactly. That's why I didn't say the
25 name --

1 THE COURT: -- Privitera.

2 MR. POWERS: -- because I didn't know the correct
3 pronunciation.

4 THE COURT: Yeah, the idea that you should test this
5 under a rational standard. I mean, that's not controlling on
6 me as a Nevada State court judge, but.

7 MR. POWERS: No, Your Honor, no, but I was building
8 the legislative history. To have a fundamental right, it has
9 to be within the nation's legal traditions, practice, and
10 history. It has to be considered fundamental over a broad
11 historical perspective of time.

12 THE COURT: So, you agree with his philosophical
13 argument concerning the rights to marriage, and all the things
14 I mentioned in my overview? I mean, do you agree that, as a
15 matter of legal premise that a fundamental right could be
16 created over time, even if there's not a statute that you can
17 point to initially to say that a fundamental right was
18 intended to be created by some legislative body?

19 MR. POWERS: That is correct, Your Honor.

20 THE COURT: Okay.

21 MR. POWERS: That is the case law of the U.S.
22 Supreme Court. Over time, you look at the nation's history,
23 tradition and practices to determine whether -- and society
24 has come to the conclusion that that's a right that's
25 fundamental and protected to the highest level that the

1 Constitution protects the rights, but there's so few of those.
2 The list he had are those ones that we all consider to be
3 truly fundamental to carry out individual liberty.

4 But access to all healthcare, that historically has
5 not been considered a fundamental right. Healthcare has been
6 regulated from the very beginning. I mean, obviously, drugs
7 affect individuals in different ways, and therefore, society;
8 in particular, our society, has always regulated drugs.
9 There's no fundamental right to access all healthcare.

10 THE COURT: Okay.

11 MR. POWERS: So that brings us to what this case is
12 about. Is there a fundamental right to access medical
13 marijuana prescribed by a physician or recommended by a
14 physician? That's where we turn to the most recent case law
15 on the subject.

16 In particular, the Ninth Circuit has had this before
17 twice in the past decade, and both times, the Ninth Circuit,
18 in the Wright case, and then most recently in the other
19 California case from the Ninth Circuit, they made it clear
20 that under substantive due process, there's no fundamental
21 right to use medical marijuana recommended by a physician,
22 even if it's authorized by state law.

23 This Court is not bound by the Ninth Circuit cases.
24 It's persuasive authority, but it's very strong persuasive
25 weight, because there is no court in the country that has

1 found a fundamental right to use medical marijuana recommended
2 by a physician. One of the reasons, of course, it can't be --
3 there can't be a long tradition and history of this right if
4 it's still prohibited by federal law. It's rather odd if the
5 federal Constitution was recognizing the fundamental right to
6 use a drug that for at least five decades or more --

7 THE COURT: Well, you just said the one thing I had
8 in my notes that was most important to me that I didn't
9 mention yet. But that's a really good argument, the idea that
10 if federal law does not allow the use of marijuana, how could
11 it be a fundamental right in any way?

12 MR. POWERS: Exactly. And the plaintiff is asking
13 you to ignore that federal law and to create this --
14 essentially, fabricate, not out of our nation's histories,
15 traditions, and legal practice, but out of his belief as a
16 matter of policy that allowing unrestricted use of medical
17 marijuana is a good idea.

18 Ultimately, the plaintiff's arguments all boil down
19 to policy. He's asking you to craft injunctive relief that's
20 for a legislature to decide. He's saying, we'll just allow
21 physicians to recommend medical marijuana, and that's all you
22 need, and there's no regulation whatsoever, and --

23 THE COURT: Okay, that gets me -- I'm sorry to
24 interrupt you, but --

25 MR. POWERS: No.

1 THE COURT: -- you know, we do that with each other
2 around here respectfully, no problem. You can interrupt me,
3 too. All right.

4 MR. POWERS: We do that in the legislature as well.

5 THE COURT: Yeah, I know. I've actually been there,
6 too. We won't cover it now, but I actually wrote NRS 7.285 in
7 the lobby of the legislature after learning a lot about what
8 lobbyists do. But that's, you know, an interesting -- an
9 interesting thing happens up there, is all I got to say, how
10 laws get created.

11 But anyway, if it's not a fundamental right, Mr.
12 Powers, let me ask you this. And I agree -- if I were to
13 agree with that, then I imagine what you're going to do is
14 tell me what the standard then becomes, and what the State's
15 rational, legitimate interest is in the statutory scheme.

16 MR. POWERS: That's correct, Your Honor.

17 THE COURT: So, go ahead.

18 MR. POWERS: The next step would be the rational
19 basis test.

20 THE COURT: Yeah.

21 MR. POWERS: And obviously, all the legislature
22 needs is some legitimate State interest, which health, and
23 safety, and regulating dangerous jobs is a very legitimate
24 State interest, and its requirements just have to be
25 rationally related to that interest.

1 We cite the Whalen vs. Roe case, a U.S. Supreme
2 Court case from 1977. That's where New York required anytime
3 a Schedule II drug was prescribed, for the name of the
4 patient, the drug prescribed, the dosage to be sent to a
5 central repository run by the State Health Department. So,
6 all that information was collected anytime a Schedule II drug
7 was prescribed.

8 The U.S. Supreme Court said having a patient ID
9 requirement is rationally related to protecting the health and
10 the safety of the public, because when you're doing dangerous
11 drugs, you're trying to prohibit the abuse of dangerous drugs.
12 And that is the main purpose of the registry here. It helps
13 curb abuse of medical marijuana, because, again, we have to
14 remember, medical marijuana in this state is not an
15 unconditional, unrestricted right.

16 Every time the plaintiff says there's a right to use
17 medical marijuana under the Nevada Constitution, he never
18 finishes the sentence. Yes, there's a right to use medical
19 marijuana under the Nevada Constitution, so long as that
20 person participates in the registry. That's in the
21 Constitution, too. Both those provisions stand on equal
22 footing. One's not more important than the other.

23 And when the voters approved that constitutional
24 amendment, it was on, if you look at the ballot materials,
25 based on the balance between the need to provide medical

1 marijuana to those who need it, and the need of society to
2 protect against abuse. Giving the right in the Constitution
3 was in exchange for participation in the registry.

4 THE COURT: Okay.

5 MR. POWERS: They go hand in hand.

6 THE COURT: I understand that, but getting to this
7 rational -- if that's the test, the rational relation test --
8 maybe Ms. Anderson is going to be the person better to answer
9 this question.

10 But in any event, what if somebody -- let's envision
11 a case where somebody has the most legitimate need for medical
12 marijuana that you could ever come up with. And I know Mr.
13 Hafter thinks, well, that's my client. You know, these
14 migraine headaches all these years, and what have you, but
15 maybe it is.

16 But let's assume though for this hypothetical that
17 the person who's the most needy -- this is the model person,
18 the one that, you know, we can say, thank God we finally got
19 to medical marijuana for -- because it helps this person.
20 What if that person had been previously convicted of selling a
21 controlled substance?

22 MR. POWERS: Under the statute as it's structured,
23 with the registration card, if you have certain prior
24 convictions, you cannot get a registration card issued by the
25 Health Division. That is true. How --

1 THE COURT: What are the prior convictions that
2 would fall under that, in your view?

3 MR. POWERS: It's listed in the statute.

4 THE COURT: Yeah, it is. Okay.

5 MR. POWERS: It's a felony conviction for
6 possession, distribution, or use of a --

7 THE COURT: Possession, distribution, or use?

8 MR. POWERS: Yeah.

9 THE COURT: Yeah.

10 MS. ANDERSON: It's actually just for the sale of
11 marijuana. And I just want to note, Your Honor, just to move
12 this along that --

13 THE COURT: Okay.

14 MS. ANDERSON: -- even if the Division did deny on
15 that basis, there is a Petition for Judicial Review.

16 THE COURT: Right, I saw that.

17 MS. ANDERSON: So, it could come before a court --

18 THE COURT: Right, I understand.

19 MS. ANDERSON: -- for review of that.

20 THE COURT: That's right. There's --

21 MR. POWERS: But more importantly, Your Honor, that
22 individual, they're not done. They can still use medical
23 marijuana in state law. Under NRS 453A.310, even if you don't
24 have a registration card, you have an affirmative defense to
25 criminal prosecution under state law --

1 THE COURT: Right.

2 MR. POWERS: -- as long as you're only possessing
3 and using the amounts that are prescribed by state law.

4 And that's the thing. The reason you need the
5 registry and the reason you need regulation, because medical
6 marijuana, you're only allowed to possess a certain amount.
7 Beyond that, you're committing a crime both under federal law
8 and state law then. That exemption from prosecution is only
9 from an amount that the State has determined is a safe amount;
10 an amount that won't lead to abuse.

11 THE COURT: And you can't use it in public.

12 MR. POWERS: That is correct, you cannot use it in
13 public.

14 THE COURT: Yeah.

15 MR. POWERS: You cannot use it at the workplace if
16 your employer prohibits you from using it at the workplace.
17 You can't require an insurance company to reimburse for use of
18 medical marijuana. There's some significant restrictions on
19 the use of marijuana that stem from the constitutional
20 provision. There are conditions on the state constitutional
21 right. And everything the legislature has done with the
22 registry, there's a rational basis for protecting the health
23 and safety of the public. Everything helps carry that out.

24 And one thing that's important on the rational basis
25 test, there doesn't have to be mathematical certainty. It

1 doesn't even have to be the best way of achieving it; it just
2 has to be rationally related.

3 THE COURT: In that regard -- I mean, you know,
4 again, we're all doing the best we can. But from my point of
5 view, I'm thinking, well, as I look at this whole scheme --
6 this is the first I ever looked at it for this case, okay? I
7 said to myself, well, what is the State's interest here?
8 Whether it's a rational interest, or a strict -- some other
9 test to be applied, you know, nonetheless, what's the
10 interest?

11 And I looked at it and I said, well, it seems like,
12 at least in part, and maybe the biggest part that I can make
13 of it from all this is that we're saying as a public, we -- I
14 mean, this is the legislature speaking, you know, your client.

15 The legislature is basically saying, look, we've
16 gotten to a point -- we've evolved, rightly so, where medical
17 marijuana has a legitimate medicinal use in our community and
18 our world in Nevada. And so, but we have to balance that with
19 concerns for protection of the Nevada public.

20 And one of the things that we want to do to protect
21 Nevada public is, in our wisdom as the legislature, as the
22 lawmakers, we want to -- we want to -- it's a balance. Though
23 we might, and we do obviously respect the need for medical
24 marijuana to some patients, we're going to deny the use in any
25 event, even for a needy person, if they've been convicted of

1 the requisite criminal offense in order to protect the public.

2 It seems like that's, in a nutshell, what this is
3 all about. I mean, in other words, why do we even have the
4 paperwork, you know, the Exhibit A, and the acknowledgment
5 form and everything? Why do we have all that?

6 Maybe the answer, it seems to me, is that it's this
7 whole idea of a copy goes to the criminal history place and we
8 need to see if somebody's been convicted of a crime to where,
9 even though we as a society really want people to get medical
10 marijuana if they need it, we're going to -- we're going to
11 say "no" to some people, because if they've been convicted of
12 a crime having to do with a controlled substance, well, they
13 basically -- we need to protect society from them, is what it
14 sounds like this is all about. Do you agree with that?

15 MR. POWERS: For the most part, yes. The
16 legislature when it's operating under the rational basis test
17 always engages in line drawing, and you have to draw the line
18 somewhere, as long as there's a rational basis for it, and
19 that's what the legislature has done.

20 What the plaintiff would have you believe is that
21 because other types of controlled substances and dangerous
22 drugs are regulated differently, that marijuana has to be
23 regulated the same way. But that's not the standard, the test
24 under the Equal Protection Clause, or the Due Process Clause,
25 or the rational basis test. Everything does not have to be

1 treated the same, as long as there's a rational basis for
2 distinguishing between them.

3 Medical marijuana is different from all kind of
4 other drug treatments. It's treated differently under federal
5 law. That in and of itself is a rational basis for
6 distinguishing between marijuana and all other dangerous
7 drugs. And the fact that there's another system for certain
8 types of dangerous drugs doesn't prohibit the legislature from
9 adopting a different system for medical marijuana, as long as
10 there's a rational basis, and there is.

11 Marijuana is used differently in our society. It
12 doesn't have a history of being medicinal; it has a history of
13 being abused. Therefore, when we move from all-out
14 prohibition in the state to regulation, of course it's going
15 to be regulated differently, because it's always been treated
16 differently.

17 And again, Mr. Hafter in his pleadings just keeps
18 making policy argument after policy argument. That's for the
19 legislature to determine. The legislature has decided the
20 policy. He thinks there's a better way to do it. Well, go to
21 the legislature and try to convince them there's a better way
22 to do it. That's where his policy arguments need to be.

23 But the policy in this court is whether there's a
24 rational basis, and there clearly is, and there's very many
25 legitimate State interests. You're protecting the health, and

1 safety, and welfare of the public. Regulating dangerous drugs
2 historically has been done by the State, and that's done to
3 protect not only the user, but everyone around the user.
4 Everyone needs the protection when dangerous drugs are
5 involved.

6 And the State -- obviously, the interest is health
7 and safety, and what the legislature has done with the
8 registry, it's rationally related to carrying out that health
9 and safety.

10 THE COURT: All right. Do you want to say anything
11 about the Fifth Amendment?

12 MR. POWERS: I absolutely do.

13 THE COURT: Okay, go ahead.

14 MR. POWERS: Moving on then to the Fifth Amendment.
15 The threshold question here is that the plaintiff is using a
16 line of cases that isn't controlling. The threshold question
17 is, is there State compulsion? Before we get to the second
18 issue that you mentioned, Your Honor, about what kind of
19 questions are being asked, is the State compelling anyone to
20 participate in the Medical Marijuana Registry program?
21 They're not. It's purely voluntary. That's what the
22 Selective Service System case from the U.S. Supreme Court set
23 out. That's the line of cases that control here.

24 In that, in order to get federal educational aid, an
25 applicant had to say whether or not they had registered for

1 the Draft. If they said they had not registered for the
2 Draft, they would be admitting to a felony under federal law.
3 The court said, no one's required to apply for federal
4 educational aid. Once you do, you're voluntarily entering
5 that. If you choose to answer the question, there's no State
6 compulsion.

