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Deputy

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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

The parties have filed cross-motions for summary judgment with respect to certain provisions of the Montana Marijuana Act. James Goetz, J. Devlan Geddes, and Jeffrey J. Tierney represent Plaintiffs Montana Cannabis Industry Association and others (collectively MCIA). Attorney General Timothy C. Fox, J. Stuart Segrest and Matthew T. Cochenour represent the State.

FACTUAL AND PROCEDURAL HISTORY

The Court conducted two evidentiary hearings in this matter, with relation to the issuance of preliminary injunctions. The parties have agreed that

the Court may rely on the evidence and testimony presented at those hearings for purposes of the pending motions. The parties have further agreed that the pending motions are ripe for determination without the need for further hearings.

Based on these agreements, the Court will not repeat all the findings contained in its previous orders issuing preliminary injunctions, but incorporates those findings herein. Interested parties are instead referred to those orders. Order on Motion for preliminary Injunction (June 30, 2011); Order on Preliminary Injunction (June 16, 2013). Likewise, based on the parties' agreement, the Court will proceed to consider the pending motions for summary judgment without further hearing. The Court agrees that these motions are ripe for determination based on the record before the Court.

This is the third time this Court has attempted to wade through the morass of conflicting federal and state law, discussed more fully below, to decide whether Montana's version of a medical marijuana law can withstand constitutional scrutiny. In its first effort, the Court determined that a preliminary injunction directed towards certain portions of this law was appropriate. This Court perceived a "Venn diagram" of overlapping fundamental rights and interests—specifically the rights to make a living, to seek one's healthcare, and of privacy—that supported the issuance of the preliminary injunction.

Upon appeal of that order by the State, the Montana Supreme Court decided that this Court had used an inappropriate standard of review, referred to as strict scrutiny, in reaching its decision to issue a preliminary injunction. The Supreme Court determined that none of the fundamental rights on which this Court had relied supported the preliminary injunction. The Supreme Court reversed the Court's decision to issue a preliminary injunction and remanded with instructions

that this Court should use the less stringent rational basis standard for review in reviewing these statutes. *Mont. Cannabis Indus. Assoc. v. State*, 2012 MT 201, 366 Mont. 224, 286 P.3d 1161 (*MCIA*).

Upon remand, this Court, following a second evidentiary hearing, again issued a preliminary injunction but this time this Court expressly did not make any substantive determinations on the ultimate constitutionality of this law, instead issuing a preliminary injunction merely to hold the *status quo* in place pending the final determination of that question. Neither party appealed this Court's second preliminary injunction.

PRELIMINARY MATTERS

At the outset, this Court is compelled to discuss some limitations in its analysis.

A. The Conflict Between Federal and State Law

The cultivation, possession and use of marijuana remains illegal under the federal Controlled Substances Act. Indeed, marijuana remains a Schedule I drug under the federal law, on par with heroin. 21 U.S.C. § 812; 21 CFR 1308.11. The Supremacy Clause of the U.S. Constitution makes this federal law supreme over conflicting state laws. That a person possesses or uses medical marijuana in compliance with his or her state law provides no defense to prosecution under the federal law. *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

The Supreme Court in *MCIA* noted this unavoidable legal conflict: "Moreover, the Plaintiffs cannot seriously contend that they have a fundamental right to medical marijuana when it is still unequivocally illegal under the Controlled Substances Act." 2012 MT 201, ¶ 32.

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Justice Nelson, in his dissent in *MCIA*, goes even further to state that this legal conflict should end the debate over the constitutionality of Montana's medical marijuana law. Justice Nelson argues, with some force, that Montana courts have no jurisdiction to issue an opinion about a state law that is clearly in conflict with overriding federal law:

> In summary, the courts of Montana should not be required to devote any more time trying to interpret and finesse state laws that, ultimately, are contrary to federal law and the Supremacy Clause. After all, judges in Montana take an oath to support, protect, and defend the federal Constitution and are bound by federal laws, anything in the laws of this State to the contrary notwithstanding.

