MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA CANNABIS INDUSTRY ASSOCIATION, MARK MATTEWS, SHIRLEY HAMP, SHELLY YEAGER, JANE DOE, JOHN DOE #1, JOHN DOE #2, MICHAEL GECI-BLACK, M.D., CHARLIE HAMP, Plaintiffs, vs. STATE OF MONTANA, Defendant.	Cause No.: DDV-2011-518 **ORDER ON MOTION FOR PRELIMINARY INJUNCTION**

This Court heard this matter on June 20 through June 24, 2011. James H. Goetz, Esq., and J. Devlan Geddes, Esq., represented Plaintiffs above-named. James P. Molloy, Esq., and J. Stuart Segrest, Esq., represented Defendant State of Montana (State).

From the testimony and evidence presented, the Court makes the following:

FINDINGS OF FACT

1. In November 2004, the voters of Montana through their constitutional initiative power, Article III, section 4, of the Montana Constitution,

passed the Montana Medical Marijuana Act (MMA), authorizing the use of marijuana for medical purposes in certain limited circumstances. A substantial majority, 61.8 percent, of those voting on the initiative voted in favor of the initiative. The MMA sets forth a statutory scheme for allowing the controlled medicinal production and use of marijuana in Montana.

2. In response to a perceived spike in the number of persons authorized to use medical marijuana, including a large number of persons between the age of 18 and 30, the 2011 Montana legislature passed House Bill 161, repealing the MMA. Governor Brian Schweitzer vetoed this bill.

3. The legislature then passed Senate Bill 423 (SB 423) repealing the prior MMA and enacting a new medical marijuana law. This new bill became law without the Governor's signature.

4. Plaintiffs then filed the present action challenging SB 423 on a variety of grounds. Plaintiffs immediately sought, and obtained from this Court, a temporary restraining order on one section of the bill scheduled to take effect on May 13, 2011, which would have banned all advertising by providers of medical marijuana.[1] The State consented to the extension of this temporary restraining order until the present hearing.

5. Plaintiffs seek a preliminary injunction enjoining the implementation and enforcement of the remaining provisions of SB 423 until a full trial on Plaintiffs' various challenges can be heard. This was the subject of the Court's hearing beginning on June 20, 2011.

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[1] SB 423 discusses both medical marijuana and marijuana infused products. Sections 2(5) and (6). For ease herein, the Court uses the term marijuana to include both types of products.

6. Plaintiffs consist of persons and entities having a variety of connections with medical marijuana. The Montana Cannabis Industry Association is a non-profit trade association dedicated to promoting, *inter alia,* professionalism in the cannabis industry in Montana. Some of the named plaintiffs testifying at the hearing are users, or spouses of users, of medical marijuana. Some of the named plaintiffs testifying at the hearing are physicians who have either studied medical marijuana or recommended its use to their patients.

7. Marijuana remains a schedule I drug under the federal Controlled Substances Act (CSA), codified at 21 U.S.C. § 801, which prohibits the possession of marijuana and does not provide an exception for the use of medical marijuana pursuant to state law. See 21 U.S.C. §§ 841, 844. This is the most restrictive listing of drugs in the federal hierarchy. Schedule I drugs have been determined to have no medical benefits and may not be prescribed by any physician having a federal drug enforcement agency (DEA) certification. When a Montana physician recommends a patient to try medical marijuana, the physician is not prescribing its use as he or she would prescribe prescription drugs; the doctor is merely recommending its use. Because the federal government lists marijuana as a schedule I drug, scientific studies, which might determine its medical efficacy, are not allowed. Evidence on the use of medical marijuana to treat a variety of medical conditions, such as nausea and loss of appetite for persons undergoing cancer treatment, is therefore anecdotal only.

8. Despite the federal government's continued listing of marijuana as a banned schedule I substance, 15 states and the District of Columbia have enacted laws authorizing the use of medical marijuana.

