IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 11-0460

MONTANA CANNABIS INDUSTRY ASSOCIATION, MARC 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, Appellees and Cross-Appellants,

vs.

STATE OF MONTANA,

Defendant and Appellant.

On Appeal from Montana First Judicial District Court,
Lewis and Clark County – Cause No. DDV-2011-518
Hon. James P. Reynolds, District Judge

APPELLEES' RESPONSE AND CROSS-APPEAL BRIEF

APPEARANCES:

James H. Goetz
J. Devlan Geddes
Goetz, Gallik & Baldwin, P. C.
35 N. Grand (zip code 59715)
P. O. Box 6580
Bozeman, MT 59771-6580
Ph: (406) 587-0618
Fax: (406) 587-5144
Email: jim@goetzlawfirm.com
devlan@goetzlawfirm.com
Attorneys for Appellees

Steve Bullock, Attorney General
James P. Molloy, Assistant Attorney General
J. Stuart Segrest, Assistant Attorney General
Montana Department of Justice
215 North Sanders (zip code 59620)
P.O. Box 201401
Helena, MT 59620-1401
Ph: (406) 444-2026
Fax: (406) 444-3549
Emails: jmolloy@mt.gov
ssegrest@mt.gov
Attorneys for Appellant

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OTHER CITATIONS:

Blumeson, Eric, and Nilsen, Eva, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 Va. J. Soc. Pol.'y & L. 43, Fall 2009 . . . 6, 7

Clifford, Mathew O. and Huff, Thomas P., *Some Thoughts on the Meaning and Scope of the Montana Constitution's Dignity Clause with Possible Applications*, 61 Mont. L.Rev. 301, 308 (2000) 20

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Institute of Medicine of the National Academy of Sciences, *Marijuana and Medicine: Assessing the Science Base*, ... 3, 4, 5

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STATEMENT OF ISSUES

1. Did the district court manifestly abuse its discretion in granting a preliminary injunction enjoining certain provisions of SB 423, including its authorization of warrantless searches, its complete ban on advertising, its special restriction on doctors, its limit of three patients per provider, and its prohibition on remuneration?

2. Did the district court err in not enjoining the blanket denial of medical marijuana to probationers?

3. Did the district court err in not enjoining SB 423's medical standard of care which applies specially to medical marijuana?

4. In light of the pervasive unconstitutionality of numerous features of the statute, did the district court err in declining to enjoin SB 423 in its entirety?

STATEMENT OF THE CASE

The State seeks to confine its appeal to just one aspect of the preliminary injunction, claiming to challenge only paragraph 1(d) of the *Order on Motion for Preliminary Injunction* ("Order"), which enjoins the application of §§ 50-46-308(3), (4), (6)(a) and (b), MCA. The State purports to reserve other defenses. This is an improper request for an interlocutory advisory opinion on a single issue in a case involving a variety of factors which the court considered in granting the preliminary injunction. Because this case involves an appeal of issuance of a

preliminary injunction, it involves all aspects of SB 423, as well as the questions of irreparable injury, likelihood of success on the merits, and balance of hardships. Further, Plaintiffs' cross-appeal raises the issue of whether the district court properly enjoined only certain aspects of the Act, while salvaging others. The cross-appeal also raises the issues of whether the district court erred in refusing to enjoin: (1) the blanket prohibition on medical marijuana use by probationers; and (2) the imposition on medical doctors of a special standard of care.

STATEMENT OF FACTS

A. Background of the Legislation.

In 2004 the Montana voters, through the initiative process, adopted the MMA.[1] The purpose was to ensure that citizens suffering debilitating medical conditions would have access to medical marijuana.

From 2004 until 2011, several legislative sessions barely touched the MMA. The 2011 Montana Legislature, however, in response to alleged abuse, repeatedly attempted to undo the Citizen Initiative. First, the Legislature tried to repeal the MMA in its entirety with HB 161. That was vetoed by the Governor. Exhibit 6.

When the outright repeal didn't work, the Legislature cobbled together SB 423, hereinafter referred to as "SB 423" or "the Act."[2] The Act constitute a thinly-veiled attempt to accomplish what the vetoed HB 161 could not—the outright

[1]Medical Marijuana Act ("MMA") codified at § 50-46-101, *et seq.*
[2]Now codified at § 50-46-301, *et seq.* ("Montana Marijuana Act").

repeal of the MMA. Indeed, the Governor's amendatory veto letter said just that, "I believe [S]B 423 essentially repeals I-148." *Id.*, p. 2.

B. Plaintiffs' Position That Marijuana Is Truly a Medicine.

There is no doubt that marijuana is truly a medicine. The Montana statute makes it so. The evidence adduced at the hearing powerfully anchors this point. Bozeman Oncologist Dr. Jack Hensold testified that medical marijuana is effective for patients who suffer from nausea due to chemotherapy, loss of appetite and pain. Tr. 31-33. Retired Emeritus Harvard Medical School Professor, Dr. Lester Grinspoon, testified that marijuana is medically effective for many debilitating conditions including severe pain and glaucoma. He testified it is "lifesaving" in its ability to help AIDS sufferers maintain needed weight. Tr. 76-78, and 81-83; *see also* testimony of Oncology Social Worker Wendy Gwinner (Tr. 137-139); Dr. Michael Geci-Black (Tr. 199-202); and Dr. John Stowers (Tr. 276-280) as to marijuana's medicinal qualities; *see Marijuana and Medicine: Assessing the Science Base* issued by the Institute of Medicine of the National Academy of Sciences (hereinafter referred to as *Marijuana and Medicine*), Exhibit 5.

Cancer patient Point Hatfield, who suffered non-stop vomiting as a result of his chemotherapy, testified that without medical marijuana "I would be dead by now." Tr. 163. Patient Shirley Hamp, age 78, based on an initial suggestion from a doctor at the Mayo Clinic in Minnesota, uses marijuana tincture to address

chronic weight loss, after having serious surgery for esophageal cancer. Tr. 170-180.

In the face of this overwhelmingly compelling evidence, the State offered **no evidence** to the contrary.

The old bugaboo about cannabis and the emerging informed medical consensus were discussed in *State v. Nelson*, 2008 MT 359, 346 Mont. 366, 195 P.3d 826:

> We recognize that some find the very idea of medical marijuana a hard pill to swallow, given the use of marijuana is generally illegal and has been so for some time. However, as Judge Alex Kozinski stated in his concurrence in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), while the allowance of medical marijuana "may seem faddish or foolish ... the public record reflect[s] a legitimate and growing division of informed opinion on this issue. A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs." *Conant*, 309 F.3d at 640-41 (Kozinski, J., concurring).

Id., ¶ 32.

Judge Kozinski, in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), discussed the national study, *Marijuana and Medicine* (Exhibit 5):

> It resulted in a 250-plus-page report which concluded that "[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC, for pain relief, control of nausea and vomiting, and appetite stimulation," *id.* at 179.

Id. at 641.

In sum, the evidence established that marijuana has important medicinal qualities.

C. Plaintiffs' Position That Marijuana is Largely Benign.

Rather than denying marijuana's medicinal qualities, the State tried to justify SB 423 based on perceived "abuses" under the previous MMA. For that reason, a substantial part of the hearing was devoted to the question of "abuse," just how serious the perceived problem is, and whether the legislative reaction, SB 423, violates the constitution. The Plaintiffs argued that the State exaggerated the "problems" with marijuana. The legislation is based on the long-discredited premise that the effects of marijuana use are seriously harmful and that there is an overriding need for careful controls, even at the expense of potentially denying access to those in serious medical need.

The evidence shows that, in fact, marijuana use is quite prevalent in our society, and that marijuana use, while not totally harmless, is relatively benign. For example, *Marijuana and Medicine* makes several important points. It states:

> **Millions of Americans have tried marijuana**, but most are not regular users. In 1996, 68.6 million people—32% of the U. S. population over 12 years old—had tried marijuana or hashish at least once in their lifetimes, but only 5% were current users.

Exhibit 5, p. 92 (emphasis added). More important, the rate of habituation is lower for marijuana than it is for alcohol and tobacco. *See* Table 3.4 of that study, p. 95,

labeled Prevalence of Drug Use and Dependence in the General Population. It shows the following:

Drug Category	Proportion That Have Ever Used (%)	Proportion of Users That Ever Became Dependent (%)
Tobacco	76	32
Alcohol	92	15
Marijuana (including Hashish)	46	9

Eminent national expert, Harvard Medical Professor Emeritus, Dr. Lester Grinspoon, who has researched and published widely on marijuana, puts it this way:

> Based on my research, I have found that **cannabis is remarkably safe**. Although not harmless, it is surely less toxic than most of the conventional medicines it could replace if it were legally available. Despite its use by millions of people over thousands of years, **cannabis has never caused an overdose death**. *** Once cannabis regains the place in the U. S. Pharmacopoeia that it lost in 1941 after the passage of the Marijuana Tax Act (1937), it will be among the **least toxic substances** in that compendium. Right now the greatest danger in using cannabis medically is the illegality that imposes a great deal of anxiety and expense on people who are already suffering.

