



Via Email to: StateBoardofHealth@health.ok.gov

July 18, 2018

Tom Bates, Interim Commissioner
Oklahoma State Department of Health
1000 N.E. Tenth Street
Oklahoma City, Oklahoma 73117-1299

Subject: Unconstitutionality of Pregnancy Test Provision and Ban on the Sale of Merchandise in OAC 310:681, et. seq.

Dear Commissioner Bates:

We write to you today to express serious concerns with the emergency rules purporting to regulate the licensing of medical marijuana, enacted by the Board of Health on July 10, 2018, specifically found at OAC 310:681, et. seq. We note that Attorney General Hunter has communicated with you by formal letter today, specifically finding that the Board of Health overstepped its authority in enacting these subject regulations. We concur in both the Attorney General's assessment of the Board's illegal actions, and recommendation that they be rescinded voluntarily. We also note, however, that the specific regulations and concerns contained within Attorney General Hunter's letter do not mention two more inappropriate rules enacted by the Board, both of which are likely to result in litigation. Specifically, these are the unconstitutional pregnancy test requirement found at OAC 310:681-1-9.1(b)(8) and the unconstitutional prohibition on certain acts, including advertising and sale of merchandise with logos, found at OAC 310:681-5-18.

We write to you to express our grave concerns regarding the constitutionality of both the pregnancy test requirement and the restrictions on the advertising and sale of merchandise with logos found within the emergency regulations.

Specifically, OAC 310:681-1-9.1(b)(8) states that “all females of childbearing years” must submit to a pregnancy test before a physician may recommend a medical marijuana license to any woman who might benefit therapeutically or palliatively from medical marijuana (as determined by the patient and her treating physician, not the state). This provision is facially discriminatory on the basis of sex, is an unconstitutional invasion of privacy, and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. To survive a federal constitutional challenge, which we are prepared to file, the state must be prepared to survive intermediate scrutiny, ie., the state must show that this regulation serves an important government purpose and the means are substantially related to that interest. See e.g., *Craig v. Boren*, 429 U.S. 190 (1976). We do not believe the state can survive this challenge.

We note, however, that the regulations at issue already expressly require warning labels on medical marijuana products concerning the purported risks of medical marijuana use during pregnancy or breastfeeding. Specifically, OAC 310681-7-1(b)(12) requires all medical marijuana packaging to include a warning label that states “[m]arijuana use during pregnancy or breastfeeding poses potential harms” and OAC 310:681-7-1(c)(1)(L)(iv) states that all packaged medical marijuana concentrate products must include a warning label that states “[m]arijuana used during pregnancy or breast feeding [sic] poses potential harm.” These labeling requirements are consistent with pharmaceutical labeling for certain prescription drugs, as well as for certain “vice” products available for sale to the public, including to pregnant women and women who are within “childbearing years”, such as tobacco and alcohol. Additionally, we have not found that the state requires a woman to submit to a pregnancy test prior to any narcotic being prescribed to her by her treating physician, including opioids such as Fentanyl. Requiring “all females of childbearing years” to submit to a pregnancy test, prior to receiving a license for medical marijuana, serves no substantial relationship to any conceivable government interest in a woman’s reproductive health, privacy, or doctor-patient relationship with her treating physician.

Additionally, we are equally concerned with the Board's prohibitions on advertising and the sale of merchandise with logos, located within the emergency regulations at OAC 310:681-5-18. Specifically, OAC 310:681-5-18(I) states "No commercial establishment shall produce any items for sale or promotional gifts, such as T-shirts or novelty items, bearing a symbol of or references to marijuana or medical marijuana products, including logos." This regulation discriminates based on both content and viewpoint, amounting to an unconstitutional violation of permissible commercial speech in violation of the First Amendment of the United States Constitution as well as the free speech protections in the Oklahoma Constitution.

We hope that the Board will address our concerns when it recovenes to reconsider the promulgated rules, as recommended by Attorney General Hunter. If the Board does not promptly remedy the unconstitutionality of these regulations at its upcoming special meeting, however, we are prepared to ask a federal court to do so. Please contact me by phone at (405) 525-3831, or by email at bhenderson@acluok.org, to discuss this at your convenience.

Sincerely,



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cc. Oklahoma Attorney General Mike Hunter
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