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Montana Cannabis Industry Association v. State: Feeling the Effects of Medical Marijuana on Montana's Rational Basis Test

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PRECAP; *Montana Cannabis Industry Association v. State*: Feeling the Effects of Medical Marijuana on Montana’s Rational Basis Test

Luc Brodhead

No. DA 15-0055 Montana Supreme Court

Oral Argument: Wednesday, November 4, 2015 at 9:30 AM in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana.

I. QUESTIONS PRESENTED

What is the scope and proper application of rational basis review in Montana?

Does the Montana Marijuana Act’s (MMA) commercial prohibition on marijuana providers (limiting them to 3 patients and prohibiting any sale of marijuana) satisfy rational basis review?

Does the MMA’s 25 patient physician review trigger (an automatic review of the standards of any doctor who certifies more than 24 patients per year) satisfy rational basis review?

Does the MMA’s provider advertising ban unconstitutionally infringe on protected free speech?

Does the blanket ban on probationer access to medical marijuana satisfy rational basis review?

Does the warrantless provider search provision (permitting state inspectors to enter and inspect provider premises) infringe on right to privacy?

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2011, the Montana Legislature passed the MMA, a more tightly regulated version of the prior medical marijuana law.¹ The Legislature passed the MMA in response to a rapid increase in cardholders (patients approved for medical marijuana consumption) and marijuana providers.² The Legislature was specifically concerned with evidence of various abuses under the prior version the law, including issues such as the diversion of medical marijuana to non cardholders, the low threshold for getting cardholder status under the “chronic pain” category, and widespread advertising by providers.³

Soon after the passage of the MMA, the Montana Cannabis Industry Association (MCIA) and other plaintiffs sued in Lewis and

¹ Br. of Appellant at 3–6, *Mont. Cannabis Indus. Ass’n v. State* (Mont. May 6, 2015) (DA 15-0055).

² *Id.* at 4.

³ *Id.* at 4–5.

Clark County District Court to enjoin various provisions of the new act.⁴ The district court preliminarily enjoined several of the provisions such as the ban on commercial sale of medical marijuana, the ban on caregiver advertising, the warrantless caregiver inspections, and the 25 patient physician review trigger.⁵ The court reasoned that those provisions implicated the plaintiff's fundamental constitutional rights, triggering strict scrutiny analysis.⁶ The state appealed the injunction on the commercial ban, arguing that the district court erred in applying strict scrutiny, fundamental rights analysis to the provisions.⁷

In 2012, the Montana Supreme Court determined that the commercial ban did not implicate the fundamental rights to employment, to health, or to privacy, and that the plaintiffs had no fundamental right to medical marijuana.⁸ Accordingly, the Court reversed and remanded the case to the district court to apply rational basis review to the commercial ban.⁹

In 2015, the district court applied rational basis review to the commercial ban and the 25 patient physician review trigger, finding them irrational even under the less demanding test.¹⁰ The court concluded on summary judgment that the MCIA, challenging the commercial ban on the basis of denial of equal protection, had met its burden of showing that the provision created different classes of cardholders and imposed different burdens upon them.¹¹ The court further concluded that the State failed to meet its burden of justifying the distinction with a rationally related objective,¹² rejecting the State's arguments that marijuana remains illegal under federal law¹³ and that the ban was necessary to prevent the abuses cited by the Legislature in 2011.¹⁴ The court took a similar stance on the 25 patient physician review trigger, finding that the state failed to show any rational justification for the provision in light of the fact that abuses by physicians had already receded under the enjoined version of the MMA.¹⁵ Accordingly, the court entered a permanent injunction on both provisions.¹⁶

In the same decision, the district court enjoined the prohibition on advertising by marijuana providers on First Amendment grounds, an

⁴ *Id.* at 2.

⁵ Thomas J. Bourguignon, *Montana Cannabis Industry Association v. State of Montana and the Constitutionality of Medical Marijuana*, 75 MONT. L. REV. 167, 174 (2009).

⁶ Br. of Appellant at 2.

⁷ *Id.*

⁸ Mont. Cannabis Indus. Ass'n v. State, 286 P.3d 1161, 1166, 1168 (Mont. 2012).