2012 MT 201, ¶ 48.

Under Justice Nelson's argument, this Court should dismiss this action as this Court can do no more than issue an improper advisory opinion, having no effect on the larger issue of federal illegality of the cultivation, possession and use of marijuana. 2012 MT 201, ¶ 55.

That Justice Nelson's dissent on this point was not adopted by the majority of the Supreme Court indicates to this Court that the Supreme Court must view there is some limited room, despite the federal Controlled Substances Act, in which Montana's medical marijuana laws can properly and lawfully operate. It is left to this Court in the first instance to try to determine the size of that legitimate operating room.

B. Rational Versus Rational Basis

It is not the function of this Court, nor of any Court, to determine the wisdom of a legislative act. *McClanathan v. Smith*, 186 Mont. 56, 66, 606 P.2d 507, 513 (1980) ("What a court may think as to the wisdom or expediency of the

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legislation is beside the question and does not go to the constitutionality of the statute.")

During oral argument, this Court noted the seeming disconnect within a statutory scheme:

1. whose purpose in part was to allow persons with serious debilitating medical conditions to use marijuana;

2. that imposed an expectation that people would grow their own medical marijuana;

3. that disallowed providers to charge any fee or compensation whatsoever for growing marijuana for others; and

4. that disallowed providers, who might be willing to grow marijuana for free for others, from advertising their willingness and availability to those who might need this assistance.

The cumulative effects of these provisions was testified to before this Court and described in the Court's findings in support of its re-issued preliminary injunction on January 16, 2013. Those most debilitated and in need of medical marijuana would often be those least likely able to grow their own supply. Those persons might not have anyone available to grow marijuana for them and, because of the compensation and advertising ban, would have no way of obtaining medical marijuana or learning about anyone would could provide them with medical marijuana. Such a system does not seem rational, if the goal of the legislation at all is to insure that those most in need have some way to access medical marijuana.

That such a system may not seem rational, however, is besides the point of whether such a system, under rational basis scrutiny, violates the Constitution as argued by MCIA.

1 **C. The Scope of this Court's Review**

2 In its opinion and order remanding this matter, the Supreme Court
3 specifically directed this Court "to apply the rational basis test to determine whether
4 §§ 50-46-308(3), (4), (6)(a) and (6)(b), MCA, should be enjoined." As noted, the
5 Supreme Court's opinion was in reaction to this Court's earlier opinion that the
6 overlapping or intersecting rights to seek employment, to seek one's health, and to
7 privacy warranted the issuance of the Court's first preliminary injunction.

8 As the case stands before the Court now, however, the arguments being
9 made are different than were made before this Court's first preliminary injunction.

10 First, in the first round of this litigation, the State had agreed to a
11 preliminary injunction against the provision prohibiting advertising by providers
12 of medical marijuana, § 50-46-341, MCA; the provision authorizing warrantless
13 searches of providers' businesses by Department of Public Health and Human
14 Services (DPHHS) and law enforcement officials, § 50-46-329, MCA; and the
15 provision requiring DPHHS to notify the board of medical examiners of any
16 physician who certified more than 25 patients in a year for medical marijuana,
17 § 50-46-303(10), MCA. The State has now withdrawn its agreement to these
18 provisions being enjoined. Thus, issues not considered by this Court in its first
19 preliminary injunction must be considered in this round.

20 Secondly, MCIA argues on remand that Montana's medical marijuana
21 law violates the right to equal protection and due process. MCIA had argued this
22 in the first briefing as well, but it did not form a basis for the Court's decision in
23 issuing its first preliminary injunction. Thus, the Court must undertake an equal
24 protection and due process analysis not undertaken during the first preliminary
25 injunction proceedings.

With these preliminary matters out of the way, the Court once more ventures gingerly into the labyrinth of medical marijuana laws.

ANALYSIS

A. Is Medical Marijuana Legal or not Illegal?

From the Court's perspective, a foundational determination[1] to be made is whether the use of medical marijuana as contemplated by and pursuant to the Montana Marijuana Act is legal or whether it is not illegal. While these may seem to be the same way to express an idea, they are not and the parties make this distinction in some of their arguments to this Court. For example, MCIA argues that the use of medical marijuana according to the statutes is legal and therefore restrictions on the advertising of this legal activity by providers violates their First Amendment rights. The State on the other hand, argues that the use of marijuana remains illegal and the purpose of the statutes merely is to provide those who do use medical marijuana with a defense to state prosecution. From this perspective, the State argues there is no right to advertise illegal activities.

