STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY SUPERIOR COURT Docket No.

LINDA B. HORAN,

Alstead, NH

V.

THE STATE OF NEW HAMPSHIRE
By its Commissioner of Health and
Human Services,
Nicholas Toumpas
(In his official capacity only)
Brown Building
129 Pleasant St.
Concord, NH 03301

VERIFIED PETITION FOR PRELIMINARY INJUNCTION, DECLARATORY JUDGMENT, INCORPORATED POINTS OF LAW,AND REQUEST FOR EXPEDITED TEMPORARY HEARING.

NOW COMES Linda B Horan, the Petitioner, by and through counsel and respectfully petition the Court to issue a preliminary and permanent injunction

and declaratory judgment ordering the Respondent to issue her a therapeutic cannabis registration card forthwith.

In support of this petition, Petitioners state as follows:

INTRODUCTION

"No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891)

1. The Petitioner is suffering from terminal stage 4 lung cancer which has spread to her brain and lymph nodes. Her prognosis is death within months, accompanied by intolerably painful side effects. She does not wish to spend her last months in a narcotic haze from prescribed opiates, but rather wishes to mitigate her debilitating symptoms to the extent possible through use of therapeutic cannabis for as long as possible. The Respondent has begun to accept applications for patient registry cards on Nov. 1, 2015. These cards are issued under RSA 126:X and in essence will have two separate and distinct effects — first, they will allow patients to possess up to two ounces of marijuana no matter what the source without being subject to criminal charges, and second, they will allow patients to purchase marijuana in allowed amounts from state-sanctioned dispensaries when they are open. The Department of Health and Human Services has indicated that it will not, however, issue cards to qualifying patients until the dispensaries are

open. Originally this refusal was based upon an advisory opinion from the Attorney General, which claimed that there was no source of legally obtained marijuana until then. Petitioner denies that the law supports that opinion to any degree and further notes that, in any event, dispensaries in the State of Maine are now serving patients from other states who have patient registry cards in their home states, thus providing a legal source of cannabis prior to the opening of New Hampshire dispensaries. Petitioner seeks an order declaring qualified patients are entitled to receive patient registry cards regardless of the existence of operating dispensaries in New Hampshire. Petitioner further requests issuance of an emergency expedited temporary order directing the Respondent to issue her such a card upon receipt of a proper application sufficient to establish her as a qualifying patient.

PARTIES

2. Petitioner is a 64 -year-old woman and a longtime (30+ years) resident of New Hampshire who lives in Alstead. On July 29, 2015, she was diagnosed with lung cancer by her primary care physician and referred to Dartmouth Hitchcock Medical Center, Pulmonary Oncology. The attending Pulmonary Oncologist was Dr. Peter De Long. After a series of tests, Dr. De Long determined that her initial lung tumor was a stage cancer 6-7 centimeters in length that had metastasized to her lymph nodes and brain, with no likelihood of successful treatment. Dr. De Long advised Petitioner to go home and attempt to enjoy what remained of her life to the best of her ability.

Further testing by the Radiation Oncologist, Dr. Lesley Jarvis, determined her quality of life would be improved by radiation to the brain, but by the time this was done, the one spot on her brain had increased to five separate spots. Radiation took

place on October 15. A subsequent scan has shown that the original tumor in the lung had grown by 25% in two months' time, and three new spots are now present on her lungs.

She has also seen a Palliative Care Doctor and a Chemotherapy Oncologist, who stated that while her incurable cancer will not be abated, the quality of her life might be improved by a clinical chemotherapy trial. Petitioner began chemotherapy on Nov. 2, 2015.

Petitioner has spoken with all five of these physicians about the benefits of medical marijuana. All five have said she medically qualifies for therapeutic cannabis. They have informed petitioner that therapeutic cannabis could be useful in controlling anxiety and assisting in rest and sleep. Petitioner suffers from nausea and is losing weight at an alarming rate, now weighing less than 100 pounds. Her doctors have told her that cannabis can be useful in combatting such wasting and in reducing nausea. Her physician has certified to the state that side effects of Petitioner's cancers include both wasting and cachexia, each of which is associated with 20% of cancer deaths. (Guzman, Manuel, "Cannabinoids: Potential Anticancer Agents, Nature Reviews, October 2003.) Most importantly, Petitioner has been told and believes that use of therapeutic cannabis will both delay and minimize to the extent possible the need to use narcotics to control pain, thereby allowing her to stay in control of her illness, awake and aware of her surroundings and the people around her, instead of in the narcotic stupor to which the state's refusal to issue a patient registry card will consign her. On Nov. 3, 2015, Petitioner filed an application for a patient registry card with Respondent. This application was accompanied by a certification from her treating physician stating that she suffered from cancer, a qualifying condition, and that she exhibited qualifying symptoms that met the requirements of RSA 126:X, thus establishing all requisite conditions for issuance of a registry card.

