IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 11-0460

MONTANA CANNABIS INDUSTRY ASSOCIATION, MARK MATTHEWS, SHIRLEY HAMP, SHELLY YEAGER, JANE DOE, JOHN DOE #1, JOHN DOE #2, MICHAEL GECI-BLACK, M.D., JOHN STOWERS, M.D., POINT HATFIELD, and CHARLIE HAMP,

Plaintiffs and Appellees, and Cross-Appellants,

v.

STATE OF MONTANA,

Defendant and Appellant, and Cross-Appellee.

# BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable James P. Reynolds, Presiding


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## STATEMENT OF THE ISSUE

Did the trial court erroneously apply a strict scrutiny, fundamental rights analysis to preliminarily enjoin statutory provisions restricting the commercial production, sale and distribution of marijuana--a drug that is illegal for all purposes under federal law, and illegal for all purposes except as specifically authorized and limited under Montana law?

## STATEMENT OF THE CASE

This is an appeal from specific provisions of an order granting a preliminary injunction. On May 13, 2011, Plaintiff and cross-appellant Montana Cannabis Industry Association and others filed a lawsuit seeking to temporarily and permanently enjoin in its entirety the implementation of Senate Bill 423, "the Montana Marijuana Act." ("SB 423") Senate Bill 423, 57th Leg., Reg. Sess., now codified at Mont. Code Ann. ("MCA") §§ 50-46-301 -344 (2011).[1] [Docket "Dk." 1]. Based on a motion filed with the Complaint, the District Court immediately entered a temporary restraining order blocking implementation of one section of the bill that was scheduled to take effect that day, which would have prohibited

[1] The District Court Order at issue refers to the section numbers of Senate Bill 423 because the Order pre-dates the codification of the law. This brief refers to the statutory provisions as now codified in the Montana Code. For the convenience of the Court and parties, a copy of the Montana Marijuana Act, as codified, is attached as Appendix B.

advertising by providers of marijuana for medical use. [Dk. 11]. By stipulation, the TRO remained in effect pending the preliminary injunction hearing. [Dk. 20].

The Court held a preliminary injunction hearing on June 20 through 22, 2011. [Dk. 57, 61, 62]. Evidence was admitted through affidavits, exhibits, and witness testimony at the hearing. [Dk. 36-42; 47-52; 55-57; 60-64]. At the conclusion of the hearing, the State--while expressly reserving all defenses and arguments for purposes of final judgment--advised the Court that it would not object if the Court preliminarily enjoined implementation of three provisions in SB 423: (1) the advertising restriction under § 50-46-341, MCA; (2) unannounced inspection procedures under §§ 50-46-329(1), (2), (3); and (3) the requirement that the Department of Public Health and Human Services notify the Montana Board of Medical Examiners of the name of any physician who authorized 25 or more cardholders in a year, under § 50-46-303(10). [Transcript ("Tr."), 655-59; see also State's Bench Memorandum On Severability, Dk. 67]. In all other respects, the State opposed a preliminary injunction.

On June 30, 2011, the District Court issued its Order on Motion For Preliminary Injunction. [Dk. 71] ("the Order")(copy attached as Appendix A). In the Order, the Court preliminarily enjoined implementation of the three provisions identified above, together with provisions prohibiting commercial transactions in marijuana, §§ 50-46-308(4), (6)(a), (6)(b), MCA, and limiting the number of

persons to whom any cardholder can provide marijuana to three. § 50-46-308(3), MCA. The District Court rejected the Plaintiffs' remaining challenges to SB 423. Order, pp. 13-14. For purposes of preliminary injunction, it held that the remaining provisions are valid and severable. Order, pp. 14-15.

The State timely filed its Notice of Appeal on August 10, 2011. [Dk. 74]. Plaintiffs timely filed their Notice of Cross-Appeal on August 16, 2011. [Dk. 75].

This appeal is properly before this Court pursuant to Mont. R. App. P. 6(3)(e). In this interlocutory appeal, the State challenges only paragraph 1(d) of the Order, which enjoins the implementation of §§ 50-46-308(3), (4), (6)(a) and (6)(b), MCA. For purposes of further proceedings on remand and final judgment, the State reserves and does not waive its defenses to all statutory provisions that are preliminarily enjoined.

## STATEMENT OF FACTS

In 2004, Montana voters approved the use of medical marijuana through passage of I-148. The initiative left in place those provisions in Montana's criminal code (Title 45) that make it illegal to cultivate, possess, distribute or use marijuana. It created legal protections for authorized users of medical marijuana by providing that such persons "may not be arrested, prosecuted, or penalized in any manner or denied any privilege or right" under Montana law. Exhibit ("Ex.") 72 (§ 50-46-201(1), MCA (2009) (repealed by SB 423, 57th Leg., Reg. Sess., § 34

(Mont. 2011)). Federal law, which lists marijuana as a Class I (prohibited) substance, was unaffected by I-148, pursuant to the Supremacy Clause of the United States Constitution. Order, p. 3.

For the first few years after implementation of I-148, a relatively small number of Montanans qualified for and obtained registry cards authorizing them to use medical marijuana. In the first year, 176 individuals obtained cards. It took until 2008 to reach 1,000. Exs. 101, 104, 105; Tr. 334. The number tripled to approximately 3,000 by June of 2009. From there, the numbers exploded. By the spring of 2010, more than 12,000 Montanans had obtained medical marijuana cards. Id. Along with the growth of users, there was a corresponding growth in the number of "caregivers" --persons and entities that were authorized to grow and sell marijuana to users. Exs. 101, 104, 106; Tr. 334.

In April 2010, the Children, Families, Health, and Human Services Interim Committee of the Montana Legislature decided to examine issues relating to medical marijuana. Exs. 111-111A; Tr. 594-601. These issues included concepts relating to:

- The emergence of large scale commercial grow operations;
- Storefront operations at which persons could purchase marijuana and marijuana-related products;
- At least one business that was organizing traveling "medical clinics" that drew hundreds of people at a time;
- Some patients smoking marijuana in public;
- Young people and probationers receiving medical marijuana cards in increasing numbers.

Id. See also Tr. 495-506.

Over the course of the next several months leading up to the 2011 legislative session, the Interim Committee continued to examine facts and issues relating to medical marijuana. Id. In the meantime, the numbers of authorized cardholders and caregivers in Montana continued to increase exponentially. Exs. 101, 104, 105, 106. Almost 30% of the authorized users were in the age group from 18-30. Ex. 108; Tr. 334. Approximately 80% of cardholders had received their cards for "chronic pain" or "severe or chronic pain or muscle spasms." Ex. 109. Only 843 of almost 30,000 cardholders were persons diagnosed with cancer, glaucoma, HIV, or AIDS--conditions specifically mentioned in the proponents' 2004 arguments for I-148. Additionally, aggressive advertising and marketing activities were undertaken by "caregivers." See e.g., Plaintiffs' Brief in Support of Motion for Temporary Restraining Order, Exs. 2, 6, 9 [Dk. 6]. The Board of Medical Examiners and others had concerns relating to whether some physicians were inappropriately authorizing persons to obtain medical marijuana cards without establishing a bona fide doctor-patient relationship, or otherwise conducting appropriate medical examinations justifying the authorizations. Tr. 446-451; Ex. 115; Tr. 449.

The 2011 Legislature, in the face of a system perceived to be out of control, considered various legislative responses, including an outright repeal of I-148,

which was vetoed by the Governor. Order, p. 2. Ultimately, the Legislature enacted SB 423, which repeals the original Medical Marijuana Act and replaces it with "the Montana Marijuana Act." As with the original I-148, the new law does not change Montana's criminal laws with respect to marijuana, but instead provides a legal defense when marijuana is grown, distributed or used in compliance with the Marijuana Act. § 50-46-319, MCA. SB 423 includes specific provisions to prohibit the existence of a commercial marijuana industry. § 50-46-308. As with prior law under I-148, however, it continues to allow patients with defined, debilitating medical conditions to use marijuana, so long as that use is in compliance with the Marijuana Act. Exs. 7 and 110 at pp. 30-33.

## STANDARD OF REVIEW

A district court's order granting or denying a preliminary injunction is reviewed for "a manifest abuse of discretion." State v. BNSF, 2011 MT 108, ¶ 16, 360 Mont. 361, 254 P.3d 561 (quoting Yockey v. Kearns Properties, LLC, 2005 MT 27, ¶ 12, 326 Mont. 28, 106 P.3d 1185). A manifest abuse of discretion is "one that is obvious, evident, or unmistakable." State v. BNSF (quoting Yockey, ¶ 12).

