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

10 MONTANA CANNABIS INDUSTRY
11 ASSOCIATION, MARK MATTEWS,
12 SHIRLEY HAMP, SHELLEY YEAGER,
13 JANE DOE, JOHN DOE #1, JOHN DOE
14 #2, MICHAEL GECI-BLACK, M.D.,
15 CHARLIE HAMP,

16 Plaintiffs,

17 v.

18 STATE OF MONTANA,

19 Defendant.

Cause No.: DDV-2011-518

**ORDER ON
PRELIMINARY
INJUNCTION**

20 This matter is before the Court following remand from the Montana
21 Supreme Court. *Mont. Cannabis Indus. Assn. v. State*, 2012 MT 201, 366 Mont 224,
22 286 P.3d 1161 (herein, *MCIA*). The Supreme Court reversed this Court's previous
23 entry of a preliminary injunction on the basis that this Court used the wrong standard
24 of review, *i.e.*, strict scrutiny. The Supreme Court remanded the case with
25 instructions to review the challenged Montana Medical Marijuana Act pursuant to
the rational basis standard of review.

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Upon remand, Plaintiffs Montana Cannabis Industry Association and others (collectively MCIA) have again moved for a preliminary injunction. James Goetz and J. Devlan Geddes represent MCIA. The State of Montana opposes this motion. James Molloy and Stuart Segrest represent the State. On October 26, 2012, the Court entered a Temporary Restraining Order.

The Court conducted an evidentiary hearing on December 13, 2012. The parties fully briefed the issue and MCIA's motion is ripe for decision.

From the testimony and evidence presented,¹ the Court draws 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 its passage. The MMA sets forth a statutory scheme for allowing the controlled medicinal production and use of marijuana in Montana.

2. In response to a spike in the number of persons authorized to use medical marijuana, the 2011 Montana Legislature passed Senate Bill 423 (SB 423), repealing the prior MMA and enacting a new medical marijuana law, codified as the Montana Marijuana Act. Sections 50-46-301 to -344, MCA.

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¹ The parties agreed that the Court could also consider the testimony and evidence submitted at the June 2011 hearing on MCIA's previous motion for preliminary injunction.

1 3. Plaintiffs then filed the present action challenging SB 423 on a
2 variety of grounds. Plaintiffs immediately sought, and obtained from this Court, a
3 temporary restraining order on one section of the bill scheduled to take effect on
4 May 13, 2011, which would have banned all advertising by providers of medical
5 marijuana.² The State consented to the preliminary injunction of this section of
6 SB 423. *MCIA*, ¶ 6.

7 4. Plaintiffs initially sought a preliminary injunction enjoining the
8 implementation and enforcement of the remaining provisions of SB 423 until a full
9 trial on Plaintiffs' various challenges could be heard. This was the subject of the
10 Court's hearing beginning on June 20, 2011. In their post-remand motion, *MCIA*
11 seeks a preliminary injunction of certain sections this Court previously enjoined, *i.e.*,
12 those sections of SB 423 limiting providers to only three clients and prohibiting any
13 commercial transaction with regard to medical marijuana. The Supreme Court
14 reversed this Court's previous decision to preliminarily enjoin these sections on the
15 basis that the Court used an incorrect standard of review.³

16 5. Plaintiffs consist of persons and entities having a variety of
17 connections with medical marijuana. The Montana Cannabis Industry Association
18 is a non-profit trade association dedicated to promoting, *inter alia*, professionalism
19 in the cannabis industry in Montana. Some of the persons testifying at the hearings
20 are physicians or healthcare workers who have either studied medical marijuana or
21 recommended its use to their patients. Some of the persons testifying at the hearings

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

24 ³ This Court also enjoined sections 50-46-341, -329(1)-(3), and -303(10), MCA, which are not at
25 issue on remand. *See MCIA*, ¶ 6.

1 are users, or spouses of users, of medical marijuana. Two of the witnesses testifying
2 at the hearing are providers of medical marijuana.

3 6. Point Hatfield testified in June 2011. He is now 61 years of age
4 and has cancer, the treatment of which caused him severe nausea and loss of
5 appetite. Point tried various prescribed medications and homeopathic remedies to
6 address his symptoms, but these were not successful. Medical marijuana provided
7 him with instant relief from the severe nausea and stimulated his appetite. In his
8 opinion, without medical marijuana, he would now be dead because he could not
9 eat. He was unsuccessful in trying to grow marijuana.