Grinspoon Affidavit, ¶ 8 (emphasis added); *see also* Tr. 67-70.

Dr. Grinspoon's observations in this regard are widely shared in the national literature. In Blumeson, Eric, and Nilsen, Eva, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 Va.J.Soc.Pol.'y&L. 43, Fall 2009, the authors summarize as follows:

> How risky is marijuana to the average user? Marijuana use does pose some health risks, although it is surely **less dangerous to health than alcohol, nicotine, acetaminophen, fried foods, and downhill skiing**. For the unlucky ones, who constitute a significant number, any of these latter activities may prove fatal, whereas **there is no known case of marijuana use causing death**, and the lethal dose is at least 20,000 times the amount of marijuana in a single cigarette. Publicly and privately funded studies have mostly concluded that the casual use of marijuana is not harmful to most users. The medical journal Lancet found, "cannabis less of a threat than alcohol or tobacco .... [O]n the medical evidence available, moderate indulgence in cannabis has little ill effect on health." Indeed, in recommending that marijuana be moved to Schedule II, one administrative law judge declared marijuana to be "one of the safest therapeutically active substances known to man."

17 Va.J.Soc.Pol.'y&L. 43, Fall 2009, pp. 65-66 (emphasis added).

D. The State's Case That There Were Abuses under the Old Law.

The State does not try to establish the harmfulness *vel non* of marijuana. Instead, it bases its case on the fact that marijuana use and possession is criminal conduct under Montana and Federal law. Its case hinges on the statistics showing that the number of caregivers and cardholders, particularly younger persons, has recently grown rapidly. In the State's view increased use equals abuse—but no attempt is made to assess the **relative** nature of the so-called abuse or to refute strong evidence that marijuana is remarkably safe.

E. The Preliminary Injunction.

Judge Reynolds' Order found the Act severable, enjoined certain features of the Act, including the advertising ban, warrantless searches, and certain provisions

designed to cut off access, but upheld the balance of the amendments, including the ban on probationers' access.

F. Appellees' Cross-Appeal.

Appellees cross-appeal on the severability issue, as well as the denial of access to probationers and the imposition of a special standard of care on medical doctors.

STATEMENT OF STANDARD OF REVIEW

In reviewing an order granting or denying a preliminary injunction the Court determines whether the district court **manifestly** abused its discretion. *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 11, 334 Mont. 86, 146 P.3d 714. The cases generally hold that where injunctive relief is based on conclusions of law, this Court reviews the conclusions of law to determine whether they are correct. *Id.* The State seeks to isolate one issue which it claims to be a conclusion of law and seeks *de novo* review on that issue only. This ignores the balancing of factors that go into issuance of a preliminary injunction (irreparable injury, balance of hardships, likelihood of success on the merits). The Order's conclusion on likelihood of success on the merits was properly tentative. "[A] 'preliminary injunction does not determine the merits of the case ...,'" but only likelihood of success. *Benefis*, ¶¶ 19 and 32.

Ordinarily the scope of appellate review "... is confined to the issues necessary to determine the propriety of the interlocutory order itself." Wright, Miller, Cooper, 16 Fed. Prac. 7 Proc. Juris. § 3921.1(2d ed.):

> The curtailed nature of most preliminary injunction proceedings means that the broad issues of the action are not apt to be ripe for review, ... and appellate courts are apt to be particularly reluctant to expand review when constitutional issues are involved.

Id.

The right to appeal a preliminary injunction provided in Rule 6(1)(e), M.R.App. P., is an **exception** to the important **rule of finality**, Rule 4(1), *id.*, and it should be applied judiciously. The equivalent Federal statute has been construed narrowly to ensure that an appeal of right will be available only in circumstances where an appeal will further the statutory purpose of "permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequences." *Carson v. American Brands, Inc.*, 450 U. S. 79, 84 (1981).

In essence, the State is seeking a premature advisory opinion from this Court on a single issue. That attempt at avoiding the rule of finality is not appropriate. "This Court discourages premature and piecemeal interlocutory appeals. We have done so to 'support judicial economy and efficiency and uphold the integrity of the trial court's process.'" *Farmers Union Mut. Ins. Co. v. Bodell*, 2008 MT 363, ¶ 26, 346 Mont. 414, 197 P.3d 913 (quoting *In re D. A.*, 2003 MT 109, ¶ 19, 315 Mont. 340, 68 P.3d 735). The State's approach offers no advantage in judicial

efficiency because even if the State prevails on the one issue, the preliminary injunction remains in place and subject to later trial.

Although the State prefers that the Court ignore the palpably unconstitutional features of the Act which it has chosen not to defend, in an equity case this Court is empowered to determine all questions involved, including the power to fashion equitable relief. Section 3-2-204(5), MCA; *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 11, 307 Mont. 45, 36 P.3d 408.

SUMMARY OF ARGUMENT

Certain aspects of SB 423 are palpably unconstitutional and were virtually conceded by the State. For that reason the district court properly enjoined them. These include the authorization for warrantless searches, the total ban on advertising, and the Act's requirement that any medical doctor certifying more than 24 patients for medical marijuana must be turned in by the State and subjected to special review, paid for by the doctor.

The district court also properly enjoined several features of the Act which were designed to cut off access to medical marijuana. These include the limitation of three patients per provider and the total ban on remuneration to the providers. These provisions, coupled with various aspects of the Act which deny patients and providers any **legitimate** means of obtaining marijuana for production, were

calculated to dry up all reasonable access, even though the legislation professes to "allow" medical marijuana for debilitating illnesses.

Judge Reynolds properly held that, from the standpoint of patients in need, these restrictions infringe on fundamental rights, including the rights to pursue good health, happiness, privacy, dignity and a lawful occupation. These rulings by the district court properly applied fundamental rights analysis, but the Act also fails rational review.

The preliminary injunction, however, did not go far enough—the entire Act should have been enjoined because its constitutionally-offensive features are so intertwined with the rest of the Act that the excision amounted to an improper rewrite of the statute.

The State made no case at all regarding the relative harms of marijuana. Its abuse case was based on limited evidence and the Act was not carefully tailored to address specific abuses alleged by the State.

Finally, the court's refusal to enjoin the Act's prohibition of medical marijuana to probationers and the provision of a special medical standard of care are erroneous.

ARGUMENT

The base foundation of the State's case is that marijuana is illegal as a Schedule I drug under State and Federal law. Its tacit premise is that the State, as a matter of **grace**, has made a narrow exception for medical use, and it can control its beneficence as it sees fit.

This turns the Constitution on its head. Under Montana's Constitution, "All political power **is vested in and derived from the people**. All government of right **originates with the people**, ..." Mont. Const., Art. II, Sec. 1 (emphasis added). The people have the inalienable right to pursue life's basic necessities, including safety, **health**, and happiness in all lawful ways ...." *Id.*, Sec. 3 (emphasis added).

When the government takes action that threatens the well being or health of the people, it has a very heavy burden of justification. The State simply cannot start with the breezy proposition that marijuana is illegal and therefore the State can do what it wants.

This is particularly true here because marijuana's illegality rests on a very slender reed. A controlled substance is classified as a Schedule I drug if it has a "high potential for abuse" and "**has no accepted medical use and treatment in the United States.**" Section 50-32-221, MCA; 21 U.S.C. 801, *et seq.* The Kafkaesque classification of marijuana as a Schedule I drug while, at the same

time making it available for medical use, cannot survive even passing scrutiny. Thus, the very foundation of the State's argument crumbles immediately.

I. SB 423, IN ITS ENTIRETY, IS AN UNCONSTITUTIONAL BROADSIDE ON THE RIGHTS OF MONTANANS.

The central problem with the Act, addressed below, is that it is calculated virtually to deny all reasonable access to medical marijuana. First, however, this brief deals with the various provisions of the Act which are so palpably unconstitutional that the State declined to defend them.

At the end of the preliminary injunction hearing, the State virtually conceded that the advertising ban, warrantless searches, and the 25-patient restriction on doctors features of SB 423 were not defensible. Tr. 656-659. Nevertheless, in a continuing effort to save face, the State avoids talking about these problems, claiming it is only appealing the Act's restrictions on commercial production and distribution.

It is not that easy. This Act constitutes a legislative broadside on the rights of Montanans. The district court's issuance of the preliminary injunction cannot be reviewed in the vacuum suggested by the State. Moreover, Appellees have cross-appealed several additional features, including the blanket ban on use by probationers, the legislative imposition of a special medical standard of care, and the district court's strained effort to salvage the remaining parts of the Act on the basis that the statute is severable.

A. The Act Unconstitutionally Provides for Warrantless Searches.

Section 50-46-329, MCA, authorizes warrantless unannounced searches. While termed "inspections" these are "searches." *See State v. Hardaway*, 2001 MT 252, ¶ 16, 307 Mont. 139, 36 P.3d 900.