7 The Medical Marijuana Registry is the same thing.
8 No one's required to apply for a registration card. In fact,
9 as I mentioned, 453A.310, that's the affirmative defense
10 statute, if you don't have the registration card, you can
11 still protect yourself from State prosecution. So, if you
12 don't want to be part of the registry, you can still use
13 medical marijuana and the State will protect you.

14 Truly, entering the registry is a pure voluntary
15 choice. There's no State compulsion. Without State
16 compulsion, the privilege against self-incrimination in the
17 Fifth Amendment simply does not apply. It's just not
18 applicable under that standard.

19 Now, the cases he cites, if you look at all of them,
20 they involve statutes that, one, require someone to register;
21 and two, give you a criminal penalty if you fail to register;
22 and three, require you to register because they want
23 information about your criminal activities. They were enacted
24 to require people to disclose criminal activities, and to
25 punish them by a separate crime if you didn't disclose your

1 criminal activities. Each of those cases involved that
2 situation.

3 One was you had to disclose your illegal wagering
4 activity, and if you didn't disclose your illegal wagering
5 activity, you were punished for a separate crime. Others was
6 there was a tax on illegal -- on illegal marijuana, and it
7 required you to file a form saying that you had sold marijuana
8 illegally and pay a tax on it, and if you did not file that
9 form, you were given a criminal penalty.

10 That's not what goes on in the Medical Marijuana
11 Registry. Number one, you're not required to file it at all,
12 because you don't have to participate in it. And if you, if
13 you don't like file your application to participate in the
14 registry, there's no criminal penalty for that. You're not
15 penalized. If you don't answer some of the questions on the
16 form, you're not given a criminal penalty. Your application
17 may be rejected, but failing to answer the questions or
18 filling out the form, that's not resulting in a criminal
19 penalty. All the cases he relies on, that's what was going
20 on.

21 And another distinction, too, in all those cases,
22 the defendants raised the Fifth Amendment as an affirmative
23 defense to criminal prosecution as those statutes were applied
24 to them. What the plaintiff wants to use those cases is a
25 facial challenge to validate the entire registry. Those cases

1 just simply aren't applicable. The Selective Service case is
2 what is applicable.

3 And we mention at least one federal district court
4 with the District of Columbia's medical marijuana program has
5 found that it's a voluntary program, and the Fifth Amendment
6 doesn't apply to a voluntary program.

7 Turning next to your next issue, Your Honor, that
8 you were --

9 THE COURT: Hold on just a second. Do you agree
10 that one enjoys immunity from prosecution under state law in
11 Nevada once they go through the process here? Do you agree
12 with that?

13 MR. POWERS: That is correct. If you use medical
14 marijuana within the limits of the law, you're exempt from
15 prosecution for that use. If you go above the law, if you
16 possess more, then you are going to be criminally prosecuted.

17 THE COURT: Okay. What about the idea that the
18 federal government, nonetheless, in theory, could prosecute?
19 I mean, even if you had a doctor, and the registration, and
20 you did everything, you could -- what do you make of that? I
21 mean, I looked at the acknowledgment form in here in the
22 initial application, and the first thing it says is, "The
23 federal government does not recognize the medical marijuana
24 card and does not exempt the holder from prosecution under
25 federal law." That's what the State's own document says.

1 MR. POWERS: But the threshold question is, does
2 anyone have to fill out that form? No one in the state has to
3 fill out that form. If you want to participate in the
4 registry and have a registration card, you may voluntarily
5 choose to do so, and then you have to fill out the form. No
6 one's compelling anyone to fill out that form. You have a
7 choice. And if you choose not to, like I said, you can still
8 use medical marijuana in this state; you just have to rely on
9 the affirmative defense in 453A.310.

10 There's a clear option here. If you don't want to
11 like risk the chance of revealing something, don't participate
12 in the registry; rely on the affirmative defense. That
13 doesn't make the registry violate the Fifth Amendment. That
14 gives everyone a voluntary choice.

15 THE COURT: Yeah. Okay, I mean, because probably
16 mostly for entertainment, I watched the presidential debates.
17 There's going to be a change in president because President
18 Obama's term will expire. Who knows what happens, is my
19 thought. I mean, really, who knows what's going to happen in
20 the federal area here probably not too far in the future, you
21 know?

22 MR. POWERS: And another thing I want to point out,
23 too, when an individual is filling out a form, if they believe
24 a question will incriminate themselves, they're allowed to
25 refuse to answer that on the Fifth Amendment. No one's

1 requiring them to answer that form. Now, granted, your
2 application may be denied, but you're not denied the right to
3 use medical marijuana; you just have to rely on the
4 affirmative defense in 453 --

5 THE COURT: It seems like it all comes back to
6 whether it's a fundamental right or not for you. I mean, in
7 other words, it seems like, really, your -- one of your
8 mainline positions is it's not a fundamental right, and so you
9 -- if you voluntarily want to use medical marijuana, then have
10 at it, is pretty much what your position seems to be.

11 MR. POWERS: Well, I think our position is, yes,
12 there's no fundamental right.

13 THE COURT: Yeah, and that makes it different.

14 MR. POWERS: But also, in this state, the State
15 Constitution, to the extent you exercise your right to use
16 medical marijuana, it either requires you to participate in
17 the registry or to rely on the affirmative defense, but you're
18 never denied, under state law, the right to use medical
19 marijuana, as long as you use it within the bounds of the law.

20 THE COURT: So, you -- I think what you're saying to
21 me, Mr. Powers, is you agree that there is a Fifth Amendment
22 right as it pertains to protecting yourself from federal
23 prosecution, but if one decides to invoke it there may be an
24 effect then under the state law system that they just have to
25 live with? Maybe it's --

1 MR. POWERS: What I'm saying -- what I'm saying,
2 first though -- first though --

3 THE COURT: In other words -- let me cover -- let
4 me --

5 MR. POWERS: -- that the Fifth Amendment doesn't
6 apply at all because it's voluntary.

7 THE COURT: Okay.

8 MR. POWERS: But you don't have to participate in
9 the medical marijuana program.

10 THE COURT: Yeah.

11 MR. POWERS: If there's no State compulsion, the
12 Fifth Amendment doesn't apply. But even so, even if you feel
13 like you don't want to disclose that information on the
14 application --

15 THE COURT: Okay.

16 MR. POWERS: -- you can raise your Fifth Amendment
17 right, and the law is, if you don't, you waive it. It's an
18 individual right, and it has to be raised. All I'm saying is
19 that there are options for the person who wants to participate
20 in the registry. One, they don't have to participate at all;
21 they can rely on the affirmative defense; no compulsion.

22 Two, they can make an application, but on the
23 application they can claim their Fifth Amendment privilege and
24 not answer questions. Again, the result would be the
25 application most likely would be denied, but then they can

1 still use medical marijuana under the affirmative defense in
2 453A.310. They're not denied the right to use medical
3 marijuana. It's a pure voluntary program. The Fifth
4 Amendment cannot apply.

5 THE COURT: As if there's not enough issues in here,
6 I saw you also brought up the idea that, in regard to the John
7 Doe here, since he didn't bring up his objections, your --
8 somebody wrote in here -- he didn't bring up his objections in
9 the past, that they're waived, because you've got to make your
10 -- you have to do your Fifth Amendment objection
11 contemporaneous with the Fifth Amendment right arising,
12 essentially.

13 MR. POWERS: That is correct. What the plaintiff is
14 trying to do is use the Fifth Amendment to make a facial
15 challenge --

16 THE COURT: Yeah.

17 MR. POWERS: -- and the Fifth Amendment doesn't work
18 that way. It's an individual right and it has to be raised
19 and applied to the individual facts. It's not -- it's not a
20 facial invalidation.

21 Even in the statutes he -- the cases he refers to
22 when those statutes had a criminal penalty for failing to
23 register, those were still as applied challenge. Those
24 individual defendants raised them as applied. It wasn't a
25 facial challenge. He's trying to use the Fifth Amendment as a

1 facial sword and it just can't be used that way.

2 Let's assume for the sake of argument though -- as
3 you brought up, Your Honor -- let's assume this wasn't a
4 voluntary program and you had to fill out this form. The
5 question then, like you said, does this form ask you any
6 questions that could lead to criminal prosecution? This form
7 doesn't. You don't have to disclose past criminal activity.
8 You never have to say whether you've used it in the past,
9 whether you've grown it in the past, whether you've sold it or
10 distributed it in the past.

11 The one question they like to focus on is they ask,
12 where do you intend to grow it? That in and of itself is not
13 a crime. Stating that, I intend in the future to potentially
14 grow marijuana doesn't lead the criminal prosecution. You're
15 not disclosing a past crime or criminal activity.

16 You may get the card; you may never grow marijuana.
17 There's no crime. You haven't -- you haven't -- you haven't
18 incriminated yourself. So, simply saying I may intend to grow
19 marijuana doesn't mean I have grown marijuana; therefore, I've
20 committed a crime.

21 Intent by itself without an act is not a crime.
22 That's basic criminal law. Granted, act with intent is a
23 crime, but intent without act is not a crime. So, the form is
24 not asking you to disclose act; it's only asking you to
25 disclose future intent. You may never act on that future

1 intent, and even if you do, the form doesn't admit that you
2 will or that you have.

3 So the form itself doesn't require someone to
4 disclose incriminating information. So not only is it
5 voluntary, but even assuming it wasn't voluntary, there's no
6 incriminating information on the form to be disclosed,
7 therefore, the Fifth Amendment doesn't apply in that
8 circumstance as well.

9 THE COURT: All right. One of the things we may do
10 here today is have Mr. Hafter tell me, and then you'll hear,
11 too, where he thinks there would be some passage, even one
12 question that would go too far, and then we'll have you react
13 to that, because really --

14 MR. POWERS: Yeah.

15 THE COURT: -- that's what I should put on him.

16 MR. POWERS: And that brings an important point,
17 Your Honor.

18 THE COURT: Yeah.

19 MR. POWERS: If that is the case, if there are
20 questionable questions and answers on the form, that's where
21 the focus has to be. If there's any injunctive relief here;
22 if there's a question that for whatever reason the Court
23 determines violates the Fifth Amendment privilege against
24 self-incrimination, that's the question that gets struck from
25 the form. The registry doesn't go away, only the question

1 goes away.

2 There's no way the Fifth Amendment can completely
3 invalidate the registry, because the registry is more than the
4 questions and more than the form. All the Fifth Amendment can
5 do is invalidate specific questions on the application. No
6 more than that. He's, again, trying to use the Fifth
7 Amendment for a broad facial challenge to undo the entire
8 registry; can't be done.

9 Which then brings me to the other argument. It's
10 severance. When the voters approved the constitutional
11 amendment, it was the right to use medical marijuana in
12 exchange for participation in the registry. When the
13 legislature enacted the statute it was, we're going to
14 implement medical marijuana as long as there's a registry.
15 The intent of the voters and the intent of the legislature is
16 clear from both the ballot question and the legislative
17 record.

18 If the registry falls, so does Article 4, Section 8
19 -- 38. If the registry falls, so does NRS Chapter 453A, the
20 medical marijuana laws. They're inherently connected. One is
21 dependant on the other. There can't be severance, because
22 there was not intent of the legislature or the voters to have
23 the right to use medical marijuana without the obligation to
24 participate in the registry, or without some type of
25 regulation, but not regulation that Mr. Hafter comes up with

1 that he thinks is a better policy.

2 See, he's asking you to enter an injunction. He
3 actually wanted you to specify what should be done in their
4 interim until the legislature changes the law, and to come up
5 with a policy he thinks would be preferable to the
6 registration system. That's not what courts do. They don't
7 craft policies.

8 If it's unconstitutional, it's unconstitutional in
9 toto. The whole thing has to fall; the right to use and the
10 obligation to participate in the registry. They go hand in
11 hand, they're tied and connected together, they must fall or
12 stand together. And so, we would argue that if it's --

13 THE COURT: You sound like Lincoln.

14 MR. POWERS: If the registry is unconstitutional and
15 can't be implemented, then both Article 4, Section 38 and NRS
16 Chapter 453A have to be struck in their entirety, there is no
17 severance, and that would be the remedy here. And I think,
18 Your Honor --

19 THE COURT: But you do -- it seems like -- correct
20 me if I'm wrong, but you seem to be suggesting that you would
21 -- my word is acquiesce to the idea that, as a court, I could
22 find that a question or more than one question runs afoul say
23 of the Fifth Amendment and enters such an order.

24 MR. POWERS: That's correct, Your Honor. That would
25 be narrow, specific injunctive relief, trying to sever the

1 specific question while maintaining the registry as much as
2 constitutionally possible. The registry would still exist.
3 The division would just have to re-frame its application and
4 change its application to conform to the Court's requirements,
5 but that wouldn't be striking down the entire registry.

6 It's clear that the plaintiff wants the entire
7 registry to go, and the plaintiff wants to substitute his own
8 notion of what he believes is better regulation than what the
9 voters and the legislature have already determined was -- is
10 an effective regulatory system.

11 MS. ANDERSON: Your Honor, I apologize, and I don't
12 mean to jump in. I do need to alert the Court though that I
13 do have to appear in a child support hearing later this
14 morning. I told them I would be late, but it may be later.

15 THE COURT: Okay.

16 MS. ANDERSON: And I would like to just comment
17 really quickly on this Fifth Amendment argument, and I don't
18 mean to interrupt counsel. One piece though, you know, that
19 we clearly --

20 THE COURT: What time do you have to be -- what time
21 do you have to be somewhere?

22 MS. ANDERSON: I have to be there at 11:00.

23 THE COURT: Here in this building?

24 MS. ANDERSON: No.

25 THE COURT: Where's it at?

1 MS. ANDERSON: At the child support on Flamingo and
2 Maryland.

3 THE COURT: Okay, so you need --

4 MS. ANDERSON: And they know I'll be late, so --

5 THE COURT: Okay.

6 MS. ANDERSON: -- I will, but I didn't realize that
7 we were going to go as late as we did, and unfortunately, I
8 have another deputy who's ill.

9 THE COURT: Well, would anybody object to just
10 having Ms. Anderson do whatever --

11 MS. ANDERSON: I can be --

12 THE COURT: -- she's going to do, and then take off?

13 MS. ANDERSON: -- represented by my esteemed
14 colleagues if the Court will dismiss me.

15 THE COURT: Okay. So, why don't we -- go ahead, Ms.
16 Anderson. You tell me anything in addition to what's in the
17 pleadings, and then --

18 MS. ANDERSON: In addition to everything that --

19 THE COURT: -- you'll take off.

20 MS. ANDERSON: -- counsel said on the Fifth
21 Amendment about compulsory and it not being compulsory, I just
22 want to add one thing, because I hear in the Court the concern
23 about whether they're violating their Fifth Amendment rights.
24 The legislature in its wisdom and from the voters set this --
25 these applications up as highly confidential.

