IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

STATE OF NEVADA EX REL. THE LEGISLATURE OF THE 77TH SESSION OF THE STATE OF NEVADA; THE STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; AND THE HONORABLE BRIAN SANDOVAL, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEVADA,

Respondents.

Electronically Filed
Jul 12 2016 02:42 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court Case No. 69801

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

RESPONDENTS' JOINT ANSWERING BRIEF

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STATEMENT OF APPELLATE ASSIGNMENT

For purposes of appellate assignment, this case should be retained by the Supreme Court and should not be assigned to the Court of Appeals. NRAP 28(a)(5). The principal issues raised in this case are matters that the Supreme Court should hear and decide under NRAP 17(a).

In particular, this case involves federal constitutional claims and state-law tort claims brought by Appellant John Doe against the State of Nevada concerning the validity and operation of the provisions of Nevada's medical marijuana laws which establish the medical marijuana registration program and prescribe procedures and fees to apply for and obtain a registration card for purposes of using medical marijuana as authorized by Article 4, Section 38 of the Nevada Constitution and NRS Chapter 453A. The federal constitutional issues are whether the district court correctly determined that: (1) Doe's Fifth Amendment claim has no merit as a matter of law because the medical marijuana registration program does not violate the privilege against self-incrimination; and (2) Doe's Fourteenth Amendment claims have no merit as a matter of law because there is no fundamental right under the Fourteenth Amendment to use medical marijuana and because the medical marijuana registration program is rationally related to legitimate state interests. Given these federal constitutional issues, this case involves several questions of first impression and statewide public importance that presumptively

are matters which should be retained by the Supreme Court under NRAP 17(a)(13) and NRAP 17(a)(14).

STATEMENT OF THE ISSUES

1. Did the district court correctly determine that the State is entitled to judgment as a matter of law on Doe's federal constitutional claims for money damages under 42 U.S.C. § 1983 (section 1983) because the State and its agencies and officials acting in their official capacities are absolutely immune from liability for money damages under section 1983?

2. Did the district court correctly determine that the State is entitled to judgment as a matter of law on Doe's federal constitutional claims for declaratory and injunctive relief under section 1983 because Doe did not sue the proper state official who is charged by state law with administering and enforcing the medical marijuana registration program?

3. Did the district court correctly determine that allowing Doe to amend his complaint to add the proper state official under section 1983 would be futile because Doe's federal constitutional claims under the Fifth and Fourteenth Amendments do not state a permissible or actionable claim on their merits as a matter of law?

4. Did the district court correctly determine that Doe's Fifth Amendment claim has no merit as a matter of law because the medical marijuana registration program does not violate the privilege against self-incrimination?

5. Did the district court correctly determine that Doe's Fourteenth Amendment claims have no merit as a matter of law because there is no fundamental right under the Fourteenth Amendment to use medical marijuana and because the medical marijuana registration program is rationally related to legitimate state interests?

6. Did the district court correctly determine that the State is entitled to judgment as a matter of law on Doe's state-law tort claims for fraud and unjust enrichment because the state-law tort claims are barred as a matter of law by sovereign immunity?

ANSWERING BRIEF

Respondents State of Nevada ex rel. the Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau (LCB) under NRS 218F.720, and the Department of Health and Human Services (Department) and the Governor of the State of Nevada (Governor), by and through their counsel the Office of the Attorney General (collectively the State), hereby jointly file their Answering Brief. The State asks the Court to affirm the district court's final judgment in favor of the State on all causes of action and claims for relief alleged in Appellant John Doe's second amended complaint.

STATEMENT OF CASE AND FACTS

The State agrees with the district court's statement of the case and facts, including the procedural background and the history and overview of Nevada's medical marijuana laws set forth in the district court's order. (*JA3:460-76*.)[1] Therefore, the State will not restate that information here.

However, the State disagrees with Doe's purported statement of facts regarding the State's operation of the registration program since its inception in 2001. Specifically, in an attempt to support his state-law tort claims, Doe asserts

[1] Citations to "*JA*" are to volume and page numbers of the Joint Appendix.

that the State has accepted fees from persons participating in the registration program but the State has issued registration cards knowing that they were "worthless" in facilitating access to medical marijuana because, until August 24, 2015, "there was no place within Southern Nevada for a patient to legally purchase seeds, plants or plant derivatives, as neither the State nor the related agencies had approved a dispensary for business."[2] (Opening Br. 5-6.)

Doe's assertions are meritless and legally inaccurate because since the registration program's inception in 2001, the State has operated the program strictly in accordance with state law as directed by the Legislature in NRS Chapter 453A. Because each person is presumed to know the law, each person who pays fees and is issued a registration card is presumed to do so with full knowledge of the functions served by the registration card as prescribed by NRS Chapter 453A. In particular, from 2001 to the present, each registration card has authorized the possession, delivery or production of medical marijuana within the limits authorized by NRS Chapter 453A, and each registration card has exempted the holder from state prosecution for any criminal offense in which the possession,

[2] The 2013 legislation authorizing the registration and operation of medical marijuana dispensaries became effective on April 1, 2014. S.B. 374, 2013 Nev. Stat., ch. 547, § 26(2), at 3729. The first registered medical marijuana dispensary to operate in Southern Nevada began its operations in the City of Las Vegas on August 24, 2015. Eric Hartley, *First marijuana dispensary in Las Vegas area opens*, Las Vegas Review-Journal (Aug. 24, 2015).

delivery or production of marijuana is an element, so long as the exempted medical use of marijuana complies with NRS Chapter 453A. *See* A.B. 453, 2001 Nev. Stat., ch. 592, § 17, at 3055-56 (enacting NRS 453A.200). Thus, from 2001 to the present, each registration card issued to a person has served and continues to serve these statutorily prescribed functions, even after the enactment of the 2013 legislation authorizing the registration and operation of medical marijuana dispensaries.

Under the 2013 legislation, the Legislature authorized the operation of medical marijuana dispensaries that must register with the Division to sell or dispense medical marijuana to holders of valid registration cards. *See* S.B. 374, 2013 Nev. Stat., ch. 547, §§ 10-20, at 3703-15 (enacting NRS 453A.320-453A.370). However, the 2013 legislation does not guarantee that medical marijuana dispensaries will be approved for operation in any particular locations in the State. *Id.* Instead, the 2013 legislation created a regulatory system for the registration and operation of medical marijuana dispensaries, but the actual registration and operation of medical marijuana dispensaries is dependent upon numerous contingencies, including the submission of proper applications by qualified applicants and the approval of locations by local governments. *Id.*

Because the 2013 legislation does not guarantee that medical marijuana dispensaries will be approved for operation in any particular locations in the State,

each person who pays fees and is issued a registration card is presumed to know the law and has full knowledge that the registration and operation of medical marijuana dispensaries in any particular locations in the State, including Southern Nevada, is a contingent proposition. Therefore, each person who pays fees and is issued a registration card does not have a reasonable expectation that medical marijuana dispensaries will be approved for operation in any particular locations in the State. Instead, the only reasonable expectation is that the registration card will serve its statutorily prescribed functions in that it will: (1) authorize the possession, delivery or production of medical marijuana within the limits authorized by NRS Chapter 453A; and (2) exempt the holder from state prosecution for any criminal offense in which the possession, delivery or production of marijuana is an element, so long as the exempted medical use of marijuana complies with NRS Chapter 453A.

Accordingly, contrary to Doe's assertions, each time a person pays fees and is issued a registration card, the registration card it not "worthless." Rather, because the registration card serves its statutorily prescribed functions—including authorizing the use of medical marijuana in Nevada and providing an exemption from criminal prosecution under state law—the holder benefits from those statutorily prescribed functions, whether or not any medical marijuana dispensaries are approved for operation in any particular locations in the State.

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment on Doe's federal constitutional claims for money damages under 42 U.S.C. § 1983 (section 1983) and his federal constitutional claims for declaratory and injunctive relief under section 1983. With regard to his federal constitutional claims for money damages, because Doe does not challenge the district court's decision that the State and its agencies and officials acting in their official capacities are absolutely immune from liability for money damages under section 1983, the district court's decision should be affirmed.

