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10
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF MERCED

13 ROSE JOHNSON,

14 Petitioner,

15 v.

16 GEORGE VALVERDE, DIRECTOR,
17 DEPARTMENT OF MOTOR VEHICLES,

18 Respondent,

No.

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19 PETITION WITH MEMORANDUM OF POINTS AND AUTHORITIES

20 INTRODUCTION

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22
23 Despite having a sparkling clean driving record, the Department of Motor Vehicles
24 ("DMV") revoked petitioner Rose Johnson's ("Johnson") driver's license because she is a
25 medical marijuana patient. Ms. Johnson, who is 53 years old, has been driving since she was
26 sixteen years-old and has not caused a single accident in more than 37 years. She is,
27 indisputably, a safe driver, yet the DMV has revoked her license "because of . . . [an] addiction
28

1 to, or habitual use of, [a] drug,” as Ms. Johnson uses marijuana at night, pursuant to California
2 law, to treat chronic pain. The voters of California clearly did not intend for the DMV strip
3 medical marijuana patients of their drivers’ licenses when they enacted the Compassionate Use
4 Act to “ensure that seriously ill Californians have the right to obtain and use marijuana for
5 medical purposes where that medical use is deemed appropriate and has been recommended by a
6 physician.” The DMV’s policy of doing this, which has been harshly and arbitrarily applied
7 against Ms. Johnson, must be corrected.
8

9 **PETITION**

10 TO THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE
11 COUNTY OF MERCED:

12 Petitioner Rose Johnson (“Johnson”) respectfully petitions this Court for a writ of
13 mandamus directed to the Director of the Department of Motor Vehicles (“DMV”), State of
14 California, and alleges by this verified petition as follows:
15

16 1. Johnson is a fifty-three year-old woman who has been driving for thirty-seven
17 years and has caused no accidents. (See AR¹ 11-12, 29 & 34.) The DMV recognizes that
18 Johnson has an “excellent driv[ing] record” and it has sent her a letter stating that she is an
19 excellent driver. (AR 32 & 45.)
20

21 2. In 1990, Johnson was parked at a red light when she was rear-ended by a truck
22 traveling at a high speed. (AR 36.) This caused Johnson to suffer serious injuries to her neck
23 and back, which prompted Johnson to use marijuana to alleviate her suffering on the advice of
24 her physician. (AR 35-37.) Ms. Johnson does not drive while under the influence of marijuana.
25 (AR 63 & 65.)
26

27
28

¹ “AR” refers to the Administrative Record, which is filed herewith.

1 3. On April 2, 2008, Johnson went to the DMV for a routine driver's license
2 renewal. When she was called to the counter, she moved slowly, due to her neck and back
3 injuries. This prompted the DMV agent at the desk to file a form requesting that the DMV
4 reexamine Johnson's driver's license. (AR 13.)

5
6 4. The DMV held its first hearing on June 2, 2008. At this hearing, the DMV officer
7 noted that Johnson has an "excellent driver record." (AR 32.) Commenting on that record, the
8 DMV officer observed: "There are no legal issues on here. There [are] no abstracts from the
9 court, no failures to pay, no failures to appear, no accidents." (AR 32.)

10
11 5. Despite Johnson's sparkling clean driving record and the lack of any evidence
12 demonstrating that her use of medical marijuana pursuant to California's Compassionate Use Act
13 renders her incapable of operating a motor vehicle safely, the DMV officer concluded that Ms.
14 Johnson's nighttime use of marijuana to treat her chronic pain rendered her "incapable of safely
15 operating a motor vehicle because of . . . [an] addiction to, or habitual use of, [a] drug," pursuant
16 to Vehicle Code Section 13353. The hearing officer noted that there "is not a really
17 overwhelming need for [Ms. Johnson] to drive, it appears. You're fairly close to home. You
18 have other people that can bring you around, take you different places. So that will have to be
19 weighed, too." (AR 52.) By letter dated July 22, 2008, the DMV indefinitely suspended Ms.
20 Johnson's driver's license. (AR 8.)

