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No. 81283-7

THE SUPREME COURT
OF THE STATE OF WASHINGTON

JANE ROE,

Appellant,

v.

TELETECH CUSTOMER CARE
MANAGEMENT (COLORADO) LLC,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The People of Washington and the State Legislature well understood that if qualifying patients could be fired from their jobs based solely on their at-home and off-duty use of medical marijuana, then the rights guaranteed to them by Washington's Medical Use of Marijuana Act ("MUMA"), RCW 69.51A, would be nothing more than an empty promise. TeleTech Customer Care Management (Colorado), LLC ("TeleTech") ignores the language and purpose of MUMA. Washington courts have repeatedly rejected TeleTech's cramped reading of the Act as nothing more than a medical marijuana decriminalization statute. Read as a whole, MUMA imposes a legal duty on Washington employers to accommodate the at-home use of medical marijuana.

This is a case about Washington law and public policy. The fact that the medical use of marijuana remains illegal under federal law is of no consequence. By enacting MUMA, the People of Washington decided to break with the federal government, and require employers to accommodate their employees' off-site medical use of marijuana. MUMA neither conflicts with nor is preempted by federal law. By terminating Ms. Roe solely because she used medical marijuana at home under her doctor's supervision, and in accordance with state law, TeleTech violated both MUMA and Washington public policy.

II. ARGUMENT

A. TeleTech Violated MUMA When It Discharged Ms. Roe Solely Because Of Her Off-Site Use Of Medical Marijuana.

1. Ms. Roe is a "Qualifying Patient" Who Used Medical Marijuana at Home in Accordance with MUMA.

The record in this case conclusively establishes that Ms. Roe is a "qualifying patient" who *never* used medical marijuana in the workplace. TeleTech has not offered one shred of evidence to the contrary. Nevertheless, TeleTech now asserts "there is a genuine issue of material fact as to whether Ms. Roe is a 'qualifying patient' under the Act." Respondent's Brief at 47. It should be noted that TeleTech's counsel previously stipulated that there were no issues of material fact in this case. CP 236. In the Superior Court, TeleTech admitted that the "Authorization [to Possess Marijuana for Medical Purposes in Washington State issued to Ms. Roe] was valid." Def. S.J. Mot. at p. 3 n.1, CP 391. By definition,[1] "valid documentation" can only be issued to a "qualifying patient." By admitting that the Authorization issued to Ms. Roe was valid, TeleTech conceded that she was a "qualifying patient" with a "terminal or debilitating medical condition" under RCW 69.51A.010(3)-(4).

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[1] "Valid documentation" is a term of art under MUMA. "Valid documentation" consists of "a statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient." RCW 69.51A.010(5).

In any event, TeleTech's claim there is a genuine issue of material fact whether Ms. Roe is a "qualifying patient" under MUMA is without merit. As set forth in Appellant's Opening Brief at 11, Ms. Roe met all five criteria of a "qualifying patient." Moreover, an Authorization signed by a Washington licensed physician on an appropriate Washington State Medical Association form establishes that a person is a "qualifying patient" within the meaning of MUMA. *See State v. Hanson*, 138 Wn. App. 322, 326, 157 P.3d 438 (2007). The statute expressly provides that a patient is authorized to use medical marijuana when *her* physician decides it is medically advisable. MUMA does not allow either TeleTech or a court to second guess the medical judgment of Ms. Roe's physician.

MUMA does not require a patient who is suffering from intractable pain to *exhaust all* other medical treatments and medications before seeking authorization to use medical marijuana. Instead, MUMA requires only that a patient's pain is "unrelieved by standard medical treatments." RCW 69.51A.010(4)(b). Ms. Roe met this standard and was a "qualifying patient" who had "valid documentation" to use medical marijuana. Moreover, TeleTech concedes that Ms. Roe is within the class of persons for whom MUMA was intended to benefit, Respondent's Brief at 37, further undermining its claim she was not a "qualified patient." The statute would benefit Ms. Roe only if she were a "qualifying patient."

TeleTech next claims there is a genuine issue of material fact as to whether Ms. Roe was "using" medical marijuana in the workplace. *See* Respondent's Brief at 49-50. That claim is also without foundation. Ms. Roe declared under penalty of perjury that she has "never used marijuana in the workplace, at TeleTech or anywhere else." CP 263. TeleTech has offered no factual evidence whatsoever to the contrary. Instead, TeleTech makes the spurious legal argument that because Ms. Roe had medical marijuana "in her system" when she reported for her drug test, she was at that moment "using" medical marijuana in the workplace within the meaning of MUMA.