With regard to Doe's federal constitutional claims for declaratory and injunctive relief, the district court correctly determined that Doe did not sue the proper state official who is charged by state law with administering and enforcing the registration program, namely, the Administrator of the Division of Public and Behavioral Health (Division). The district court also correctly denied leave to amend Doe's complaint to add the Administrator as the proper state official under section 1983 because such an amendment would be futile given that Doe's federal constitutional claims under the Self-Incrimination Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment fail on their merits as a matter of law.

Under well-established U.S. Supreme Court precedent, a person is not *compelled* to make a disclosure in violation of the Fifth Amendment privilege against self-incrimination when the government asks the person to disclose potentially incriminating information on an application which the person *voluntarily* files because the person wants to be considered for participation in a government program. Because the registration program is a voluntary program and nothing in the medical marijuana laws requires any person to submit an application or register with the State unless the person voluntarily elects to do so, the Fifth Amendment privilege simply does not apply to the program, and the State may ask a person who wants to participate in the program to disclose potentially incriminating information without violating the Fifth Amendment privilege against self-incrimination. Therefore, because a person is clearly under no compulsion to submit an application or register with the State, the person is not *compelled* to participate in the registration program, and the Fifth Amendment privilege against self-incrimination does not invalidate the program or the application for a registration card.

Furthermore, even if a person makes the voluntary choice to participate in the registration program and completes the application, the application does not require the person to make any incriminating admissions about past acts which might tend to show that the person had committed a crime. Although in submitting

the application and registering with the State, the person is required to provide the Division with certain personal, medical and background information, the person is not required to answer any official questions asking whether the person has grown, purchased, distributed or possessed marijuana. In the absence of such questions, the person is not compelled to give answers which might incriminate the person in future criminal proceedings because the person is not required to give answers about past acts which might tend to show that the person had committed a crime. Therefore, because a person who voluntarily files an application and registers with the State is not compelled to disclose potentially incriminating information, the district court correctly determined that Doe's Fifth Amendment claim has no merit as a matter of law, and the district court's judgment should be affirmed.

Doe contends that the Fourteenth Amendment creates a substantive and fundamental right to access health care recommended by a person's physician and that this case is not about a person's right to use medical marijuana but is about a much broader fundamental right to access *any and all* medical treatments recommended by a physician. However, under well-established U.S. Supreme Court precedent, Doe cannot use such a broad formulation to assert a fundamental right but must carefully formulate the asserted right based on the actual and specific interests at stake in the litigation. Therefore, despite Doe's attempt to use a broad formulation to assert a fundamental right to access *any and all* medical

treatments recommended by a physician, the precise formulation of the asserted fundamental right—which is based on the actual and specific interests at stake in the litigation—is whether there is a fundamental right under the Fourteenth Amendment to use *medical marijuana* recommended by a physician.

When Doe's asserted fundamental right is properly narrowed as required by U.S. Supreme Court precedent, Doe's attempt to create a fundamental right fails as a matter of law because no court to date has held that a person has a fundamental right under the Fourteenth Amendment to use medical marijuana recommended by a physician because such a right is not deeply rooted in America's history, traditions and practices. Moreover, even outside the context of medical marijuana, courts historically have rejected claims that the Fourteenth Amendment creates a fundamental right to use a particular drug treatment recommended by a physician.

Thus, contrary to Doe's contentions, there is no fundamental right to access *any and all* health care recommended by a person's physician. Instead, our Nation's history, traditions and practices establish that the State has broad police powers to regulate drug treatments prescribed or recommended by a physician, so long as there is a rational basis for such regulation. Consequently, because there is no fundamental right under the Fourteenth Amendment for a person to use medical marijuana recommended by a physician, the district court correctly determined that

the registration program is constitutional under the rational-basis standard of review because the program is rationally related to legitimate state interests.

In the context of medical treatments, state legislatures may regulate different medical treatments differently without violating the Fourteenth Amendment because persons who use different medical treatments for the same medical condition are not similarly situated. In the case of medical marijuana, the Legislature could reasonably believe that, at this time, the potential evils associated with medical marijuana are of different dimensions and proportions and require different remedies in comparison to the potential evils associated with other dangerous drugs. Furthermore, the Legislature is permitted to implement its reforms one step at a time, addressing its legislation only to the potential evils associated with medical marijuana and applying different remedies to that phase of the problem without addressing the potential evils associated with other dangerous drugs. Such differential treatment is rational because logic and contemporary practice support the Legislature's judgment that the use of medical marijuana is different from the use of other dangerous drugs that comply with federal law. Therefore, because of this longstanding and rational distinction, the Legislature had a rational basis for treating the use of medical marijuana differently from the use of other dangerous drugs that comply with federal law. In addition, the Legislature could reasonably believe that the registration program would aid in the

enforcement of Nevada's medical marijuana laws, have a deterrent effect on potential violators and assist in the detection or investigation of specific instances of apparent abuse.

Given the State's legitimate and vital interests in controlling the use of medical marijuana and preventing its abuse, the registration program is the product of an orderly and rational legislative decision, and the program is rationally related to legitimate state interests. Therefore, the district court correctly determined that Doe's Fourteenth Amendment claims have no merit as a matter of law, and the district court's judgment should be affirmed.

Finally, the district court correctly determined that Doe's state-law tort claims for fraud and unjust enrichment are barred as a matter of law by sovereign immunity. Under NRS 41.032(1), the State and its agencies and officials acting in their official capacities are entitled to sovereign immunity based on any acts or omissions in their execution and administration of a statute or regulation "whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction." Thus, even if the State is executing an invalid statute or regulation, the State enjoys sovereign immunity under NRS 41.032(1) for any acts or omissions committed by the State *before* the statute or regulation is declared invalid. Therefore, because Doe's state-law tort claims are premised on alleged acts or omissions by the State in the execution and

administration of the medical marijuana laws which have not been declared invalid by a court of competent jurisdiction, the district court correctly determined that Doe's state-law tort claims are barred as a matter of law by sovereign immunity under NRS 41.032(1), and the district court's judgment should be affirmed.

In addition, under NRS 41.032(2), which provides discretionary-function sovereign immunity, the State and its agencies and officials acting in their official capacities are entitled to sovereign immunity based on the performance of official duties which involve an element of official discretion or judgment and are grounded in the creation or execution of social, economic or political policy. When governmental actors are acting pursuant to their statutory authority in order to execute and carry out the social, economic and political policies enacted by the Legislature in statutes, the governmental actors are entitled to sovereign immunity under NRS 41.032(2) because they play an integral part in the furtherance of the policies which led to the enactment of the statutes.

In this case, Doe does not allege that the State and its agencies and officials were acting outside their statutory authority in executing and carrying out the social, economic and political policies enacted by the Legislature in the medical marijuana laws. Because the State and its agencies and officials were acting pursuant to their statutory authority, they were playing an integral part in the furtherance of the policies which led to the enactment of the medical marijuana

laws, and they are entitled to discretionary-function sovereign immunity under NRS 41.032(2). Therefore, Doe's state-law tort claims are barred as a matter of law by discretionary-function sovereign immunity under NRS 41.032(2), and the district court's judgment should be affirmed.

ARGUMENT

I. Standard of review.

Because Doe's claims raise only issues of law, the district court's decision granting summary judgment and denying declaratory and injunctive relief is reviewed de novo on appeal. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942 (2006). The question of whether a statute is constitutional is also subject to de novo review. *Id.* at 939. In conducting that review, all "[s]tatutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity." *Id.*

II. The district court correctly granted summary judgment on Doe's federal constitutional claims for money damages under section 1983.

The district court determined that the State is entitled to judgment as a matter of law on Doe's federal constitutional claims for money damages under section 1983 because the State and its agencies and officials acting in their official capacities are absolutely immune from liability for money damages under section 1983. (*JA3:478-82*.) In his opening brief, Doe does not challenge the

district court's determination regarding his federal constitutional claims for money damages. By failing to raise such a challenge, Doe waived this issue on appeal. *Powell v. Liberty Mut. Fire Ins.*, 127 Nev. 156, 161 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."). Therefore, in its answering brief, the State will not present any further arguments on this issue, and the Court should affirm the district court's decision granting summary judgment on Doe's federal constitutional claims for money damages.

