City Commission Special Meeting Agenda
2 Park Drive South, Great Falls, MT
Commission Chambers, Civic Center
October 16, 2023
3:00 PM

The agenda packet material is available on the City's website: **https://greatfallsmt.net/meetings.** The Public may view and listen to the meeting on government access channel City-190, cable channel 190; or online at **https://greatfallsmt.net/livestream.**

Public participation is welcome in the following ways:

- Attend in person.
- Provide public comments in writing by 12:00 PM the day of the meeting: Mail to City Clerk, PO Box 5021, Great Falls, MT 59403, or via email to: **commission@greatfallsmt.net**. Include the agenda item or agenda item number in the subject line, and include the name of the commenter and either an address or whether the commenter is a city resident. Written communication received by that time will be shared with the City Commission and appropriate City staff for consideration during the agenda item and before final vote on the matter; and, will be so noted in the official record of the meeting.

CALL TO ORDER

ROLL CALL / STAFF INTRODUCTIONS

AGENDA APPROVAL

CONFLICT DISCLOSURE / EX PARTE COMMUNICATIONS

PETITIONS AND COMMUNICATIONS

(Public comment on any matter that is not on the agenda of the meeting and that is within the jurisdiction of the City Commission. Please keep your remarks to a maximum of 3 minutes. When at the podium, state your name and either your address or whether you are a city resident for the record.)

1. Miscellaneous reports and announcements.

NEW BUSINESS

2. APPEAL OF SIC REVOCATION -- Appeal from M&D Retail Montana 2, LLC dba Wild West Wellness on the Revocation of a Safety Inspections Certificate (SIC). *Action: Grant or deny the appeal.*

ADJOURNMENT

(Please exit the chambers as quickly as possible. Chamber doors will be closed 5 minutes after adjournment of the meeting.)

Assistive listening devices are available for the hard of hearing, please arrive a few minutes early for set up, or contact the City Clerk's Office in advance at 455-8451. Wi-Fi is available during the meetings for viewing of the online meeting documents.

Commission meetings are televised on cable channel 190 and streamed live at https://greatfallsmt.net.

Special Commission Meeting Date: October 16, 2023

CITY OF GREAT FALLS
COMMISSION AGENDA REPORT

Item:	ADMINISTRATIVE APPEAL -- Appeal from City Staff Decision to Revoke the Safety Inspection Certificate issued to M & D Retail on December 1, 2022 for operation of a "head shop" selling "glass and accessories."
From:	David G. Dennis, City Attorney
Initiated By:	M & D Retail Bozeman, LLC
Presented By:	David G. Dennis, City Attorney
Action Requested:	Conduct a Public Hearing and Uphold, Reverse or Revise the Staff Decision to Revoke M & D Retail's Safety Inspection Certificate.

Public Hearing:

1. Mayor conducts public hearing, pursuant to OCCGF 1.2.050 and Title 17, Chapter 16, Article 6.

2. Mayor closes public hearing and asks the will of the Commission.

Suggested Motion:

1. Commissioner moves:

   "I move that the City Commission deny the appeal and uphold the decision of City staff to revoke the Safety Inspection Certificate issued to Appellants."

   OR

   "I move that the City Commission grant the appeal and reverse the decision of City staff to revoke the Safety Inspection Certificate issued to Appellants."

2. Mayor requests a second to the motion, Commission discussion, and calls for the vote.

While the background and history of this case are somewhat complicated, the questions being presented to the Commission are relatively simple.

1. Did APPELLANT fail to disclose its intent to sell cannabis intoxicants in its November 29, 2023 Safety Inspection Certificate Application?; or

2. As of May 22, 2023, was Appellant required to be licensed as set forth in HB 948 to offer its cannabis intoxicants for sale to the public?

If the answer to either of these questions is yes, the revocation of Appellant's SIC should be upheld by the Commission. Staff submits the answer to both of the above questions is "yes," and therefore, the Commission should uphold the revocation of Appellant's SIC.

BACKGROUND

Glass and accessories. On November 29, 2022, M and D Retail MT 2, located at 725 1st Avenue North and doing business as Wild West Wellness (Appellant), submitted to the City of Great Falls an application for a Safety Inspection Certificate (SIC) (Exhibit A). An SIC, which is the City's equivalent of a business license, is required by City ordinance to conduct business within the incorporated City limits. To be issued, an application for an SIC must be approved by the following departments: Planning/Zoning, Building, Fire, Health, and Public Works.

Appellant's application, completed by Mack Ethington describes the nature of Appellant's business as follows: "We sell glass and accessory's (sic)." Mr. Ethington signed the application, attesting that he had "filled out this application to the best of my knowledge." Mr. Ethington also completed the applicant section of the safety inspection certificate approval sheet (Exhibit B). On this sheet, Mr. Ethington describes the business use as a "head shop."

Great Falls Fire Rescue Assistant Chief Mike McIntosh contacted Mr. Ethington to schedule an inspection of the business premises. During his inspection, Mr. McIntosh observed that there was no product in the store. Mr. McIntosh inquired as to the nature of the business, and Mr. Ethington responded that Appellant would be selling CBD and pipes. Mr. McIntosh completed the inspection of the business on December 1, 2022, and the SIC was issued on the same date.

Almost immediately following the opening of business, City staff began receiving complaints that Appellant was selling marijuana in an area not zoned for such business. Following-up on these complaints, on December 9, 2022 Assistant Chief McIntosh, accompanied by Planning and Community Development Deputy Director Tom Micuda, made an unannounced visit to the store. Upon entering the business, Mr. Micuda and Mr. McIntosh observed display cases filled with plants that appeared to them to be marijuana. Mr. Micuda and Mr. McIntosh were greeted by a Mr. Dan Kanewske (Mr. Kanewske is listed as Appellant's registered agent and a member of Appellant's parent company—M and D International, LLC). Mr. Kanewske immediately insisted they discuss the matter in another room. While escorting Mr. Micuda and Mr. McIntosh into a private room, Mr. Kanewske contacted Mr. Ethington, who was on his way back to the store. Mr. Ethington asserted that the business was not selling marijuana, but rather a "hemp derivative" and that Appellant's activities had been vetted through its attorney. Mr. Micuda and Mr. McIntosh reminded Mr. Ethington of the applicable zoning restrictions and, after the discussion, were escorted out the side door of the business.

City staff continued to receive complaints and other reports asserting that Appellant was operating as a marijuana dispensary. One citizen forwarded photos of product purchased from Appellant (Exhibit C). The photos show a bottle containing two labels, one placed over the other. The top label indicates the product contains 27.2% THC. The label underneath indicates a THC level of 25.6%. Further, the bottom label, which appeared to have been concealed by the top label, indicated the product was intended for medical marijuana users.

Finally, Google Maps identified Appellant as a "cannabis store" and the reviews posted on Google Maps at the time (Exhibit C) remarked on the quality of the "dispensary" and the "high" obtained from Appellant's products. There was even a review purporting to be from Mr. Kanewske which refers to the business as a dispensary (Exhibit C). Thus, the information available to the City in January of 2023 strongly suggested that Appellant was operating a marijuana dispensary at 725 1st Avenue North. At a minimum, Appellant was not simply selling glass and CBD as it represented in its SIC application, or operating a "head shop." But, rather, was selling cannabis-based intoxicants.

On January 13, 2023, the City notified Appellant of its intent to revoke Appellant's SIC because Appellant appeared to be selling marijuana products from the location, and the location was not zoned for marijuana sales of any kind (Exhibit C).

Delta 8 and 10 THC; Not Delta 9.

At Appellant's request, a hearing was conducted by City Manager, Greg Doyon on March 17, 2023. During the hearing, Appellant provided additional information relating to the type of products being sold at Appellant's 725 1st Ave. N. location. In short, Appellant asserted that it was not selling marijuana, as defined by Montana statute. At the time, Montana statutes defined marijuana (in relevant part) as follows: "Marijuana" means all plant material from the genus Cannabis containing tetrahydrocannabinol (THC)." However, Montana law excluded from the definition of marijuana, any "hemp" and hemp derivative "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3%..."

Appellant admitted that it sold "cannabis-based intoxicants," but, asserted that its cannabis products were "hemp" or "hemp derived." Further, Appellant, asserted that, although the THC concentrations of its product were upwards of 20%, the "Delta 9" THC concentrations in its product were below 0.3%--the majority of THC being Delta 8 THC and Delta 10 THC. Appellant provided reports breaking-down the ingredients of their various intoxicants, which contained data supporting their argument. The documentary material was provided to staff during the meeting March 17, 2023 meeting, on the understanding that staff would return the documents, because Appellant claimed the "recipes" shown were proprietary trade secrets.

Decision

By letter dated March 31, 2023 (Exhibit D), City Manager Doyon issued his decision on Appellant's appeal. In his letter, Doyon concluded that Appellant did not provide "a good explanation as to why the business represented itself as a "head-shop" which in common terms means a business selling articles and pipes for drug use, but not the drug itself." Because of the mischaracterization, City Manager Doyon rendered the following decision:

> Because this misrepresentation directly led the City to approve the SIC without a proper understanding of the proposed business activity, the City hereby requires Appellant Wellness to submit a proper SIC application with detailed supporting information on the products it is selling to customers.

The letter required Appellant to submit the new SIC application to City staff by April 7, 2023, and specifically advised that "failure to submit a new SIC application will require a formal revocation of the existing SIC, and may result in fines, or other enforcement measures."

Appellant failed to comply with the instruction in City Manager Doyon's March 31, 2023 Letter. Appellant did not submit a new SIC application, nor did Appellant provide detailed information on the products it is selling to its customers. Although, Appellant did submit a response letter on April 7, 2023, the response did not even attempt to comply with City Manager Doyon's request. The April 7, 2023 letter from Appellant's counsel simply disagreed with the City Manager Doyon's conclusion that "head shop" was not an accurate description of the business. And the "supplemental information" provided as to the products being sold by Appellant was not viewed by staff as a "good faith" effort to comply with City Manager Doyon's request for "detailed supporting information" on the intoxicants it was selling to customers.

Legislative Changes to Regulation of Adult-Use Marijuana.

On May 22, 2023, Governor Gianforte signed into law HB 948 (Exhibit E). HB 948 makes it illegal in the State of Montana to manufacture, process or sell a synthetic marijuana product, including any synthetic cannabinoid. In addition, HB 948 requires businesses selling any product containing THC levels in excess of 0.3% (whether Delta 8, 9, 10 or other types of THC) to be licensed as a dispensary through the Department of Revenue. Specifically, HB 948 provides as follows:

> "Products containing or consisting of cannabinoids produced and processed for any type of consumption into a human body, whether marketed as containing or consisting of cannabinoids or not, that exceed a THC concentration of 0.3% may only be sold by a manufacturer licensed under §16-12-222 or a dispensary licensed under §16-12-224, MCA unless the products are authorized as a drug by the United States food and drug administration."

On information and belief, Appellant is not licensed under either §16-22-222 or §16-22-224 to sell its cannabis intoxicants. And, by its own admission, Appellant sells cannabis intoxicants containing THC levels in excess of 0.3%. As such, as of May 22, 2023, Appellant was operating in violation of Montana law.

Closing of Wild West Wellness in Great Falls.

Following the signing of HB 948, Appellant discontinued conducting business from its location at 725 1st Ave N, in Great Falls and from its other locations around the State, and filed a legal action in Lewis and Clark County, seeking to have HB 948 invalidated, asserting that HB 948 was unconstitutionally vague (Exhibit F, p.3). As stated in its brief, Appellant asserted it did "not intend to reopen until it, or similarly situated businesses, can determine what they can and cannot sell." Notably, however, despite losing its vagueness challenge to HB 948 (Exhibit G), Appellant has renewed its operations at 725 1st Ave N., and again, appears to be offering for sale, products requiring it to be licensed by the Montana Department of Revenue (Exhibit H).

Final SIC Revocation.

By letter dated July 5, 2023, the City issued a final revocation of Appellant's SIC. The City provided the following basis for its decision:

> Wild West failed to comply with the instruction in City Manager Doyon's March 31, 2023 Letter. Wild West did not submit a new SIC application, nor did Wild West provide detailed information on the products it is selling to its customers. Although, Wild West did submit a response letter on April 7, 2023, the letter did not comply with City Manager Doyon's request. The April 7 letter from Wild West simply disagreed with the City's conclusion that "head shop" was not an accurate description of the business. Wild West also provided "supplemental information" as to the products it sells, but the offering provided little information as to the intoxicants being sold.
>
> On May 22, 2023, Governor Gianforte signed into law HB 948. Among other modifications to Montana's marijuana laws, HB 948 requires businesses selling any product containing THC levels in excess of 0.3% (whether Delta 8, 9, 10 or other types of THC) to be licensed as a dispensary through the Department of Revenue. HB 948 became effective on signing (i.e. May 22, 2023). By its own admission, Wild West is not licensed through the Department of Revenue to sell its cannabis intoxicants. And, by its own admission, Wild West sells cannabis intoxicants containing THC levels in excess of 0.3%. As such, Wild West is currently operating in violation of Montana law.

On information and belief, Appellant continues to operate and sell high THC cannabis intoxicants through its 725 1st Ave N. location. It has not submitted a more accurate SIC application to the City. Nor is it licensed through the Montana Department of Revenue.

Staff Recommendation: Staff recommends the Commission uphold the City's revocation of the SIC issued to Appellant.

Alternatives: The City Commission could overturn the City's decision to revoke APPELLANT's SIC.

Attachments/Exhibits:
Exhibit A: Application for a Safety Inspection Certificate (SIC)
Exhibit B: Safety Inspection Certificate Approval Sheet
Exhibit C: Notice of Intent to Revoke SIC Certificate
Exhibit D: March 31, 2023 letter on Manager's Decision – Revocation of SIC Certificate
Exhibit E: HB0948
Exhibit F: Memorandum of Support of Motion for Temporary Restraining Order and Preliminary Injunction and Defendant's Response in Opposition to Plaintiff's Motion for Preliminary Injunction
Exhibit G: Opinion and Order on Motion for Preliminary Injunction
Exhibit H: Wild West Wellness Website Content

Agenda #2.

EXHIBIT A

SAFETY INSPECTION CERTIFICATE APPLICATION
CITY OF GREAT FALLS – GREAT FALLS FIRE RESCUE
PO BOX 5021
105 9TH ST SOUTH
GREAT FALLS, MONTANA 59403-5021
OFFICE (406)727-8070

SIC. 001623-02022
expiration 12.31.23

1st avenue N

BUSINESS NAME M and D Retail MT 2 STREET ADDRESS 725

MAILING ADDRESS _____ CITY / STATE Great Falls MT ZIP CODE 59401

BUSINESS PHONE 406-924-9030 ESTIMATED SQUARE FOOTAGE OF BUSINESS 1800

E-MAIL ADDRESS Mack.Ethington@Mandd international.com

BRIEF DESCRIPTION OF NATURE OF BUSINESS We sell Glass and accessory's

BUSINESS OWNER'S NAME Mack (First Name) W (Initial) Ethington (Last Name) HOME PHONE 406-924-9030

OWNER'S ADDRESS 1740 W Montana ave CITY / STATE Helena MT ZIP CODE 59601

Please circle if this is a **PARTNERSHIP, CORPORATION, LLC** or **SOLE PROPRIETOR,** list the names, addresses, and phone numbers of each partner or officer on a separate piece of paper.

If this is a **NON PROFIT ORGANIZATION,** please list the names, addresses, and phone numbers of the officers and managers on a separate piece of paper.

FEES

NEW ISSUANCE

		TOTAL	SIC		ZONING
Tier 1	0 to 2,000 sq ft	$232.00	($132.00	/	$100.00)
Tier 2	2,001 to 10,000 sq ft	$273.00	($173.00	/	$100.00)
Tier 3	10,001 to 25,000 sq ft	$330.00	($230.00	/	$100.00)
Tier 4	25,001 to 50,000 sq ft	$399.00	($299.00	/	$100.00)
Tier 5	50,001 to 100,000 sq ft	$543.00	($443.00	/	$100.00)
Tier 6	over 100,000 sq ft	$700.00	($600.00	/	$100.00)
Churches		$232.00	($132.00	/	$100.00)
Transfer of Ownership fee		$30.00			

RENEWAL

Tier 1	0 to 2,000 sq ft	$63.00
Tier 2	2,001 to 10,000 sq ft	$98.00
Tier 3	10,001 to 25,000 sq ft	$144.00
Tier 4	25,001 to 50,000 sq ft	$207.00
Tier 5	50,001 to 100,000 sq ft	$345.00
Tier 6	over 100,000 sq ft	$500.00
Churches		$63.00
Delinquent Fee		$30.00

Please include payment with application. Fees are paid through December of the application year. Payments of renewals are due by end of the calendar year. Any licenses not renewed by March 1st of the current renewal year will become inactive and will require a new issuance of the Safety Inspection Certificate reflecting new issuance fees to your business.

Federal, State and Local Government Agencies are exempt.

CERTIFICATION

I HEREBY CERTIFY THAT I HAVE FILLED OUT THIS APPLICATION TO THE BEST OF MY KNOWLEDGE.

11/24/2022
DATE

SIGNATURE OF OWNER

EXHIBIT B

SAFETY INSEPCTION CERTIFICATE APPROVAL SHEET

TO BE COMPLETED BY APPLICANT:

1. NAME OF BUSINESS M and D Retail MT 2
2. STREET ADDRESS OF BUSINESS 725 9th avenue W
3. NAME OF BUSINESS OWNER Mack Ethington
4. NAME OF BUILDING OWNER Don Vandercliff
5. PHONE # OF BUSINESS 406-924-9036 PHONE # FOR INSPECTION same
6. BUSINESS E-MAIL Mack.Ethington@mandd.international.com
7. EXPLANATION OF BUSINESS Head Shop

TO BE COMPLETED BY STAFF:

Planning / Zoning Department	Date Sent: 11.29.22	Approval Date
Parcel# / Zoned / Permit#	Land Use	
Building Department	Date Sent: 11.29.22	Approval Date
Fire Department	Date Sent: 11.29.22	Approval Date
Health Department	Date Sent: 11.29.22	Approval Date
Public Works Department Environmental Division	Date Sent: 11.29.22	Approval Date

Certificate or License # Issued 11623.2023 Date 11 29 22

Charge / Cash Check _____ Amount Paid 232.00

Processed By Kyrrait Certificate of License Term 12.31.23

EXHIBIT C

City Attorney's Office
Civil Division
P.O. Box 5021
Great Falls, MT 59403
Tel: 406-455-8578

David G. Dennis
City Attorney
Robin L. Beatty
Paralegal

Notice of Intent to Revoke SIC Certificate - Wild West Wellness

January 13, 2023

M and D Retail Montana 2, LLC dba Wild West Wellness
725 1st Avenue North
Great Falls, MT 59401

RE: Revocation of SIC Certificate / Request for Review

Dear business owner/operator:

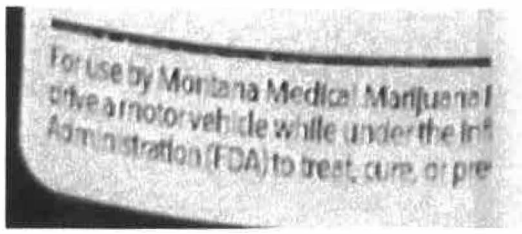
Notice. Pursuant to OCCGF 5.1.09B.1, this letter shall serve as notice to M and D Retail Montana 2, LLC, dba Wild West Wellness ("Wild West"), located at 725 1st Avenue North, that the City of Great Falls ("City") intends to revoke the Safety Inspection Certificate issued to Wild West on December 1, 2022. This revocation, which is effective fifteen (15) days from the date of this letter, is based upon the following:

Basis for Decision. On November 29, 2022, M and D Retail MT 2, located at 725 1st Avenue North and doing business as Wild West Wellness, submitted to the City of Great Falls an application for a Safety Inspection Certificate (SIC). An SIC is required by City ordinance to conduct business within the incorporated City limits. The application, signed by Mack Ethington, listed the type of business as "head shop." On the same day, Great Falls Fire Rescue Assistant Chief Mike McIntosh contacted Mr. Ethington to schedule an inspection of the business premises. During the conversation, Mr. McIntosh inquired as to the nature of the business. Mr. Ethington responded they would be selling CBD and pipes. Mr. McIntosh completed the inspection of the business on December 1, 2022, and the SIC was issued on the same date. During his inspection, Mr. McIntosh observed no product in the store.