A district court's conclusions of law, however, are reviewed *de novo* "to determine whether its interpretation is correct." Id. Where a district court's conclusions are erroneous as a matter of law, the issuance of the injunction based

on those erroneous conclusions constitutes a manifest abuse of discretion. Id., ¶¶ 23-24 (district court manifestly abused its discretion by enjoining conduct beyond the legal boundaries of injunctive relief); Spoklie v. Dept. of Fish, Wildlife and Parks, 2002 MT 228, ¶ 15, 311 Mont. 427, 432, 56 P.3d 349, 352-53 ("[W]here 'the district court bases its decision to grant [injunctive] relief upon its interpretation of a statute, no discretion is involved and we review the district court's conclusion of law to determine whether it is correct.'")(citations omitted).

In a constitutional challenge such as this, statutes are presumed to be constitutional unless they infringe upon a fundamental right. State v. Michaud, 2008 MT 88, ¶ 15, 342 Mont. 244, 180 P.3d 636. In the absence of a fundamental right, the party making the constitutional challenge bears the burden of proving, beyond a reasonable doubt, that the statute is unconstitutional. Michaud, ¶ 15. Only if a statute is found to regulate the exercise of a fundamental right or involve a suspect class, must it be justified by a compelling state interest and be narrowly tailored to that compelling interest. Gryczan v. State, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). If it does not regulate a fundamental right or involve a suspect class, it is subject to rational basis review and is presumptively constitutional. Jaksha v. Butte-Silver Bow County, 2009 MT 263, ¶ 17, 352 Mont. 46, 214 P.3d 1248; Wiser v. State of Montana, 2006 MT 20, ¶ 19, 331 Mont. 28, 34, 129 P.3d 133, 138.

This case involves a facial challenge to SB 423. In such challenges, the plaintiffs' burden is particularly high. The challengers must 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. Brady v. PPL Mont., 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); see also United States v. Salerno, 481 U.S. 739, 745 (1987). Thus, if a statute has a "plainly legitimate sweep," it must withstand a facial attack, even if under some set of factual circumstances it could be found unconstitutional as applied. Washington State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 (2008). See also Rohlfs v. Klemenhagen, 2009 MT 440, 354 Mont. 133, 227 P.3d 42 (rejecting facial challenge to dram shop 180-day notice provision with a concurring opinion indicating an as applied challenge could potentially succeed).

## SUMMARY OF ARGUMENT

The District Court's grant of a preliminary injunction as to the sections of SB 423 prohibiting the commercial production and sale of marijuana should be reversed because it relies on an application of the rights to pursue employment and health, and of privacy that is at odds with this Court's precedent. This Court has already determined that the right to pursue employment is limited to *lawful*

activities. Wiser v. State, 2006 MT 20, ¶ 24, 331 Mont. 28, 129 P.3d 133. Commercially selling marijuana, however, is illegal under Montana law as well as federal law. Similarly, there is no right to pursue health free of government regulations. Id. And while the right to privacy encompasses the right to make medical decisions, that right must be balanced against the State's police power, especially where no fundamental right is at issue. Id., ¶ 24. Because there is no fundamental right to use marijuana, the proper standard of scrutiny is rational basis. Id., ¶ 19.

Despite this precedent, and without distinguishing or even acknowledging Wiser, the District Court applied strict scrutiny and determined that once the State allowed marijuana to be used for a medical purpose, limitations or restrictions on that permissive use are subject to strict scrutiny. Because the District Court's application of strict scrutiny constitutes an erroneous conclusion of law, it constitutes a manifest abuse of discretion. For this reason alone, the District Court should be reversed.

Even if this Court analyzes the preliminary injunction factors, Plaintiffs cannot show a prima facie case or injury under rational basis review. Selling marijuana has been illegal, both under state and federal law, for decades. It is well within the State's police powers to determine the conditions upon which it makes marijuana legal for medical purposes. The threat of federal prosecution and the

history of abuses under I-143 provide ample evidence that prohibiting commercial concerns is a legitimate state interest, and thus a prima facie case cannot be established. For essentially the same reasons, Plaintiffs cannot show a threat of irreparable injury under a rational basis standard.

The District Court's ruling ignores clearly applicable precedent from this Court. The grant of a preliminary injunction on the sections prohibiting the commercial sale of marijuana should be reversed as a manifest abuse of discretion. Of equal importance, as a matter of judicial efficiency, this Court should correct the District Court's erroneous legal conclusions before this case proceeds to trial.

## ARGUMENT

### I. PREFACE

As explained above in the Statement of the Case, for purposes of preliminary injunction, the State did not object to an order delaying the implementation of three specific provisions of SB 423 pending a full trial. The District Court indicated that the State "concedes" these provisions may raise constitutional problems. Order, pp. 8, 9. The State emphasizes that its "concessions" were for purposes of preliminary injunction only.

The "concessions" with respect to advertising and inspections were predicated on the State's position that the provisions prohibiting a commercial marijuana industry are constitutional and should not have been enjoined. Analysis

of first amendment issues differs if commercial speech is involved. Because the District Court's preliminary injunction order allows a commercial marijuana industry to continue to exist in Montana, there remains an incentive for those in the industry to advertise in ways that are not in the public interest as determined by the Legislature. Similarly, constitutional issues involving inspection procedures are different when the premises are used for commercial, rather than private activities. With a commercial marijuana industry, the state's interests are higher in being able to conduct inspections.

In addition to scaling back the impact of an overly broad preliminary injunction, the State brings this interlocutory appeal primarily for purposes of establishing the correct legal standards to be applied to the issues in this case. As discussed below, the District Court erroneously applied a fundamental right, strict scrutiny analysis to the statutory provisions governing commercial transactions and numerical limits on cardholders. As this Court recognizes, if strict scrutiny applies to a statute, the "State . . . 'shoulder[s] the burden of demonstrating that no less restrictive'" means are available for achieving the State's interest in regulating an activity. Wiser, ¶ 18. Under this analysis, regulating for the public welfare "become[s] very difficult, if not impossible, for the State to undertake." Id. It is important that this Court correct the District Court's erroneous legal conclusions,

and clarify the correct constitutional analysis, before this case proceeds to trial on the merits of the Plaintiffs' claims.

## II. THE DISTRICT COURT ERRONEOUSLY APPLIED A FUNDAMENTAL RIGHTS ANALYSIS TO THE PRODUCTION, SALE AND USE OF MARIJUANA FOR MEDICAL PURPOSES.

### A. Prohibiting the Commercial Sale and Distribution of Marijuana for Medical Purposes Does Not Violate the Constitutional Right to Pursue Employment.

The first basis upon which the District Court relied to apply strict scrutiny analysis is the right to pursue employment. Order, pp. 10-11. The District Court correctly noted that in Wadsworth v. State, 275 Mont. 287, 911 P.2d 1165, 1172 (1996), this Court held 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.'" From this undisputed proposition, the District Court jumped to the erroneous conclusion that the right to pursue employment encompasses a right to sell marijuana, because the "State has declared medical marijuana a legal product in Montana." Order, p. 11.

In arriving at its erroneous conclusion, the District Court ignored entirely this Court's analysis and holding in Wiser. Denturists and their patients in Wiser challenged licensing regulations that restricted the activities that denturists can

perform and the statutory framework that placed control over denturists with the Board of Dentistry. They relied in part on the right to pursue employment. In language equally applicable to the present case, this Court rejected that argument:

> As mentioned in the above discussion concerning privacy rights, the State of Montana holds police power to regulate for the health and welfare of its citizens. *Skurdal*, 235 Mont. at 294, 767 P.2d at 306; *see also State ex rel. Bennett v. Stow* (1965), 144 Mont. 599, 620, 399 P.2d 221, 231. Furthermore, **the idea that the right to pursue employment and life's other "basic necessities" is limited by the State's police power is imbedded in the plain language of the Constitution. Article II, Section 3 states that citizens have the right to pursue "life's basic necessities . . . *in all lawful ways*." Art. II, Sec. 3, Mont. Const. (emphasis added).** The Constitution is clear. While it granted the fundamental right to pursue employment, it also circumscribed that right by subjecting it to the State's police power to protect the public's health and welfare. "Liberty is necessarily subordinate to reasonable restraint and regulation by the state in the exercise of its sovereign prerogative-police power." *State v. Safeway Stores* (1938), 106 Mont. 182, 203, 76 P.2d 81, 86. Accordingly, while one does have the fundamental right to pursue employment, one does not have the fundamental right to practice his or her profession free of state regulation promulgated to protect the public's welfare.