III. The district court correctly granted summary judgment on Doe's federal constitutional claims for declaratory and injunctive relief under section 1983.

The district court determined that the State is entitled to judgment as a matter of law on Doe's federal constitutional claims for declaratory and injunctive relief under section 1983 because Doe did not sue the proper state official who is charged by state law with administering and enforcing the registration program, namely, the Administrator of the Division. (*JA3:483-87*.) The district court also denied Doe leave to amend his complaint to add the Administrator as the proper state official under section 1983. *Id.* The district court determined that allowing Doe to amend his complaint to add the Administrator would be futile because Doe's federal constitutional claims do not state a permissible or actionable claim on their merits as a matter of law. *Id.*

In his opening brief, Doe does not challenge the district court's determination that he failed to sue the proper state official who is charged by state law with administering and enforcing the registration program. By failing to raise such a challenge, Doe waived this issue on appeal. Instead, Doe contends that his federal constitutional claims are "meritorious claims" and that, as a result, he should be allowed to amend his complaint to add the proper state official for purposes of declaratory and injunctive relief under section 1983. (Opening Br. 62-63.) Because the district court correctly determined that Doe's federal constitutional claims do not state a permissible or actionable claim on their merits as a matter of law, the district court's judgment should be affirmed.

A. Doe's Fifth Amendment claim has no merit as a matter of law because the medical marijuana registration program does not violate the privilege against self-incrimination.

The district court determined that the registration program is a voluntary program and that nothing in Nevada's medical marijuana laws requires any person to request, complete or submit an application packet or register with the State, unless the person voluntarily elects to do so. (*JA3:491-93*.) Because Nevada's registration program is a voluntary program, the district court concluded that the Fifth Amendment privilege against self-incrimination simply does not apply to the registration program because a person is not "compelled" by the State to participate in the registration program. *Id.* In addition, the district court found that

even if a person makes the voluntary choice to participate in the registration program and completes the application packet, the application packet does not require the person to make any incriminating admissions about past acts which might tend to show that the person had committed a crime. *Id.* Because the district court correctly determined that Doe's Fifth Amendment claim has no merit as a matter of law, the district court's judgment should be affirmed.

Doe contends that persons who register with the State are compelled by state law to identify themselves to the government and admit that they intend to use medical marijuana and that by making such an admission, they are compelled to incriminate themselves in violation the privilege against self-incrimination because they are admitting that they intend to or are engaging in acts illegal under federal law. (Opening Br. 15-24.) To support his Fifth Amendment claim, Doe relies upon the wrong line of cases from the U.S. Supreme Court.

Under those inapt cases, the Supreme Court has held that, under certain circumstances, a defendant may invoke the Fifth Amendment privilege against self-incrimination *as a defense in a criminal prosecution* which is based on the defendant's failure to comply with a *criminal statute* whose elements compel the defendant to answer official questions disclosing illegal activities or face criminal penalties for failing to make the required disclosures. *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39 (1968) (holding that Fifth Amendment privilege was a

defense to *prosecution* for failure to register and pay occupational tax on illegal wagering activities); *Grosso v. United States*, 390 U.S. 62 (1968) (holding that Fifth Amendment privilege was a defense to *prosecution* for failure to pay excise tax on illegal wagering activities); *Haynes v. United States*, 390 U.S. 85 (1968) (holding that Fifth Amendment privilege was a defense to *prosecution* for failure to register firearms acquired in illegal manner); *Leary v. United States*, 395 U.S. 6 (1969) (holding that Fifth Amendment privilege was a defense to *prosecution* for failure to pay transfer tax on illegal marijuana). In this line of cases, the very purpose of the criminal statutes is to compel the defendant to disclose illegal activities by punishing the defendant criminally if the defendant fails to make the required disclosures.

By contrast, the Supreme Court has held that a person is not *compelled* to make a disclosure in violation of the Fifth Amendment privilege when that disclosure is required as part of a *voluntary* application for benefits which the person must file only if the person wants to be considered for the benefits. *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 856-58 (1984). In *Selective Serv. Sys.*, the Supreme Court held that the Fifth Amendment privilege did not apply when individuals submitted applications for federal educational aid and were required to disclose on the application whether they registered for the draft as required by federal law. The Supreme Court stated that

the application's requirement that an individual disclose whether he failed to register for the draft—a federal criminal offense—did not violate the privilege against self-incrimination because an individual "clearly is under no compulsion to seek financial aid." *Id.* at 857.

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

In particular, the D.C. Circuit determined that the Fifth Amendment privilege did not invalidate a security clearance questionnaire which asked employees the following questions about past illegal drug use:

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

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

Furthermore, at least one federal court has concluded that the Fifth Amendment privilege is not implicated when an individual applies to participate in the District of Columbia's medical marijuana program as a cultivator or dispensary operator and is required to execute an affidavit acknowledging that "[g]rowing, distributing, and possessing marijuana in any capacity . . . is a violation of federal laws" and that the "law authorizing the District's medical marijuana program will not excuse any registrant from any violation of the federal laws governing marijuana." *Sibley v. Obama*, 810 F. Supp. 2d 309, 310-11 (D.D.C. 2011). As explained by the court:

> [P]laintiff here is clearly "under no compulsion to seek" a permit to grow and sell medical marijuana. Although plaintiff relies extensively on *Leary v. United States*, 395 U.S. 6, 16 (1969), that case addresses a situation, unlike here, where the defendant was actually compelled—he

> faced criminal charges for failure "to identify himself" as a drug purchaser under the relevant tax statute. Nothing in the District's medical marijuana laws requires plaintiff to apply to be a cultivator or to run a dispensary. Simply put, plaintiff need not seek to participate in the District's budding medical marijuana industry.

Id. at 311.

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

In addition, even if a person makes the voluntary choice to participate in Nevada's registration program, the acts of submitting an application and registering with the State do not compel the person to answer any official questions where the answers might incriminate the person in future criminal proceedings. In submitting an application and registering with the State, a person is required to provide the Division with certain personal, medical and background information. (*JA3:473-76.*) However, the person is not required to answer any official questions asking whether the person has grown, purchased, distributed or possessed marijuana. *Id.* In the absence of such questions, the person is not compelled to give answers which might incriminate the person in future criminal proceedings because the person is not required to give answers about past acts which "might tend to show that he himself had committed a crime." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)). Therefore, because the acts of submitting an application and registering with the State do not compel the person to answer any official questions where the answers might incriminate the person in future criminal proceedings, Doe's Fifth Amendment claim has no merit as a matter of law.

Finally, even assuming the registration program required a person to answer certain questions that might violate the Fifth Amendment privilege against self-incrimination, Doe's request for overly broad injunctive relief to enjoin state

officials from operating the entire registration program would not be the appropriate remedy for such a violation because the appropriate remedy would be to narrowly tailor any injunctive relief to cure the constitutional violation in a manner that is as minimally disruptive as possible to the operation of the registration program.

It is well established that "[p]ublic officers can only be enjoined from acts that are unlawful or in excess of the officer's authority." *City Council v. Reno Newspapers*, 105 Nev. 886, 890 (1989). Therefore, if a court grants injunctive relief, the injunction must not be "too broad in scope" so as to enjoin the officer from "doing a lawful act." *Id.* As explained by the U.S. Supreme Court:

> Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.

Ayotte v. Planned Parenthood, 546 U.S. 320, 328-29 (2006) (citations omitted). Therefore, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.* at 329 (quoting *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985)).

Accordingly, even if the registration program required a person to answer certain questions that might violate the Fifth Amendment privilege against self-

incrimination, Doe's request for overly broad injunctive relief to enjoin state officials from operating the entire registration program would not be the appropriate remedy for such a violation. Instead, the appropriate remedy would be to narrowly tailor any injunctive relief to cure the constitutional violation in a manner that is as minimally disruptive as possible to the operation of the registration program. Under that standard, the appropriate remedy would be to enjoin the Administrator of the Division from implementing only those parts of the registration program which offend the Fifth Amendment privilege against self-incrimination without enjoining the operation of the entire registration program.