3. Respondent is the Commissioner of the New Hampshire Department of Health and Human Services. This action is brought against him only in his official capacity.

4. In spite of the fact that the law in New Hampshire has authorized the issuance of registration cards for the use of therapeutic cannabis by qualified patients for the last 28 months (since July 25, 2013), the Respondent has not issued a single card and continues to refuse to issue one to Petitioner, despite the critical nature of her need and the fact that she fully qualifies under RSA 126:X.

5. This refusal is not to any degree based upon any belief that the Petitioner does not fully qualify as an authorized user of therapeutic cannabis. Rather it is based solely upon an advisory opinion issued by the Attorney General's Office issued on Feb. 14, 2013, which stated that because there was then no legal source of marijuana for qualifying patients, the Respondent should not issue registration cards until the authorized cannabis dispensaries were up and operating in New Hampshire. No other reason was suggested to support a failure to issue patient registry cards. This opinion had no basis whatsoever in the law establishing the right of qualifying patients to possess cannabis, RSA 126-X, and directly contravened the rules that were adopted by the agency and approved by the Legislature. Rule He-C 401.10 states that the department has 15 days to review an application, and if it is sufficient, "(w)ithin 5 calendar days of the determination to approve an application for either a qualifying patient or a designated caregiver, the department shall issue to the applicant a registry identification card." (Sec. g).

In any event, even in the absence of dispensaries in NH, patients can now access legally access therapeutic cannabis from dispensaries in Maine as long as they have a card from their home state certifying their status as qualifying patients.

6. RSA 126-X in no way limited the right of qualifying patients to possess

cannabis to only that which was bought in New Hampshire dispensaries. The law explicitly recognized that patients would travel to New Hampshire with therapeutic cannabis that they had purchased elsewhere and specifically authorized residents of other states with registry cards from their home states to possess cannabis in New Hampshire, without limitation on how it was obtained. RSA 126-X:2 (V) states that:

> "A valid registry identification card, or its equivalent, that is issued under the laws of another state, district, territory, commonwealth, or insular possession of the United States that allows, in the jurisdiction of issuance, a visiting qualifying patient to possess cannabis for therapeutic purposes, shall have the same force and effect as a valid registry identification card issued by the department in this state…"

126-X:1 (XIII) provides:

> XIII. "**Therapeutic use" means** the acquisition, **possession**, cultivation, preparation, use, delivery, transfer, or transportation **of cannabis** or paraphernalia relating to the administration of cannabis to treat or alleviate a qualifying patient's qualifying medical condition or symptoms or results of treatment associated with the qualifying patient's qualifying medical condition. **It shall not include:**
>
> (a) The use of cannabis by a designated caregiver who is not a qualifying patient; or
>
> (b) Cultivation or **purchase by a visiting qualifying patient**; or
>
> (c) Cultivation by a designated caregiver or qualifying patient.

7. Furthermore, once a New Hampshire resident has received a New Hampshire patient registry card certifying their status as qualifying patient, they are shielded from criminal prosecutions from possession of marijuana in specific amounts

without regard to the source of the marijuana:

> RSA 126-X:1 I. A qualifying patient shall not be subject to arrest by state or local law enforcement, prosecution or penalty under state or municipal law, or denied any right or privilege for the therapeutic use of cannabis in accordance with this chapter, if the qualifying patient possesses an amount of cannabis that does not exceed the following:
>
> (a) Two ounces of usable cannabis; and
>
> (b) Any amount of unusable cannabis.