1 And when I say that I've been representing this
2 agency for ten years, I've never released any of those
3 applications in a way that could be used in federal court
4 proceedings. So, the Division has never been asked to do
5 that, and I think if someone did, the medical marijuana user
6 would be able to object to that being used.

7 THE COURT: Well, I'm glad you brought that up
8 because that's one of the questions I was going to ask you. I
9 wanted to ask you, what happens to these --

10 MS. ANDERSON: These applications are --

11 THE COURT: -- applications? I mean --

12 MS. ANDERSON: The only way they can get out is if
13 they're -- a release is signed by the user themselves --

14 THE COURT: Um-hum.

15 MS. ANDERSON: -- or an order of a court. And
16 that's the latest rendition the legislature gave us, but these
17 applications are not subject to discovery; they're not subject
18 to subpoena by statute.

19 So, what the legislature did in their, you know,
20 balancing of the interest and to -- because they acknowledge
21 right on there they can't ever remove the threat of federal
22 prosecution for using medical marijuana. That just can't
23 happen. They alert the recipient of that, but they also took
24 every step that they could to keep that information protected.
25 And so, that's where not only is it not compulsory, but the

1 registry applications are not out there for the public, or for
2 the federal agents, or anyone else to utilize.

3 The question, for instance, for you to take out that
4 question about do you intend to grow, that's very critical to
5 understanding who is going to be able -- because the
6 legislature now with dispensaries is still going to allow some
7 people to grow marijuana because they meet some criteria. For
8 instance, there's no dispensary within 25 miles; they need a
9 specific type of medical marijuana that they can't get.

10 So, these are the ways that the Division of Public
11 and Behavioral Health is still going to have to, you know,
12 oversee that program. They're going to have to ask those
13 questions. So, I would caution the Court about trying to
14 exercise out a particular question --

15 THE COURT: Yeah.

16 MS. ANDERSON: -- because the use of that
17 application, it's just always going to be a right, as was
18 discussed, that if someone did try to use that application to
19 prosecute --

20 THE COURT: Yeah.

21 MS. ANDERSON: -- I think there'd be some pretty
22 strong arguments for the Court to hear as to why that
23 shouldn't be used to incriminate a person.

24 THE COURT: Okay. The only thing about that that
25 comes to mind though is the Supremacy Clause. I mean, you

1 know, if the federal government decided to prosecute, my guess
2 is we can have state laws, you know, thicker than all these
3 papers you guys filed that say that it's confidential, but the
4 Supremacy Clause and the feds would say, we want it anyway,
5 and my guess is a federal judge would say you get it.

6 MS. ANDERSON: And for ten years, that has not
7 happened, but yes.

8 THE COURT: Yeah.

9 MS. ANDERSON: That's why we put right on the
10 application, you know, this -- we can't give you exemption
11 from federal prosecution.

12 THE COURT: Right. Yeah.

13 MS. ANDERSON: Now, the feds have their own
14 priorities, and as you noted, that could change with a change
15 in administration, but this particular choice that a person
16 makes when they voluntarily sign up with the registry, they
17 should be aware that those are the possible consequences, and
18 nothing we can do will change that. Going around and handing
19 out doctor's notes to get medical marijuana would have even
20 the same implications. Those notes and everything else would
21 be used. This registry was intended to provide the best
22 protection that we could --

23 THE COURT: Okay.

24 MS. ANDERSON: -- under state law.

25 THE COURT: Yeah, the State -- what you're saying is

1 the State -- your view is, anyway, the State has done the best
2 they can to keep it confidential, all the while knowing that
3 the federal government might have an ability to discover them
4 if the federal government so desired.

5 MS. ANDERSON: And you know, at this point, we would
6 oppose any of that, but it would probably --

7 THE COURT: Yeah.

8 MS. ANDERSON: -- have to come to a federal -- you
9 know, a federal judge making that order, and that's the best
10 that we can do with that information.

11 THE COURT: Right, understood.

12 MS. ANDERSON: Since I'm here, just lightly, I do
13 want to touch on the fraud and the unjust enrichment.

14 THE COURT: Okay.

15 MS. ANDERSON: These are -- you know, our position
16 was that these were not claimed. We -- the Department didn't
17 make any misrepresentations for fraud, they didn't retain any
18 unjust enrichment, but really, the biggest defense we believe
19 we have is under NRS 41.032.

20 All the Department and the Division below it did was
21 comply with the statutes as they're written. John Doe has not
22 said that we deviated at all. We're following the will of the
23 people in terms of the constitutional amendment, which
24 required that we develop this registry, and we've been
25 operating that registry as required by the statutes, and

1 therefore, we believe we're entitled to immunity under those
2 claims.

3 As the Court already recognized, Mr. Doe did not
4 protest when he voluntarily elected to sign up with the
5 registry; the payment of those fees. If, as he alleges, he
6 didn't use medical marijuana because he wanted to wait until
7 he could buy it in a dispensary, which he now can, then he
8 should have waited; he shouldn't have applied. There would be
9 no reason for him to have a card. So, those arguments, we
10 submit to you, Your Honor, should be dismissed as a matter of
11 law.

12 THE COURT: Okay. Anything else?

13 MS. ANDERSON: Thank you.

14 THE COURT: Do you want to take -- go do your child
15 protection hearing?

16 MS. ANDERSON: I'll give you -- hear a little bit
17 more, but if I sneak out, with the Court's indulgence --

18 THE COURT: Okay.

19 MS. ANDERSON: -- I appreciate that.

20 THE COURT: All right. Now, Mr. Powers, I imagine
21 we could procedurally continue with you, since you were nice
22 enough to have Ms. Anderson sort of jump in there.

23 MR. POWERS: Your Honor, I think at this juncture, I
24 think I covered our basic analysis with regard to the
25 Fourteenth Amendment and the Fifth Amendment claims. I

1 certainly would like the opportunity, obviously, to respond --

2 THE COURT: Okay.

3 MR. POWERS: -- to anything the plaintiff's --

4 THE COURT: All right, good.

5 MR. POWERS: -- attorney has to say on those
6 matters.

7 THE COURT: Mr. Zunino, do you want to -- since I'm
8 on the defense side, since you guys have all the dispositive
9 motions, do you want to add something to this?

10 MR. ZUNINO: I'll be brief, Your Honor. You know,
11 and my role in this is to basically raise the procedural
12 argument, which you've addressed in your opening statements,
13 and which Mr. Powers I think could have raised as well. This
14 procedural argument is that the legislature and the Governor
15 are not really proper parties to this action. Mr. Powers has
16 kind of chosen to address these claims on the merits, which I
17 appreciate, because he's done all the heavy lifting here.

18 THE COURT: Yeah, I mean, that's not lost on me.
19 You guys could have just said, look, you got the wrong party
20 sued, let us out and go home, but you decided to put all this
21 merit-based stuff together, so that's a lot of extra work.

22 MR. ZUNINO: And I appreciate that.

23 THE COURT: Yeah.

24 MR. ZUNINO: My argument is just that the Governor
25 in his official capacity is not a person for purposes of 42

1 1983. There are a number of ways to challenge the
2 constitutionality of a statute; suing the Governor for a
3 violation of the Federal Civil Rights Act is not one of those.

4 THE COURT: Okay, understood. All right, anything
5 else from the defense side before I turn it over to Mr.
6 Hafter? All right. So, what we're going to do is take a --
7 about a ten-minute comfort break. Come back in about ten
8 minutes or so. You might not be here anymore. And then we'll
9 -- Mr. Hafter, and then it will be your turn at that time.

10 (Court recessed at 10:23 A.M. until 10:34 P.M.)

11 THE COURT: Back on the record. And Mr. Hafter?

12 MR. HAFTER: Good morning, Your Honor. I have a lot
13 that I'd like to respond to, and I appreciate your patience
14 and the patience of opposing parties in allowing me to address
15 everything that's been said so far. I also appreciate the
16 opportunity to make these arguments this morning in a manner
17 where we're not rushed by other matters on your calendar, so I
18 appreciate you and your staff's efforts to make sure that we
19 can clear the calendar just for this matter.

20 THE COURT: Yeah. When we saw it, we thought it
21 might take a while, so we cleared everything else, but thank
22 you.

23 MR. HAFTER: I want to -- I want to start my
24 comments with recognizing that the legislature already messed
25 up once with the development of this program. If you recall,

1 for years, the only thing that the -- that this program did
2 was create an affirmative defense, and the State would argue
3 and would waive the flag of protecting the public.

4 What they really did was create an incentive to go
5 and support your local drug dealers, because they never
6 provided a system of access to medical marijuana in the
7 creation of the registry, which is why, in 2013, the
8 legislature completely revamped in some respects the registry
9 model and the registry program, and created the concept of
10 dispensaries, which is also why 2013 is a key date for this
11 lawsuit, because we are looking at that point on.

12 To that end though, I find it almost appalling, if
13 not shocking, that the State is going to stand up here and say
14 that they're protecting the public through the registry, when
15 the fact of the matter is all they're doing is creating an
16 administrative hurdle that is very poorly executed to allow
17 law-abiding citizens to be able to access medical marijuana.

18 And why do I say that? Because what the State
19 hasn't been able to address is if you -- how do you as a
20 patient obtain either seeds to grow or the actual medical
21 marijuana if you don't have a registry card? Because we know
22 that if you don't have a registry card, you cannot go to a
23 dispensary.

24 And these arguments are modified a little bit, Your
25 Honor, now as opposed to when we first filed this action,

1 because, interestingly enough, there were no dispensaries when
2 we first filed the action. Within two weeks of filing the
3 action, miraculously, all these dispensaries started to open
4 up. It's kind of interesting. But the point is, is how do
5 you get it if you don't participate in the registry? You
6 can't. You can't under the program, because there's no place
7 to buy seeds legally, and there's no place to buy marijuana
8 legally.

9 So, what you're doing, Your Honor, is you're saying,
10 go to your local drug dealer and buy your seeds or marijuana
11 from him. And if you happen to get caught, you have an
12 affirmative defense if you meet certain criteria. Your Honor,
13 how is that allowing patients to access the right given to
14 them under Nevada Constitution Article 4, Section 38? It --
15 it's -- and how, better yet, does that protect the public?

16 The problem with the registry is that there is no
17 checks or balances on consumption. They say, oh, we want to
18 be careful that nobody's abusing this. Well, the -- how are
19 they doing that? Because all the -- the only thing that the
20 registry does is aggregate data on patients who are about to
21 get a card, and then re-affirm that data the next year when
22 the card expires. There's no independent inquiry as to what
23 that person's bought or grow -- or what they grew during that
24 year time that they had the card.

25 So, I'm shocked. How does that protect the public

1 and ensure safety? If anything, all it's doing, as you said,
2 was limit -- creating a very fine limit that they're making
3 sure that people with felony convictions don't -- aren't
4 allowed to exercise this right. Query if that felony
5 conviction was in fact because the person was using medical
6 marijuana but didn't get the card because they were afraid of
7 all of the adverse implications of it. How is that just? How
8 is that fair?

9 And so, what I'd like you to do as I go through the
10 arguments on creating a fundamental right, is I'd like for
11 you, Your Honor, without creating any kind of assumptions, and
12 I can do this here without -- where I couldn't do it in front
13 of a jury, is ask you to put yourself in the shoes of the
14 medical marijuana patient, okay?

15 You've had let's say some debilitating illness.
16 Let's say, hypothetically, you have a bad skiing injury on
17 your knee when you're 19-years-old, and you've had four or
18 five surgeries, including a knee replacement, and you live
19 with chronic pain every day. And your choices are narcotics,
20 which are extremely habit-forming, extremely -- have a
21 significant risk of abuse, and we know have a high association
22 -- correlation with overdose, okay? None of that we have for
23 marijuana.

24 And basically, most people cannot function in a
25 professional capacity as an attorney, or a judge, or whatever

1 the case may be if they're on high doses of narcotics because
2 of their pain. And their doctor says, you should try medical
3 marijuana as an alternative, and they want to try it. How do
4 they get it?

5 Well, in this state, they have to complete a paper,
6 send the paper with a fee via snail mail to the State, wait
7 for them to process that, send you back the proper
8 application. You then take that application and have your
9 physician fill it out. You then send it with a fee, and
10 eventually, they will say, hopefully, that your request has
11 been granted. You then go to the DMV to get your card.

12 And in that process, I can tell you -- and these are
13 all questions of fact, so a lot of what Ms. Anderson and a lot
14 of what I say are really questions of fact which should
15 prevent a dispositive motion from being determined if you
16 really feel that these are relevant.

17 But at the DMV, they're not secret about who's on
18 the registry. As a matter of fact, I can tell you that my
19 client and many other patients -- and this is styled as a
20 similarly situated class of people -- they go to the DMV, and
21 you can see just by looking at the screen who's above you and
22 who's below you in the registry.

23 You get a card that anyone who's looking at --
24 anyone who may be watching can see there's a card that says
25 you're a medical marijuana patient. It's not confidential at

1 all. And then who's to -- while they safeguard data, who's to
2 say that that -- the DMV personnel aren't misusing, or feds
3 aren't going to the DMV to obtain that information directly
4 without letting Ms. Anderson know or the State know?

5 So there's a lot of questions of fact on that. But
6 if you don't want to go through that process, which takes
7 weeks, if not months, and costs, with aggregate fees and
8 everything, \$550, then you -- your other choice is, if you
9 still want to use medical marijuana, grow it your own, or go
10 to your local drug dealer, and just maintain your levels at a
11 part that's below the statute.

12 But that's not -- that's very limiting, and it's
13 also very obstructive to a patient who's in chronic pain today
14 and is looking to get off of something that's known to be
15 addictive, and has association and correlation with overdoses,
16 such as narcotics, onto something that has never been
17 associated with an overdose, ever, medical marijuana. Okay,
18 so I would like you to keep that in the back of your mind.