B. Doe's Fourteenth Amendment claims have no merit as a matter of law because there is no fundamental right under the Fourteenth Amendment to use medical marijuana and because the medical marijuana registration program is rationally related to legitimate state interests.

The district court determined that there is no fundamental right under federal law to use medical marijuana. (*JA3:487-91*.) In the absence of a fundamental right, the district court determined that it must uphold the registration program against Doe's Fourteenth Amendment challenge if the registration program is rationally related to a legitimate state interest. *Id.* The district court found that the registration program is rationally related to the legitimate state interest of protecting the health, safety and welfare of the public because the registration program serves a legitimate public protection function with regard to the distribution and abuse of medical marijuana, which is a widely desired and

dangerous drug for which there is both a lawful and an unlawful market. *Id.* Therefore, because the registration program satisfied the rational-basis standard, the district court concluded that the registration program does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Because the district court correctly determined that Doe's Fourteenth Amendment claims have no merit as a matter of law, the district court's judgment should be affirmed.

1. There is no fundamental right under the Fourteenth Amendment to use medical marijuana.

Doe contends that the Due Process Clause creates a substantive and fundamental right to "access the health care that our physicians recommend to us." (Opening Br. 33.) As a result, Doe contends that this case is not about a person's right to use medical marijuana but rather it is about a much broader fundamental right to "access these physician recommended treatments." (Opening Br. 35.) Doe contends that the registry and associated fees burden this asserted fundamental right to "access health care recommended by a person's physician" in violation of the Equal Protection Clause because the registry and associated fees apply only to persons who seek to use medical marijuana for their medical condition but do not apply to similarly situated persons who seek to use any other medical treatment for the same medical condition. (Opening Br. 38-41.)

Despite Doe's varying descriptions of this asserted fundamental right to "access health care recommended by a person's physician," Doe has not cited a

single case in which a court has recognized such a broad fundamental right under the Federal Constitution. This is not surprising because the U.S. Supreme Court does not recognize broad formulations of asserted fundamental rights. *Washington v. Glucksberg*, 521 U.S. 702, 720-23 (1997). Instead, the Supreme Court has "a tradition of carefully formulating the interest at stake in substantive-due-process cases." *Id.* at 722. As a result, any "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

Consequently, Doe cannot use broad formulations to assert a fundamental right but must carefully formulate the asserted right so that it is "refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." *Glucksberg*, 521 U.S. at 722. This requires a "precise" formulation of the asserted fundamental right which is based on the actual and specific interests at stake in the litigation. *Id.* at 722-24.

In this case, Doe does not allege that the registry burdens access to *any and all* health care recommended by a physician. Rather, Doe alleges that the registry burdens access to a particular type of health care recommended by a physician—the use of medical marijuana. Therefore, despite Doe's attempt to use a broad

formulation to assert a fundamental right to access *any and all* health care recommended by a physician, the "precise" formulation of the asserted fundamental right—which is based on the actual and specific interests at stake in the litigation—is whether there is a fundamental right under the Federal Constitution to use *medical marijuana* recommended by a physician. Because this formulation meets the requirement of "a careful description of the asserted right," Doe's broad formulation of the asserted fundamental right must be rejected as a matter of law in favor of a narrow formulation of the interests at stake. *Flores*, 507 U.S. at 302; *Glucksberg*, 521 U.S. at 722-24; *Raich v. Gonzales (Raich II)*, 500 F.3d 850, 863 (9th Cir. 2007) ("*Glucksberg* instructs courts to adopt a narrow definition of the interest at stake.").

When Doe's asserted fundamental right is properly narrowed as required by U.S. Supreme Court precedent, Doe's attempt to create a fundamental right fails as a matter of law because no court to date has held that a person has a fundamental right under the Fourteenth Amendment to use medical marijuana recommended by a physician because such a right is not deeply rooted in America's history, traditions and practices. *See, e.g., Raich II*, 500 F.3d at 866 (holding that "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering."); *Seeley v. State*, 940 P.2d 604, 612-14 (Wash. 1997) (holding that a person does not have

"a fundamental right to have marijuana prescribed as his preferred treatment over the legitimate objections of the state.").[3]

To determine whether a person has a fundamental right to medical treatment recommended by a physician, the U.S. Supreme Court examines "[o]ur Nation's history, legal traditions, and practices" because the concept of substantive due process under the Fourteenth Amendment "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720-21. However, the Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* at 720 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). As a result, the Supreme Court will recognize an asserted right as fundamental only if a review of our Nation's history, traditions and practices

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

conclusively demonstrates that the asserted right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 721 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

In *Glucksberg*, the plaintiffs—three terminally ill patients, four physicians and Compassion in Dying, a nonprofit organization that counsels people considering physician-assisted suicide—brought an action against the State of Washington for a declaratory judgment that a state statute banning assisted suicide violated their substantive due process rights because persons who are terminally ill have a fundamental right to commit suicide with the assistance of their physicians to end severe pain and suffering from their illnesses. *Id.* at 705. After examining our Nation's history, traditions and practices, the Supreme Court held that there is:

> a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.

Id. at 723.

Based on the reasoning in *Glucksberg*, no court to date has held that a person has a fundamental right under the Fourteenth Amendment to use medical marijuana recommended by a physician because such a right is not deeply rooted in America's history, traditions and practices. For example, the Ninth Circuit has held that the Fourteenth Amendment "does not recognize a fundamental right to

use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering." *Raich II*, 500 F.3d at 866. Therefore, the Ninth Circuit has rejected the notion that "the Due Process Clause embraces a right to make a life-shaping decision on a physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed." *Id.* at 864. Similarly, the Washington Supreme Court has held that because a person does not have "a fundamental right to have marijuana prescribed as his preferred treatment over the legitimate objections of the state," the person does not possess "a right to have marijuana prescribed as his preferred medical treatment for the nausea and vomiting associated with chemotherapy." *Seeley*, 940 P.2d at 612-14.

Thus, it is well established in our Nation's history, traditions and practices that there is no fundamental right under the Fourteenth Amendment for a person to use medical marijuana recommended by a physician. It also is well established that a person who seeks to use medical marijuana for his or her medical condition is not similarly situated to persons who seek to use other medical treatments for the same medical condition. *See Vacco v. Quill*, 521 U.S. 793, 800-09 (1997) (holding that States may regulate different medical treatments differently without violating the Equal Protection Clause because persons who use different medical treatments for the same medical condition are not similarly situated); *Wilson v. Holder*, 7 F.

Supp. 3d 1104, 1125 (D. Nev. 2014) (holding that a person who possesses a Nevada registration card and uses medical marijuana for treatment "is not similarly situated to individuals [who] avail themselves of treatment methods *that comply with federal law*.").

Despite this overwhelming precedent, Doe attempts to distinguish the Ninth Circuit's *Raich II* decision on the basis that since the decision in 2007, twenty-three states and District of Columbia have purportedly authorized the use of medical marijuana under state and local law and "the role of medical marijuana in our culture and marketplace is much more established than it was over a decade ago when *Raich II* was before the Ninth Circuit." (Opening Br. 44.) However, since *Raich II*, the Federal Government has not authorized the use of medical marijuana under federal law, and as recently as 2014, the Ninth Circuit reaffirmed that the Federal Constitution does not "protect a fundamental right to 'distribute, possess and use medical cannabis' in compliance with California state law." *Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 (9th Cir. 2014), *pet. for rehearing en banc denied* (9th Cir. Feb. 21, 2014).