In Montana, searches conducted in the absence of a properly issued warrant are *per se* unreasonable, absent a recognized exception to the warrant requirement. *State v. McLees*, 2000 MT 6, ¶¶ 10-26, 298 Mont. 15, 994 P.2d 683.[3] This was properly enjoined. Order, p. 9.

B. The Act Infringes Free Speech.

Section 20 of SB 423 (codified at §50-46-341) provides:

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

This is palpably unconstitutional. The court in *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, held that the consuming public had a protected First Amendment interest in the **free flow of truthful information concerning a lawful activity**. 425 U.S. 748, 761 (1976); *see also Bigelow v. Virginia*, 421 U.S. 809, 812-13 (1975) (invalidating a state statute outlawing

[3]*See* Pike, Joshua H., *The Impact of A Knee-Jerk Reaction: The Patriot Act Amendments to the Foreign Intelligence Surveillance Act and the Ability of One Word to Erase Established Constitutional Requirements*, 36 Hofstra L.Rev. 185, Fall 2007 (arguing that the warrantless wiretapping of foreign agents features of the Patriot Act are unconstitutional).

advertisements that "encourage or prompt the procuring of abortion"); *Carey v. Population Services*, 431 U.S. 678 (1977) (holding invalid a ban on "advertising or display" of contraceptives).

This Section is properly enjoined. Order, p. 8.

C. The Act Unconstitutionally Intrudes on the Doctor/Patient Relationship.

The Act also takes a ham-fisted swipe at the ability of medical doctors to certify patients in medical need by creating oppressive features designed to accomplish an *in terrorem* effect to dissuade physicians from recommending use of medical marijuana. First, the Act requires doctors to report certifications to the Montana Department of Health and Human Services ("MDHHS"), which must in turn investigate every doctor (at the doctor's expense) who certifies over 24 patients. Section 50-46-303(10). There is no similar restriction in any other area of medical practice. Tr. 463. The State conceded this Section could be enjoined although the State claimed it was reserving its position on the issue. Tr. 659.

The Act also imposes a special and onerous **standard of care** on the medical profession. For example, prior to certifying a cardholder, a medical doctor must prepare a written certification which, among other things, states 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." Section 50-46-

310(2)(h), MCA. This is a special standard applicable only to medical marijuana and no other medicine no matter how dangerous. The State's leading medical witness, Dr. Mary Anne Guggenheim, a member of the State Board of Medical Examiners, testified that she, in all honesty, "would not ever be able to ..." meet this standard. Tr. 465:

> Q. ... You could not ever certify a patient for medical marijuana?
>
> A. [Guggenheim]: Unless I ignored that particular item of statute, yes.
>
> Q. Which would make you a scofflaw, right?
>
> A. [Guggenheim]: I guess so. I would have to go before the Board of Medical Examiners.

Tr. 466. She conceded that when penicillin was first used years ago, it was a "huge quantum leap" and a doctor prescribing penicillin at the time would not have been able to meet the standard now set in Montana marijuana law. Tr. 467.

An additional medical obstacle is that to be certified for a "debilitating medical condition on the basis of chronic pain," the Act requires "objective proof of the etiology [such as x-rays] or confirmation by a second physician." Section 50-46-302(2)(c), MCA. Ironically, much more potent and addictive pain relief drugs, such as opioids, can be routinely prescribed to treat chronic pain without the

cumbersome procedures called for in the certification for medical marijuana under the Act.[4] Tr. 37-39.

This is a serious over-reaction to a relatively minor problem.[5] To put this in perspective the State's law enforcement witness, Mark Long, conceded that prescription drug abuse in Montana is 15 times more deadly than meth, heroin and cocaine combined. The Department of Justice has labeled it "an invisible epidemic." Tr. 546-547. Long also opined that prescription drugs are easier for young people to obtain than street drugs. Tr. 548. Notwithstanding this, medical marijuana has been carved out for a special medical standard of care.

The legislatively-prescribed standard of care intrudes on the doctor/patient relationship. The privacy of that relationship is protected as a fundamental right in Montana. *Armstrong v.* State, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. Even though many other medical procedures and drugs are infinitely more dangerous than medical marijuana, the Legislature has never seen fit to prescribe for them a

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[4]*See FDA Acts to Reduce Harm From Opioid Drugs*, http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm251830.htm.

[5]This is a huge backwards step. *See Relieving Pain in America: A Blueprint for Transforming Prevention, Care, Education and Research*, National Academy of Sciences 2011, p. S-1, noting that chronic pain affects large numbers of Americans [116,000,000 adults] and that there are "many shortfalls in pain assessment and treatment ... despite humanity's intimate familiarity with pain throughout history." This document is subject to judicial notice. It is at http://www.iom.edu/Reports/2011/Relieving-Pain-in-America-A-Blueprint-for-Transforming-Prevention-Care-Education-Research.aspx.

"standard of care," or to require the extensive paperwork now required for medical marijuana certification.

The parallel to the pattern in abortion cases is obvious—some legislatures hostile to abortion, realizing they cannot undo the constitutional cases providing procreative rights, have tried to kill the right through imposition of a myriad of onerous regulations. In *Planned Parenthood v. Casey*, the court found that such regulations would be upheld only if they did not create an "undue burden" on the woman's freedom of choice. 505 U.S. 833 (1992). If a law presented "a substantial obstacle" to the woman's choice, it would be an unconstitutional undue burden. *Id.*, at 837; *see also* Rotunda and Nowak, *Treatise on Constitutional Law*, 4th ed., Section 18.29(c)(i), p. 146 ("Laws that **specifically regulate** abortion procedures are subject to independent judicial review. If a state asserts that an abortion regulation is designed to protect the health of the woman, a court must make a determination of whether the regulation is a narrowly-tailored means of that interest."). (Emphasis added.)

As with abortion, medical marijuana has been singled out in an obvious effort to chill medical marijuana use and intrude into the doctor/patient relationship. None of these specific regulations are carefully tailored to legitimate governmental needs. Rather, they are a crude attempt to discourage use of medical marijuana, despite the relative safety of the drug.

D. The Blanket Prohibition on Access for Probationers Is Unconstitutional.

Section 50-46-307(4), MCA, prohibits probationers from receiving medical marijuana despite the fact that many of them suffer debilitating medical conditions. Judge Reynolds declined to enjoin this feature of the Act, finding that it should be considered case-by-case. Order, p. 13. This makes no sense—a sentencing judge is not allowed to overrule this proscription.

Probationer Marc Matthews of Billings, age 28, suffered 10 to 12 severe, sometimes life threatening seizures a year prior to using medicinal marijuana. Matthews Affidavit, ¶¶ 4-8, Case Register Report ("CRR") No. 41 (Appendix 2). Under SB 423 he is forbidden to use medical marijuana even though it is the only medicine that has been effective in treating his severe condition. *Id.* It is not only irrational, but cruel, to deprive him of the only medicine that works, as this Court held in *State v. Nelson*, 2008 MT 359, 346 Mont. 366, 195 P.3d 826 (applying the previous MMA).

The refusal to enjoin this provision is a manifest abuse of discretion.[6]

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[6]Other provisions of the law are likewise suspect. For example, Section 5(2) limits those who can serve as providers, imposing various arbitrary conditions, including a blanket prohibition on one who "has a felony conviction." This flies in the face of Article II, Section 28(2) of the Montana Constitution, which provides for the "rights of the convicted" and provides that "full rights are restored by termination of state supervision for any offense against the state."

E. The Act Makes Providers and Patients Second Class Citizens.

The Act, taken cumulatively, invidiously treats medical patients who are dependent on marijuana as second class citizens. The entire structure of the Act poses pernicious threats to the civil liberties of the patient, which are akin to forbidden racial profiling. As such, in addition to violating fundamental privacy, dignity, health and free speech rights, the Act also violates the rights against illegal search and seizure and the patients' rights to equal protection of the laws.[7]

An individual patient's ***dignity*** is "directly assailed by treatment which degrades, demeans, debases, disgraces, or dishonors persons, or it may also be indirectly undermined by treatment ... which trivializes the choices persons make for their own lives." *See* Mathew O. Clifford and Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's Dignity Clause with Possible Applications*, 61 Mont. L.Rev. 301, 308 (2000); *see also Walker v. State*, 2003 MT 134, 316 Mont. 103, 121, 68 P.2d 872, 884 (quoting same).

II. THE ACT PURPORTS TO MAKE MEDICAL MARIJUANA AVAILABLE BUT IS DESIGNED TO CUT OFF LEGITIMATE ACCESS.

The central problem with the Act is that it seeks to choke off access to medical marijuana for those in need by eliminating caregiver producers.

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[7]Ironically, the Act treats legitimate patients more harshly than black market users. The criminal penalty for a first-time possessor of 2.5 ounces or less of marijuana, with its presumption of a deferred sentence (MCA § 45-9-102(7)), is less than the penalties under Section 15 of SB 423.