19 Would you prefer if I started on the Fourteenth
20 Amendment or the Fifth Amendment?

21 THE COURT: Whatever you'd like.

22 MR. HAFTER: I'd like to start with the Fifth
23 Amendment, because I think that that is -- the very first
24 dispositive motion that was filed in this case was actually
25 ours, Your Honor, and it was the Motion for the Fifth

1 Amendment Relief. And there was a typo in our Reply. We --
2 in the title, we said Fourteenth Amendment, but the whole body
3 talked about replying to the Fifth Amendment issues.

4 But the Fifth Amendment, their defense -- the
5 government's defense -- well, first of all, they say that we
6 gave a line of cases that aren't controlling. I think that
7 the U.S. Supreme Court is controlling. They also say that
8 it's purely voluntary, and I don't agree for this -- for the
9 reasons why I just said. If somebody wants to obtain legally,
10 without going to your local drug dealer, seeds or marijuana,
11 they have to engage in the registry to be able to buy at a
12 dispensary. And so, it's not voluntary.

13 If you want to access the right that's set forth in
14 the Nevada Constitution where it says, "The use by a patient
15 upon advice of his physician a plant of the genus Cannabis,"
16 then you have to apply for the registry; otherwise, you're
17 going to be obtaining medical marijuana illegally.

18 And matter of fact, I thought it was really
19 interesting that Ms. Anderson said, before we had -- before we
20 had medical marijuana dispensaries, that a patient simply
21 should have just waited to use medical marijuana because
22 there's no dispensary; they shouldn't have applied for the
23 card. I mean, she even admits that if you want to use the
24 medical marijuana, you really, now that there are
25 dispensaries, need the card.

1 And then they say, but Section 38 of the Article 4
2 of the Constitution is -- is tied to the registry. I agree
3 with that. I agree with that. However, that doesn't mean
4 that this state can't find that that provision in the registry
5 is violative of the U.S. Constitution and strike it, because
6 federal law trumps state law. So, if it's a violation of the
7 U.S. Constitution, then the state constitutional provision can
8 be struck, so you have that power, Your Honor.

9 But also, there are many workarounds. California,
10 for example, has a very interesting method of dealing with
11 their dispensaries. If you want a card in California, you can
12 go to dozens, if not hundreds of doctors offices, and they'll
13 evaluate you, and then they have access to a central computer
14 database that they simply put you into, and immediately, they
15 print out the form that says you're accepted and you've met
16 your need. There's not weeks of waiting, and layers and
17 hurdles to go through. It's all done through the doctor.

18 It's no different than the regulation of drugs in
19 this state that's all done through the pharmacy. These aren't
20 policy arguments that I raise. It's to show that the State,
21 when they've tried to control dangerous or drugs of addiction,
22 they've -- they've -- this State has not gone so far as to say
23 we need a State registry for that; they let the actual point
24 of access control it.

25 THE COURT: Okay, I understand other states do

1 things. I mean, what's Colorado doing, for example? I
2 mean --

3 MR. HAFTER: Well, now, in Colorado --

4 THE COURT: I mean --

5 MR. HAFTER: -- it's legal for recreational use. I
6 don't think there's any registry at all.

7 THE COURT: I know. The point I'm making though
8 is --

9 MR. HAFTER: But so --

10 THE COURT: -- I understand and I appreciate what
11 happens in other states, but I'm going to focus mostly on what
12 Nevada law is and whether it --

13 MR. HAFTER: Sure.

14 THE COURT: -- violates any of the --

15 MR. HAFTER: What's --

16 THE COURT: -- constitutional areas that you've
17 brought up, and --

18 MR. HAFTER: Right.

19 THE COURT: I mean, because the way I look at it is,
20 you know, every state's legislature does -- in theory, does
21 its best to protect its citizenry in a way they think that
22 that citizenry ought to be protected. The Colorado
23 Legislature has done something, maybe Washington State, I
24 don't know; a lot of them have done things that maybe Nevada
25 eventually will do. Who knows?

1 MR. HAFTER: Correct. And what's fascinating is
2 that the legislature actually gave them the out to do this.
3 They say that the registry -- or the cards are to be provided
4 by the Division or their designee.

5 THE COURT: Yeah.

6 MR. HAFTER: And probably a better way that would
7 have had better constitutional safeguards is to outsource the
8 registry to a private company, which the legislature clearly
9 anticipated for, and let that private company administer it,
10 save and except for the state law enforcement coming just to
11 validate if somebody has a card.

12 That would have put far more controls on the process
13 than simply having the -- making the admission to the
14 government. If I'm making the admission to a private
15 organization, then I could see that there would be a
16 distinction there that may not be as concerning to the
17 plaintiff and --

18 THE COURT: Okay, I think that's a good argument.
19 It certainly is an admission to a government. I mean, that's
20 a governmental form, an agency, and requirement. Are you
21 going to --

22 MR. HAFTER: Correct.

23 THE COURT: Are you going to at some point tell
24 me --

25 MR. HAFTER: I'm trying.

1 THE COURT: Let's look at Exhibit A --

2 MR. HAFTER: Well, yeah, that's --

3 THE COURT: -- and show me in there where you think
4 there's a question, or more than one that calls for something
5 that's clearly, as you say in your paperwork, such that
6 compliance or answering the question would compel disclosure
7 of information that would surely prove a significant link in a
8 chain of evidence tending to establish guilt. That's what I
9 want to know.

10 MR. HAFTER: Right. And to that end, Your Honor, I
11 think you said in your beginning comments that I didn't give
12 you the cases that provide that test. Those -- that test --
13 that three-part test is clearly stated by the Supreme Court in
14 California vs. Byers and the Albertson case, and the Marchetti
15 case, all from the Nevada Supreme -- excuse me, all from the
16 U.S. Supreme Court. But before --

17 THE COURT: But what I was saying is --

18 MR. HAFTER: -- I go to that specific --

19 THE COURT: -- I didn't see that all three factors
20 were in one case. I think they were mentioned in different
21 cases.

22 MR. HAFTER: I think Byers is where they made them
23 all and brought it together.

24 THE COURT: Okay. Well, if that's the case, I just
25 didn't catch that, so I appreciate you telling me that.

1 MR. HAFTER: Okay.

2 THE COURT: Okay.

3 MR. HAFTER: With respect to the supplement -- or to
4 the exhibit --

5 THE COURT: Exhibit A?

6 MR. HAFTER: Exhibit A.

7 THE COURT: Okay, I've got it here.

8 MR. HAFTER: The question is, what is the
9 disclosure? It's my belief that globally -- and it's our
10 argument, globally, that the mere application for a card is an
11 admission. Unlike all the cases that were given to us before;
12 gun registry or registry for another drug, like the controlled
13 substances Type II, those are all legal. It's not illegal to
14 have a drug -- to have a gun. It's not illegal to have a
15 Control II substance. It's not illegal to have any of those
16 issues.

17 So when you're getting included into a registry,
18 because you're purchasing a gun, or being prescribed, or
19 actually obtaining a Type II -- Control II -- Schedule II
20 drug --

21 THE COURT: Yeah.

22 MR. HAFTER: -- then you're not admitting to
23 anything illegal, which is why it's not a Fifth Amendment
24 violation. Here, medical marijuana is illegal under federal
25 law. The mere fact that you're applying for the card is an

1 admission to the government that you are going to engage in
2 activity that is illegal under the federal law, all right?

3 So, I believe, globally, the registry in and of
4 itself, the application process, is an admission that could be
5 held against you. I think that any law enforcement could take
6 the fact that you applied, that first page -- which I don't
7 have a copy of, Your Honor. Remember, this is a two-part
8 process. So, you first send out an inquiry form to the State,
9 and then they send you out that application that you received
10 as Exhibit A.

11 THE COURT: Yeah.

12 MR. HAFTER: That first form that just says, I want
13 to apply for the registry, here's my fee, I think is an
14 admission to the State that you're going to engage in conduct,
15 because we know if the federal government were to obtain that
16 form, that would be enough to give a judge probable cause to
17 issue a warrant to your house to do a search and seizure. And
18 so, I think that form alone is sufficient.

19 But looking at the application itself, I have to
20 turn your attention to page 6, Subsection C. "Plans for
21 growing marijuana." It is required; that's their word. Their
22 word, "required." "Plans for growing marijuana required," all
23 right? And then it says, "Participants in the Nevada Medical
24 Marijuana Registry must," not shall, "must designate their
25 physical address as their grow site. The only exception is

1 when a participant has a primary caregiver or designates a
2 dispensary," okay?

3 And so, if you're designating a dispensary or you're
4 showing a caregiver, I mean, regardless, you're still
5 admitting to using marijuana. You have to complete this. And
6 even the State said that if you don't fill out all the
7 questions, you're going to get rejected. So -- and I should
8 say, Your Honor, whether or not you would get rejected and
9 whether or not you have to fill out all the questions is
10 probably more of a question of fact which may exceed the scope
11 of this argument. But it's clear, the form says you have to
12 -- you have to answer your plans for growing marijuana, or you
13 have to say you're going to go to this dispensary or you have
14 this care giver.

15 I think, again, looking at the same -- if a federal
16 judge were to obtain this application, all right, even if it's
17 denied, they probably would have enough there to issue a
18 warrant for probable cause to search a house for evidence of
19 marijuana, which is illegal under federal law. And so, I
20 think that the application very clearly is a compelled
21 disclosure of -- that could be used in a prosecution against
22 somebody.

23 THE COURT: Okay. Other than the argument that
24 you've made that just by virtue of applying and then later
25 filling out the application, that is exposure to federal

1 criminal liability, and your argument that Section C of the
2 registration application specifically is that as well, is
3 there any other part of this application --

4 MR. HAFTER: Well --

5 THE COURT: -- that specifically you think I should
6 look at?

7 MR. HAFTER: Section D is requiring a patient to
8 authorize the release of their medical records to the State,
9 and in those medical records could be discussion between the
10 patient and the physician that either they've used medical
11 marijuana, could be a disclosure, or that the physician has
12 counseled them to use medical marijuana and they are using
13 medical marijuana. And so, we don't know what's in those
14 medical records as well.

15 And the problem is, is that Section C is the heart
16 of the application. If we look at anything else, it's really
17 demographic information beyond that. Section C is the heart
18 of where the information for this crime is. And so, we do
19 think that it is -- it is -- it is not voluntary, because if
20 you want to access medical marijuana as allowed by the State,
21 you have to apply for the registry; otherwise, you can't get
22 it lawfully.

23 THE COURT: All right, so would you --

24 MR. HAFTER: And two --

25 THE COURT: Would you agree with the idea that, no

1 matter what sort of machination we use, that C and D cannot be
2 used by state authorities to prosecute you?

3 MR. HAFTER: We were never concerned about state
4 authorities.

5 THE COURT: Right. I just wanted to make sure of
6 that.

7 MR. HAFTER: Now, I can tell you that if this Court
8 were to allow this case to proceed, and if this Court were to
9 certify the class, there are dozens, if not hundreds -- close
10 to a hundred people out of the global registry list where they
11 never had any problems with law enforcement and medical
12 marijuana before they applied for the card, and somehow, after
13 they apply for the card, they've been harassed, or
14 investigated, or are charged with medical marijuana -- excuse
15 me, marijuana possession issues on a state level, and query
16 how that's happening.

17 And there are also judges in this court that are not
18 willing to allow an affirmative defense if somebody doesn't
19 have a medical marijuana card. Those are all questions of
20 fact which we would love to be able to bring to the Court's
21 attention at a further time.

22 THE COURT: Do you have any idea how many people
23 have applied?

24 MR. HAFTER: Yeah, there's about -- I don't know how
25 many people have applied. Last I heard, there was about

1 11,000 cardholders, and I'm not sure if that's in the state or
2 this area.

3 UNKNOWN FEMALE SPEAKER: It's the state.

4 UNKNOWN MALE SPEAKER: It's the state.

5 MR. HAFTER: In the state.

6 THE COURT: Um-hum.

7 MR. HAFTER: Now, that doesn't mean the population's
8 11,000. That means that the population could be longer and
9 some people aren't reapplying, and there also are a
10 substantial number of people who are not applying because of
11 this exact issue; they don't want to tell the State that
12 they're engaging in a use of a federally illegal substance.
13 It has a substantial chilling effect, which is also something
14 that this Court probably needs to take into consideration. On
15 the --

16 THE COURT: Yeah, it does have a chilling effect,
17 I'll give you that. I mean, it just does by its very nature,
18 given that there's this potential specter of federal
19 prosecution. I mean --

20 MR. HAFTER: Your Honor, I'm going to be very candid
21 for the purpose --

22 THE COURT: But I think it goes further than that,
23 and I want you to react to this.

24 MR. HAFTER: Okay.

25 THE COURT: I mean, it seems to me that, given

1 what's happened over time in the marijuana issue, I mean, you
2 know, it's only been a relatively recent change in mindset in
3 America, it seems like to me, that marijuana is accepted for
4 medical use.

5 And so, for example, you gave me a hypothetical
6 where you asked me to think about some ski injury that I had.
7 I wouldn't have one because I don't ski, but in any event, I
8 understand your hypothetical.

9 But further, if I had every need in the world to get
10 medical marijuana, and had every legitimate doctor note, and
11 went through the whole process, it seems like I would think,
12 well, should I even do that anyway, because I'm a judge, and
13 we elect judges, and what would the world think if they come
14 to know that I was interested in medical marijuana or having a
15 card?

16 MR. HAFTER: Now, for --

17 THE COURT: And other people in society might think
18 the same thing, school teachers, you know, police officers.

19 MR. HAFTER: For purposes of disclosure, and for the
20 benefit of the State, and duty of candor of the Court, they
21 did -- the 2013 Legislature did put in a section into 453A
22 that said that a professional licensing board shall not use
23 the card against somebody in a matter.

24 THE COURT: Understood. I'm just saying, as a
25 matter of --

1 MR. HAFTER: But I --

2 THE COURT: As a matter of common sense in this
3 whole issue, it seems like anybody who -- you know, again,
4 using the ski injury you put on me, thank you for that, you
5 know, but anybody who's interested and needs the medical
6 marijuana after a doctor says, hey, this is a good
7 alternative, it just seems like in today's world still --
8 maybe 20 years from now there would be no stigma, the cloud
9 hanging over it, but it just seems like you got to make a
10 decision anyway no matter who you are; if you're a school
11 teacher, or a --

12 MR. HAFTER: Right.

13 THE COURT: -- police officer, or a lawyer.

14 MR. HAFTER: Your Honor, I --

15 THE COURT: You know.

16 MR. HAFTER: I'm going to say just --

17 THE COURT: Or what if you're the counsel for the
18 State?

19 MR. HAFTER: I'm going to --

20 THE COURT: You know, who knows what you do in life,
21 right?

22 MR. HAFTER: The reason why I use that example, at
23 the risk of incriminating myself, I'm that person. As you may
24 recall, last year, I had a cane.