⁹ *Id.* at 1168.

¹⁰ Appellee's Response Br. at 2, *Mont. Cannabis Indus. Ass'n v. State* (Mont. July 2, 2015) (DA 15-0055).

¹¹ Order on Mot. for Summ. J. 19:5-7, Jan. 2, 2015 [DDV-2011-518].

¹² *Id.* at 19:8-9.

¹³ *Id.* at 20:1-7.

¹⁴ *Id.* at 2:18-23.

¹⁵ *Id.* at 15:1-11.

¹⁶ *Id.* at 15:12-13, 21:19.

issue that the Montana Supreme Court had not previously addressed.¹⁷ The court found that the provision made content-based distinctions on protected political and educational speech and found that the provision failed under strict scrutiny.¹⁸ The court took issue with the vagueness and overbreadth of the provision, finding it “to be meaningless as to what it prohibits.”¹⁹

Lastly, the district court declined to enjoin the warrantless provider search provision and the ban on access by probationers.²⁰ As to the warrantless searches, the court adopted the State’s argument that “regulatory inspections of closely regulated industries can constitute an exception to the search warrant requirement,”²¹ finding that medical marijuana was clearly a “closely regulated activity.”²² As to the probationer restriction, the court agreed with the state’s rational justification that the Department of Corrections should have discretion to limit the rights of people under its supervision,²³ but asserted that the restriction should only apply on a case-by-case basis, when a reasonable nexus exists between the restriction and the person’s underlying offense.²⁴

Shortly thereafter, the State appealed the injunctions on the commercial ban, the 25 patient physician review trigger, and the advertising ban.²⁵ MCIA cross-appealed the district court’s failure to enjoin the warrantless search provision and the blanket ban on probationer use.²⁶

III. ARGUMENT

A. The scope and proper application of rational basis review in Montana.

Since the Montana Supreme Court required rational basis review of the commercial prohibition in 2012, these parties have disagreed over its extent and proper application, focusing on two main questions: whether the burden of proof shifts from the challenger of a statute to the State; and, the extent to which evidence is required in rational basis review and the proper use and scope of that evidence.²⁷ In the order now under appeal, the district court substantially adopted and applied MCIA’s

¹⁷ *Id.* at 9:9–15, 12:8.

¹⁸ *Id.* at 11:10–14.

¹⁹ *Id.* at 10:21–11:4.

²⁰ *Id.* at 14:7, 22:23.

²¹ *Id.* at 12:24–25.

²² *Id.* at 13:5–6.

²³ *Id.* at 22:10–15.

²⁴ *Id.* at 22:16–19.

²⁵ Br. of Appellant at 1.

²⁶ Appellee’s Response Br. at 1.

²⁷ Br. of Appellant at 13, 22–23; Appellee’s Response Br. at 18–20.

view of the rational basis test.²⁸ The Montana Supreme Court’s decision on some of the questions presented here will likely depend on whose version of the test it applies.

1. Arguments

The State argues that under rational basis review the burden remains on the challenger, “to show the law is not rationally related to a legitimate government interest,” or in other words, “to negate every conceivable basis which might support it.”²⁹ The State further argues that even if it does bear a burden, it need not meet that burden with current empirical proof of the law’s effectiveness.³⁰ Rather, the State must only present evidence of the Legislature’s unsubstantiated “rational speculation” as to a law’s justification.³¹ The State takes this one step further by asserting that evidence of the current state of the law should not influence the analysis because that amounts to a judicial determination of the law’s current necessity (i.e. its “wisdom or expediency”), not whether the Legislature had a rational basis for making the law at the time it was made.³²

MCIA argues that under rational basis review, an equal rights challenger has the initial burden of demonstrating that the law treats “two similarly situated classes of individuals differently.”³³ Therefore, MCIA argues, “once a challenger meets its initial burden, the burden then shifts to the government to justify the classification.”³⁴ MCIA further asserts that the district court correctly supported its findings with evidence of the current circumstances of the law.³⁵ MCIA reasons that such evidence sheds light on whether the legislative concerns that motivated the making of a law still apply today.³⁶

2. Analysis

The Court will likely address this issue at oral argument, either as a stand-alone question or in the context of specific provisions. Either way, the Court will want to hear from the parties on the question of burden shifting and the question of whether the use of current circumstances evidence is necessary or even permissible in rational basis review.