8. While Respondent and the Attorney General's Office might wish that the law limited the right to possess cannabis to only that bought in a state-regulated dispensary, the law must be applied as it was actually written by the legislature — without any such limitation. The law by its explicit terms authorizes the possession of the permitted amounts of marijuana no matter the source and neither the Respondent or the Attorney General have the power to rewrite the law as passed by the elected representatives of the people in the Legislature.

9. The Legislature further manifested its intent in this regard by establishing markedly different deadlines for the issuance of rules and regulations regarding the establishment of the dispensaries and the issuance of cards. Thus RSA 126-X set up an 18-month deadline for the rules regarding dispensaries, but only 12 months for the rules regarding the issuance of registration cards, a difference that would serve no purpose had the legislature intended to delay issuance of cards until such time as dispensaries were open. Likewise, had the legislature wanted to limit legal possession to cannabis bought in a state-run dispensary, they could have done so in a single simple declaratory sentence. Absolutely nothing in the statute or the legislative history supports the position advocated by the Attorney General's Office, which, it must be noted, has been hostile to the entire concept of medical marijuana

for decades. The Attorney General's Office is attempting to rewrite as statute to reflect views overwhelmingly rejected by the legislature.

10. Even if the law had been written as Respondent wishes so as to limit the right to possess to legally obtained cannabis, Respondent would still have no valid reason to refuse to issue a registration card to Petitioner, as a New Hampshire registry card would enable her to obtain cannabis legally from the state of Maine, which has dispensaries set up that currently dispense medicine to persons registered as qualifying patients in their home states. Qualifying patients from Massachusetts, which only recently saw its first dispensaries open, are able to obtain critically needed medicine at Maine dispensaries for use in their home state. Thus Maine Revised Statute 22 MRS 2423-D provides that:

> **"§ 2423-D. Authorized conduct by a visiting qualifying patient**
>
> A qualifying patient who is visiting the State from another jurisdiction that authorizes the medical use of marijuana pursuant to a law recognized by the department who possesses a valid written certification as described in section 2423-B from the patient's treating medical provider and a valid medical marijuana certification from that other jurisdiction and photographic identification or a driver's license from that jurisdiction may engage in conduct authorized for a qualifying patient under this chapter."

11. The Department of Health and Human Services commenced accepting applications for registration cards on Nov. 2. 2015. On Nov. 3, 2015, Petitioner submitted a complete application along with a certification from her physician stating that she meets the criteria for a qualifying patient. Her treating physician has stated that he supports her decision to utilize therapeutic cannabis in her remaining time. HHS has indicated that upon receipt of a proper and full application, it will issue a

letter stating that the person is a qualified user but will not issue an actual registration card until the dispensaries are open, which is anticipated to be sometime in the first or second quarter of 2016. (According to the statute, as interpreted by both the AG and the DHHS, the letter will not be sufficient to provide her with protection from arrest—only the registry card affords that level of protection.) There is a significant chance that the Petitioner will not live to the date of the anticipated issuance of the cards, which is over two and a half years after the effective date of the law by which the legislature sought to allow for therapeutic use of cannabis and one and a half years after the legislative **deadline** for adoption of rules for issuance of the patient registry cards. (RSA 126-X,I).

12. The Supreme Court of New Hampshire has made clear that the equal protection provisions of the State Constitution "are designed to ensure that State law treats groups of similarly situated citizens in the same manner." *McGraw v. Exeter Region Co-op. Sch. Dist.*, 145 N.H. 709, 711 (2001).

13. Therefore, the first question in any Equal Protection analysis is whether or not the law treats groups of similarly situated persons differently. Id. (citing *LeClair v. LeClair*, 137 N.H. 213, 222 (1993)).

14. A refusal to provide the Petitioner with a patient registry card would violate her right to equal protection of the law as guaranteed by both the state and federal constitutions. A citizen who differed from the Petitioner in no respect other than state of residence and who had exactly same diagnosis and prognosis as Petitioner, and was even treated by the same physician, but who came from the State of Maine and who had obtained marijuana from the same Maine dispensary would be protected from prosecution in New Hampshire, while the Petitioner's possession of the same amount of marijuana obtained from the same dispensary in Maine for the exact same conditions would expose her to loss of freedom for a period that is likely

to exceed the rest of her life. There is no justifiable reason for the state to treat such equally situated citizens in such a cruelly disparate manner — the different states of legal residence is simply unrelated to any justifiable state interest.