The Act establishes that a "provider" may supply medical marijuana to a "cardholder." However, the measure places such severe restrictions on the providers that it is clear the Legislature really intended to destroy the viability of the provider-patient relationship. For example, a provider may assist only a "maximum of **three registered cardholders**." Section 50-46-308(3)(a)(i), MCA (emphasis added). More onerously, a provider **may not "accept anything of value**, including monetary remuneration, for any services or products provided to a registered cardholder." Section 50-46-308(6)(a), MCA (emphasis added).

The Order properly enjoins these provisions but, as demonstrated below, it does not go far enough because there are other intertwined provisions which also improperly cut off access.

The State unabashedly concedes that the Act's purpose is to eliminate commercial activity in marijuana, describing the Act as a "legislative choice to control the sale and abuse of marijuana by prohibiting commercial sales ...." State's Brief, p. 23.

This amounts to throwing the baby out with the bathwater. On the one hand, the Legislature declares a policy of allowing persons with debilitating conditions to have access to medical marijuana where medically appropriate. On the other hand, the Legislature has destroyed the mechanism by which such product can be furnished to the person in need.

This is like the Montana Legislature begrudgingly conceding that abortions must be made available in Montana under *Roe v. Wade*, but then limiting the number of abortions a physician could perform to three, and then prohibiting the physician from receiving any remuneration; then, to boot, adding onerous paperwork and conditions on the "standard of care." Obviously in the abortion context, such un-artful attempts to "regulate" would not survive constitutional muster. *See Planned Parenthood v. Casey, supra.*

Imagine the uproar if companies such as Merck and Johnson & Johnson were given the "opportunity" to help medically needy Montanans with their blood pressure, cancer, or pain medication needs, but then are limited to three customers who are legally prohibited from paying for their pharmaceuticals. This Court flatly held in *State v. Nelson*, 2008 MT 359, ¶ 29:

> When a qualifying patient uses medical marijuana in accordance with the MMA, **he is receiving lawful medical treatment. In this context medical marijuana is most properly viewed as a prescription drug**.

(Emphasis added.)

A. The "Grow Your Own" Approach Is No Solution.

The State's primary response below was to argue that the Act contemplated that persons in need of medical marijuana could grow their own.

The State's "grow your own" answer is no solution to elderly, debilitated patients who may lack a spouse or other committed person who is willing to become a "provider" under the new Act.

As the Governor's amendatory veto letter states:

> I believe SB 423 makes access to medical marijuana far too difficult for patients, many of whom are suffering chronic and severe illness and do not have the physical or financial ability to grow their own marijuana to treat their debilitating condition. Patients must be able to obtain medical marijuana from legitimate sources with a reliable product.

Exhibit 6, p. 3.

The Act makes it illegal to buy or sell clones, stems or plants. Section 50-46-308(6)(b), MCA. If the contemplation is that marijuana is to be grown from seed, there are significant horticultural impediments.

It takes up to six months to grow a marijuana seed into usable medicinal marijuana product (presuming there are no setbacks). Problems that can arise during the growing cycle include, variability in exterior temperature, too much or too little water, lack of nutrients, lack of light, lack of drainage, and damage or destruction by mildew, rot, worms, slugs, or other pests that can kill or reduce the output of the plants. *See* Conrad Affidavit, ¶¶ 17, 33-34 (CRR No. 34). The failure of any system could destroy an entire harvest. *See* Conrad Affidavit, ¶ 35. Thus, it is inevitable that registered patients who are forced to grow their own marijuana,

and who cannot stockpile, will not have their medicine for an extended period of time.

Moreover, there are severe limits on the size and number of plants that a person can possess (four mature plants per cardholder, § 50-46-319(1)(a)). As a practical matter, these limits make it impossible for a patient to grow enough marijuana to meet her consumption needs.[8]

There is another bizarre limitation in the Act, Section 5(7), which prohibits a producer from growing for his patient-spouse in their own home.[9] This Section is addressed by the MDHHS:

> **11. Are there limitations in the law on where a provider may grow marijuana or manufacture infused products?** Yes. Providers cannot grow marijuana ... at a location that is shared with ... another registered cardholder. ... For example:
> (a) A husband [who has been named and approved as a provider] *cannot* grow in a home shared by his wife, if she is also a registered cardholder.

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[8]A typical indoor yield can range from 0.5 to 1 ounce per plant – that drops to 0.025 to 0.25 ounces per plant with small plants. Growing marijuana indoors also requires having the necessary space to grow and harvest as many as 64 or more small indoor plants each month to meet a patient's consumption needs. *See* Conrad Affidavit, ¶ 41-42. The grower must be able to "sex" the plant because male plants do not produce useable flowers, or bud, and must be culled from the crop. However, a grower cannot determine what sex a plant will become until the plant enters its bloom cycle, about three to four months after the start of the grow cycle. *Id.* ¶¶ 9, 18.

[9]Section 5(7), codified at § 50-46-308(7)(b), MCA, governs "Providers." It states: "No portion of the property used for cultivation and manufacture of marijuana may be **shared with ... another registered cardholder**."

MDHHS pamphlet, Exhibit 10.

Shirley Hamp is dependent on marijuana tincture for weight gain, having undergone an esophagectomy because of cancer of the esophagus. The Act puts her caregiver out of business. Without the injunction she will have to rely on her elderly husband to somehow figure out how to grow marijuana and manufacture marijuana tincture. Tr. 176-178. But under Section 5(7) he can't grow in their home. Tr. 173-176.

Judge Reynolds, looking at a conflicting Section, Section 4(7) (§ 50-46-307(7)), which applies to cardholders, not providers, held that Charlie Hamp could grow marijuana for his wife in their home because the Hamps are related by blood or marriage. Order, ¶ 3(f). Even if correct, this does not address the fact that a **non-spouse** cannot do the same. For example, a gay male could not grow medical marijuana in a home shared by him and his committed partner who has AIDS because they are not related by "blood or marriage." Under Art. XIII, Sec. 7, Mont. Const., they are prohibited from marrying.[10]

The Montana Supreme Court said in *Walker v. State*, 2003 MT 134, ¶ 81, 316 Mont. 103, 66 P.3d 872:

[10] The constitutionality of Montana's laws based on the marriage relationship that discriminate against committed same-sex couples is pending before this Court in *Donaldson, et al. v. State of Montana*, Case No. DA 11-0451.

> Treatment which degrades or demeans persons, that is, treatment which deliberately reduces the value of persons, and which fails to acknowledge their worth as persons, directly violates their dignity. [Citing] Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications* (Summer 2000), 61 Mont.L.Rev. 301, 307 (hereafter, *Clifford*).

B. Providers Are Denied Legal Means of Production Because the Act Makes Clones and Cuttings Illegal, and the Ability to Grow Your Own Is Illusory.

The access problem was addressed in the cross-examination of Roy Kemp, the MDHHS official in charge of issuing marijuana cards. Under the previous law a "caregiver" was allowed to produce medical marijuana and sell it to a patient. Tr. 382. Under the new Act, on July 1, 2011, caregivers were eliminated and were required to turn in or destroy all of their mature plants, seedlings, cuttings, clones, and useable marijuana. SB 423, Section 35(4); Tr. 370-371. In place of "caregivers" the new Act calls them "providers," but it makes no **provision for legally acquiring the product**. The common way to grow marijuana is from clones or cuttings. Conrad Affidavit, ¶¶ 40-41. The Act, however, forbids that. A provider "[m]ay not ... buy or sell mature marijuana plants, seedlings, cuttings, clones, usable marijuana, or marijuana-infused products ...." Section 50-46-308(6)(b), MCA; Tr. 372. This leaves only seeds. But Montana law (MCA § 45-9-102(2)) criminalizes possession of marijuana and illegal marijuana includes seeds: "... all plant material from the genus cannabis containing

tetrahydrocannabinol, THC, or **seeds of the genus capable of germination.**" Section 50-31-201(17), MCA, (emphasis added).

Mr. Kemp testified:

> Q. So that leaves available, under my calculation, seeds of the genus **incapable** of germination. Would you agree?
>
> A. [Kemp]: Apparently you could have seeds that were not capable of growing, yes.

Tr. 373 (emphasis added).[11]

Mr. Kemp was then handed a page from Joseph Heller's novel, *Catch-22*. Having read *Catch-22*, Mr. Kemp agreed that the Act presents a catch-22 dilemma:

> I would agree that under your original analysis and whatnot, it seems to lead you back to the beginning, which is an impossible place to begin because you can only possess seeds that don't grow.

Tr. 374; *see* illustrative diagram referenced at Tr. 371-372 (attached hereto as Appendix 1).

Further, Mr. Kemp conceded that newly-diagnosed cancer patients after July 1, 2011, the effective date of the Act, who wanted to grow their own marijuana would be in even more of a catch-22 situation because "[t]hey would likely not have any resources whatsoever as it's just been diagnosed." Tr. 375.