Doe also attempts to distinguish the Ninth Circuit cases on the basis that those cases arose in California and "unlike California, a state that initiated medical marijuana solely through statute, Nevada initiated it through constitutional amendment. To that end, Nevada patients have a CONSTITUTIONAL RIGHT

under the Nevada Constitution to access medical marijuana. This is a ***huge*** distinction." (Opening Br. 43 (citation omitted).) Contrary to Doe's contentions, the fact that Nevada initiated medical marijuana through a state constitutional amendment has no bearing on whether the *Federal Constitution* recognizes a fundamental right to use medical marijuana recommended by a physician because the federal constitutional rights of Nevada citizens are not greater than the federal constitutional rights of California citizens, all of whom enjoy the same "privileges or immunities of citizens of the United States" under the Fourteenth Amendment. Therefore, the fact that the Ninth Circuit cases arose in California does not diminish their persuasive weight in interpreting the *Federal Constitution* because this is an issue of federal constitutional law, not state constitutional law.

Furthermore, Nevada patients do not have an unconditional or absolute right under Article 4, Section 38 of the Nevada Constitution to use medical marijuana upon the recommendation of a physician, but any such right is expressly subject to, conditioned by and contingent upon the state constitutional requirement for the patient to be part of the registry. Therefore, given that Nevada's state constitutional right to use medical marijuana upon the recommendation of a physician is expressly subject to the state constitutional requirement for the patient to be part of the registry, Article 4, Section 38 cannot be the source of Doe's

asserted fundamental right under the *Federal Constitution* to use medical marijuana without participating in the registry.

Finally, Doe attempts to distinguish the Ninth Circuit cases on the basis that those cases involved claims challenging the constitutionally of the federal Controlled Substances Act under the Supremacy Clause and the Tenth Amendment. (Opening Br. 44-45.) Even though the Ninth Circuit cases addressed those claims, the cases also expressly addressed and rejected the parties' other claims which alleged that substantive due process creates a fundamental right to use medical marijuana that is recommended by a physician as permitted by state law. *Raich II*, 500 F.3d at 861-66; *Sacramento Nonprofit Collective*, 552 F. App'x at 683. Because that is the precise federal constitutional issue being litigated in this case, the Ninth Circuit cases are directly on point.

Moreover, even outside the context of medical marijuana, courts historically have rejected claims that the Federal Constitution creates a fundamental right to use a particular drug treatment recommended by a physician. *People v. Privitera*, 591 P.2d 919, 921-26 (Cal. 1979). In *Privitera*, a physician who—in violation of federal and state law—prescribed the drug laetrile to his patients to use for the alleviation or cure of cancer claimed that the Federal Constitution protects a patient's fundamental right of access to drugs prescribed by a physician, regardless of whether the drugs have been approved for such use by the government. The

California Supreme Court rejected such a fundamental right under the Federal Constitution because "[i]t is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions." *Id.* at 923 (quoting *Robinson v. California*, 370 U.S. 660, 664-65 (1962)). The court concluded, therefore, that "the selection of a particular procedure [such as a drug treatment] is a medical matter to which privacy status does not attach and which may be regulated by the government, providing a rational basis for such regulation exists." *Id.* at 922. Applying the rational-basis standard, the court held that "the challenged legislation bear[s] a reasonable relationship to the achievement of the legitimate state interest in the health and safety of its citizens." *Id.* at 925-26.

Thus, contrary to Doe's contentions, there is no fundamental right to "access health care recommended by a person's physician." Instead, our Nation's history, traditions and practices establish that the State has broad police powers to regulate drug treatments prescribed or recommended by a physician, so long as there is a rational basis for such regulation. Consequently, because there is no fundamental right under the Fourteenth Amendment for a person to use medical marijuana recommended by a physician, the State's regulation of the use of medical marijuana is subject to the rational-basis standard of review and is constitutional if it is rationally related to legitimate state interests.

2. The medical marijuana registration program is rationally related to legitimate state interests.

Under the rational-basis standard, a state legislature may enact statutory classifications that treat persons in different situations differently, but the statutory classifications must be "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985). When drawing statutory classifications, state legislatures "are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Under this wide latitude, state legislatures "may implement their program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *Id.* For example, a state legislature may believe that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). Under such circumstances, legislative "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Id.* (citations omitted).

In the context of medical treatments, state legislatures may regulate different medical treatments differently without violating the Equal Protection Clause

because persons who use different medical treatments for the same medical condition are not similarly situated. *See Vacco v. Quill*, 521 U.S. 793, 800-09 (1997). In *Vacco*, the Supreme Court held that New York could treat terminally ill patients who request withdrawal of life-sustaining medical treatment differently from terminally ill patients who request medication for assisted suicide because:

> Logic and contemporary practice support New York's judgment that the two acts are different, and New York may therefore, consistent with the Constitution, treat them differently. By permitting everyone to refuse unwanted medical treatment while prohibiting anyone from assisting a suicide, New York law follows a longstanding and rational distinction.

521 U.S. at 808.

Under federal law, Congress has followed a longstanding and rational distinction of treating the use of marijuana differently from the use of other dangerous drugs. *See Gonzales v. Raich*, 545 U.S. 1, 13-15 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490-92 (2001). Because the use of marijuana is generally prohibited by federal law, a person who seeks to use medical marijuana for his or her medical condition is not similarly situated to persons who seek to use other medical treatments for the same medical condition. This longstanding and rational distinction has been recognized by Nevada's federal district court, which has determined that a person who possesses a Nevada registration card and uses medical marijuana for treatment "is not similarly situated

to individuals [who] avail themselves of treatment methods *that comply with federal law*." *Wilson v. Holder*, 7 F. Supp. 3d 1104, 1125 (D. Nev. 2014).

Despite this longstanding and rational distinction of treating the use of marijuana differently from the use of other dangerous drugs, Doe contends that because the State already has a system for regulating dangerous drugs, including narcotics and other controlled substances, without a registry of patients or any associated fees, "[t]here is no legitimate purpose served by adding a [r]egistry requirement and annual fee in order for patients to access this one and only drug—a plant of the genus Cannabis." (Opening Br. 57.) However, under the Equal Protection Clause, the Legislature may believe that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies," and its legislative "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson*, 348 U.S. at 489.

In the case of medical marijuana, the Legislature could reasonably believe that, at this time, the potential evils associated with medical marijuana are of different dimensions and proportions and require different remedies in comparison to the potential evils associated with other dangerous drugs. Furthermore, the Legislature is permitted to implement its reforms one step at a time, addressing its

legislation only to the potential evils associated with medical marijuana and applying different remedies to that phase of the problem without addressing the potential evils associated with other dangerous drugs. Such differential treatment is rational because logic and contemporary practice support the Legislature's judgment that the use of medical marijuana is different from the use of other dangerous drugs that comply with federal law. Therefore, because of this longstanding and rational distinction, the Legislature had a rational basis for treating the use of medical marijuana differently from the use of other dangerous drugs that comply with federal law.

The Legislature's classification of medical marijuana for differential treatment is also rationally related to legitimate state interests. Doe contends that the registry and fee requirements are not rationally related to any legitimate state interests, including the Legislature's interests in: (1) regulating a patient's use of potentially dangerous drugs in medical treatments by requiring a patient to satisfy and submit proof of certain health and safety standards before the patient may engage in the use of medical marijuana; and (2) ensuring that the State is able to operate and maintain the registry to identify which patients are authorized to use medical marijuana so that, if necessary, the State may verify whether the patients are using medical marijuana in compliance with all health and safety standards required by state law. (Opening Br. 51-59.) Contrary to Doe's contentions, the

U.S. Supreme Court has found that these types of legitimate state interests justify patient-identification requirements under the rational-basis standard. *Whalen v. Roe*, 429 U.S. 589 (1977).