15. The right to equal protection under the law is guaranteed to all persons by Part One, Articles 1, 2, 4, 6, and 12 of the New Hampshire Constitution. These Articles collectively and individually guarantee persons who are equally situated must receive equal treatment from the government. *State v. Amyot*, 119 NH 671 (1979). In *Petition of Abbott*, 139 NH 412 (1995), the Supreme Court held that "'[t]he equal protection guarantee extends to the State's granting of privileges as well as to its imposition of restrictions. Equality of benefit is no less required than equality of burden.'" *Park v. Rockwell Int'l Corp.,* 121 N.H. 894, 899, 436 A.2d 1136, 1139 (1981).

16. In analyzing cases involving the concept of equal protection of the law under the New Hampshire Constitution, the courts utilize a three prong test. If the classification does not affect a fundamental right, an important substantive right, or classify on the basis of an improper characteristic such as race or creed, the court will look only to see whether there is a rational basis for the difference in treatment. *Opinion of the Justices,* 135 NH 549 (1992). Where important fundamental or substantive rights of a person are involved, the Constitution mandates the use of an intermediate test where the classifications must be reasonable and based upon a difference that bears a fair and substantial relationship to the purpose of the legislation. *City of Dover v. Imperial Casualty & Indemnity Co,* 133 NH 109 (1990). Rights that the court have deemed to be subject to this test include the right to recover for personal injuries (*Rooney v. Fireman's Fund Ins. Co.* 138 NH 637 (1994)); the right to use and enjoy private property, (*Asselin v. Town of Conway*, 135 NH 576 (1992)); and the right to recover for injuries from a municipality (*Dover, supra*). Finally, classifications based upon improper characteristics such as race,

gender, etc., are subject to a test of strict scrutiny.

17. The state's refusal to grant the right of access to a medicine and protection from arrest for possession to New Hampshire residents while granting it to identically situated residents of other states fails both the rational basis test and the intermediate test. In essence, by refusing to provide the Petitioner with the patient registry card to which she is entitled by statute, the Respondent is denying her a medical treatment to relieve horrible symptoms while allowing persons from other states such access. There is no rational basis for doing so, and certainly there is no substantial relationship with a valid state policy objective.

18. Not a single person will be harmed to any degree by issuing a card now that the State will otherwise issue in the spring of next year. Failure to issue the card now will however consign the Petitioner to spending her last months of life in agonizing pain and a narcotic stupor. The Respondent's refusal to act in these circumstances shocks the conscience in violation of the Petitioner's right to substantive Due Process of Law as Guaranteed by Part One, Article 2 of the New Hampshire Constitution and the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

19. Part One, Article 2 provides that:

> All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

20. Part One, Article 4 of the New Hampshire Constitution provides *inter alia* that "[a]Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them … ." Given that the Petitioner has only months to live and that the state will be giving out the registry cards to all

qualified patients within a six month period, the Petitioner has an inalienable right to use a medication that is both legally available and has been found by the Legislature to be an effective medicine for her condition and symptoms.

21. A baseless refusal to allow access to medicine and protection from arrest under the circumstances of this case on the part of the state represents a willful denial of petitioner's right to the enjoyment of life and her right to seek and obtain happiness, thus denying her a fundamental and inalienable right guaranteed by both Articles 2 and 4.

22. In the case of *In re Karen Quinlin*, the parents of a young woman in a persistent vegetative state sought to have her removed from life support. In deciding the case, the New Jersey Supreme Court noted that as a person approaches the end of life, the state's interest in control of medical procedures lessens. "We think that the State's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest." (*In re Karen Quinlin*, 355 A. 2d 647, 70 NJ 10, 70 New Jersey 10 (1976), at p. 41.) In the instant case, the state has no substantial interest and the Petitioner's interest could not be greater. Simply put, at this stage of life and death, the State cannot act as an 'uber-doctor' and refuse access to legally permissible medicine to critically needed to mitigate the pains of the dying process.

23. The procedural and substantive protections of the rights of a person to control of their privacy and bodily and mental processes have their federal counterparts in what has become known as the right to substantive due process of law. Over the past decades, the US Supreme Court has gradually expanded the concept of a realm of personal privacy protected by the Constitution. At times the Court has relied upon the Fifth Amendment Due Process Clause, the reservation of rights to the people expressed the Ninth Amendment, and the concept of liberty as

protected by the 14th Amendment.