Almost immediately following the opening of business, City staff began receiving complaints that Wild West was selling marijuana in an area not zoned for such business. Following-up on these complaints, on December 9, 2022 Assistant Chief McIntosh, accompanied by Planning and Community Development Deputy Director Tom Micuda, made an unannounced visit to the store. Upon entering the business, Mr. Micuda and Mr. McIntosh observed display cases filled with plants that appeared to them to be marijuana. Mr. Micuda and Mr. McIntosh identified

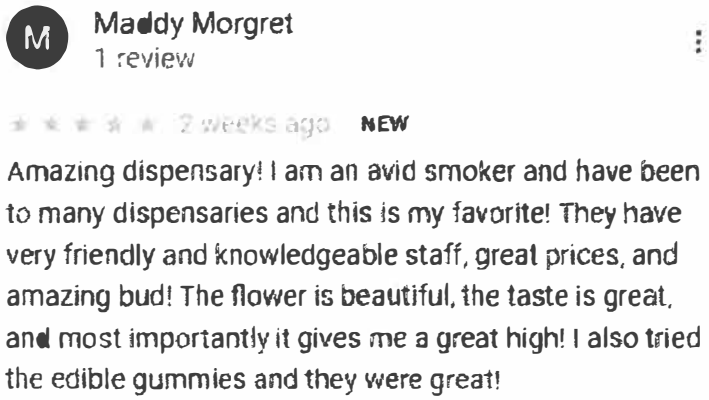
themselves to Dan Kanewske. Mr. Kanewske inexplicably insisted they talk in another room, even though Mr. McIntosh stated they would be fine speaking to him in the retail area of the store. While escorting Mr. Micuda and Mr. McIntosh into a private room, Mr. Kanewske contacted Mr. Ethington, who was on his way back to the store. Mr. Ethington asserted that the business was not selling marijuana, but rather a "hemp derivative" and that Wild West's activities had been vetted through its attorney. Mr. Micuda and Mr. McIntosh reminded Mr. Ethington of the applicable zoning restrictions and were escorted out the side door of the business.

Despite your assertions that Wild West is not operating as a marijuana dispensary, over the past month, the City has continued to receive complaints and other reports asserting otherwise. One citizen forwarded photos of product obtained from Wild West. The photos (attached) show a bottle containing two labels, one placed over the other. The top label indicates the product contains 27.2% THC. The label underneath indicates a THC level of 25.6%. These levels of THC are far above the .3% THC level allowed for hemp under Montana and Federal law. Further, the bottom label, which has been concealed by the top label, clearly indicates the product is intended for medical marijuana users:



Finally, receipts provided by another citizen (attached) demonstrate sales of "flowers" and "pre rolls."

Google Maps identifies Wild West as a "Cannabis store" and the following reviews posted on Google Maps remarking on the quality of the "dispensary" and the "high" obtained from Wild West's products, reinforce the conclusion that Wild West is operating a marijuana dispensary.



Kelsie Schwartz
2 reviews

★★☆☆☆ 2 weeks ago **NEW**

I've always loved Wild West in Bozeman MT so I was very eager to try out this location and they didn't disappoint! They always have great customer service, the shop is beautiful and most importantly the bud was amazing. The bud was being sold at a fair price and had wonderful flavor profiles and a mellow highs. Wild West is my favorite dispensary in Montana and I would pick their dispo compared to anywhere else in great falls!

Reed Ramm
1 review

★★★★★ 2 weeks ago **NEW**

This is hands down the best dispo in great falls! I've been to all the shops here and the staff here is the most friendly and the bud is the best!

There is even a review purporting to be from Mr. Kanewske, Wild West's registered agent and a member of Wild West's parent company—M and D International, LLC—referring to the business as a dispensary:

Daniel Kanewske
4 reviews

★★★★★ 2 weeks ago **NEW**

Best dispo in town! Concentrates are great, love the flower and the staff are very helpful

The information available to the City at this time strongly supports the conclusion that Wild West is operating a marijuana dispensary at 725 1st Avenue North. 725 1st Avenue North is zoned C-4. Pursuant to City Ordinance 3249, marijuana dispensaries are allowed in two zoning districts within the City's zoning jurisdiction: Light Industrial (I-I) and Heavy Industrial (1-2). As such, Wild West is in violation of City zoning codes.

Review. Pursuant to OCCGF 5.1.090.B.3, you may request a review of Wild West's SIC revocation, in writing, through the City Attorney's Office within 15 days of the date of this Notice. Upon receipt of a written request for review, a meeting will be scheduled with City staff and a representative or representatives of Wild West.

If you fail to request a review of Wild West's SIC revocation within fifteen (15) days of the date of this Notice, Wild West's SIC will be revoked, and Wild West will be required to cease business operations at 725 1st Avenue North.

Sincerely,

David G. Dennis
City Attorney

Cc:

Gravis Law, PLLC, 1830 3rd Avenue E., Suite 302, Kalispell, MT 59901
Daniel Kanewske, 24 2555 W. College St., Bozeman, MT 59718
Mack Ethington, 389 Stubbs Lane, Bozeman, MT 59718
Reed Remitz, 389 Stubbs Lane, Bozeman, MT 59718


Captain Crunch Flower
7.00 g
Indica
Office:Wild West Wellness, 7675 Shedhorn Drive, Ingredients:
BOZEMAN, MT, 59718
LIC# n/a
THC: 27.2% CBD: 1.1% CBN: 0.00% THCa: 22.7%
CBDa: 0.4% CBGa: 0%


Jet Fuel Flower
3.50 g Sativa
Office:Wild West Wellness, 767
BOZEMAN, MT, 59718
LIC# n/a
THC: 25.6% CBD: 0.02% CBN: 0
22.48% CBDa: 0.45% CBGa: 0%
For use by Montana Medical Marijuana
drive a motor vehicle while under the in
Administration (FDA) to treat, cure, or pre

EXHIBIT D

City of Great Falls
City Manager's Office
PO Box 5021
Great Falls MT 59403

(406) 455-8450

March 31, 2023

M and D Retail Montana 2, LLC dba Wild West Wellness
725 1st Avenue North
Great Falls, MT 59401

Re: Decision – Revocation of SIC Certificate

Dear Mack Ethington:

On November 29, 2022, Wild West Wellness, submitted to the City of Great Falls an application for a Safety Inspection Certificate (SIC). Under the explanation of business section, you wrote, "Head Shop".

That same day, Great Falls Fire Marshal Mike McIntosh contacted you to schedule an inspection of the business premises. During the scheduling call Mr. McIntosh was advised that the nature of the business was to sell CBD and pipes.

Mr. McIntosh completed the business inspection on December 1, 2022, and the SIC was issued on

After the business was opened, City staff began receiving complaints that Wild West was selling marijuana in an area not zoned for such business. On December 9, 2022 Fire Marshal McIntosh, accompanied by Planning and Community Development Deputy Director Tom Micuda, made an unannounced visit to the store. Upon entering the business, Mr. Micuda and Mr. McIntosh observed display cases filled with plants that appeared to them to be marijuana flowers. After being ushered into another room, you asserted that the business was not selling marijuana.

At the hearing of March 17, 2023 there was fairly extensive conversation about what is being sold at the business. Wild West claims that the product is an unregulated "hemp derivative" that is a proprietary blend of intoxicating substances. Wild West also asserts that its product is not marijuana as defined by State statute or the City's zoning code. There was not a good explanation as to why the business represented itself at a "head-shop" which in common terms means a business selling articles and pipes for drug use, but not the drug itself.

Because this misrepresentation directly led the City to approve the SIC without a proper understanding of the proposed business activity, the City hereby requires Wild West Wellness to submit a proper SIC application with detailed supporting information on the products it is selling to customers. This new application must be submitted to the City for review no later than seven (7) business days from the date of this letter. Failure to submit a new SIC application will require a

formal revocation of the existing SIC, and may result in fines, or other enforcement measures the City deems to be necessary.

Very Truly Yours,

Gregory T. Doyon
City Manager

Cc: Mike McIntosh, Fire Marshal
Thomas Micuda, Planning and Community Development Deputy Director
David Dennis, City Attorney

EXHIBIT E

AN ACT REVISING MARIJUANA LAWS; PROHIBITING THE MANUFACTURE AND DISTRIBUTION OF SYNTHETIC MARIJUANA PRODUCTS; PROVIDING DEFINITIONS; PROVIDING FOR ENFORCEMENT BY DEPARTMENTS AND LAW ENFORCEMENT; PROVIDING FOR RESTRICTIONS BY LOCAL GOVERNMENTS; CLARIFYING UNLAWFUL TRANSACTIONS REGARDING THE DISTRIBUTION OF SYNTHETIC MARIJUANA PRODUCTS TO CHILDREN; CLARIFYING THE OFFENSE OF ALTERING A LABEL ON DANGEROUS DRUGS; REQUIRING PUBLIC REPORTING OF VIOLATIONS; CREATING A TEMPORARY ADVISORY COUNCIL; ESTABLISHING REPORTING REQUIREMENTS; PROVIDING AN APPROPRIATION; AMENDING SECTIONS 16-12-101, 16-12-102, 16-12-108, 16-12-125, 16-12-208, 45-5-623, 45-9-105, 50-32-222, AND 80-18-101, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A TERMINATION DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Synthetic marijuana products prohibited -- restriction on sale of marijuana products. (1) A person may not manufacture, process, or offer for sale a synthetic marijuana product.

(2) Products containing or consisting of cannabinoids produced and processed for any type of consumption into a human body, whether marketed as containing or consisting of cannabinoids or not, that exceed a THC concentration of 0.3% may only be sold by a manufacturer licensed under 16-12-222 or a dispensary licensed under 16-12-224 unless the products are authorized as a drug by the United States food and drug administration. Products under this section may not exceed the potency levels established in 16-12-224.

(3) Products containing a THC concentration of 0.3% or less sold by any person other than a licensed manufacturer under 16-12-222 or a licensed dispensary under 16-12-224 may not exceed 0.5 milligrams of THC for each serving and may not exceed 2 milligrams per package.

(4) This section does not apply to unadulterated hemp flower that is not further processed into extracts, infused products, or concentrates.

Section 2. Enforcement -- ordinances -- investigations -- injunctions -- violation. (1) A local government may, by ordinance or otherwise, impose regulations regarding products under [section 1(1) and (3)].

(2) The department of agriculture, the department of justice, the department of public health and human services, local sheriff departments, municipal police departments, a county attorney's office, and the department of revenue may inspect any business to investigate unlawful activity under [section 1(1)].

(3) (a) If an investigation results in reasonable cause to believe that a violation of [section 1] occurred, the investigating agency may issue a cease and desist order to be served pursuant to Rule 4, M.R.Civ.P. The order is effective upon service. Proof of service constitutes notice to the person of the existence and contents of the order.

(b) The investigating agency may assess a penalty of not more than $1,000 per day for each day a cease and desist order issued under this section is violated. Fifty percent of the penalty must be deposited into the healing and ending addiction through recovery and treatment account under 16-12-122, and the remainder must be deposited in the marijuana state special revenue account under 16-12-111.

(4) (a) The investigating agency may institute and maintain in the name of the state an action for injunction or another civil remedy in district court to enforce a cease and desist order under this section. Proof of inadequacy of a legal remedy or proof of substantial or irreparable damage from continued violation is not required. It is sufficient to charge that the person engaged in the unlawful conduct subject to [section 1] on a certain day in a certain county without averring further or more particular facts concerning the violation.

(b) The department is entitled to its costs, including the costs of investigation and attorney fees, incurred in seeking a district court order under this section.

(c) A person who knowingly or purposely violates a district court injunction under this section is guilty of a felony and subject to the penalties set forth in 46-18-213.

(5) An officer, agent, partner, or member of a business entity who knowingly and personally participates in a violation of this section is subject to the penalties prescribed in this section.

(6) The remedies provided for in this section are in addition to and do not limit the remedies and actions otherwise permitted or required by law.

(7) A violation of [section 1(1)] may be enforced under:

(a) criminal distribution of dangerous drugs as defined in 45-9-101;

(b) criminal possession of dangerous drugs as defined in 45-9-102; or

(c) criminal production or manufacture of dangerous drugs as defined in 45-9-110.

Section 3. Synthetic marijuana products advisory council. (1) The department of revenue shall establish a synthetic marijuana products advisory council in accordance with 2-15-122 that is composed of the following members:

(a) one member from the department of agriculture;

(b) one member from the department of justice;

(c) one member from the department of public health and human services;

(d) one member from the department of revenue;

(e) one member from the board of pharmacy;

(f) two members from the marijuana industry; and

(g) one public member. The public member must have expertise in:

(i) toxicology;

(ii) organic chemistry; or

(iii) regulatory affairs in nutraceutical, pharmaceutical, or dietary supplements.

(2) The department shall provide staff and support services for the advisory council.

(3) Members are entitled to reimbursement for travel expenses as provided in 2-18-501 through 2-18-503.

(4) The advisory council shall review available research, data, and regulations of other jurisdictions related to synthetic marijuana products, including but not limited to:

(a) definitions of the term "impairing" in relation to cannabinoids, as well as definitions of the terms "artificial cannabinoids" and "synthetically derived cannabinoids"; and

(b) recommendations on potential guidelines for safe methods of manufacturing, extracting, and

synthesizing cannabinoids, including the sale of synthetic marijuana products.

(5) The advisory committee shall compile findings and make recommendations in a report to the economic affairs interim committee, in accordance with 5-11-210, regarding regulating synthetic marijuana products in the adult-use marijuana market by September 15, 2024.

Section 4. Section 16-12-101, MCA, is amended to read:

"16-12-101. Short title -- purpose. (1) This chapter may be cited as the "Montana Marijuana Regulation and Taxation Act".

(2) The purpose of this chapter is to:

(a) provide for legal possession and use of limited amounts of marijuana legal for adults 21 years of age or older;

(b) provide for the licensure and regulation of the cultivation, manufacture, production, distribution, transportation, and sale of marijuana and marijuana products;

(c) eliminate the illicit market for marijuana and marijuana products;

(d) prevent the manufacture and distribution of synthetic marijuana products;

~~(d)~~(e) prevent the distribution of marijuana sold under this chapter to persons under 21 years of age;

~~(e)~~(f) ensure the safety of marijuana and marijuana products;

~~(f)~~(g) ensure the security of licensed premises;

~~(g)~~(h) establish reporting requirements for licensees;

~~(h)~~(i) establish inspection requirements for licensees, including data collection on energy use, chemical use, water use, and packaging waste to ensure a clean and healthy environment;

~~(i)~~(j) provide for the testing of marijuana and marijuana products by licensed testing laboratories;

~~(j)~~(k) give local governments authority to allow for the operation of marijuana businesses in their community and establishing standards for the cultivation, manufacture, and sale of marijuana that protect the public health, safety, and welfare of residents within their jurisdictions;

~~(k)~~(l) tax the sale of marijuana and marijuana products to provide compensation for the economic and social costs of marijuana;

~~(l)~~(m) authorize courts to resentence persons who are currently serving sentences for acts that are

permitted under this chapter or for which the penalty is reduced by this chapter and to redesignate or expunge those offenses from the criminal records of persons who have completed their sentences as set forth in this chapter; and

~~(m)~~(n) preserve and protect Montana's well-established hemp industry by drawing a clear distinction between those participants and programs and the participants and programs associated with the marijuana industry.

(3) Marijuana and marijuana products are not agricultural products, and the cultivation, processing, manufacturing or selling of marijuana or marijuana products is not considered agriculture subject to regulation by the department of agriculture unless expressly provided."

Section 5. Section 16-12-102, MCA, is amended to read:

"**16-12-102. Definitions.** As used in this chapter, the following definitions apply:

(1) "Adult-use dispensary" means a licensed premises from which a person licensed by the department may:

(a) obtain marijuana or marijuana products from a licensed cultivator, manufacturer, dispensary, or other licensee approved under this chapter; and

(b) sell marijuana or marijuana products to registered cardholders, adults that are 21 years of age or older, or both.

(2) "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, another person.

(3) "Beneficial owner of", "beneficial ownership of", or "beneficially owns an" is determined in accordance with section 13(d) of the federal Securities and Exchange Act of 1934, as amended.

(4) "Canopy" means the total amount of square footage dedicated to live plant production at a licensed premises consisting of the area of the floor, platform, or means of support or suspension of the plant.

(5) "Consumer" means a person 21 years of age or older who obtains or possesses marijuana or marijuana products for personal use from a licensed dispensary but not for resale.

(6) "Control", "controls", "controlled", "controlling", "controlled by", and "under common control with" mean the possession, direct or indirect, of the power to direct or cause the direction of the management or

policies of a person, whether through the ownership of voting owner's interests, by contract, or otherwise.

(7) "Controlling beneficial owner" means a person that satisfies one or more of the following:

(a) is a natural person, an entity that is organized under the laws of and for which its principal place of business is located in one of the states or territories of the United States or District of Columbia, or a publicly traded corporation, and:

(i) acting alone or acting in concert, owns or acquires beneficial ownership of 5% or more of the owner's interest of a marijuana business;

(ii) is an affiliate that controls a marijuana business and includes, without limitation, any manager; or

(iii) is otherwise in a position to control the marijuana business; or

(b) is a qualified institutional investor acting alone or acting in concert that owns or acquires beneficial ownership of more than 15% of the owner's interest of a marijuana business.

(8) "Correctional facility or program" means a facility or program that is described in 53-1-202(2) or (3) and to which an individual may be ordered by any court of competent jurisdiction.

(9) "Cultivator" means a person licensed by the department to:

(a) plant, cultivate, grow, harvest, and dry marijuana; and

(b) package and relabel marijuana produced at the location in a natural or naturally dried form that has not been converted, concentrated, or compounded for sale through a licensed dispensary.

(10) "Debilitating medical condition" means:

(a) cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome when the condition or disease results in symptoms that seriously and adversely affect the patient's health status;

(b) cachexia or wasting syndrome;

(c) severe chronic pain that is a persistent pain of severe intensity that significantly interferes with daily activities as documented by the patient's treating physician;

(d) intractable nausea or vomiting;

(e) epilepsy or an intractable seizure disorder;

(f) multiple sclerosis;

(g) Crohn's disease;

(h) painful peripheral neuropathy;

(i) a central nervous system disorder resulting in chronic, painful spasticity or muscle spasms;

(j) admittance into hospice care in accordance with rules adopted by the department; or

(k) posttraumatic stress disorder.

(11) "Department" means the department of revenue provided for in 2-15-1301.

(12) (a) "Employee" means an individual employed to do something for the benefit of an employer.

(b) The term includes a manager, agent, or director of a partnership, association, company, corporation, limited liability company, or organization.

(c) The term does not include a third party with whom a licensee has a contractual relationship.

(13) (a) "Financial interest" means a legal or beneficial interest that entitles the holder, directly or indirectly through a business, an investment, or a spouse, parent, or child relationship, to 5% or more of the net profits or net worth of the entity in which the interest is held.

(b) The term does not include interest held by a bank or licensed lending institution or a security interest, lien, or encumbrance but does include holders of private loans or convertible securities.

(14) "Former medical marijuana licensee" means a person that was licensed by or had an application for licensure pending with the department of public health and human services to provide marijuana to individuals with debilitating medical conditions on November 3, 2020.

(15) (a) "Indoor cultivation facility" means an enclosed area used to grow live plants that is within a permanent structure using artificial light exclusively or to supplement natural sunlight.

(b) The term may include:

(i) a greenhouse;

(ii) a hoop house; or

(iii) a similar structure that protects the plants from variable temperature, precipitation, and wind.

(16) "Licensed premises" means all locations related to, or associated with, a specific license that is authorized under this chapter and includes all enclosed public and private areas at the location that are used in the business operated pursuant to a license, including offices, kitchens, restrooms, and storerooms.

(17) "Licensee" means a person holding a state license issued pursuant to this chapter.

(18) "Local government" means a county, a consolidated government, or an incorporated city or town.

(19) "Manufacturer" means a person licensed by the department to convert or compound marijuana into marijuana products, marijuana concentrates, or marijuana extracts and package, repackage, label, or relabel marijuana products as allowed under this chapter.

(20) (a) "Marijuana" means all plant material from the genus Cannabis containing tetrahydrocannabinol (THC) or seeds of the genus capable of germination.

(b) The term does not include hemp~~, including any part of that plant, including the seeds and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis, or commodities or products manufactured with hemp, or any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products~~ as provided in 80-18-101.

(c) The term does not include synthetic marijuana products.

~~(c)~~(d) The term does not include a drug approved by the United States food and drug administration pursuant to section 505 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301, et seq.

(21) "Marijuana business" means a cultivator, manufacturer, adult-use dispensary, medical marijuana dispensary, combined-use marijuana licensee, testing laboratory, marijuana transporter, or any other business or function that is licensed by the department under this chapter.

(22) "Marijuana concentrate" means any type of marijuana product consisting wholly or in part of the resin extracted from any part of the marijuana plant.

(23) "Marijuana derivative" means any mixture or preparation of the dried leaves, flowers, resin, or byproducts of the marijuana plant, including but not limited to marijuana concentrates and other marijuana products.