²⁸ Order Mot. Summ. J. 15:1–11, 17:1–18, 20:8–21:7.

²⁹ Br. of Appellant at 13.

³⁰ *Id.* at 23.

³¹ *Id.* at 23.

³² *Id.* at 22.

³³ Appellee’s Response Br. at 13.

³⁴ *Id.* at 19.

³⁵ *Id.* at 10.

³⁶ *Id.* at 11.

The State's position that they bear no burden under rational basis review will face an uphill battle. MCIA can point to numerous cases that indicate a positive burden on the State to show that the challenged law has a legitimate objective and to rationally connect that objective to the law's classification.³⁷ Therefore, the State will have to convince the Court to overrule its own precedent in order to adopt its approach. While the State has some federal authority in support of its position, MCIA will likely insist that the Montana Constitution offers a greater level of protection to individuals than 14th amendment, making the federal precedent less persuasive.

In contrast, it is unclear how the Court will address the position that rational basis review permits, and even requires, consideration of evidence of a law's current circumstances. On one hand, MCIA makes a compelling argument that in determining the rationality of a law, a court should consider the actual effect that the law has towards the government's objective. The idea that a court should simply ignore evidence that a law is not achieving its objective seems to place those people negatively affected by the law at an unnecessary risk. On the other hand, the State makes a strong argument that it is not the Court's job to fix an ineffectual law. Rather, it is the Legislature's job. The Court may ultimately be swayed by the State's argument that rational basis "constitutes the 'paradigm of judicial restraint,'"³⁸ meaning that while a law may be clearly ineffective, courts must concentrate only on ensuring that, at the time it was made, the Legislature had some articulable reason for making it in a way that treats people unequally.

B. Whether the commercial ban satisfies rational basis review.

1. Arguments

The State's principle argument is that the district court based its conclusion on the faulty premise that the legislative objective of the MMA was to provide access to marijuana to those who need it. The State asserts that this assumption led the court to conclude that the commercial prohibition works in opposition to this objective.³⁹ The State takes the position that the legislative purpose of the MMA was merely to continue protecting cardholders from prosecution, to provide a limited ability to cultivate marijuana, and to address the abuses stemming from the prior version of the law.⁴⁰ Under these objectives, the State asserts that the Legislature was well within its discretion to ban commercial sales because such a ban would not lead to cardholder prosecution, would still

³⁷ *Id.* at 19.

³⁸ Br. of Appellant at 13.

³⁹ *Id.* at 11.

⁴⁰ *Id.*

permit limited opportunities to cultivate marijuana, and would address abuses under the prior law such as the diversion of medical marijuana to non-cardholders.⁴¹

The State further argues that the district court exceeded the scope of rational basis review by considering the effectiveness of the commercial ban in meeting these objectives. Under its concept of rational basis review, the state asserts that, if it had any burden at all, it was only to roughly estimate that the ban was related to these objectives at the time the provision was made.⁴² The State considers evidence of the law's effectiveness and of changed circumstances since that time as beyond the scope of rational basis review.⁴³

MCIA argues that it met its initial burden of showing a discriminatory effect by demonstrating that the MMA classified people and the ban treated those classes unequally. MCIA asserts that the MMA created a class of persons who need marijuana, but lack the ability to cultivate their own.⁴⁴ MCIA points to the section of the MMA that provides “some debilitated persons in need of medical marijuana have the capability of growing their own—many do not.”⁴⁵

Having established a classification, MCIA argues that the commercial ban treats this class of people differently than others because, under the ban, providers will be unwilling to cultivate marijuana for them free of charge.⁴⁶ Thus, MCIA argues that the commercial ban discriminates against them by making it impossible for them to access marijuana while giving access to those with means to cultivate it.