21
22 6. On August 21, 2008, the DMV conducted a second hearing. At this hearing, it
23 was confirmed that Ms. Johnson does not use marijuana while driving. (AR 63 & 65.)
24 Nevertheless, by letter dated August 21, 2008, the DMV reaffirmed its suspension of Ms.
25 Johnson's driver's license for using medical marijuana pursuant to state law. (AR 3.)
26
27
28

1 7. If Ms. Johnson stops using marijuana as recommended by her physician, she will
2 suffer extreme pain.

3 8. The DMV's suspension of Johnson's driver's license based solely on her status as
4 a qualified medical marijuana patient under California law constitutes an abuse of discretion
5 because it is, among the other reasons stated in this Petition: contrary to the Compassionate Use
6 Act (Health & Safety Code § 11362.5); contrary to her constitutional right to control the course
7 of her medical treatment (*Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d
8 1303, 1317-1318; *Bouvia v. Superior Court* (1986) 179 Cal.App.3d 1127, 1137; and is not
9 supported by the evidence.
10

11 9. At all times prior to the suspension or revocation of petitioner's license, Johnson
12 was the holder of a valid California driver's license, license number N0441898, and she is
13 beneficially interested in this action.
14

15 10. Johnson is appealing from the final decision of the DMV and she has exhausted
16 her administrative remedies.
17

18 11. Johnson is a resident of the County of Merced in the State of California at the
19 time this Petition is filed, so jurisdiction and venue is proper in this Court.
20

21 12. Johnson does not have a speedy and adequate remedy at law because there is no
22 appeal from the DMV's order suspending her privilege to operate a motor vehicle. Johnson's
23 only method of review of that order is by writ of mandate in this Court.

24 13. This Petition is timely filed pursuant to Vehicle Code section 23 and Code of
25 Civil Procedure section 1094.5.

26 14. Johnson's license is not suspended for any reason other than that stated in this
27 petition.
28

1 15. The DMV has a policy or practice of suspending the driver's licenses of medical
2 marijuana patients based solely on their status as such. (See AR 51.) Other medical marijuana
3 patients will be harmed by the operation of this policy, unless enjoined by this Court.
4

5 Wherefore, petitioner prays that:

6 1. An alternative writ of mandate issue under the seal of the Court commanding
7 respondent Director of the DMV to set aside and revoke the DMV's order suspending
8 petitioner's license or to show cause before this Court at a time and place hereafter to be
9 specified by the Court why it has not done so, and why a peremptory writ should not issue.
10

11 2. Pending the hearing and final judgment of the Court in this matter, the DMV be
12 ordered to stay the operation of the order suspending petitioner's license.²

13 3. This Court issue a declaration that suspension or revocation of one's driver's
14 license based solely on his or her status as a qualified medical marijuana patient under California
15 law is:

16 a. contrary to the Compassionate Use Act (Health & Safety Code §
17 11362.5); and is
18

19 b. contrary to the constitutional right to control the course of one's medical
20 treatment.
21

22 4. This Court enjoin the DMV from suspending or revoking the driver's licenses of
23 medical marijuana patients based solely on their status as such.
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28 ² A copy of Johnson's driving record is found at pages 11-12 of the Administrative Record.

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5. Petitioner be granted costs, attorney's fees, and such other and further relief as
may be appropriate.

DATED: November 18, 2008

Respectfully submitted,



JOSEPH D. ELFORD
Counsel for Petitioner
ROSE JOHNSON

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VERIFICATION

I, JOSEPH D. ELFORD, declare as follows:

I am an attorney duly licensed to practice law in the State of California and am counsel of record for Petitioner in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct based upon my review of the record in this case and my interview with Petitioner. Petitioner is absent from Alameda County, which is where I maintain my office for Americans for Safe Access, so I verify this Petition on her behalf.

Executed this 15th day of November in Oakland, California.