25 THE COURT: Yeah.

1 MR. HAFTER: I had multiple surgeries. I never,
2 never engaged in any illicit drugs in college, high school,
3 anything, but I was on narcotics for -- I was on a knee -- I
4 had a knee replacement in August of 2012 -- 2000 and -- excuse
5 me, 2014, and I couldn't function. The drugs were horrible.

6 And I obtained medical marijuana because I have a
7 lot of clients that are physicians that recommended it, and
8 it's helped amazing. I don't have a cane anymore; I'm able to
9 function; I'm not have all the physical side effects of the
10 narcotics. It's really been amazing.

11 Now, I've got to say, there are certain strains that
12 actually hurt my knee more than --

13 THE COURT: Okay.

14 MR. HAFTER: -- help, but the point is --

15 THE COURT: Maybe I -- maybe I started this --

16 MR. HAFTER: -- I go to California to do that --

17 THE COURT: You know --

18 MR. HAFTER: -- because I'm afraid of what Nevada
19 would do to me if they found out, because I think that I have
20 a couple enemies in Nevada that may not like that.

21 THE COURT: Um-hum.

22 MR. HAFTER: Your Honor, it's very stigmatizing,
23 and --

24 THE COURT: Yeah, I know, that's what I'm saying. I
25 respect that, and I mean, it's the world we're in right now.

1 MR. HAFTER: The other reason why I took this case
2 -- and I'm not the plaintiff. I don't have migraines, thank
3 God, but was because of the Fourteenth and the Fifth -- the
4 Fourteenth Amendment arguments.

5 I believe that the next major issue that the courts
6 need to realize and address is access to healthcare as a
7 fundamental right. We've dealt with gay marriage, we've dealt
8 with all these other social issues, we all hear that Obamacare
9 is a concern, and I think the real issue that nobody's talking
10 about is whether or not access to healthcare is a fundamental
11 right. Not access to free healthcare; just access to the
12 healthcare that your doctor recommends.

13 THE COURT: Um-hum.

14 MR. HAFTER: Yes, in this case, it may be marijuana,
15 but I don't think the right is access to healthcare. So --
16 and that's what I'm asking this Court, and hopefully not, but
17 apparently we probably will be asking appellate courts one way
18 or the other to address this issue, is -- is -- I think this
19 is the next big civil rights argument. And just because the
20 courts haven't to have addressed this before doesn't mean
21 those rights don't exist.

22 You know, before Loving came down, did it mean that
23 they should have said no to Loving because -- interracial
24 marriages because, oh, the courts have never discussed it
25 before? That's the whole purpose, and that's why we gave you

1 a substantial amount of case law showing the evolution of
2 fundamental rights all coming from the life, liberty, pursuit
3 of happiness.

4 How can you have a right to life if you don't have a
5 right to access healthcare? I just don't get it. And I think
6 it's so obvious that that's why the Supreme Court has not
7 specifically mentioned it while they have given us certain
8 healthcare rights.

9 As you correctly noted, Your Honor, the newly
10 created rights, a lot of them breach the area of healthcare.
11 The right to bodily integrity in Rochin vs. California, 342
12 U.S. 165. In 1952, the Supreme Court said that we have a
13 right to bodily -- body integrity; the right to an abortion.

14 Now, this was very, very interesting. Mr. Powers
15 said on this issue that this is absurd, that no court has
16 recognized such a right because it would be absurd because
17 they couldn't regulate that field.

18 Now, look at abortion, Your Honor. Abortion's
19 highly regulated. It's a practice of medicine. Same thing
20 with use of contraceptives. It's the practice of medicine;
21 it's subject to regulation by the Board of Medical Examiners,
22 and the Board of Pharmacy, and the like, and yet, the court
23 has still held those as fundamental rights.

24 So, Mr. Powers is completely incorrect, with all due
25 respect, by saying that just because something is a

1 fundamental right doesn't mean it can't be regulated by the
2 State. As a matter of fact, that's where this state should be
3 coming down.

4 It should be holding physicians accountable. If
5 you're going to recommend to a doctor -- to a patient medical
6 marijuana, then you need to be accountable for that
7 recommendation, Doctor. And that's the only thing that
8 matters, really. It's -- this is a relationship between a
9 doctor and a patient, not between the State and the patients.

10 And so, on a fundamental right perspective, why is
11 it that a doctor can prescribe narcotics, or
12 anti-inflammatories, or steroids, or any other drug for
13 inflammation and pain, and I don't have to pay a fee, I don't
14 have to register with the State, but all the sudden, when they
15 want to say, use this plant, that's when we say, no, no,
16 you've got to engage in this arduous fee -- arduous
17 application process and pay a fee every year to be able to do
18 that.

19 And that's where I'm saying I don't think that this
20 is correct on a fundamental right basis, because inherently
21 access to medical care is -- is essential to our right to
22 life. We can't have a right to life without access to
23 healthcare, and that's why we've seen that in American
24 society, the average age for males and females is no longer in
25 their 30s as it was in the 1800s, but we're now up into the

1 70s because of medicine.

2 And all of these inherent rights are ones in which
3 healthcare is a factor, and I can't understand how we can
4 honestly say that we want to live in a society that doesn't
5 allow this fundamental right of access to healthcare. I'm not
6 saying paying for it. I'm not saying it's free government
7 healthcare. I'm simply saying, if a doctor wants to recommend
8 a medical treatment to you, then you should have the right to
9 access that treatment.

10 Clearly, a doctor shouldn't be recommending a
11 healthcare that goes outside the scope of medicine, and we
12 have -- 630.309 gives the Medical Board the authority to
13 prosecute a physician for engaging in recommending a treatment
14 that is not appropriate or outside the scope of medicine, and
15 so deviates from standard of care. It's malpractice. It's
16 actually Subsection D in that statute.

17 And this happens all the time. That's why we have a
18 Medical Board, that's why we have a Board of Osteopathic
19 Medicine, that's why we have a Board of Nursing, that's why we
20 have all of these other safety nets to ensure that healthcare
21 providers are recommending things that are appropriate. But
22 if the doctor recommends what's appropriate, then we should
23 have a fundamental right to be able to access that. Just
24 access. Not pay for it; access it.

25 THE COURT: Do you think that the ease at which this

1 particular drug can be created enters into this in some way?
2 In other words, you just -- you know, you put some seeds and
3 you grow a marijuana plant, whereas, other -- this is in
4 response to your argument about comparison to other, you know,
5 product drugs. It seems like most people would have some
6 difficulty creating the other narcotic drugs, I mean, unless
7 you're that guy from Breaking Bad or something. I mean, you
8 know, really, is it ease of creation here that I think is part
9 of the --

10 MR. HAFTER: I understand that.

11 THE COURT: -- the legislative concern. I do think
12 that.

13 MR. HAFTER: Your Honor, first of all, let me just
14 clarify a couple technical issues. Narcotics are basically a
15 class of drugs that include -- that have -- that work on the
16 narcotic receptors in the brain, and they're generally all
17 opium derivatives. Breaking Bad, great show, but that was
18 making meth, which was far different. Narcotics are a great
19 example --

20 THE COURT: Yeah.

21 MR. HAFTER: -- because they're very easy to make,
22 very easy to get, because basically, and we saw this going
23 back millennia, it's opium. It's the poppies. We've seen in
24 societies throughout the country going back to the beginning
25 of time that people were growing their own opium, their own

1 poppies, and were smoking it in opium dens very easily.

2 The only reason why that doesn't occur in this state
3 is, one, heroin and other narcotics are so cheap and easy to
4 get, it's not worth growing and it doesn't behoove people to
5 grow it.

6 But the reality is, is we still have in other
7 cultures and other countries to this day opium being smoked
8 routinely for pain and for medicinal purposes, and that's just
9 as easy as marijuana to grow. I don't think that this is an
10 ease to get issue. I really don't.

11 I think if we're going to sit here and say we want
12 to protect the people of this state, let's not do it half-ass,
13 with all due respect. We're not going to say, okay, we're
14 going to have a registry that's going to monitor who is
15 allowed to do it, but we have absolutely no controls on
16 consumption or monitoring of use, or what's being acquired.
17 And so, the reality is, is this registry doesn't do anything
18 to promote the safety; it just blocks people who are felons
19 from being able to participate in the program --

20 THE COURT: Do you think that's a legitimate --

21 MR. HAFTER: I don't.

22 THE COURT: -- concern?

23 MR. HAFTER: I don't know if I have standing at this
24 point to do that, because I'm just looking at people who have
25 cards, but I -- I think --

1 THE COURT: So, you know, we do these hypotheticals
2 back and forth. Envision the worst criminal history that
3 somebody could have --

4 MR. HAFTER: They're going to be getting it anyways.

5 THE COURT: -- with substance abuse and what have
6 you, and that person says, you know, I'm going to apply for
7 the medical marijuana card. You don't think that the
8 government or the State has some interest in --

9 MR. HAFTER: Honestly, the person with the worst
10 criminal history is not going to apply for medical cards, just
11 like gun control.

12 THE COURT: Well, understood, but --

13 MR. HAFTER: We have the toughest gun control laws
14 of any state in California, and yet we have a tragedy at San
15 Bernardino occurring where the criminals broke the laws on gun
16 control to still engage in a massacre.

17 If you have criminals who are going -- who want to
18 engage in medical marijuana, they're not going to say to the
19 State, mother, may I? They're just not. They're going to go
20 ahead and engage in the activities that they are used to
21 engaging in. So, the reality is, no, that's not a legitimate
22 purpose at all.

23 THE COURT: Well, just like Obama said the other
24 night though, I mean, state and federal agencies can only do
25 what they can do. I mean, you know, if they make it more

1 difficult to -- to --

2 MR. HAFTER: Which is why I raised all the policy
3 arguments.

4 THE COURT: If they make it more difficult to get an
5 assault rifle, you know, I agree with you that, you know, only
6 criminals then would possess assault rifles. I get it.

7 MR. HAFTER: Right.

8 THE COURT: You're not going to stop the actual
9 criminals from having them, but you might -- I guess the
10 theory is, you make it more difficult; somewhere along the
11 way, you maybe prevent something. I mean, you know --

12 MR. HAFTER: Which is why I'm saying that merely
13 waving a flag of protecting patient health and safety --

14 THE COURT: Yeah.

15 MR. HAFTER: -- and protecting the people's health
16 and safety is not sufficient to say -- to prove the rational
17 basis, because it doesn't do that.

18 With -- you asked me is it improper that they're
19 keeping felons out. I think that the concern is, is you have
20 a patient who was legitimately engaged in use of medical
21 marijuana before there was a proper statutory scheme, or
22 better yet, you have a patient who was in Arizona where there
23 is no medical marijuana, or give me a state where there's no
24 medical marijuana law -- and for your reference, Your Honor,
25 in my Opposition to the Legislature's Summary Judgment Motion

1 on page 22, I have a list of the 20-something states that have
2 all passed medical marijuana or marijuana laws. Interestingly
3 enough, Arizona -- I don't think -- Arizona's not on there.

4 So, but if you have somebody who lives in Arizona
5 and they move to Nevada, but they had a felony conviction for
6 simply using their medicine in Arizona, now they're kept from
7 using it here, that's -- that doesn't protect the safety of
8 our people, that doesn't protect health, because what they're
9 going to go do is they're going to go get it on the streets,
10 which encourages drug dealers to keep selling, which is what
11 we don't want to do. So, I don't think it -- I don't think
12 it's a proper rational basis.

13 To that end, I want to talk about that. You know,
14 Mr. Powers raised an argument about how one of the cases they
15 used, the Raich case in the Ninth Circuit, supported the fact
16 that there's no right to use medical marijuana. Page 20
17 through 22 of my Opposition to his motion actually discusses
18 that case in detail. And it was fascinating, because if that
19 case were decided today, I believe the Ninth Circuit would
20 have actually changed and found a different result.

21 They said the reason why they weren't going to find
22 that right was because legal recognition -- quote, "Legal
23 recognition has not yet reached the point where a conclusion
24 can be drawn that the right to use medical marijuana is
25 fundamental and implicit in the concept of ordered liberty,"

1 and that's because they were asked to look at it back when
2 there were a minimal number of states that were participating.

3 But now when we have 26 states that have all said
4 we're going to allow marijuana for medical use or recreational
5 use, and you've got another seven or eight states that are
6 going to look at it next year, and you've got more states that
7 are going -- I think we've reached that point, Your Honor,
8 where we can say maybe there's a fundamental right here. And
9 I think the --

10 THE COURT: Okay.

11 MR. HAFTER: -- proper way is --

12 THE COURT: I under -- yeah.

13 MR. HAFTER: -- fundamental right to access to
14 healthcare.

15 THE COURT: Right, I understand that argument. I
16 think it's an interesting and novel way to go about the
17 general overall subject of right to healthcare, but let me ask
18 you this. Has any judge at any level found a fundamental
19 right to use medical marijuana, to your knowledge?

20 MR. HAFTER: Your Honor, I don't want to -- at the
21 risk of sounding arrogant or cocky, I do my own legal work. I
22 don't -- I don't draft by simply copying other people's stuff.

23 THE COURT: I know.

24 MR. HAFTER: I do my own thought. I love this case
25 because I think that this case takes this country in the next

1 direction where we need to be going, to say it's ethical, it's
2 appropriate, and it's sound, grounded in our Constitution to
3 protect life, liberty, and the pursuit of happiness to say, we
4 have a right to access healthcare. This is all my original
5 thought, Your Honor.

6 I can tell you that I did call NORML's office in
7 Washington D.C. to let them know about the case, and figured
8 maybe they could add some input on the Pleadings or something,
9 and they thought I was -- they didn't want to participate in
10 this. But I don't -- I haven't seen another case that argued
11 this, but I don't see that it's been argued in another case,
12 so I don't think that that's really controlling on us at this
13 point.

