IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GARY ROSS, Plaintiff/Appellant, vs. RAGINGWIRE TELECOMMUNICATIONS, INC., Defendant/Respondent.	No. C043392 [Sacramento Superior Court No. 02AS05476]

REPLY BRIEF TO ANSWER FOR PETITION FOR REVIEW

OF THE OPINION OF THE COURT OF APPEAL THIRD APPELLATE DISTRICT

On Appeal from the Judgment of the Superior Court of the State of California, County of Sacramento, Honorable Joe. S. Gray

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INTRODUCTION

Seeking to avoid this Court's review of the erroneous published opinion issued by the Court of Appeals, Respondent RagingWire Telecommunications, Inc. ("RagingWire" or "Respondent") contends that medical marijuana use remains illegal under federal law and this deprives petitioner Gary Ross ("Ross" or "Petitioner") of a remedy under this State's medical marijuana laws for his wrongful termination for acting in accordance with these laws. Such contention implicates extremely important federalism concerns and flies in the face of more than 130 years of precedent establishing that state courts are to enforce state, rather than federal law. (See *People v. Kelly* (1869) 38 Cal. 145, 150; *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1445; but see *People v. Bianco* (2001) 93 Cal.App.4th 748, 752 [holding that state court may enforce compliance with federal law as probation condition]). Even the Court of Appeals and the Respondent recognize that this case involves extremely important questions of public policy impacting medical marijuana patients and employers throughout this State. (See *Ross v. Ragingwire Telecommunications, Inc.* (Sept. 7, 2005) 132 Cal.App.4th 590, 602; Answer at pp. 2-3). In electing to enforce federal law to supplant the medical marijuana laws of this State, the Court of Appeals clearly erred in its published opinion. Review of this erroneous decision by this Court is necessary to settle important questions of law and to ensure that other California

courts do not follow the Court of Appeals' lead to the detriment of thousands of qualified medical marijuana patients.

ARGUMENT

I. THIS CASE RAISES IMPORTANT QUESTIONS ABOUT OUR FEDERALIST STRUCTURE OF GOVERNMENT, OVER WHICH THE COURTS OF APPEAL DISAGREE

Distilled to their essence, Respondent's arguments for the denial of the instant Petition are premised on the proposition that Ross' medical marijuana use is "unlawful." Whether this is so depends on whether Ross' *state* law claims for wrongful termination in violation of public policy and for violation of California's Fair Employment and Housing Act ("FEHA") are to be governed by conflicting *federal* law. Relying heavily on *People v. Bianco, supra,* Respondent answers this question in the affirmative and claims that this is "well-settled." (See also *Ross, supra*, 132 Cal.App.4th at p. 602 [citing *Bianco*]).

Far from being well-settled in this direction, however, this Court in *People v. Kelly* (1869) 38 Cal. 145, held that state courts are to enforce only state, not federal, law. (*Id.* at p. 150; see also Penal Code § 777 ["Every person is liable to punishment by the laws of this State, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States"].) Such holding is not only consistent with our federalist principles of government, but Congress has expressly stated that it is not seeking to preempt

state laws relating to controlled substances. (See 21 U.S.C. § 903; see also 21 U.S.C. § 885(d) ["no civil or criminal liability shall be imposed by virtue of this subchapter upon . . . any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances"].) Commandeering state courts to enforce federal law, on the other hand, might run afoul of the Tenth Amendment. (See *Murphey v. Lanier* (9th Cir. 2000) 204 F.3d 911, 914-15 [observing that provision allowing states to close their courts to federal claims under the Telephone Consumer Protection Act indicates Congress' effort to avoid any conflict with the Tenth Amendment which might be created had it coerced state courts to hear such claims] [citing *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.* (4th Cir. 1997) 106 F.3d 1146, 1157-58]; see also *Conant v McCaffrey* (9th Cir. 2002) 309 F.3d 629, 646-47 (Kozinski, J., concurring) [federal attempts to impede implementation of Compassionate Use Act by threatening to penalize physicians who recommend marijuana to their patients violates the Tenth Amendment]).