The Supreme Court opinion in *MCIA* can be read to lend support to both sides. Thus, in deciding that the restrictions under the medical marijuana law did not implicate a provider's right to employment or a cardholder's right to seek health care, the Supreme Court focused on the fact that the Constitutional provision underpinning these rights expressly provided that persons' right to employment or to seek healthcare is circumscribed in that the exercise of these rights is by "all lawful ways." Mont. Const. Art. II, section 3. The Supreme Court held this clause authorized the Montana Legislature through its police power to restrict these rights.

[1] Keeping in mind Justice Nelson's admonition that courts should not spend time finessing these statutes to no positive end.

The inference from these holdings is that the Supreme Court did not view the use of medical marijuana as a lawful activity. And as quoted above, the Supreme Court noted that the use of marijuana for any purpose remains unequivocally illegal under federal law.

On the other hand, the Supreme Court also stated that "In this case, the legislature, in its exercise of the State's police powers, decided that it would legalize the limited use of medicinal marijuana while maintaining a prohibition on the sale of medical marijuana." 2012 MT 201, ¶ 21.

Reading the medical marijuana statutes in their entirety, this Court concludes that the use of medical marijuana pursuant to these statutes is a lawful activity. These statutes affirmatively grant persons with valid registry cards the ability to possess and use medical marijuana. Such persons may not be arrested, prosecuted or penalized in any manner. The fact that such persons possess a valid registry card does not give law enforcement probable cause to search them or their property. "A registered cardholder . . . is presumed to be engaged in the use of marijuana as allowed" by these statutes if the person has valid registry card and possesses no more than the prescribed amount of marijuana. Section 50-46-319(1), (2), (6), and (8), MCA.

Likewise, physicians who provide certifications of patients with debilitating medical conditions pursuant to these statutes may not be arrested, prosecuted or penalized in any manner including by the board of medical examiners. Section 50-46-319(3), MCA.

By these provisions, these statutes go beyond providing merely a defense to state prosecution of medical marijuana users and providers. So long as users and providers have valid cards and comply with the provisions of these

statutes, users and providers may lawfully—i.e., without interference from law enforcement—possess and use medical marijuana. *See also, State v. Nelson*, 2008 MT 359, ¶¶ 29, 30, 346 Mont. 366, 195 P.3d 826 (Under former medical marijuana law, "When a qualifying patient uses medical marijuana in accordance with the MMA, he is receiving lawful medical treatment. . . . [A] qualifying patient with a valid registry identification card [is] lawfully entitled to grow and consume marijuana in legal amounts.")

B. Prohibition on Advertising by Providers

As noted above, the issue of whether § 50-46-341, MCA, entitled "Advertising prohibited," meets constitutional muster was not before this Court when it issued its first and second preliminary injunction and was therefore not before the Supreme Court in its opinion in *MCIA*. The reason for this was that the State originally stipulated to the Court preliminary enjoining this statute.[2] The State has withdrawn from this stipulation. MCIA seeks a continuation of this injunction on First Amendment grounds.[3]

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

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[2] This Court's original preliminary injunction against this statute has remained in effect since June 30, 2011. The State has presented no evidence that this preliminary injunction has somehow interfered with the enforcement of this law otherwise. *See Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) ("The government has not provided any empirical evidence to demonstrate that this injunction interferes with or threatens to interfere with any legitimate law enforcement activities. Nor is there any evidence that the similarly phrased preliminary injunction that preceded this injunction, *Conant v. McCaffrey*, 172 F.R.D. 681 (N.D. Cal. 1997), which the government did not appeal, interfered with law enforcement.")

[3] Montana's Constitution also has a "freedom of speech, expression and press" provision. Art. II, § 7. For ease of understanding, unless otherwise noted, this Court's reference to freedom of speech or the first amendment refers to both the federal and state provisions.