10 7. Plaintiff Charlie Hamp testified in June 2011. Charlie was 79
11 years of age. His wife, Plaintiff Shirley Hamp, was 78 years old and had undergone
12 an esophagectomy, in which the esophagus is removed and replaced with lining
13 from the stomach. As a result of this procedure, Shirley lost a great deal of weight
14 and had no appetite. Various other methods of appetite stimulation did not work for
15 Shirley. It was recommended she use medical marijuana, which has worked as an
16 appetite stimulant. Shirley tried consuming marijuana in foods and in mist form, but
17 found that taking it as a tincture in her tea every morning worked best. Shirley has
18 gained back some of the weight she lost. Charlie retired from a career as a sales
19 manager and has no experience or expertise as a plant grower of any kind. Were
20 Charlie to become a provider for his wife, he would be barred from growing
21 marijuana in the home they share because section 50-46-308(7)(b), MCA, prohibits
22 providers from sharing property used for cultivation and manufacture with a
23 registered cardholder.

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1 8. Lori Burnam⁴ testified at the December 13, 2012 hearing. She
2 was 66 years of age, weighed 69 pounds and appeared in court using a wheelchair
3 and oxygen. Lori suffered from a range of debilitating medical conditions including
4 cancer, emphysema, double radical mastectomy, and a broken hip. She was a
5 registered cardholder and took medical marijuana mainly for symptoms caused by
6 cancer. She tried prescription medications for pain, anxiety and appetite stimulation,
7 but these medications had substantial side effects, including making her “comatose”
8 with accompanying horrible nightmares and sweats. She then used medical
9 marijuana, which had much less significant side effects.⁵ It stimulated her appetite
10 and allowed her to interact positively with her family. She obtained her medical
11 marijuana from a commercial provider, who told her that if the provisions barring
12 commercial transactions were to go into effect, the provider would close its
13 business. Lori did not have the physical ability and stamina to grow her own
14 medical marijuana.

15 9. Melva Jean Stuart testified at the December 13, 2012 hearing.
16 She is 65 years of age and assumed the witness stand with the assistance of a cane.
17 Melva has severe degenerative scoliosis, leukemia, sleep apnea and trigeminal
18 neuralgia, a condition causing “horrific” pain in her facial nerves. She has tried
19 several prescription medications to deal with her pain, including vicodin, morphine,
20 oxycontin, and hydrocodone. Because of her small stature, these medications
21 overwhelm her system and she has awoken on the floor several times, twice with

22 ⁴ Burnam died on January 10, 2013. Helena Independent Record, *Hamilton Medical Marijuana*
23 *Advocate Dies at 66*, [http://helenair.com/news/state-and-regional/hamilton-medical-marijuana-](http://helenair.com/news/state-and-regional/hamilton-medical-marijuana-advocate-dies-at/article_b75c6628-5e70-11e2-844c-001a4bcf887a.html)
24 [advocate-dies-at/article_b75c6628-5e70-11e2-844c-001a4bcf887a.html](http://helenair.com/news/state-and-regional/hamilton-medical-marijuana-advocate-dies-at/article_b75c6628-5e70-11e2-844c-001a4bcf887a.html) (Jan. 14, 2013).

25 ⁵ Lori testified that the cost of her medical marijuana was \$200 - \$300 per month, while the cost of
the prescribed drugs was \$1,000 to \$1,500 per month.

1 paramedics attending her. Melva is a registered cardholder and uses medical
2 marijuana to assist with her nausea and loss of appetite from chemotherapy. Since
3 beginning to use marijuana, she has been able to be weaned from the narcotic pain
4 relievers. She is also able to interact socially. Without the medical marijuana, she
5 testified she would be housebound because she would not know when she might
6 collapse from the effects of the narcotic medications she had been taking. She
7 resides in federally subsidized housing which prohibits her from growing medical
8 marijuana. While she has successfully grown houseplants, she does not have the
9 knowledge or physical ability to grow medical marijuana. Melva obtains her
10 medical marijuana from a commercial provider.

11 10. Patricia Roath testified at the December 13, 2012 hearing. She
12 is 54 years old and has been diagnosed with end stage uterine cancer; she is a
13 registered cardholder. All told, Patricia has had nine surgeries and biopsies, two
14 rounds of radiation and one round of chemotherapy. The radiation treatment to her
15 uterus destroyed the lining of the digestive system, with the result that Patricia lost
16 30 pounds within about two weeks of starting treatments. She uses medical
17 marijuana to reduce her nausea, stimulate her appetite, and as an aid for sleep and
18 anxiety reduction. It allowed her to keep working while undergoing treatment, an
19 important consideration given that she is the sole income-earner in her household.
20 She tried prescription medications for her various conditions, but medical marijuana
21 worked much better. Despite being a fairly good gardener, she was unable to grow
22 marijuana. She also tried to keep alive the plants she purchased from her provider,
23 but was unsuccessful. She obtains her medical marijuana from a commercial
24 provider. If her provider were to close its operation, she would be compelled to
25 resort to the black market to obtain marijuana.