MCIA further argues that the State failed to meet its burden of showing any rational connection between a government objective and the banning of commercial sales. The State asserts the objective of providing access to cardholders, but MCIA observes that the commercial ban clearly has an opposite effect.⁴⁷ As to the objective of reducing the abuses, MCIA observes that abuses have in fact decreased since the passage of the MMA despite the enjoinder of the commercial ban.⁴⁸ Finally, as to the objective of reducing liability under federal law, MCIA observes that federal law does not distinguish between commercial and non-commercial activity and that the US Department of Justice will not interfere with medical marijuana laws.⁴⁹ Thus, without any rational reason to eliminate commercial activity, aside from the state's

⁴¹ *Id.*

⁴² *Id.* at 12.

⁴³ *Id.* at 11–12.

⁴⁴ Appellee's Response Br. at 14.

⁴⁵ *Id.*

⁴⁶ *Id.* at 26.

⁴⁷ *Id.* at 23.

⁴⁸ *Id.* at 4–5.

⁴⁹ *Id.* at 34–35.

speculation that some conceivable justification exists, MCIA concludes that the statute fails rational basis review.⁵⁰

2. Analysis

The Court's decision on the constitutionality of the commercial ban will depend on how it applies the rational basis test. The State's argument that the ban rationally relates to the reduction in abuses is persuasive if the Court limits its consideration to justifications the Legislature had in 2011. At that time, the Legislature was genuinely concerned about the diversion of medical marijuana to non-cardholders. Banning commercial sales could be rationally tied to prevention of this abuse because that kind of availability arguable created greater opportunities for diversion.

However, if the Court requires substantiated evidence of the legislators actually making that rationalization or if the court permits evidence of the subsequent effectiveness of the commercial ban in actually preventing the abuse, then the State's argument quickly falls apart. Ultimately, the State offers little concrete evidence in support of its conclusion that the MMA's objectives are rationally related to the commercial ban and does not rebut MCIA's assertion that abuses have decreased in spite of the commercial ban's enjoinder. The State's argument depends on the court giving the Legislature the deference that it believes is necessary under rational basis review. Despite the State's lack of evidence, the Court may be persuaded by the idea that if people are truly discriminated against by the commercial ban, the proper remedy is to petition the Legislature to amend the law.⁵¹

C. Whether the 25 patient review trigger satisfies rational basis review.

1. Arguments

The State's argument for this provision parallels its position on commercial prohibition.⁵² The State attacks the district court's consideration of the current circumstances of the law, specifically the evidence showing that abuses of the certification process by physicians have reduced despite the provision's enjoinder.⁵³ Like in its argument for the commercial ban, the State reasons that such evidence is irrelevant to rational basis review. Rather, the State insists that the court should have limited its review to what the Legislature faced in 2011.⁵⁴

⁵⁰ *Id.* at 4.

⁵¹ Br. of Appellant at 12.

⁵² *Id.* at 28.

⁵³ *Id.*

⁵⁴ *Id.*

Thus, the State focuses its argument on how the Legislature created the 25 patient review trigger in response to its understanding of the abuses occurring under the prior law. The State asserts that in 2011, the Legislature was concerned about evidence of doctors travelling the state, or using video conferencing, to certify hundreds of patients without actually establishing doctor-patient relationships.⁵⁵ The State also points to the Legislature's concern that physicians were not held accountable for certifications under the vague "chronic pain" category.⁵⁶ The State asserts that these concerns constitute a legitimate state interest in controlling the certification of cardholders, and it concludes that ensuring a standard of care by creating an automatic review system for physicians is rationally related to that interest.⁵⁷

MCIA argues that evidence of the current circumstances of this provision show its ineffectiveness and therefore reveals its irrationality. MCIA points to the fact that the board of medical examiners has reported no problems with physicians abusing the medical marijuana certification process since 2011 despite the fact that this provision has never been in effect.⁵⁸ MCIA asserts that this evidence demonstrates that the provision is not necessary to meet its purported objectives and reveals provision's irrational nature.⁵⁹

MCIA further argues that even in 2011, the Legislature lacked rational basis to impose this provision because by 2010, the Board of Medical Examiners had sufficient authority to discipline certifying doctors who violated its standard of care; by that time, the board had also issued a directive prohibiting certification solely by videoconference.⁶⁰ MCIA insists that even if the evidence of the provision's current irrelevance is not proper, then the evidence that the Board of Medical Examiners already had abuses under control in 2010 undermines the Legislature's rational for making the provision in 2011.