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. At the outset, it is helpful to set out what this case is and is not about.

a. It is not the function of this Court to decide whether marijuana does or does not have medical benefits and whether Montana ought to have or must have a medical marijuana law. The people in 2004 through their initiative vote and the legislature in 2011 have already decided that in Montana, marijuana may be used for certain medical conditions under certain restrictions.

b. Nor is it the function of this Court in this proceeding to try to sort out the conflict between federal and state law on marijuana. The Court takes judicial notice of the fact that, despite the continued federal criminalization of the possession of marijuana, fifteen states and the District of Columbia have passed medical marijuana laws. The Court takes further judicial notice of the fact that despite Montana's medical marijuana law, the United States Attorney for Montana has recently raided several marijuana operations throughout the state and has filed charges against some of these operations in federal court. The question of whether Montana's medical marijuana laws provide any protection against these charges is not before this Court.

c. From the virtual beginning of our government, it has been and continues to be the function of the courts to determine whether laws passed by the legislature comport with constitutional requirements. *Marbury v. Madison*, 5 U.S. 137 (1803). This judicial review of legislative actions helps define the checks and balances of our form of government. The function of this Court, therefore, is to determine whether, at this preliminary stage of these proceedings, the legislature, in passing SB 423, has acted in a way that substantially implicates the

constitutional rights of Plaintiffs and, if so, whether it is appropriate to hold the implementation of SB 423 in abeyance until these issues can be fully resolved at the final trial in this matter.

2. There are several well-established principles that guide and restrict a court in reviewing a legislative enactment.

a. Any state law, whether enacted by initiative of the voters or by the legislature, may be amended or repealed by later legislatures. See *Cottingham v. State Bd of Examiners,* 134 Mont. 1, 328 P.2d 907 (1958).

b. A law passed by the legislature is presumed to be constitutional. *Weidow v. Uninsured Employers' Fund,* 2010 MT 292, ¶ 22, 359 Mont. 77, 246 P.3d 704. Those challenging such a law have a heavy burden to show the law conflicts with the constitution. Generally, the challengers must show the law is unconstitutional beyond a reasonable doubt. *State v. Stock,* 2011 MT 131, ¶ 19, __ P.3d __. In a challenge to a law on its face as in the present case, the burden is on the challengers to show that under no set of facts can the law be constitutionally applied; the challenge does not depend on the facts of a particular case. See *Brady v. PPL Mont., LLC,* 2008 MT 177, ¶ 19, 343 Mont. 405, 185 P.3d 330 (Gray, C. J., dissenting); *Marriage of K.E.V.,* 267 Mont. 323, 336, 883 P.2d 1246, 1255 (1994).

c. In reviewing laws by the legislature, a court is to avoid ruling on its constitutionality and to give the laws a constitutional interpretation if possible. *Weidow,* 2010 MT 292, ¶ 22.

d. SB 423 has a severability clause providing that if a court should find a section of the law unconstitutional, that part should be severed from the remaining constitutional parts of the law, which should then remain in effect.

Only if the severable clause is so essential to the overall structure of the law as to make the remaining parts invalid or ineffective, should the whole statute be struck down. *Newville v. Dep't of Family Servs.*, 267 Mont. 237, 255, 883 P.2d 793, 804 (1994).

e. A court takes a law as it is written. A court should not omit what is inserted nor insert what has been omitted. Section 1-2-101, MCA. Only if the terms of the law are vague and ambiguous may a court resort to external sources of information, such as its legislative history, to determine its meaning. *Stop Over Spending Mont. v. State*, 2006 MT 178, ¶ 62, 333 Mont. 42, 139 P.3d 788.

3. The present hearing is on Plaintiffs' request that SB 423 be preliminarily enjoined in its entirety until a full, final trial can be held. The majority of SB 423 is scheduled to go into effect on July 1, 2011.[2] The standards for granting a preliminary injunction are also well established:

> In determining the merits of a preliminary injunction, it is not the province of either the District Court or this Court on appeal to determine finally matters that may arise upon a trial on the merits. The limited function of a preliminary injunction is to preserve the *status quo* and to minimize the harm to all parties pending full trial; findings and conclusions directed toward the resolution of the ultimate issues are properly reserved for trial on the merits. In determining whether to grant a preliminary injunction, a court should not anticipate the ultimate determination of the issues involved, but should decide merely whether a sufficient case has been made out to warrant the preservation of the *status quo* until trial. A preliminary injunction does not determine the merits of the case, but rather, prevents further injury or irreparable harm by preserving the *status quo* of the subject in controversy pending an adjudication on the merits.