In short, the Act just does not provide any **legal** means of obtaining access. In truth, the only reason producers have been able to legally produce medical

[11]Mr. Kemp conceded that a person cannot tell by looking at the seed whether it is capable of germination—one would have to "put it in soil." *Id.*

marijuana is because the court enjoined the access features of the Act and some unenjoined provisions have been ignored. Had it not been for the injunction, the effect of the Act would be to force people to resort to the black market—to become scofflaws in order to address their medical needs.

III. THE ACT'S SEVERE RESTRICTIONS ON ACCESS VIOLATE THE FUNDAMENTAL RIGHTS OF BOTH THE PATIENTS AND THE PROVIDERS.

The State takes the position that there is no fundamental right to use marijuana and, for that reason, it has the right to engage in reasonable regulation of commercial use of marijuana. This fails to come to grips with Judge Reynolds' Order. Judge Reynolds first noted that the State has declared medical marijuana a legal product in Montana and has established a licensing and distribution system through providers. Thus, he determined that persons engaged in the activity "are engaged in legal activities." Order, p. 11. Following *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1171-72 (1996), he found that the opportunity to pursue employment "is itself a fundamental right" in Montana.

The State cites *Wiser v. State Dept. of Commerce*, 2006 MT 20, 331 Mont. 28, 129 P.3d 133, in arguing that although the right to pursue employment is fundamental, it is limited by the State's police power and it applies only in "lawful" ways. State's Brief, p. 9, 11-21.

This ignores the rights of the **patient** to privacy, dignity and to pursue good health. These are fundamental and inalienable. In Judge Kozinski's concurrence in *Conant v. Walters*, he agreed with the majority that the doctors' interest in giving advice about the medical use of marijuana is important but that the "fulcrum" of the dispute is not the First Amendment right of the doctors, but the rights of the **patients**. 309 F.3d at 640, ("Those immediately and directly affected by the federal government's policy are the patients who will be denied information crucial to their well-being ....").

Judge Reynolds focused on the rights of Montana's residents who have a fundamental right to "seek[] their safety, health and happiness in all lawful ways." He found that the ban on providers receiving compensation will "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." Order, pp. 11-12. He continued:

> 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 effecting her or his bodily integrity and health in partnership with a chosen healthcare 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 certain 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 produce.

Id., p. 12. The court's logic is unassailable.

The State argues, based on *Wiser*, that the Act survives constitutional challenge because there is no fundamental right to obtain medical care free of regulation. Appellees have never argued that there can be **no** regulation of the medical profession or of prescription drugs. SB 423 is hardly a good faith effort to "regulate" medicine. As Judge Reynolds found, it will "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." Order, pp. 11-12 (emphasis added).

With respect to the rights of providers, *Wiser* reinforced the important holding of *Wadsworth* that the opportunity to pursue employment is itself, a fundamental right. *Wiser* simply distinguished *Wadsworth* by noting that the statute involved did not completely prohibit denturists from performing partial denture work, all that it did was require a dentist's referral. *Id.*, ¶ 23. SB 423 is not simple "regulation"—it completely prohibits a provider from accepting remuneration. During the hearing, Judge Reynolds stated the obvious—that it is

unlikely that "guardian angels" would step forward and see to the needs of patients free of charge. Tr. 665.

The Act, which purports to allow access to medical marijuana but then effectively cuts off that access, is completely arbitrary, is not reasonably tailored to governmental needs, and therefore also offends substantive due process. *See Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 493, 740 P.2d 668, 671 (1987); *Newville v. Dep't. Family Services*, 267 Mont. 237, 252, 883 P.2d 793, 802 (1994).

This Court said in *Town & Country Foods, Inc. v. City of Bozeman*:

> Substantive due process primarily examines underlying substantive rights and remedies to determine whether restrictions are unreasonable or arbitrary **when balanced against the purpose of a government body in enacting a statute, ordinance or regulation.**

2009 MT 72, ¶ 17, 349 Mont. 452, 203 P.3d 1283 (emphasis added.)

The ostensible purpose of the Act is to provide for the use of medical marijuana by those persons with debilitating medical conditions in order to alleviate their medical symptoms. At the same time, the Act tries to control the production and distribution of marijuana for non-qualifying purposes. This approach is like using a sledge hammer to kill a fly. Without **access**, the Act is a hollow promise of relief. The Bill dries up all reasonable access with its onerous restrictions on production. There are clearly many less drastic approaches which would serve the interests of those in medical need, while satisfying the State's interest in curbing illegitimate traffic.

Unlike **every other medicinal drug on the market**, under the Act there is no commercially-available source of supply—a patient is just going to have to fend for himself. All commercial activity in marijuana will be eliminated. Even assuming some abuses and the need to control, this is simply not a **rational response**.

IV. THE COURT SHOULD REJECT THE STATE'S ATTEMPT TO FRAME THE QUESTION AS WHETHER THERE IS A FUNDAMENTAL RIGHT TO MEDICAL MARIJUANA.

A. The State's Contorted Logic.

The State tries to frame the question as, there is no fundamental constitutional right to use medical marijuana, therefore, strict scrutiny does not apply and the State's Legislature has acted rationally to curb abuses. Notably, all of the State's eggs are in one basket—it makes no attempt to justify SB 423 based on some compelling State interest. As demonstrated below, the State is wrong, but beyond that the new statute does not even survive reasonable review scrutiny—it is not reasonably tailored to accomplishing legitimate State ends, and many of its provisions are plainly violative of the rights of the people.

B. The State's Literal Textual Argument Has Been Universally Rejected.

The State's Memorandum below **repeatedly** characterized Plaintiffs' position as a claim that there is a fundamental right to use medical marijuana. (CRR No. 23.) The State then took an extremely literal approach, pointing out that

no such right is **textually** found in the text of the Constitution. Therefore, argued the State, it does not need to justify SB 423 by a compelling showing. Although it has refined its approach on appeal, its argument is still the same.

The State tried the same literal tactic, unsuccessfully, in *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997). In that case homosexuals challenged the State's anti-sodomy statutes. The State tried to characterize the issue as whether the Constitution textually confers a fundamental right upon homosexuals to engage in sodomy, citing *Bowers v. Hardwick*, 478 U.S. 188 (1986). This Court rejected that characterization and found that Montana's fundamental right of privacy is extremely broad:

> In *Bowers v. Hardwick* ... after being charged with violating a Georgia statute criminalizing sodomy by committing that act with another adult male in the privacy of his home, Hardwick brought suit to challenge the constitutionality of the statute. The United States Supreme Court determined that the federal constitution does not confer a fundamental right upon homosexuals to engage in sodomy, thus the statute was held to be constitutional. However, Justice Blackmun dissenting in *Bowers*, articulated that *Bowers* was **not about the right to engage in homosexual sodomy, but rather it was about "the right to be let alone"** as enunciated by Justice Brandeis' dissent in *Olmstead*. *Bowers*, 478 U. S. at 199 ....

Gryczan, 283 Mont. at 448, 934 P.2d at 121 (emphasis added).[12] This Court, in *Gryczan*, roundly rejected the State's attempt to characterize the case as a "right to

[12]Subsequent to Montana's decision in *Gryczan*, *Bowers* was reversed in *Lawrence v. Texas* ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.") 539 U.S. 568, 578 (2003).

sodomy," stating, "...Montana's Constitution affords citizens broader protection of their rights to privacy than does the federal constitution. ... Unlike the federal constitution, Montana's Constitution explicitly grants to all Montana citizens the right to individual privacy." *Id.* This Court found that the right of privacy entailed broad rights of personal autonomy and the "right to be let alone." *Id.*, 283 Mont. at 445, 934 P.2d at 125. It stated:

> Since the right to **privacy** is explicit in the Declaration of Rights in the Montana Constitution, **it is a fundamental right and any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis.** To withstand a strict-scrutiny analysis, the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest.

Id., 283 Mont. at 499, 934 P.2d at 122 (emphasis added).

A few illustrations easily show just how sophomoric the State's *literal* argument is:

- In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the State of Oklahoma probably would have prevailed if, instead of applying fundamental equal protection principles, the court had framed the issue as, **"Does the U. S. Constitution LITERALLY contain a fundamental right against castration of a person who has been convicted and imprisoned two or more times?"**

- In *Loving v. Virginia*, 388 U.S. 1 (1967), the Commonwealth of Virginia probably would have prevailed if, instead of applying the broad Federal Equal Protection Clause, the issue had been phrased as, **"Does the U. S. Constitution LITERALLY contain a provision that forbids interracial marriage?"**

- In *McLaughlin v. Florida*, 379 U.S. 184 (1964), the State of Florida probably would have prevailed if, instead of applying broad equal protection provisions, the court had phrased the question, **"Does the U. S. Constitution LITERALLY guarantee the right of interracial fornication?"**

- In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the State of Connecticut probably would have prevailed in its statute denying married couples the right to contraceptive advice if, instead of applying general privacy, the court had framed the question as, **"Does the U. S. Constitution LITERALLY guarantee the right of married couples to use contraceptives?"**

- In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Commonwealth of Massachusetts probably would have prevailed in denying unmarried couples the right to obtain contraceptives if, instead of applying broad privacy protections, the court had phrased the question as, **"Does the U. S. Constitution LITERALLY provide for the right of unmarried couples to use contraceptives?"**

- In *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, the State of Montana may have prevailed if the question were literally, **"Does the Montana Declaration of Rights LITERALLY guarantee procreative autonomy?"**[13]

In sum, the State may not avoid rigorous analysis simply by re-characterizing the right at stake. The question is not whether Montana's Constitution textually protects the right to use medical marijuana, or the right to commercial intercourse. Rather, the question is, whether a Montanan's rights to

[13]Instead, the *Armstrong* court said, referring to the Constitutional Convention's reliance on *Griswold* and other developments in the law, "... it is clear that the procreative autonomy component of the personal autonomy is protected by Montana's constitutional right of individual privacy found at Art. II, Sec. 10." *Armstrong, supra*, ¶ 48.

pursue good **health**, personal autonomy and privacy, life's basic necessities and personal **dignity** are involved.