14 I also want to -- I'm just looking through notes,
15 Your Honor, and at this point --

16 THE COURT: Sure.

17 MR. HAFTER: -- I may go with some piecemeal
18 argument.

19 THE COURT: Okay.

20 MR. HAFTER: On preventing the people who have
21 felony convictions, I also have a problem that that may
22 violate their due process rights, because when they got the
23 felony conviction, it may have been before the medical
24 marijuana statutes were implicated, and they may not have
25 known or had the ability to know that they would be losing

1 that right that was given in the future because of the felony
2 conviction in the past, especially in the context of people
3 who were convicted of marijuana possession when they were
4 trying to simply obtain it for medical purposes.

5 THE COURT: Do you want to say anything about your
6 Partial Summary Judgment Request in addition to the Pleadings?

7 MR. HAFTER: I do, Your Honor. Can I just address
8 the discretionary immunity arguments that were raised? I want
9 to remind the court that they do have discretionary immunity
10 when they're applying a statute, unless the statute's found
11 unconstitutional. So, if this Court were to find that the
12 statute -- or it violates the Constitution, then they wouldn't
13 be immune from that.

14 The other thing about naming the proper party I want
15 to raise, because we ended on this from the Governor's
16 counsel, said that the Governor's not a person for purposes of
17 1983.

18 First of all, I have a -- it's public record. I
19 mean, I've sued many people under 1983, and I've gone back and
20 forth. Do we name everybody individually, or do we name just
21 the organizations? Because fundamentally, what generally
22 happens is you name the people, and the party -- then the
23 Department comes in and, you know, we release the person.

24 And so, I have -- I've gotten a bit skeptical in
25 naming individual people. But I did name the Governor,

1 because if you look at all the organizational charts in this
2 -- in this case, the Governor, which is the one who's at the
3 head of the Department of Health and Human Services on their
4 own organizational chart, and I included that in the documents
5 here.

6 And so, I understand that the Governor is the
7 Governor, but, you know, I did sue the Governor previously
8 when we dealt with First Amendment rights related to --
9 related to Kosher food in the prisons. And the federal courts
10 didn't throw him out, because -- not because he was the
11 Governor, but because as the Governor, he sat on the Board of
12 Prisons. And so, I named Ms. Masto -- Ms. Cortez Masto, and
13 him, and the third -- I can't remember who was the third
14 person on the Board of Prisons.

15 Similarly, he was named because he's the head of the
16 Department of Health and Human Services, according to their
17 organizational charts. We have no problem substituting the
18 right person in if we could just know who that is, and I would
19 ask that the Court allow us to simply do that in an expedited
20 fashion.

21 THE COURT: Understood. I mean, Ms. Anderson told
22 you who it is.

23 MR. HAFTER: I would hate to see -- I would hate to
24 see that we name them in an Amended Complaint where the only
25 change is to amend them, and then they bring up more Motions

1 to Dismiss and we drag this on even further.

2 I filed the Fifth Amendment Summary Judgment Motion
3 because I think that's the easiest. I think it's very easy
4 for somebody to recognize that merely applying to the State to
5 be part of the registry to say that you're going to use
6 medical marijuana, just the mere application -- there's no
7 other reason to apply for a registry card unless you're going
8 to use medical marijuana.

9 Because marijuana is illegal under federal law, the
10 mere application to the program I think is the compelled
11 interest, and it is compelled, because you can't exercise your
12 right to use medical marijuana without applying if you want to
13 gain the drugs legally.

14 So, I think the degree of relief that this Court
15 were to order on the injunction would depend if it were ruling
16 under the Fifth Amendment, or if it were ruling under the
17 Fourteenth Amendment. If it's ruling under the Fifth
18 Amendment, I would like to ask, again, that the Court say that
19 the registry be deemed a violation of the Fifth Amendment,
20 because the mere application is -- is a compelled disclosure,
21 and that a declaratory relief, because this Court can -- can
22 say -- issue declaratory relief, which confirms their position
23 that you don't need a registry card to get the -- to get the
24 affirmative defense, and declaratory relief that a -- I mean,
25 maybe this Court can't say that a person who has a medical --

1 has a recommendation from their doctors be allowed to
2 substitute that for a registry card to be able to buy at a
3 dispensary, but hopefully the government will work to be able
4 to make that clarification possible as soon as possible.

5 I heard that there was maybe a special legislative
6 session next week, December 16th or 17th, and maybe this could
7 be addressed at that time if this Court were to, you know,
8 issue an order that were -- require attention from the
9 legislature. They're going to be meeting next week,
10 allegedly.

11 And so, at the very least, I would ask that the
12 whole registry be struck. I didn't ask for safeguarding the
13 information on the registry, because I too have done a fair
14 amount of legal work involving injunctions, and I have a real
15 hard time when a court orders prospective injunctive relief as
16 an injunction.

17 Now, if you were to find on summary judgment this as
18 a finding of law in this matter, separate from the injunction,
19 then I think the Court could be able to address that issue as
20 well.

21 But if however we are going to say the application
22 is not a violation of the Fifth Amendment, but you do believe
23 that there is a right to access healthcare, and we shouldn't
24 have to have -- under an equal protection, if there is a
25 right, then I should be able to access medical marijuana no

1 different than narcotics, or Tylenol, or Ibuprofen, then I
2 think that the Court also needs to strike the registry,
3 because it's that application process that is just so
4 burdensome. And the fee -- again, we don't have to pay a fee
5 to access any other role of healthcare.

6 And so, again -- which begs the question, you asked
7 maybe it's because marijuana is so easy to grow and obtain by
8 themselves, that's why this is different, but we actually have
9 a Board of Homeopathic Medicine here in the State of Nevada
10 where -- regulates natural and homeopathic medicines, and most
11 of those are all grown by patients as well.

12 So, even in areas where we have naturopath and
13 homeopathic medicine, we haven't gone to the level that we
14 have in this -- in this case.

15 I think I've answered all of your questions, and I
16 think I've responded to theirs. I'm sorry for the time I've
17 taken, Your Honor, but I appreciate the opportunity.

18 THE COURT: All right, Mr. Hafter. You don't need
19 to be sorry about the time. I mean, this is going to take
20 some time no matter what because --

21 MR. HAFTER: I actually --

22 THE COURT: -- there's more issues than just a few
23 here, so.

24 MR. HAFTER: I actually want to say this is probably
25 the highlight right now of my caseload, just because it -- it

1 is new, novel, and I think there's some very interesting
2 arguments here. So, thank you.

3 THE COURT: All right, thanks a lot.

4 Now, Mr. Powers, you may want to respond to some of
5 that because you guys had dispositive motions. Either one of
6 you can respond, and I'll give you the last word. That's
7 typically my practice when you bring a motion like that, but
8 they've got motions, so we'll just keep -- reasonably, we can
9 go back and forth, okay?

10 But I do have a question for you in addition to
11 whatever you want to do to respond to what Mr. Hafter said.
12 You did do this already, and so blame me for maybe prolonging
13 things a little bit.

14 But you know, I just want to ask you a question, and
15 that is, how would you -- in real simple terms, if we had the
16 entire Nevada public here to listen to the answer, what is the
17 rational basis for this whole legislative scheme, in your
18 view? What is the -- what do you -- what's the rational basis
19 that you would say to the public? That's my question.

20 MR. POWERS: I think the rational basis in the
21 broadest sense is protecting the public health, safety, and
22 welfare. That is the rational basis. It prevents abuse of
23 dangerous drugs by those who have possession of them, and it
24 also protects society from harm that could occur from those
25 who abuse dangerous drugs.

1 And I think the easy thing here is that the U.S.
2 Supreme Court has already answered the question for us in the
3 Whalen vs. Roe case that involved New York's patient
4 identification registry for patients who received Schedule II
5 drugs. Their name, their address, their doctor, their drug
6 prescribed, and their dosage amount all went to the State
7 Department of Health. The U.S. Supreme Court was clear there
8 were several important rational bases behind that law.

9 The legislature could reasonably be expected to
10 believe that the patient ID registry requirement would have a
11 deterrent effect on potential violators, as well as aid in the
12 detection or investigation of specific instances of abuse. At
13 the very least, the State's vital interest in controlling the
14 distribution of dangerous drugs would support a decision to
15 experiment with new techniques for control.

16 That's all the legislature needs. It needs to have
17 a goal of protecting the health, safety, welfare in the
18 public, and this has to be a reasonable method. It doesn't
19 have to be the best method, doesn't even have to be a
20 particularly good method; it just has to be a reasonable
21 method for protecting the health, safety, and welfare of the
22 public.

23 Under the rational basis test, we do not need
24 mathematical certainty. Each state is allowed to experiment
25 and determine whether each system for regulation is an

1 effective deterrent and protection against apparent abuse.
2 And a registry does do that. As the plaintiffs even
3 mentioned, someone who wants to abuse drugs is not going to
4 participate in the registry and try to be fraudulently
5 obtaining medical marijuana because their fear of being caught
6 from using the abuse.

7 The registry itself has a deterrent effect. At the
8 same time, the State is only allowing each individual to use a
9 certain amount of marijuana. If you go beyond that amount,
10 you commit a state law crime.

11 The only way for the State to know who has the right
12 to use that limited amount of marijuana is through a registry
13 system. If we just allow physicians to shoot out
14 recommendations, easily, those recommendations could be
15 obtained fraudulently; they could be forged. How would a law
16 enforcement officer know? He would have to arrest everyone
17 who held one of those cards to prove whether that card -- that
18 authorization from this physician was valid.

19 With a registry, the law enforcement officer goes to
20 the registry, your name's on it, issue done. That's rational
21 to implement a medical marijuana program. It prevents
22 fraudulent and forged physician authorizations.

23 Let's face it, these wouldn't even be prescriptions,
24 because physicians can't write prescriptions for medical
25 marijuana under federal law, so it wouldn't even be regulated.

1 Each physician would be making up their own form as to what is
2 a written authorization.

3 Now that written authorization goes to the
4 Department and through the registry, and it has to be verified
5 by a state agency, so the physicians have to follow a standard
6 practice. Once again, that furthers the State's interest in
7 health, safety, and welfare.

8 I can go on indefinitely. There are so many reasons
9 that this furthers the state's health, safety, and welfare.
10 It's just rationally related.

11 What the plaintiff is asking you to do, he's
12 questioning the policy, wisdom, and expediency of the law.
13 But the Nevada Supreme Court has said time and time again, the
14 policy, wisdom, and expediency of the law is for people's
15 representatives in the legislature assembled. That is where
16 we make policy arguments.

17 Mr. Hafter may be right. Maybe this isn't the best
18 way to regulate medical marijuana, but that's the way the
19 legislature chose, and it's allowed to have that discretion
20 and leeway. He can come up with 100 different ways that he
21 thinks are better, but that's why we have a legislature.

22 At the beginning of his presentation, it was a
23 legislative committee hearing; it wasn't a court hearing on
24 the constitutionality of these -- of these laws. It just
25 wasn't. He's asking the Court to say, there's better ways to

1 do this; let's throw this out. That's not the standard.

2 The standard is whether there's a rational basis,
3 and there is a rational basis for the legislature to protect
4 the public health, safety, and welfare with a registry
5 requirement. Whalen vs. Roe, the U.S. Supreme Court already
6 told us there's a rational basis for it. This is no
7 different.

8 And let's get back to the fundamental right. And
9 just to let you know, Your Honor, I do my own legal work as
10 well, and my legal work leads to the conclusion that there is
11 no merit to these constitutional claims.

12 THE COURT: I guess I'm the only one in here that
13 doesn't do their own legal work.

14 MR. POWERS: In Washington vs. Glucksberg, the U.S.
15 Supreme Court talked about fundamental rights in the
16 healthcare field. And what they said is that they were very
17 cautious of creating fundamental rights, because when you do
18 that, you essentially remove that area from traditional State
19 regulation. In order to regulate, the State has to prove a
20 compelling interest for everything.

21 Mr. Hafter mentioned abortion. Abortion is not
22 easily regulated by the State. Every abortion regulation is
23 challenged in court because the State has to prove a
24 compelling interest, and most often than not, those abortion
25 regulations fail because it's a fundamental right.

1 So, what you would do is take what's now the
2 rational basis test where most regulation of healthcare is
3 upheld, and you would flip it on its end, and most regulation
4 of healthcare would be struck down if there was a fundamental
5 right to access healthcare.

6 If a prescription wrote -- if a doctor wrote a
7 prescription for ecstasy, someone would argue, I have a
8 fundamental right to use ecstasy because that doctor
9 prescribed it to me. Then the State would have to prove a
10 compelling interest to prohibit you from using ecstasy, even
11 if there's no real medical reason behind it, because according
12 to him, there's a fundamental right to access healthcare.

13 That's the situation. You would be flipping the
14 entire world of healthcare and how it's regulated by the State
15 on its ear. And already, courts have rejected such an
16 approach.

17 In the People vs. Privitera case from 1979 that we
18 talked about before, the court said, "It is, of course, well
19 settled that the State has broad police powers in regulating
20 the administrative drugs by the healthcare profession." It
21 needs to.

22 The whole FDA approval process; the whole, you can
23 only prescribe drugs for the FDA approved uses. If you start
24 prescribing out those -- outside of those FDA approved uses,
25 it becomes more dangerous. Therefore, the State regulates

1 that, and all they need is a rational basis.

2 There just simply can't be a fundamental right to
3 access healthcare. It would really undo the way the State
4 regulates the healthcare system.

5 Turning then to medical marijuana, there'S certainly
6 is not a fundamental right to regulate medical marijuana. He
7 mentions in the Raich Ninth Circuit case from 2007 that they
8 mention that, over time, maybe that this view of medical
9 marijuana would change.

10 Well, and recently, in 2013, the Ninth Circuit had
11 the same question before it. It once again held there was no
12 fundamental right to use medical marijuana, and then, the en
13 banc court rejected the petition for en banc review in
14 February of 2014.

15 So, as -- since February of 2014, as recently as
16 that, the Ninth Circuit hasn't changed its mind. Society
17 hasn't changed. There's no fundamental right to use medical
18 marijuana.

19 So, I've already talked about the rational basis. I
20 don't want to get into that again. Let's go now to the Fifth
21 Amendment again real quick. The difference between the cases
22 he cites and the Selective Service case that we cite is that
23 there's no requirement to get federal educational aid, so if
24 you submit the application, and they ask you a question that
25 incriminates you and you choose to answer it, you haven't been

1 compelled to answer that question. You're trying to get a
2 benefit from the State.

3 The same thing here. If you want to use medical
4 marijuana, the State submits you an application; you choose
5 whether or not you want to file the application or submit it.
6 No one's forcing you to do so.