Yockey v. Kearns Props., LLC, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185 (citations omitted).

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[2] As the State notes, certain provisions of the law have already taken effect.

Section 27-19-201, MCA, authorizes the issuance of a preliminary injunction when it appears that the applicant is entitled to the relief sought; the commission of an act by a party would cause irreparable harm to the applicant; or the adverse party is doing something that threatens to violate the applicant's rights. These requirements are in the disjunctive; only one needs to be present. *Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs of Sweet Grass County*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825.

The loss of a constitutional right constitutes irreparable harm for purposes of determining whether a preliminary injunction should be issued. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). A court examines legislation that implicates fundamental constitutional rights under a strict scrutiny standard. *State v. Renee*, 1999 MT 135, ¶ 23, 294 Mont. 527, 983 P.2d 893. "Strict scrutiny requires the government to show a compelling state interest for its action." *Davis v. Union Pac. R.R. Co.*, 937 P.2d 27, 31, 282 Mont. 233, 242 (1997).

4. With the foregoing principles and restrictions in mind, the Court concludes with respect to SB 423 as follows:

a. Section 20 of SB 423 provides that: "Advertising prohibited. Persons with valid registry identification cards may not advertise marijuana or marijuana-related products in any medium, including electronic media." Under section 3 of SB 423, the state issues registry identification cards to persons either authorized to use medical marijuana or identified as medical marijuana providers. All persons, however, have the fundamental right to freedom of speech under the First Amendment to the U.S. Constitution. Article II, section 7, of the Montana Constitution provides: "No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish

whatever he will on any subject, being responsible for all abuse of that liberty." The United States Supreme Court has made it clear that freedom of speech extends to businesses and persons advertising legal products. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (striking down ban on advertising of prescription drugs).

The complete prohibition against advertising of any kind by only persons with valid registry identification cards implicates substantial constitutional rights of Plaintiffs. Medical marijuana is, under this law, a legal substance. Advertising concerning it cannot be banned consistent with first amendment principles.

The State concedes that this section raises potential First Amendment problems and concedes this section is severable and may be preliminarily enjoined without affecting the integrity of the remainder of SB 423.

b. Section 14(1) of SB 423 provides: "The department and state or local law enforcement agencies may conduct unannounced inspections of registered premises." Subsections (2) and (3) of section 14 expand on these inspections. Registered premises are defined by the law as "the location at which a provider or marijuana-infused products provider has indicated the person will cultivate or manufacture marijuana for a registered cardholder." SB 423, section 2(13). Under the United States Constitution, however, all persons are protected from unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

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searched, and the persons or things to be seized." Fourth Amendment, U.S. Const. This protection against such searches is replicated in the Montana Constitution:

> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

Art. II, section 11.

Section 14 of SB 423 allowing for unannounced inspections by state or local law enforcement officers brings this section within the foregoing proscriptions and implicates substantially these constitutional rights.

The State concedes that such unannounced inspections by law enforcement may constitute unreasonable searches and is therefore amenable to the Court enjoining these inspections provisions under subsections (1), (2), and (3) of section 14. The State concedes that these provisions may be severed from the remaining provisions of SB 423.

c. Section 3(10) of SB 423 provides in part that: "The board of medical examiners shall review practices of any physician who provides written certification for 25 or more patients within a 12-month period in order to determine whether the practices meet appropriate standards of care." It was testified that the board of medical examiners has not developed its review protocols for such situations. It was also testified that certain physicians who have been involved in writing certifications for medical marijuana users under the former law are concerned that such reviews are unprecedented, could reflect badly on a physician's professional reputation, and would cause these physicians to discontinue making any

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certifications for any patients. In addition, section 3(10)(b) requires the physician to pay the costs of this review.

The State is amenable to the Court temporarily enjoining this provision pending further proceedings in this matter.

d. Sections 5(6)(a) and (b) of SB 423 prohibit medical marijuana providers from "accept[ing] anything of value, including monetary remuneration, for any services or products provided to a registered cardholder;" and from "buy[ing] or sell[ing] mature marijuana plants, seedlings, cuttings, clones, usable marijuana, or marijuana-infused products." Section 5(4) provides that medical marijuana providers may only accept remuneration from a medical marijuana user to pay for the provider's registration fee. Section 5(3) limits a registered medical marijuana provider to no more than three registered users of medical marijuana.