(24) "Marijuana product" means a product that contains marijuana and is intended for use by a consumer by a means other than smoking. The term includes but is not limited to edible products, ointments, tinctures, marijuana derivatives, and marijuana concentrates.

(25) "Marijuana transporter" means a person that is licensed to transport marijuana and marijuana products from one marijuana business to another marijuana business, or to and from a testing laboratory, and

to temporarily store the transported retail marijuana and retail marijuana products at its licensed premises, but is not authorized to sell marijuana or marijuana products to consumers under any circumstances.

(26) "Mature marijuana plant" means a harvestable marijuana plant.

(27) "Medical marijuana" means marijuana or marijuana products that are for sale solely to a cardholder who is registered under Title 16, chapter 12, part 5.

(28) "Medical marijuana dispensary" means the location from which a registered cardholder may obtain marijuana or marijuana products.

(29) "Outdoor cultivation" means live plants growing in an area exposed to natural sunlight and environmental conditions including variable temperature, precipitation, and wind.

(30) "Owner's interest" means the shares of stock in a corporation, a membership in a nonprofit corporation, a membership interest in a limited liability company, the interest of a member in a cooperative or in a limited cooperative association, a partnership interest in a limited partnership, a partnership interest in a partnership, and the interest of a member in a limited partnership association.

(31) "Paraphernalia" has the meaning provided for "drug paraphernalia" in 45-10-101.

(32) "Passive beneficial owner" means any person acquiring an owner's interest in a marijuana business that is not otherwise a controlling beneficial owner or in control.

(33) "Person" means an individual, partnership, association, company, corporation, limited liability company, or organization.

(34) "Qualified institutional investor" means:

(a) a bank or banking institution including any bank, trust company, member bank of the federal reserve system, bank and trust company, stock savings bank, or mutual savings bank that is organized and doing business under the laws of this state, any other state, or the laws of the United States;

(b) a bank holding company as defined in 32-1-109;

(c) a company organized as an insurance company whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and that is subject to regulation or oversight by the insurance department of the office of the state auditor or a similar agency of another state, or any receiver or similar official or any liquidating agent for such a company, in their capacity as such an insurance company;

(d) an investment company registered under section 8 of the federal Investment Company Act of 1940, as amended;

(e) an employee benefit plan or pension fund subject to the federal Employee Retirement Income Security Act of 1974, excluding an employee benefit plan or pension fund sponsored by a licensee or an intermediary holding company licensee that directly or indirectly owns 10% or more of a licensee;

(f) a state or federal government pension plan; or

(g) any other entity identified by rule by the department.

(35) "Registered cardholder" or "cardholder" means a Montana resident with a debilitating medical condition who has received and maintains a valid registry identification card.

(36) "Registry identification card" means a document issued by the department pursuant to 16-12-503 that identifies an individual as a registered cardholder.

(37) (a) "Resident" means an individual who meets the requirements of 1-1-215.

(b) An individual is not considered a resident for the purposes of this chapter if the individual:

(i) claims residence in another state or country for any purpose; or

(ii) is an absentee property owner paying property tax on property in Montana.

(38) "Seedling" means a marijuana plant that has no flowers and is less than 12 inches in height and 12 inches in diameter.

(39) "State laboratory" means the laboratory operated by the department of public health and human services to conduct environmental analyses.

(40) "Synthetic cannabinoids" has the meaning provided in 50-32-222 and includes any cannabinoids produced artificially, whether from chemical synthesis or biosynthesis using recombinant biological agents, including but not limited to yeast and algae.

(41) "Synthetic marijuana product" means marijuana or marijuana products that contain synthetic cannabinoids.

~~(40)~~(42) "Testing laboratory" means a qualified person, licensed under this chapter that:

(a) provides testing of representative samples of marijuana and marijuana products; and

(b) provides information regarding the chemical composition and potency of a sample, as well as the presence of molds, pesticides, or other contaminants in a sample.

~~(41)~~(43) (a) "Usable marijuana" means the dried leaves and flowers of the marijuana plant that are appropriate for the use of marijuana by an individual.

(b) The term does not include the seeds, stalks, and roots of the plant. (Subsection (15)(b)(ii) terminates October 1, 2023--sec. 117(1), Ch. 576, L. 2021.)"

Section 6. Section 16-12-108, MCA, is amended to read:

"16-12-108. Limitations of act. (1) This chapter does not permit:

(a) any individual to operate, navigate, or be in actual physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana or marijuana products;

(b) consumption of marijuana or marijuana products while operating or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport while it is being operated;

(c) smoking or consuming marijuana while riding in the passenger seat within an enclosed compartment of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport while it is being operated;

(d) production, delivery, distribution, purchase, or consumption of synthetic marijuana products;

~~(d)~~(e) delivery or distribution of marijuana or marijuana products, with or without consideration, to a person under 21 years of age;

~~(e)~~(f) purchase, consumption, or use of marijuana or marijuana products by a person under 21 years of age;

~~(f)~~(g) possession or transport of marijuana or marijuana products by a person under 21 years of age unless the underage person is at least 18 years of age and is an employee of a marijuana business licensed under this chapter and engaged in work activities;

~~(g)~~(h) possession or consumption of marijuana or marijuana products or possession of marijuana paraphernalia:

(i) on the grounds of any property owned or leased by a school district, a public or private preschool, school, or postsecondary school as defined in 20-5-402;

(ii) in a school bus or other form of public transportation;

(iii) in a health care facility as defined in 50-5-101;

(iv) on the grounds of any correctional facility; or

(v) in a hotel or motel room;

~~(h)~~(i) using marijuana or marijuana products in a location where smoking tobacco is prohibited;

~~(i)~~(j) consumption of marijuana or marijuana products in a public place, except as allowed by the department;

~~(j)~~(k) conduct that endangers others;

~~(k)~~(l) undertaking any task while under the influence of marijuana or marijuana products if doing so would constitute negligence or professional malpractice; or

~~(l)~~(m) performing solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food-grade ethanol unless licensed for this activity by the department.

(2) A person may not cultivate marijuana in a manner that is visible from the street or other public area.

(3) A hospice or residential care facility licensed under Title 50, chapter 5, may adopt a policy that allows use of marijuana by a registered cardholder.

(4) Nothing in this chapter may be construed to:

(a) require an employer to permit or accommodate conduct otherwise allowed by this chapter in any workplace or on the employer's property;

(b) prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana or marijuana products;

(c) prevent an employer from declining to hire, discharging, disciplining, or otherwise taking an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or privileges of employment because of the individual's violation of a workplace drug policy or intoxication by marijuana or marijuana products while working;

(d) prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition; or

(e) permit a cause of action against an employer for wrongful discharge pursuant to 39-2-904 or discrimination pursuant to 49-1-102.

(5) Nothing in this chapter may be construed to prohibit a person from prohibiting or otherwise regulating the consumption, cultivation, distribution, processing, sale, or display of marijuana, marijuana products, and marijuana paraphernalia on private property the person owns, leases, occupies, or manages, except that a lease agreement executed after January 1, 2021, may not prohibit a tenant from lawfully possessing and consuming marijuana by means other than smoking unless required by federal law or to obtain federal funding.

(6) A licensee who violates 15-64-103 or 15-64-104 or fails to pay any other taxes owed to the department under Title 15 is subject to revocation of the person's license from the date of the violation until a period of up to 1 year after the department certifies compliance with 15-64-103 or 15-64-104.

(7) Unless specifically exempted by this chapter, the provisions of Title 45, chapter 9, apply to the conduct of consumers, licensees, and registered cardholders."

Section 7. Section 16-12-125, MCA, is amended to read:

"**16-12-125. Hotline -- reporting -- referrals.** (1) The department shall create and maintain a hotline to receive reports of suspected abuse of the provisions of this chapter.

(2) An individual making a complaint must be a resident and shall provide the individual's name, street address, and phone number.

(3) (a) The department shall provide a copy of the complaint to the person or licensee that is the subject of the complaint.

(b) The department may not redact the individual's name or city of residence from the complaint copy.

(4) The department may:

(a) investigate reports of suspected abuse of the provisions of this chapter; or

(b) refer reports of suspected abuse to the law enforcement agency having jurisdiction in the area where the suspected abuse is occurring.

(5) The department shall make available to the public complaints about violations of [section 1(3)], including:

(a) information regarding the types of businesses or products being reported; and

(b) any disciplinary action taken against a person in violation of [section 1(3).

(6) The department reports made to the legislature pursuant to 16-12-110 must include the number of investigations and complaints the department referred to law enforcement and the complaints' disposition."

Section 8. Section 16-12-208, MCA, is amended to read:

"16-12-208. Restrictions. (1) A cultivator or manufacturer may not cultivate marijuana or manufacture marijuana products in a manner that is visible from the street or other public area without the use of binoculars, aircraft, or other optical aids.

(2) A cultivator or manufacturer may not cultivate, process, test, or store marijuana at any location other than the licensed premises approved by the department and within an enclosed area that is secured in a manner that prevents access by unauthorized persons.

(3) A licensee shall make the licensed premises, books, and records available to the department for inspection and audit under 16-12-210 during normal business hours.

(4) A licensee may not allow a person under 18 years of age to volunteer or work for the licensee.

(5) Edible marijuana products manufactured as candy may not be sold in shapes or packages that are attractive to children or that are easily confused with commercially sold candy that does not contain marijuana.

(6) (a) Marijuana or marijuana products must be sold or otherwise transferred in resealable, child-resistant exit packaging that complies with federal child resistance standards and is designed to be significantly difficult for children under 5 years of age to open and not difficult for adults to use properly.

(b) (i) Packaging of individual products may contain only the following design elements and language on a white label:

(A) the seller's business name and any accompanying logo or design mark;

(B) the name of the product; and

(C) the THC content or CBD content, health warning messages as provided in 16-12-215, and ingredients.

(ii) All packaging and outward labeling, including business logos and design marks, must also

comply with any standards or criteria established by the department, including but not limited to allowable symbols and imagery.

(7) An adult-use dispensary or medical marijuana dispensary may not sell or otherwise transfer hemp flower, hemp plants, synthetic cannabinoids, or alcohol from a licensed premises.

(8) (a) Prior to selling, offering for sale, or transferring marijuana or marijuana product that is for ultimate sale to a consumer or registered cardholder, a licensee or license applicant shall submit both a package and a label application, in a form prescribed by the department, to receive approval from the department.

(b) The initial submission must be made electronically if required by the department. The licensee or license applicant shall submit a physical prototype upon request by the department.

(c) If a license applicant submits packages and labels for preapproval, final determination for packages and labels may not be made until the applicant has been issued a license.

(d) A packaging and label application must include:

(i) a fee provided for in rule by the department;

(ii) documentation that all exit packaging has been certified as child-resistant by a federally qualified third-party child-resistant package testing firm;

(iii) a picture or rendering of and description of the item to be placed in each package; and

(iv) for label applications for inhalable marijuana products that contain nonmarijuana additives:

(A) the nonmarijuana additive's list of ingredients; and

(B) in a form and manner prescribed by the department, information regarding the additive or additives and the manufacturer of the additive or additives.

(9) For the purpose of this section, "exit packaging" means a sealed, child-resistant certified receptacle into which marijuana or marijuana products already within a container are placed at the retail point of sale."

Section 9. Section 45-5-623, MCA, is amended to read:

"45-5-623. Unlawful transactions with children. (1) Except as provided for in 16-6-305, a person commits the offense of unlawful transactions with children if the person knowingly:

(a) sells or gives explosives to a child except as authorized under appropriate city ordinances;

(b) sells or gives intoxicating substances other than alcoholic beverages to a child;

(c) sells or gives an alcoholic beverage to a person under 21 years of age;

(d) sells or gives to a child a tobacco product, alternative nicotine product, or vapor product, as defined in 16-11-302;

(e) sells or gives to a child a synthetic marijuana product, as defined in 16-12-102;

~~(e)~~(f) being a junk dealer, pawnbroker, or secondhand dealer, receives or purchases goods from a child without authorization of the parent or guardian; or

~~(f)~~(g) tattoos or provides a body piercing on a child without the explicit in-person consent of the child's parent or guardian. For purposes of this subsection (1)~~(f)~~(g), "tattoo" and "body piercing" have the meaning provided in 50-48-102. Failure to adequately verify the identity of a parent or guardian is not an excuse for violation of this subsection (1)~~(f)~~(g).

(2) A person convicted of the offense of unlawful transactions with children shall be fined an amount not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of a second offense of unlawful transactions with children shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both. (See compiler's comments for contingent termination of certain text.)"

Section 10. Section 45-9-105, MCA, is amended to read:

"**45-9-105. Altering labels on dangerous drugs.** (1) A person commits the offense of altering labels on dangerous drugs if the person affixes a false, forged, or altered label to or otherwise misrepresents a package or receptacle containing a dangerous drug, as defined in 50-32-101.

(2) The offense of altering labels on dangerous drugs includes falsely labeling or otherwise misrepresenting marijuana or a marijuana product, as those terms are defined in 16-12-102, as hemp, as defined in 80-18-101."

Section 11. Section 50-32-222, MCA, is amended to read:

"**50-32-222. Specific dangerous drugs included in Schedule I.** Schedule I consists of the drugs

and other substances, by whatever official, common, usual, chemical, or brand name designated, listed in this section.

(1) Opiates. Unless specifically excepted or listed in another schedule, any of the following are opiates, including isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of those isomers, esters, ethers, and salts is possible within the specific chemical designation:

(a) acetyl-alpha-methylfentanyl, also known as N-(1-(1-methyl-2-phenethyl)-4-piperidinyl)-N-phenylacetamide;

(b) acetylmethadol, also known as 4-(dimethylamino)-1-ethyl-2,2-diphenylpentyl acetate or methadyl acetate;

(c) allylprodine, also known as 1-methyl-4-phenyl-3-(prop-2-en-1-yl)piperidin-4-yl propanoate;

(d) alphacetylmethadol, except levo-alphacetylmethadol, also known as levo-alpha-acetylmethadol, levomethadyl acetate, or LAAM;

(e) alphameprodine;

(f) alphamethadol;

(g) alpha-methylfentanyl, also known as (N-[1-(alpha-methyl-beta-phenyl)ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine);

(h) alpha-methylthiofentanyl, also known as N-[1-methyl-2-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide;

(i) benzethidine;

(j) betacetylmethadol;

(k) beta-hydroxyfentanyl, also known as N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenylpropanamide;

(l) beta-hydroxy-3-methylfentanyl, also known as N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide;

(m) betameprodine;

(n) betamethadol;

(o) betaprodine;

(p) clonitazene;

(q) dextromoramide;

(r) diampromide;

(s) diethylthiambutene;

(t) difenoxin;

(u) dimenoxadol;

(v) dimepheptanol;

(w) dimethylthiambutene;

(x) dioxaphetyl butyrate;

(y) dipipanone;

(z) ethylmethylthiambutene;

(aa) etonitazene;

(bb) etoxeridine;

(cc) furethidine;

(dd) hydroxypethidine;

(ee) ketobemidone;

(ff) levomoramide;

(gg) levophenacylmorphan;

(hh) 3-methylfentanyl, also known as N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropanamide;

(ii) 3-methylthiofentanyl, also known as N-[3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide;

(jj) morpheridine;

(kk) MPPP, also known as desmethylprodine and (1-methyl-4-phenyl-4-propionoxypiperidine);

(ll) noracymethadol;

(mm) norlevorphanol;

(nn) normethadone;

(oo) norpipanone;

(pp) para-fluorofentanyl, also known as N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-

piperidinyl]propanamide;

(qq) PEPAP, also known as (1-(-2-phenethyl)-4-phenyl-4-acetoxypiperidine);

(rr) phenadoxone;

(ss) phenampromide;

(tt) phenomorphan;

(uu) phenoperidine;

(vv) piritramide;

(ww) proheptazine;

(xx) properidine;

(yy) propiram;

(zz) racemoramide;

(aaa) thiofentanyl, also known as N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide;

(bbb) tilidine; and

(ccc) trimeperidine.

(2) For the purposes of subsection (1)(hh), the term "isomer" includes the optical, positional, and geometric isomers.

(3) Opium derivatives. Unless specifically excepted or listed in another schedule, any of the following are opium derivatives, including salts, isomers, and salts of isomers whenever the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation:

(a) acetorphine;

(b) acetyldihydrocodeine;

(c) benzylmorphine;

(d) codeine methylbromide;

(e) codeine-N-oxide;

(f) cyprenorphine;

(g) desomorphine;

(h) dihydromorphine;

(i) drotebanol;

(j) etorphine, except hydrochloride salt;

(k) heroin;

(l) hydromorphinol;

(m) methyldesorphine;

(n) methyldihydromorphine;

(o) morphine methylbromide;

(p) morphine methylsulfonate;

(q) morphine-N-oxide;

(r) myrophine;

(s) nicocodeine;

(t) nicomorphine;

(u) normorphine;

(v) pholcodine; and

(w) thebacon.

(4) Hallucinogenic substances. Unless specifically excepted or listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following is a hallucinogenic substance, including salts, isomers, and salts of isomers whenever the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation:

(a) alpha-ethyltryptamine, also known as etryptamine, monase, alpha-ethyl-1H-indole-3-ethanamine, 3-(2-aminobutyl) indole, alpha-ET, and AET;

(b) alpha-methyltryptamine, also known as AMT;

(c) 4-bromo-2,5-dimethoxyamphetamine, also known as 4-bromo-2, 5-dimethoxy-alpha-methylphenethylamine, and 4-bromo-2,5-DMA;

(d) 4-bromo-2,5-dimethoxyphenethylamine, also known as 2-(4-bromo-2,5-dimethoxyphenyl)-1-aminoethane, alpha-desmethyl DOB, and 2C-B, Nexus;

(e) 2,5-dimethoxyamphetamine, also known as 2,5-dimethoxy-alpha-methylphenethylamine and 2,5-DMA;

(f) 2,5-dimethoxy-4-(N)-propylthiophenethylamine, also known as 2C-T-7;

(g) 3,4-methylenedioxyamphetamine;

(h) 2,5-dimethoxy-4-ethylamphetamine, also known as DOET;

(i) 5-methoxy-NN, -diisopropyltryptamine, also known as 5-MeO-DIPT;

(j) 5-methoxy-NN, -dimethyltryptamine, also known as 5-MeO-DMT;

(k) 4-methoxyamphetamine, also known as 4-methoxy-alpha-methylphenethylamine;

(l) 5-methoxy-3,4-methylenedioxyamphetamine;

(m) 4-methyl-2,5-dimethoxyamphetamine, also known as 4-methyl-2, 5-dimethoxy-alpha-methylphenethylamine, DOM, and STP;

(n) 3,4-methylenedioxymethamphetamine, also known as MDMA;

(o) 3,4-methylenedioxy-N-ethylamphetamine, also known as N-ethyl-alpha-methyl-3,4(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA;

(p) N-hydroxy-3,4-methylenedioxyamphetamine, also known as N-hydroxy-alpha-methyl-3,4 (methylenedioxy)phenethylamine and N-hydroxy MDA;

(q) 3,4,5-trimethoxyamphetamine;

(r) bufotenine, also known as 3-(beta-dimethylaminoethyl)-5-hydroxyindole, 3-(2-dimethylaminoethyl)-5-indolol, NN, -dimethylserotonin, 5-hydroxy-NN, -dimethyltryptamine, and mappine;

(s) diethyltryptamine, also known as NN, -diethyltryptamine and DET;

(t) dimethyltryptamine, also known as DMT;

(u) hashish;

(v) ibogaine, also known as 7-ethyl-6,6beta,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepine [5,4-b] indole and tabernanthe iboga;

(w) lysergic acid diethylamide, also known as LSD;

(x) marijuana;

(y) mescaline;

(z) parahexyl, also known as 3-hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,8,9-trimethyl-6H-dibenzo[bd,]pyran and synhexyl;

(aa) peyote, meaning all parts of the plant presently classified botanically as lophophora williamsii lemaire, whether growing or not; the seed of the plant; any extract from any part of the plant; and every

compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seed, or extracts;

(bb) N-ethyl-3-piperidyl benzilate;

(cc) N-methyl-3-piperidyl benzilate;

(dd) psilocybin;

(ee) psilocyn;

(ff) tetrahydrocannabinols, neutral compounds, and their corresponding acids, including synthetic equivalents of the substances contained in the plant or in the resinous extractives of cannabis, or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity, such as those listed in subsections (4)(ff)(i) through (4)(ff)(iii). Because nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered, are included in the category as follows:

(i) delta ~~1~~ 9 (delta ~~9~~ 1) cis or trans tetrahydrocannabinol and its optical isomers;

(ii) delta ~~6~~ 8 (delta 6) cis or trans tetrahydrocannabinol and its optical isomers; and