2. Analysis

Like for the commercial prohibition, the Supreme Court's decision on this provision will depend greatly on whether it views evidence of the current effectiveness or necessity of the law as proper in rational basis review. If so, the State will have to overcome the fact that complaints about issuance of medical marijuana certifications have dried up under the current law. The State could argue that the only reason abuses *appear* to have receded since 2011 is because the physician

⁵⁵ *Id.* at 28–29.

⁵⁶ *Id.* at 29.

⁵⁷ *Id.*

⁵⁸ Appellee's Response Br. at 33.

⁵⁹ *Id.* at 34.

⁶⁰ *Id.* at 32.

review trigger has been enjoined. However, that would require the State to bring in its own evidence of the current necessity of the provision, something that it has declined to do thus far.

However, even if the Court does not view current circumstance evidence as proper, MCIA still makes a persuasive argument that, in 2011, the Legislature lacked a rational justification for this provision. The evidence that the Board of Medical Examiners had already taken steps to curb abuses cuts against the state's argument that the Legislature was legitimately concerned about them.

D. The constitutionality of the provider advertising ban.

1. Arguments

The State argues the commercial advertising ban restricts only commercial speech and, therefore, should be subject to the less rigorous, four-part test established in *Central Hudson Gas & Electric v. Public Service Comm'n of New York*,⁶¹ rather than strict scrutiny.⁶² The State uses statutory analysis to demonstrate that the provision only implicates commercial speech,⁶³ asserting that the statute's restriction to "not advertise" and its application only to "marijuana or marijuana-related products" is unambiguously limited to commercial speech.⁶⁴

The State applies the *Hudson* factors to the provision and finds that it passes the constitutional test at the first stage. The State takes the position that the provider advertisements concern an illegal activity⁶⁵ and points out that the first factor requires that the commercial speech at issue "must concern a lawful activity and not be misleading."⁶⁶ Because the illegal content of the speech is a threshold issue, the State argues that the court need not address the remaining factors.

Even so, the State runs through the remaining factors to further demonstrate the constitutionality of the ban. The remaining factors require that, when "there is a substantial government interest, the regulation must directly advance the asserted objective, and reach no further than necessary to accomplish that objective."⁶⁷ The State observes that the Legislature had a substantial government interest in removing the profit motive of medical marijuana,⁶⁸ and argues that the provision directly advances that objective by suppressing advertising and reducing demand.⁶⁹ The State concludes that the provision meets the final tailoring question because there is an "immediate connection"

⁶¹ 447 U.S. 557 (1980).

⁶² Br. of Appellant at 31.

⁶³ *Id.* at 33.

⁶⁴ *Id.*

⁶⁵ *Id.* at 38.

⁶⁶ *Hudson*, 447 U.S. at 565.

⁶⁷ *Id.*

⁶⁸ Br. of Appellant at 41.

⁶⁹ *Id.* at 42.

between the ends of removing the profit motive and the means of prohibiting advertising.⁷⁰

MCIA argues the district court correctly found the ban to be unconstitutional on the ground that its “overbreadth implicates non-commercial speech, both political and educational, which triggers strict scrutiny.”⁷¹ MCIA argues that the restriction implicates political speech because medical marijuana is a controversial and politicized topic and the restriction could be used to infringe on that discourse.⁷²

MCIA further argues that even if the *Hudson* test applies to the provision, it is still unconstitutional. MCIA asserts that the State did not meet its burden of showing a substantial government objective by failing to offer a witness in support of its position.⁷³ Just for good measure, MCIA also throws in evidence of the current circumstances of the provision that show that the MMA has functioned effectively despite the provision’s enjoinder back in 2011.⁷⁴

2. Analysis

It is unlikely that the Court will adopt MCIA’s and the district court’s argument that the provision implicates political speech. The State makes a persuasive argument that the statute plainly restricts only advertisements for marijuana products. Considering its unambiguous language, MCIA’s argument that it may be used for other purposes has little weight.