MCIA launches an array of challenges against this statute. MCIA contends that the statute is overbroad and could be read as prohibiting even political advertising by cardholders in favor of changing the medical marijuana laws; that the prohibition is an improper content-based ban in violation of the First Amendment; and that the prohibition is improper in that it prevents speech by only certain persons also in violation of the First Amendment.

The State defends the prohibition on speech primarily as a proper exercise of police power to prevent illegal activities, that is, there is no right to advertise an activity that remains illegal under federal law.

The parties also debate the proper standard of review for restrictions on speech.

Courts have historically been very reluctant to uphold restrictions on speech. This Court finds instructive the exhaustive majority and concurring opinions in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). In that case, the federal appeals court upheld an injunction granted to physicians against a provision of the federal controlled substances act that subjected physicians to possible penalties for recommending medical marijuana to their patients under the California medical marijuana act.[4] The Court held that such a prohibition violated the physicians' right to freedom of speech; the concurring opinion also viewed the prohibition as violating the patients' right to receive information.

The prohibition on advertising in § 50-46-341, MCA, is so vague and overbroad as to be meaningless as to what it prohibits. What if a cardholder should

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[4] Montana's medical marijuana law actually requires as part of its certification process that a physician discuss medical marijuana with their potentially qualifying patients with medically debilitating conditions and make a recommendation for the patient to use medical marijuana. § 50-46-310, MCA.

write a letter to the editor praising the effectiveness of medical marijuana in urging a modification of the law? Has he or she violated the advertising ban? What if a cardholder should post on Facebook how effective her medical marijuana has been? Has she violated the ban on advertising through electronic media?

The statute also is too narrow in that it limits only advertising by valid cardholders. What if the spouse of the cardholder wanted to spread information about the effectiveness of medical marijuana on his spouse? The terms of § 341 would not apply to prohibit such speech. Regulations which impose speech restrictions on one group are seldom upheld.

Lastly, the statute restricts content-based speech. Should an opponent of medical marijuana wish to advertise against such use, § 341 would also not apply. Section 341 renders the "playing field" for discussion of the pros and cons of medical marijuana completely uneven. This is not permitted under the First Amendment or Article II, section 7 of the Montana Constitution. *See, Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). In *Sorrell*, the U.S. Supreme Court struck down as violative of the first amendment a Vermont statute that prohibited the disclosure of physician prescription practices by insurers and pharmacies, among others, to pharmaceutical companies. As the Court observed, Vermont's law enacted content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. In essence, the Court concluded the "law on its face burden[ed] disfavored speech by disfavored speakers." 131 S. Ct. at 2663. The Court struck down the statute, concluding: "The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do." 131 S. Ct. at 2672.

Reference to Article II, section 7, reveals the substantial limitation on governmental interference with free speech within Montana: "No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty." Found in article II, this right is a fundamental right and must pass a strict scrutiny analysis. *Gryzcan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). Section 341 runs afoul of this constitutional proscription.

For the foregoing reasons, the Court will enjoin § 50-46-341, MCA.

C. Warrantless Searches

As with the prohibition on advertising, the State originally stipulated that § 50-46-329, MCA, allowing unannounced inspection of registered premises, could be enjoined. The State has now withdrawn from that stipulation and contends that this section should be allowed to be enforced.

Section 329 provides, "The department and state or local law enforcement agencies may conduct unannounced inspections of registered premises." "Registered premises" are defined as "the location at which a provider or marijuana-infused products provider has indicated the person will cultivate or manufacture marijuana for a registered cardholder." Section 50-46-302(13), MCA.

MCIA challenges this statute as being in violation of the Fourth Amendment to the U.S. constitution and article II, section 11 of the Montana Constitution. These provisions generally guarantee against unreasonable searches.

The State responds that similar administrative inspections of businesses do not require a warrant. Citing, *intra alia, New York v. Burger*, 482 U.S. 691 (1987), the State argues that administrative or regulatory inspections of "closely regulated" industries can constitute an exception to the search warrant requirement.

In *Burger*, the U.S. Supreme court upheld a New York statute that authorized spontaneous, unannounced inspections of automobile junkyards by law enforcement officers and for the purpose of discovering criminal activities as well as violations of the regulatory statute.