(iii) delta 6a, 10a, (delta 3,4) cis or trans tetrahydrocannabinol and its optical isomers;

(gg) ethylamine analog of phencyclidine, also known as N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl)ethylamine, N-(1-phenylcyclohexyl)ethylamine, cyclohexamine, and PCE;

(hh) pyrrolidine analog of phencyclidine, also known as 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, and PHP;

(ii) thiophene analog of phencyclidine, also known as 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, and TCP;

(jj) 1-[1-(2-thienyl)cyclohexyl]pyrrolidine, also known as TCPy;

(kk) synthetic cannabinoids, including:

(i) unless specifically excepted or listed in another schedule, any chemical compound chemically synthesized from or structurally similar to any material, compound, mixture, or preparation that contains any quantity of a synthetic cannabinoid found in any of the following chemical groups, or any of those groups that contain synthetic cannabinoid salts, isomers, or salts of isomers, whenever the existence of those salts, isomers, or salts of isomers is possible within the specific chemical designation, including all synthetic cannabinoid chemical analogs in the following groups:

(A) naphthoylindoles, whether or not substituted in the indole ring to any extent or the naphthyl ring to any extent;

(B) naphthylmethylindoles, whether or not substituted in the indole ring to any extent or the naphthyl ring to any extent;

(C) naphthoylpyrroles, whether or not substituted in the pyrrole ring to any extent or the naphthyl ring to any extent;

(D) naphthylmethylindenes, whether or not substituted in the indene ring to any extent or the naphthyl ring to any extent;

(E) acetylindoles, whether or not substituted in the indole ring to any extent or the acetyl group to any extent;

(F) cyclohexylphenols, whether or not substituted in the cyclohexyl ring to any extent or the phenyl ring to any extent;

(G) dibenzopyrans, whether or not substituted in the cyclohexyl ring to any extent or the phenyl ring to any extent; and

(H) benzoylindoles, whether or not substituted in the indole ring to any extent or the phenyl ring to any extent;

(ii) any compound that has been demonstrated to have agonist binding activity at one or more cannabinoid receptors or is a chemical analog or isomer of a compound that has been demonstrated to have agonist binding activity at one or more cannabinoid receptors;

(iii) 1-pentyl-3-(1-naphthoyl)indole (also known as JWH-018);

(iv) (6aR,10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol (also known as HU-210 or 1,1-dimethylheptyl-11-hydroxy-delta8-tetrahydrocannabinol);

(v) 2-(3-hydroxycyclohexyl)-5-(2-methyloctan-2-yl)phenol (also known as CP-47,497), and the dimethylhexyl, dimethyloctyl, and dimethylnonyl homologues of CP-47,497;

(vi) 1-butyl-3-(1-naphthoyl)indole (also known as JWH-073);

(vii) 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl) indole (also known as JWH-200);

(viii) 1-pentyl-3-(2-methoxyphenylacetyl)indole (also known as JWH-250);

(ix) 1-hexyl-3-(1-naphthoyl)indole (also known as JWH-019);

(x) 1-pentyl-3-(4-chloro-1-naphthoyl)indole (also known as JWH-398);

(xi) JWH-081: 1-pentyl-3-(4-methoxy-1-naphthoyl)indole, also known as 4-methoxynaphthalen-1-yl-(1-pentylindol-3-yl)methanone;

(xii) the following substances, except where contained in cannabis or cannabis resin, namely tetrahydro derivatives of cannabinol and 3-alkyl homologues of cannabinol or of its tetrahydro derivatives:

(A) [2,3-Dihydro-5-methyl-3-(4-morpholinylmethyl)pyrrolo [1,2,3-de]-1,4-benzoxazin-6-yl]-1-napthalenylmethanone (also known as WIN-55,212-2);

(B) 3-dimethylheptyl-11-hydroxyhexahydrocannabinol (also known as HU-243); or

(C) [9-hydroxy-6-methyl-3-[5-phenylpentan-2-yl]oxy-5,6,6a,7,8,9,10,10a-octahydrophenanthridin-1-yl]acetate;

(ll) Salvia divinorum, also known as salvinorin A (2S,4aR,6aR,7R,9S,10aS,10bR)-9- (acetyloxy)-2-(3-furanyl)dodecahydro-6a,10b-dimethyl-4, 10-dioxo-2H-naphtho[2,1-c] pyran-7-carboxylic acid methyl ester;

(mm) substituted cathinones, including any compound, except bupropion or compounds listed in another schedule, structurally derived from 2-amino-1-phenyl-1-propanone by modification in any of the following ways:

(i) by substitution in the phenyl ring to any extent with alkyl, alkoxy, alkylenedioxy, haloalkyl, hydroxyl, or halide substituents, whether or not further substituted in the phenyl ring by one or more other univalent substituents;

(ii) by substitution at the 3-position with an alkyl substituent;

(iii) by substitution at the nitrogen atom with alkyl or dialkyl groups, or by inclusion of the nitrogen atom in a cyclic structure; and

(iv) any lengthening of the propanone chain between carbons 1 and 2 to any extent with alkyl groups, whether further substituted or not;

(nn) any compound not listed in this code, in an administrative rule regulating controlled substances or approved for use by the United States food and drug administration that is structurally derived from 2-amino-1-phenyl-1-propane by modification in any of the following ways:

(i) by substitution in the phenyl ring to any extent with alkyl, alkoxy, alkylenedioxy, haloalkyl, or

halide substituents, whether or not further substituted in the phenyl ring by one or more other univalent substituents;

(ii) by substitution at the 3-position with an alkyl substituent;

(iii) by substitution at the nitrogen atom with alkyl or dialkyl groups, or by inclusion of the nitrogen atom in a cyclic structure; and

(iv) any lengthening of the propane chain between carbons 1 and 2 to any extent with alkyl groups, whether further substituted or not.

(5) (a) For the purposes of subsection (4), the term "isomer" includes the optical, positional, and geometric isomers.

(b) Subsection (4)(kk) does not apply to synthetic cannabinoids approved by the United States food and drug administration and obtained by a lawful prescription through a licensed pharmacy. The department of public health and human services shall adopt a rule listing the approved cannabinoids and shall update the rule as necessary to keep the list current.

(6) Depressants. Unless specifically excepted or listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances is a depressant having a depressant effect on the central nervous system, including salts, isomers, and salts of isomers whenever the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation:

(a) gamma-hydroxybutyric acid, also known as gamma-hydroxybutyrate, 4-hydroxybutyrate, 4-hydroxybutanoic acid, sodium oxybate, sodium oxybutyrate, and GHB;

(b) mecloqualone; and

(c) methaqualone.

(7) Stimulants. Unless specifically excepted or listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances is a stimulant having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

(a) aminorex, also known as aminoxaphen, 2-amino-5-phenyl-2-oxazoline, and 4,5-dihydro-5-phenyl-2-oxazolamine;

(b) cathinone, also known as 2-amino-1-phenyl-1-propanone, alpha-aminopropiophenone, 2-

aminopropiophenone, and norephedrone;

(c) fenethylline;

(d) methcathinone, also known as 2-(methylamino)-propiophenone, alpha-(methylamino)propiophenone, 2-(methylamino)-1-phenylpropan-1-one, alpha-N-methylaminopropiophenone, monomethylpropion, ephedrone, N-methylcathinone, methylcathinone, AL-464, AL-422, AL-463, and UR1432, including its salts, optical isomers, and salts of optical isomers;

(e) 4-Methylaminorex (cis isomer), also known as U4Euh, McN-422;

(f) (levo-dextro) cis-4-methylaminorex, also known as (levo-dextro) cis-4, 5-dihydro-4-methyl-5-phenyl-2-oxazolamine;

(g) N-benzylpiperazine, also known as 1-benzylpiperazine or BZP;

(h) N-ethylamphetamine; and

(i) NN, -dimethylamphetamine, also known as NN, -alpha-trimethyl-benzeneethanamine and NN, -alpha-trimethylphenethylamine.

(8) Substances subject to emergency scheduling. Any material, compound, mixture, or preparation that contains any quantity of the following substances is included in this category:

(a) N-[1-benzyl-4-piperidyl]-N-phenylpropanamide (benzylfentanyl), its optical isomers, salts, and salts of isomers); and

(b) N-[1-(2-thienyl)methyl-4-piperidyl]-N-phenylpropanamide (thenylfentanyl), its optical isomers, salts, and salts of isomers).

(9) If prescription or administration is authorized by the Federal Food, Drug and Cosmetic Act, then any material, compound, mixture, or preparation containing tetrahydrocannabinols listed in subsection (4) must automatically be rescheduled from Schedule I to the same schedule it is placed in by the United States drug enforcement administration.

(10) Dangerous drug analogues. Unless specifically excepted or listed in another schedule, this designation includes any material, compound, mixture, or preparation defined in 50-32-101 as a dangerous drug analogue."

Section 12. Section 80-18-101, MCA, is amended to read:

"**80-18-101. Definitions.** As used in this part, the following definitions apply:

(1) (a) "Hemp" means ~~all parts and varieties of the plant Cannabis consistent with the United States department of agriculture's definition of hemp and rules established by the department~~ the plant species Cannabis sativa L. and any part of that plant, including the seeds and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a total delta-9 tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis.

(b) The term does not include synthetic cannabinoids.

(2) "Hemp crude" means a hemp derivative in a temporary state of not complying with the legal definition of hemp, the amount of tetrahydrocannabinol, or the amount of tetrahydrocannabinolic acid that will be further processed in order to comply.

(3) "Hemp derivatives" means all products that contain or are processed from, extracted from, or manufactured from hemp.

(4) "Marijuana" means all plant material from the genus Cannabis containing tetrahydrocannabinol (THC) or seeds of the genus capable of germination.

(5) "Synthetic cannabinoids" has the meaning provided in 50-32-222 and includes any cannabinoids produced artificially, whether from chemical synthesis or biosynthesis using recombinant biological agents, including but not limited to yeast and algae."

Section 13. Appropriation. There is appropriated $2,500 from the state special revenue fund in 16-12-111 to the department of revenue for the biennium beginning July 1, 2023, for the purposes of administration of the advisory council provided for in [section 3] and additional reporting requirement provisions as required under 16-12-125.

Section 14. Codification instruction. (1) [Section 1] is intended to be codified as an integral part of Title 16, chapter 12, part 1, and the provisions of Title 16, chapter 12, part 1, apply to [section 1].

(2) [Section 2] is intended to be codified as an integral part of Title 16, chapter 12, part 3, and the provisions of Title 16, chapter 12, part 3, apply to [section 2].

Section 15. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 16. Effective date. [This act] is effective on passage and approval.

Section 17. Termination. [Section 3] terminates December 31, 2024.

- END -

I hereby certify that the within bill,

HB 948, originated in the House.

_____

Chief Clerk of the House

_____

Speaker of the House

Signed this _____day

of_____, 2023.

_____

President of the Senate

Signed this _____day

of_____, 2023.

HOUSE BILL NO. 948

INTRODUCED BY S. GALLOWAY

AN ACT REVISING MARIJUANA LAWS; PROHIBITING THE MANUFACTURE AND DISTRIBUTION OF SYNTHETIC MARIJUANA PRODUCTS; PROVIDING DEFINITIONS; PROVIDING FOR ENFORCEMENT BY DEPARTMENTS AND LAW ENFORCEMENT; PROVIDING FOR RESTRICTIONS BY LOCAL GOVERNMENTS; CLARIFYING UNLAWFUL TRANSACTIONS REGARDING THE DISTRIBUTION OF SYNTHETIC MARIJUANA PRODUCTS TO CHILDREN; CLARIFYING THE OFFENSE OF ALTERING A LABEL ON DANGEROUS DRUGS; REQUIRING PUBLIC REPORTING OF VIOLATIONS; CREATING A TEMPORARY ADVISORY COUNCIL; ESTABLISHING REPORTING REQUIREMENTS; PROVIDING AN APPROPRIATION; AMENDING SECTIONS 16-12-101, 16-12-102, 16-12-108, 16-12-125, 16-12-208, 45-5-623, 45-9-105, 50-32-222, AND 80-18-101, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A TERMINATION DATE.

EXHIBIT F

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IN AND FOR THE FIRST JUDICIAL DISTRICT,
COUNTY OF LEWIS AND CLARK ,
STATE OF MONTANA

M and D Retail Bozeman, LLC,

Plaintiff,

vs.

STATE OF MONTANA by and though AUSTIN KNUDSEN, in his official capacity as Attorney General,

Defendant.

Case No. DDV-25-2023-0000405-IJ

Judge **Presiding Judge: Hon. Chris Abbott**

Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction

Plaintiff, M and D Retail Bozeman LLC ("M and D"), by and through undersigned counsel, files this Memorandum in support of its Motion for Temporary Restraining Order and Preliminary Injunction. M and D is suffering and will continue to suffer irreparable harm as a result of the enactment / enforcement of HB 948, unless this Court issues a temporary restraining order enjoining Defendant, its agents, employees, appointees, and/or successors from enforcing HB 948. Such a restraining order is appropriate because sections 1(3),1(1), and 11 at §50-32-222 (4)(ff) of HB 948 are

unconstitutionally vague, and §2(2) of HB 948 violates the Fourth Amendment to the U.S. Constitution and Art. II, sec. 11 of the Montana Constitution.

FACTUAL BACKGROUND

M and D is a business that sells hemp-derived products through its retail stores around the State. M and D opened its first retail store in Bozeman on January 5, 2022. It then opened stores in Helena, on May 5, 2022, and Great Falls, on December 5, 2022. M and D has nine full-time employees.

Prior to the enactment of HB 948, neither the Montana Marijuana Regulation and Taxation Act ("MMRTA") nor the Montana Controlled Substances Act ("MCSA") regulated the hemp-derived products that they sell. Since no statute or rule regulated the hemp-derived products sold by M and D, they were not required to acquire a marijuana or other license.

HB 948 was introduced on March 27, 2023, and signed into law by Governor Gianforte on May 22, 2023. HB 948 explicitly regulates hemp-derived products. It further purports to define "synthetic marijuana," and changes the definition of "marijuana" in the Montana Controlled Substances Act. Even more, the bill gives any number of law enforcement and administrative agencies the power to inspect a hemp retailer, despite the lack of a licensing regime, without a search warrant.

HB 948 includes § 1(3) which states, "Products containing a THC concentration of 0.3% or less sold by any person other than a licensed manufacturer under 16-12-222 or a licensed dispensary under 16-12-224 may not exceed 0.5 milligrams of THC for each serving and may not exceed 2 milligrams per package." and § 2(2) states the department

of agriculture, the department of justice, the department of public health and human services, local sheriff departments, municipal police departments, a county attorney's office, and the department of revenue may inspect any business to investigate unlawful activity under [section 1(1)]."

Upon the passage of HB 948, M and D was forced to close its doors to the public and lay off its nine employees because, despite its good faith effort, M and D could not understand the vague requirements of the bill. Without judicial intervention, M and D will either be forced to keep its doors permanently closed to the public, or to do business and face civil actions, cease and desist orders, and criminal liability for distributing "dangerous" drugs. As a result, M and D does not intend to reopen until it, or similarly situated businesses, can determine what they can and cannot sell.

ARGUMENT

1. PLAINTIFF SATISFIES THE CRITERIA FOR A PRELIMINARY INJUNCTION

Preliminary injunctive relief serves to "protect the rights of all parties to th[e] suit, that, whatever may be the ultimate decision of these issues, the injury to each may be reduced to the minimum." *Porter v. K&S Partnership,* 192 Mont. 175, 182, 627 P.2d 836, 840 (1981). Section 27-19-314, MCA, makes clear that immediate, temporary relief is available: "Where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is

called a temporary restraining order." M and D's motion and memorandum in support have been served on counsel for the Defendant.

The issuance of a preliminary injunction is governed by § 27-19-201, MCA, which provides, in part:

> (1) when it appears that the applicant is entitled to the relief demanded and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
>
> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual; ...

The subsections of § 27-19-201, MCA are "disjunctive", meaning the Court must grant a preliminary injunction upon finding that an applicant for a preliminary injunction has satisfied any one of these subsections. *Sweet Grass Farms, Ltd v. Board of Commr 's. of Sweet Grass County,* 300 Mont. 66, 72, 2 P.3d 825,829 (2000); *Stark v. Borner,* 226 Mont. 356,359, 735 P.2d 314,317(1987). An applicant for a preliminary injunction must only establish a *prima facie* case, or make a showing that he will likely suffer irreparable injury before his rights can be fully litigated. *Porter*, 192 Mont. at 181, 627 P.2d 836, 839.

A preliminary injunction should be issued if it is necessary to maintain the *status quo* pending a trial on the merits. *Porter,* 192 Mont. at 181, 627 P.2d at 839.

The status quo is "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Id.* (citations omitted). Courts have clarified that the purpose of a preliminary injunction is to prevent defendants "from gaining any advantage by their own wrongful acts." *Pennsylvania Public Utility Commission v. Israel,* 356 Pa. 400,408, 52 A.2d 317, 321-22 (1947).

In determining whether to issue a preliminary injunction, a court must evaluate whether applicant has either (1) stablished a *prima facie* case; or (2) that the applicant will possibly suffer irreparable injury before his rights can be fully litigated. If one of the two elements are met, the court must analyze whether the balance of hardships favors the applicant. *Porter,* 192 Mont. at 181-182, 672 P.2d at 839-840. In balancing the hardship to each party, the District Court has a duty to minimize the injury or damages to all parties involved in the lawsuit. *Id*

a. Plaintiff Establishes a Prima Facie Case

Here, the Complaint, which is made a part hereof by reference, sets forth facts as to why Plaintiff is entitled to relief. A prima facie showing of entitlement to relief need not establish evidence sufficient to prevail at trial. *Planned Parenthood of Montana v. State by and through Knudsen*, 2022 MT 157, ¶6, 409 Mont. 378, 385, 515 P. 3d 301, 305 (citations omitted). As recently re-stated in *Planned Parenthood of Montana v. State by and through Knudsen,* only a showing of entitlement to temporary relief is required, and not a showing of ultimate success on the final judgment. As discussed in the petition and *infra,* Plaintiff demonstrates a prima facie case that HB 948 § 1(3), §1(1), and § 11 at

§50-32-222 (4)(ff) are unconstitutionally vague, and that HB 948 § 2(2) violates the Fourth Amendment of the United States and Montana Constitution.

i. *HB 948 is Unconstitutionally Vague on its Face*

A statute is unconstitutionally vague if (1) it is vague on its face or (2) it is vague as applied in a particular circumstance. *State v. Martel*, 273 Mont. 143, 149, 902 P. 2d 14, 18 (1995) (*citing Choteau v. Joslyn*, 208 Mont. 499, 505, 678 P. 2d 665, 668 (1984)). A statute is void for vagueness on its face if "it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." *Id.* No individual "should be required to speculate as to whether his contemplated course of action may be subject to criminal penalties." *State v. Stanko*, 1998 MT 321, ¶ 22, 292 Mont. 192, 192, 974 P. 2d 1132, 1135. Here, Section 2 of HB 948 provides enforcement and criminal penalties for violations of the substantive provisions of HB 948, and therefore the interpretation of the language of HB 948 can lead to criminal prosecution.

1. HB 948 § 1(3)

The language of HB 948 § 1(3) states, "Products containing a THC concentration of 0.3% or less sold by any person other than a licensed manufacturer under 16-12-222 or a licensed dispensary under 16-12-224 may not exceed 0.5 milligrams of THC for each serving and may not exceed 2 milligrams per package." The term "product" is not defined by the bill. And the bill uses two separate terms— "marijuana product" and "synthetic

marijuana product" —without clarifying which product(s) are prohibited and/or regulated by the bill.

As such, section 1(3) could apply to any product, whether related or not to marijuana, and purports that it could apply to any product under the sun, including but not limited to corn flakes, white bread, or tomato soup. Further it is impossible to determine whether §1(3) applies to "marijuana products," "synthetic marijuana products," or both. Without clarity as to what the term "product" refers, it is impossible for an ordinary person to understand what conduct is prohibited / what product is regulated. Similarly, M and D cannot determine what products are prohibited and/or regulated by the bill and when M and D may subject to criminal liability for non-compliance.

2. HB 948 § 1(1)

The language of HB 948 § 1(1) states that "A person may not manufacture, process, or offer for sale a synthetic marijuana product." Section 5 of HB 948 amends 16-12-102, MCA to include the definitions provided within that section. HB 948 §5(40) defines "synthetic cannabinoids" as "has the meaning provided in 50-32-222 and include cannabinoids produced artificially, whether from chemical synthesis or biosynthesis using recombinant biological agents, including but not limited to yeast and algae." As well, HB 948 § 5(41) defines "synthetic marijuana product" as meaning "marijuana or marijuana products that contain synthetic cannabinoids."