2. In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court extended the right to substantive due process to include the right of a woman to choose whether to go through a pregnancy. The Court discussed the areas in which a personal right to self-determination had been held to take precedence over the power of the state:

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford,* 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio,* 392 U.S. 1, 8-9 (1968), *Katz v. United States,* 389 U.S. 347, 350 (1967), *Boyd v. United States,* 116 U.S. 616 (1886), *see Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut,* 381 U.S. at 484-485; in the Ninth Amendment, *id.* at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, *see Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy." At p 151.

25. In *Raich v. Gonzales*, 500 F3rd 850 (2007), the United States Ninth Circuit Court of Appeals dealt with a denial of a request for an injunction barring interference with the use of medical marijuana by a very ill but not terminal patient.

The patient had been found qualified to use medical marijuana by the State of California and the injunction was sought against federal agents interfering with his use of marijuana. (The Due Process analysis thus was under the Fifth and Ninth Amendments without reference to the 14th Amendment guarantee against action by the states.) The Court began its analysis with remarks from a 1961 dissent written by Justice Harlan wherein he discussed the scope of substantive due process rights:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (Harlan, J. , dissenting) (citations omitted); see also *Planned Parenthood of SE Penn. v. Casey*, 505 U.S. at 849 (noting that Justice Harlan's position was adopted by the Court in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)).

26. The *Raich* Court then noted that the concept of a penumbra of unenumerated fundamental rights was supported by the terms of the Ninth Amendment, which states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Ninth Circuit then went on to list examples of unenumerated rights that had been found to be protected by constitutionally mandated substantive due process of law:

"The Supreme Court has a long history of recognizing unenumerated fundamental rights as protected by substantive due process, **[*863]** even before the term evolved into its modern usage. See, e.g., Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (to have an abortion); Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (same); Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) (to use contraception); Griswold, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (to use contraception, to marital privacy); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (to marry); Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (to bodily integrity); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (to have children); Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (to direct the education and upbringing of one's children); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (same)."

27. In the present case, Petitioner states that where a state has authorized the use of medical marijuana to treat the cancer from which she suffers, where she and her doctors believe it is the appropriate treatment for her at this time, where she is facing a prognosis of death within months and a rapid decline accompanied by painful and agonizing symptoms, she has a substantive due process right under both the state and the federal constitutions to be issued a registry card that will enable her to legally obtain the needed medicine in Maine.

28. Marijuana has a long history of use in this country and only a relatively short period of prohibition:

"It is beyond dispute that marijuana has a long history of use -- medically and otherwise -- **[*865]** in this country. Marijuana was not regulated under federal law until Congress passed the Marihuana Tax Act of 1937, Pub. L. No. 75-348, 50 Stat. 551 (repealed 1970), and marijuana was not prohibited under

federal law until Congress passed the Controlled Substances Act in 1970. See *Gonzales v. Raich*, 125 S. Ct. at 2202. There is considerable evidence that efforts to regulate marijuana use in the early-twentieth century targeted recreational use, but permitted medical use. See Richard J. Bonnie & Charles H. Whitebread, The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition, 56 Va. L. Rev. 971, 1010, 1027, 1167 (1970) (noting that all twenty-two states that had prohibited marijuana by the 1930s created exceptions for medical purposes). By 1965, although possession of marijuana was a crime in all fifty states, almost all states had created exceptions for "persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person." (*Leary v. United States*, 395 U.S. 6, 16-17, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969).)

"The history of medical marijuana use in this country took an about-face with the passage of the Controlled Substances Act in 1970. Congress placed marijuana on Schedule I of the Controlled Substances Act, taking it outside of the realm of all uses, including medical, under federal law. As the Supreme Court noted in *Gonzales v. Raich*, 125 S. Ct. at 2199, no state permitted medical marijuana usage until California's Compassionate Use Act of 1996. Thus, from 1970 to 1996, the possession or use of marijuana -- medically or otherwise -- was proscribed under state and federal law." *Raich supra*.