This Court is persuaded by the analysis in *Burger*. There can be little doubt that medical marijuana is a closely regulated activity in Montana. Indeed, it is against these restrictions that MCIA has brought its complaint. The fact remains that the possession and use of marijuana remains a crime under federal law and, with the narrow exceptions created by the Montana Marijuana Act, under Montana law. Likewise, in *Burger*, the Supreme Court noted that criminal behavior, specifically auto theft, often was intertwined with auto junkyards.[5]

Further, the Court in *Burger* noted that the statutory scheme put junkyard operators on notice that they were subject to unannounced searches and who was authorized to conduct the inspections. 482 U.S. at 711. Section 329 of the Montana provides the same notice and information to providers. It should be noted that such inspections may only be conducted "during normal business hours." § 50-46-329(3)(a), MCA. The *Burger* Court found these types of provisions to be a constitutionally adequate substitute for a warrant. *Id.*

Inspections under § 329 conducted by law enforcement officials to uncover and use evidence of criminal behavior, provisions to which MCIA objects, were permitted by the Court in *Burger*. Further, the Montana statutes allow the provider to define the registered premises subject to inspection: "the location at which a provider or marijuana-infused products provider has indicated

[5] To be clear, the Court is not imputing criminal behavior to providers of medical marijuana; only that the entire issue of marijuana use and possession has significant criminal overtones.

the person will cultivate or manufacture marijuana for a registered cardholder." § 50-46-302(13), MCA. By carefully defining his registered premises, the provider can address concerns that the inspection might be too broad or intrusive.

In summary, the Court can find no principled distinction between the unannounced inspections allowed in *Burger* and the unannounced inspections authorized under Montana's medical marijuana law.

For these reasons, the Court will not enjoin § 50-46-329, MCA.

D. The 25 Patient Certification Limit on Physicians

Section 50-46-303(10), MCA, requires DPHHS, primarily charged with implementing the medical marijuana law, to "provide the board of medical examiners with the name of any physician who provides written certification of 25 or more patients within a 12-month period." The statute then directs the board to review the physician's practices to determine whether the practices meet the standard of care.

The Court has preliminarily enjoined this provision on the stipulation of the parties. The State has now withdrawn from this stipulation.

MCIA offers the testimony of Ian Marquand, designated by the State to testify on behalf of the board of medical examiners. Marquand testified that there had not been any complaints about physicians participating in so-called marijuana caravans and that the board's workload on medical marijuana had been "very, very light if non-existent." The board issued a standard of care directive in 2010 that disallowed certification exclusively by telemedicine. According to Marquand, the board also has adequate authority to discipline doctors who violate standard of care directives. Marquand testified the board had not discussed any problem with physicians certifying more than 25 patients.

Again, as noted, this provision has been enjoined since June 30, 2011; it has never been in effect. As discussed below with regard to the commercial provisions, the fact that this provision has never been in effect, yet the board of medical examiners has reported no problems with medical marijuana certifications indicates this provision is not rationally related—indeed not necessary at all—to the goals of the medical marijuana laws. Roy Kemp, DPHHS's administrator of the medical marijuana registry program, testified that he knew of no rationale justifying the 25-patient limit and implementation of the 25-patient limitation would cripple the program.

The State has not produced any contrary evidence or justification in support of this limitation.

The Court concludes this provision is not rationally related to the medical marijuana program and will therefore enjoin it.

E. The Commercial Provisions of the Montana Marijuana Act

In its previous preliminary injunctions, this Court enjoined what may be collectively referred to as the commercial provisions of the Montana Marijuana Act: § 50-46-308(3), limiting providers to assist no more than three registered cardholders; and § 50-46-308(4) and 6(a), prohibiting a provider from accepting anything of value, including remuneration, for any services or products provided to a cardholder, except reimbursement of the provider's application or renewal fee.

As noted above, this Court identified an overlapping set of rights and interests—the right to employment, the right to seek one's health care, and the right to privacy—supporting the issuance of its first preliminary injunction. Because these rights are found in article II of Montana's constitution, they are considered

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fundamental. Any intrusion on fundamental rights must be analyzed under a strict scrutiny standard.