Wiser, ¶ 24. *(Bold emphasis added; italicized emphasis in original.)* So, while Wadsworth recognizes the fundamental right to pursue employment generally, Wiser establishes that such a right does not guarantee a right to any particular employment. Nor does it mean that any restrictions or even prohibitions on particular forms of employment trigger the strict scrutiny required for a fundamental right. See also, e.g., Petition of William Dee Morris, 175 Mont. 456,

458, 575 P.2d 37, 38 (1978)("An individual has no inalienable right to earn a living practicing law. . . . The practice of law is a privilege burdened with conditions.").

The District Court's approach would require that all laws regulating employment, including laws prohibiting certain types of commercial activity, be subject to strict scrutiny analysis because they "substantially implicate" the right to pursue employment. Order, p. 12. Cf. Wiser, ¶ 18. ("A conclusion that Montanans have a fundamental right to seek medical care from unlicensed professionals would force the State and its licensing boards to demonstrate a compelling state interest in order to license and regulate health care professionals.")

In essence, the District Court's holding would mean that because Montana has allowed the use of marijuana for medical purposes, there is a constitutional right to sell marijuana. It further would mean that any regulation of that purported constitutional right would be subject to strict scrutiny analysis. As this Court expressly held in Wiser, the right to pursue employment is proscribed by the constitutionally limiting principle that it must be in a "lawful way[]." Mont. Const. Art. II, § 3. Pursuant to its recognized police power to protect the public health and welfare, the State has determined that it is not lawful to sell marijuana for any purpose, including for the limited purpose for which it may lawfully be used under

Montana law.[2] Thus, contrary to the District Court's holding, there is no constitutional right to pursue employment or earn a living through the production and sale of marijuana. Because the preliminary injunction was predicated in part on an erroneous legal conclusion, its issuance constitutes a manifest abuse of discretion.

### B. The Statutory Provisions Prohibiting Commercial Transactions and Limiting the Number of Cardholders Do Not Violate the Right to Pursue Health or the Right of Privacy.

In addition to the right to pursue employment, the District Court based its preliminary injunction in part on the right to pursue health under Article II, section 3. The District Court cited no authority for the proposition that any restrictions or controls on that right are subject to strict scrutiny analysis. The court effectively converted the fundamental right to pursue health into a fundamental right to have access to a particular form of medical treatment. In doing so, it again inexplicably ignored Wiser and this Court's holding that the rights articulated in Article II, section 3 to "pursue life's basic necessities" are "circumscribed . . . by . . . the State's police power to protect the public's health and welfare." Wiser, ¶ 24. So, while there is a fundamental right to pursue life's basic necessities, including

[2] Montana is not alone in prohibiting the sale of marijuana for medical use. See Ex. 123 at p. MT-1987 ("Hawaii law does not authorize any person or entity to sell or dispense marijuana to medical use of marijuana patients."). Low numerical limits on the number of persons to whom

health, there is no fundamental right to do so free of lawful restrictions and exercise of the State's police power. Therefore, where lawful restrictions are involved, strict scrutiny does not apply. Id., ¶ 25. To hold otherwise would be to nullify the police power by subjecting any limits or conflicts on medications to strict scrutiny analysis.

The District Court also based its Order on the right of privacy under Article II, section 10, relying upon Armstrong v. State, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. Again, the court entirely ignored Wiser, in which this Court expressly rejected the argument that "the right to obtain medical care free of regulation is a fundamental right, and the State's regulation of that right must be supported by a compelling state interest." Wiser, ¶ 20. ("[W]e disagree with Appellants' contention that the fundamental right extends that broadly. . . ."). This Court explained that while the right to privacy is a fundamental right, "it does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes that right." Id.

The District Court's reliance on Armstrong was misplaced. In that case, the right at issue--to obtain a pre-viability abortion--is itself a right that is constitutionally protected under the federal and state constitutions. Roe v. Wade, 410 U.S. 113 (1973); Armstrong. Thus, the restrictions on a woman's right to

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marijuana can be distributed by a provider are also not unique to Montana. See Ex. 126 at p.

undergo a constitutionally protected procedure were subject to strict scrutiny. In contrast, the asserted right at issue here--access to marijuana for specified medical purposes--is not itself constitutionally protected. To the contrary, a long line of authorities establishes that there is no constitutional right of access to marijuana or other particular drugs for medical purposes.

In County of Santa Cruz v. Ashcroft, 279 F. Supp. 2d. 1192 (N.D. Cal. 2003), the plaintiffs argued that they had a fundamental right to access to medical marijuana recommended by their physicians under California's Compassionate Use Act of 1996. They asserted that the rights to maintain bodily integrity, alleviate pain and suffering, and control the circumstances of one's death are deeply rooted in our nation's history, and therefore are constitutionally protected, subjecting any infringements upon those rights to strict scrutiny. The court rejected plaintiffs' arguments and denied their request for preliminary injunction. In doing so, the court noted that:

> [T]he application of the right Plaintiffs seek logically [cannot] be limited to the use of medicinal marijuana; as framed, it would permit a terminally ill person to use and cultivate any substance[fn.7], regardless of whether Congress or the DEA has determined that it has any medically-established or scientifically-supported benefit, as long as he or she could find a physician to recommend that he or she do so. . . . By extension, the fundamental right that Plaintiffs urge this Court to recognize would include the right to use other controlled substances that alleviate pain and suffering such as heroin and morphine.

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MT-1999 (Michigan - 5 patient limit per "caregiver").

Id., 279 F.Supp. 2d at 1202 and n. 7. Significantly, the analysis applied by the court in County of Santa Cruz is the same as a test applied by this Court in analyzing privacy claims under Montana's Constitution. See Gryczan v. State, 283 Mont. 433, 450, 942 P.2d 112, 122 (1997)(a court asks whether the statute in question "violate[s] those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"(quoting Palko v. Connecticut, 302 U.S. 319, 328 (1937)).

The court's holding in County of Santa Cruz is consistent with other cases rejecting claims that access to medical marijuana is constitutionally protected. See, e.g., Kuromiya v. United States, 78 F. Supp. 2d 367, 372-73 (E.D. Pa. 1999)(the government's termination of a controversial medical marijuana program did not violate equal protection principles); Seeley v. State, 940 P.2d 604 (Wash. 1997)(equal protection was not violated by termination of a state treatment program as applied to a medical marijuana patient with terminal bone cancer and severe obstructive airway disease); United States v. Cannabis Cultivator's Club, 1999 U.S. Dist. LEXIS 2259 (N.D. Cal. 1999)( the government has authority to limit or restrict a patient's choices of medicine without violating equal protection); cf., Gonzales v. Raich, 545 U.S. 1(2005) (rejecting commerce clause challenge to enforcement of federal marijuana laws against Californians who cultivated and used marijuana in compliance with California's Compassionate Use Act).

These cases, in turn, are consistent with a long line of authorities holding that while a person may have constitutionally protected interests in health care matters, they do not have a constitutional right to a particular form of treatment. Among these authorities, Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695 (D.C. Cir. 2007)(en banc) is illustrative and instructive. The court in that case concluded terminally ill patients did not have a constitutional right to access to experimental drugs that has passed limited FDA-mandated safety trials, but had not yet been FDA approved. The court traced the history of governmental regulation of drugs and determined that there is no fundamental right to unrestricted access to drugs that is "deeply rooted in our Nation's history and traditions." Id., 495 F.3d at 711. In doing so, the court noted that courts consistently reject claims that there is a fundamental right to affirmative access to any particular form of treatment:

> No circuit has acceded to an affirmative access claim. *See, e.g., Mitchell v. Clayton, 995 F.2d 772, 775 (7th Cir. 1993)*("most federal courts have held that a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider"); *N.Y. State Opthalmological Soc'y v. Bowen, 854 F.2d 1379, 1389 (D.C. Cir. 1988)*("We disagree that the constitutional right to privacy comprehensively protects all choices made by patients and their physicians or subjects to 'strict scrutiny' all government interference with choice of medical treatment. There is no basis under current privacy case law for extending such stringent protection to every decision bearing, however indirectly, on a person's health and physical well-being."), *cert. denied, 490 U.S. 1098 . . . (1989); Carnohan v. United States, 616 F.2d 1120, 1122 (9th Cir.*

> *1980)*("Constitutional rights of privacy and personal liberty do not give individuals the right to obtain [the cancer drug] laetrile free of the lawful exercise of government police power."); *Rutherford v. United States, 616 F.2d 455, 457 (10th Cir. 1980)*("[T]he patient['s] . . . selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health. . . .")