1 11. William Reid testified at the December 13, 2012 hearing. He is
2 65 years old and is a retired postal worker. He is currently an authorized provider of
3 medical marijuana in Billings. William suffers from stenosis of the spine, scoliosis
4 and degenerative disk disease causing chronic pain. He is also a registered medical
5 marijuana cardholder. William's use of medical marijuana was much more effective
6 than prescription drugs for treating his pain. The prescription drugs made him
7 dysfunctional and this experience led him to become a provider. William currently
8 provides medical marijuana to 15 cardholders, although before SB 423 was passed,
9 he served about 180 patients. He has about \$180,000 invested in his growing
10 operation at his residence. He testified that he provided clones of the marijuana
11 plants to his patients and, out of the 180 patients, only two were able to grow their
12 own medical marijuana even with his assistance. None of his current 15 patients
13 could grow their own medical marijuana. If the provisions of SB 423 barring
14 commercial transactions in medical marijuana go into effect, he will close his
15 operation.

16 12. Plaintiff Jesse Rumble testified at the December 13, 2012
17 hearing.⁶ Jesse is an authorized medical marijuana provider and a registered
18 cardholder. He became involved with medical marijuana because of his
19 grandmother's positive experience using medical marijuana. His business currently
20 serves approximately 60 customers. He provides medical marijuana in various
21 forms, including edible products, salves, tinctures, and candies. He provides various
22 kinds of medical marijuana depending on the needs of his customers, whether for
23 appetite stimulation, anxiety reduction, nausea relief, or other needs. He cultivates

24 ⁶ Jesse is identified as Plaintiff John Doe # 1 in the complaint.
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1 30-35 different strains of medical marijuana that assist in meeting these various
2 needs. It takes three to four years to grow a serviceable marijuana plant from seed.
3 A successful “small-grow” operation costs about \$3,500 to set up and requires
4 additional money to pay for supplies and utilities to maintain. If the provisions of
5 SB 423 barring commercial transactions are allowed to take effect, he will close his
6 business. Even if he were to continue providing medical marijuana *gratis* as
7 contemplated by section 50-46-308(6), MCA, he would be limited by section
8 50-46-308(3), MCA, to providing it to only two other persons. His remaining
9 58 customers would have to find another source for their medical marijuana.

10 13. In passing SB 423, the legislature placed much greater
11 restrictions on the medical conditions for which a person may be allowed a medical
12 marijuana card. For a person to receive a medical marijuana card, the medical
13 condition must be “debilitating.” Section 50-46-302(2), MCA. “Debilitating” is
14 defined as “denoting or characteristic of a morbid process that causes weakness.”
15 mediLexicon, *Stedman’s Medical Dictionary* (Lippincott Williams & Wilkins 2006),
16 available at <http://www.medilexicon.com/medicaldictionary.php?t=22971> (last
17 accessed Jan. 11, 2013). The obvious goal of the legislature in imposing these
18 restrictions was to limit the availability of medical marijuana to only those most
19 in need of this substance and thus to limit the number of persons qualifying for
20 a medical marijuana card. SB 423 also limited the eligibility of minors, and
21 prohibited persons on probation and parole from qualifying for a medical marijuana
22 card. Section 50-46-307(2), (3), (4), MCA. These provisions were not enjoined by
23 this Court’s prior order.

24 14. To further restrict the availability of medical marijuana, the
25 legislature also imposed restrictions which limit a medical marijuana provider to

1 supplying medical marijuana to only three persons and prevented the provider from
2 receiving any form whatsoever of compensation for providing the medical
3 marijuana. Section 50-46-308(3), (6) MCA. These provisions were previously
4 enjoined by this Court.

5 15. As of March 2011, there were 29,948 registered patients and
6 4,848 registered caregivers.⁷ (Def.'s Ex. 101.) Under the more restrictive eligibility
7 requirements of SB 423, as of November 2012, there were 8,404 registered
8 cardholders and 293 registered providers. Of the currently registered cardholders,
9 3,193 grow their own medical marijuana; the remaining 5,211 cardholders rely on
10 providers to supply them with medical marijuana. (Pls.' Ex. 24.) It is reasonable to
11 assume that many if not most of these latter cardholders are those with the most
12 severe medical conditions. It is also reasonable to assume that some of the
13 providers, such as those who testified or were referred to in the hearings, will close
14 their operations if the provisions of SB 423 barring commercial transactions go into
15 effect. Even assuming all 293 of the currently registered providers continue in
16 business, the limitation of three cardholders per provider means that the existing
17 providers could provide medical marijuana to a maximum of 879 cardholders.⁸ This
18 means that approximately 4,332 of the currently registered cardholders would have
19 no source of medical marijuana.⁹ These are presumably the cardholders with the
20 most severe medical conditions preventing them from growing their own medical

21 ⁷ The terms "cardholder" and "provider" replaced the former terms "patient" and "caregiver" in
22 the prior MMA. *Compare* section 50-46-302(10), (12), MCA (2011) *with* section 50-46-102(1),
23 (8), MCA (2009).

