IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GARY ROSS, Plaintiff/Petitioner, vs. RAGINGWIRE TELECOMMUNICATIONS, INC., Defendant/Respondent.	No. S1380130 [Court of Appeal, Third Appellate District-No. C043392] [Sacramento Superior Court No. 02AS05476]

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Despite every indication from the electorate and the Legislature that they sought to protect qualified medical marijuana patients from being punished for their private use of marijuana, RagingWire Telecommunications, Inc. ("RagingWire") contends that employers have the "right" to do this because medical marijuana use remains illegal under federal law. This case, however, involves state law, not federal law. No California court has held that it should look to federal law to resolve state law claims, absent any direction from the Legislature that it should do so. Not only is such direction wholly lacking here, but the California electorate, in 1996, consciously elected to depart from federal marijuana policy and the Legislature has implicitly recognized that this required California employers to accommodate off-duty medical marijuana use. This case involves a commonsense application of California's laws against employment discrimination against those with disabilities, as read in light of the Compassionate Use Act. Every maxim of statutory construction confirms that these laws protect against the discrimination perpetrated against Gary Ross ("Ross").

I. COURTS LIBERALLY CONSTRUE VOTER-APPROVED INITIATIVES TO GIVE EFFECT TO THE VOTERS' INTENT IN SITUATIONS NOT SPECIFICALLY ADDRESSED

Without citing any authority, RagingWire boldly asserts that "as a voter-passed initiative, the Compassionate Use Act is interpreted narrowly." (Respondent's Answering Brief [hereinafter RAB] at 24.) This, however, is not the law. In *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, this Court declared that "the power of initiative must be liberally construed . . . to promote the democratic process" and that courts are to give initiatives "a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people." (*Id.* at pp. 219 & 245 [quoting *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 210 fn. 3 & *Los Angeles Met. Transit Authority v. Public Util. Com.* (1963) 59 Cal.2d 863, 869].) To like effect, in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, this Court affirmed that because initiatives do not always supply "a certain answer for every possible situation," "appellate courts will remain available to aid in the familiar common law task of filing in the gaps in the statutory scheme" as new situations arise. (*Id.* at p. 1202 [citation omitted].) This case presents a paradigmatic example of the need for this judicial function.

II. CALIFORNIA'S FAIR EMPLOYMENT AND HOUSING ACT PROVIDES A REMEDY FOR THE DISCRIMINATION PERPETRATED AGAINST ROSS

A. The Electorate and the Legislature Have Evinced Their Intent to Forbid Discrimination against Medical Marijuana Patients in Employment

With the law properly construed according to these traditional principles, the Fair Employment and Housing Act (Gov. Code, § 12960 et seq. [hereinafter FEHA]) works together with the Compassionate Use Act (Health & Saf. Code § 11362.5 et seq.) to provide a remedy to Ross. In 1996, the California electorate not only consciously elected to depart from federal marijuana policy, but it ensured "the right [of seriously ill Californians] to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician. . . ." (Health & Saf. Code § 11362.5, subd. (b)(1)(A).) Eight years later, in 2003, the Legislature implicitly recognized that this groundbreaking addition of marijuana to the medications legally available to Californians required employers to accommodate an employee's private, off-duty medical marijuana use. Not only did the Legislature reference the FEHA by using its term of art "reasonable accommodation," but it selectively excused employers only from having to "accommodate[e] [] any medical use of marijuana *on the property or premises of any place of*

employment or during the hours of employment." (Health & Saf. Code § 11362.785 [Italics added].) The Legislature could have, but did not excuse employers wholesale from the "accommodation of any medical use of marijuana by an employee;" instead, it added the qualifying language that such accommodation was not required in the workplace. Under the maxim of statutory construction that "[s]ignificance if possible should be attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose" (*Beaty v. Imperial Irrigation Dist.* (1986) 186 Cal.App.3d 897, 902), this means that the Legislature intended employers to accommodate an employee's medical marijuana use during nonworking hours. And the bedrock principle of statutory construction *expressio unius est exclusio alterius* confirms this. (See *Dyna-Med, Inc. v. Fair Employment and Housing Com.* (1987) 43 Cal.3d 1379, 1391 fn. 13 ["The statutory construction doctrine of *expressio unius est exclusio alterius* means 'the expression of certain things in a statute necessarily involves exclusion of other things not expressed'"] [quotation omitted]; see also *Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 410 ["[W]here exceptions to a general rule are specified by statute, other exceptions are not to be

implied or presumed."] [quotation omitted].)[1]