TeleTech stretches the term "use" beyond all recognition and ignores the statutory definition of "medical use of marijuana." Under the express terms of the statute, a person "uses" marijuana when she produces, possesses, or administers the drug. *See* RCW 69.51A.010(1). It is undisputed that Ms. Roe never "possessed," "produced," or "administered" marijuana in the workplace. Whether Ms. Roe "used medical marijuana" in the workplace is a purely legal question to be resolved by a court, not a jury. TeleTech's nonsensical reading of the word "use" in RCW 69.51A.060(4) does not turn an issue of statutory construction into a factual dispute. As a matter of law, Ms. Roe did not use medical marijuana in the workplace.

2. TeleTech Has Misconstrued MUMA and its Purpose.

TeleTech's assertion that MUMA imposes no obligation of accommodation on employers directly conflicts with the Act's text and purpose. TeleTech repeatedly asserts that the sole *raison d'etre* of MUMA was to provide immunity from criminal prosecution. But Washington courts have uniformly rejected that contention. They have ruled instead that MUMA's purpose is to allow patients with terminal or debilitating illnesses to use medical marijuana when authorized by their treating physicians based on their professional medical judgment and discretion. *State v. Hanson*, 138 Wn. App. 322, 329, n.1, 157 P.3d 438 (2007); *State v. Ginn*, 128 Wn. App. 872, 877-78, 117 P.3d 1155 (2005); *State v. Butler*, 126 Wn. App. 741, 748, 109 P.3d 493 (2005); *State v. Shepherd*, 110 Wn. App. 544, 549, 41 P.3d 1235 (2002).[2]

TeleTech would have this Court rewrite RCW 69.51A.040(1) and repeal RCW 69.51A.060(4) altogether. If MUMA were just a decriminalization statute, as TeleTech insists, there would be absolutely no need for the statute's directive that qualifying patients who use medical

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[2] *State v. Tracy*, 158 Wn.2d 683, 147 P.3d 559 (2006), is not to the contrary. *Cf.* Respondent's Brief at 25, n. 11. In that case, this Court ruled that MUMA did not provide Tracy immunity from marijuana manufacturing and possession charges because she had not established she was a "qualifying patient" under the Act. *Id.* at 685. Although the Court rightly recognized that I-692 "created a compassionate use defense against prosecution for marijuana related crimes," *id.*, it did not identify that as the sole or even primary purpose of the Act.

marijuana in accordance with the Act "shall not be penalized in any manner, or denied any right or privilege, for such actions." RCW 69.51A.040(1).[3] Similarly, if MUMA were just a decriminalization statute, there would have been no need for the voters to have enacted RCW 69.51A.060(4), which sets limits on the obligations of third parties to accommodate the medical use of marijuana under the Act by qualifying patients. TeleTech's reading of MUMA would render entire sections of the Act superfluous and must be rejected.

TeleTech has fundamentally misconstrued the relationship between RCW 69.51A.040(1) and RCW 69.51A.060(4) and twisted Ms. Roe's arguments beyond recognition. First, Ms. Roe has never claimed that the protections conferred by RCW 69.51A.040(1) are limitless or apply "in all contexts." *Cf.* Respondent's Brief at 19. Reading the statute as a whole and interpreting its provisions together, RCW 69.51A.040(1) is limited by RCW 69.51A.060(4), including the exclusion of an employer's duty to accommodate an employee's on-site use of medical marijuana. There is no inconsistency between these statutory provisions. *Cf. id.* at 19-20.

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[3] It is irrelevant that the code reviser added "Qualifying patients' affirmative defense" preceding RCW 69.51A.040 after I-692 was codified. That section heading did not appear in the Initiative that the People voted on. RCW 69.51A.902 expressly states: "Captions used in this chapter are not any part of the law." Section headings that are not adopted by the Legislature are not part of the law and may not be relied on to construe a statute. *See Sollenberger v. Cranwell*, 26 Wn. App. 783, 787, 614 P.2d 234 (1980); *State v. Lundell*, 7 Wn. App. 779, 782 n. 1, 503 P.2d 774 (1972).