Separate from the "definitions" included, HB 948, Section 3 of HB 948 provides direction to a "synthetic marijuana products advisory council" to review the definitions of "artificial cannabinoids" and "synthetically derived cannabinoids" and make recommendations as to their definition.

Despite these definitions, what exactly HB 948(1)(1) regulates is wholly ambiguous, and the definition will almost certainly change as the implementation of this law continues. The definition of "synthetic marijuana product" purports to include products that contain synthetic cannabinoids, and the definition provided for synthetic cannabinoids purports to expand the historic definition provided in §50-32-222, MCA. However, what it is expanding the definition to is wholly unclear. Nothing in HB 948 defines what "artificial" means, nor is the term used in §50-32-22, MCA. Even more, nothing defines or identifies what processes include "chemical synthesis" or "biosynthesis." Where the Legislature adds terms to a definition but does not define the terms of art within that definition, the addition of the terms does not provide clarity, but instead creates ambiguity and vagueness.

In fact, the Legislature acknowledged that the terms "artificial cannabinoid" and "synthetic cannabinoid" were not sufficiently / readily defined, and as such, in HB 948, gave direction to the advisory council to provide recommendations on guidelines for the same. As such, the Legislature itself acknowledged the ambiguity and/or potential for ambiguity because what will be covered under "synthetic marijuana products" is vague on its face. In short, the Legislature has left what will be covered under the definition and

regulation of "synthetic marijuana products" up in the air, meaning businesses like M and D do not and cannot know exactly what creates criminal liability under the statute.

Finally, by referencing § 50-32-222, MCA, and adding language to that definition for the purposes of amending § 16-12-102, MCA, it is unclear whether any alleged addition to the definition applies back to § 50-32-22, MCA. Are any "cannabinoids produced artificially" also included in § 50-32-222 (kk), MCA, and therein classified as a Schedule 1 drug? Are retailers liable for possession of a schedule drug if they are in possession of whatever a "cannabinoid produced artificially" becomes defined as? Are consumers liable for possession and prosecution under the drug schedule for having a "cannabinoid produced artificially?" Or, do such "artificially produced cannabinoids" exist separate from other scheduled drugs. These questions are not answered as HB 948 is currently written, and leaves producers, retailers, and consumers unclear as to their potential criminal liability.

ii. HB 948 is Vague as Applied to M and D

A criminal statute is unconstitutionally vague if a "person is required to speculate as to whether his contemplated course of action may be subject to criminal penalties." *State v. Knudson*, 2007 MT 324, ¶ 18, 340 Mont. 167, 171, 174 P. 3d 469, 472. There is a two-part test to determine whether a statute is unconstitutional as applied to an individual. *Id.* First, courts consider "whether actual notice was given to citizens." *Id.* Second, courts consider "whether the statute contains minimal guidelines sufficient to govern law enforcement." *Id.*

1. HB 948 §1(3)

Here, the language of HB 948 §1(3) does not give M and D actual notice of prohibited conduct, because it does not make clear what constitutes a "product." Adopting the argument raised *supra*, the language of §1(3) does not provide a clear or actual guideline for what is being regulated. Similarly, the language, and lack of a definition or reference for "product" does not contain the minimal guidelines sufficient for "local sheriff departments, municipal police departments, a county attorney's office" (as referenced in § 2(1) of HB 948) for what to enforce.

So too with §1(3)'s language related to "may not exceed 2 milligrams per package." "Package" is not defined in HB 948. What is more, the products potentially regulated by the statute do not have standardized "packages" or structure. The language, without the definition of a package, does not provide actual notice as to what physical item cannot exceed 2 milligrams per package. Further, it is unclear to M and D, how this language would apply to a Vape Cartridge or gummy—as the language does not specify whether the package is the totality of item sold, or a portion thereof. As it is unclear to the public, it is just as unclear to law enforcement. In short, the § 1(3) does not supply adequate notice to M and D, as to what is regulated / prohibited, and does not provide adequate and interpretable guidance to law enforcement. As such, §1(3) is vague as applied to M and D because neither M and D, nor the enforcing agencies can understand the intent of the statute.

2. HB 948 § (1)(1)

Applying the same analysis of HB 948 § 1(1) as provided *supra*, M and D is unable to determine what products are regulated by the section, due to it its vagueness. Without having a clear definition of what a *synthetic marijuana product* includes and does not include, M and D is unable to determine what products it can and cannot sell. The products sold by M and D may or may not fall within the statute's purview, and the regulation included therein.

The terms "artificial," "chemical synthesis," and "biosynthesis" are undefined, leaving M and D unclear as to what processes, or lack thereof, might be considered synthetic. Prior to the enactment of HB 948, there was a clear definition of what a synthetic cannabinoid was under § 50-32-222(kk)(i), MCA. Now, with the added vague and overbroad language of "artificial," M and D is unable to comprehend, based on the language of the statute, what products may fall into this synthetic designation. Where HB 948 imposes criminal and civil penalties for the sale of goods that fall within its purview, the lack of clarity on what product it actually regulates prevents the evenhanded application and/or enforcement of the law.

Accordingly, HB 948 §1(1) is unconstitutionally vague as it applies to M and D.

3. HB 948 § 11

Section 11 of HB 948 amends the Controlled Substances act so that Δ 8 and Δ10 are included in the definition of tetrahydrocannabinols. Prior to HB 948, only Δ 1 (known as Δ 9), Δ6, or Δ 3 tetrahydrocannabinols were included in the Controlled Substances Act.

The products that M and D sells that include amounts of Δ 8 and Δ 10 tetrahydrocannabinols that are extracted from an unadulterated hemp flower. Accordingly, HB 948 as written makes it unclear whether these products fall within the scope of § 1(1) which (if constitutional and clear) would wholly prohibit their sale or § 1(3) which would limit the percentages / concentration of Δ8 and Δ 10. In effect, because the statute does not reference and/or define Δ 8 and Δ 10, and how it is classified within HB 948 (and instead only modifies the language of the controlled substance act), it is unclear to M and D how HB 948 regulates products containing Δ 8 and Δ 10.

iii. HB 948 Violates M and D's Fourth Amendment and Article II Rights

The Montana Constitution affords individuals greater protection than is found under the U.S. Constitution. *State v. Scheetz*, 286 Mont. 41, 45, 950 P. 2d 722, 724 (1997). It is unconstitutional under the Fourth Amendment of the United States Constitution to conduct a search without a warrant anywhere that a person has a reasonable expectation of privacy. *See generally Katz v. United States,* 389 U.S 347 (1967). The protections apply to that which the individual or entity seeks to preserve as private "even in an area accessible to the public." *Id.* at 350. Montana has taken the same approach and has added that "warrantless searches are *per se* unreasonable, except as authorized under a recognized and well-defined exception to the warrant requirements." *State v. Staker*, 2021 MT 151, ¶ 13, 404 Mont. 307, 307, 489 P. 3d 489, 497.

The "heightened Montana constitutional right to privacy" limits the range of warrantless searches permissible under Article II, Sections 10 and 11 of the Montana

Constitution. *Id.* And, as a result of the presumption of unreasonableness, the "State bears the burden of demonstrating that a warrantless search or seizure was narrowly tailed to further a compelling government interest and accordingly fell within a recognized exception to the warrant requirement." *Id.*

Here, §2(2) of HB 948 states that "the department of agriculture, the department of justice, the department of public health and human services, local sheriff departments, municipal police departments, a county attorney's office, and the department of revenue may inspect any business to investigate unlawful activity under [section 1(1)]." With the definition of "synthetic marijuana" unclear as to what it regulates, discussed *infra*, section 2(2) authorizes law enforcement, etc. to conduct a warrantless search of businesses that have not been required to have a marijuana license under Title 16, Chapter 12 of the Montana Code Annotated or any other specific license that serves as a knowing and informed waiver the businesses' expectation of privacy or that of its owner(s), agent(s), and/or employee(s). Unlike licensed marijuana businesses, businesses that may fall under this section have not explicitly waived their privacy rights by agreeing/consenting to a specific licensing regime.

What is more, none of the exceptions to the warrant requirement apply here. The stores are not open fields or abandoned property. Further, the products potentially covered by HB 948 are inside of the stores and not in plain view. Because M and D has not knowingly and/or intentionally consented to a waiver of its right to privacy, no other warrantless search exceptions do not apply, HB 948 violates M and D Fourth Amendment

and Article II rights to privacy by allowing law enforcement and other agencies to carry out warrantless searches.

b. *If HB 948 is not Enjoined, Plaintiff will Continue to Suffer Irreparable Harm*

Plaintiff must make some demonstration of threatened harm or injury, whether under the "great or irreparable injury standard" or "the lesser degree of harm implied in the other subsections of § 27-19-201, MCA." *Planned Parenthood of Montana v. State by and through Knudsen*, 2022 MT 157, ¶ 6. Irreparable harm includes suffering the loss of a constitutional right. *See, e.g. id.*

Here, M and D suffers and will continue to suffer irreparable harm via the loss of the business and the income they derive therefrom. Even more, M and D suffers and will continue to suffer the loss of their constitutional rights to conduct business within the State of Montana. As discussed *supra*, HB 948 treads on M and D's constitutional rights to (a) due Process, as fair notice of what is punishable and what is not is a constitutional right; (b) unreasonable Search and Seizure, as HB 948 overrides M and D's protections from warrantless searches without M and D waiving such protections, or one of the exceptions applying, and (c) M and D's constitutional right to earn a living. Unless and until HB 948 is enjoined, M and D will continue to be forced to keep their doors closed and have their constitutional rights trod upon.

c. *The Damage to M and D is Greater than the Risk of Harm*

The final consideration in whether to issue an injunction is to apply the "balance of hardship" analysis. *Porter,* 192 Mont. at 181-182, 672 P.2d at 839-840. "The balance of the hardships is determined by weighing the harm that will be suffered by the plaintiff if an injunction is not granted, against the harm that will be imposed upon the defendant by the granting of an injunction." *A.J. Industries, Inc. v. Alaska Public Service Commission*, 470 P. 2d 537, 539 (1970). In short, if the damage to the plaintiff is greater than the harm to the respondent in enjoining their action, the balance weighs in favor of the plaintiff. *Id.*

Here, the balance of the hardships weighs in favor of the Plaintiff. M and D has demonstrated that they will continue to suffer irreparable harm both via the closure of their business and letting go their employees, but more importantly via the continued loss and denial of their constitutional rights—due process and Fourth Amendment and Article II section 11 privacy rights.

Respondent, however, will not suffer great hardship in being enjoined from enforcing the provisions of HB 948. During Montana's nearly twenty years of regulation of marijuana, beginning in 2004 with medical marijuana and 2022 for recreational use, the Montana Legislature has not seen it relevant or fit to regulate the sale of hemp. The lack of regulation of hemp demonstrates that the Legislature did not have concerns about such hemp-derived products. What is more, prior to HB 948, hemp was not even included in the Controlled Substances Act. *See* § 50-32-222, MCA.

The federal government has taken the same historical approach towards hemp products—hemp was affirmatively removed from Schedule I of the (federal) Controlled Substances Act in 2018 and is no longer a controlled substance. *See* Agriculture Improvement Act of 2018, PL 115-334, § 12619 (commonly known as the "2018 Farm Bill"); *see also* Executive Summary of New Hemp Authorities, Memorandum, United States Department of Agriculture, May 28, 2019 (explaining, via USDA general counsel, the USDA's position on the regulation of hemp under the 2018 farm bill). Even though the Federal Government does not allow for adult recreational use of marijuana, it has no concerns with hemp (cannabis plant, or derivative thereof, that contains not more than 0.3 percent delta-9 tetrahydrocannabinol), and the federal government actually authorizes the sale and use of hemp-derived products. Accordingly, enjoining Section 1(1); Section 1(3); Section 2(2), Section 5 at §16-12-102(20), (40), and (41), MCA; Section 6 at §16-12-108(1)(d), MCA; Section 8 at §16-12-208(7), MCA; Section 11 at §50-32-222 (4)(ff); and Section 12 at §80-18-101(5), MCA of HB 948 does not alter the status quo.

Because enjoining defendant, its agents, employees, appointees, or successors from enforcing the following provisions of HB 948: Section 1(1); Section 1(3); Section 2(2), Section 5 at §16-12-102(20), (40), and (41), MCA; Section 6 at §16-12-108(1)(d), MCA; Section 8 at §16-12-208(7), MCA; Section 11 at §50-32-222 (4)(ff); and Section 12 at §80-18-101(5), MCA does not interfere with the regulatory scheme of marijuana prior to HB 948, the harm to Respondent is far less than the irreparable harm Petitioner continues to suffer.

CONCLUSION AND PRAYER FOR RELIEF

The Court should issue a Temporary Restraining Order and Order a Preliminary Injunction until the case is decided on its merits because M and D has demonstrated (a) a prima facie case, (b) that they are suffering and will continue to suffer irreparable harm if the government is not enjoined from enforcing HB 948, and (c) that the continued irreparable harm to M and D—usurping M and D's constitutional rights—is greater than any risk in delaying the enforcement of HB 948.

Dated this 2nd day of June, 2023.

Dodd Law Firm

Dillon A. Post
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing document was served on the below, this the 5th day of June, 2023:

VIA USPS FIRST CLASS
Office of the Attorney General
P.O Box 201401
Helena, MT 59620

Krystyna Hochmuth

CERTIFICATE OF SERVICE

I, Dillon A Post, hereby certify that I have served true and accurate copies of the foregoing Motion - Motion to the following on 06-05-2023:

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

M and D RETAIL BOZEMAN, LLC Plaintiff, v. STATE OF MONTANA by and through AUSTIN KNUDSEN, in his official capacity as Attorney General, Defendant.	Cause DDV 2023-0405 Hon. Christopher D. Abbott **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

By enacting House Bill ("HB") 948 (2023), the State of Montana sought to prohibit the manufacture, process, or sale of synthetic marijuana products, as well as provide a mechanism by which law enforcement and administrative agencies may enforce the prohibition. Plaintiff argues that the law is unconstitutionally vague and usurps constitutional privacy rights. The State counters that HB 948 § 1 is clear in what it bans, and Section 2 does not infringe on Plaintiff's constitutional rights. This Court should deny Plaintiffs' motion for a preliminary injunction.

STATEMENT OF FACTS

On May 22, 2023, Montana Governor Greg Gianforte signed HB 948 into law. Section 1 of the bill "prohibits the manufactur[ing], process[ing], or offer[ing] for sale [of] synthetic marijuana product[s]." HB 948 § 1. Synthetic marijuana products are defined as "marijuana or marijuana products that contain synthetic cannabinoids." *Id.* § 5(41). Synthetic cannabinoids are defined as "the meaning provided in 50-32-222 and includes any cannabinoids produced artificially, whether from chemical synthesis or biosynthesis using recombinant biological agents, including but not limited to yeast and algae." *Id.* § 5(40). The enforcement mechanism is contained in Section 2. HB 948 permits local governments to impose regulations regarding products in Section 1, as well as empowers state agencies and law enforcement to inspect businesses for unlawful activity under Section 1(1). *Id.* § 2(1) and (2). Penalties may follow if an investigation results in reasonable cause to believe a violation of Section 1 occurred. *Id.* § 2(3)(a). Penalties may include the issuance of a cease-and-desist order, fines, injunctions, and can result in criminal prosecution. *Id.* § 2(3) and (6).

HB 948 specifically excludes "unadulterated hemp flower that is not further processed into extracts, infused products, or concentrates." *Id.* § 1(4). The bill also amended several sections contained within Title 16, chapter 12, also known as the Montana Marijuana Regulation and Taxation Act (MMRTA). Of note, Section 15 contains a severability clause. "If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect." *Id.* § 15.

ARGUMENT

Preliminary injunctive relief is "an extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794 (citation omitted). A preliminary injunction is "never awarded

as of right." *Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).; see also *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–338 (1933) (injunction is not a remedy which issues as of course); *Yakus v. United States*, 321 U.S. 414, 440 (1944). A preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Furthermore, in each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter*, 555 U.S. at 24 (citing *Amoco Prod. Co. v. Gambell*, 480 U.S., at 542 (1987)); see also *Hooks for and Behalf of Natl. Labor Rel. Bd. v. Nexstar Broadcasting Inc.*, 54. F.4th 1101, 1114 (9th Cir. 2022) (injunctive relief must be evaluated on a case-by-case according to traditional equitable principles and without the aid of presumptions or a "thumb on the scale" in favor of issuing such relief). The basis for injunctive relief in the federal courts has always been the inadequacy of legal remedies coupled with irreparable injury. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506–507.

In 2023, the Montana State Legislature amended Mont. Code Ann. § 27-19-201, adopting an entirely new legal standard for issuing preliminary injunctions. *See* Senate Bill ("SB") 191 (2023). This new legal standard changes the requirements for obtaining a preliminary injunction in at least the following significant ways: First, the burden of proof no longer rests with the Defendants to show why an injunction should ***not*** issue. The burden of proof now rests squarely with the applicants to show why an injunction ***should*** issue. Second, the former five-part disjunctive test to obtain a preliminary injunction is now a four-part conjunctive test. Applicants for an injunction bear the burden of proving the following four elements: (a) likelihood of success

on the merits; (b) likelihood of suffering irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest. *Id.* at § 1.

The Legislature expressly stated its intention that "the language in subsection (1) mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law." *Id.* With SB 191's clear legislative intent that the new standard for issuance of preliminary injunctions mirror the federal preliminary injunction standard, and that interpretation and application of this standard closely follow United States Supreme Court case law, it is evident that Plaintiff has not met the high burden needed for this extraordinary remedy.

I. PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS.

Statutes passed by the Legislature are presumed to be constitutional under Montana law; to the extent Plaintiffs present a facial challenge, they must demonstrate unconstitutionality in all possible applications of the challenged statute beyond a reasonable doubt. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357; *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566; *Mont. Cannabis Indus. Assn. ("MCIA")*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131; *Adv. for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825.

A. THE LANGUAGE OF HB 948 § 1 IS NOT VAGUE.

Section 1 of HB 948 is quite clear: "A person may not manufacture, process, or offer for sale a synthetic marijuana product." HB 948 § 1(1). The terms "synthetic marijuana products" and "synthetic cannabinoids" are defined thereafter within Section 5. See *Id.* § 5(41), 5(40). A more comprehensive definition of "synthetic cannabinoids" can be found in Mont. Code Ann. § 50-32-222(4) (kk). Taken altogether, it's clear what the Legislature intended to do: HB 948 § 1(1), read

in conjunction with §§ 4 and 6, and § 50-32-222(4) (kk) of the Controlled Substances Act, provide that synthetic marijuana products are banned in the State of Montana. With the passing of the HB 948, Montana has joined the federal government and a growing number of states in banning said products due to their safety concerns.[1] As synthetic marijuana products have become a nationwide concern, and considering the extraordinary length that Montana has gone to provide precise technical and scientific definitions of "synthetic marijuana products," Plaintiff, as a business who sells marijuana products, should be on notice and without question as to what the term means.

Plaintiff further contends that, as a business, it cannot determine what constitutes a "product" in conjunction with "synthetic marijuana products," or the words "package" and "serving" as used in HB 948 § 1(3). Courts "presume that a person of average intelligence can comprehend a term of common usage contained in a statute." *Wing v. State*, 2007 MT 72, ¶ 12, 336 Mont. 423, 155 P.3d 1224. "A term is unconstitutionally vague if a person of common intelligence must necessarily guess at its meaning. However, a term is not vague simply because it can be dissected or subject to different interpretations." *Mont. Media, Inc. v. Flathead Cnty.*, 2003 MT 23, ¶ 59, 314 Mont. 121, 63 P.3d 1129. "Products," as this Court pointed out, is ordinarily understood to mean "'something distributed commercially for use or consumption'" or "'an item that has passed through a chain of commercial distribution before ultimate use or consumption.'" (Doc. 4) (citing Black's Law Dictionary 1461 (11th Ed. 2019)). "Package" is defined as "a commodity or a unit of a product uniformly wrapped or sealed." [2] "Serving" is defined as "a helping of food or drink." [3]

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[1] *See also About synthetic cannabinoids*, (Mar. 23, 2021) https://www.cdc.gov/nceh/hsb/chemicals/sc/About html.
[2] *Definition of PACKAGE*, Merriam-Webster (June 4, 2023), https://www merriam-webster.com/ dictionary/package.
[3] *Definition of SERVING*, Merriam-Webster (June 6, 2023), https://www merriam-webster.com/ dictionary/serving.