B. *RagingWire Cannot Defeat Ross's FEHA Claim by Extending His Proposed Reasonable Accommodation to Include Absurd Results or by Limiting the Compassionate Use Act to a Defense to Criminal Prosecutions*

To overcome Ross's claims under the FEHA, RagingWire sets up a series of straw men, then it knocks them down. This case is not, as RagingWire suggests, about the legality of preemployment drug testing. (See RAB at pp. 7-8.) Ross does not dispute that employers can do this (see *Loder v. City of Glendale* (1997) 14 Cal.4th 846); however, the fact that an employer can learn about an attribute of an employee does not automatically mean that it can retaliate against him on that basis. This is the ultimate question in every employment discrimination case.

Nor, more importantly, is this case about on-duty medical marijuana use or medical marijuana patients reporting to work under its influence. Ross most assuredly does *not* contend that an employer must tolerate his reporting to work under the influence of marijuana or that it must

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[1] It bears emphasizing that even the authorities cited by RagingWire distinguish on-duty drug use from off-duty drug use in determining whether employers have the authority to regulate the drug use of their employees. For instance, whereas California's Drug-Free Workplace Act (Gov. Code § 8350 et seq.) requires state contractors to develop policies to prevent "the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance . . . *in the person's or organization's workplace*" (Gov. Code § 8355, subd. (a)(1) [Italics added]), it does not extend this prohibition to off-duty drug use. Such consistent efforts by the California Legislature to distinguish on-duty from off-duty drug use evinces its intent to forbid employers from regulating the latter. (Cf. *Dyna-Med, Inc., supra,* 43 Cal.3d at p. 1391 fn. 13.)

accommodate medical marijuana use outside the workplace, "even if that use affects the employee during working hours." (See RAB at 22; cf. Complaint ¶¶ 20 & 21 [alleging that Ross's "disability and use of medical marijuana do not affect his ability to do the essential functions of the job" and he "has not had any problems performing satisfactorily nor have there been any complaints about his job performance"].) Instead, Ross concurs with RagingWire that "use" of marijuana extends beyond the mere act of ingesting it and, consequently, an employer need not accommodate off-duty use of marijuana that results in an employee reporting to work under its influence. This, however, does not mean that employers need not accommodate *any* medical marijuana use. (Cf. *Beaty, supra,* 186 Cal.App.3d at p. 902 ["The provisions must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the Legislature, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity."].) Legislative intent will be best effectuated by requiring the reasonable accommodation proposed by Ross.

RagingWire next contends that the Compassionate Use Act cannot be construed to protect against discrimination in employment because it does nothing more than to provide a defense to criminal charges. (RAB at pp. 24-

27) This attempt to restrict the Compassionate Use Act in this manner not only ignores the expressly stated purposes of the Compassionate Use Act as doing more than this (see Health & Saf. Code § 11362.5, subd. (b)(1)(A)), as well as this Court's admonition that initiatives are to be construed liberally (*supra*), but it overlooks that Ross's claim of employment discrimination is based directly on the FEHA, rather than the Compassionate Use Act. Voter-approved initiatives often have "collateral effects" on other statutes and courts are frequently called upon to define the scope of these effects as they arise on a case-by-case basis. (Cf. *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 577 ["it is well established that an initiative may have 'collateral effects' without violating the single-subject rule."] [quotation omitted]; *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 377-3788 ["As with other innovative procedures and doctrines . . . in the first instance trial courts will deal with novel problems that arise in time-honored case-by-case fashion, and appellate courts will remain available to aid in the familiar common law task of filling in the gaps in the statutory scheme."] [quotation omitted].) Thus, in *People v. Mower* (2002) 28 Cal.4th 457, for instance, this Court stated that when interpreting the probable cause requirement of article I, section 13 of the California Constitution, "[p]robable cause depends on all of the surrounding facts

[citation], including those that reveal a person's status as a qualified patient or primary caregiver under [the Compassionate Use Act]." (*Id.* at p. 469.) Just as the Compassionate Use Act interacts with the California Constitution to redefine what constitutes probable cause, it interacts with the FEHA to provide a remedy for employment discrimination, since the only reason no such remedy existed prior to the Compassionate Use Act was that the employee's method of treating his disability was illegal. (See Health & Safety Code § 11358.)

