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.

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Supreme Court Case No. 69801

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

RESPONDENTS' JOINT MOTION UNDER NRAP 36 TO REISSUE UNPUBLISHED ORDER AS OPINION TO BE PUBLISHED IN *NEVADA REPORTS*

ATTORNEYS FOR RESPONDENTS

BRENDA J. ERDOES
Legislative Counsel
Nevada Bar No. 3644
KEVIN C. POWERS
Chief Litigation Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU,
LEGAL DIVISION
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830
Fax: (775) 684-6761
E-mail: kpowers@lcb.state.nv.us
Attorneys for Respondent State of Nevada ex rel. the Legislature of the State of Nevada

ADAM PAUL LAXALT
Attorney General
Nevada Bar No. 12426
LINDA C. ANDERSON
Chief Deputy Attorney General
Nevada Bar No. 4090
JORDAN T. SMITH
Assistant Solicitor General
Nevada Bar No. 12097
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave. Ste. 3900
Las Vegas, NV 89101
Tel: (702) 486-3420
Fax: (702) 486-3871
E-mail: landerson@ag.nv.gov
E-mail: jsmith@ag.nv.gov
GREGORY L. ZUNINO
Chief Deputy Attorney General
Nevada Bar No. 4805
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 8970l
Tel: (775) 684-1237
Fax: (775) 684-1180
E-mail: gzunino@ag.nv.gov
Attorneys for Respondents State of Nevada ex rel. the Department of Health and Human Services and the Governor of the State of Nevada

MOTION

Pursuant to NRAP 36, 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Attorney General (collectively the State), hereby file a joint motion under NRAP 36 asking this Court to reissue its unpublished order of affirmance, which was issued in this case on July 25, 2017, as an opinion to be published in the *Nevada Reports*.

ARGUMENT

This case presents constitutional issues of first impression and involves constitutional issues of public importance that have application beyond the parties, and these same constitutional issues are likely to arise again if this Court does not issue a published opinion that establishes binding precedent in Nevada.

In its unpublished order, this Court rejected Doe's constitutional challenges to the validity and operation of the provisions of Nevada's medical marijuana laws which establish the medical marijuana registry 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. In particular, this Court held that the State has broad power to regulate the use of medical marijuana in Nevada without violating the Due Process

and Equal Protection Clauses of the Fourteenth Amendment because the medical marijuana registry: (1) does not impinge upon any fundamental rights; and (2) is rationally related to legitimate state interests.

In so holding in its unpublished order, this Court decided constitutional issues of first impression—both in Nevada and nationally—because no other court has directly addressed in a published opinion the constitutional validity of a state's regulation of the use of medical marijuana through a medical marijuana registry. Furthermore, in its unpublished order, this Court decided constitutional issues of public importance that have application beyond the parties because this Court's unpublished order affirms the State's broad power to regulate the use of marijuana under the rational-basis test.

In Nevada and nationally over the last several years, there have been significant changes in cultural views regarding the use of medical marijuana and recreational marijuana, and there have been corresponding changes in state laws which permit, under certain circumstances, the use of medical marijuana and recreational marijuana. However, as cultural views and state laws change in favor of such use, it is essential to safeguard the public's health, safety and welfare by ensuring that each state retains its historic and traditional police powers to regulate the use of marijuana—whether medical or recreational—in order to carry out and protect legitimate state interests.

In Nevada, the voters have passed initiatives to authorize the use of both medical marijuana and recreational marijuana. Nev. Const. art. 4, § 38 (authorizing the use of medical marijuana under a voter-approved constitutional amendment); NRS Chapter 453D (authorizing the use of recreational marijuana under a voter-approved statutory amendment). However, there is nothing in the language or history of those initiatives to suggest that the voters intended to deprive the State of its broad power to regulate the use of marijuana—whether medical or recreational—in order to carry out and protect legitimate state interests.

Accordingly, because this Court's unpublished order affirms the State's broad power to regulate the use of marijuana under the rational-basis test, the unpublished order should be reissued in a published opinion so that it is unmistakably clear in Nevada law that the State retains its historic and traditional police powers to regulate the use of marijuana in order to carry out and protect legitimate state interests. Therefore, if reissued in a published opinion, this Court's decision would provide important and binding precedent in Nevada regarding the State's power to regulate the use of marijuana under the rational-basis test.

In addition, in its unpublished order, this Court rejected Doe's constitutional challenge alleging that the State's medical marijuana registration program violates a person's right against self-incrimination under the Fifth Amendment because a person who files an application for a registration card is compelled to disclose that

the person intends to use medical marijuana in violation of federal law. In particular, this Court held that because the medical marijuana registry is an entirely voluntary program, Nevada law does not compel any person to participate in the program, and if a person elects to file an application, Nevada law does not impose any criminal or civil penalties on the person if the person does not complete the application. This Court also held that even though an incomplete application may be denied, such a possibility, in itself, does not implicate a person's right under the Self-Incrimination Clause of the Fifth Amendment.