Second, Ms. Roe has never claimed that RCW 69.51A.040(1) – or any other provision of MUMA – applies to the federal government or would "prohibit the federal government from penalizing a medical marijuana user." *Cf.* Respondent's Brief at 18-19, 21. For almost 200 years it has been settled that a state's police powers do not extend to the federal government. *See North Dakota v. United States*, 495 U.S. 423, 434, 110 S. Ct. 1986, 109 L. Ed. 2d 420 (1990) (citing *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819)). But Washington's police powers do undoubtedly reach the conduct of private parties, including private employers such as TeleTech. *See DeCanas v. Bica*, 424 U.S. 351, 356, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976).

TeleTech baldly asserts that MUMA prohibits only the State–not private entities–from denying rights and privileges to patients who use medical marijuana in accordance with the Act. *See* Respondent's Brief at 19. There is nothing in MUMA's text or legislative history to support TeleTech's contention. If the People and the Legislature had intended for MUMA to apply only to public entities, one would expect to find some indication of that in the language of the statute, in the 1998 ballot title and voters' pamphlet, or in the 2007 legislative history. Instead, the Act prohibits a qualified person from being penalized "in any manner." RCW 69.51A.040(1). This Court must "assume that the legislature means

exactly what it says." *Nelson v. Schnautz*, 141 Wn. App. 466, 475, 170 P.3d 69 (Wn. App. 2007) (citing *City of Kent v. Jenkins*, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000)).[4]

Indeed, RCW 69.51A.060 directly refutes TeleTech's argument that MUMA does not apply to private entities. RCW 69.51A.060(2) provides that MUMA does not require "any health insurance provider to be liable for any claim of reimbursement for the medical marijuana." RCW 69.51A.060(3) provides that nothing requires "any physician to authorize the use of medical marijuana for a patient." These provisions clearly address the relationship between private entities and parties.

If MUMA were intended to cover only the State, there would have been no reason for RCW 69.51A.060(4) to exempt the use of medical marijuana in "any place of employment" from legal protection. Likewise, there would have been no reason to have exempted the use of medical marijuana "in any school bus" or "in any youth center" if the statute applied only to the State. Most youth centers, school buses, and places of employment in Washington are private not public. RCW 69.51A.060(4) also gives no protection for use of medical marijuana in a "public place"

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[4] TeleTech's claim that this interpretation "would prohibit a person from choosing not to marry an individual based on the individual's use of medical marijuana" is patently absurd. *See* Respondent's Br. at 19, n. 8. Being rebuffed by a single suitor is not a denial of the "right to marry" as any rational person would understand the term.

as defined by RCW 70.160.020. Under that statute, "public place" means "that portion of any building or vehicle used by and open to the public, *regardless of whether the building or vehicle is owned in whole or in part by private persons or entities*, the state of Washington, or other public entity. . . ." (emphasis supplied). The specific exceptions set forth in RCW 69.51A.060(4) prove that MUMA imposes a general duty on non-federal) public and as well as private entities in Washington to accommodate the off-site use of medical marijuana.

Ms. Roe agrees with TeleTech that the text of RCW 69.51A.060(4) is unambiguous. *See* Respondent's Brief at 14. The provision originally stated: "[N]othing in this chapter requires any accommodation of any medical use of marijuana *in* any *place* of employment school bus, or *on* any school grounds, or *in* any youth center." RCW 69.51A.060(4) (emphasis supplied). RCW 69.51A.060(4) imposes clear limits on an employer's obligation under RCW 69.51A.040(1) not to penalize an employee, or deny her the privilege of employment, because of her use of medical marijuana in accordance with MUMA. However, TeleTech misreads the provision's unambiguous language to suggest that employers have no duty to accommodate the medical use of marijuana at all.

TeleTech argues as if RCW 69.51A.060(4) read: "an employer has no duty to accommodate the medical use of marijuana." *See* Respondent's

Brief at 38. That is not what the Act says or ever said. TeleTech's interpretation reads the words "in," "on," and "place of employment" right out of the statute. Those words speak expressly to location and place. Together with the phrase "medical use of marijuana," they unambiguously confine RCW 69.51A.060(4)'s limitations to excusing employers from a duty to accommodate the *on-site* possession, production, or administration of marijuana *within* the work*place*. A voter in 1998 who read the initiative text as it was actually written would have understood that the necessary corollary of the limitations in the measure was that an individual's *off-site* use of medical marijuana outside of the workplace must be accommodated. *Cf.* Respondent's Brief at 16-17.

