

NANCY SWEENEY
CLERK DISTRICT COURT

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**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 GRANTING
TEMPORARY
RESTRAINING ORDER**

Plaintiffs Montana Cannabis Industry Association, *et al.*, have moved the Court for a temporary restraining order, preliminary injunction, and order to show cause. James H. Goetz and J. Devlan Geddes represent Plaintiffs. Defendant State of Montana opposes Plaintiffs' motion. Attorney General Steve Bullock and assistant attorneys general James P. Malloy and J. Stuart Segrest represent the State.

The Court heard argument on Plaintiffs' motion for a temporary restraining order on October 24, 2012. At the hearing, the State acknowledged it had adequate notice of Plaintiffs' motion. The parties have briefed the motion. In

1 addition, Plaintiffs have filed affidavits of patients and providers in support of their
2 motion. Plaintiffs' motion for a temporary restraining order is ripe for decision.

3 For the following reasons, the Court concludes it should grant Plaintiffs'
4 motion for a temporary restraining order and set this matter for hearing on Plaintiffs'
5 application for a preliminary injunction.

6 PROCEDURAL AND FACTUAL BACKGROUND

7 This case is back before this Court on remand from the Montana
8 Supreme Court. This Court had enjoined provisions of the Montana Marijuana Act
9 that prohibited providers of medical marijuana from remuneration for any services or
10 products provided to a registered cardholder and limited each provider to serving a
11 maximum of three registered cardholders. Sections 50-46-308(3), (4), (6)(a), (6)(b),
12 MCA.

13 The Supreme Court reversed on the basis that this Court had improperly
14 applied the "strict scrutiny" test to Plaintiffs' claims and the statute. The Supreme
15 Court remanded to this Court with directions "to apply the rational basis test to
16 determine whether §§ 50-46-308(3), (4), (6)(a) and (6)(b), MCA, should be enjoined."
17 *Mont. Cannabis Indus. Assoc. v. State*, 2012 MT 201, ¶ 35, 366 Mont. 224.

18 For a further discussion of the history of this matter, the reader is referred
19 to *Montana Cannabis Industry Association*.

20 ANALYSIS

21 Section 27-19-314, MCA, provides: "Where an application for an
22 injunction is made upon notice or an order to show cause, either before or after
23 answer, the court or judge may enjoin the adverse party, until the hearing and decision
24 of the application, by an order which is called a temporary restraining order."
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1 Both parties argue that a court can enter a temporary restraining order
2 only upon a showing of irreparable injury. The Court reads such a showing as only
3 being required for the issuance of a temporary restraining order **without notice** to the
4 other party. Section 27-19-315, MCA. Here, the State has acknowledged it had
5 adequate notice of Plaintiffs' application for a temporary restraining order and
6 participated in the hearing on whether such a temporary restraining order ought to be
7 issued.

8 Nevertheless, the Court finds, based on the affidavits submitted with
9 Plaintiffs' application for a temporary restraining order and on the testimony and
10 evidence presented at the order to show cause hearing held June 20-22, 2011, on
11 Plaintiffs' previous application for a preliminary injunction, that immediate and
12 irreparable harm will occur to Plaintiffs and others unless a temporary restraining
13 order is issued pending a determination of whether a preliminary injunction ought to
14 be issued. The harm is that persons who have been certified by the State as eligible
15 for medical marijuana cards will be denied meaningful access to this medical
16 treatment if enforcement of those portions of the Medical Marijuana Act prohibiting
17 commercial transactions are not temporarily restrained.

18 In reaching this conclusion, the Court finds it agrees with the principles
19 recited by the State in opposition to Plaintiffs' motions herein.

20 In a constitutional challenge such as this, statutes carry a substantial
21 presumption of constitutionality. The party making the challenge bears the burden of
22 proving beyond a reasonable doubt that the statute is unconstitutional. *State v.*
23 *Michaud*, 2008 MT 88, ¶ 15, 342 Mont. 244, 180 P.3d 636. The question before the
24 court is not whether the statute should be condemned, but whether it is possible to

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1 uphold the statute. *Walters v. Flathead Concrete Prod., Inc.*, 2011 MT 45, ¶ 32, 359
2 Mont. 346, 249 P.3d 913.