Rather, the Court’s decision on the provision may well depend on whether it considers the provider advertisements to concern a legal or illegal activity. The arguments of both parties hinge on that issue, but neither party can point to any precedent from the Court suggesting that it will go one way or the other. The State’s argument that marijuana is illegal under both state and federal law is simple, but it may be persuasive if the Court recognizes that those laws actually affect the content of the advertisements at issue here.

Conversely, the Court may acknowledge that medical marijuana is legal in Montana for cardholders, meaning that the provision concerns only the use and sale of a legal substance. But, the Court has not yet ruled on whether the MMA actually legalizes medical marijuana in Montana or whether it merely creates a protection from prosecution for cardholders. The district court took up that issue below, inferring from the 2012 supreme court decision that the MMA makes medical marijuana

⁷⁰ *Id.* at 43.

⁷¹ Appellee’s Response Br. at 40.

⁷² *Id.*

⁷³ *Id.* at 41.

⁷⁴ *Id.*

legal.⁷⁵ It is noteworthy that the supreme court hinted to medical marijuana's legality in its decision despite its parallel acknowledgment of marijuana's illegality under federal law. This does not necessarily mean the Court will follow the district court's holding on medical marijuana's legality, nor does it mean that they will uphold the injunction on the advertising ban, but they are certain to focus on both issues at oral argument.

E. Whether the ban on probationer use satisfies rational basis review.

1. Arguments

MCIA argues on cross appeal that it is irrational to create a blanket rule depriving probationers of medical marijuana and that the district court's solution of applying a case-by-case test is not possible under the provision. MCIA supports its argument of irrationality with the holding from *State v. Nelson*⁷⁶ which requires that medical marijuana be treated as a prescription drug, not a controlled substance, in the context of conditions imposed at criminal sentencing. MCIA also points to the holding from *State v. Ashby*⁷⁷ which affirms that, on a case-by-case basis, sentencing conditions must have a reasonable nexus to the offender's underlying offense. Under these holdings, MCIA asserts that the government has no rational basis to restrict probationer access, so long as it cannot identify a reasonable relationship between the restriction and the underlying offense. MCIA concludes that the provision is facially irrational because its form as a blanket ban precludes any case-by-case analysis.

The State argues that the ban satisfies rational basis because the Legislature had a legitimate interest in preventing probationers from access to marijuana and because the ban is rationally related to that interest. The State asserts a legislative interest in allowing the Department of Corrections to establish its own sentencing conditions and in preventing probationer access because of their high rates of substance abuse and dependency issues.⁷⁸ The State also undermines MCIA's application of *Nelson*, arguing that it was based on the prior version of the law.⁷⁹

The State agrees with MCIA's and the district court's conclusion that a case-by-case approach to this problem would satisfy the nexus requirement of *Ashby*. The State asserts that under the probationer ban,

⁷⁵ Order Mot. Summ. J. 8:1–8.

⁷⁶ 195 P.3d 826, 833 (Mont. 2008).

⁷⁷ 179 P.3d 1164, 1168 (Mont. 2008).

⁷⁸ Appellant Reply and Answer to Cross Appeal at 18, *Mont. Cannabis Indus. Ass'n v. State* (Mont. Aug. 3, 2015) (DA 15-0055).

⁷⁹ *Id.*

offenders would still have the opportunity to argue at sentencing for access to marijuana.⁸⁰ The State concludes that, because of the inapplicability of *Nelson* and the availability of case-by-case determinations under *Ashby*, the provisions is rationally related to the purpose of deferring to the Department of Corrections and reducing substance abuse among probationer.⁸¹

2. Analysis

The Court will likely recognize the State's asserted purpose in deferring to the department of corrections but may find that it lacks a rational relationship to the provision's *blanket* effect. MCIA makes a persuasive argument that while a case-by-case determination would be rational, the provision does not permit that approach as it is written. The statute provides that "[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."⁸² The State makes no argument as to how the Department of Corrections could get around that language and allow access to a probationer under *any* circumstances, including those where the probationer has a qualifying medical condition and has not committed any drug or substance-abuse related offense. Even so, the Court will have to decide whether this lack of flexibility in the provision makes it facially irrational, a potentially high bar.