Article II, section 3, of the Montana Constitution provides:

> Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and **the rights of pursuing life's basic necessities**, enjoying and defending their lives and liberties, **acquiring, possessing and protecting property,** and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

(Emphasis added.)

The Montana Supreme Court has interpreted the emphasized language as guaranteeing Montana's citizens the right to pursue employment as a fundamental constitutional right:

> [W]e have held a right may be "fundamental" under Montana's constitution if the right is either found in the Declaration of Rights or is a right "without which other constitutionally guaranteed rights would have little meaning." *Butte v. Community Union* (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311-13 (holding that Montana's constitution does not create a right to welfare). The inalienable right to pursue life's basic necessities is stated in the Declaration of Rights and is therefore a fundamental right.

> While not specifically enumerated in the terms of Article II, section 3 of Montana's constitution, the opportunity to pursue employment is, nonetheless, necessary to enjoy the right to pursue life's basic necessities. See *Globe Newspaper Co. v. Superior Ct. for Norfolk County* (1982), 457 U.S. 596, 604, 102 S. Ct. 2613, 2618-19, 73 L. Ed. 2d 248, 255. (First Amendment encompasses those rights that, while not specifically enumerated in the very terms of the Amendment, are nonetheless necessary to enjoyment of other First Amendment rights). As a practical matter, employment serves not only to provide income for the most basic of life's necessities, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other essentials of modern life, including health and medical insurance, retirement, and day care. We conclude that without the right to the opportunity to pursue employment, the right to pursue life's basic necessities would have little meaning, because it is primarily through work and employment that one exercises and enjoys this latter fundamental constitutional right. Accordingly, we hold that **the opportunity to pursue employment**, while not specifically enumerated as a fundamental constitutional right under Article II, section 3 of Montana's constitution is, notwithstanding, necessarily encompassed within it and **is itself a fundamental right** because it is a right "without which other constitutionally guaranteed rights would have little meaning."

Wadsworth v. State, 275 Mont. 287, 911 P.2d 1165, 1171-72 (1996) (emphasis added).

The State has declared medical marijuana a legal product in Montana. It has established a licensing and distribution system through providers. Persons engaged in that activity subject to the licensing and other restrictions within the law are engaged in legal activities.

Furthermore, under this same constitutional provision, Montana's residents have a fundamental right to "seek[] their safety, health and happiness in all lawful ways." Medical marijuana is a lawful means of seeking one's own health under this provision. The ban on providers receiving compensation and limiting the number of cardholders that each provider can serve will certainly limit the number of willing providers and will thereby deny the access of Montanans otherwise

eligible for medical marijuana to this legal product and thereby deny these persons this fundamental right of seeking their health in a lawful manner.

Further, the Montana Supreme Court has held that the right to personal privacy found in Art. II, section 10, of the Montana constitution includes "broadly, the right of each individual to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government[.]" *Armstrong v. State,* 1999 MT 262, ¶ 39, 296 Mont. 361, 989 P.2d 364. In *Armstrong,* the legislature had passed a law prohibiting certified physicians assistants from performing abortions. In striking down the law, the Court noted that the purpose of the law then under review was clearly "to make it as difficult, as inconvenient and as costly as possible for women to exercise their right to obtain, from the health care provider of their choice, a specific medical procedure" authorized and protected by the U.S. and Montana constitutions. The same is true here. By these provisions, the legislature is attempting to make it as difficult and as inconvenient for persons eligible under state law to use medical marijuana to obtain this legally authorized product.

The Court is unaware of and has not been shown where any person in any other licensed and lawful industry in Montana — be he a barber, an accountant, a lawyer, or a doctor — who, providing a legal product or service, is denied the right to charge for that service or is limited in the number of people he or she can serve.