In *Walker, supra*, this Court cited the *Clifford* article with approval, as follows:

> "[I]n the case of the **mentally ill, basic human needs must be met**, along with adequate opportunity to develop capacities, and adequate mental health care must be provided to treat the illness. It is natural to speak of the inherent dignity of such developmentally disabled or mentally ill persons and to speak of the requirement that such vulnerable persons be treated with dignity."

Id., ¶ 81 (emphasis added). There is no sound reason why adequate **physical health** care is any less fundamental than pursuit of good **mental health.** Montana's Constitution, with its dignity, health, and privacy/personal autonomy provisions clearly requires the State to justify the legislation with compelling reasons.

Under the application of strict scrutiny, the State must show that "... the law is narrowly tailored to serve a compelling government interest." *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 13, 325 Mont. 1, 103 P.3d 1019. "Necessarily, *demonstrating* a compelling interest entails something more than simply saying it is so." *Wadsworth v. State*, 275 Mont. 287, 303, 911 P.2d 1165 (1996) (emphasis in original). The Act does not survive strict scrutiny.

V. THE STATE MAKES LITTLE EFFORT TO JUSTIFY THE LEGISLATURE'S RESTRICTIVE PROVISIONS. THE ACT IS UNCONSTITUTIONAL EVEN UNDER RATIONAL BASIS REVIEW.

Not only does the Act not meet a compelling state interest, but it fails even the lowest level of constitutional review. Rational basis review "... requires the government to show that the objective of the statute was legitimate and bears a rational relationship to the classification used by the Legislature." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 19, 302 Mont. 518, 15 P.3d 877.

The evidence is now overwhelming that marijuana, while not completely harmless, is much more benign than many other pharmaceutical products, as well as tobacco and alcohol. The State makes no attempt to defend the statute with any evidence of scientific harms such as toxicity, harmful side effects, or habituation rates. Instead, the State's Brief **assumes** harms and falls back on shibboleths such as "abuses." State's Brief, pp. 9-10, 23. The State cites the growth in the number of users and caregivers, and the number of young people receiving medical marijuana cards; it argues that some physicians are inappropriately authorizing persons to obtain medical marijuana cards. The State argues that marijuana is still illegal in Montana (except for medical marijuana) and is a Schedule I ("prohibited") substance under Federal law. *Id.*, pp. 22-23. The State is at its patronizing best when it argues that, "By allowing the commercial trade of medical marijuana, the Legislature would have exposed Montanans, including Plaintiffs, to

the very real possibility of federal criminal prosecution." *Id.*, p. 23. In conclusory fashion, the State argues it has a legitimate state interest in controlling a substance that is illegal and it falls back on deference to the Legislature on policy questions.[14]

The State's position is circular. Marijuana is illegal. There is increased use. Therefore the Legislature may address the increased use because marijuana is illegal, and it may do so free of constitutional constraint. It's like saying in *Gryczan* that sodomy is, by definition, illegal, and therefore, the State can proscribe it—or that, prior to 1967 (when the Virginia criminal anti-miscegenation statute was invalidated in *Loving, supra*) miscegenation was on the rise so the Legislature could do something about it.

What **are** the harms in marijuana that are **so great**, that they somehow justify the Act's severe reaction? Law enforcement witness Long made a laughable attempt to address marijuana's harms resulting from a grow operation. He cited faulty wiring which could cause fires and electrocution. "There's mold. There's pesticide issues. There's bugs. Mold is one of the bigger ones." Tr. 542.

The State particularly emphasizes the problems with the "traveling medical clinics" that went from location to location with in-house rogue doctors who readily certified cardholders with minimal medical workup. State's Brief, pp. 4-5.

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[14]This is much like the fanatical deference by Justice Potter Stewart when he called the Connecticut law forbidding contraceptives to married couples "uncommonly silly" but would not join the majority in invalidating it. *Griswold, supra*, 381 Mont. at 496.

This problem is already addressed. In 2010, the Board of Medical Examiners adopted a new policy making it clear that medical marijuana workups must meet the same standard of care as any other medical workup. It prohibits the exclusive use of "teleconference methods." Exhibit 115 ("It is the Board of Medical Examiner's position that the certification of an individual to use marijuana for a medical condition requires the same standard of care as required when any conventional medication is prescribed."). Dr. Guggenheim testified that the Board has in place a well-established complaint process and is prepared to discipline physicians who do not follow the expected standard of care. She conceded that this could be an effective tool in dealing with the previous problem of medical over-certification for medical marijuana cards. Tr. 471-473.

Further, law enforcement has the means to pursue illegal practices but their efforts are tepid. For example, Officer Mark Long testified that he posed as a patient at these traveling clinics, went through the "whole process" and was certified to get a card, but did nothing to enforce the law:

> Q. Now, you heard testimony yesterday that the Board of Medical Examiners has the ability to investigate complaints made against doctors. Right?
> A. [Long]: Yes.
> Q. And you didn't take advantage of the process?
> A. [Long]: No.

Tr. 537-538. He filed no charges. *Id.*

It is clear that the limited abuses cited by the State could easily be addressed by legislation that is much less draconian than is SB 423. In fact, the Act was developed not to redress specific objective problems, but out of an irrational hostility to marijuana.

The parade of horribles that has long held sway in some circles regarding marijuana is largely a myth.

Statutes subject to constitutional challenge may not be justified by myth, religious prejudice, or cultural bias. A statute may not be based on sheer prejudice or revealed knowledge—it must be based on reasonably objective evidence that there is a need. In the case of marijuana, the asserted harms are largely imaginary based on attitudes tainted by years of false propaganda.

Further, legislation based upon majoritarian morality cannot be justified. This Court in *Gryczan* squarely rejected the State's plea that the court abdicate its constitutional responsibility and completely defer to legislative judgment, stating:

> That said, it does not follow, however, that **simply because the legislature has enacted as law what may be a moral choice of the majority**, the courts are, therefore, bound to simply acquiesce.

Id., 283 Mont. 433, ¶ 20 (emphasis added). And:

> **Our Constitution does not protect morality**; it does, however, guarantee to all persons, whether in the majority or in a minority, those certain basic freedoms and rights which are set forth in the Declaration of Rights, not the least of which is the right of individual privacy. Regardless that **majoritarian morality** may be expressed in the public-policy pronouncements of the legislature, **it remains the**

> **obligation of the courts**—and of this Court in particular—**to scrupulously support, protect, and defend those rights and liberties guaranteed to all persons under our Constitution**. The oath of office taken by every justice and every judge in this state (not to mention every legislator as well) demands precisely that[.] Art. III, Sec. 3, Mont. Const.

Id. (emphasis added).

The herb has been around and used for thousands of years with no known deaths. Grinspoon Affidavit, ¶ 8. The side effects of marijuana are well known and not particularly serious. *Id.* Its medical benefits are clear. *Id.*, ¶¶ 8, 17, 18-25. The numerous constitutionally objectionable features of SB 423 are simply not even **rationally** related to any legitimate government objective.

VI. THE ACT IS SO PERMEATED WITH CONSTITUTIONAL VIOLATIONS THAT THE SEVERANCE WAS IMPROPER.

The District Court erred by severing SB 423 because the remainder of the statute is not "complete in itself and capable of being executed in accordance with the apparent legislative intent." *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 399, 632 P.2d 300, 311 (1981). The serious defects set forth above, the unconstitutional intrusion into the doctor-patient relationship, the unduly punitive features of the statute vis-à-vis doctors, the gross privacy violations of providers and medical patients, and the calculated deprivation of rights of providers to pursue a viable practice, all go to the heart of the statute.