Without acknowledging this law, the Court of Appeal in *Bianco, supra,* held that a state court can impose a requirement of compliance with federal law as a condition of probation where necessary to help rehabilitate the appellant. (*Bianco,*

supra, 93 Cal.App.4th at pp. 753-754) This erroneous holding was made before this Court's decision in *People v. Mower* (2002) 28 Cal.4th 457, which noted that the federal government's blanket probation on marijuana for all purposes "has no bearing upon the question[s] presented, which involve[s] state law alone." (*See id.* at p. 465 fn.2; see also *id.* at p. 482 ["As a result of the enactment of section 11362.5(d), the possession and cultivation of marijuana is no more criminal--so long as its conditions are satisfied--than the possession and acquisition of any prescription drug with a physician's prescription.") Thus, in *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, another medical marijuana/probation case in the Third Appellate District, the court disagreed with *Bianco* and held that state courts must follow only state law in determining probation conditions. The *Tilehkooh* court explained as follows:

> The People rely on this court's decision in *People v. Bianco* (2001) 93 Cal.App.4th 748, 753, 113 Cal.Rptr.2d 392, decided before *Mower*, for the rule that section 11362.5 is not a defense to a violation of probation that directs the defendant to obey all laws. . . .
>
> The People have misunderstood the role that the federal law plays in the state system. The California courts long ago recognized that state courts do not enforce the federal criminal statutes. "The State tribunals have no power to punish crimes against the laws of the United States, *as such.* The same act may, in some instances, be an offense against the laws of both, and it is only as an offense against the State laws that it can be punished by the State, in any event." [Footnote omitted] (*People v. Kelly* (1869) 38 Cal. 145, 150 [emphasis in original]; see also *People v. Grosofsky* (1946) 73 Cal.App.2d 15, 17-18.)

> Since the state does not punish a violation of the federal law "as such," it can only reach conduct subject to the federal criminal law by incorporating the conduct into the state law. The People do not claim they are enforcing a federal criminal sanction attached to the federal marijuana law. Rather, they seek to enforce the state sanction of probation revocation which is solely a creature of state law. (§ 1203.2.) The state cannot do indirectly what it cannot do directly. That is what it seeks to do in revoking probation when it cannot punish the defendant under the criminal law.
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> * * * *
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> California courts do not enforce the federal marijuana possession laws when defendants prosecuted for marijuana possession have a qualified immunity under section 11362.5. Similarly, California courts should not enforce federal marijuana law for probationers who qualify for the immunity provided by section 11362.5. The court held to the contrary in *People v. Bianco, supra*, a case which preceded *Mower* and did not consider the fact that what was being enforced was state and not federal law.

(*Id.* at pp. 1445-1447.)

Here, similarly, the Court of Appeal is seeking to incorporate federal law into state law and to enforce it without any statutory authority to do so. Whether the private use of marijuana upon the oral or written recommendation of a physician is "unlawful" under FEHA is to be determined by reference to state, not federal, law, and state law answers the question in the unmistakable negative. (See Health & Safety Code § 11362, subd. (b)(1)(A) [noting purpose of the Act is to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would

benefit from the use of marijuana".) The Court of Appeal, as urged on by Respondent, erred in choosing to impose federal law to overcome this.

II. PROPERLY UNDERSTOOD AS BEING GOVERNED BY STATE LAW, PETITIONER HAS STATED VALID STATE LAW CLAIMS

Properly understood as being governed exclusively by state law, Ross' Complaint stated valid state law causes of action for wrongful termination in violation of public policy and for violation of FEHA. His contention is not that his employer must permit him to possess marijuana on this employer's property, which might violate federal law. (Compare Answer at p. 2.) Nor does he contend that he must be permitted to work under the influence of marijuana, as the Respondent disingenuously attempts to phrase the issue. (See Answer at p. 7 ["There is no public policy favoring working under the influence of marijuana"]) Rather, Ross contends only that he should not be discriminated against by his employer in the most extreme way, termination, simply for exercising his state-conferred right to treat his medical condition. Such discrimination is precisely what the common law tort of termination in violation of public policy and FEHA were designed to prevent.

To overcome this straightforward interpretation of these anti-discrimination laws when read in light of the CUA, Respondent contends that the narrow scope of the CUA is settled law and that there is no public policy allowing for the use of

marijuana in the workplace. (Answer at pp. 3-4 & 7-8.) In making the former contention, Respondent simply ignores actions by the California Legislature and courts affirming that the Compassionate Use Act is not limited to the criminal law. In 2003, based on its authority under the CUA, the California Legislature enacted SB 420, or the "Medical Marijuana Program Act," which references employer obligations (Health & Safety Code § 11362.785, subd. (a)), as well as a host of other non-criminal ramifications.[1] Just recently, the Court of Appeal for the Third Appellate District recognized that the Legislature has affirmed the existence of collectives and cooperatives to meet the voters' challenge to implement the commands of the Compassionate Use Act. (See *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 33 Cal.Rptr.2d 859, 881). It is, thus, not well-settled that the Compassionate Use Act is "narrowly drafted to exempt medical marijuana use from just two criminal laws," as the Respondent contends. (See Answer at p. 7.)