These clear and understandable definitions lead to the inescapable conclusion that, despite Plaintiff's contention, there can be no speculation or vagueness here. The Legislature was clear: Plaintiff, a marijuana business owner, cannot sell consumable substances that contain synthetic marijuana ingredients. HB 948 § 1(1). Furthermore, consumable substances marketed for sale containing a THC concentration of 0.3% or less sold by any person other than a licensed manufacturer or dispensary may not exceed 0.5 milligrams for each serving (or a helping) and may not exceed 2 milligrams of THC per package (or a commodity or a unit of a product uniformly wrapped or sealed). *Id.* § 1(3). Thus, Plaintiff is not likely to succeed on the merits of this claim.

B. HB 948 Does Not Violate Plaintiff's Fourth Amendment and Article II Rights.

Section 2 of HB 948 authorizes law enforcement and state agencies to inspect *businesses* for unlawful activity under § 1(1) (emphasis added). HB 948 § 2(2). Section 1(1) provides that "a *person* may not manufacture, process, or offer for sale a synthetic marijuana product." *Id.* § 1(1) (emphasis added). Thus, the inspection provision applies only to persons with a business—and as the product being banned is a marijuana product, the business would be one that manufactures, processes, or sells marijuana. And any business that is involved in marijuana within the state is one that must be licensed and will be regulated. Mont. Code. Ann. § 16-12-101 (2021). The Legislature, through HB 948, then specifically added that the MMRTA does not permit the "production, delivery, distribution, purchase, or consumption of synthetic marijuana products." HB 948 § 6(d). In effect, the ban on synthetic marijuana products became inextricably linked to the MMRTA, as well as both its licensing and regulatory schemes.

The purpose of the inspection authority delineated within § 2 is to ensure that marijuana business owners are complying with the synthetic marijuana ban, to detect problems before they get out of hand, and to prevent abuses. Inspections are a reasonable condition of the Legislature's

willingness to allow distribution and use of what remains a Schedule I Controlled Substance under federal law and strictly controlled under state law. Pursuant to Mont. Code Ann. § 16-12-210(1)(a), the Legislature authorized unannounced inspections of licensed premises. Inspections may occur up to twice a year, unless a citation had been issued to a licensee or "there is other just and reasonable cause." § 16-12-210(1)(b). Reasonable cause for an unannounced inspection may follow from a tip or complaint alleging unlawful activity. HB 948 also amended Mont. Code Ann. § 16-12-125, which is the Hotline for reporting suspected abuse of the MMRTA. HB 946 § 7. Whether by an inspection due to reasonable cause, or by the periodic inspections that occur as part of the regulatory scheme of MMRTA, the Legislature has shown that it intends prevent abuses and maintain a careful regulatory environment with marijuana. HB 948 merely added an additional reason for an inspection—synthetic marijuana products. Because businesses are what is to be inspected, and that the items sought would be products sold to the public, any inspection would not take more than a cursory look of what the business has on its shelves. A more extensive examination of the premises remains authorized under MMRTA: "Each licensed premises, including any places of storage, where marijuana is cultivated, manufactured, sold, stored, or tested are subject to entry by the department or state or *local law enforcement* agencies for the purpose of inspection or investigation." § 16-12-125(4)(a) (emphasis added). Either through MMRTA or HB 948, law enforcement agencies are authorized to inspect businesses that are involved in marijuana products.

Marijuana is far from the only example of a closely regulated industry in which reasonable privacy expectations are consequently greatly reduced. See, e.g., *United States v. Gonsalves*, 435 F.3d 64, 67 (1st Cir. 2006) (locations where controlled substances are manufactured, distributed or stored are heavily regulated); *cf. New York v. Burger*, 482 U.S. 691, 702-03 (1987) (warrantless

inspections of junkyards); *Almeida v. Sanchez*, 413 U.S. 266 (1973) (holding that businessmen in regulated industries impliedly consent to the restrictions placed on them); *United States v. Biswell*, 406 U.S. 311, 3 17 (1972) (firearms inspections); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76–77, (1970) (inspections of liquor licensees).

The fact that law enforcement may even become involved, as opposed to only state agencies, should not be cause for concern. The United States Supreme Court has rejected this jaded view and recognized that many states simply have limited resources:

> Finally, we fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct the § 415-a5 inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work. See *People v. De Bour*, 40 N.Y.2d 210, 218, 352 N. E. 2d 562, 568 (1976) ("To consider the actions of the police solely in terms of arrest and criminal process is an unnecessary distortion") . . . . As a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself.

Burger, 482 U.S. at 717. Moreover, whether the inspection is initiated by law enforcement or a state agency, such inspections necessarily rely heavily upon cooperation and consent. *See e.g., State v. Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (recognizing the government's authority to conduct reasonable inspections involving the highly regulated activity of fishing). Consent is a well-recognized exception to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973) ("[T]here is nothing constitutionally suspect in a person's voluntarily allowing a search.").

The Montana Supreme Court has opined on the issue of privacy and medical marijuana dispensaries. As the Court found on a similar challenge to a regulatory scheme that involved inspections of businesses:

> While individuals may have an actual expectation of privacy from warrantless searches, an expectation that a provider's marijuana production and distribution facilities are entitled to the same privacy protections is not one that society is willing to recognize as objectively reasonable. Indeed, it is reasonable for owners of registered premises where marijuana—a uniquely regulated substance—is cultivated, manufactured, or stored to expect those premises to be subject to inspection during normal business hours to satisfy the State's legitimate regulatory interests.

MCIA, ¶ 81. The challenged inspection statute was part of the 2011 Montana Marijuana Act, which was a precursor to the passage of MMRTA in 2021. The businesses involved in *MCIA* were registered medical marijuana dispensaries, whereas the businesses involved in MMRTA are licensed for medical or recreational purposes. HB 948 amended MMRTA and explicitly banned synthetic marijuana products, and provided that businesses regulated by MMRTA may be inspected to ensure compliance with said ban. Inspections ensuring compliance were and continue to be a necessary requirement for marijuana businesses in Montana.

Marijuana businesses are a closely regulated industry subject to a reduced expectation of privacy under both the Fourth Amendment to the United States Constitution and Article II of the Montana Constitution. Moreover, search issues should not be decided in a factual vacuum. Whether a search or invasion of privacy has occurred is a fact-intensive inquiry, requiring consideration of actual or subjective expectations and that nature of the State's intrusion, and the particular facts of each case. *See e.g., State v. Cotterell*, 2008 MT 409, ¶ 51, 347 Mont. 231, 198 P.3d 254. Plaintiff has the heavy burden of demonstrating there are no situations in which government officials could conduct appropriate inspections of locations where marijuana is sold. Plaintiff cannot meet that burden. If particular situations apply in the future that raise legitimate

warrantless search issues, the inspection provision can be evaluated in an "as applied" context. As such, Plaintiff is not likely to succeed on the merits.

II. PLAINTIFF WILL NOT SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

Plaintiffs must show more than a possibility of future harm; they are required "to demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in the original) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, 139 (2d ed. 1995) ("*Wright & Miller*") (applicant must demonstrate that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"); *Wright & Miller* at 154–155 ("A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury"). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (citation omitted); see also *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 (1900) (an injunction is not a remedy to restrain an act the injurious consequences of which are merely trifling).

Plaintiff claims that due to the vague and speculative nature of specific terms within HB 948 § 1, compliance was impossible and therefore three business locations had to be shut down, which has led to an irreparable injury. (Doc. 1 at 2.) Plaintiff also stated that the business, M and D Retail, "trad[es] primarily in hemp-derived products" and sells products such as "vape cartridges, gummies, and other types of candies," but cannot say whether the products sold are

either of natural or synthetic origin. (*Id.* at 1, 3.) Curiously enough, Plaintiff understands the definition of the word "product" when it comes the hemp-derived items but fails to understand the same word when applied to synthetically-derived items. Plaintiff also fails to provide any detail as to how the allegedly vague terms apply to specific products Plaintiff has; nor whether said products are integral to the business and thus required it to shut down due to the passage of HB 948. As such, Plaintiff will not suffer an irreparable injury absent enjoining HB 948 § 1.

As to Section 2, Plaintiff contends that unless the enforcement mechanism is enjoined, the business will be forced to remain shut down. At the outset, it should be recognized that Section 2 remains predominantly within a civil process with civil remedies. "If an investigation results in reasonable cause to believe that a violation of [section 1] occurred, the investigating agency ***may*** issue a cease-and-desist order to be served." HB 948 § 2(3)(a) (emphasis added). A penalty of not more than $1,000 per day ***may*** be assessed for each day the order is violated. *Id.* § 2(3)(b) (emphasis added). An injunction can follow should compliance remain elusive. *Id.* § 2(4)(a). Additionally, compliance and avoiding possible sanctions are achievable—namely by not selling synthetic marijuana products. Lastly, unannounced inspections and investigations are part of the regulatory environment by which Plaintiff signed up for when a license was sought to sell marijuana products. There can be no shock or surprise that an individual working for an agency may walk into the doors of M and D Retail with a clipboard and begin looking around. *See* § 16-12-210.

Irreparable injury is completely avoidable. Do not sell synthetic marijuana products. Information on common brands of synthetic marijuana products can easily be found.[4] It would take little effort to do an image search of each of the items listed. Plaintiff knows what a product,

[4] https://addictiontreatmentmagazine.com/27-synthetic-cannabinoids-list/.

package, and a serving is. Plaintiff deals in items containing marijuana, likely has a variety of options for customers, and more than likely must explain the differences when selling them. (Doc. 1 at 3.) Plaintiff, as a business owner, knows what is being ordered to be put on shelves. Seeking to enjoin an enforcement provision applicable across the state and narrowly construed to a specific closely regulated industry because terms of common understanding are elusive to Plaintiff and a category of product may or may not be sold M and D Retail is a bridge too far. Plaintiff cannot demonstrate that it will suffer an irreparable injury absent an injunction, thus the injunction should be denied.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR THE STATE.

The balance of the equities and the public interest "merge into one factor when the government opposes a preliminary injunction." *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). A preliminary injunction movant must show that "the balance of equities tips in his favor." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (citing *Winter*, 555 U.S. at 20). In assessing whether the plaintiffs have met this burden, courts have a "duty . . . to balance the interests of all parties and weigh the damage to each." See *L.A. Memorial Coliseum Commn. v. Natl. Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980).

Courts should consider whether a preliminary injunction would be in the public interest if "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences." *Boardman*, 822 F.3d at 1023 (quoting *Stormans, Inc.*, 586 F.3d at 1138–39 (9th Cir. 2009)). "When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be 'at most a neutral factor in the analysis rather than one that favor[s] [granting or] denying the preliminary injunction.'" *Stormans, Inc.*, 586 F.3d at 1139 (quotation omitted). "If, however, the impact of an injunction reaches beyond the parties,

carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Id.* (citation omitted). When an injunction is sought that will adversely affect a public interest, a court may in the public interest withhold relief until a final determination on the merits, even if the postponement is burdensome to the plaintiff. Id. (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982)). In fact, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger*, 456 U.S. at 312).

The public interest contravenes an injunction against HB 948 because the synthetic marijuana product ban and the enforcement mechanism for it are in the public's interest. As the Food and Drug Administration ("FDA") has determined, "[synthetic marijuana] products have been known to be associated with adverse effects including rapid heart rate, vomiting, violent behavior and suicidal thoughts, and an increase in blood pressure, as well as causing reduced blood supply to the heart, kidney damage, and seizures." [5] Moreover, the FDA became aware of reports of "severe illnesses and deaths resulting from the use of synthetic cannabinoid (marijuana) products that have been contaminated with brodifacoum, a very long-acting anticoagulant commonly used in rat poison," which led to the agency working with the Drug Enforcement Administration ("DEA") to add said products to the Schedule 1 Controlled Substances Act.[6] The risks extend beyond the initial user of the product:

> [W]e're also concerned about the potential contamination of donated blood products. The FDA has received several reports of donors who used synthetic cannabinoids contaminated with brodifacoum. Because of its long half-life, the bleeding risk from brodifacoum, which prevents vitamin K from being reused within the body, can persist for weeks. Consequently, potential safety concerns

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[5] *About synthetic cannabinoids, Statement from FDA warning about significant health risks of contaminated illegal synthetic cannabinoid products that are being encountered by FDA*, (Mar. 24, 2020), https://www fda.gov/news-events/press-announcements/statement-fda-warning-about-significant-health-risks-contaminated-illegal-synthetic-cannabinoid.

[6] *Id.*

> exist for both the blood donor and the donated blood components, given the potential impact on coagulation because of its long-acting vitamin K antagonist activity.[7]

The FDA noted that they believed the use of brodifacoum in the products was seemingly deliberate.[8]

Montana followed the guidance by adding synthetic marijuana products to the list of Controlled Substances in § 50-32-222(4) (kk). The State then outright banned them from being manufactured, processed, or sold. It remains in the public interest to not only maintain the ban in HB 948 § 1(1), but also the enforcement mechanism in § 2. Due to the grave risks involved to public health, the balance of equities weighs against granting Plaintiff's request for an injunction.

CONCLUSION

The Court must deny Plaintiff's request for a preliminary injunction because Plaintiff has not met the burden of proving the four-part conjunctive test to obtain the extraordinary remedy of injunctive relief. Plaintiff cannot establish a likelihood of success on the merits because the ban on synthetic marijuana products is not vague; it is clearly defined. The terms "product," "package," and "serving" are words of common understanding that any business owner or person who has read a nutritional label has seen before. The enforcement mechanism hardly differs from the inspection rules of the MMRTA, and Plaintiff, as a marijuana business, is already subject to a regulatory scheme because of being involved in a closely regulated industry—thus, there is no constitutional violation. Due to that the terms are, again, of common understanding and determining what are synthetic marijuana products is easily searchable, and that irreparable injury is completely avoidable by knowing the products on the shelves and not stocking those that are synthetic, Plaintiff cannot show an irreparable injury. Finally, because of the grave health concerns

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[7] *Id.*
[8] *Id.*

attributed to consuming synthetic marijuana products, the balance of equities and public interest tips in favor of the State and away from Plaintiff. Therefore, the State respectfully asks this Court to deny Plaintiff's request for a preliminary injunction.

DATED this 21st day of June, 2023.

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CERTIFICATE OF SERVICE

I, Michael Noonan, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 06-21-2023:

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Dated: 06-21-2023

EXHIBIT G

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

M AND D RETAIL BOZEMAN, LLC, Plaintiff, v. STATE OF MONTANA by and through AUSTIN KNUDSEN, in his official capacity as Attorney General, Defendant.	Cause No.: DDV-2023-405 **OPINION AND ORDER ON MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff M and D Retail Bozeman LLC ("M&D"), represented by Dillon A. Post, has moved the Court for a preliminary injunction enjoining enforcement of several provisions of House Bill 948, 2023 Mont. Laws 746 (eff. May 22, 2023). The State, represented by Michael Noonan and Emily Jones, opposes the motion.

A hearing on the motion was held July 7, 2023. Dillon Post appeared for M&D, and Michael Noonan appeared for the State. The Court heard

testimony from Kyle Strode and received Exhibits A and B. The Court also heard argument from the parties. Based on the evidence and testimony presented, and for the reasons that follow, the motion for a preliminary injunction will be granted in part and denied in part.

BACKGROUND[1]

Synthetic marijuana cannabinoids are a serious public health hazard. According to the CDC, synthetic cannabinoids are a class of drugs that "act on the same brain cell receptors as tetrahydrocannabinol (THC), the main active ingredient in marijuana," but often "affect the brain in different and unpredictable ways compared to marijuana." (State's Ex. A, at 1.) Cannabinoids can impair the brain, the respiratory system, the heart and vascular system, the kidneys, the gastrointestinal system, and the muscular system, and in some cases, use can cause severe illness or death. (*Id.* at 2.)

Although there have long been laws regulating marijuana, "synthetic marijuana" has long been largely unregulated. These products are often "sold in convenience stores and gas stations as substitutes for marijuana under names such as "K2" and "Spice." (State's Ex. B, at 1.) Because they are unregulated, there have long been few standards for manufacturing, packaging, or selling them. As a result, "two packets of a brand-named [synthetic cannabinoid] may have completely different chemicals," the potency may vary between batches, and synthetic marijuana may be contaminated with other toxic substances and psychoactive drugs. (Ex. A, at 2.) These substances have long skirted regulation because manufacturers tweak the chemical structure to evade the definitions of listed controlled substances. (Ex. B, at 1.)

[1] The following constitutes the Court's findings of fact. Mont. R. Civ. P. 52(a)(2).

In the wake of this background, in 2023 the legislature enacted House Bill 948, which was signed by the Governor and took effect May 22, 2023. House Bill 948 is plainly aimed at prohibiting the manufacture and distribution of these "synthetic marijuana products." HB 948 § 1(1). It continues to permit the manufacture and sale of hemp and hemp-derived products but clarifies that only licensed dispensaries may sell marijuana products with a sufficiently high THC concentration, and nobody—regardless of licensure—may manufacture or distribute synthetic marijuana. For unlicensed retailers who sell products derived from hemp (that is, products derived from the *Cannabis Sativa L.* plant with a THC concentration of less than 0.3%), the statute provides that such products may not contain more than 0.5 mg THC in the aggregate per serving or 2 mg of THC per package sold. HB 948 § 1(3). The law also expands the number of isomers of tetrahydrocannabinol that are considered THC for the purposes of the Controlled Substances Act, title. 53, ch. 22, Mont. Code Ann., and the Montana Marijuana Regulation and Taxation Act (MMRTA), tit. 16, ch. 12, Mont. Code Ann. HB 948, § 11.

The new law also includes an enforcement mechanism in Section 2. If a person is selling synthetic marijuana products or an unlicensed retailer is selling hemp-derived products that exceed the THC concentration and aggregate limits in Section 1 of HB 948, law enforcement may issue a cease-and-desist order and assess penalties for violation of that order. HB 948, § 2(3). Law enforcement may also bring an action in court to obtain an injunction against continued violations, the further violation of which is a felony. *Id.* § 2(4). Additionally, the manufacture and sale of synthetic marijuana products is made a criminal offense punishable under pre-existing statutes for the prosecution of

criminal possession of dangerous drugs, criminal possession with intent to distribute, and criminal distribution of dangerous drugs. *Id.* § 2(7). Most controversially, law enforcement is empowered to detect violations of HB 948 with the power to "inspect any business to investigate unlawful activity under" Section 1(1), that is, to determine whether a business is unlawfully producing or selling synthetic marijuana. *Id.* § 2(2). The statute contains no requirement of predicate suspicion—i.e., reasonable suspicion or probable cause—and does not require a warrant.

M&D is a business that primarily sells hemp-derived products to adults aged twenty-one or older, including "vape cartridges, gummies and other types of candies, and other edible food products." (Verified Comp., ¶ 11.) They are not a licensed dispensary or manufacturer. They contend that because they have been unable to understand how to comply with the new law, they have chosen instead to shut down operations and lay off their employees rather than risk civil and criminal liability.

M&D brought this action on June 5, 2023, seeking an injunction and a temporary restraining order. On June 8, 2023, this Court temporarily restrained enforcement of Section 2(2) (allowing warrantless inspections of businesses), but the Court declined to restrain the State from enforcing any other provision of the law.

Dr. Kyle Strode, Ph.D, testified at the preliminary injunction hearing. Dr. Strode is an analytical chemist who taught in the chemistry department at Carroll College for twenty-three years. Dr. Strode was critical of several aspects of HB 948's drafting. He observed the definitions of "marijuana" and "synthetic marijuana products" appear to mutually exclude each other and

are internally inconsistent. He noted that the term chemical synthesis is extremely broad and can apply to any product that is the result of a chemical reaction. For instance, he noted that the definition of hemp in the statute purports to exclude synthetic cannabinoids, but notes that derivatives, salts, isomers, and acids of the hemp plant *are* the products of chemical synthesis. Similarly, Dr. Strode criticized the definition of synthetic cannabinoids—which includes anything structurally similar to a cannabinoid—as overly broad. Finally, Dr. Strode noted the difficulty that a business faces in determining what compounds are contained in its products and how those compounds were generated.

Dr. Strode was a credible witness with a clear command of his field. Nevertheless, there are important limitations to his testimony. For one, Dr. Strode's testimony was limited to his understanding as an analytical chemist; he was not competent to pass on what is vague as a matter of law. And second, Dr. Strode conceded that his conception of the difference between artificial and natural is not based on a term of art in his field. Authoritative though the testimony was on some of the draftsmanship issues with the bill, it did not materially alter the Court's task of construing the legislature's intent and determining whether the law set forth a sufficient standard to avoid constitutional vagueness.

STANDARD

A preliminary injunction may be granted under the following circumstances:

> A preliminary injunction order or temporary restraining order may be granted when the applicant establishes that:
>
> (a) the applicant is likely to succeed on the merits;

(b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief;
(c) the balance of equities tips in the applicant's favor; and
(d) the order is in the public interest.

