

CASE NO. 69801
IN THE SUPREME COURT OF THE STATE OF NEVADA

<p>JOHN DOE, on his own behalf and on behalf of a class of persons similarly situated, Appellant,</p>	<p>Electronically Filed July 27, 2017 4:17 p.m. Elizabeth A. Brown Clerk of Supreme Court</p>
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v.

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

Appellees,

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

Real Parties In Interest.

APPELLANT'S PETITION FOR REHEARING
PURSUANT TO NRAP 40

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

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July 27, 2017

MEMORANDUM OF POINTS AND AUTHORITIES

LEGAL STANDARD FOR PETITION FOR REHEARING

NRAP 40(c)(2) permits this Court to grant a petition for rehearing when it has overlooked or misapprehended a material fact or has overlooked or misapplied controlling law. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. —, —, 245 P.3d 1182, 1184 (2010). In petitions for rehearing, parties may not reargue matters they presented in their appellate briefs and during oral arguments, and no point may be raised for the first time. NRAP 40(c)(1).

ARGUMENT

A. THIS COURT ABUSED ITS DISCRETION IN RE-WRITING DOE’S LEGAL QUESTION

Despite the fact that this case involves serious constitutional questions. Despite the fact that this case involves questions of first impression. Despite the fact that this case asks this Court to enumerate a never before enumerated fundamental right. Despite that the right sought is probably one of the timeliest issues of our day, an issue with very little precedent – namely, our rights when it comes to health care. Despite the fact that this Court viewed this case important enough to schedule it for *en banc* argument, and, did it as

one of the first set of cases argued in the new courthouse. This Court chose to resolve this case in an unpublished decision, and, in doing so failed to address what the very essence of Appellant's claim.

Rather, this Court chose to "construe" or rewrite the central legal issue of the case to fit within a sociopolitical framework within which this court felt it could safely operate; while such may be the practice of courts within an elected judiciary, it is a cowardly approach by the judiciary that deprives the people of this great State of full access to spirit, intent and utility of the courts. Such practice is an extreme abuse of its power and is a disappointment to those litigants who are brave enough to battle to resolve issues of first impression.

In the briefs submitted in this case, and, because it has been said that not all the Justices actually read all the briefs of all the cases before them, at oral argument, it was made very clear that Mr. Doe was NOT asking for this Court to enumerate a fundamental right to use medical marijuana; rather, the legal issue of first impression which Mr. Doe asked that this Court resolve is whether there is a fundamental right to access the health care that our physicians recommend without undue governmental influence.

By framing the question as Mr. Doe posed, this Court cannot blindly skip along the path of a “deep rooted in this Nation’s history and tradition” to deny enumerating this new fundamental right.¹ The fact is that there is a deep rooted history and tradition of undue governmental interference in patient access to medical care. Prior to the implementation of medical marijuana in Nevada – something that was done through a constitutional amendment, an amendment that clearly creates a nexus between marijuana and medical treatment – all efforts to regulate health care have occurred on the provider side. Whether it be the regulation of physicians, nurses and other health care providers, or the regulation of pharmacies, hospitals and other delivery systems, the government never interferes on the side of the patient. There is not one area of medicine or health care besides medical marijuana where the government places a hurdle between the patient and the health care services sought; this is a first. Should this Court be brave enough to actually address the merits of this Petition, rather than provide a stock two word denial to this Petition referencing NRAP 40(c), Mr. Doe challenges this Court to

¹ In light of the swift moving affirmation of marriage equality in the courts over the past decade, query whether the pre-requisite that a right must be deeply rooted in our history and tradition is even a proper legal test for enumerating new fundamental rights anymore.

identify even one (1) other medical treatment that requires a patient to (a) register with the government, (b) pay a fee to the government for the right to be considered eligible to obtain the treatment, and (c) be approved to receive the treatment BEFORE the patient is entitled to obtain the treatment. The fact is that after combing through over a century of health care delivery in this State, or this Country, you cannot do so. For as long as the current system of medicine has been in place, patients never have had to pass through the gates of the government to access their care.

Hence, there is a clear historical basis in the right sought – a right to access the health care that our physicians recommend without undue governmental influence. This Court should grant this Petition, and, in doing so, enumerate that Nevadans have a fundamental right to access the health care that our physicians recommend without undue governmental interference.

B. IN LIGHT OF LEGALIZATION OF RECREATIONAL MARIJUANA, THE STATE NO LONGER HAS A LEGITIMATE PURPOSE IN MAINTAINING THE REGISTRY

By failing to recognize the implications of the recent change in the law that legalized recreational marijuana, this Court erred in concluding that

“Nevada's medical marijuana registry is rationally related to a legitimate state interest.”

In affirming the district court’s opinion, this Court regurgitated the argument that “here, the registry seeks to aid in the enforcement of laws designed to minimize the misuse of drugs.” This argument fails, however, in light of the recent change in the law allowing for recreational marijuana use. At this point, people have two choices – obtain a recommendation form from the State (for a fee), see a physician (for a fee), submit the completed form (with a fee) to the government, and wait for permission to be included in the registry, or, in the alternative, the same person can walk right into a dispensary (the same dispensary used for the medical marijuana patient) and purchase the same marijuana sold to the medical patient without the government’s knowledge. Now, we have a market where there is no registry, and no ability for law enforcement to use to minimize the misuse of drugs. In fact, the implications are worse because at least with the medical marijuana patient, we had medical supervision of the marijuana use; now, the incentive to include one’s physician, a physician who has the skill and expertise to identify and address an abuse of drugs, in one’s use of medical marijuana has been essentially eliminated. And, the recreational market is thriving without a

registry and without the state's ability to "aid in the enforcement of laws designed to minimize the misuse of drugs."

In fact, what this Court's decision in this case did was solidify discriminatory scheme for marijuana access in Nevada. Those patients with a disability and/or medical condition who want to use medical marijuana, responsibly, under a physician's supervision, are required to pay additional fees to the government and jump through procedural hoops in order to participate in this State's medical marijuana program; those without such medical conditions and/or disabilities do not have to pay such fees and jump through such hoops. In other words, but for Nevada's patients' medical conditions and/or disabilities, they would have no need to participate in the registry.

Ultimately, because a person can obtain marijuana legally without being included in the registry, the State no longer has a legitimate state interest in maintaining the registry.

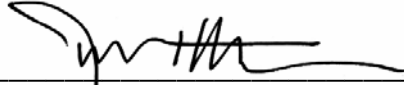
CONCLUSION

For these reasons, Mr. Doe respectfully requests that this Court GRANT this Petition, and, in doing so, lead Country in the discussion of

health care rights, enumerating, once and for all that we have a fundamental right, a right that we have all enjoyed for decades, if not centuries, to access the health care that one's physician recommends without undue governmental influence on the patient.

DATED THIS 27th day of July, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this 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:

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

[] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style]

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 1,326 words; or

[] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[] Does not exceed _____ pages.

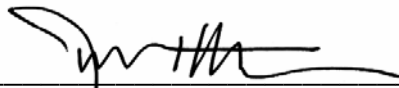
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or

interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED THIS 27th day of July, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 27th day of July, 2017, I served a copy of the **PETITION FOR REHEARING** through the electronic court filing system of this Court.

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