Contrary to what TeleTech claims, Ms. Roe is not asking the Court to create an employment scheme out of whole cloth. Respondent's Brief at 33. RCW 69.51A.060(4) expressly uses the term "accommodation." The Court must presume that the People and the Legislature chose this precise term for a reason. The term "accommodation" has a well-established meaning under Washington law dating back decades. An "accommodation" requires an employer to make adjustments to its standard policies and procedures under certain circumstances based on an individualized assessment of an employee's ability to perform a particular job. *See Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930

(2004); *Buckingham v. United States*, 998 F.2d 735, 741 (9th Cir. 1993) (noting that requiring employers to alter existing policies or procedures is "the essence of reasonable accommodation"). This is obviously what the voters intended when they provided that employers must accommodate their employees' off-site use of medical marijuana.

3. MUMA's History Provides Further Evidence of the Act's Employment Accommodation Mandate.

Ms. Roe's reading of MUMA's text is reinforced by the testimony of Initiative 692 co-drafter and sponsor Timothy Killian, the 1998 voter's pamphlet, and the 2007 clarifying amendments. As set forth more fully in Appellant's Opening Brief, Mr. Killian's declaration provides additional evidence that the Initiative was intended to require employers to accommodate an employee's off-site use of medical marijuana. *See* Appellant's Opening Brief at 18-19. TeleTech asserts, without citation to legal authority, that Mr. Killian's declaration has no relevance at all and should be entirely disregarded. Respondent's Brief at 26. That position has no basis in law. Washington courts presume that the drafters and sponsors of legislation understand the meaning of the language they propose. *In re Marriage of Kovacs*, 121 Wn.2d 795, 807-808, 854 P.2d 629 (1993); *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). For this reason, courts pay particular attention to the statements of prime

drafters and sponsors of the enactment. *Duke*, 133 Wn.2d at 86. TeleTech's claim that this rule does not apply in the initiative context directly contradicts with this Court's direction that initiatives are to be interpreted according to the general rules of statutory construction. *See City of Spokane v. Taxpayers of the City of Spokane*, 111 Wn.2d 91, 97, 758 P.2d 480 (1988). Ms. Roe has never claimed that Mr. Killian's declaration is "dispositive." *Cf.* Respondent's Brief at 26. But it undoubtedly does provide important corroborating evidence of MUMA's intended scope and meaning.

Mr. Killian's declaration is fully consistent with 1998 voter's pamphlet for Initiative 692 and the 2007 clarifying amendments enacted by the Legislature. The voter's pamphlet highlights that MUMA's duty of employer accommodation does not extend to the use of medical marijuana in the workplace. The pamphlet instructed voters that the Initiative "[p]rohibits marijuana use *while* . . . *in* the workplace." (emphasis added). The Attorney General's statement, which TeleTech relies on, simply restates the exact language of RCW 69.51A.060(4). *See* Respondent's Brief at 23. Neither that statement nor anything else in the voter's pamphlet suggests that employers do not have to accommodate a qualifying patient's *off-site* medical use of marijuana, as the text of the statute necessarily provides.

The Washington Legislature amended MUMA in 2007 "to *clarify* the law on medical marijuana so that the lawful use of this substance is not impaired . . . ." CP 240 (emphasis supplied).[5] There can be no question that the 2007 amendments clarified rather than changed existing MUMA law. *Cf.* Respondent's Brief at 31. The House Report states: "This bill *clarifies* several ambiguities in the current law. . . . [It] *does not expand nor restrict current law*, but *clarifies* it to help patients comply." CP 210-11.[6] Ms. Roe has never argued that the 2007 legislation applies retroactively to her claim. *Cf.* Respondent's Brief at 16. But those clarifying amendments provide strong evidence of what was intended by voters in the first place. *See State v. Baldwin*, 109 Wn. App. 516, 527, 37 P.3d 1220 (2001) (citing *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 755, 953 P.2d 88 (1998)).

As part of MUMA's clarifying amendments, the Legislature inserted the term "on-site" into RCW 69.51A.060(4) to ensure that the

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[5] TeleTech's challenge to the constitutionality of MUMA's clarifying amendments under art. II, sec. 19 is a red herring. *See* Respondent's Brief at 32-33, n. 16. "[T]he title to a bill need not be an index to its contents." *Patrice v. Murphy*, 136 Wn.2d 845, 853, 966 P.2d 1271 (1998). "A few well-chosen words, suggestive of the general subject treated, is all that is required." *State ex rel. Seattle Elc. Co. v. Superior Court*, 28 Wn. 317, 322, 68 P. 957 (1902). The 2007 Senate Bill clarifying MUMA, entitled "An act relating to medical use of marijuana," plainly meets this standard.