F. The constitutionality of the warrantless search provisions.

1. Arguments

MCIA's principle argument is that the district court erred in applying a relaxed federal regulatory inspection standard in Montana where the Constitution affords additional privacy rights. MCIA asserts that the district court failed to perform a separate analysis of the provision, taking into consideration Montana's constitutional right to privacy.⁸³ MCIA cites to *State v. Bowen*,⁸⁴ in support of this point which held that such an "independent analysis" is necessary in the case of any warrantless search.⁸⁵ MCIA also points to the requirement under the Constitution's privacy clause that the State must provide a compelling reason to invade privacy.⁸⁶ MCIA asserts that the State failed to show a compelling reason for the inspection procedure and that the district court

⁸⁰ *Id.*

⁸¹ *Id.* at 18–19.

⁸² MONT. CODE ANN. § 50–46–307(4) (2015).

⁸³ Appellee's Response Br. at 44.

⁸⁴ 755 P.2d 1364 (Mont. 1988).

⁸⁵ *Id.* at 1370.

⁸⁶ Appellee's Response Br. at 44.

erred by not take this failure into consideration in a separate analysis of Montana privacy rights.

The State argues that the district court was correct to apply the federal standard for regulatory inspections and that the inspections under this provision are easily satisfy by that standard. The standard offered by the state comes from *New York v. Burger*⁸⁷ where the United States Supreme Court held that regulatory inspections of “closely regulated” industries are an exception to the search warrant requirement.⁸⁸ The State asserts that the district court had every right to apply the precedent of the United States Supreme Court, especially when it is as closely on point as *Burger*.⁸⁹ Furthermore, the state observes that the plaintiffs do not contest that growing and providing medical marijuana constitutes a “closely regulated” activity.⁹⁰

The State further argues that, even under a separate analysis of the provision, it would still meet Montana’s heightened privacy standards because of its reasonable nature. The State asserts that, under *State v. Bassett*,⁹¹ Montana’s privacy protections are limited by their objective reasonableness.⁹² The State reasons that providers choosing to participate in this industry have the reasonable expectation that inspections will occur, the expectation stemming from the fact that they went through an authorization procedure and have been given the opportunity to deal in an “otherwise illegal substance.”⁹³ The state concludes that this reasonable expectation of an invasion of privacy makes the invasion itself reasonable and therefore satisfies Montana’s privacy protection standards.

The State further concludes that the Legislature had a compelling interest in conducting the inspections and that the provision is narrowly tailored to that purpose. The State asserts that the Legislature had a compelling interest in enforcing criminal laws and, because it had created a narrow exception to those laws, the Legislature had a compelling interest in ensuring that providers stay within that exception.⁹⁴ The State also asserts that the provision is narrowly tailored to that interest because the inspections occur during regular business hours for the limited purpose of ensuring provider compliance with the MMA.⁹⁵

2. Analysis

⁸⁷ 482 U.S. 691(1987).

⁸⁸ *Id.* at 702.

⁸⁹ Appellant Reply and Answer to Cross Appeal at 20.

⁹⁰ *Id.* at 19.

⁹¹ 1982 P.2d 410 (Mont. 1999).

⁹² *Id.*

⁹³ Appellant Reply and Answer to Cross Appeal at 22.

⁹⁴ *Id.*

⁹⁵ *Id.*

The Court will likely agree with MCIA's point that a separate analysis of the provision is required in light of Montana's privacy rights. While *Burger* provides an effective standard for analyzing search warrant exceptions for regulatory inspections, the Court cannot ignore the heightened and separate right to privacy found in Montana.

However, even under that heightened standard, the State does make a separate and persuasive argument that the provision is reasonable. Considering the illegality of marijuana in Montana and the high standard for authorization under the current MMA, the Court will likely agree that providers have an expectation that inspection is part of that authorization. The Court will recognize the ease in which providers can exceed the limitations of their operations, transforming a legal enterprise into a criminal one with little effort.