Id., 495 F.3d at 710, n. 18.

In determining whether a fundamental right is implicated in health care matters, the specific right that is asserted must be specifically identified. See Abigail Alliance, 495 F.3d at 701, n. 5. This is precisely what this Court did in Wiser. The plaintiffs there argued the right at issue was the right to obtain medical care free of regulation. This Court, however, identified the more specific issue of whether there is a right to receive medical care from a particular type of provider (denturist) that has not been determined by the licensing authority to be qualified to provide the desired service. Wiser, ¶¶ 17-18. In holding that the right to privacy does not encompass such a right, this Court cited with approval one of the cases within the line of authorities discussed above, holding that there is no constitutional right to a particular form of medical treatment. Wiser, ¶ 17. n. 1 (*citing* Carnohan (no right to use medical drugs free of government police power)).

In this case, neither the Plaintiffs nor the court below cited a single case holding that there is a fundamental right of access to medical marijuana. No such right exists. The District Court erred by extending the holding in Armstrong to essentially create that right, while ignoring this Court's holding in Wiser. Because

the medical treatment at issue here--access to marijuana for specified medical purposes--is itself not constitutionally protected, the statutory restrictions at issue are not subject to strict scrutiny.

The District Court was wrong in its constitutional analysis with respect to the right to pursue health and the right of privacy. Its order preliminarily enjoining implementation of SB 423's commercial restrictions and numerical limits on cardholders is, therefore, based on an incorrect legal conclusion. It constitutes a manifest abuse of discretion and must be reversed.

## III. PLAINTIFFS CANNOT SHOW A PRIMA FACIE CASE OR IRREPARABLE INJURY WHEN THE CORRECT ANALYSIS IS APPLIED.

Because the District Court incorrectly applied strict scrutiny to the sections limiting the commercial sale of marijuana, this Court need not separately analyze whether the preliminary injunction factors set out in § 27-19-201, MCA, are met. Nevertheless, when rational basis scrutiny is applied to these sections, Plaintiffs cannot establish a prima facie case, or show that it is at least doubtful whether or not they will suffer irreparable injury before their rights can be fully litigated. State v. BNSF, 2011 MT 108, ¶ 17, 360 Mont. 361, 254 P.3d 561.

Selling marijuana is not a legal activity or service in Montana, accept as specifically authorized by SB 423. Montana, unlike the federal government, has

begun the incremental process of allowing residents and physicians to experiment with using marijuana as a medical drug. However, because marijuana has been illegal in Montana for decades, and is still a Schedule 1 controlled substance under federal law, the people of Montana, acting through their elected representatives, have every right to make adjustments along the way and regulate the use or sale of marijuana to the extent necessary to protect the public. Montana may not have hit the perfect balance yet, but that policy decision should be left to the "laboratories of democracy." See New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting). Montana has the uncontested power to criminalize marijuana use or sale; it may certainly regulate the use and sale of marijuana for medical purposes.

As such, and specifically under the holdings of Wiser and Abigail Alliance, Plaintiffs' challenge to the provisions of SB 423 prohibiting the commercial sale of marijuana, or the provision of marijuana to more than three patients, must be analyzed under rational basis and is presumed constitutional. Under rational basis review, the State need only show that a statute is rationally related to a legitimate state interest. Jaksha, ¶ 17 (citation omitted); Wiser, ¶ 19.

Here, due to the fact that marijuana is generally illegal under Montana law, and completely illegal under federal law, there is no question that the State has a legitimate concern in controlling all transactions involving marijuana, including in

particular commercial transactions. Among other things, the Legislature had to consider the warnings and actions of the United States Department of Justice concerning its intention to crack down on commercial marijuana activities. See Order, p. 4. By allowing the commercial trade of medical marijuana, the Legislature would have continued to expose Montanans, including Plaintiffs, to the very real possibility of federal criminal prosecution. Indeed, some of the plaintiffs in this case filed anonymous affidavits, and are referred to as "John Doe" plaintiffs in the case caption, because they fear being prosecuted for engaging in commercial transactions in an illegal drug. [Dk. 36 (Affidavit of John Doe #1), 37 (Affidavit of John Doe # 2)]. Moreover, the Legislature had before it, as detailed in the Statement of Facts, a history of abuses concerning the sale of marijuana as well as evidence of an exploding industry and an exponential growth in use rates. The legislative choice to control the sale and abuse of marijuana by prohibiting commercial sales is therefore reasonably related to these legitimate governmental concerns. Under rational basis scrutiny, then, Plaintiffs cannot establish a prima facie case.

Furthermore, there is no threat of irreparable injury or violation of Plaintiffs' rights. Plaintiffs do not have a right to sell or use marijuana free from regulation. The State has the right to control the sale and use of marijuana, including the prohibition of commercial sales. In fact, the threat of injury to Plaintiffs would

likely be greater if these provisions were enjoined and Plaintiffs were allowed to continue the commercial sale of marijuana, thus risking federal seizure of assets and prosecution. As with a prima facie case, Plaintiffs cannot show a threat of irreparable injury under rational basis review.

## CONCLUSION

For the foregoing reasons, this Court should hold that the District Court erred in enjoining the implementation of §§ 50-46-308(3), (4), 6(a) and 6(b). In doing so, this Court should articulate the correct constitutional analysis to be applied by the District Court on remand, as this case moves to final judgment.

Respectfully submitted this 16 day of November, 2011.

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## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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DATED November 16, 2011 Mary Adams

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

JAMES P. MOLLOY

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 11-0460

MONTANA CANNABIS INDUSTRY ASSOCIATION, MARK MATTHEWS, SHIRLEY HAMP, SHELLY YEAGER, JANE DOE, JOHN DOE #1, JOHN DOE #2, MICHAEL GECI-BLACK, M.D., JOHN STOWERS, M.D., POINT HATFIELD, and CHARLIE HAMP,

Plaintiffs and Appellees, and Cross-Appellants,

v.

STATE OF MONTANA,

Defendant and Appellant, and Cross-Appellee.

## APPENDIX

Appendix A

**MONTANA FIRST JUDICIAL DISTRICT COURT**
**LEWIS AND CLARK COUNTY**

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| 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,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF MONTANA,<br><br>Defendant. | Cause No.: DDV-2011-518<br><br>**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 libertics, **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

Appendix B

# Part 3. Montana Marijuana Act



**50-46-301. Short title -- purpose.** (1) This part may be cited as the "Montana Marijuana Act".

(2) The purpose of this part is to:

(a) provide legal protections to persons with debilitating medical conditions who engage in the use of marijuana to alleviate the symptoms of the debilitating medical condition;

(b) allow for the limited cultivation, manufacture, delivery, and possession of marijuana as permitted by this part by persons who obtain registry identification cards;

(c) allow individuals to assist a limited number of registered cardholders with the cultivation and manufacture of marijuana or marijuana-infused products;

(d) establish reporting requirements for production of marijuana and marijuana-infused products and inspection requirements for premises; and

(e) give local governments a role in establishing standards for the cultivation, manufacture, and use of marijuana that protect the public health, safety, and welfare of residents within their jurisdictions.

**History:** En. Sec. 1, Ch. 419, L. 2011.

**50-46-302. Definitions.** As used in this part, the following definitions apply:

(1) "Correctional facility or program" means a facility or program that is described in 53-1-202 and to which a person may be ordered by any court of competent jurisdiction.

(2) "Debilitating medical condition" means:

(a) cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome when the condition or disease results in symptoms that seriously and adversely affect the patient's health status;

(b) cachexia or wasting syndrome;

(c) severe chronic pain that is persistent pain of severe intensity that significantly interferes with daily activities as documented by the patient's treating physician and by:

(i) objective proof of the etiology of the pain, including relevant and necessary diagnostic tests that may include but are not limited to the results of an x-ray, computerized tomography scan, or magnetic resonance imaging; or

(ii) confirmation of that diagnosis from a second physician who is independent of the treating physician and who conducts a physical examination;

(d) intractable nausea or vomiting;

(e) epilepsy or an intractable seizure disorder;

(f) multiple sclerosis;

(g) Crohn's disease;

(h) painful peripheral neuropathy;

(i) a central nervous system disorder resulting in chronic, painful spasticity or muscle spasms;

(j) admittance into hospice care in accordance with rules adopted by the department; or

(k) any other medical condition or treatment for a medical condition approved by the legislature.