On review, the Montana Supreme Court disagreed with this Court's analysis and held that these fundamental rights did not apply to Montana's medical marijuana scheme. The Supreme Court reversed this Court's first preliminary injunction and remanded this matter to consider whether this Court should enjoin these commercial provisions of the medical marijuana laws under a less stringent rational basis analysis.

The Court begins its analysis mindful of several well-established principles:

> We presume a legislative enactment to be constitutional. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action. . . . Thus, a legislative enactment will not be declared invalid unless it conflicts with the constitution beyond a reasonable doubt. The party challenging a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute.

American Cancer Socy. v. State, 2004 MT 376, ¶ 8, 325 Mont. 70, 103 P.3d 1085 (citing *Powder River County v. State*, 2002 MT 259, ¶¶ 73, 74, 312 Mont. 198, 60 P.3d 357; internal quotations omitted.).

This deference is substantial; it is not, however, absolute. "Notwithstanding the deference that must be given to the Legislature when it enacts a law, it is the express function and duty of this Court to ensure that all Montanans are afforded equal protection under the law." *Davis v. Union Pac. R.R.*, 282 Mont. 233, 240, 937 P.2d 27, 31 (1997) (declaring unconstitutional under the rational basis test, a venue statute treating non-resident corporate defendants differently than non-resident non-corporate defendants.)

Once a challenger meets its initial burden under the rational basis standard, the government must then come forward to justify the distinction. "Under this [rational basis] standard, the government must illustrate that the objective of the statute is legitimate and such objective is rationally related to the classification used by the Legislature." *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 13, 325 Mont. 1, 103 P.3d 1019 (rejecting under rational basis test, workers' compensation statute distinguishing between workers compensation recipients based on their separate receipt of social security retirement benefits.) The State argues that *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, 354 Mont. 133, 227 P.3d 42, imposes the burden on MCIA to prove that there is no rational justification for the challenged statutes. The Court disagrees. In *Jaksha v. Butte-Silver Bow County*, 2009 MT 263, ¶ 17, 352 Mont. 46, 214 P.3d 1248, the Court, citing *Reesor*, affirmed that under the rational basis test, "the government must illustrate that the objective of the statute is legitimate and such objective is rationally related to the classification used by the Legislature." *See also, Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 MT 234, ¶ 20, 366 Mont. 399, 288 P.3d 169 ("If no constitutionally-significant interests are interfered with by § 77-1-121(2), MCA, then the State must only demonstrate that the statute has a rational basis.")

MCIA challenges these commercial provisions anew based on denial of equal protection of the law under Article II, section 4 of the Montana Constitution or denial of substantive due process, citing, *inter alia, Town & Country Foods, Inc. v. City of Bozeman*, 2009 MT 72, 349 Mont. 453, 203 P.3d 1283.

The first step in an equal protection analysis is whether the statute under review creates distinct classes and whether they are similarly situated. Under a substantive due process challenge, no review of classifications is required.

MCIA maintains the classes created are those persons with medically debilitating conditions who are otherwise suitable for treatment with medical marijuana[6] and who have the ability and means to grow their own marijuana and those persons with medically debilitating conditions who are otherwise suitable for treatment with medical marijuana and who do not have the ability and means to grow their own marijuana. The latter group would include those who are physically unable to grow marijuana due to their medically debilitating conditions,[7] who have no place or means to grow marijuana,[8] or lack the horticultural ability to grow marijuana successfully.[9]

The State argues that MCIA's equal protection challenge is invalid because the medical marijuana law creates no classifications at all. The Court disagrees that the only way a statute may create is a classification is expressly on its face.

> A classification within a law can be established in one of three ways. First, the law may establish the classification "on its face." This means the law by its own terms classifies persons for different treatment . . . Second, the law may be tested in its "application." In these cases the law either shows no classification on its face or else indicates a classification which seems to be legitimate, but those challenging the legislation claim that the governmental officials who administer the law are applying it with different degrees of severity to different groups of persons who are described by some suspect trait . . .