The ban on providers receiving compensation for engaging in such legal activities and the limit on the number of registered cardholders each provider can serve substantially implicates the foregoing constitutional rights of providers and users of medical marijuana. The State concedes that preliminary enjoining

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sections 5(4) and (6)(a) and (b) may be done without affecting the integrity of the remaining provisions.

e. Section 4(4) of SB 423 prohibits a person in the custody or under the supervision of the Department of Corrections or youth court from being eligible for a medical marijuana registry card. Plaintiffs challenge this provision on numerous constitutional grounds.[3] Persons in the custody or under the supervision of the department of corrections, however, are subject to substantial restrictions on their fundamental rights, up to and including the loss of liberty through incarceration. Further restrictions routinely imposed on such persons include, for example, their fundamental right to choose where they live, the right to travel, the right to seek employment in certain lawful industries, the right to possess firearms, and the right to establish a business. Section 20.7.1101, ARM. The State has the power to impose these restrictions on those who violate the state's criminal laws. While the state may not disregard the health conditions of those persons in its custody or supervision, it has great discretion in the manner it will address those conditions. *Wilson v. State,* 2010 MT 278, 358 Mont. 438, 249 P.3d 28 (no violation of the Eighth Amendment where prison psychiatrist changed medication of inmate where previous medication was one often abused in prison.) So long as the Department of Corrections attends to the needs of those it supervises in a reasonable manner, there is no constitutional violation. Challenges to the ban on probationers having access to medical marijuana should be made on a case-by-case basis as opposed to Plaintiffs' facial challenge. See *People v. Moret,* 180 Cal. App. 4th 839, 104 Cal. Rptr.3d 1 (2009).

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[3] The affidavit submitted by Plaintiffs in support of their position is substantially contradicted by sworn testimony of the affiant in other court proceedings.

State v. Nelson, 2008 MT 359, 346 Mont. 366, 195 P.3d 826, on which Plaintiffs rely, does not mandate a different conclusion. That case was based on the plain language of the former MMA that did not prohibit the use of medical marijuana by probationers. The decision did not elevate the possession of medical marijuana by probationers to a constitutional right and even observed that had the defendant in that case been sentenced to incarceration, the former MMA would bar his possession of medical marijuana. *Id.,* 2008 MT 359, ¶ 24.

f. Section 4(7) raised several questions during the hearing. This section prohibits property used for the cultivation of marijuana for use by a registered cardholder from being shared with another provider or registered cardholder unless the property is owned, rented, or leased by cardholders who are related to each other by the second degree of kinship by blood or marriage. Plaintiffs presented testimony to claim this would prevent the spouse of a registered cardholder from growing marijuana for his spouse in the house they shared. This is not the Court's reading of this section. The Court's reading of this provision is that this couple would not be subject to this limitation because they are related by marriage. The State says its conflicting interpretations are under review. While the interpretation urged by Plaintiffs may raise substantial questions if adopted by the State, such a challenge should be made on an as-applied basis.

4. The Court has considered other challenges made by Plaintiffs to SB 423 and concludes they do not support a preliminary injunction at this time.

5. If the Court were to enjoin the enforcement of the foregoing provisions, the remaining provisions of SB 423 are valid. The enjoined provisions are severable.

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6. The Court makes the preceding findings and conclusions at this stage of the proceedings without prejudice to either party upon full trial in this matter.

7. The preceding findings of fact and conclusions of law are made in order to meet SB 423's effective date deadline of July 1, 2011.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

PRELIMINARY INJUNCTION

1. The State of Montana is hereby enjoined from enforcing the following sections of Senate Bill 423:

a. Section 20 entitled "Advertising prohibited;"

b. Sections 14(1), (2) and (3), the section entitled "Inspection Procedures."

c. Section 3(10), the section entitled "Department responsibilities – issuance of cards – confidentiality – reports."

d. Sections 5(3), 5(4), and 5(6)(a) and (b), the section entitled "Provider types – requirements – limitations – activities."

2. The remaining provisions of Senate Bill may take effect as scheduled.

3. This preliminary injunction shall remain in effect until further order of the Court.

DATED this 30 day of June 2011.

JAMES P. REYNOLDS
District Court Judge

JPR/Mt Cannabis Industry v State CDV-2011-518

c: James H. Goetz/J. Devlan Geddes/Jim Barr Coleman
James P. Molloy/ J. Stuart Segrest

d/JPR/Mt Cannabis Industry v State CDV-2011-518