(3) "Department" means the department of public health and human services provided for in 2-15-2201.

(4) "Local government" means a county, a consolidated government, or an incorporated city or town.

(5) "Marijuana" has the meaning provided in 50-32-101.

(6) (a) "Marijuana-infused product" means a product that contains marijuana and is intended for use by a registered cardholder by a means other than smoking.

(b) The term includes but is not limited to edible products, ointments, and tinctures.

(7) (a) "Marijuana-infused products provider" means a Montana resident who meets the requirements of this part and who has applied for and received a registry identification card to manufacture and provide marijuana-infused products for a registered cardholder.

(b) The term does not include the cardholder's treating or referral physician.

(8) "Mature marijuana plant" means a harvestable female marijuana plant that is flowering.

(9) "Paraphernalia" has the meaning provided in 45-10-101.

(10) (a) "Provider" means a Montana resident 18 years of age or older who is authorized by the department to assist a registered cardholder as allowed under this part.

(b) The term does not include the cardholder's treating physician or referral physician.

(11) "Referral physician" means a person who:

(a) is licensed under Title 37, chapter 3;

(b) has an established office in Montana; and

(c) is the physician to whom a patient's treating physician has referred the patient for physical examination and medical assessment.

(12) "Registered cardholder" or "cardholder" means a Montana resident with a debilitating medical condition who has received and maintains a valid registry identification card.

(13) "Registered premises" means the location at which a provider or marijuana-infused products provider has indicated the person will cultivate or manufacture marijuana for a registered cardholder.

(14) "Registry identification card" means a document issued by the department pursuant to 50-46-303 that identifies a person as a registered cardholder, provider, or marijuana-infused products provider.

(15) (a) "Resident" means an individual who meets the requirements of 1-1-215.

(b) An individual is not considered a resident for the purposes of this part if the individual:

(i) claims residence in another state or country for any purpose; or

(ii) is an absentee property owner paying property tax on property in Montana.

(16) "Second degree of kinship by blood or marriage" means a mother, father, brother, sister, son, daughter, spouse, grandparent, grandchild, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent-in-law, grandchild-in-law, stepfather, stepmother, stepbrother, stepsister, stepson, stepdaughter, stepgrandparent, or stepgrandchild.

(17) "Seedling" means a marijuana plant that has no flowers and is less than 12 inches in height and 12 inches in diameter.

(18) "Standard of care" means, at a minimum, the following activities when undertaken by a patient's treating physician or referral physician if the treating physician or referral physician is providing written certification for a patient with a debilitating medical condition:

(a) obtaining the patient's medical history;

(b) performing a relevant and necessary physical examination;

(c) reviewing prior treatment and treatment response for the debilitating medical condition;

(d) obtaining and reviewing any relevant and necessary diagnostic test results related to the debilitating medical condition;

(e) discussing with the patient and ensuring that the patient understands the advantages, disadvantages, alternatives, potential adverse effects, and expected response to the recommended treatment;

(f) monitoring the response to treatment and possible adverse effects; and

(g) creating and maintaining patient records that remain with the physician.

(19) "Treating physician" means a person who:

(a) is licensed under Title 37, chapter 3;

(b) has an established office in Montana; and

(c) has a bona fide professional relationship with the person applying to be a registered cardholder.

(20) (a) "Usable marijuana" means the dried leaves and flowers of the marijuana plant and any mixtures or preparations of the dried leaves and flowers that are appropriate for the use of marijuana by a person with a debilitating medical condition.

(b) The term does not include the seeds, stalks, and roots of the plant.

(21) "Written certification" means a statement signed by a treating physician or referral physician that meets the requirements of 50-46-310 and is provided in a manner that meets the standard of care.

**History:** En. Sec. 2, Ch. 419, L. 2011.

**50-46-303. Department responsibilities -- issuance of cards -- confidentiality -- reports.** (1) (a) The department shall establish and maintain a program for the issuance of registry identification cards to Montana residents who:

(i) have debilitating medical conditions and who submit applications meeting the requirements of this part; and

(ii) are named as providers or marijuana-infused products providers by persons who obtain registry identification cards for their debilitating medical conditions.

(b) Persons who obtain registry identification cards are authorized to cultivate, manufacture, possess, and transport marijuana as allowed by this part.

(2) The department shall conduct criminal history background checks as required by 50-46-307 and 50-46-308 before issuing a registry identification card for a person named as a provider or marijuana-infused products provider.

(3) Registry identification cards issued pursuant to this part must:

(a) be laminated and produced on a material capable of lasting for the duration of the time period for which the card is valid;

(b) state the name, address, and date of birth of the registered cardholder and of the cardholder's provider or marijuana-infused products provider, if any;

(c) state the date of issuance and the expiration date of the registry identification card;

(d) contain a unique identification number;

(e) easily identify whether the card is for a person with a debilitating medical condition, a provider, or a marijuana-infused products provider; and

(f) contain other information that the department may specify by rule.

(4) (a) The department shall review the information contained in an application or renewal submitted pursuant to this part and shall approve or deny an application or renewal within 30 days of receiving the application or renewal and all related application materials.

(b) The department shall issue a registry identification card within 5 days of approving an application or renewal.

(5) Rejection of an application or renewal is considered a final department action, subject to judicial review.

(6) (a) Registry identification cards expire 1 year after the date of issuance unless:

(i) a physician has provided a written certification stating that a card is valid for a shorter period of time; or

(ii) a registered cardholder changes providers or marijuana-infused products providers.

(b) A provider's or marijuana-infused products provider's registry identification card expires at the time the department issues a card to a new provider or new marijuana-infused products provider named by a registered cardholder.

(7) A registered cardholder shall notify the department of any change in the cardholder's name, address, physician, provider, or marijuana-infused products provider or change in the status of the cardholder's debilitating medical condition within 10 days of the change. If a change occurs and is not reported to the department, the registry identification card is void.

(8) The department shall maintain a confidential list of persons to whom the department has issued registry identification cards. Except as provided in subsection (9), individual names and other identifying information on the list must be confidential and are not subject to disclosure, except to:

(a) authorized employees of the department as necessary to perform the official duties of the department; and

(b) authorized employees of state or local government agencies, including law enforcement agencies, only as necessary to verify that an individual is a lawful possessor of a registry identification card.

(9) The department shall provide the names of providers and marijuana-infused products providers to the local law enforcement agency having jurisdiction in the area in which the providers or marijuana-infused products providers are located. The law enforcement agency and its employees are subject to the confidentiality requirements of 50-46-332.

(10) (a) The department shall provide the board of medical examiners with the name of any physician who provides written certification for 25 or more patients within a 12-month period. The board of medical examiners shall review the physician's practices in order to determine whether the practices meet the standard of care.

(b) The physician whose practices are under review shall pay the costs of the board's review activities.

(11) The department shall report biannually to the legislature the number of applications for registry identification cards, the number of registered cardholders approved, the nature of the debilitating medical conditions of the cardholders, the number of providers and marijuana-infused products providers approved, the number of registry identification cards revoked, the number of physicians providing written certification for registered cardholders, and the number of written certifications each physician has provided. The report may not provide any identifying information of cardholders, physicians, providers, or marijuana-infused products providers.

(12) The board of medical examiners shall report annually to the legislature on:

(a) the number and types of complaints the board has received involving physician practices in providing written certification for the use of marijuana, pursuant to 37-3-203; and

(b) the number of physicians whose names were provided to the board by the department as required under subsection (10). The report must include information on whether a physician whose practices were reviewed by the board pursuant to subsection (10) met the standard of care when providing written certifications.