29. At the time of the *Raich* decision, only 11 states had authorized the use of medical marijuana. The *Raich* Court recognized that societal norms can rapidly change so that a right that once was not fundamental can become fundamental, just as the right to same-gender sexual relations had crystalized in the years between 1986, when the Court had denied such a right in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) and 2004 when it recognized the right in

Lawrence v. Texas, 539 US 572 (2004). In *Lawrence*, Justice Kennedy had discussed how the evolution of society can change our conception of what rights are fundamental to the dignity of a human being, stating, "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."

31. Ultimately, the *Raich* Court declined to find that society had sufficiently evolved to recognize the right to use medical marijuana as fundamental; however, it explicitly recognized that the rapidity of change in attitudes might soon lead to a different result:

> "For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected."

32. Developments in the years since the *Raich* decision have indeed brought about a sea change. Today 148 million Americans live in the 23 states that have legalized the medical use of marijuana; another 119 million live in the 15 other states that have legalized the use of Cannabidiol (CBD), a phyto-cannabinoid derived from the marijuana plant. Thus in total, 267 million Americans, 84.5 percent of the population of the United States, live in states with legal access to either marijuana or an extract of marijuana. Public opinion is likewise overwhelmingly in support of authorizing seriously ill people to treat with medical marijuana — a CBS poll in the spring of this year found that 84 percent of Americans support medical marijuana. (For comparison, it is instructive to note that the most recent polling shows that slightly under half of Americans support the right to same sex marriage found to be a substantive due process right last June.)

32. This overwhelming national acceptance of the right of patients to treat

serious conditions with medical marijuana was explicitly recognized and codified in Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, 128 Stat. 2130 (2014) ("2015 Appropriations Act"), which prohibits the Department of Justice from expending any funds in connection with the enforcement of any law that interferes with state's ability to "implement their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

33. Recently, the United States District Court for the Northern District of California issued an opinion informing the Department of Justice and all federal law enforcement agencies that this appropriation was binding and all encompassing — they were not to spend a penny that interfered with any persons or entities that were acting on conformity with state medical marijuana laws. (*U.S. v. Marin Alliance for Medical Marijuana et al,* No. C 98-00086 CRB, decided October 19, 2015.)

34. The societal support for the right of the seriously ill to access medical marijuana — as evidenced by the ban against interference established by the United States Congress, by laws in states with 84.5% of the American people, and by polling showing overwhelming popular support — far exceeds the levels that were found to be sufficient to establish societal acceptance of a fundamental substantive due process right in both *Lawrence v Texas, supra,* and *Obergfell v Hodges*, 576 US ___, (2015) decided June 26, 2015, establishing fundamental liberty due process right to same sex marriage.

35. In New Hampshire itself, the law authorizing the use of medical marijuana passed by overwhelming bipartisan majorities in both the House and Senate (286 to 65 in the House, and in the Senate the bill passed on a voice vote without objection).

36. The sponsors of the bill have without exception stated that the intent was to allow access to medical marijuana before the dispensaries were open. Thus the primary sponsor of the bill, Rep. Donna Schlactmann of Exeter was quoted as saying,

> "The intention of the cards was to protect patients so if for some reason they get stopped and there's a question about whether marijuana is on them or in them, they will be protected," she said. "It's just to make sure we are identifying those patients who are legally possessing marijuana. The card issue date is prior to the opening of the dispensaries, so our intention was to completely protect patients… It was never our expectation that patients would only get and only have the option of getting it from dispensaries." (Manchester Hippo, 6/19/13.)

37. Given the overwhelming support for access to medical marijuana in country, the overwhelming support of the members of the legislature in New Hampshire, the clear meaning of the law authorizing the use of medical marijuana with or without New Hampshire dispensaries, the availability of carefully regulated medical marijuana, and the lack of any valid state interest in interfering with the palliative treatment of a dying person, the state's unwarranted and baseless refusal to issue Petitioner a patient registry card represents a denial of her right to substantive due process of law as guaranteed by the Fifth, Ninth, and 14th Amendments to the United States Constitution and Part One, Articles 2 and 4 of the New Hampshire Constitution.