The constitutional issue of whether Nevada's medical marijuana registry violates the Self-Incrimination Clause of the Fifth Amendment is a constitutional issue of first impression in Nevada. In reaching its holding in its unpublished order, this Court cited favorably to the published opinion in *Sibley v. Obama,* 810 F. Supp. 2d 309, 310-11 (D.D.C. 2011), in which a federal district court concluded that the Self-Incrimination Clause of the Fifth Amendment was not implicated when a person applied to participate in the District of Columbia's medical marijuana program as a cultivator or dispensary operator. The decision in *Sibley v. Obama* is the only published opinion nationally that directly addresses a constitutional challenge under the Self-Incrimination Clause of the Fifth Amendment to the government's operation of a medical marijuana program. However, it is well established in Nevada that decisions of federal district courts

may be cited only for their persuasive value, if any, and such decisions do not establish any binding precedent in Nevada. *See Blanton v. N. Las Vegas Mun. Ct.*, 103 Nev. 623, 633 (1987) ("[T]he decisions of the federal district court . . . are not binding upon this court."), *aff'd*, 489 U.S. 538 (1989). Similarly, an unpublished order of this Court does not establish binding precedent and may be cited only "for its persuasive value, if any." NRAP 36(c)(2)-(3). Therefore, unless this Court reissues its unpublished order as a published opinion, there will be no binding precedent in Nevada on this constitutional issue of public importance.

Finally, even though Nevada's voters have approved the use of recreational marijuana, many Nevadans with certain chronic or debilitating medical conditions will continue to seek to participate in Nevada's medical marijuana program because Nevada's laws governing medical marijuana will continue to offer significant advantages that are not available under Nevada's laws governing recreational marijuana. For example, unlike Nevada's laws governing recreational marijuana, Nevada's laws governing medical marijuana allow a person holding a registration card—under certain circumstances—to: (1) grow or possess marijuana plants; (2) cultivate greater quantities or more potent strains of marijuana when necessary for the medical use of the person to treat his or her specific medical condition; and (3) use the person's registration card in other states that have

authorized reciprocity for registration cards issued under the medical marijuana laws of another state. NRS 453A.200; NRS 453A.364.[1]

Therefore, because many Nevadans will continue to seek to participate in Nevada's medical marijuana program for the foreseeable future, it is likely that the same constitutional issues of public importance addressed in this Court's unpublished order will arise again if this Court does not issue a published opinion that establishes binding precedent in Nevada. Consequently, the State respectfully asks this Court to reissue its unpublished order in this case as a published opinion.

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[1] In addition to Nevada, several states have authorized reciprocity for registration cards issued under the medical marijuana laws of another state. *See, e.g.*, Ariz. Rev. Stat. §§ 36-2801(17) & 36-2804.03; Del. Code tit. 16, §§ 4902A & 4903A; Me. Rev. Stat. tit. 22, § 2423-D; Mich. Comp. Laws §§ 333.26423 & 333.26424; 21 R.I. Gen. Laws § 21-28.6-4.

CONCLUSION

Based on the foregoing reasons, the State respectfully asks this Court to reissue its unpublished order, which was issued in this case on July 25, 2017, as an opinion to be published in the *Nevada Reports*.

DATED: This **8th** day of August, 2017.

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

By: /s/ Linda C. Anderson
LINDA C. ANDERSON
Chief Deputy Attorney General
Nevada Bar No. 4090
By: /s/ Jordan T. Smith
JORDAN T. SMITH
Assistant Solicitor General
Nevada Bar No. 12097
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave. Ste. 3900
Las Vegas, NV 89101
Tel: (702) 486-3420
Fax: (702) 486-3871
E-mail: landerson@ag.nv.gov
E-mail: jsmith@ag.nv.gov
By: /s/ Gregory L. Zunino
GREGORY L. ZUNINO
Chief Deputy Attorney General
Nevada Bar No. 4805
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 8970l
Tel: (775) 684-1237
Fax: (775) 684-1180
E-mail: gzunino@ag.nv.gov
Attorneys for Respondents State of Nevada ex rel. the Department of Health and Human Services and the Governor of the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **8th** day of August, 2017, 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 Motion under NRAP 36 to Reissue Unpublished Order as Opinion to be Published in *Nevada Reports*, by electronic means to registered users of the Nevada Supreme Court's electronic filing system, directed to the following:

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

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