A contrary result, on the other hand, would eviscerate the right promised to the seriously ill by the California electorate. The court explained this in *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, as follows:

> It might be argued that the only operative language of section 11362.5 is subdivision (d), which decriminalizes the possession and cultivation of marijuana, leaving the lawful use and possession of marijuana subject to regulation by a probation condition. But section 11362.5 is not so limited. Subdivision (b)(1)(A) says the purpose of section 11362.5 is to " *ensure . . . the right to obtain and use marijuana* for medical purposes" and subdivision (b)(1)(B) says the purpose is "[t]o ensure that patients . . . who *obtain and use* marijuana for medical purposes upon the recommendation of a physician are not subject to *criminal prosecution or sanction.*" (Italics added) We are directed to give sense to all of the terms of an enactment. To do so requires that we give effect to the purposes of section 11362.5 to ensure the right to obtain and use marijuana. . . It is readily apparent that the right to obtain or

> use marijuana is not "ensure[d]" if its use is not given protection from the adverse consequences of probation.

(*Id.* at pp. 1442-1443 [Italics in original].) The same is true here, only the reasoning is applied in the employment context.

C. Federal Law Does Not Overcome Ross's State Law Claims

Rather than offer a legitimate business justification for its termination of Ross, RagingWire relies on the federal government's continued classification of marijuana as a Schedule I substance to contend that "the fact that a drug is prescribed does not change its potential for abuse." (RAB at p. 11.) This case, however, is based on state, not federal law and the voters of California have rejected the view that all marijuana use constitutes "abuse" of the drug. As with any other prescription medication, a physician's recommendation of marijuana distinguishes its legitimate medical use from drug abuse, which is evidenced clearly by recent experiences with the unauthorized use of Oxycontin. Whereas no court has held that employers are free to retaliate against their employees for using prescription medications to treat their disabilities, several courts have affirmed that such discrimination would be illegal. (Cf. *Howell v. New Haven Board of Education* (D. Conn. 2004) 309 F.Supp.2d 286, 291-292 [holding that teacher's claim that he was excluded from educational field because of his use of medication to treat diabetes sufficient to state a cause

of action under the ADA]; *Alvarez v. Fountainhead, Inc.* (N.D. Cal. 1999) 55 F.Supp.2d 1048, 1055 [granting preliminary injunction on finding that failure of pre-school to reasonably accommodate child with asthma by administering or allowing child to take albuterol at school constitutes a violation of the ADA].)[2] RagingWire misunderstands the intent of the California Legislature when it continues to characterize medical marijuana use as drug abuse. (Cf. *Mower, supra,* 28 Cal.4th at p. 482; see also *People v. Russell* (2006) 138 Cal.App.4th 723, 729-730 [characterizing medical marijuana use in compliance with California law as "legal activity"].)

Next, RagingWire contends that it need not abide solely by state law because neither the FEHA, the Compassionate Use Act, nor SB 420 expressly says that it must do so. In support, RagingWire cites to Labor Code section 1171.5, which explicitly states that a person's immigration status is irrelevant to his eligibility for workers' compensation benefits under

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[2] The recently decided case of *Washburn v. Columbia Forest Products, Inc.* (2006) 340 Or. 469, 134 P.3d 161, is not to the contrary. In *Washburn*, the Supreme Court of Oregon held that the plaintiff could not state a cause of action for employment discrimination based on disability under Oregon law because it found that he was not "disabled," since he was able to counteract his physical impairment through mitigating measures. *Washburn, supra*, 340 Or. at pp. 479-480. Here, by sharp contrast, Ross's status as "disabled" is not at issue, as he has alleged in his complaint that his debilitating back pain and muscle spasms render him "disabled." (See Complaint ¶ 3; *cf. Livitsantos v. Superior Court (Continental Culture Specialists, Inc.)* (1992) 2 Cal.4th 744, 747 [well-pleaded facts of complaint are deemed true for purposes of hearing on demurrer].) Furthermore, the legal definition of "disabled" is broader in California than it is in Oregon, with the California Legislature rejecting the view that one's ability to mitigate his physical impairment deprives him of his legal status as "disabled." (See Govt. Code, § 12926.1, subd. (a).)

state law. (See RAB at 19-20 [citing Labor Code § 1171.5 & 3351, subd.(a)].) Ignored by RagingWire in making this argument is that the *very next sentence* of Labor Code section 1171.5 states that the provision cited by RagingWire was "declaratory of existing law." (Labor Code § 1171.5, subd. (c).) Thus, although the Legislature went to lengths to emphasize that federal law could not serve as a barrier to workers' compensation benefits under state law, it simultaneously acknowledged that no such express declaration was necessary.[3]

To distract from its inability to cite any state or federal law that *it* would be violating by accommodating Ross, RagingWire wildly speculates that "if employers are required to accommodate medical marijuana use, presumably landlords would be required to accommodate it as well," which would subject them to the risk of federal forfeiture. (RAB at pp. 31-32.) Aside from the fact that this is highly improbable, cases involving landlords present the entirely different context of medical marijuana use on-premises. Ross does not claim any such accommodation here, so there is *no* risk of federal forfeiture to RagingWire.