**History:** En. Sec. 3, Ch. 419, L. 2011.

**50-46-304 through 50-46-306 reserved.**

**50-46-307. Persons with debilitating medical conditions -- requirements -- minors -- limitations.** (1) Except as provided in subsections (2) through (4), the department shall issue a registry identification card to a person with a debilitating medical condition who submits the following, in accordance with department rules:

(a) an application on a form prescribed by the department;

(b) an application fee or a renewal fee;

(c) the person's name, street address, and date of birth;

(d) proof of Montana residency;

(e) a statement that the person will be cultivating and manufacturing marijuana for the person's use or will be obtaining marijuana from a provider or a marijuana-infused products provider;

(f) a statement, on a form prescribed by the department, that the person will not divert to any

other person the marijuana that the person cultivates, manufactures, or obtains for the person's debilitating medical condition;

(g) the name of the person's treating physician or referral physician and the street address and telephone number of the physician's office;

(h) the street address where the person is cultivating or manufacturing marijuana if the person is cultivating or manufacturing marijuana for the person's own use;

(i) the name, date of birth, and street address of the individual the person has selected as a provider or marijuana-infused products provider, if any; and

(j) the written certification and accompanying statements from the person's treating physician or referral physician as required pursuant to 50-46-310.

(2) The department shall issue a registry identification card to a minor if the materials required under subsection (1) are submitted and the minor's custodial parent or legal guardian with responsibility for health care decisions:

(a) provides proof of legal guardianship and responsibility for health care decisions if the person is submitting an application as the minor's legal guardian with responsibility for health care decisions; and

(b) signs and submits a written statement that:

(i) the minor's treating physician or referral physician has explained to the minor and to the minor's custodial parent or legal guardian with responsibility for health care decisions the potential risks and benefits of the use of marijuana; and

(ii) the minor's custodial parent or legal guardian with responsibility for health care decisions:

(A) consents to the use of marijuana by the minor;

(B) agrees to serve as the minor's marijuana-infused products provider;

(C) agrees to control the acquisition of marijuana and the dosage and frequency of the use of marijuana by the minor;

(D) agrees that the minor will use only marijuana-infused products and will not smoke marijuana;

(c) submits fingerprints to facilitate a fingerprint and background check by the department of justice and federal bureau of investigation. The parent or legal guardian shall pay the costs of the background check and may not obtain a registry identification card as a marijuana-infused products provider if the parent or legal guardian does not meet the requirements of 50-46-308.

(d) pledges, on a form prescribed by the department, not to divert to any person any marijuana cultivated or manufactured for the minor's use in a marijuana-infused product.

(3) An application for a registry identification card for a minor must be accompanied by the written certification and accompanying statements required pursuant to 50-46-310 from a second physician in addition to the minor's treating physician or referral physician.

(4) A person may not be a registered cardholder if the person is in the custody of or under the supervision of the department of corrections or a youth court.

(5) A registered cardholder who elects to obtain marijuana from a provider or marijuana-infused products provider may not cultivate or manufacture marijuana for the cardholder's use unless the registered cardholder is the provider or marijuana-infused products provider.

(6) A registered cardholder may cultivate or manufacture marijuana as allowed under 50-46-319 only:

(a) at a property that is owned by the cardholder; or

(b) with written permission of the landlord, at a property that is rented or leased by the cardholder.

(7) No portion of the property used for cultivation and manufacture of marijuana for use by the registered cardholder may be shared with or rented or leased to a provider, a marijuana-infused products provider, or a 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.

**History:** En. Sec. 4, Ch. 419, L. 2011.

**50-46-308. Provider types -- requirements -- limitations -- activities.** (1) The department shall issue a registry identification card to or renew a card for the person who is named as a provider or marijuana-infused products provider in a registered cardholder's approved application if the person submits to the department:

(a) the person's name, date of birth, and street address on a form prescribed by the department;

(b) proof that the person is a Montana resident;

(c) fingerprints to facilitate a fingerprint and background check by the department of justice and the federal bureau of investigation;

(d) a written agreement signed by the registered cardholder that indicates whether the person will act as the cardholder's provider or marijuana-infused products provider;

(e) a statement, on a form prescribed by the department, that the person will not divert to any other person the marijuana that the person cultivates or manufactures for a registered cardholder;

(f) a statement acknowledging that the person will cultivate and manufacture marijuana for the registered cardholder at only one location as provided in subsection (7). The location must be identified by street address.

(g) a fee as determined by the department to cover the costs of the fingerprint and background check and associated administrative costs of processing the registration.

(2) The department may not register a person under this section if the person:

(a) has a felony conviction or a conviction for a drug offense;

(b) is in the custody of or under the supervision of the department of corrections or a youth court;

(c) has been convicted of a violation under 50-46-331;

(d) has failed to:

(i) pay any taxes, interest, penalties, or judgments due to a government agency;

(ii) stay out of default on a government-issued student loan;

(iii) pay child support; or

(iv) remedy an outstanding delinquency for child support or for taxes or judgments owed to a government agency; or

(e) is a registered cardholder who has designated a provider or marijuana-infused products provider in the person's application for a card issued under 50-46-307.

(3) (a) (i) A provider or marijuana-infused products provider may assist a maximum of three registered cardholders.

(ii) A person who is registered as both a provider and a marijuana-infused products provider may assist no more than three registered cardholders.

(b) If the provider or marijuana-infused products provider is a registered cardholder, the provider or marijuana-infused products provider may assist a maximum of two registered cardholders other than the provider or marijuana-infused products provider.

(4) A provider or marijuana-infused products provider may accept reimbursement from a cardholder only for the provider's application or renewal fee for a registry identification card issued under this section.

(5) Marijuana for use pursuant to this part must be cultivated and manufactured in Montana.

(6) A provider or marijuana-infused products provider may not:

(a) accept anything of value, including monetary remuneration, for any services or products provided to a registered cardholder;

(b) buy or sell mature marijuana plants, seedlings, cuttings, clones, usable marijuana, or marijuana-infused products; or

(c) use marijuana unless the person is also a registered cardholder.

(7) (a) A person registered under this section may cultivate and manufacture marijuana for use by a registered cardholder only at one of the following locations:

(i) a property that is owned by the provider or marijuana-infused products provider;

(ii) with written permission of the landlord, a property that is rented or leased by the provider or marijuana-infused products provider; or

(iii) a property owned, leased, or rented by the registered cardholder pursuant to the provisions of 50-46-307.

(b) No portion of the property used for cultivation and manufacture of marijuana may be shared with or rented or leased to another provider or marijuana-infused products provider or another registered cardholder.

**History:** En. Sec. 5, Ch. 419, L. 2011.

**50-46-309. Marijuana-infused products provider -- requirements -- allowable activities.** (1) An individual registered as a marijuana-infused products provider shall:

(a) prepare marijuana-infused products at a premises registered with the department that is used for the manufacture and preparation of marijuana-infused products; and

(b) use equipment that is used exclusively for the manufacture and preparation of marijuana-infused products.

(2) A marijuana-infused products provider:

(a) may cultivate marijuana only for the purpose of making marijuana-infused products; and

(b) may not provide a cardholder with marijuana in a form that may be used for smoking unless the marijuana-infused products provider is also a registered provider and is providing the marijuana to a registered cardholder who has selected the person as the person's registered provider.

(3) All registered premises on which marijuana-infused products are manufactured must meet any applicable standards set by a local board of health for a food service establishment as defined in 50-50-102.

(4) Marijuana-infused products may not be considered a food or drug for the purposes of Title 50, chapter 31.

**History:** En. Sec. 6, Ch. 419, L. 2011.

**50-46-310. Written certification -- accompanying statements.** (1) The written certification provided by a physician must be made on a form prescribed by the department and signed and dated by the physician. The written certification must:

(a) include the physician's name, license number, and office address and telephone number on file with the board of medical examiners and the physician's business e-mail address, if any; and

(b) the name, date of birth, and debilitating medical condition of the person for whom the physician is providing written certification.

(2) A treating physician or referral physician who is providing written certification for a patient shall provide a statement initialed by the physician that must:

(a) confirm that the physician is:

(i) the person's treating physician and that the person has been under the physician's ongoing medical care as part of a bona fide professional relationship with the person; or

(ii) the person's referral physician;

(b) confirm that the person suffers from a debilitating medical condition;

(c) describe the debilitating medical condition, why the condition is debilitating, and the extent to which it is debilitating;

(d) confirm that the physician has assumed primary responsibility for providing management and routine care of the person's debilitating medical condition after obtaining a comprehensive medical history and conducting a physical examination that included a personal review of any medical records maintained by other physicians and that may have included the person's reaction and response to conventional medical therapies;

(e) describe the medications, procedures, and other medical options used to treat the condition;

(f) state that the medications, procedures, or other medical options have not been effective;

(g) confirm that the physician has reviewed all prescription and nonprescription medications and supplements used by the person and has considered the potential drug interaction with marijuana;

(h) state that the physician has a reasonable degree of certainty that the person's debilitating medical condition would be alleviated by the use of marijuana and that, as a result, the patient would be likely to benefit from the use of marijuana;

(i) confirm that the physician has explained the potential risks and benefits of the use of marijuana to the person;

(j) list restrictions on the person's activities due to the use of marijuana;

(k) specify the time period for which the use of marijuana would be appropriate, up to a maximum of 1 year;

(l) state that the physician will:

(i) continue to serve as the person's treating physician or referral physician; and

(ii) monitor the person's response to the use of marijuana and evaluate the efficacy of the treatment; and

(m) contain an attestation that the information provided in the written certification and accompanying statements is true and correct.