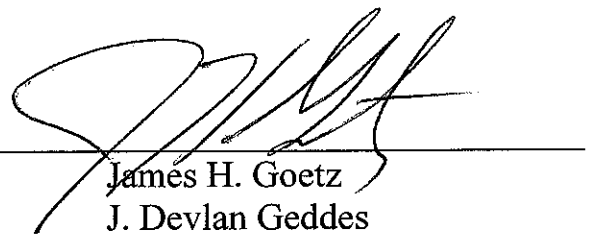
In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006), the Court addressed the rule that where certain portions of a statute are constitutional, the Court will try to "limit the solution to the problem" by severing its problematic portions while leaving the remainder intact. However, where the constitutional flaws are pervasive, as they are here, a court should not invade the legislative domain by attempting to salvage the statute by excision. *Id.* at 330. In those cases, the statute must be voided *in toto*. This is especially true when the resulting uncertainties caused by excision leave hanging questions for providers (and their employees) and cardholders who, if they do not punctiliously comply with the excised law, can be charged criminally for possessing dangerous drugs.

CONCLUSION

For the foregoing reasons the Preliminary Injunction Order should be affirmed in part and remanded for the purpose of directing entry of a preliminary injunction enjoining the entirety of SB 423 and reinstating the previous law pending a hearing on the permanent injunction.

DATED this 17th day of January, 2012.

GOETZ, GALLIK & BALDWIN, P.C.

By: 

James H. Goetz
J. Devlan Geddes

Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft WordPerfect does not exceed 9,998 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

DATED this 17th day of January, 2012.

GOETZ, GALLIK & BALDWIN, P.C.

By: _____
James H. Goetz

Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that the foregoing document was served upon the following counsel by the means designated below on this 17th ay of January, 2012.

- ☐ U.S. Mail
- ☐ Federal Express
- ☑ Hand-Delivery
- ☐ Via Fax: (406) 444-3549
- ☐ E-mail: jmolloy@mt.gov
  ssegrest@mt.gov

Steve Bullock, Attorney General
James P. Molloy, Assistant Attorney General
J. Stuart Segrest, Assistant Attorney General
Montana Department of Justice
P. O. Box 201401
Helena, MT 59620-1401
Attorneys for the State of Montana

James H. Goetz
J. Devlan Geddes

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APPENDIX 2 – Case Register Report

I. June 30, 2011

A. Patient (Cardholder) (HIV in severe need of medical marijuana)

Access?

B. Caregiver

II. July 1, 2011

A. Same Patient (Cardholder) (HIV in severe need of medical marijuana)

Access?

B. "Caregiver" eliminated

SB 423, Sec. 35(4): "A person who obtained a registry identification card as a **caregiver** pursuant to 50-46-103 before [the effective date of this section] **may not be in possession** of mature marijuana plants, seedlings, cuttings, clones, usable marijuana, or marijuana-related products on July 1, 2011, if the person has not obtained a registry identification card pursuant to the provisions of [sections 1 through 23] as provided for in subsection (2). Before July 1, 2011, a caregiver who has not obtained a registry identification card pursuant to [sections 1 through 23] **shall take** any mature marijuana plants, seedlings, cuttings, clones, usable marijuana, or marijuana-related

APPENDIX 1

products still in the caregiver's possession **to the law enforcement agency** having jurisdiction in the caregiver's area. **The law enforcement agency shall destroy the items.**

C. "Providers" may supply the needed medical marijuana

May have up to one ounce of usable marijuana and 4 mature plants and 12 seedlings for each cardholder, SB 423 Sec. 10(1)(b), (limited to 3 cardholders)

D. But, how does provider get that?

1. May not ". . . buy or sell . . . usable marijuana" Sec. 5(6)(b)

E. So, Provider must **grow** his/her own

F. But,

1. Setting aside the time involved, how is the growing operation to be done?

2. DHHS FAQ

Where can I get materials and marijuana seeds or cuttings to get started? The department does not have information about growing marijuana, but recommends using the internet, family and friends as resources to find information.

G. A provider "may not . . . buy or sell mature marijuana plants, seedlings, cuttings, clones, usable marijuana, or marijuana-infused products" SB 423, Sec. 5(6)(b)

H. So—that leaves **seeds**

I. But, MCA 45-9-102(2) criminalizes marijuana possession, and

Sec. 50-32-101(17) defines marijuana as:

"Marijuana (marihuana)" means all plant material from the genus cannabis containing tetrahydrocannabinol (THC) or **seeds** of the genus **capable of germination**.

J. Leaving available: "Seeds of the genus (**incapable**) of germination

K. ------ **CATCH 22** ------

Catch 22, by Joseph Heller

"There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. **All he had to do was ask**; and **as soon as he did, he would no longer be crazy** and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he were sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle."

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Case Register Report
DV-25-2011-0000518-OC

Montana Cannabis Industry Association, etal. vs. State Of Montana

iled: 5/13/2011
ubtype: Civil-Other

Status History

Open	5/13/2011
On Appeal	8/10/2011
Closed	9/15/2011

Plaintiffs

Pl. no. 1 Montana Cannabis Industry Association,

Attorneys

Goetz, James H.	(Primary attorney)	Send Notices
Geddes, J. Devlan		Send Notices
Coleman, James Barr		Send Notices

Pl. no. 2 Matthews, Mark

Attorneys

Goetz, James H.	(Primary attorney)	Send Notices
Geddes, J. Devlan		Send Notices
Coleman, James Barr		Send Notices

Pl. no. 3 Hamp, Shirley

Attorneys

Goetz, James H.	(Primary attorney)	Send Notices
Geddes, J. Devlan		Send Notices
Coleman, James Barr		Send Notices

Pl. no. 4 Yeager, Shelly

Attorneys

Goetz, James H.	(Primary attorney)	Send Notices
Geddes, J. Devlan		Send Notices
Coleman, James Barr		Send Notices

Pl. no. 5 DOE, JANE

Pl. no. 6 Doe #1, John

Pl. no. 7 Doe #2, John

Pl. no. 8 Geci-Black, M.d., Michael

Attorneys

Goetz, James H.	(Primary attorney)	Send Notices
Geddes, J. Devlan		Send Notices
Coleman, James Barr		Send Notices

Pl. no. 9 Hamp, Charles

Attorneys

Goetz, James H.	(Primary attorney)	Send Notices

APPENDIX 2

Lewis & Clark County District Court
Case Register Report
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Montana Cannabis Industry Association, etal. vs. State Of Montana

Defendants

Def. no. 1 State Of Montana,

Attorneys

Bullock, Stephen C.	(Primary attorney)	Send Notices
Molloy, James P.		Send Notices
Segrest, Jere Stuart		Send Notices

Judge History

Date	Judge	Reason for Removal
5/13/2011	Seeley, Kathy	Substituted
5/24/2011	Reynolds, James P.	Current

Register of Actions

Doc. Seq.	Entered	Filed	Text	Judge
1.000	05/16/2011	05/13/2011	Complaint for Declaratory and Injunctive Relief - Summons issued	Seeley, Kathy
2.000	05/16/2011	05/13/2011	Certification of Notice - Plaintiffs	Seeley, Kathy
3.000	05/16/2011	05/13/2011	(Fax) Plaintiffs' Motion for Temporary Restraining Order	Seeley, Kathy
4.000	05/16/2011	05/13/2011	(Fax) Plaintiffs' Brief in Support of Motion for Temporary Restraining Order	Seeley, Kathy
5.000	05/16/2011	05/13/2011	Plaintiffs' Motion for Temporary Restraining Order	Seeley, Kathy
6.000	05/16/2011	05/13/2011	Plaintiffs' Brief in Support of Motion for Temporary Restraining Order	Seeley, Kathy
7.000	05/16/2011	05/13/2011	Plaintiffs' Motion for Leave to File Overlength Brief	Seeley, Kathy
8.000	05/16/2011	05/13/2011	Order Granting Plaintiffs' Motion to File Overlength Brief	Seeley, Kathy
9.000	05/16/2011	05/13/2011	Plaintiffs' Motion for Preliminary Injunction	Seeley, Kathy
10.000	05/17/2011	05/13/2011	Plaintiffs' Brief in Support of Motion for Preliminary Injunction	Seeley, Kathy
11.000	05/18/2011	05/13/2011	Temporary Restraining Order and Order to Show Cause (Original) - Hearing set for 05/13/2011 at 4:00 p.m.	Seeley, Kathy
12.000	05/18/2011	05/17/2011	Corrected Temporary Restraining Order and Order to Show Cause - (Original) - Hearing set for 05/27/2011 at 1:30 p.m.	Seeley, Kathy
13.000	05/18/2011	05/17/2011	Attached Affidavit to Brief / Praecipe / Plaintiff	Seeley, Kathy
14.000	05/25/2011	05/23/2011	(fax) Motion for Substitution of Judge - Plaintiffs	Reynolds, James P.
15.000	05/25/2011	05/24/2011	(fax) Stipulated Extension of Temporary Restraining Order	Reynolds, James P.
16.000	05/25/2011	05/24/2011	Motion for Substitution of Judge - Plaintiffs	Reynolds, James P.
17.000	05/25/2011	05/24/2011	Assumption - Judge Reynolds assumes jurisdiction from Judge Seeley	Reynolds, James P.
18.000	05/25/2011	05/24/2011	Affidavit of Mailing (Angie Sparks) - Assumption	Reynolds, James P.
19.000	05/25/2011	05/24/2011	Minute Entry (5/24/2011) - Time set for scheduling conference. The hearing set for 5/27/2011 in front of Judge Seeley is vacated. Preliminary injunction hearing is set for 6/20/2011 at 9:00 am.	Reynolds, James P.