7 The way that Mr. Hafter describes it is that the
8 state constitutional right has to be exercised by everyone if
9 they want to. That's unreasonable. No one has an absolute
10 right. All rights are subject to reasonable regulation. It
11 doesn't -- nothing compels you to go and participate in the
12 medical marijuana program; therefore, the Fifth Amendment
13 doesn't apply. There's no compulsion.

14 THE COURT: Do you think it's that same type of
15 logic like if you graduate law school and you apply to a bar
16 to take the bar exam, you have to disclose your criminal
17 history?

18 MR. POWERS: That is correct. That is. You don't
19 have a right to participate and practice law.

20 THE COURT: You have to answer a lot of questions,
21 too, that maybe ask you to admit the things that might be
22 illegal when you apply to take a bar exam.

23 MR. POWERS: It's true, and they can do that because
24 you voluntarily choose to apply. And then, once they hand you
25 the application, if you answer those questions, that's your

1 choice.

2 The difference is that in the cases he cites, if you
3 fail to answer the questions, you're subject to a criminal
4 penalty. See, that's what's all the case (indecipherable).
5 It's not just simply, you have to register. His cases are,
6 you have to register, or you're convicted for failing to
7 register. That's compulsion.

8 When the government hands you a form and says, you
9 have to fill out this form, and if you don't fill out this
10 form and tell us truthfully about your criminal history, we're
11 going to convict you for another crime, that's compulsion.
12 That's what those cases are about. Either you register, or
13 you get convicted for failing to register.

14 That's not here. If you choose not to apply for a
15 registration card for medical marijuana, no one can convict
16 you. It's not a crime, because you choose whether or not to
17 do it. That's the difference. That line of cases -- we
18 didn't say the U.S. Supreme Court cases aren't binding. What
19 we're saying is that that line of cases has no application
20 here. It just simply doesn't apply.

21 THE COURT: I understand. I mean, I understand what
22 you're distinguishing. Are you going to -- I mean, I know
23 it's -- we've been talking a long time, but are you going to
24 tell me what you think about Section C and D of this
25 application?

1 MR. POWERS: Yes, I was heading there next.

2 THE COURT: Okay.

3 MR. POWERS: I think it gets back to what I
4 mentioned earlier, Your Honor. Disclosing intent is not
5 disclosing a criminal act. For a criminal act to exist, you
6 have to have both act and intent. That's a crime; both act
7 and intent. Just saying an intent to do an act is not enough
8 to make it a crime.

9 It's like the conspiracy statutes. You -- for a
10 conspiracy to occur, it's not enough for people to agree to a
11 crime; it has to be connected to some additional overt act.
12 The crime only occurs when you have overt act and intent.

13 All this application says is, tell us your plans to
14 grow marijuana and where you plan to grow it. That doesn't
15 say I have grown it; it doesn't say I will grow it. It says,
16 these are my plans to grow it. Many people may not grow it at
17 all. How is that incriminating? Because you're not admitting
18 to any past acts, so that intent without the act doesn't equal
19 crime. You're not incriminating yourself.

20 Now, Mr. Hafter says that the application itself
21 just globally, it just -- if you just -- the very fact that
22 you participate in the registry or file the application, but
23 that's why we make the voluntary argument. It's -- it's just
24 not simply subject to the Fifth Amendment. And the
25 application itself, again, doesn't tell anyone anything, other

1 than you may intend in the future to use medical marijuana.
2 It doesn't say you've used it in the past. No one has to say
3 in that application, in the past, I have used medical
4 marijuana. No one has to say that in that application.

5 And it also says -- no one has to say, in the
6 future, I am definitely going to use medical marijuana, and
7 you should then know that I'm going to commit a criminal act
8 when I use it. All it says is, what are your plans? We all
9 have plans; doesn't mean they actually get executed. And
10 until there's an overt act, it's not a crime; no
11 incrimination; Fifth Amendment does not apply.

12 I want to wrap up then Your Honor, unless you have
13 something else for the Fourteenth -- Fourteenth and Fifth
14 Amendment, I think I've covered that.

15 THE COURT: No, I don't. I mean, what's going
16 through my mind is that C and D, logically, if you really
17 think about it, it doesn't matter anyway, because the idea is
18 there will be no State prosecutions in any event for either
19 the use of the marijuana once you have the card and you go
20 through the registry; to growing it, plans for growing it.
21 It's all -- you know, the State's not going to prosecute you
22 anyway for that stuff, as long as you meet the program. The
23 question has always been, what about the federal exposure for
24 both the use and the growth?

25 MR. POWERS: It's true --

1 THE COURT: And I think that's -- at the end of the
2 day, that's what this whole thing comes down to for me is the
3 idea that -- we -- I think everybody in the room -- I do think
4 everybody in the room would have to agree that there is, in
5 theory, the potentiality of a federal prosecution. Whether
6 you're using it, whether you're growing it, anything having to
7 do with marijuana --

8 MR. POWERS: Yes.

9 THE COURT: -- in those areas, there's the
10 potentiality of a federal prosecution. The question becomes,
11 how does that fact enter into this whole thing? And the
12 State, your position is, basically, well, we understand that,
13 we disclose it, but because it's voluntary and not a
14 fundamental right, you can choose or not choose to involve
15 yourself in the program, knowing that you may be exposed to
16 this theoretical prosecution.

17 MR. POWERS: That is correct. And the U.S. Supreme
18 Court in the Selective Service case made it clear, to fill out
19 that application for federal educational aid, you had to
20 answer the question about the Draft. If you said you had not
21 registered for the Draft, you would be admitting to a felony.

22 THE COURT: Now, here's the thing we're now talking
23 about. Those folks might be prosecuted, actually. Has
24 anybody been prosecuted by the feds?

25 MR. POWERS: I don't have an answer to that

1 question. You mean for federal education and aid, or --

2 THE COURT: For the marijuana thing.

3 MR. POWERS: Oh, the marijuana?

4 MR. HAFTER: Your Honor, that's a question of fact
5 that we believe that we could show evidence upon class
6 certification that not only has there been fed, but there's
7 also been State prosecution.

8 THE COURT: Yeah.

9 MR. POWERS: Well, Your Honor, but it wouldn't be
10 enough to show prosecutions. It would be whether they
11 prosecuted you for saying these things in this application.

12 THE COURT: Right, that's --

13 MR. POWERS: Yeah.

14 THE COURT: That's really my question.

15 MR. POWERS: Um-hum. With all due respect, Your
16 Honor, if a district attorney brought to you a signed
17 statement from a defendant that said, I plan to grow
18 marijuana, would you convict him of violating the marijuana
19 laws? Just a signed statement, I plan to grow marijuana.

20 THE COURT: Yeah, there would be quite a few reasons
21 to not do that.

22 MR. POWERS: Yes, and that's the point. What does
23 this do? It does nothing, except simply lists a potential --
24 a potentiality.

25 THE COURT: But again, I'm just saying to you that

1 it seems to me as a state court judge, the question is this
2 specter of potential federal prosecution. I mean, it is there
3 and it is legitimate. I mean, even the State -- you know, the
4 first thing they say, again, is that the federal government
5 does not recognize a medical marijuana card and does not
6 exempt the holder from prosecution under federal law. That's
7 the first -- basically, the first thing anybody's asked here
8 and told. And so, to me, that's really the issue, is --

9 MR. POWERS: But the next question is --

10 THE COURT: -- more than anything else.

11 MR. POWERS: -- is the information you provide
12 enough to incriminate you? Just providing information isn't
13 enough. Is it -- is it incriminating information? And the
14 information you have to provide here is not incriminating.

15 THE COURT: Right, I understand that. Okay, good
16 enough. Okay.

17 MR. POWERS: And let me just wrap up then with the
18 state law claims, which haven't been covered that much, but I
19 think the state law claims, it's easy for the Court to decide
20 one based on sovereign immunity under NRS 41.032(1) and (2).

21 I'll focus right now on sub (1), and that's the one
22 Mr. Hafter mentioned. The statute says that the State and its
23 officers and entities aren't liable for executing a statute
24 that hasn't been declared unconstitutional by a court of law.
25 What that means is that every act before the declaration of

1 unconstitutional is protected by sovereign immunity. If
2 there's a declaration of unconstitutionality, and then the
3 State acts after that, that wouldn't be protected by sovereign
4 immunity.

5 So, finding the statute unconstitutional in this
6 case doesn't open up the State to past liability. Mr.
7 Hafter's arguments for state law claims for fraud and unjust
8 enrichment are based on the Department's execution of lawful
9 statutes that haven't been declared invalid.

10 Even if the Court were to declare them invalid now,
11 that immunity would protect them all the way up to the date of
12 that declaration. His fraud and unjust enrichment claims are
13 based on past acts before declaration prohibitively protected
14 by sovereign immunity in 41.032(1) of the NRS.

15 And they're also protected under the discretionary
16 function immunity in 41.03(2) as well, because what sub (2)
17 protects is agencies who are executing the policies enacted by
18 the legislature. In this case, the policy for medical
19 marijuana is in Chapter 453 of NRS. These agencies are
20 executing it; they're protected by discretionary immunity;
21 they can't be subject to state law tort claims.

22 So, the plaintiff cannot recover, under sovereign
23 immunity, state law tort claims. And I also reaffirm what the
24 Department said in their documents, that the statute of
25 limitations bars it, and also the Voluntary Payment Doctrine.

1 They didn't pay under protest. They needed to pay under
2 protest. In order to challenge the validity of a state fee,
3 you have to pay it under protest. If you fail to pay it under
4 protest, you voluntarily paid it, and you've given up your
5 right to challenge its validity.

6 THE COURT: Yeah, I mentioned that. Okay.

7 MR. POWERS: And I think that will wrap it up.

8 THE COURT: All right, Mr. Powers. Go ahead and
9 have a seat there, because I want you to leaf through your
10 material, and could you please -- just to make sure I
11 understand it correctly, could you spell and give me the cite
12 for that Whalen Roe case?

13 MR. POWERS: Absolutely. I can give you that right
14 now. Whalen vs. Roe is W-h-a-l-e-n --

15 THE COURT: Uh-huh.

16 MR. POWERS: -- vs. Roe, R-o-e. It's 429 U.S. 589,
17 1977.

18 THE COURT: Okay. I mean, I know I saw it in there
19 and what have you, I just wanted to make sure I had it
20 correct. Thank you. Mr. Hafter?

21 MR. HAFTER: Your Honor, real quickly, on the
22 Voluntary Payment Doctrine and discretionary immunity, I think
23 that my arguments in my Opposition are sufficient. I'm going
24 to rest on those arguments.

25 But I do want to address something that he just said

1 about how sovereign immunity -- I guess basically a
2 declaration of being unconstitutional would trigger the waiver
3 of the immunity, but that doesn't quite make sense, because
4 how do you ever get a declaration of something to be
5 unconstitutional if the government always has sovereign
6 immunity?

7 I mean, in some respects, you need a case like this
8 where you can bring the action, and ask the Court to say it's
9 unconstitutional and ask for damages. Sovereign immunity is
10 an absolute bar in some respects to litigation. How do you
11 ever bring those cases if they have absolute sovereign
12 immunity, pending, you know, a declaration of
13 unconstitutionality? I -- that's a new argument that I don't
14 know if there's case law for, and so I'm a bit concerned about
15 that.

16 MR. POWERS: Since we're taking an informal
17 approach, Your Honor, just real quick, you find
18 unconstitutionality through declaratory injunctive relief.
19 You just don't get money damages. So, what we're saying is
20 that his claims for fraud and unjust enrichment are for money
21 damages, but you can't recover because sovereign immunity
22 protects all the way up to the date of invalidity.

23 THE COURT: I understand.

24 MR. POWERS: You can use declaratory injunctive
25 relief to get the statute struck down, and then after that if

1 the State exercises under unconstitutional (indecipherable)--

2 THE COURT: Right.

3 MR. POWERS: -- it would be liable.

4 THE COURT: That goes back to what I said real early
5 on, the whole idea of this prospective injunctive relief, I
6 could -- I could use that vehicle, assuming the right state
7 actor was named, to find unconstitutionality.

8 MR. HAFTER: But that's on your federal claims.
9 That doesn't address the state --

10 MR. POWERS: The same rules apply in the state --
11 for state law claims as well.

12 MR. HAFTER: Okay. Your Honor, I want to go back to
13 that federal prosecution. I want to give you a scenario.
14 Let's say you --

15 THE COURT: Which one?

16 MR. HAFTER: The one where, how does the fed
17 prosecute -- can the application be used to distinguish guilt.

18 THE COURT: Okay.

19 MR. HAFTER: Here's a scenario. You have three
20 people that are roommates. Three unmarried men, two unmarried
21 men, it doesn't matter. They're roommates. Like not -- just
22 roommates, that's it.

23 THE COURT: Okay, Oscar and Felix.

24 MR. HAFTER: Oscar and Felix. And Oscar and Felix
25 -- Oscar has a card, and Oscar grows at his house. Felix

1 doesn't participate. There's a raid by the federal police,
2 and they see that, at the home, there is drugs.

3 THE COURT: Yeah.

4 MR. HAFTER: Whose are they, Oscar's or Felix?
5 Well, if I was the one who wasn't involved, if I was his
6 attorney, I would get a subpoena to get the application, or at
7 least get the other defendant to admit that he had a medical
8 marijuana card where it said that he's growing at his house.
9 And I think it would pretty much show that he's liable and the
10 drugs aren't mine.

11 THE COURT: All right, are these state or federal
12 authorities coming into the odd couple's house?

13 MR. HAFTER: Well, can't it be either? Does it
14 really matter? I mean, there's nothing here that -- and
15 that's the other thing that's really interesting --

16 THE COURT: I think it would matter. I do. I mean,
17 at the end of the day, logically and practically, it would
18 matter --

19 MR. HAFTER: But --

20 THE COURT: -- because the state authorities would
21 have difficulty; the federal authorities might not have the
22 same difficulty.

23 MR. HAFTER: But Your Honor, there's nothing in the
24 law that says that the State isn't going to prosecute or
25 cannot prosecute. That's the problem here. We're taking

1 these arguments that are simply being made by counsel, and
2 we're swallowing them, and we can't do that. Okay, where is
3 the precedent for that to say that they're not going to
4 prosecute?