(3) A physician who is the second physician recommending marijuana for use by a minor shall submit:

(a) a statement initialed by the physician that the physician conducted a comprehensive review of the minor's medical records as maintained by the treating physician or referral physician;

(b) a statement that in the physician's professional opinion, the potential benefits of the use of marijuana would likely outweigh the health risks for the minor; and

(c) an attestation that the information provided in the written certification and accompanying

statements is true and correct.

(4) If the written certification states that marijuana should be used for less than 1 year, the department shall issue a registry identification card that is valid for the period specified in the written certification.

**History:** En. Sec. 7, Ch. 419, L. 2011.

**50-46-311 through 50-46-316 reserved.**

**50-46-317. Registry card to be carried and exhibited on demand -- photo identification required.** A registered cardholder, provider, or marijuana-infused products provider shall keep the person's registry identification card in the person's immediate possession at all times. The person shall display the registry identification card and a valid photo identification upon demand of a law enforcement officer, justice of the peace, or city or municipal judge.

**History:** En. Sec. 8, Ch. 419, L. 2011.

**50-46-318. Health care facility procedures for patients with marijuana for use.** (1) (a) Except for hospices and residential care facilities that allow the use of marijuana as provided in 50-46-320, a health care facility as defined in 50-5-101 shall take the following measures when a patient who is a registered cardholder has marijuana in the patient's possession upon admission to the health care facility:

(i) require the patient to remove the marijuana from the premises before the patient is admitted if the patient is able to do so; or

(ii) make a reasonable effort to contact the patient's provider, marijuana-infused products provider, court-appointed guardian, or person with a power of attorney, if any.

(b) If a patient is unable to remove the marijuana or the health care facility is unable to contact an individual as provided in subsection (1)(a), the facility shall contact the local law enforcement agency having jurisdiction in the area where the facility is located.

(2) A provider, marijuana-infused products provider, court-appointed guardian, or person with a power of attorney, if any, contacted by a health care facility shall remove the marijuana and deliver it to the patient's residence.

(3) A law enforcement agency contacted by a health care facility shall respond by removing and destroying the marijuana.

(4) A health care facility may not be charged for costs related to removal of the marijuana from the facility's premises.

**History:** En. Sec. 9, Ch. 419, L. 2011.

**50-46-319. Legal protections -- allowable amounts.** (1) (a) A registered cardholder may possess up to 4 mature plants, 12 seedlings, and 1 ounce of usable marijuana.

(b) A provider or marijuana-infused products provider may possess 4 mature plants, 12 seedlings, and 1 ounce of usable marijuana for each registered cardholder who has named the person as the registered cardholder's provider.

(2) Except as provided in 50-46-320 and subject to the provisions of subsection (7) of this section, an individual who possesses a registry identification card issued pursuant to this part

may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty or disciplinary action by a professional licensing board or the department of labor and industry, solely because:

(a) the individual cultivates, manufactures, possesses, or transports marijuana in the amounts allowed under this section; or

(b) the registered cardholder acquires or uses marijuana.

(3) A physician may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty or disciplinary action by the board of medical examiners or the department of labor and industry, solely for providing written certification for a patient with a debilitating medical condition.

(4) Nothing in this section prevents the imposition of a civil penalty or a disciplinary action by a professional licensing board or the department of labor and industry if:

(a) a registered cardholder's use of marijuana impairs the cardholder's job-related performance; or

(b) a physician violates the standard of care or other requirements of this part.

(5) (a) An individual may not be arrested or prosecuted for constructive possession, conspiracy as provided in 45-4-102, or other provisions of law or any other offense solely for being in the presence or vicinity of the use of marijuana as permitted under this part.

(b) This subsection (5) does not prevent the arrest or prosecution of an individual who is in the vicinity of a registered cardholder's use of marijuana if the individual is in possession of or is using marijuana and is not a registered cardholder.

(6) Except as provided in 50-46-329, possession of or application for a registry identification card does not alone constitute probable cause to search the individual or the property of the individual possessing or applying for the registry identification card or otherwise subject the individual or property of the individual possessing or applying for the card to inspection by any governmental agency, including a law enforcement agency.

(7) The provisions of this section relating to protection from arrest or prosecution do not apply to an individual unless the individual has obtained a registry identification card prior to an arrest or the filing of a criminal charge. It is not a defense to a criminal charge that an individual obtains a registry identification card after an arrest or the filing of a criminal charge.

(8) (a) A registered cardholder, a provider, or a marijuana-infused products provider is presumed to be engaged in the use of marijuana as allowed by this part if the person:

(i) is in possession of a valid registry identification card; and

(ii) is in possession of an amount of marijuana that does not exceed the amount permitted under this part.

(b) The presumption may be rebutted by evidence that the possession of marijuana was not for the purpose of alleviating the symptoms or effects of a registered cardholder's debilitating medical condition.

**History:** En. Sec. 10, Ch. 419, L. 2011.

**50-46-320. Limitations of the act.** (1) This part does not permit:

(a) any person, including a registered cardholder, to operate, navigate, or be in actual physical control of a motor vehicle, aircraft, or motorboat while under the influence of marijuana; or

(b) except as provided in subsection (3), the use of marijuana by a registered cardholder:

(i) in a health care facility as defined in 50-5-101;

(ii) in a school or a postsecondary school as defined in 20-5-402;

(iii) on or in any property owned by a school district or a postsecondary school;

(iv) on or in any property leased by a school district or a postsecondary school when the property is being used for school-related purposes;

(v) in a school bus or other form of public transportation;

(vi) when ordered by any court of competent jurisdiction into a correctional facility or program;

(vii) if a court has imposed restrictions on the cardholder's use pursuant to 46-18-202;

(viii) at a public park, public beach, public recreation center, or youth center;

(ix) in or on the property of any church, synagogue, or other place of worship;

(x) in plain view of or in a place open to the general public; or

(xi) where exposure to the marijuana smoke significantly adversely affects the health, safety, or welfare of children.

(2) A registered cardholder, provider, or marijuana-infused products provider may not cultivate or manufacture marijuana for use by a registered cardholder in a manner that is visible from the street or other public area.

(3) A hospice or residential care facility licensed under Title 50, chapter 5, may adopt a policy that allows use of marijuana by a registered cardholder.

(4) Nothing in this part may be construed to require:

(a) a government medical assistance program, a group benefit plan that is covered by the provisions of Title 2, chapter 18, an insurer covered by the provisions of Title 33, or an insurer as defined in 39-71-116 to reimburse a person for costs associated with the use of marijuana by a registered cardholder;

(b) an employer to accommodate the use of marijuana by a registered cardholder;

(c) a school or postsecondary school to allow a registered cardholder to participate in extracurricular activities; or

(d) a landlord to allow a tenant who is a registered cardholder, provider, or marijuana-infused products provider to cultivate or manufacture marijuana or to allow a registered cardholder to use marijuana.

(5) Nothing in this part may be construed to:

(a) prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition; or

(b) permit a cause of action against an employer for wrongful discharge pursuant to 39-2-904 or discrimination pursuant to 49-1-102.

(6) Nothing in this part may be construed to allow a provider or marijuana-infused products provider to use marijuana or to prevent criminal prosecution of a provider or marijuana-infused products provider who uses marijuana or paraphernalia for personal use.

(7) (a) A law enforcement officer who has reasonable cause to believe that a person with a valid registry identification card is driving under the influence of marijuana may apply for a search warrant to require the person to provide a sample of the person's blood for testing pursuant to the provisions of 61-8-405. A person with a tetrahydrocannabinol (THC) level of 5 ng/ml may be charged with a violation of 61-8-401.