In *Whalen*, the Supreme Court upheld a New York statute which provided that whenever a "Schedule II" drug was prescribed to a patient, the patient's name, address and age, along with the identity of the prescribed drug and its dosage, had to be filed with the state department of health. Applying the rational-basis standard, the Court upheld the patient-identification statute because:

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

429 U.S. at 597-98 (footnotes omitted).

Like the New York patient-identification system upheld in *Whalen*, the medical marijuana registry is rationally related to many of the same legitimate state interests. When the medical marijuana registry was enacted, it was the product of extensive hearings on the proposed legislation, and it was based on experience with similar programs in other states. In particular, the Legislature modeled the legislation after the Oregon Medical Marijuana Act of 1999. *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 10, 2001). The Legislature could reasonably believe that the registry would aid in the enforcement of Nevada's medical marijuana laws, have a deterrent effect on potential violators and assist in the detection or investigation of specific instances of apparent abuse. For example, by requiring a patient to satisfy and submit proof of certain health and safety standards before the patient may engage in the use of medical marijuana—such as satisfying public safety standards that verify whether the patient has been convicted of certain drug-related crimes—the registry ensures that only qualified patients participate in the program. Additionally, by identifying which patients are authorized to use medical marijuana, the registry allows the State to verify, if necessary, whether the patients are using medical marijuana in compliance with all health and safety standards required by state law, such as the public safety standards which place limitations on the amount of marijuana,

marijuana plants or marijuana products that the patient may possess, deliver or produce at any one time.

Given the State's legitimate and vital interests in controlling the use of medical marijuana and preventing its abuse, the registry and fee requirements are "manifestly the product of an orderly and rational legislative decision." *Whalen*, 429 U.S. at 597. Therefore, because the registry and fee requirements are rationally related to legitimate state interests, they are constitutional under the rational-basis standard, and Doe's Fourteenth Amendment claims have no merit as a matter of law.

IV. If the Court determines that the registration program violates the Fifth or Fourteenth Amendment and enjoins the State's operation of the program, then the Court must strike down Article 4, Section 38 and NRS Chapter 453A in their entirety because the voters and the Legislature did not intend for the medical marijuana laws to be operative without the registration program.

Under the severance doctrine, if the Court determines that one component of an initiative or statute is invalid, the Court must determine whether the voters who approved the initiative or the Legislature which enacted the statute intended for the remaining components of the measure to be given effect without the invalid parts. *Rogers v. Heller*, 117 Nev. 169, 177-78 (2001); *Nevadans for Prop. Rights v. Heller*, 122 Nev. 894, 909-13 (2006); *Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 514-18 (2009). Because the severance doctrine applies to both initiatives approved by the voters and statutes enacted by the Legislature, the same

standards are used for determining whether any invalid parts of such measures are severable. *Nevadans Prop. Rights*, 122 Nev. at 912 n.49; *Flamingo Paradise*, 125 Nev. at 515.

Under the severance standards, any invalid parts are severable if: (1) the remaining parts, standing alone, can be given legal effect after the invalid parts are severed; and (2) the voters or the Legislature, as appropriate, intended for the remaining parts to be given effect even after severance of the invalid parts. *Nevadans Prop. Rights*, 122 Nev. at 912; *Flamingo Paradise*, 125 Nev. at 515. A measure is not severable when severance would gut a "central component" or "destroy the central purpose" of the measure as intended by the voters or the Legislature, as appropriate, so the remainder of the measure cannot stand alone because it would be contrary to the intent of the voters or the Legislature. *Rogers*, 117 Nev. at 177-78; *Nevadans Prop. Rights*, 122 Nev. at 913; *Flamingo Paradise*, 125 Nev. at 517.

In addition, when determining whether any invalid parts of an initiative are severable, the Court begins with a general reluctance to sever the initiative because it "has been signed by thousands of voters. Initiative petitions must be kept substantively intact; otherwise, the people's voice would be obstructed." *Rogers*, 117 Nev. at 177. As further explained by the court:

> We agree that initiative legislation is [generally] not subject to judicial tampering—the substance of an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as originally proposed and signed. . . . Like the Legislature, *we are not in a position to know whether an initiative's drafters and signers would want an initiative to proceed without a primary component of the proposal*.

Id. at 178 (emphasis added). However, when an initiative contains a severability clause, the Court is more likely to "sever the initiative's provisions that concern *secondary subjects*," because by approving the severability clause, "the initiative petition's signers have expressed a desire to allow the initiative to proceed even without some sections, and, in severing, this court need not speculate whether the signatories would have signed the petition in its severed form." *Nevadans Prop. Rights*, 122 Nev. at 910 & 911-12 (emphasis added).

Article 4, Section 38 was added to the Nevada Constitution by a constitutional initiative approved by the voters in 2000. *State of Nevada Ballot Questions 2000, Question No. 9* (Nev. Sec'y of State). According to the ballot materials presented to the voters, "[t]he initiative is an attempt to balance the needs of patients with the concerns of society about marijuana use." *Id.* As part of that balance, the voters were told that "[a] confidential registry of authorized users shall be created and available to law enforcement agencies to verify a claim of authorization," and that with such "safeguards included to protect the concerns of society, this proposal can make a difference in the lives of thousands of persons suffering from these serious illnesses." *Id.*

Based on the ballot materials and history of the constitutional initiative, the voters intended for the registry to operate as a central component of the initiative because when they approved a patient's use of medical marijuana upon the recommendation of a physician, they also made the use of medical marijuana expressly subject to, conditioned by and contingent upon the initiative's requirement for the patient to be part of the registry. Furthermore, because the initiative does not contain a severability clause, the voters did not instruct the judiciary to sever any invalid parts of the initiative and preserve all remaining parts which can be given effect without the invalid parts. Therefore, the voters clearly did not intend for the initiative to be operative without the registration program. As a result, the registration program cannot be severed from the initiative because severance would gut a "central component" or "destroy the central purpose" of the initiative as intended by the voters, so that the remainder of the initiative cannot stand alone because it would be contrary to the intent of the voters who approved it. *Rogers*, 117 Nev. at 177-78; *Nevadans for Prop. Rights*, 122 Nev. at 913; *Flamingo Paradise*, 125 Nev. at 517.

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

Oregon Medical Marijuana Act of 1999 (Oregon Act). *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 10, 2001) ("The bill was modeled after the Oregon Medical Marijuana Act of 1999."). Since the Oregon Act's enactment in 1999, it has authorized only persons holding a valid registration card to use medical marijuana. *See* 1999 Or. Laws, ch. 4, § 4 & ch. 825, § 2 (enacting Or. Rev. Stat. § 475.309 (now codified as § 475B.415)); *Emerald Steel Fabricators v. Bureau of Labor & Indus.*, 230 P.3d 518, 519 (Or. 2010) ("The Oregon Medical Marijuana Act authorizes persons holding a registry identification card to use marijuana for medical purposes.").

During legislative hearings in the Assembly on A.B. 453, the bill's primary sponsor, Assemblywoman Giunchigliani, testified that "[t]he Oregon model would be adopted regarding registered cardholders being allowed to have a certain number of plants and quantity of useable marijuana," and that "[f]ollowing the Oregon model was a good choice." *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 12, 2001). She also testified that the registration program "maintained the safety and integrity of the measure the [voters] signed." *Hearing on A.B. 453 before Assembly Comm. on Judiciary*, 71st Leg. (Nev. Apr. 10, 2001). Before the bill was passed by the Assembly, Ms. Giunchigliani rose in support of A.B. 453 and stated to the body that "I think the public knew very well what they voting on and recognized that under extreme

medical conditions, they supported the issue of a registry card and allowing an individual to have access to this." *Assembly Daily Journal*, 71st Leg., at 41 (Nev. May 23, 2001). During legislative hearings in the Senate, Ms. Giunchigliani emphasized that "only those who are registered are eligible for the program." *Hearing on A.B. 453 before Senate Comm. on Human Res. & Facilities*, 71st Leg. (Nev. June 3, 2001).

Finally, when the Legislature enacted A.B. 453, it explained in the preamble to the bill that it intended for the bill to "carry out the will of the people of this state and to regulate the health, medical practices and well-being of those people in a manner that respects their personal decisions concerning the relief of suffering through the medical use of marijuana." A.B. 453, 2001 Nev. Stat., ch. 592, preamble, at 3053. However, the Legislature also explained that it was enacting the registration program because "[m]any residents of this state have suffered the negative consequences of abuse of and addiction to marijuana, and it is important for the legislature to ensure that the program established for the distribution and medical use of marijuana is designed in such a manner as not to harm the residents of this state by contributing to the general abuse of and addiction to marijuana." *Id.* Thus, like the voters who approved the initiative, the Legislature intended for the registration program to operate as a central component of the medical marijuana laws in NRS Chapter 453A because the Legislature made a patient's use

of medical marijuana expressly subject to, conditioned by and contingent upon the statutory requirement for the patient to be part of the registration program.