[6] Furthermore, no court had ever interpreted RCW 69.51A.060(4) to apply to anything other than the "off-site" use of medical marijuana. For this reason as well, the Legislature's addition of the term "on-site" to avoid any possible future misinterpretation is a "clarification" rather than an "amendment" under Washington law.

limitations on an employer's duty to accommodate qualifying patients would not be subject to the very misinterpretation advanced by TeleTech in this case. The insertion of the term "on-site" removes any doubt about the intended scope of MUMA. RCW 69.51A.060(4) is, and always was, intended to limit an employer's duty to accommodate *on-site* use of medical marijuana "in any place of employment." It is unremarkable that the Final Bill Report does not directly address the insertion of "on-site" into RCW 69.51A.060(4). *Cf.* Respondent's Brief at 32. The meaning of that term was self-evident and required no further comment. However, the House Bill Report did explain that correctional facilities were being "added to the list of *places where* the *on-site* medical use of marijuana does not need to be accommodated." CP at 210 (emphasis supplied).

In sum, the 1998 voter's pamphlet, the 2007 clarifying amendments, and the un-rebutted testimony of MUMA's principal drafter all confirm that the statute creates a duty of employer accommodation with respect to a qualifying patient's at-home use of medical marijuana.

4. This Court Should Not Consider Hearsay Newspaper Clippings in Determining the Voters' Intent.

If the Court deems it necessary to look to extrinsic evidence to determine the intended scope and meaning of MUMA, it should not consider the numerous hearsay newspaper clippings that TeleTech

submitted to the Superior Court. The Superior Court granted Ms. Roe's motion to strike from the summary judgment record most of the editorials and articles that TeleTech had submitted along with its opposition to Ms. Roe's motion summary judgment on the basis that they were inadmissible hearsay. Separately, the Superior Court refused to consider any of the new evidence that TeleTech had submitted along with its reply brief. TeleTech has waived its right to challenge both of those decisions on appeal.

TeleTech's claim that it "was not required to separately appeal the trial court's order granting [Ms. Roe's] motion to strike," Respondent's Brief at 28, n.13, is contrary to law. RAP 5.1(d) provides that a party seeking cross-review must file a timely notice of appeal. "It is axiomatic that a party must file a notice of appeal when he or she is asking an upper tribunal to review the ruling of a lower tribunal." *Chaney v. Fetterly*, 100 Wn. App. 140, 151, 995 P.2d 1284 (1990). By failing to file a notice of appeal of the Superior Court's grant of Ms. Roe's motion to strike, TeleTech waived its right to seek appellate review of that ruling.

Similarly, TeleTech waived its right to challenge the Superior Court's decision not to consider any of the evidence it submitted for the first time along with its reply brief. In *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 463 n. 1, 909 P.2d 291 (1996), this Court specifically instructed that a challenge to a Superior Court's decision not

consider certain evidence on summary judgment should be "raised in an assignment of error contesting the trial court's refusal to consider the particular item of evidence." TeleTech failed to comply with *Mithoug*.

The Superior Court's evidentiary rulings were also correct on their merits. A court should not consider evidence submitted for the first time in a reply brief. *Cf. Sacco v. Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) (issues raised for the first time in a reply brief will not be considered). Furthermore, newspaper articles are classic hearsay and they are inadmissible as evidence to prove the truth of the statements contained therein. *See State ex rel. Pierce County v. King County,* 29 Wn.2d 37, 45, 185 P.2d 134 (1947); *see also Tortes v. King County*, 119 Wn. App. 1, 13-14, 84 P.3d 252 (2003). The statements of witnesses or commentators reported in the articles and editorials that TeleTech submitted are hearsay within hearsay, and plainly inadmissible under Rules of Evidence 801-05.

Nelson v. McClatchy Newspapers, Inc., 131 Wn.2d 523, 936 P.2d 1123 (1997) is of no assistance to TeleTech. In that case, this Court held that the Fair Campaign Practices Act prohibits employers from discriminating against an employee because of his or her refusal to abstain from political activity. *Id.* at 530. This Court reached that conclusion despite observing that "[n]ewspaper articles and editorials published during the 1992 election season uniformly fail to mention this particular

provision nor does the voter's pamphlet in its description of or the statements for or against the law. In all, the provision now before the court seems to have gone largely unnoticed." *Id.* at 531. *Nelson* supports Ms. Roe's position in this case, not TeleTech's.[7]

B. Federal Law Does Not Conflict With Or Preempt MUMA.

TeleTech suggests that if MUMA means what Ms. Roe claims, the statute would be "in direct conflict with federal law and would be void." Respondent's Brief at 20. TeleTech profoundly misapprehends the law of federal preemption. Federal regulation of marijuana does not displace state medical marijuana statutes. States are "independent sovereigns in our federal system." *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). The individual states "possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *DeCanas v. Bica*, 424 U.S. 351, 356, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976).