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[6] That is, meet all the other requirements, including physician certification of their debilitating condition, under the medical marijuana statutes.

[7] Lori Burnham and Melva Stuart, who testified at the December 13, 2012, hearing before this Court, are examples of such persons.

[8] Melva Stuart is an example of such a person. She lives in federally subsidized housing, which prohibits her from even trying to grow her own marijuana.

[9] Charlie Hamp, who testified at the June 20, 2011, hearing before this Court, is an example of such a person. He had tried unsuccessfully to grow marijuana for his medically debilitated wife.

> Finally, the law may contain no classification, or a neutral classification, and be applied evenhandedly. Nevertheless the law may be challenged as in reality constituting a device designed to impose different burdens on different classes of persons.

State v. Spina, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421.

The Court concludes that the statutes under challenge here do impose different burdens on different classes of persons as described by MCIA and, therefore, do create a classification.

Having presided over two evidentiary hearings, this Court can perceive of no rational basis for the commercial prohibitions of the medical marijuana laws.

To the contrary, these prohibitions work in opposition to the goals of the statutes and the policy of the state. The statute seeks to afford access to marijuana for persons with seriously debilitating conditions. Yet, a person with the most seriously debilitating conditions—like Lori Burnham—is unable to grow her own marijuana by virtue of those same debilitating conditions. Under the statutes, such a person would not be able to pay a provider to grow marijuana for her and would not be able to learn about a provider who might be willing to provide her marijuana *gratis*[10] because of the prohibition on advertising. She, therefore, has no access to marijuana. Meanwhile, a person, with less debilitating conditions who is physically able to grow her own marijuana, would have access. This turns the compassionate purposes of the statutes on their head.

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[10] This "guardian angel" remains a mythical character. No person has come forward willing to invest the time, money, and labor to provide medical marijuana for free. And see, deposition testimony of Roy Kemp, the administrator of the medical marijuana program, at 13:15-23: "I don't know of anyone who would take the time, the trouble, the expense of creating a grow that he can receive no remuneration for any capacity, and would be willing to do that for three individuals[.]" Kemp further testified that if the commercial provisions were not enjoined the medical marijuana program would be crippled.

The State's primary justification for the statute—that the cultivation, possession and use of marijuana—remains illegal under federal state law—does not justify these provisions. This justification would support Montana not having a medical marijuana law at all. But literally every provision of Montana's medical marijuana law beginning with the second sentence[11] of the first statute thereof is contrary to this federal and state illegality. A statute which is directly contrary to its justification cannot be rationally related to that justification.

This conclusion is buttressed by the State's experience with medical marijuana since this Court's issuance of its first preliminary injunction on June 30, 2011 and the re-issuance of that preliminary injunction on January 16, 2013. The Court enjoined these commercial prohibitions; they have never been in effect. *See, Conant v. Walters*, 309 F.3d at 632:

> The government has not provided any empirical evidence to demonstrate that this injunction interferes with or threatens to interfere with any legitimate law enforcement activities. Nor is there any evidence that the similarly phrased preliminary injunction that preceded this injunction, which the government did not appeal, interfered with law enforcement.

(Citation omitted.)

When asked if the concerns that may have motivated the passage of Senate Bill 423 still existed—such as marijuana caravans, abuse of the law by young and otherwise healthy individuals, crimes connected to grow operations, storefronts and improper advertising, growth of the commercial marijuana industry—the State's witnesses either testified they had no evidence that those concerns remained or the State offered no witness to testify to these concerns.

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[11] The first sentence merely sets forth the short title of the law.

This Court, as did the Court in *Conant*, views this as substantial evidence that the medical marijuana laws, as enjoined by this Court, have accomplished their purpose.[12] The enjoined commercial provisions were irrelevant to accomplishing the goal of limiting access to marijuana. On the other hand, as explained above, the enjoined commercial provisions have the effect of denying access to persons with the most debilitating conditions, contrary to the compassionate purpose of the laws.