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[3] RagingWire confidently claims that "[e]mployers have no obligation to accommodate illegal activity; such a proposition is not reasonable on its face." (RAB at p. 16.) In other contexts, the Legislature has required employers to turn a blind eye, or not ask about, conduct that is illegal under federal law. (See Labor Code § 432.8.) Thus, it is not unreasonable on its face to require employers to tolerate activity that is illegal under federal law, so long as the employer violates no federal law in doing so.

III. RAGINGWIRE'S RETALIATION AGAINST ROSS FOR HIS PRIVATE, OFF-DUTY MEDICAL MARIJUANA USE CONSTITUTES WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

No less than three statutory and constitutional provisions supply the public policy for Ross's wrongful discharge claim. (See Appellant's Opening Brief [hereinafter AOB] at pp. 27-38.) Despite this, RagingWire contends that the public policy against termination of medical marijuana patients for privately tending to their health was not sufficiently delineated in 2001 to put it on notice that its termination of Ross could subject it to liability, since, it contends, the public policy is not "one about which reasonable persons can have little disagreement." (RAB at p. 37 [quoting *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 668].) This, however, is not the standard for a wrongful discharge claim. Although the court noted in *Foley, supra*, that the policy at issue there was one over which there was little disagreement, it did not establish this as the benchmark for a wrongful discharge claim. Rather, in *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, this Court established that "the policy must have been articulated at the time of the discharge" (*id.* at pp. 889-890) and Ross has established that he meets this standard (see AOB at pp. 35-38). The federal government's disagreement with this State's public policy does not make it any less fundamental under the laws of this State. (Cf. *Kovatch v. California*

Casualty Management Co. (1998) 65 Cal.App.4th 1256, disapproved on other grounds by *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854 [wrongful discharge claim may lie for discrimination based on sexual orientation, which is not recognized as the public policy of the federal government].)

A. The Compassionate Use Act Establishes Medical Marijuana Use as the Public Policy of this State

Notwithstanding the California electorate's express declaration in the Compassionate Use Act of the right of seriously ill persons to obtain and use marijuana for medical purposes (Health & Saf. Code § 11362.5, subd. (b)(1)(A)), RagingWire contends that this cannot serve as the basis for a wrongful discharge claim because the Act does not expressly extend to the decisions of private employers. (RAB at pp. 42-43 [citing *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 77].) This contention conflicts with the court's statement in *Grinzi, supra*, that the constitutional or statutory provision on which a plaintiff relies to support a wrongful discharge claim "does not have to specifically prohibit the employer's precise act." (*Id.* at p. 80.) Although the court held in *Grinzi* that the First Amendment could not serve as the basis for a wrongful discharge claim against a private employer because that Amendment "expresses a guarantee only against action taken by the government" (*id.* at p. 80-81 [citing *Hidgens*

v. N.L.R.B. (1976) 424 U.S. 507, 513, 96 S.Ct. 1029]), such holding is not controlling here. Unlike the First Amendment, the Compassionate Use Act is not limited to actions by government officials. Rather, as in *Semore v. Pool* (1990) 217 Cal.App.3d 1087, wherein the court held that the plaintiff properly stated a wrongful discharge claim for post-employment drug testing based on the constitutional right to privacy, the Compassionate Use Act has never been limited to actions by government officials, "[s]ince [the right to use medical marijuana in private] can be invaded by government agencies, businesses or individuals. . . . " (Cf. *id.* at p. 1092.)

Nor does the court's decision in *Sullivan v. Delta Air Lines, Inc.* (1997) 58 Cal.App.4th 938, suggest that the policy expressed by the voters in the Compassionate Use Act is not "fundamental." In *Sullivan, supra,* the court found that Labor Code section 1025, which requires an employer to accommodate an employee's drug or alcohol rehabilitation unless this would cause economic hardship to the employer, could not support a claim for wrongful discharge because: (1) there was no express declaration of its purposes in the statute itself, (2) the statute's undefined and potentially contradictory standards of conduct were insufficient to enable an employer to know the public policies expressed in that law, and (3) the purpose of the statute claimed by the plaintiff did not resemble other public polices that