Accordingly, based on the legislative history of A.B. 453, it is clear that the Legislature did not intend for the medical marijuana laws in NRS Chapter 453A to be operative without the registration program. As a result, the registration program cannot be severed from NRS Chapter 453A because severance would gut a "central component" or "destroy the central purpose" of the statutes as intended by the Legislature, so that the remainder of the statutes cannot stand alone because it would be contrary to the intent of the Legislature. *Rogers*, 117 Nev. at 177-78; *Nevadans for Prop. Rights*, 122 Nev. at 913; *Flamingo Paradise*, 125 Nev. at 517. Therefore, if the Court determines that the registration program violates the Fifth or Fourteenth Amendment and enjoins the operation of the entire registration program, then the Court must strike down Article 4, Section 38 and NRS Chapter 453A in their entirety because the voters and the Legislature did not intend for the medical marijuana laws to be operative without the registration program.

V. The district court correctly granted summary judgment on Doe's state-law tort claims for fraud and unjust enrichment.

In his state-law tort claim for fraud, Doe claims that the State fraudulently induced him to apply and pay fees for registration cards which were useless in facilitating access to medical marijuana because the State knew or should have known that no dispensaries would be open in Southern Nevada within the one-year

period covered by the registration cards. (*JA1:62-64*.) In his state-law tort claim for unjust enrichment, Doe claims that he never obtained any benefit from the registration cards because the State never licensed any dispensaries during the period that the registration cards were valid and that the State unjustly accepted and retained his fees for the registration cards. (*JA1:64-65*.) Doe seeks money damages as "compensation for all fees and costs associated with the acquisition of a registration card." (*JA1:74*.)

The district court determined that the State is entitled to judgment as a matter of law on Doe's state-law tort claims because the claims are barred as a matter of law by sovereign immunity under NRS 41.032(1) and *Hagblom v. State Dir. of Mtr. Vehs.*, 93 Nev. 599, 601-04 (1977). (*JA3:493-95*.) Because the district court correctly determined that Doe's state-law tort claims are barred as a matter of law by sovereign immunity, the district court's judgment should be affirmed.

In addition, because the State is the party that prevailed in the district court, the State may "without cross appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument." *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755 (1994). Because the district court determined that Doe's state-law tort claims are barred as a matter of law by sovereign immunity under NRS 41.032(1), it declined to consider the State's additional arguments that: (1) Doe's claims are barred as a matter of law by

sovereign immunity under NRS 41.032(2), which is also known as discretionary-function sovereign immunity; and (2) Doe's claims are barred as a matter of law by the voluntary payment doctrine and the statute of limitations. (*JA3:494*.) Although the district court did not consider the State's additional arguments, its judgment may be affirmed based on those additional arguments as a matter of law. *See Rosenstein v. Steele*, 103 Nev. 571, 575 (1987) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons.").

A. Sovereign immunity.

Under the doctrine of sovereign immunity, the State of Nevada cannot be sued in state court for state-law claims unless the lawsuit and the type of relief being sought are both authorized by Nevada law. *See Arnesano v. State*, 113 Nev. 815, 820-24 (1997), *abrogated on other grounds by Martinez v. Maruszczak*, 123 Nev. 433 (2007). Thus, a plaintiff cannot bring a state-law claim for money damages against the State, its agencies and its officials acting in their official capacities except as expressly authorized by Nevada's conditional waiver of its sovereign immunity in NRS 41.031 et seq. *Hagblom*, 93 Nev. at 601-04. Nevada's conditional waiver of its sovereign immunity is expressly limited by NRS 41.032(1) and NRS 41.032(2), which state:

> [N]o action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:
>
> 1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction; or
>
> 2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

NRS 41.032(1) and NRS 41.032(2) each provide a separate and independent basis for applying sovereign immunity, and each subsection requires a separate and independent legal analysis regarding its application. *See Hagblom*, 93 Nev. at 603-05; *Dalehite v. United States*, 346 U.S. 15, 32-33 (1953) (discussing analogous provisions under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a), which served as the model for NRS 41.032(1) and NRS 41.032(2)). Because the FTCA served as the model for each subsection of Nevada's statute, the Nevada Supreme Court has found that federal cases interpreting the FTCA are relevant in interpreting Nevada's provisions. *Hagblom*, 93 Nev. at 602; *Martinez v. Maruszczak*, 123 Nev. 433, 444 (2007); *Frank Briscoe Co. v. County of Clark*, 643 F. Supp. 93, 97 (D. Nev. 1986).

1. Doe's state-law tort claims are barred as a matter of law by sovereign immunity under NRS 41.032(1).

Under NRS 41.032(1), the State and its agencies and officials acting in their official capacities are absolutely immune from liability for money damages based on any acts or omissions in their execution and administration of statutory provisions which have not been declared invalid by a court of competent jurisdiction. *Hagblom*, 93 Nev. at 603-04. In interpreting the analogous statutory exception in the FTCA, the U.S. Supreme Court has stated that the exception "bars tests by tort action of the legality of statutes and regulations." *Dalehite*, 346 U.S. at 33; 2 Jayson & Longstreth, *Handling Federal Tort Claims* § 12.03 (LexisNexis 2014) (collecting federal cases and stating that the exception "bars the use of a FTCA suit to challenge the constitutionality or validity of statutes or regulations.").

The U.S. Supreme Court's interpretation of the exception is supported by its legislative history where Congress stated that it was not "desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation, should be tested through the medium of a damage suit for tort." *Dalehite*, 346 U.S. at 29 n.21; *Handling Fed. Tort Claims* § 12.02 (explaining that the exception's "objective was to ensure that certain governmental activities would not be disrupted by the threat of damage suits."). Consequently, by enacting the exception, Congress made clear that a claim for damages against the government

cannot be premised on the unconstitutionality or invalidity of a statute or regulation. *Handling Fed. Tort Claims* § 12.03.

The Nevada Supreme Court has taken a similar view of the statutory exception in NRS 41.032(1). *Hagblom*, 93 Nev. at 603-04. In *Hagblom*, the plaintiff brought claims for declaratory relief regarding the validity of a state agency's regulation and also claims for money damages based on the state agency's implementation of the regulation. The Court upheld dismissal of the claims for money damages based on NRS 41.032(1), which the Court stated "provides immunity to all individuals implementing the new regulation since that policy, applied with due care and without discrimination, had not been declared invalid by a court of competent jurisdiction." *Id.* at 603.

To overcome the immunity provided by NRS 41.032(1), the plaintiff has the burden to prove that the State "in any way deviated from the statute's requirements," and "[a]bsent any allegation of such a deviation it cannot be said that the officers acted with anything other than due care." *Welch v. United States*, 409 F.3d 646, 652 (4th Cir. 2005). Therefore, "it is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists and that none of the statute's waiver exceptions apply to his particular claim. If the plaintiff fails to meet this burden, then the claim must be dismissed." *Id.* at 651 (citations omitted).

Doe does not allege that the State and its agencies and officials in any way deviated from the requirements of NRS Chapter 453A in collecting fees under the registration program. The Administrator of the Division is expressly required to collect the fees under NRS 453A.740(3), which directs the Administrator to adopt regulations establishing the following fees:

> 3. Fees for:
> (a) Providing to an applicant an application for a registry identification card or letter of approval, which fee must not exceed $25; and
> (b) Processing and issuing a registry identification card or letter of approval, which fee must not exceed $75.

The Administrator is also required by NRS 453A.730(1) to use the fees to carry out the provisions of NRS Chapter 453A, including paying for the costs of the registration program.