3 Under the rational basis test, a law need only be rationally related to a
4 legitimate government interest. What a court may think of the wisdom of expediency
5 of the legislation is beside the point and does not go to the constitutionality of the
6 statutes being challenged. In the absence of an affirmative showing that no valid
7 reason existed behind the law, the legislature's choice as to the structure or content of
8 the statute is not to be disturbed. That purpose need not appear on the face or
9 legislative history of the statute. It may be any possible purpose of which the court
10 can conceive. *Rohlfs v. Klemenhausen, LLC*, 2009 MT 440, ¶ 31, 354 Mont. 133,
11 227 P.3d 42.

12 The Court further agrees that the State can regulate medical marijuana,
13 even to the point of making the possession and use of marijuana for all purposes again
14 illegal.

15 Yet, despite these limits on judicial review imposed under the rational
16 basis test, the Montana Supreme Court has declared a variety of statutes
17 unconstitutional utilizing this test. See *Davis v. Union Pac. R.R. Co.*, 282 Mont. 233,
18 242 P.2d 12 (1997), for a collection of cases in which the Supreme Court has struck
19 down statutes as unconstitutional under the rational basis test.

20 In this context, the charge to this Court by the remand from the Supreme
21 Court is significant. The Supreme Court did not decide that the Montana Marijuana
22 Act passes all constitutional review. Instead, the Supreme Court remanded to this
23 Court to review the challenged sections under the rational basis test.

24 It is therefore this Court's task to undertake that review.

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1 Pending that review, however, this Court is persuaded that certain
 2 persons who have been certified as eligible for medical marijuana will suffer
 3 immediate harm if their access to this treatment is eliminated by the State's
 4 enforcement of the challenged provisions of the Montana Medical Marijuana Act.
 5 Perhaps foremost in mind is the circumstance testified to by Charlie Hamp, a man in
 6 his 80's, whose wife in her 70's utilizes tincture of marijuana to stimulate her appetite
 7 while undergoing cancer therapy. To expect Charlie Hamp to now¹ grow his own
 8 marijuana and refine it into a tincture for use by his ailing wife is not reasonable while
 9 the statute is under review.

10 The Court issues the temporary restraining order without prejudice to
 11 either side on the larger question of whether a preliminary injunction should issue. As
 12 the Court commented at the hearing on Plaintiffs' application for this order, it appears,
 13 based on the Supreme Court's opinion in this matter, that the window for Plaintiffs to
 14 prevail on the preliminary injunction issue and ultimately on its challenge to this
 15 statute is quite small. Indeed, perhaps Justice Nelson's dissent in this case raises the
 16 better question: Should Montana courts spend time and resources in mental
 17 gymnastics over Montana's medical marijuana law when the possession of marijuana
 18 is illegal for all purposes under ^{the}supreme federal law? Still the Supreme Court has
 19 directed this Court to conduct such a review.

20 For the foregoing reasons, the Court concludes that Plaintiffs' motion for
 21 a temporary restraining order should be granted.

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24 ¹ Until the Supreme Court issued its opinion on September 11, 2012, Hamp and others like him
 25 could obtain commercial marijuana under this Court's previous preliminary injunction. It takes
 four to five months to grow marijuana.

IT IS HEREBY ORDERED that:

1. Plaintiffs' motion for a temporary restraining order is **GRANTED**.

2. The State is temporarily restrained from enforcing sections 50-46-308(3), (4), (6)(a), and (6)(b), MCA.

3. This temporary restraining order shall be issued at the hour of 4 o'clock, p.m., on October 26, 2012, and shall expire **twenty four hours after the hearing date below** unless otherwise renewed by the Court.

4. A hearing on Plaintiffs' motion for preliminary injunction is set for **9 o'clock, a.m., on November 13, 2012**, in the Lewis and Clark County Courthouse, 228 Broadway Street, Helena MT.

5. Plaintiffs shall not be required to post bond to secure this temporary restraining order.

DATED this 26 day of October 2012.


JAMES P. REYNOLDS
District Court Judge

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

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

² The ten day limit for hearings following the issuance of a temporary restraining order also applies if such orders are issued without notice. Section 27-19-316(4), MCA.