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[1] Respondent contends that it need not address SB 420 because it was not specifically cited in the briefs below. (Answer at p. 13 [citing Rule 28(c), California Rules of Court].) This is not a new *issue*, but only an additional *legal argument* advanced in support of the issues that were raised below. In any event, this Court has held that "[i]n a number of cases, this court has decided issues raised for the first time before us, where those issues were pure questions of law, not turning upon disputed facts, and were pertinent to a proper disposition of the cause or involved matters of particular public importance." (*People v. Randle* (2005) 5 Cal.4th 987, 1001 [collecting citations] [emphasis omitted].)

Rather, it is the public policy of this State that qualified patients have the right to obtain and use marijuana medicinally, and this Court should clarify this.[2]

Finally, Respondent contends that even California law favors a drug-free workplace and that this Court has approved of pre-employment drug testing. (Answer at pp. 6 & 7-10 [citing *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 865].) Once again, Petitioner Ross is only requesting that he not be discriminated against for his at-home use of medical marijuana, not that he be permitted to bring it to work or to work under its influence. Like the other state laws cited by Respondent, California's Drug Free Workplace Act only seeks to prohibit the "unlawful" use of controlled substances. (See Gov't Code §§ 8351, subd. (a) & (c).) As explained *supra*, medical marijuana use in accordance with the Compassionate Use Act is not unlawful. (See *People v. Mower* (2002) 28 Cal.4th 457, 465 fn. 2.)

Thus, this Court's decision in *Loder, supra,* is not dispositive. In *Loder,* this Court affirmed pre-employment drug tests in general, but emphasized that "[u]nder the regulation [implementing FEHA], an employer may condition an offer of employment upon the results of a medical examination conducted before the

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[2] This Court's decision in *People v. Mower* (2002) 28 Cal.4th 457, is not to the contrary. That case described the appropriate procedure for asserted a medical marijuana defense in a criminal case, not whether the Compassionate Use Act extends beyond the criminal law.

employee begins work so long as (1) all entering employees in similar positions are subjected to such an examination, (2) *the applicant or employee is permitted to 'submit independent medical opinions for consideration' before the applicant is disqualified based upon the results of the examination*, and (3) the results of the examination are maintained on separate forms and are treated as confidential medical records." (*Loder, supra*, 14 Cal.4th at p. 865 [citing Cal. Code Regs., tit. 2, § 7294.0, subd. (d)] [emphasis added].) Here, Ross' physician's recommendation establishes his entitlement to use marijuana under the Compassionate Use Act and, under *Loder*, his employer should have considered this before disqualifying him out of hand. Regardless whether it is the public policy of this State to maintain a drug-free workplace, which is not at issue here, it most assuredly is the public policy of this State for employers not to impair the health of their employees. RagingWire has run afoul of this public policy by forcing Ross to choose between his employment and his health. Well-established state law causes of action provide remedies for such employer misconduct.

CONCLUSION

Respondent's Answer to this Petition reveals a disagreement in the courts over the scope of the proper role of conflicting federal laws in our state courts and the scope of the Compassionate Use Act. This Court is being called upon to resolve these important unsettled questions. No person should be discriminated

against in their employment simply for exercising a right promised him by the California electorate. Unless this Court intervenes, the will of the voters will be frustrated and the medical marijuana patients they sought to assist will continue to suffer.

DATED: November 10, 2005 Respectfully submitted,

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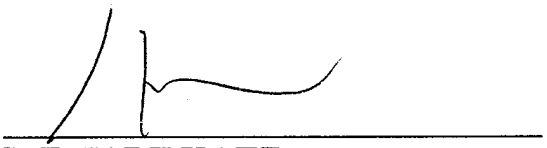
CERTIFICATE OF WORD COUNT

The text of the brief consists of 2,199 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: November 10, 2005



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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 November 10, 2005, I served the attached **REPLY BRIEF TO ANSWER FOR PETITION FOR REVIEW** to the People in this matter by mailing a true copy to the following address:

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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. November 10, 2005 at Sacramento, California.

Victoria L. Burau
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