JURISDICTION

38. This is an action by Petitioner seeking injunctive and declaratory relief pursuant to Superior Court Rule 161(b) and RSA 491:22(I). Petitioner seeks an expedited temporary order requiring the Respondent to issue the Petitioner a cannabis patient registry card upon receipt of a sufficient application. Petitioner also seeks in final judgment a determination that qualifying patients who have submitted sufficient applications are entitled to receive patient registry cards without regard to the status of New Hampshire dispensaries. Petitioners request a judicial determination that the refusal of the Respondent to issue qualifying patients registry cards violates state law, Part 1, Articles l, 2, and 10, of the New Hampshire Constitution, and the 14th and 24th Amendments to the Constitution of the United States. RSA 491:22(I) provides in part, "Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive."

39. The Court has personal jurisdiction over the Respondent, as his office and the department facilities which issue registry cards are located in Merrimack County.

40. The Court has subject matter jurisdiction pursuant to RSA 491:22, RSA 541-A:24 and Superior Court Rule 161(b).

41. The venue in Merrimack County is proper because it is where all state actions relating to the application for a registry card must occur.

CAUSES OF ACTION

Count I

(Violation of State Law and Rules)

42. Petitioners adopt the allegations contained in Paragraphs 1-37.

43. The failure of Respondents to issue patient registry cards to Petitioner violate the RSA 126:X and further violate Rule He-C 401.10, which was promulgated by Respondent and approved by the Legislature.

Count II

(Violation of State and Federal Constitutional Guarantees of Equal Protection)

44. Petitioners adopt the allegations contained in Paragraphs 1-37.

45. Failure to provide qualifying patients such as Petitioner from New Hampshire with patient registry cards that protect them from criminal prosecution while providing such protection to persons similarly situated from other states operates to deny her Equal Protection of the Law, as guaranteed by Part One, Articles 1, 2, 6, and 10 of the New Hampshire Constitution and the 14th Amendment of the United States Constitution.

Count III

(Violation of Substantive Fundamental Privacy Rights Under State and Federal Constitutions)

46. Petitioners adopt the allegations contained in Paragraphs 1-37.

47. The failure to allow access to a legal medical treatment to a person who suffers from an acute terminal disease is a denial of fundamental substantive rights protecting the dignity of persons as guaranteed by Part One, Articles 2 and 4 of the New Hampshire Constitution and the Fifth, Ninth, and 14th Amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioner pray that:

1. Pending a final hearing on this matter, the Court schedule an expedited hearing given the need for an immediate resolution of the legal issues raised by Petitioners.

2. Following such hearing, in light of the irreparable harm to Petitioner caused by the failure to allow legal access to needed medical treatment, Petitioner's lack of an alternate adequate remedy at law, and the substantial likelihood that Petitioner will succeed on the merits of their case, the Court issue a preliminary injunction ordering the Respondent to forthwith issue a therapeutic registry card to Petitioner upon receipt of an application that conforms with the statute.

3. The Court schedule an expedited final hearing in this matter.

4. Following the final hearing, the Court issue a declaratory judgment finding:

a. RSA 126:X does not mandate that the issuance of patient registry cards be withheld until dispensaries are open and operating in New Hampshire. Receipt of an application and physician certification sufficient under the terms of the statute requires the Respondent to issue such card to a qualifying patient.

b. RSA 126:X allows qualifying patients from other states to possess cannabis in New Hampshire. Failure to issue cards to qualifying patients from New Hampshire such as Petitioner represents a denial of Equal Protection of the Law.

c. The Respondent is bound by the terms of its own administrative Rule 401.10 and must issue patient registry cards within five days of approval of an application, which approval process must be completed within 15 days of receipt of the application.

d. Any putative interest the state might propose is grossly outweighed by the fundamental substantive due process rights of critically ill patients to access therapeutic marijuana under the Federal Constitution.

e. Qualifying patients who are critically ill have a fundamental right to access therapeutic marijuana that outweighs any state interest to the contrary under Part One, Articles 2 and 4 of the New Hampshire Constitution.

5. That following the final hearing, and as a consequence of the above-requested declaratory relief, the Court issue a permanent injunction directing the New Hampshire to issue qualifying patients registry cards without regard to the status of dispensaries within 5 days of approval of applications.

6. And for such other relief as may be just and proper.

Respectfully Submitted,

Petitioner, by and through her Attorney

_____

Paul Twomey

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(603)568-3254

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Declaratory Judgment and Injunctive Relief Under Oath has been forwarded to the Office of the New Hampshire Attorney General this 3rd day of Nov, 2015. The Attorney General's Office has agree to accept service on behalf of the Respondent.

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