JOSEPH D. ELFORD

1 IN THE SUPREIOR COURT OF THE STATE OF CALIFORNIA
2 COUNTY OF MERCED
3
4

5 ROSE JOHNSON,) No.
6)
7 Petitioner,)
8)
9 v.)
10 DIRECTOR, DEPARTMENT OF MOTOR)
11 VEHICLES,)
12 Respondent,)
13)

14 MEMORANDUM OF POINTS AND AUTHORITIES

15 I.

16 **THE DMV ABUSED ITS DISCRETION AND WAS WITHOUT JURISDICTION TO**
17 **SUSPEND JOHNSON'S DRIVER'S LICENSE BASED SOLELY UPON HER STATUS**
18 **AS A QUALIFIED MEDICAL MARIJUANA PATIENT**

19 A. Legal Standards

20 Pursuant to its authority under the Vehicle Code, the DMV may suspend or revoke the
21 driver's license of a person rendered incapable of safely operating a motor vehicle because of an
22 addiction to, or habitual use of, a drug. (See Vehicle Code § 12806, subd. (a) & 13803, subd.(f).)
23 As in all administrative proceedings to suspend or revoke a license, the burden of proving the
24 facts necessary to support the action rests with the DMV. (*Daniels v. Department of Motor*
25 *Vehicles* (1983) 33 Cal.3d 532, 536; *Coniglio v. Department of Motor Vehicles* (1996) 39
26 Cal.App.4th 666, 682.) It must come forward with "substantial competent evidence" of facts
27 supporting a suspension before the licensee has any obligation to rebut the allegations or
28

1 otherwise respond. (*Daniels, supra*, 33 Cal.3d at pp.536-537; see *Coniglio, supra*, 39
2 Cal.App.4th at p.682.)

3 If the DMV elects to suspend a driver's license after conducting a hearing, the driver may
4 petition the superior court in the county in which he resides for a writ of mandate. (Code of Civil
5 Procedure § 1094.5, subd. (c).) In ruling on such petition, this Court exercises its independent
6 judgment to determine whether the law and the weight of the evidence supports the
7 administrative officer's decision, since a driver's license is a protectable property interest. (See
8 *Lake v. Reed* (1997) 16 Cal.4th 448, 456; *Morgenstern v. Department of Motor Vehicles* (2003)
9 111 Cal.App.4th 366, 372; *Coniglio, supra*, 39 Cal.App.4th at p.682 [citation omitted]; see also
10 *Daniels, supra*, 33 Cal.3d at p.536 ["It is well recognized that the private interest at stake in this
11 case--the right to retain a driver's license absent competent proof of a violation of the law--is a
12 substantial one.].)

13
14
15 **B. The DMV Abused Its Discretion in Suspending Johnson's License Based on Her**
16 **Status as a Qualified Medical Marijuana Patient**

17 Despite the fact that Johnson is an experienced driver who has caused no accidents in her
18 more than thirty-seven years of driving, the DMV revoked her driver's license because it found
19 that her use of marijuana to treat chronic pain rendered her "incapable of safely operating a
20 motor vehicle because of . . . [an] addiction to, or habitual use of, [a] drug." (See Vehicle Code §
21 12806, subd. (a).) The only evidence introduced by the DMV to support this conclusion is the
22 fact of Johnson's medical marijuana use pursuant to state law. The DMV abused its discretion
23 by suspending Johnson's license on this basis.

24
25
26 *1. The DMV Has Not Proceeded in the Manner Prescribed by Law*

27 Approved by fifty-seven percent of the California electorate, the Compassionate Use Act
28 declares as its purpose: "[E]nsur[ing] that seriously ill Californians have the right to obtain and