Because Doe does not allege that there has been a deviation from these statutory requirements, Doe has not met his burden to prove that the State has acted with anything other than due care in the execution of the medical marijuana laws. Because the State has acted with due care in the execution of the medical marijuana laws, Doe's state-law tort claims for money damages are exactly the type of claims that the State's sovereign immunity under NRS 41.032(1) is intended to prohibit because his claims for money damages are premised on the alleged unconstitutionality of statutes that have not been declared invalid by a court of competent jurisdiction.

In his opening brief, Doe acknowledges that no court has declared the fee provisions of NRS Chapter 453A unconstitutional. (Opening Br. 62.) However, Doe argues that because the purpose of this case is to "declare the laws requiring the fee-based registry unconstitutional," the State's sovereign immunity under NRS 41.032(1) will not apply if the Court declares in this case that those laws are unconstitutional. Doe's argument is wrong as a matter of law.

Based on the plain language of NRS 41.032(1), if the State is executing a statute or regulation, the State's sovereign immunity applies "whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction." Thus, even if the State is executing an invalid statute or regulation, the State enjoys sovereign immunity under NRS 41.032(1) for any acts or omissions committed by the State *before* the statute or regulation is declared invalid. After the statute or regulation is declared invalid, the State can be held liable for any acts or omissions committed by the State *after* the declaration of invalidity, but the State retains its sovereign immunity from liability for any acts or omissions committed by the State *before* the declaration of invalidity.

Therefore, even if the Court were to declare in this case that the medical marijuana laws are unconstitutional, the State would retain its sovereign immunity from liability for any acts or omissions committed by the State *before* such a

declaration of invalidity. Accordingly, because Doe's state-law tort claims are premised on alleged acts or omissions by the State in the execution and administration of the medical marijuana laws which have not been declared invalid by a court of competent jurisdiction, the district court correctly determined that Doe's state-law tort claims are barred as a matter of law by sovereign immunity under NRS 41.032(1).

2. Doe's state-law tort claims are barred as a matter of law by sovereign immunity under NRS 41.032(2).

Under NRS 41.032(2), which provides discretionary-function sovereign immunity, the State and its agencies and officials acting in their official capacities are absolutely immune from liability for money damages based on the performance of official duties which involve an element of official discretion or judgment and are grounded in the creation or execution of social, economic or political policy. *Martinez v. Maruszczak*, 123 Nev. 433, 445-47 (2007); *Scott v. Dep't of Commerce*, 104 Nev. 580, 583-86 (1988). When governmental actors are acting pursuant to their statutory authority in order to execute and carry out the social, economic and political policies enacted by the Legislature in statutes, the governmental actors are entitled to sovereign immunity under NRS 41.032(2) because they play an integral part in the furtherance of the policies which led to the enactment of the statutes. *See Boulder City v. Boulder Excavating*, 124 Nev. 749, 757-60 (2008) (finding sovereign immunity under NRS 41.032(2) where the

governmental actor "was acting pursuant to his statutory authority."); *United States v. Gaubert*, 499 U.S. 315, 324 (1991) ("if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation."); *Dalehite*, 346 U.S. at 36 ("acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.").

Thus, sovereign immunity under NRS 41.032(2) protects governmental actors from liability for damages whenever "the injury-producing conduct is an integral part of governmental policy-making or planning." *Martinez*, 123 Nev. at 446. The reason for providing sovereign immunity under such circumstances is to protect the policy-making functions of the political branches from "judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Martinez*, 123 Nev. at 446 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)).

Doe does not allege that the State and its agencies and officials were acting outside their statutory authority in executing and carrying out the social, economic and political policies enacted by the Legislature in the medical marijuana laws. Thus, because the State and its agencies and officials were acting pursuant to their statutory authority, they were playing an integral part in the furtherance of the

policies which led to the enactment of the medical marijuana laws, and they are entitled to sovereign immunity from money damages as a matter of law. Therefore, Doe's state-law tort claims are barred as a matter of law by discretionary-function sovereign immunity under NRS 41.032(2).

B. Voluntary payment doctrine and statute of limitations.

Under Nevada law, a person who pays a governmental tax or fee under protest has a right to bring an action to challenge the validity of the tax or fee. *See Hostettler v. Harris*, 45 Nev. 43, 47-56 (1921). However, the voluntary payment doctrine is an affirmative defense which provides that a person who voluntarily pays a governmental tax or fee *without protesting the legality of the tax or fee at the time of payment* cannot recover the tax or fee in a subsequent action challenging its validity. *Nev. Ass'n Servs. v. Dist. Ct*, 130 Nev. Adv. Op. 94, 338 P.3d 1250, 1253 (2014); *Video Aid Corp. v. Town of Wallkill*, 651 N.E.2d 886, 888 (N.Y. 1995) ("The settled law is that the payment of a tax or fee cannot be recovered subsequent to the invalidation of the taxing statute or rule, unless the taxpayer can demonstrate that the payment was involuntary."). The purpose of this doctrine is to encourage stability and certainty for the governmental entity in the collection of its taxes and fees. *See Berrum v. Otto*, 127 Nev. Adv. Op. 30, 255 P.3d 1269, 1273 n.5 (2011). Thus, a person who voluntarily pays a governmental tax or fee *without protesting the legality of the tax or fee at the time of payment*

generally cannot recover the tax or fee based on a claim of unjust enrichment. *Isberian v. Vill. of Gurnee*, 452 N.E.2d 10, 14-15 (Ill. App. Ct. 1983).

Doe does not allege that when he paid fees under the registration program, he paid such fees under protest by protesting the legality of the fees at the time of each payment. Therefore, because Doe voluntarily paid the fees without protesting the legality of the fees at the time of each payment, his state-law tort claims to recover the fees from the State are barred as a matter of law by the voluntary payment doctrine.

In addition, Doe's state-law tort claims to recover the fees from the State are also barred as a matter of law by the statute of limitations. *See City of Fernley v. State Dep't of Tax'n*, 132 Nev. Adv. Op. 4, 366 P.3d 699, 706-08 (2016) (holding that statute of limitations barred state-law claims for money damages against the State). The Legislature has provided a 1-year statute of limitations for "[a]n action against an officer, or officer de facto *for money paid to the officer under protest*, or seized by the officer in his or her official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded." NRS 11.190(5)(b) (emphasis added). Therefore, even if a person pays a tax or fee under protest, the person may not recover a refund of the tax or fee unless the person brings an action challenging the validity of the tax or fee against the officer who collected the tax or fee in his or her official capacity within 1 year after the person makes the payment under

protest. Because Doe did not make a timely allegation against an officer in compliance with the 1-year statute of limitations in NRS 11.190(5)(b), Doe's state-law tort claims to recover the fees from the State are barred as a matter of law by the statute of limitations.

CONCLUSION

The State respectfully asks the Court to affirm the district court's final judgment in favor of the State on all causes of action and claims for relief alleged in Doe's second amended complaint. However, if the Court finds the registration program violates the Fifth Amendment privilege against self-incrimination, the State asks the Court to narrowly tailor any injunctive relief to cure the constitutional violation in a manner that is as minimally disruptive as possible to the operation of the registration program. Finally, if the Court finds the registration program violates the Fifth or Fourteenth Amendment and enjoins the operation of the entire registration program, the State asks the Court to strike down Article 4, Section 38 and NRS Chapter 453A in their entirety because the voters and the Legislature did not intend for the medical marijuana laws to be operative without the registration program.

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DATED: This **11th** day of July, 2016.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

1. We certify that the foregoing Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point font and Times New Roman type.

2. We certify that the foregoing Answering Brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the Answering Brief is proportionately spaced, has a typeface of 14 points or more, and contains **13,841** words.

3. We certify that we have read the foregoing Answering Brief, and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that the Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Answering Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. We understand that we may be subject to sanctions in the event that the Answering Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **11th** day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **11th** day of July, 2016, pursuant to NRAP 25, NEFCR 8 and 9 and the parties' stipulation and consent to service by electronic means, I filed and served a true and correct copy of Respondents' Joint Answering Brief, by electronic means to registered users of the Nevada Supreme Court's electronic filing system and by electronic mail, directed to the following:

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