Mont. Code Ann. § 27-19-201 (2023). The party seeking the injunction bears the burden of establishing these elements. *Id.* § 27-19-201(3). This standard is intended to mirror the standard established by *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008), and its progeny. *See* Mont. Code Ann. § 27-19-201(4).

Preliminary injunctions are "extraordinary remed[ies] never awarded as of right." *Winter*, 555 U.S. at 24. Courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Even when injunctive relief is appropriate, it "must be tailored to remedy the specific harm alleged." *Galvez v. Jaddou*, 52 F. 4th 821, 834 (9th Cir. 2022).

The Court further applies this standard mindful that this case involves a challenge to the constitutionality of a statute. Due respect for separation of powers demands that the legislature's enactments be presumed constitutional. *Weems v. State*, 2023 MT 82, ¶ 34, 412 Mont. 132, 529 P.3d 798; *see also* Mont. Const. art. III, § 1. The presumption of constitutionality is "a high burden to overcome," and it is a burden shouldered by the challenging party. *Weems*, ¶ 34. It requires that "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877. Additionally, whenever possible, courts will construe statutes narrowly to avoid an unconstitutional

interpretation. *City of Great Falls v. Morris*, 2006 MT 93, ¶ 19, 332 Mont. 85, 134 P.3d 692.

DISCUSSION[2]

M&D seeks a preliminary injunction blocking enforcement of numerous sections of HB 948:

- Sections 1(1) and 6 (imposing a blanket prohibition on the manufacture and sale of synthetic marijuana products);
- Section 5 (amending definitions in §§ 16-12-102 regarding meaning of marijuana, synthetic marijuana products, and synthetic cannabinoids);
- Section 11 (amending definition of tetrahydrocannabinol (THC) in § 50-32-222(4) (ff) to include delta-9, delta-8, delta-6a, and delta-10a isomers);
- Section 12 (amending definition of hemp in § 80-18-101 to depart from the United States Department of Agriculture definition and to expressly exclude synthetic cannabinoids);
- Section 1(3) (limitation on THC content by package and serving);
- Section 7 (amending § 16-12-208(7) to restrict sales and transfers of hemp flower, hemp plants, and synthetic cannabinoids by licensed dispensaries[3]); and
- Section 2(2) (administrative inspections of businesses to monitor compliance with HB 948);

[2] The following constitutes the Court's conclusions of law. Mont. R. Civ. P. 52(a)(2).
[3] This prohibition does not apply to M&D Retail, which is not a licensed dispensary. The Court thus does not consider it further.

Despite the number of sections challenged, M&D's action can better be summarized as follows: (1) the synthetic marijuana products ban is vague; (2) the limitation on THC content by package and serving is vague; (3) the expanded definition of THC is vague; and (4) the administrative inspection provisions violate M&D's right to privacy and guarantee against unreasonable searches and seizures. The Court examines each below.

1. Likelihood of Success on the merits

a. Synthetic Marijuana Products Ban

House Bill 948 spans 17 sections and 28 pages. Nevertheless, its core prohibition—set forth in the very first sentence following the enacting clause—is straightforwardly stated: "A person may not manufacture, process, or offer for sale a synthetic marijuana product." HB 948 § 1(1). M&D argues that the problem lies with the term "synthetic marijuana product," which they contend is unconstitutionally vague.

"Vague laws invite arbitrary power." *Sessions v. Dimaya*, __ U.S. __, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). Accordingly, due process of law requires that the Government not take "away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015)

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(citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).[4] This doctrine follows from "ordinary notions of fair play and the settled rules of law," and it holds that a law that "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The doctrine also derives in part from the separation of powers: a vague law requiring the courts to supply meaning that the legislature did not "would, to some extent, substitute the judicial for the legislative department of government." *Kolender*, 461 U.S. at 358 n. 7 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

At the same time, due process does not require that criminal statutes satisfy "impossible standards of clarity." *Kolender*, 461 U.S. at 361. Nearly all statutes will have some zone of uncertainty around the edges—indeed, this is how lawyers put food on their families' tables. Thus, that a statute "requires a person to conform [their] conduct to an imprecise but comprehensible normative standard" or can be "difficult to apply in some situations" does not render that statute vague. *State v. Martel*, 273 Mont. 143, 151, 902 P.2d 14, 19 (1995).

A statute may be challenged as vague on its face or vague as applied. *Martel*, 273 Mont. at 149, 902 P.2d at 18. A statute is vague on its face

[4] At oral argument, the State suggested that HB 948 is not a criminal statute. Section 2(7), however, plainly states that a violation of the synthetic marijuana products bans in Section 1(1) "may be enforced under" the criminal statutes for criminal distribution, possession, or production of dangerous drugs. Contrary to the State's argument, nothing in Section 2(7) requires the State to first exhaust its civil and administrative remedies before bringing a criminal prosecution. *See* Mont. Code Ann. § 1-2-101 (when construing a statute, a judge may not "insert what has been omitted or omit what has been inserted"). Moreover, whatever the Attorney General's litigation position may be with respect to exhaustion, whether to bring charges will not lie in the discretion of a single official or agency, but it will instead rest in the first instance with the fifty-six elected county attorneys throughout the state. *See* Mont. Code Ann. § 7-4-2712.

"if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." *Id.* A statute is vague as applied to a particular defendant if: "(1) it fails to provide 'actual notice' to the defendant, or (2) it fails to provide 'minimal guidelines' to law enforcement regarding the defendant's conduct." *State v. Hamilton*, 2018 MT 253, ¶ 20, 393 Mont. 102, 428 P.3d 849. In an as-applied challenge, usually raised in the context of a criminal prosecution, the court examines the statute in light of the challenger's particular conduct. *Hamilton*, ¶ 20.

With these principles in mind, the Court turns to the text of HB 948. Section 1(1) bans "synthetic marijuana products." Whether a marijuana or marijuana product is a "synthetic marijuana product" turns on whether it "contain[s] synthetic cannabinoids." Mont. Code Ann. § 16-12-102(41) (2023) (as amended by HB 948 § 5). Prior to HB 948's passage, synthetic cannabinoids, already a Schedule I dangerous drug, were defined in the Controlled Substances Act as follows:

> (i) unless specifically excepted or listed in another schedule, any chemical compound chemically synthesized from or structurally similar to any material, compound, mixture, or preparation that contains any quantity of a synthetic cannabinoid found in any of the following chemical groups, or any of those groups that contain synthetic cannabinoid salts, isomers, or salts of isomers, whenever the existence of those salts, isomers, or salts of isomers is possible within the specific chemical designation, including all synthetic cannabinoid chemical analogs in the following groups:
>
> (A) naphthoylindoles, whether or not substituted in the indole ring to any extent or the naphthyl ring to any extent;
>
> (B) naphthylmethylindoles, whether or not substituted in the indole ring to any extent or the naphthyl ring to any extent;

(C) naphthoylpyrroles, whether or not substituted in the pyrrole ring to any extent or the naphthyl ring to any extent;

(D) naphthylmethylindenes, whether or not substituted in the indene ring to any extent or the naphthyl ring to any extent;

(E) acetylindoles, whether or not substituted in the indole ring to any extent or the acetyl group to any extent;

(F) cyclohexylphenols, whether or not substituted in the cyclohexyl ring to any extent or the phenyl ring to any extent;

(G) dibenzopyrans, whether or not substituted in the cyclohexyl ring to any extent or the phenyl ring to any extent; and

(H) benzoylindoles, whether or not substituted in the indole ring to any extent or the phenyl ring to any extent;

(ii) any compound that has been demonstrated to have agonist binding activity at one or more cannabinoid receptors or is a chemical analog or isomer of a compound that has been demonstrated to have agonist binding activity at one or more cannabinoid receptors;

(iii) 1-pentyl-3-(1-naphthoyl) indole (also known as JWH-018);

(iv) (6aR,10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10atetrahydrobenzo[c]chromen-1-ol (also known as HU-210 or 1,1-dimethylheptyl-11-hydroxy-delta8-tetrahydrocannabinol);

(v) 2-(3-hydroxycyclohexyl)-5-(2-methyloctan-2-yl) phenol (also known as CP-47,497), and the dimethylhexyl, dimethyloctyl, and dimethylnonyl homologues of CP-47, 497;

(vi) 1-butyl-3-(1-naphthoyl) indole (also known as JWH-073);

(vii) 1-(2-(4-(morpholinyl)ethyl))-3-(1-naphthoyl) indole (also known as JWH-200);

(viii) 1-pentyl-3-(2-methoxyphenylacetyl)indole (also known as JWH-250);

(ix) 1-hexyl-3-(1-naphthoyl)indole (also known as JWH-019);

(x) 1-pentyl-3-(4-chloro-1-naphthoyl)indole (also known as JWH-398);

(xi) JWH-081: 1-pentyl-3-(4-methoxy-1-naphthoyl)indole, also known as 4-methoxynaphthalen-1-yl- (1-pentylindol-3-yl)methanone;

(xii) the following substances, except were contained in cannabis or cannabis resin, namely tetrahydro derivatives of cannabinol and 3-alkyl homologues of cannabinol or of its tetrahydro derivatives:

(A) [2,3-Dihydro-5-methyl-3-(4-morpholinylmethyl)pyrrolo [1,2,3-de]-1,4-benzoxazin-6-yl]-1- napthalenylmethanone (also known as WIN-55,212-2);

(B) 3-dimethylheptyl-11-hydroxyhexahydrocannabinol (also known as HU-243); or

(C)[9-hydroxy-6-methyl-3-[5-phenylpentan-2-yl]oxy-5,6,6a,7,8,9,10,10a-octahydrophenanthridin1-yl]acetate[.]

Mont. Code Ann. § 50-32-222(4)(kk). This definition was first enacted in 2013 as part of a bill seeking to prohibit "dangerous drug analogues." 2013 Mont. Laws 135, § 6 (Apr. 2, 2013). What HB 948 adds to this is a supplemental definition, codified in the MMRTA, which provides:

> Synthetic cannabinoids have the meaning provided in 50-32-222 *and includes* any cannabinoids produced artificially, whether from chemical synthesis or biosynthesis using recombinant biological agents, including but not limited to yeast and algae.

Mont. Code Ann. § 16-12-102(40) (2023) (as amended by HB 948 § 5) (emphasis added). Combined, it appears that the term "synthetic cannabinoids" embraces cannabinoids satisfying the definition in § 50-32-222(4)(kk) or otherwise "produced artificially," whether that artificial process consists of chemical or biological synthesis.

M&D is not likely to persuade the Court that the new supplemental definition of synthetic cannabinoids in Mont. Code Ann. § 16-12-201(40) (2023) is itself vague. M&D has focused on the meaning of "chemical synthesis" to argue that chemical synthesis applies to virtually any chemical reaction creating a new substance. This strikes the Court, however, as the wrong focus: whether chemical synthesis or biological synthesis is at issue, the statute applies the same requirement—that the substance be "produced artificially."

The term "artificially" is not defined in statute, and Dr. Strode attested that it does not have a peculiar meaning in the field of chemistry, so the Court uses its ordinary meaning. *State v. Knudson*, 2007 MT 324, ¶ 22, 340 Mont. 167, 174 P.3d 469; Mont. Code Ann. § 1-2-106. "Artificial" in this context means "[m]ade or produced by a human or human intervention rather than by nature." Black's Law Dictionary 139 (11th ed. 2019). The term connotes something produced by humans that imitates something derived from nature: the Merriam Webster online dictionary, for example, defines "artificial" as "humanly

contrived *often on a natural model*: man made."[5] (Emphasis added.) Merriam Webster's examples include an artificial limb or artificial diamond, both synthetic imitators of a natural phenomenon. Similarly, the online Oxford Learner's Dictionaries defines "artificial" as "made or produced to copy something natural; not real."[6] Indeed, the common meaning of "synthetic" carries a similar connotation: synthetic fibers are fibers (usually derived from petrochemicals) that *imitate* natural fibers composed of plant material; likewise, synthetic rubber is composed primarily of synthesized petrochemicals yet has the same properties and consistency as natural rubber, which is a processed derivative of a natural latex sap collected from rubber trees[7]. Thus, "produced artificially" is best understood as referring to as a laboratory-generated product created from manmade components and substances not found in nature that nevertheless imitates something that is found in nature.

Also relevant is the modified definition of "hemp." Under HB 948, the statute no longer defines hemp solely by reference to the federal definition, but instead establishes the following definition of hemp:

> (1) (a) Hemp means the plant species Cannabis sativa L. and any part of that plant, including the seeds and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a total delta-9 tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis.
>
> (b) The term does not include synthetic cannabinoids.

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[5] Merriam Webster Online Dictionary, Available: https://www.merriam-webster.com/dictionary/artificial.
[6] Available: https://www.oxfordlearnersdictionaries.com/us/definition/english/artificial?q=artificial.
[7] *See* Wikipedia, "Natural Rubber." Available: https://en.wikipedia.org/wiki/Natural_rubber.

Mont. Code Ann. § 80-18-101(1) (2023) (as amended by HB 948 § 12). This definition establishes a dichotomy between synthetic cannabinoids—which are banned regardless of THC concentration—and products derived and extracted from a *Cannabis sativa* plant, which may be manufactured and sold as hemp if the THC concentration is below a certain threshold. In other words, the definition of hemp suggests the legislature intended to distinguish between those THC-containing products that are derived from the plant, and those that are not.

The Court also considers the context underlying the adoption of HB 948 to gain insight into its meaning. The problem of synthetic drugs was not unknown prior to HB 948's passage. The United States Department of Justice, Drug Enforcement Administration (DEA) has published fact sheets about synthetic cannabinoids such as K2 and Spice. It describes synthetic cannabinoids as follows:

> Synthetic cannabinoids are not organic, *but are chemical compounds created in a laboratory*. Since 2009, law enforcement has encountered hundreds of different synthetic cannabinoids that are being sold as "legal" alternatives to marijuana. These products are being abused for their psychoactive properties and are packaged without information as to their health and safety risks.

DEA, Drug Fact Sheet, K2/Spice (emphasis added).[8] Law review articles use a similar description of synthetic cannabinoids: *See, e.g.,* Katherine Brisson, *Ending the Creation of Legal Synthetic Drugs: A Critique of the Controlled Substance Analogue Enforcement Act and Proposed Solutions*, 70 Syracuse L. Rev. 1205, 1212 (2020) ("Synthetic cannabinoids are *fabricated chemicals* that mimic THC. . . and are most commonly sprayed onto shredded plant material or

[8] Available: https://www.dea.gov/sites/default/files/2023-04/K2-Spice%202022%20Drug%20Fact%20Sheet.pdf.

suspended in oil for use in e-cigarettes." (emphasis added)). Kevin T. Brown, *Note: A Problem of Design: Proposed Changes to Controlled Substance Analogue Statutes: Modifying Tennessee's Approach*, 45 U. Mem. L. Rev. 395, 401 (2015) ("Synthetic cannabinoids, or spice, are *laboratory-created* chemicals that are functionally similar to" THC "that are typically synthesized in foreign countries and shipped into the United States in powdered form," where manufacturers "dissolve the raw product into acetone or other solvents and apply it to a leafy plant material.") (emphasis added)). At the preliminary injunction hearing, the State introduced a CDC fact sheet that included common brands of widely recognized synthetic cannabinoids, including K2, Spice, AK-47, Mr. Happy, Scooby Snax, Kush, and Kronic.

All of the foregoing suggests that contrary to the claims made by M&D, the definition of "synthetic marijuana products" is not that difficult to parse. It refers to those products that contain THC but that were produced in a laboratory from biological or chemical precursors not derived by processing plants from the genus *Cannabis* or their flowers, stems, seeds, or other parts. Moreover, as the foregoing discussion of public sources demonstrates, the identities of certain products commonly referred to as synthetic marijuana—for example, Spice and K2—are well known in public health and law enforcement circles.

Nor is M&D likely to persuade the Court that the 2013 definition of synthetic cannabinoids incorporated by reference into the definition of synthetic marijuana products renders the synthetic marijuana products ban vague. At the hearing, Dr. Strode criticized the definition of synthetic cannabinoids in the Controlled Substances Act, which is incorporated by reference into HB 948.

His particular concern was that "synthetic cannabinoids" include "any chemical compound synthesized from or *structurally similar* to" the listed classes of recognized synthetic cannabinoid compounds. *See* Mont. Code Ann. § 40-32-222(4)(kk)(i) (emphasis added). He contended that almost anything could be "structurally similar."

The structural similarity requirement derives from an attempt to combat a longstanding problem in drug interdiction. The regulations in the Controlled Substances Act have always been based on the schedules, which are lengthy lists of chemical compounds. This practice of banning or regulating only expressly enumerated compounds, however, leaves an opening for enterprising manufacturers to create new psychoactive substances with slightly different chemical compositions or structures that fall outside the listed drugs. *See, e.g.,* Jeremy Mandell, *Note: Tripping over Legal Highs: Why the Controlled Substances Analogue Enforcement Act is Ineffective against Designer Drugs*, 2017 U. Ill. L. Rev. 1299, 1301 (2017). As new compounds are scheduled, the manufacturers tweak the formula to avoid regulation. The 2013 bill on dangerous drug analogues and HB 948 both represent attempts to end this chemical arms race by getting ahead of the manufacturers and banning "structurally similar" substances *see, e.g.,* Mont. Code Ann. § 50-32-222(4)(kk)(i) or substances "structurally related to or chemically derived from" listed controlled substance compounds, *see* Mont. Code Ann. § 50-32-101(7)(a). *Cf. United States v. Hodge*, 321 F.3d 429, 432 (3d Cir. 2003) (holding that the purpose of the federal counterpart to Montana's analogue statutes is "to prevent underground chemists

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from producing slightly modified drugs that are legal but have the same effects and dangers as scheduled controlled substances").

In doing so, Montana did not break new ground. Since the enactment of the Controlled Substances Analogue Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, the federal government has regulated controlled substance analogues, defined as substances for which, among other things, "the chemical structure. . . is substantially similar to the chemical structure of a controlled substance." 21 U.S.C. § 802(32). Numerous other states have similar legislation. Brown, *A Problem of Design, supra,* at 416–420 (describing the various types of state analogue statutes). Nearly all appear to have a common requirement of substantial structural similarity to a scheduled drug. *See id.* Experience of other jurisdictions shows that the requirement for showing "substantial similarity" in chemical structure has frequently been a barrier to successful prosecutions for synthetic drug analogues:

> The chemical structure requirement is the root of most issues in controlled substance analogue prosecutions. Clandestine chemists are capable of creating analogue substances that produce the same pharmacological effects as a controlled substance but differ in chemical structure. Proving a substance has or does not have a substantially similar chemical structure often results in a "battle of the experts." The varying methods experts use to prove or disprove chemical similarity often yield inconsistent results and boil down to nothing more than biased, subjective opinions.

Brown, *A Problem of Design*, *supra*, at 430. As another commentator explained: "Prosecuting a case involving an alleged controlled substance analogue is expensive, time-consuming, and complicated because prosecutors must prove that the alleged analogue is "substantially similar" in structure and effect to its

controlled substance counterpart, which is a subjective standard with no accepted scientific definition." Katherine Brisson, *Ending the Creation of 'Legal' Synthetic Drugs: A Critique of the Controlled Substance Analogue Enforcement Act and Proposed Solutions*, 70 Syracuse L. Rev. 1205, 1219 (2020). The commentators likewise tend to agree that one of the barriers to effective control of analogues is the prohibition on vagueness in criminal statutes. *See* Brisson, *Ending the Creation*, *supra*, at 1210; Brown, *A Problem of Design*, *supra*, at 432 ("A controlled substance analogue statute must be broad enough to adequately address modern synthetic and designer drugs but also must be specific enough to provide notice and prohibit arbitrary enforcement."); Mandell, *Tripping over Legal Highs*, *supra*, at 1314.

Nevertheless, both as applied and facial vagueness challenges to structural similarity standards have almost universally failed. *E.g., United States v. Requena*, 980 F.3d 29, 39–41 (2d Cir. 2020); *United States v. Palmer*, 917 F.3d 1035, 1038–1039 (8th Cir. 2019); *United States v. Turcotte*, 405 F.3d 515, 531–533 (7th Cir. 2005); *United States v. Klecker*, 348 F.3d 69, 71–72 (4th Cir. 2003); *United States v. Granberry*, 916 F.2d 1008, 1010 (5th Cir. 1990); *Commonwealth v. Herman*, 161 A.3d 194, 210–212 (Penn. 2017) (collecting cases); *State v. Alley*, 318 P.3d 962, 972–973 (Idaho Ct. App. 2014), *overruled in part on other grounds by State v. McKean*, 356 P.3d 368 (2015); *State v. Salash*, 13 N.E. 3d 1202, 1208–1209 (Ohio Ct. App. 2014); *State v. Srack*, 314 P.3d 890, 895–897 (Kan. Ct. App. 2013); *State v. Beaudette*, 97 So. 3d 600, 604 (La. Ct. App. 2012); *People v. Frantz*, 114 P.3d 34, 36–37 (Colo. Ct. App. 2004); *Hooper v. State*, 106 S.W.3d 270, 276–277 (Tex. Ct. App. 2003); *People v. Silver*, 281 Cal. Rptr. 354, 356–358 (Cal. Ct. App. 1991); *but see United States v. Forbes*, 806 F. Supp. 232,

236–239 (D. Colo. 1992) (holding the federal analogue act to be vague as applied to the substance at issue there). And in *McFadden v. United States*, 576 U.S. 186 (2015), the Supreme Court similarly observed that the federal analogue statute is not facially vague because its scienter requirement "alleviates vagueness concerns, narrows the scope of its prohibition, and limits prosecutorial discretion." *McFadden*, 576 U.S. at 197 (alteration and quotation marks omitted).