5 And then he -- and then what was very interesting
6 was the argument where he said a police officer needs to be
7 able to look up at the registry and know. Wrong. Wrong.
8 Medical marijuana cards are not a device to legalize medical
9 marijuana.

10 They're merely an affirmative defense, which means
11 it's not for the police officer to decide who he's going to
12 ticket. He tickets, and then the person goes to the court,
13 and this court then looks at the evidence in an affirmative
14 defense to determine whether or not it's going to allow the
15 charges to proceed. That's a huge distinction, all right?

16 And so, there is nothing in state law that says the
17 State won't prosecute; there's nothing in federal law that
18 says the feds won't prosecute. It's merely an affirmative
19 defense. And if you -- if you have a raid on a home, and you
20 have multiple people in that home, you don't know whose drugs
21 they are, I can use the application to then support an
22 argument that these are one person's drugs over another, and
23 so it absolutely can lead to a compelled disclosure.

24 THE COURT: I do want to tell you, I mean, I agree
25 with that last little Oscar/Felix thing. I mean, I agree with

1 that, the whole thing. I mean, I've always, in looking at
2 this, been puzzled by the -- even more than that. That's the
3 idea that the federal authorities can still prosecute
4 people --

5 MR. HAFTER: Right.

6 THE COURT: -- in theory.

7 MR. HAFTER: Well, the State can, too.

8 THE COURT: And you know -- understood. Understood,
9 but I mean, the more nebulous concept is federal prosecution.

10 MR. HAFTER: Absolutely.

11 THE COURT: I mean, even if it's not happening a
12 whole lot, it could change at any time.

13 MR. HAFTER: I mean, what if a federal -- what if a
14 -- what if a -- I've recently seen the IRS is going after --
15 they're being so aggressive in collections, but I heard of a
16 case recently that the IRS went after a person's medical
17 records, and they obtained the medical records.

18 And what if it said in the medical records -- there
19 was a copy of the application form? Then they'd go, and they
20 can, I mean, get a search warrant based on that, and they
21 could now -- the IRS wants to be vindictive, and I know, I
22 know, it's maybe a little crazy for me to think that the IRS
23 can be vindictive, but -- and now they get the DA on you to
24 raid your house because they found out that you had a medical
25 marijuana card.

1 THE COURT: Yeah, they're probably -- some people
2 could think they're vindictive. Have you ever tried to --

3 MR. HAFTER: I think I was being a little facetious.

4 THE COURT: -- have you ever tried to itemize? I
5 mean, it's not easy.

6 MR. HAFTER: Going back to some of the original
7 arguments though, the New York patient registry is completely
8 different than this, because you're not admitting to an
9 illegal act in the -- in the registry.

10 And it almost seems like opposing counsel wants to
11 stand up here and just repeat arguments, and say nuh-uh with
12 enough force and hope that that's going to win the arguments,
13 but each one of them, I'd like to address.

14 THE COURT: Well, you could if you want, but let me
15 just tell you, this whole thing comes down to whether it's
16 going to be a fundamental right, binding or not. That's what
17 it really comes down to.

18 MR. HAFTER: Well, the Fifth Amendment's separate
19 from a fundamental right.

20 THE COURT: I understand that --

21 MR. HAFTER: Okay.

22 THE COURT: -- but I mean, that's -- the Fifth
23 Amendment analysis, I -- yeah, I understand the whole argument
24 on that, and the whole situation on it, and so.

25 MR. HAFTER: Okay. And I liked his argument that --

1 questioning whether or not each physician should make up his
2 own form. First of all, there's nothing wrong saying that the
3 State provide a form for physicians to -- or what should be
4 included in the form.

5 But second of all, are you kidding me? We're going
6 to stand in front of this Court and say a physician's not
7 capable of writing a recommendation for a patient, when all
8 they do every day is write prescriptions day out (sic) and day
9 out? I mean, that -- I think that's a bit demeaning to our --
10 to our medical community.

11 And then, you know, the argument was made with
12 Glucksberg. Again, abortion -- abortion's highly regulated,
13 but look at some of the other fundamental rights. How about
14 contraceptives? I mean, Casey vs. Planned Parenthood or
15 Planned Parenthood vs. Casey, 1991 case, which allowed
16 contraception -- contraceptive -- or excuse me, Griswold vs.
17 Connecticut, 1968 case that allowed contraceptives.

18 Now, contraceptives are, you know, given out like
19 any other prescription, and that doesn't mean just because we
20 have a fundamental right to use contraceptions that the Board
21 of Pharmacy and the Board of Medicine can't regulate them.

22 Well, then he said, well, what if the physician
23 writes a prescription for ecstasy? We still have standards of
24 the medical community. And if the doctor's engaging in the
25 practice of medicine that exceeds our community norms then --

1 then that's not going to be allowed. There's private recourse
2 through medical malpractice cases or there's regulatory or
3 administrative through the Board of Medical Examiners.

4 You know, there's -- there's a statute that says
5 that the deviation of the standard of care for purposes of
6 Medical Board regulation is anything that's new, novel, or --
7 excuse me. They say that medical malpractice is defined by a
8 deviation from the standard of care. It's NAC 630.301, I
9 think.

10 And I've challenged that before the Supreme Court,
11 and I said, that's way too broad, because anything that's a
12 new, experimental, or novel treatment which -- would
13 inherently be defined as malpractice from a regulatory
14 perspective, because the distinction is, in the regulatory
15 world, you don't need to show damage or causation; you only
16 need to show duty and breach.

17 And -- and the Supreme Court has said, no, we're not
18 going to go that far to say that -- and so, the concern is, is
19 that the Medical Board clearly has the authority to prosecute
20 doctors who engage in writing prescriptions for ecstasy, for
21 example, when there's absolutely no medical proof that that
22 would be required.

23 Here, in the medical marijuana world, there's a lot
24 of proof that's starting to emerge that shows that medical
25 marijuana is within the bounds of medical science, and so, you

1 know, they would be held accountable, those physicians would
2 be, to that label.

3 You know, similarly, he says you can't prescribe
4 outside FDA approved uses. That's absolutely false, Your
5 Honor. The Supreme Court has upheld from various
6 perspectives, but most recently, on a First Amendment basis.
7 And I don't have the case cite because this was a new argument
8 that was made, I'm sorry, that off-label uses of drugs are
9 absolutely allowed by a physician. Again, the physician's
10 responsible for the adverse causes that may result.

11 And that was recently, I think last term or two
12 terms ago, upheld on a First Amendment basis also for -- that
13 pharmaceutical companies can market off-label uses for -- for
14 drugs. So, that argument doesn't fly either.

15 He says all rights are subject to reasonable
16 regulation. I agree, and let the Medical Board do it. If
17 we're going to call it medical marijuana, if our constitution
18 initiative is going to address the words "patients" and the
19 words "upon recommendation from a physician," this should be
20 regulated by the Medical Board, the Board of Osteopathic
21 Medicine, not in the way that it has hazard implications, as
22 it does here.

23 You raised the issue of a bar exam, and I thought
24 that was interesting, because I actually did see the case law
25 that said that having to answer, for lack of a better word,

1 embarrassing questions on a bar exam does not equal a Fifth
2 Amendment violation.

3 And but this is -- this is far different. You don't
4 have to apply to be a lawyer. And those answers on the bar
5 application, as embarrassing as they may be, will not create
6 new criminal liability as long as you're answering them
7 properly.

8 THE COURT: Yeah. The reason I brought that up is
9 it's this whole philosophy where you compare a right versus a
10 privilege.

11 MR. HAFTER: Correct.

12 THE COURT: And that's what's running through this.

13 MR. HAFTER: And that's why I raised in the pleading
14 papers, you know, the fact that -- which is another reason
15 that distinguishes this case from the Raich case in
16 California. The fact that Nevada provided this through a
17 constitutional amendment cannot be disregarded by this Court.
18 This Court needs to recognize that the legislature did not
19 just simply say, we're going to provide access to medical
20 marijuana through a certain vehicle or process.

21 This is -- we have the right. We as patients in
22 this state have the right under the Constitution, and we
23 shouldn't be putting barriers or impediments in the way to
24 prevent us from accessing that right when they're not
25 rationally related, at the very least; at the very least.

1 And I find it very hard to believe that this case,
2 it is -- if we look at -- the only thing that the registry is
3 going to deter is people who are law-abiding who need it. If
4 you're not law-abiding, then why would you ever go care about
5 getting a registry card?

6 And that's something that -- but it's the people, as
7 you said, the judges, the doctors, the lawyers, the
8 professionals, the people who have something to lose who are
9 not going to -- that's who we're deterring, and that's not
10 protecting the health or safety of the public. That's
11 actually very, very dangerous.

12 Many of the arguments that were made were saying
13 that -- just conclusory, that this is -- this is a -- and I
14 loved your question, what is their rational basis, and they
15 said to protect the public health, safety, and welfare through
16 deterrent and detection. Well, detection, that's false,
17 because this is a -- this is a prerequisite, this is a barrier
18 to entry, it's a hurdle; it's not a checks and balances on
19 consumption.

20 If they were -- if they were saying that every
21 purchase through a dispensary needs to be logged and reported
22 to the registry so that way they can monitor how much
23 somebody's buying in a month, got it. That would -- that
24 would be a detection of abuse. But they have no way to
25 determine detection of abuse through the current registry

1 system. They haven't provided a shred of evidence. And to
2 simply say, oh, it's going to be a detection tool, when
3 there's no way that the registry could monitor use or
4 determine abuse is just false. And like I said, as a
5 deterrent, this is only deterring law-abiding citizens.

6 Finally, the financial aid issue, I would like to
7 address that, because there's another distinction on the
8 financial aid issue. Forget the fact that you don't need
9 financial aid, because you don't need to go to college. They
10 say, well, you don't need marijuana. No, I have a right, as I
11 said, under the Constitution, to use medical marijuana if my
12 patient require -- allow -- if my physician allows me.

13 But with financial aid, you don't need to get
14 federal financial aid because there are private financial aid
15 sources also. So, you could still go to college and obtain
16 financial aid through private funding, and avoid the potential
17 implication from the Draft. So, that's a serious distinction
18 that needs to be addressed as well.

19 And with that, Your Honor, I really respectfully
20 request that you act in the interest of the patients of this
21 State and remove the barriers that have currently been put in
22 place to lawful citizens who want to try to use and explore
23 medical marijuana for their healthcare needs, as was intended
24 by the constitutional amendment. Thank you.

25 THE COURT: All right, Mr. Hafter. Anything else?

1 MR. POWERS: I'll make this quick, Your Honor. With
2 the Fourteenth Amendment, the answer's simple. We elect
3 representatives to represent us in the legislature. They make
4 policy choices. They don't have to be right or wrong; they
5 just have to be rational.

6 In this case, there are plenty of rational reasons
7 for the registry. Mr. Hafter kept saying false and wrong.
8 Irrelevant. That's not the standard under the rational basis
9 test.

10 The legislature just has to have a reasonable basis,
11 and all it has to do is reasonably believe the registry will
12 accomplish its goals. They don't have to be right; they just
13 have to have a reasonable belief.

14 And the fact is, in Whalen vs. Roe, the U.S. Supreme
15 Court said that all of the legislature's beliefs with regard
16 to registry are reasonable, because it's reasonable to
17 conclude it would have a deterrent effect, it's reasonable to
18 conclude it'd have a detection effect. It's not a perfect
19 system, no system is, but the legislature doesn't have to be
20 perfect, it just has to be rational.

21 And then, finally, with the Fifth Amendment again,
22 all of his hypotheticals, someone can raise an as-applied
23 challenge. If the federal government comes in and prosecutes
24 an individual, and uses their application against them, let
25 them raise the Fifth Amendment as an as-applied challenge,

1 just like in all the cases that the plaintiff cites. That's
2 where you raise the Fifth Amendment. The Fifth Amendment
3 doesn't invalidate this form on its face. It just simply
4 doesn't.

5 What Mr. Hafter said, let the Medical Board do it;
6 maybe. Let the legislature tell the Medical Board to do it,
7 and then they will. That's the difference here. He doesn't
8 get to tell us who should be doing it, the legislature does,
9 and they made a rational choice. It's constitutional.

10 Simply put, his claims have no merit. He hates our
11 case law -- clearly, he hates our case law. But the fact is
12 the case law establishes the existing precedented law. It
13 governs, it controls. The Fifth Amendment isn't violated, the
14 Fourteenth Amendment isn't violated. All defendants are
15 entitled to judgment as law -- a matter of law on all federal
16 constitutional claims. And because of sovereign immunity,
17 they're entitled to judgment as a matter of law on all State
18 claims. Thank you, Your Honor.

19 THE COURT: All right. Well, here's the situation.
20 Obviously, there's a few things for me to think about, which
21 I'll do. And I will cause a court order to be entered. Now,
22 when that court order's going to be entered, I don't know, but
23 it won't be months or a month. It might be a week or more,
24 but I'll do the best I can, and you will receive a minute
25 order. That minute order is going to be as comprehensive as I

1 can make it in such an order, but I would ask that the
2 prevailing party or parties draft the ultimate order then.
3 You'll see that in the minute order, but I just wanted you to
4 know that now.

5 MR. POWERS: And on that issue, Your Honor, because
6 of the complexity of the issues, I will say, either side,
7 whoever's drafting the order, could you give them more than
8 the ten days that are in the Local Rules to prepare the order?

9 THE COURT: Yeah, I always do that anyway.

10 MR. POWERS: Thank you.

11 THE COURT: In fact, I sort of remain silent on
12 that, speaking of other rights. I just don't say anything and
13 let lawyers do what they do, because I respect that it can
14 take some time to draft complex orders.

15 In any event, the last thing I guess I just want to
16 say here at five minutes after noon is that -- and sincerely,
17 I really appreciate the professionalism and the effort put
18 forth, Mr. Hafter, Mr. Powers, and you can tell Mr. Anderson
19 that. Now, Mr. Zunino, you too, even though you sort of had
20 to sit there for most of this.

21 But in any event, I really -- I do appreciate the
22 caliber and effort of the lawyering here. It caused me to do
23 really what I wanted to do when I decided to run for this
24 office, you know, six years ago, and that is to really apply
25 my brain to things that matter to the community. So, it gives

1 me that opportunity, so I appreciate the caliber in which it
2 was done. Take care.

3 MR. POWERS: Thank you, Your Honor.

4 MR. ZUNINO: Thank you, Your Honor.

5 (Proceeding concluded at 12:04 P.M.)

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