1 use marijuana for medical purposes where that medical use is deemed appropriate and has been
2 recommended by a physician who has determined that the person's health would benefit from the
3 use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma,
4 arthritis, migraine, or any other illness for which marijuana provides relief." (Health & Safety
5 Code § 11362.5(b)(1)(A).) Despite this clear and unequivocal statement of Johnson's
6 entitlement to use marijuana to treat her chronic pain where, as here, her doctor has
7 recommended this, the DMV revoked Ms. Johnson's license simply for complying with the
8 Compassionate Use Act. The DMV erred as a matter of law in ignoring the Compassionate Use
9 Act and suspending Johnson's driver's license based solely on her exercise of a right promised
10 her by the California electorate.³

13 2. *The DMV Failed to Meet Its Burden of Presenting Substantial Competent
14 Evidence of Johnson's Inability to Safely Operate a Motor Vehicle*

15 Relying as it did solely on Johnson's status as a qualified medical marijuana patient to
16 suspend her driver's license, the DMV failed to meet its burden of coming forward with
17 substantial competent evidence that Johnson suffered from an addiction to, or habitual use of,
18 drugs that rendered her incapable of safely operating a motor vehicle. (See Vehicle Code §
19 12806, subd. (a).) Conspicuously absent from the record is *any* evidence that Johnson, in fact, is
20 an unfit driver. She has never been cited or arrested for driving under the influence, and she
21 testified that she does not use marijuana before she drives. (See AR 63 & 65.) Ms. Johnson has
22 caused *no* accidents in more than thirty-three years of driving. She did not fail a driving test. In
23 short, Johnson is guilty of nothing more than being a medical marijuana patient.
24
25

26
27 ³ For these same reasons, the DMV violated Johnson's constitutional right to determine
28 the course of her own medical treatment, absent evidence that her medical marijuana use impairs
the safety of others. (Cf. *Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d

1 In general, the statutory provisions authorizing a license reexamination, Vehicle Code
2 sections 13800 and 13801, do so only for serious driving offenses, such as accidents causing
3 death or serious injury to persons or property, serial accidents or drunk driving offenses, and
4 fraudulent use of a driver's license. (See Vehicle Code §§ 13800, subd. (a), (b) & (e)) The
5 evidence here is a far cry from that needed to support a license suspension. (See *Daniels v.*
6 *Department of Motor Vehicles* (1983) 33 Cal.3d 532, 538 [holding that accident report, standing
7 alone, was insufficient basis for suspension of driver's license under Financial Responsibility
8 Law]; *Santos v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 542, 549 [holding that,
9 absent evidence of when driver's blood was drawn, blood test revealing blood alcohol level
10 higher than 0.008 percent was insufficient to carry DMV's burden of proof]; cf. *Beamon v.*
11 *Department of Motor Vehicles* (1960) 180 Cal.App.2d 200, 203-204 & fn.1 [affirming revocation
12 of driver's license where driver had five accidents and twenty-two citations in a period of five
13 years]; see also *Kriesel v. McCarthy* (1963) 214 Cal.App.2d 69, 72 ["Section 12810 of the
14 Vehicle Code does not confer the basic authority upon the Department of Motor Vehicles to
15 suspend or revoke an operator's license."]; *Beamon, supra*, 180 Cal.App.2d at 207 ["The
16 authority to initiate an investigation or require reexamination of the licensee is not the authority
17 to state what acts violate the law"]; *Brewer v. Department of Motor Vehicles* (1979) 93
18 Cal.App.3d 353 [holding that it was error for DMV to revoke license to sell motor vehicles
19 because applicant's conviction for crime of moral turpitude was not shown to relate to his fitness
20 to sell motor vehicles].) The DMV erred in suspending Johnson's license.

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28 1303, 1317-1318 [noting constitutional right to determine the course of one's medical treatment];
Bouvia v. Superior Court (1986) 179 Cal.App.3d 1127, 1137 [same].)

1 **C. The Administrative Proceedings Violate Due Process**

2 Conducted in this manner, the administrative proceedings violate Johnson's right to due
3 process for two reasons. *First*, Johnson was not give fair notice of the allegations against her --
4 the initial notice of her license suspension does not set forth the reasons that the DMV was
5 proceeding against Johnson and she could not have known that she would be deemed an unfit
6 driver based on her status as a medical marijuana patient.