24 ⁸ If the provider is also a cardholder, he may only provide medical marijuana to another two
cardholders. Section 50-46-308(3), MCA.

25 ⁹ Total number of cardholders (8,404) minus the cardholders who provide for themselves (3,193)
and the cardholders serviced by providers (879) = cardholders without providers (4,332).

1 marijuana.¹⁰ Approximately 1,500 additional providers would be required to come
2 forward to service these cardholders under the three person limit set forth by
3 SB 423. These cardholders would be injured or irreparably harmed if the provisions
4 of SB 423 barring commercial transactions were allowed to go into effect. The
5 Court can envision few forms of injury or harm more substantial than to deprive
6 persons with debilitating medical conditions of what may be the only form of
7 effective relief from those conditions as testified to before the Court.

8 16. The State asserts, both in argument before this Court and in the
9 statute, that providers would be willing to provide medical marijuana for up to three
10 persons without any form of compensation or remuneration whatsoever from these
11 cardholders. In the two hearings before this Court, neither side has produced a
12 provider willing to go to the expense and labor of growing medical marijuana and
13 then give it away without some form of compensation or remuneration. To the
14 contrary, all the providers who testified or were referred to have stated that if they
15 are not able to charge for their medical marijuana, they will close their operations.

16 17. At the hearing on December 13, 2012, the State proposed the
17 Court extend its temporary restraining order for an additional period, such as 45
18 days, in which the legislature could consider further amendments to MMA, based on
19 the experience of the past two years.

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

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24 ¹⁰ To be clear, these are cardholders who were certified by a registered physician as suffering from
25 one of the debilitating medical conditions delineated by the legislature before the State issued
them a valid registration card.

1 **CONCLUSIONS OF LAW**

2 1. The ultimate issue before this Court on remand from the
3 Supreme Court is “to apply the rational basis test to determine whether §§
4 50-46-308(3), (4), (6)(a) and (6)(b), MCA, should be enjoined.” *MCIA*, ¶ 35.

5 2. Prior to reaching this ultimate issue, however, the immediate
6 issue before the Court is whether these provisions should be preliminarily enjoined.
7 A preliminary injunction may be issued in any of the following cases:

8 (1) when it appears that the applicant is entitled to the
9 relief demanded and the relief or any part of the relief consists in
10 restraining the commission or continuance of the act complained
of, either for a limited period or perpetually;

11 (2) when it appears that the commission or continuance
12 of some act during the litigation would produce a great or
irreparable injury to the applicant;

13 (3) when it appears during the litigation that the adverse
14 party is doing or threatens or is about to do or is procuring or
15 suffering to be done some act in violation of the applicant's
rights, respecting the subject of the action, and tending to render
the judgment ineffectual;

16 (4) when it appears that the adverse party, during the
17 pendency of the action, threatens or is about to remove or to
dispose of the adverse party's property with intent to defraud
18 the applicant, an injunction order may be granted to restrain the
removal or disposition; [or]

19 (5) when it appears that the applicant has applied for an
20 order under the provisions of 40-4-121 or an order of protection
under Title 40, chapter 15.

21 Section 27-19-201, MCA. “These requirements are in the disjunctive, meaning that
22 findings that satisfy one subsection are sufficient.” *MCIA*, ¶ 14.

23 3. It is error for a district court to determine the ultimate merits of
24 the case at the preliminary injunction stage.

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

9 *Yockey v. Kearns Props., LLC*, 2005 MT 27, ¶ 18, 316 Mont. 28, 106 P.3d 1185
10 (citations omitted).

11 4. Properly registered and eligible cardholders will be injured or
12 irreparably harmed if the Court does not preserve the status quo pending final trial in
13 this matter. These cardholders will be unable to grow their own medical marijuana
14 or will be unable to obtain it from a provider.

15 5. The Court concludes that a preliminary injunction should issue to
16 prevent this irreparable injury to these properly qualified cardholders pending the
17 outcome in this litigation.

18 6. The Court makes the preceding Findings and Conclusions at this
19 stage of the proceedings without prejudice to either party upon full trial in this
20 matter.

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

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