This Court is hard-pressed to deny the weight of this authority. Montana's structural similarity component of its synthetic cannabinoid's definition is not functionally identical to the federal language. To hold a person criminally liable for possessing or distributing a synthetic cannabinoid, the State must prove the person acted purposely or knowingly. This means the State must prove, at a minimum, that the defendant "was aware that they possessed the dangerous drug, or that such person was aware of a high probability that such substance is a dangerous drug." *In re R.L.H.*, 2005 MT 177, ¶ 24, 327 Mont. 520, 116 P.3d 791; *see also* Mont. Code Ann § 45-2-101(35) (defining knowingly with respect to a circumstance or fact). This is similar to the scienter requirement in *McFadden* that prompted the Supreme Court to reject the defendant's vagueness arguments. *See McFadden*, 576 U.S. at 194 (holding that the *mens rea* could be established "by evidence that a defendant knew that the substance with which he was dealing is some controlled substance" or "by evidence that the defendant knew the specific analogue he was dealing with"). Additionally, the burden lies with the State—not the individual—to prove that the substance *is* structurally similar. As the foregoing discussion in the literature suggests, this requirement has resulted in *fewer* prosecutions because of the difficulty and expense of proving structural similarity. The structural similarity requirement has

resulted not in indiscriminate or arbitrary enforcement, but rather in a careful exercise of discretion. Thus, M&D is unlikely to succeed on the merits based on Dr. Strode's concerns about the structural similarity provision in the definition of "synthetic cannabinoids."

The Court also considers whether M&D is likely to establish that the synthetic marijuana products ban is vague as applied. M&D is not. Importantly, the burden in a preliminary injunction application is unambiguously on the *applicant*. Mont. Code Ann. § 27-19-201(3) (2023). M&D has not produced sufficient facts for the Court to assess an as-applied challenge to any of the products it sells. The verified complaint says simply that M&D sells "hemp-derived products such as vape cartridges, gummies and other types of candies, and other edible food products to adults." (Comp., ¶ 11.) M&D has not produced any testimony or affidavits providing more information about the products they sell or providing any reason to believe that any particular product runs so far afield of the definition of "synthetic marijuana products"—as construed above—that the statute would be unconstitutional as applied to those products.

Finally, M&D argues that the ban is vague because it does not know how the products it sells were manufactured. This, however, is a policy objection to HB 948. The test for vagueness is whether the statute provides fair notice and a sufficient standard to avoid arbitrary enforcement. The statute likely accomplishes this because an ordinary person can understand that products derived from a cannabis plant are not prohibited by the ban, but products derived from human-generated compounds and substances or from biological agents like yeast and algae are. Additionally, the State must prove M&D knows the product contains synthetic marijuana products to prosecute M&D; M&D does not have to

prove it did not know. The issue M&D raises is one for its suppliers and to raise at future sessions of the legislature or with the synthetic marijuana products advisory council; it is not one for judicial enforcement.

Because M&D is not likely to prove at trial that the synthetic marijuana products ban in HB 948 is unconstitutionally vague on its face or as applied to any of M&D's merchandise, M&D is not entitled to a preliminary injunction of the synthetic marijuana products ban.[9]

b. Package and Serving Limitations on THC content

Section 1(3) of HB 948 provides: "Products containing a THC concentration of 0.3% or less sold by any person other than a licensed manufacturer under 16-12-222 or a licensed dispensary under 16-12-224 may not exceed 0.5 milligrams of THC for each serving and may not exceed 2 milligrams per package."

M&D has made two vagueness challenges. First, it claims in its opening brief that it is ambiguous whether the "product" referenced in Section 1(3) applies to "synthetic marijuana products" or "any product under the sun." (Mem. Supp. Mtn. Temp. Restraining Or. & Prelim. Injunction, Dkt. 2 at 7.) This

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[9] As Dr. Strode's testimony demonstrated, as a matter of draftsmanship, HB 948 could use some work. Some aspects are circular and internally contradictory. For example, he observed—correctly—that the definition of "marijuana" expressly excludes "synthetic marijuana products," while the definition of "synthetic marijuana products" states that it is a subset of marijuana. *Compare* Mont. Code Ann. § 16-12-201(20)(c) (2023) ("The term ["marijuana"] does not include synthetic marijuana products.") *and id.* § 16-12-201(24) ("'Marijuana product' means a product that contains marijuana") *with id.* § 16-12-201(41) ("'Synthetic marijuana product' *means marijuana or marijuana products* that contain synthetic cannabinoids" (emphasis added)). Literally read, this does not work as a matter of formal logic.

This Court's function, however, is not to grade the legislature's work. Respect for its coordinate branch of government means this Court's first resort must be to construe the statute, not throw up its hands and declare it void. Additionally, the Court must construe statutes to avoid absurd results. *Mont. Shooting Sports Ass'n v. State*, 2008 MT 190, ¶ 20, 344 Mont. 1, 185 P.3d 1003. Imperfections notwithstanding, the legislature clearly intended only to enforce a strict distinction between marijuana—which is legal subject to regulation—and synthetic marijuana—which is never legal—and nothing more.

Court's Order on the motion for a temporary restraining order already adequately dispatched with this argument, and nothing in the subsequent briefing has altered the Court's conclusion. (Or. on Mtn. for Temp. Restraining Or. & Or. to Show Cause, Dkt. 4 at 6–8.) Section 1(3) plainly and unambiguously applies not to synthetic marijuana products—which are outright banned by Section 1(1)—but to any product that contains THC.

M&D also contends that the terms "package" and "serving" are vague. Neither "package" nor "serving" have a technical meaning, so the Court looks to their ordinary and common usage. Mont. Code Ann. § 1-2-106.

A package has a relatively straightforward common meaning: "a bundle of something, usually of small or medium size, that is packed and wrapped or boxed; parcel" or "a container, as a box or case, in which something is or may be packed."[10] To a typical consumer or retailer, a package is widely understood to be the basic indivisible unit of sale for a whole host of goods—e.g., a package of ramen noodles as it appears on the store shelf. Even if the items within a package are themselves individually wrapped—think cough drops—a "package" would still be thought to an ordinary person to be the whole of the unit picked up off the shelf of the store. To be sure, packaging is a manipulable concept: the seller might choose to alternatively sell the same amount of product in one large package or multiple small individual packages (for example, one large "party" bag of M&M candies, or multiple smaller individually sized bags of M&M candies). But the ability to do so works to the *advantage* of the seller: through packaging, they can manipulate the size of their product to conform to the law.

[10] "Package," Dictionary.com. Available: https://www.dictionary.com/browse/package

The term "serving" poses a somewhat more difficult question. The ordinary definitions are not helpful: A "serving" is "a single portion of food or drink; helping."[11] There is a wide variation among people about what constitutes a single "helping" or "portion" of food. In terms of nutrition reporting, the term "serving" is notoriously amorphous.

Nevertheless, the term "serving" is not beyond regulation. For example, in the context of nutrition labeling of foods, the FDA has adopted detailed regulations and a reference guide to assist manufacturers in complying with its serving size regulations. *See* 21 CFR §§ 101.9, 101.12(b). Similarly, the MMRTA gives the Department of Revenue express rulemaking authority to adopt labeling and packaging standards, which includes authority to regulate servings, including THC content per serving and servings per package. Mont. Code Ann. § 16-12-112(1)(h). This rulemaking authority seems sufficient to permit the Department to flesh out the more general terms "package" and "serving," not unlike what the federal government has done with respect to nutrition labeling.

Finally, unlike the synthetic marijuana products ban, the THC content regulation in Section 1(3) is not itself a criminal or penal statute.[12] While violations of Section 1(1) of HB 948 may be prosecuted under the criminal dangerous drug statutes via Section 2(7), violations of Section 1(3) are enforced via Section 2(3), which contemplates issuance of a cease-and-desist order barring the sale of the offending products before any further enforcement action is taken.

[11] "Serving," Dictionary. com. Available: https://www.dictionary.com/browse/serving

[12] Under Montana law, any statute imposing a penalty for conduct, whether civil or criminal, is subject to vagueness review. *See Missoula High Sch. Legal Defense Ass'n v. Superintendent of Pub. Instruction*, 196 Mont. 106, 112, 637 P.2d 1188, 1192 (1981) (holding that statutes regarding the assessment of penalties against school districts with fewer than 180 instructional days were unenforceable due to vagueness).

It is only the violation of a cease-and-desist order or an injunction enforcing the order that triggers penalties. Because there is no penalty until after fair notice has already been provided that the State regards the conduct as illegal—thus opening the way for the business to alter their conduct or judicially challenge the cease-and-desist order—the statute does not fail to give fair notice to a reasonable person that their conduct is forbidden.

Although "serving" and "package" are broad terms, they do not appear likely to deprive manufacturers and retailers of fair notice, nor do they seem so imprecise as to permit arbitrary enforcement. Accordingly, M&D is not likely to succeed on its vagueness challenge to the THC content requirements of § 1(3).

c. Expanded Definition of THC

Section 11 of HB 948 expands the definition of tetrahydrocannabinols to include the delta-8 and delta-10 isomers of THC. M&D argues that Section 11 is vague because it contends that the definition of synthetic marijuana products is vague and so it is unclear whether products M&D sells that include delta-8 and delta-10 THC extracted from hemp flower are banned. Because the Court has already concluded that M&D is unlikely to succeed on its claim that the synthetic marijuana products ban is unconstitutionally vague, it is unlikely to succeed in its challenge to Section 11 as well.

d. Administrative Inspections

Section 2(2) of HB 948 provides:

> The department of agriculture, the department of justice, the department of public health and human services, local sheriff departments, municipal police departments, a county attorney's

> office, and the department of revenue may inspect any business to investigate unlawful activity under [section 1(1)].

M&D contends that this provision confers overbroad authority on government inspectors and invades their right to privacy and constitutional protection against unreasonable searches and seizures. The Court agrees that M&D is likely to succeed on the merits of this claim.

Through article II, sections 10 and 11, the Montana Constitution provides greater protection against unreasonable searches and seizures than does the United States Constitution. *State v. Smith*, 2021 MT 324, ¶¶ 12–14, 407 Mont. 18, 501 P.3d 398. The right to privacy applies wherever a person has an actual expectation of privacy that society is willing to recognize as reasonable. *Smith*, ¶ 17. Where there is such an expectation of privacy, warrantless searches are deemed presumptively unreasonable. *Smith*, ¶ 24.

Under both state and federal law, this presumption against warrantless searches is not limited to private residences, but also to commercial enterprises as well. As courts have repeatedly noted, the Fourth Amendment itself arose in large part from colonial anger over sweeping writs of assistance that allowed "customs officials and other agents of the King to search at large for smuggled goods." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978). The Supreme Court has explained:

> As we explained in *Camara [v. Mun. Court*, 387 U.S. 523 (1967)], a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if

> the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

Marshall, 436 U.S. at 312 (quoting *See v. Seattle*, 387 U.S. 541, 543 (1967)). Thus, warrants are required for compulsory administrative inspections just as they are for criminal investigations. *Id.* at 312–313.

There is an exception to this requirement for "closely regulated industries." This, however, is intended to be a narrow exception confined to those enterprises with "such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *Marshall*, 436 U.S. at 313. As the United States Supreme Court has emphasized, it is the exception, not the rule. *Id.* Examples of such businesses include the alcohol industry, pawnshops, firearms sellers, the mining industry, auto salvage, commercial trucking, and commercial kenneling. *State v. Beaver*, 2016 MT 332, ¶¶ 12, 14, 386 Mont. 12, 385 P.3d 956; *State v. Warren*, 2019 MT 49, ¶ 25, 395 Mont. 15, 439 P.3d 357.

In almost all of these industries, licenses are required for the business to operate. The exception is rooted both in a diminished expectation of privacy and in an implied consent theory: "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a. . . license, [the dealer] does so with the knowledge that [the dealer's] business records, firearms, and ammunition will be subject to effective inspection." *New York v. Burger*, 482 U.S. 691, 701 (1987) (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)). To be a closely regulated industry, there is no requirement that regulation have existed for a long time, but it is the "pervasiveness and

regularity" of the regulation that defines the exception. *Burger*, 482 U.S. at 701.

The sale of recreational and medical marijuana by licensed dispensaries is undoubtedly a closely regulated industry. *Mont. Cannabis Indus. Ass'n v. State [MCIA]*, 2016 MT 44, ¶¶ 75–82, 382 Mont. 256, 368 P.3d 1131. *MCIA*, however, concerned a challenge to regulations aimed at licensed dispensaries selling marijuana and marijuana products—which remains a Schedule I controlled substance banned under federal law—not hemp or hemp-derived products that contain small concentrations of THC that fail to satisfy the definition of marijuana and that are largely unregulated at the state and federal level. It appears to the Court that M&D sells the latter. In 2016 and today, licensed dispensaries are subject to an extensive set of statutory and administrative regulations. *See generally* tit. 16, ch. 12, Mont. Code Ann.; Admin. R. Mont. 42.39.102–42.39.617. Few, if any, of these requirements appear to bind a retailer like M&D. Nor does HB 948 change this: it bans synthetic marijuana products, but it neither extensively regulates nor prohibits hemp and hemp-derived products that contain THC concentrations less than 0.3%. Indeed, Subsection 1(2) makes this distinction explicit: "Products containing or consisting of cannabinoids produced and processed for any type of consumption into a human body. . . *that exceed a THC concentration of 0.3%* may only be sold by a manufacturer licensed under §16-12-222 or a dispensary licensed under §16-12-224."

The State's response to M&D's challenge is based on the (incorrect) belief that M&D is a licensed dispensary that sells marijuana and marijuana products. Based on the showing made so far, this is incorrect. That M&D's business is adjacent to a closely regulated industry does not make M&D

closely regulated. And to so extend the doctrine would be to expand it so much as to violate the admonition of *Marshall* that this is intended to be a narrow exception to the warrant requirement, not a general license to invade the privacy of commercial enterprises merely because they are subject to some degree of regulation.

In short, M&D has satisfied its burden of persuading the Court that it is likely to succeed on its claim that Section 2(2) violates M&D's right to privacy and its constitutional protection against unreasonable searches and seizures.

2. Irreparable Injury

The Court considers the presence of irreparable injury only with respect to Section 2(2), which is the only challenge for which the Court concludes M&D is likely to succeed.

The analysis here is unchanged from the Court's order on the request for a temporary restraining order. Violations of constitutional prohibitions against unreasonable searches or seizures are generally not adequately remedied after-the-fact by monetary damages. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1601 (1996). Whatever the scope of "any business," to the extent it applies to business that sell products containing THC, a warrantless search will likely cause an irreparable constitutional injury that cannot later be remedied. M&D has met its burden of showing irreparable injury.

3. Balance of the Equities and Public Interest

When the government is the party to be enjoined, the balance of the equities and the public interest elements merge.

E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 668 (9th Cir. 2021).

A balance-of-the equities analysis recognizes that the purpose of preliminary relief is to "preserve the status quo if the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions until the merits of the action are ultimately determined." *Sacramento Homeless Union v. County of Sacramento*, 617 F. Supp. 3d 1179, 1199 (E.D. Cal. 2022). The Court focuses on competing claims of injury. *Id.*

The State has demonstrated that synthetic marijuana products are an imminent hazard to public health and safety, and that it has a strong interest in taking aggressive action to combat their sale and use. The Court, however, is not halting the synthetic marijuana products ban. The only remaining section at issue is Section 2(2), which permits warrantless inspections to find illicit possession or sale of synthetic marijuana products. The State can still engage in aggressive enforcement in accordance with the traditional requirement that it obtain probable cause and a warrant before invading M&D's privacy, the same as it must have for most drug interdiction efforts. On the other side of the ledger is M&D's right to operate its business without sacrificing its privacy rights. The balance of the equities squarely favors M&D.

4. Scope of the Injunction

The only harm warranting a preliminary injunction is Section 2(2)'s provision authorizing warrantless inspections to the extent it applies to unlicensed businesses like M&D. Thus, it suffices to issue a preliminary injunction barring the State from conducting warrantless inspections of M&D. The Court need not opine on the full scope of "any business" or extend the Injunction beyond M&D to achieve the relief from this provision that M&D

seeks.

Accordingly,

IT IS ORDERED:

1. M&D's Motion for a Preliminary Injunction (Dkt. 2), is **GRANTED** in part and **DENIED** in part.

2. The State of Montana and its officers, agents, employees, appointees, successors, and assigns are **ENJOINED** from enforcing Section 2(2) of House Bill 948, 2023 Mont. Laws 746, against M&D until further order of the Court.

3. A written undertaking is waived in the interest of justice.

/s/ Christopher D. Abbott
CHRISTOPHER D. ABBOTT
District Court Judge

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EXHIBIT H

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Our goal is to bring you a classic blend of great pricing, professionalism, and a unique and unforgettable experience. Unlike many other cannabis vendors in Great Falls, we offer a satisfaction guarantee where you can return your product if it doesn't suit your tastes!

As a licensed cannabis and nicotine provider, we're proud to present you with top-shelf items that are lab-tested and curated with your user experience in mind. We ensure that our cannabis collection is vast and outstanding—we've got something for everyone! Whether you're looking for something to help you relax after a long day of work or a buzz of energy to get through the day, we've got you covered.

Our attention to detail extends to our store as well—you're going to have an incredible experience from the moment you walk through our doors! We've put a lot of energy and effort into making sure that our stores reflect our professionalism and premium techniques. We've been voted one of Montana's fastest-growing cannabis businesses for a reason.

Cosmic Collision Flower

$15.00

The Cosmic Collision Flower looks similar to an indica flower—its compact buds and broad leaves have golden-hued crystals, giving it a yellow tint over the green leaves. It's the perfect choice for daytime use because of its energizing qualities.

\- 1 + Add to cart

SKU 335

Categories Flower, Sativa

Description **Reviews (0)**

The Cosmic Collision Flower looks similar to an sativa flower—its compact buds and broad leaves have golden-hued crystals, giving it a yellow tint over the green leaves. It's the perfect choice for daytime use because of its energizing qualities. Enjoy cerebral euphoria, invigorated focus, and a prolonged immunity to fatigue with a few hits of this incredible bud! You'll even notice an improved level of creativity—perfect for artists and musicians.

This strain's THC levels can reach 30%, lending to its long-lasting power. Terpene hunters can enjoy high levels of ocimene, humulene, and pinene as well.

Home / Flower / Shaolin Kush Flower

Shaolin Kush Flower

$30.00

Get ready to be transported to the tropical paradise of Hawaii with every puff of Shaolin Kush Flower. This sativa strain is a unique blend of flavors and aromas that will leave you dreaming of sandy beaches and crystal-clear waters.

- 1 + Add to cart

SKU 695

Categories Flower, Sativa

Description **Reviews (0)**

Get ready to be transported to the tropical paradise of Hawaii with every puff of Shaolin Kush Flower. This sativa strain is a unique blend of flavors and aromas that will leave you dreaming of sandy beaches and crystal-clear waters.

Upon opening the packet, you'll be greeted with a distinct aroma of sweet pineapples, hint of mangoes, and peppery tea transportive of a Hawaiian vacation. The flavor follows suit, with a fruity and floral taste that dances on the tongue.

As you smoke, you'll feel a wave of euphoria wash over you, uplifting your mood and bringing on a sense of creativity and focus. This strain is great for socializing, tackling creative projects, or simply kicking back and enjoying the beauty of the world around you.

The buds of Shaolin Kush are also coated in a generous layer of frosty trichomes, giving them a sparkling appearance that is as pleasing to the eye as it is to the senses.

With a high THC content, the Shaolin Kush Flower is perfect for those seeking a powerful, uplifting experience. So why wait? Add a little bit of paradise to your daily routine with Shaolin Kush Flower today.

WHAT OUR
Customers Say

I was blown away by the effects and flavors on some of their unique strain offerings... I didn't know this good of weed could come from Montana!!

Sean Kimminger