7
8 *Second*, the DMV essentially shifted the burden of proof to Johnson to demonstrate her
9 innocence. It required her to submit documentation from her physician establishing her ability to
10 operate a motor vehicle safely, which she did. By shifting the burden of proof in this fashion, the
11 DMV violated Johnson's right to due process.

12
13 **D. The DMV Was Without Jurisdiction to Suspend Johnson's Driver's License**

14 The DMV also lacked the discretion even to conduct the reexamination. This case came
15 to the DMV as a result of a request from a DMV agent to reexamine Johnson's license. Pursuant
16 to Vehicle Code section 13800, the DMV may conduct an investigation to determine whether to
17 suspend or revoke a driver's license upon receiving a report from a member of the driver's
18 family or a law enforcement officer that the person is an unsafe driver. (See Vehicle Code §
19 13803, subd. (b).) This report must "state that the person filing the report reasonably and in good
20 faith believes that the operator cannot safely operate a motor vehicle." (Vehicle Code § 13803,
21 subd. (b).) In addition, the report must be "based upon personal observation or physical evidence
22 of a physical or medical condition that has the potential to impair the ability to drive safely, or
23 upon personal knowledge of a driving record that, based on traffic citations or other evidence,
24 indicates an unsafe driver." (Vehicle Code § 13803, subd. (b).) Such evidentiary foundation
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1 must be stated in the report "or the report shall be based upon an investigation by a law
2 enforcement officer." (Vehicle Code § 13803, subd. (b).)

3 Here, it does not appear that the report triggering the reexamination process with the
4 DMV contained the statutory requisites. The DMV agent's report did not state that she had a
5 good faith basis to believe that Johnson could not safely operate a motor vehicle, nor did she
6 conduct an investigation that revealed any facts to establish that Johnson has a medical condition
7 that would impair her ability to drive. Lacking this, the DMV was without the jurisdiction to
8 reexamine Johnson's license.⁴

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11 **CONCLUSION**

12 For the foregoing reasons, this Court should issue an alternative writ of mandate
13 commanding respondent Director of the DMV to set aside and revoke the DMV's order
14 suspending petitioner's license or to show cause before this Court at a time and place hereafter to
15 be specified by the Court why it has not done so. Meanwhile, this Court should stay the illegal
16 suspension of Johnson's license.
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18
19 DATED: November 18, 2008

Respectfully submitted,

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22 _____
JOSEPH D. ELFORD

23 Counsel for Petitioner
24 ROSE JOHNSON

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28 ⁴ Alternatively, this claim can be viewed as a failure of the DMV to proceed in a manner
prescribed by law, pursuant to Code of Civil Procedure section 1094.5(b).

1 **CERTIFICATE OF WORD COUNT**

2 I, JOSEPH D. ELFORD, declare as follows:

3 On November 18, 2008, I performed a word count of the above-enclosed brief, which
4 revealed a total of 3,152 words.
5

6 I declare under penalty of perjury that the foregoing is true and correct.

7 Executed this 18th day of November in Oakland, California.
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11 JOSEPH D. ELFORD
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1 **DECLARATION OF SERVICE**

2 I am a resident of the State of California and over the age of eighteen years. My business
3 address is: 1322 Webster St., Suite 402, Oakland, CA 94612.

4 On November 18, 2008, I served the within document(s):

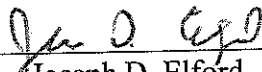
5 **PETITION FOR ALTERNATIVE WRIT OF MANDAMUS; REQUEST FOR STAY;**
6 **MEMORANDUM OF POINTS AND AUTHORTIES (NON-DUI)**

7
8 Via first-class mail to:

9 DMV Legal Office
10 2415 First Avenue
11 Sacramento, CA 95818

12 I declare under penalty of perjury under the laws of the State of California that the above is true
13 and correct.

14 Executed on this 18th day of November, 2008, in Oakland, California.

15
16 
17 _____
18 Joseph D. Elford