(b) A registered cardholder, provider, or marijuana-infused products provider who violates subsection (1)(a) is subject to revocation of the person's registry identification card if the individual is convicted of or pleads guilty to any offense related to driving under the influence of alcohol or drugs when the initial offense with which the individual was charged was a violation

of 61-8-401, 61-8-406, or 61-8-410. A revocation under this section must be for the period of suspension or revocation set forth:

(i) in 61-5-208 for a violation of 61-8-401 or 61-8-406; or

(ii) in 61-8-410 for a violation of 61-8-410.

(c) If a person's registry identification card is subject to renewal during the revocation period, the person may not renew the card until the full revocation period has elapsed. The card may be renewed only if the person submits all materials required for renewal.

**History:** En. Sec. 11, Ch. 419, L. 2011.

**50-46-321 through 50-46-326 reserved.**

**50-46-327. Prohibitions on physician affiliation with providers and marijuana-infused products providers -- sanctions.** (1) (a) A physician who provides written certifications may not:

(i) accept or solicit anything of value, including monetary remuneration, from a provider or marijuana-infused products provider;

(ii) offer a discount or any other thing of value to a person who uses or agrees to use a particular provider or marijuana-infused products provider; or

(iii) examine a patient for the purposes of diagnosing a debilitating medical condition at a location where medical marijuana is cultivated or manufactured or where marijuana-infused products are made.

(b) Subsection (1)(a) does not prevent a physician from accepting a fee for providing medical care to a provider or marijuana-infused products provider if the physician charges the person the same fee that the physician charges other patients for providing a similar level of medical care.

(2) If the department has cause to believe that a physician has violated this section, has violated a provision of rules adopted pursuant to this chapter, or has not met the standard of care required under this chapter, the department may refer the matter to the board of medical examiners provided for in 2-15-1731 for review pursuant to 37-1-308.

(3) A violation of this section constitutes unprofessional conduct under 37-1-316. If the board of medical examiners finds that a physician has violated this section, the board shall restrict the physician's authority to provide written certification for the use of marijuana. The board of medical examiners shall notify the department of the sanction.

(4) If the board of medical examiners believes a physician's practices may harm the public health, safety, or welfare, the board may summarily restrict a physician's authority to provide written certification for the medical use of marijuana.

**History:** En. Sec. 12, Ch. 419, L. 2011.

**50-46-328. Local government authority to regulate.** (1) To protect the public health, safety, or welfare, a local government may by ordinance or resolution regulate a provider or marijuana-infused products provider that operates within the local government's jurisdictional area. The regulations may include but are not limited to inspections of locations where marijuana is cultivated or manufactured in order to ensure compliance with any public health, safety, and welfare requirements established by the department or the local government.

(2) A local government may adopt an ordinance or resolution prohibiting providers and marijuana-infused products providers from operating as storefront businesses.

**History:** En. Sec. 13, Ch. 419, L. 2011.

**50-46-329. Inspection procedures.** (1) The department and state or local law enforcement agencies may conduct unannounced inspections of registered premises.

(2) (a) Each provider and marijuana-infused products provider shall keep a complete set of records necessary to show all transactions with registered cardholders. The records must be open for inspection by the department and state or local law enforcement agencies during normal business hours.

(b) The department may require a provider or marijuana-infused products provider to furnish information that the department considers necessary for the proper administration of this part.

(3) (a) A registered premises, including any places of storage, where marijuana is cultivated, manufactured, or stored is subject to entry by the department or state or local law enforcement agencies for the purpose of inspection or investigation during normal business hours.

(b) If any part of the registered premises consists of a locked area, the provider or marijuana-infused products provider shall make the area available for inspection without delay upon request of the department or state or local law enforcement officials.

(4) A provider or marijuana-infused products provider shall maintain records showing the names and registry identification numbers of registered cardholders to whom mature plants, seedlings, usable marijuana, or marijuana-infused products were transferred and the quantities transferred to each cardholder.

**History:** En. Sec. 14, Ch. 419, L. 2011.

**50-46-330. Unlawful conduct by cardholders -- penalties.** (1) The department shall revoke and may not reissue the registry identification card of a person who:

(a) is convicted of a drug offense;

(b) allows another person to be in possession of the person's:

(i) registry identification card; or

(ii) mature marijuana plants, seedlings, usable marijuana, or marijuana-infused products; or

(c) fails to cooperate with the department concerning an investigation or inspection if the person is registered and cultivating or manufacturing marijuana.

(2) A registered cardholder, provider, or marijuana-infused products provider who violates this part is punishable by a fine not to exceed $500 or by imprisonment in a county jail for a term not to exceed 6 months, or both, unless otherwise provided in this part or unless the violation would constitute a violation of Title 45. An offense constituting a violation of Title 45 must be charged and prosecuted pursuant to the provisions of Title 45.

**History:** En. Sec. 15, Ch. 419, L. 2011.

**50-46-331. Fraudulent representation -- penalties.** (1) In addition to any other penalties provided by law, a person who fraudulently represents to a law enforcement official that the person is a registered cardholder, provider, or marijuana-infused products provider is guilty of a misdemeanor punishable by imprisonment in a county jail for a term not to exceed 1 year or a

fine not to exceed $1,000, or both.

(2) A physician who purposely and knowingly misrepresents any information required under 50-46-310 is guilty of a misdemeanor punishable by imprisonment in a county jail for a term not to exceed 1 year or a fine not to exceed $1,000, or both.

(3) A person convicted under this section may not be registered as a provider or marijuana-infused products provider under 50-46-308.

**History:** En. Sec. 16, Ch. 419, L. 2011.

**50-46-332. Confidentiality of registry information -- penalty.** (1) Except as provided in 37-3-203, a person, including an employee or official of the department, commits the offense of disclosure of confidential information related to registry information if the person knowingly or purposely discloses confidential information in violation of this part.

(2) A person convicted of a violation of this section shall be fined not to exceed $1,000 or imprisoned in the county jail for a term not to exceed 6 months, or both.

**History:** En. Sec. 17, Ch. 419, L. 2011.

**50-46-333 through 50-46-338 reserved.**

**50-46-339. Law enforcement authority.** Nothing in this chapter may be construed to limit a law enforcement agency's ability to investigate unlawful activity in relation to a person with a registry identification card.

**History:** En. Sec. 18, Ch. 419, L. 2011.

**50-46-340. Forfeiture.** (1) Marijuana, paraphernalia relating to marijuana, or other property seized by a law enforcement official from a person claiming the protections of this part in connection with the cultivation, manufacture, possession, transportation, distribution, or use of marijuana must be returned to the person immediately upon a determination that the person is in compliance with the provisions of this part.

(2) A law enforcement agency in possession of mature marijuana plants or seedlings seized as evidence is not responsible for the care and maintenance of the plants or seedlings.

**History:** En. Sec. 19, Ch. 419, L. 2011.

**50-46-341. Advertising prohibited.** Persons with valid registry identification cards may not advertise marijuana or marijuana-related products in any medium, including electronic media.

**History:** En. Sec. 20, Ch. 419, L. 2011.

**50-46-342. Hotline.** (1) The department shall create and maintain a hotline to receive reports of suspected abuse of the provisions of this part.

(2) The department may:

(a) investigate reports of suspected abuse of the provisions of this part; or

(b) refer reports of suspected abuse to the law enforcement agency having jurisdiction in the area where the suspected abuse is occurring.

**History:** En. Sec. 21, Ch. 419, L. 2011.

**50-46-343. Legislative monitoring.** (1) The children, families, health, and human services interim committee shall provide oversight of the department's activities related to registering individuals pursuant to this part and of issues related to the cultivation, manufacture, and use of marijuana pursuant to this part.

(2) The committee shall identify issues likely to require future legislative attention and develop legislation to present to the next regular session of the legislature.

**History:** En. Sec. 22, Ch. 419, L. 2011.

**50-46-344. Rulemaking authority -- fees.** (1) The department shall adopt rules necessary for the implementation and administration of this part. The rules must include but are not limited to:

(a) the manner in which the department will consider applications for registry identification cards for providers and marijuana-infused products providers and for persons with debilitating medical conditions and renewal of registry identification cards;

(b) the acceptable forms of proof of Montana residency;

(c) the procedures for obtaining fingerprints for the fingerprint and background check required under 50-46-307 and 50-46-308;

(d) other rules necessary to implement the purposes of this part.

(2) The department's rules must establish application and renewal fees that generate revenue sufficient to offset all expenses of implementing and administering this part.

**History:** En. Sec. 23, Ch. 419, L. 2011.