have been found to support a cause of action for tortuous discharge. (*Id.* at pp. 945-946 [quotation omitted].) The Compassionate Use, by sharp contrast, on its face, declares as its purpose the protection of the right of qualified patients to obtain and use marijuana in appropriate circumstances and it does not contain any statements that can be construed as evincing a public policy to the contrary. This public policy resembles the long-held constitutional right to determine the course of one's medical treatment, as well as the Legislature's goal of making use of all of its productive citizens -- policies which have repeatedly been reaffirmed by the courts and the Legislature. (AOB at pp. 28-29 & 36-38.) According to *Sullivan*, these attributes of a public policy render it "fundamental." (See *Sullivan, supra,* 58 Cal.App.4th at pp. 943-944 [citing *Stevenson,* 16 Cal.4th at pp. 896-897].)

B. The State Constitution Ensures the Right to Determine the Course of One's Own Medical Treatment

As for the right to determine the course of one's own medical treatment, RagingWire contends that it has not violated any such policy because its prohibition on Ross's at-home use of medical marijuana during nonworking hours does not coerce him to be subjected to any particular medical treatment. (RAB at pp. 41-42.) The constitutional right at issue, however, not only protects employees from an employer dictating a

particular medical treatment, but it also includes the right "to determine whether or not to submit to lawful medical treatment." (See *Cobbs v. Grant* (1972) 8 Cal.3d 229, 244; see also *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 459 ["It is . . . eminently reasonable for employees to expect that their employers . . . not attempt to coerce or otherwise interfere with . . . their decisions about their own health care"].) In California, medical marijuana use is legal, so under the state constitution RagingWire was not permitted to prohibit Ross from using it. (See also *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach* (D.C. Cir. 2006) 445 F.3d 470, 486 [FDA's prohibition on experimental, potentially life-saving medicine "impinges upon an individual liberty deeply rooted in our Nation's history and tradition of self-preservation"].)

C. *The FEHA Requires Employers to Accommodate Medical Marijuana Use*

Lastly, there is the FEHA, which was designed to ensure that employers not arbitrarily exclude productive citizens from the workforce and that individuals be judged on merit, rather than group stereotypes. (See Gov. Code, § 12920; *Sullivan, supra*, 58 Cal.App.4th at 896.) This case strikes at the very heart of these principles, as RagingWire is wholly unconcerned with Ross's ability to perform his job. This Court and others have recognized a cause of action for wrongful discharge where an employer

violates the FEHA (AOB at pp. 34 [citing cases]), and RagingWire does not cite any case to the contrary. For the same reasons expressed in these cases, the FEHA amply serves as the basis for Ross's claim of wrongful discharge.

CONCLUSION

The livelihood of hundreds, if not thousands, of medical marijuana patients hangs on the outcome of this case. Whereas their lives can be ruined and the State deprived of the efforts of these productive workers, RagingWire cannot point to any legitimate business justification to exclude them from the workforce. The State of California has a long history of providing greater protection against employment discrimination than has been provided by the federal government. This case should not stand out as an exception, but, rather, as a continuation of this State's vigilant protection against arbitrary discrimination directed against productive workers.

Dated: June 23, 2006

Respectfully Submitted,

STEWART KATZ

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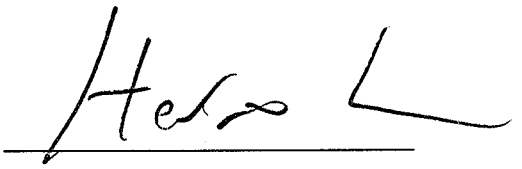
CERTIFICATE OF WORD COUNT

The text of this brief consists of 3,966 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: June 23, 2006



STEWART KATZ
Attorney for Petitioner

PROOF OF SERVICE

I, the undersigned, declare that I am over 18 years of age, and not a party to or interested in the within entitled cause. I am an employee of the Law Office of Stewart Katz, and my business address is 555 University Ave., Suite 270, Sacramento, CA 95825.

On June 23, 2006 I served the attached **PETITIONER'S REPLY BRIEF** to the People in this matter by mailing a true copy to the following addresses:

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Honorable Arthur Scotland, Presiding Justice
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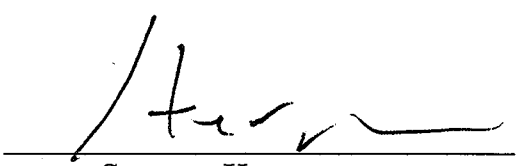
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 23, 2006 at Sacramento, California.



Stewart Katz