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Doc. Seq.	Entered	Filed	Text	Judge
20.000	05/26/2011	05/25/2011	Stipulated Extension of Temporary Restraining Order - Approved	Reynolds, James P.
21.000	06/06/2011	06/03/2011	Defendant's Motion for Leave to File Overlength Brief	Reynolds, James P.
22.000	06/06/2011	06/03/2011	Order Granting Defendant's Motion for Leave to File Overlength Brief - Granted	Reynolds, James P.
23.000	06/07/2011	06/06/2011	State's Memorandum Opposing Plaintiff's Motion for Preliminary Injunction	Reynolds, James P.
24.000	06/07/2011	06/06/2011	Plaintiffs' Unopposed Motion to Allow Testimony by Video-Teleconference	Reynolds, James P.
25.000	06/07/2011	06/06/2011	Order Granting Testimony by Video-Teleconference - Parties may present testimony by video-teleconferencing	Reynolds, James P.
26.000	06/14/2011	06/10/2011	Plaintiffs' Unopposed Motion to Exceed Page Limit	Reynolds, James P.
27.000	06/14/2011	06/10/2011	Order Granting Plaintiffs' Motion to Exceed Page Limit - Granted	Reynolds, James P.
28.000	06/14/2011	06/10/2011	Affidavit of Lester Grinspoon, M.D., in Support of Plaintiffs' Motion for Preliminary Injunction - Plaintiffs	Reynolds, James P.
29.000	06/14/2011	06/10/2011	Plaintiffs' Reply in Support of Motion for Preliminary Injunction	Reynolds, James P.
30.000	06/16/2011	06/15/2011	Plaintiffs' Notice of Errata	Reynolds, James P.
31.000	06/16/2011	06/15/2011	Amended Complaint for Declaratory and Injunctive Relief	Reynolds, James P.
32.000	06/16/2011	06/15/2011	Plaintiffs' Preliminary Injunction Hearing Witness and Exhibit List	Reynolds, James P.
33.000	06/16/2011	06/15/2011	Plaintiffs' Motion for Judicial Notice	Reynolds, James P.
34.000	06/16/2011	06/15/2011	Affidavit of Chris Conrad in Support of Plaintiffs' Motion for Preliminary Injunction - Plaintiffs	Reynolds, James P.
35.000	06/16/2011	06/15/2011	Plaintiffs' Brief in Support of Motion for Judicial Notice (exhibits not scanned)	Reynolds, James P.
36.000	06/17/2011	06/17/2011	Affidavit of John Doe #1 - Plaintiffs	Reynolds, James P.
37.000	06/17/2011	06/17/2011	Affidavit of John Doe #2 - Plaintiffs	Reynolds, James P.
38.000	06/17/2011	06/17/2011	Affidavit of Charlie Hamp - Plaintiffs	Reynolds, James P.
39.000	06/17/2011	06/17/2011	Affidavit of Shirley Hamp - Plaintiffs	Reynolds, James P.
40.000	06/17/2011	06/17/2011	Affidavit of John T. Masterson - Plaintiffs	Reynolds, James P.
41.000	06/17/2011	06/17/2011	Affidavit of Marc Matthews - Plaintiffs	Reynolds, James P.
42.000	06/17/2011	06/17/2011	Affidavit of Shelly Yeager - Plaintiffs	Reynolds, James P.
43.000	06/17/2011	06/17/2011	Plaintiffs' Proposed Findings of Fact and Conclusions of Law RE: Motion for Preliminary Injunction	Reynolds, James P.
44.000	06/17/2011	06/17/2011	State's Pre-Hearing Witness and Exhibit List	Reynolds, James P.
45.000	06/17/2011	06/17/2011	State's Prehearing Proposed Findings of Fact and Conclusions of Law	Reynolds, James P.
46.000	06/17/2011	06/17/2011	State's Notice of Filing of Affidavits in Opposition to Plaintiffs' Motion for Preliminary Injunction	Reynolds, James P.

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Doc. Seq.	Entered	Filed	Text	Judge
47.000	06/17/2011	06/17/2011	Affidavit of Vincent S. Agtarap - State	Reynolds, James P.
48.000	06/17/2011	06/17/2011	Affidavit of Ron Alsbury - State	Reynolds, James P.
49.000	06/17/2011	06/17/2011	Affidavit of Jeff Buska - State	Reynolds, James P.
50.000	06/17/2011	06/17/2011	Affidavit of Michael Touchette - State	Reynolds, James P.
51.000	06/17/2011	06/17/2011	Affidavit of Joshua P. Van Swearingen - State	Reynolds, James P.
52.000	06/17/2011	06/17/2011	Affidavit of Eleanor Cooperider - State	Reynolds, James P.
53.000	06/21/2011	06/20/2011	Acceptance of Service of Supoena and Acknowledgment of Time to Acknowledgment of Time to Appear (issued to Roy Kemp) - Plaintiffs	Reynolds, James P.
54.000	06/21/2011	06/20/2011	Plaintiffs' Supplement to Motion for Judicial Notice - Plaintiffs	Reynolds, James P.
55.000	06/21/2011	06/20/2011	Supplemental Affidavit of Joshua P. Van Swearingen - State	Reynolds, James P.
56.000	06/21/2011	06/20/2011	Affidavit of Dr. Thomas Weiner - State	Reynolds, James P.
57.000	06/21/2011	06/20/2011	Minute Entry (6/20/2011) - Time set for Preliminary Injunction. Testimony given. Exhibits admitted. Court to reconvene on 6/21/2011 at 9:00 a.m.	Reynolds, James P.
58.000	06/27/2011	06/20/2011	Acceptance Of Service Of Subpoena And Acknowledgment Of Time To Appear - Plaintiffs	Reynolds, James P.
59.000	06/21/2011	06/21/2011	Subpoena (issued to Roy Kemp) - Plaintiffs	Reynolds, James P.
60.000	06/30/2011	06/21/2011	(Amended) Minute Entry (6/21/2011) - Amended as to State's Exhibit #144 admitted	Reynolds, James P.
61.000	07/05/2011	06/21/2011	Minute Entry (06/21/2011) - Time set for preliminary injunction hearing. Exhibits admitted. Testimony given. Hearing to reconvene on 06/22/2011 at 8:30 a.m.	Reynolds, James P.
62.000	07/05/2011	06/22/2011	Minute Entry (06/22/2011) - Time set for preliminary injunction hearing. Exhibits admitted. Testimony given. Matter deemed submitted.	Reynolds, James P.
63.000	07/05/2011	06/22/2011	Amended Minute Entry (06/21/2011) - Amended as to State's exhibits #146 and 147 were offered and admitted.	Reynolds, James P.
64.000	07/05/2011	06/22/2011	Record of Exhibits - Preliminary Injunction, 06/20, 21, and 22/2011	Reynolds, James P.
65.000	07/05/2011	06/22/2011	Bench Memorandum Concerning the Status of the Law After Injunction - Plaintiffs	Reynolds, James P.
66.000	06/30/2011	06/24/2011	State's Amended Proposed Findings Of Fact 100 And 102 - State	Reynolds, James P.
67.000	06/30/2011	06/24/2011	State's Bench Memorandum On Severability And The Status Of The Law If Enjoined In Part Or In Its Entirey	Reynolds, James P.
68.000	07/05/2011	06/27/2011	Plaintiff's Motion for Leave to File the Affidavit of Sandy Wikle	Reynolds, James P.
69.000	07/05/2011	06/28/2011	Order Granting Plaintiffs' Motion for Leave to File the Affidavit of Sandy Wikle - Granted	Reynolds, James P.
70.000	07/05/2011	06/28/2011	Affidavit of Sanday Wikle - Plaintiffs	Reynolds, James P.
71.000	06/30/2011	06/30/2011	Order on Motion for Preliminary Injunction	Reynolds, James P.

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Doc. Seq.	Entered	Filed	Text	Judge
72.000	08/08/2011	08/04/2011	Answer to Amended Complaint for Declaratory and Injunctive Relief - Defendant	Reynolds, James P.
73.000	08/16/2011	08/10/2011	(copy) (Supreme Court) Notice of Filing	Reynolds, James P.
74.000	08/16/2011	08/10/2011	Notice of Appeal - State of Montana	Reynolds, James P.
75.000	08/18/2011	08/16/2011	Notice of Cross-Appeal - Appellees/Cross-Appellants	Reynolds, James P.
76.000	09/15/2011	09/15/2011	Certificate of Exhibits	Reynolds, James P.
77.000	09/15/2011	09/15/2011	Transmittal of Record to Supreme Court	Reynolds, James P.