When faced with an equal protection challenge to a statute, courts often focus appropriately on whether the laws treat people equally. This case, however, demands some attention be paid to the "protection" of the laws. In passing its medical marijuana laws, the State of Montana has recognized that perhaps, for some limited group of our residents with very serious medical conditions, marijuana might provide the best or only treatment.[13] The law states it will legally protect them if they use marijuana to alleviate the symptoms of their debilitating medical conditions. Section 50-46-301(2)(a), MCA. The testimony this Court has heard though, illustrates that the commercial provisions remove this protection from those with the most serious debilitating conditions. The Court concludes this violates the equal protection of the laws.

The Court will enjoin these commercial provisions.

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[12] No doubt, the U.S. Attorney's raiding and prosecution of large grow operations also contributed significantly to the addressing the State's concerns. The U.S. Attorney General has announced his office will not be prosecuting persons following their state's medical marijuana laws.

[13] Lori Burnham, for example, testified that she had tried prescription drugs to treat her numerous serious medical conditions. "Those other pills had terrible side effects. . . . I didn't want to be comatose. I have a family I want to spend time with and enjoy what time I have left. Marijuana gives me that. I like to eat. We laugh. We have a good time."

F. Access by Probationers

MCIA asks this Court to reconsider its earlier decision not to enjoin § 50-46-307(4), MCA, which provides, "A person may not be a registered cardholder if the person is in the custody of or under the supervision of the department of corrections or a youth court." In earlier rejecting MCIA's challenge to this provision, the Court determined that such challenges would be better raised on a case-by-case basis.

The Court remains unconvinced that this prohibition should be enjoined, on the record before this Court. The Court is able to perceive a substantial rational basis for this provision. As the Court noted in denying MCIA's earlier challenge, persons under supervision of the Department of Corrections routinely have several limitations on their activities and rights, such as, their fundamental right to choose where they live, the right to travel, the right to seek employment in certain lawful industries, the right to possess firearms, and the right to establish a business. Section 20.7.1101, ARM.

The Court agrees with MCIA that sentences should have a nexus with the underlying offense for which a person is sentenced. *State v. Ashby*, 2008 MT 83, 342 Mont. 187, 179 P.3d 1164. Determining that nexus, however, itself requires a case-by-case determination.

The possible application of § 307(4) to a particular individual such Plaintiff Marc Matthews, raises genuine issues of material fact beyond the ability of this Court to determine on a motion for summary judgment.

The Court will not enjoin this provision.

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CONCLUSION

This Court has wrestled with the issues of medical marijuana raised in this litigation for over three and one-half years, just as society continues to wrestle with the overarching issue of marijuana generally. Colorado, Washington, Alaska, and Oregon have now decriminalized to some degree the recreational use of marijuana. Twenty-four states have medical marijuana laws. Twenty-two states continue to treat any use or possession of marijuana as a criminal activity. The federal government treats marijuana as a dangerous drug on par with heroin.

Given this patchwork of laws and particularly the potential conflict between state and federal laws, the cautious approach by the Montana legislature in passing SB 423 has much to commend it. It is not the goal of this Court to interfere with the Legislature's slow and careful opening of the door to the use of medical marijuana. It is the goal of this Court, however, to ensure that everybody who could benefit from medical marijuana, and especially those with the most serious medically debilitating conditions, are able to travel through that door equally.

For the foregoing reasons, the Court issues its permanent injunction as follows:

a. Enjoining the implementation of § 50-46-341, MCA;

b. Enjoining the implementation of § 50-46-303(10), MCA; and

c. Enjoining the implementation of §§ 50-46-308(3), 50-46-308(4) and 50-46-308(6), MCA.

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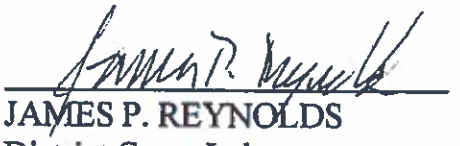
In all other respects, the Court DENIES MCIA's motions for summary judgment and GRANTS the State's motion for summary judgment.

DATED this 2 day of January 2015.



JAMES P. REYNOLDS
District Court Judge

c: James H. Goetz/J. Devlan Geddes/Jeffrey J. Tierney
Timothy C. Fox/J. Stuart Segrest/Matthew T. Cochenour

JPR/d