There is a strong presumption against federal preemption of state law. *Campbell v. State, Dep't of Social and Health Servs.*,150 Wn.2d 881, 897, 83 P.3d 999 (2004). Preemption may occur in three situations: (1) Congress passes a statute that expressly preempts state law (express

[7] Because Nelson did not argue that the newspaper articles regarding the initiative in that case were improper hearsay, their admissibility under the Rules of Evidence was not at issue before the Court.

preemption); (2) Congress occupies the entire field of regulation (field preemption); or (3) state law conflicts with federal law, making compliance with both an impossibility or creating a situation where state law presents an obstacle to the accomplishment of the federal purpose (conflict preemption). *Stevedoring Servs. of America, Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996). None of these apply here.

TeleTech does not and cannot argue that federal law expressly preempts MUMA or that Congress has occupied the field of regulation. The Controlled Substances Act ("CSA") contains an "anti-preemption" provision, 21 U.S.C. § 903. TeleTech therefore argues solely conflict preemption. Conflict preemption may only be found if "there is such a direct and positive conflict that the two acts cannot be reconciled or consistently stand together." *Dep't of Labor and Industries v. Common Carriers, Inc.*, 111 Wn.2d 586, 588, 762 P.2d 348 (1988) (internal citations omitted). In the absence of a direct and positive conflict, a citizen or entity must comply with both state and federal law.[8]

There is no actual conflict between the MUMA and federal drug laws. The federal Controlled Substances Act makes it unlawful for a person to manufacture, distribute, or possess controlled substances,

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[8] In *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), three Justices would have held that the federal prohibitions on the use of medical marijuana cannot be enforced in states with laws permitting the medical use of marijuana. *Id.* at 42-57 (O'Connor, Rehnquist and Thomas, JJ, dissenting).

including marijuana. *See* 21 U.S.C. § 841(a)(1). But that statute does not impose any obligations or duties on the employers of individuals who violate that act. Indeed, no federal law requires TeleTech to subject its employees to drug tests or to discharge employees who test positive. (If TeleTech were a federally regulated employer required to maintain a drug-free workplace by federal law, that federal obligation would trump the state law accommodation duties of MUMA. But TeleTech is not such an employer.) TeleTech can easily comply with the accommodation requirements of MUMA without running afoul of federal law.

In the absence of any direct conflict, TeleTech asserts that requiring employers to accommodate off-site medical use of marijuana by qualifying patients would "be an obstacle to the accomplishment and execution of the federal drug laws." Respondent's Brief at 21. That claim does not withstand scrutiny. Prohibiting an employer from discharging an employee for using medical marijuana at home in accordance with Washington law in *no way* hinders the federal government's ability to enforce its drug laws. The federal government may pursue legal action against individuals who use medical marijuana in violation of the CSA if it so chooses, just as it could before MUMA was enacted. The fact that Washington employers may not discharge or refuse to hire an individual

solely on the grounds that she uses medical marijuana in accordance with MUMA does not interfere with federal law enforcement in any way.

TeleTech's protestations notwithstanding, the company could no more be charged with aiding and abetting a violation of federal law by failing to terminate Ms. Roe for her at-home use of medical marijuana than it could be criminally charged for failing to terminate an employee whom it knows has failed to file her income tax returns. An employer's mere knowledge that one of its employees uses medical marijuana at home does not subject it to criminal liability of any kind, *see In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979), and an employer is under no legal duty to terminate an employee for such purely private activity. TeleTech's assertion that it could face federal criminal penalties for complying with MUMA's duty of accommodation is meritless. No conflict between federal law and MUMA exists in this case.

Ten years ago Washington made a deliberate decision to part ways with the federal government regarding the legal status of medical marijuana. Whereas the federal government concluded that marijuana has "no currently accepted medical use in treatment" and that the use of marijuana under medical supervision lacks safety, 21 U.S.C § 812, the People of Washington reached the opposite conclusion. They found "that some patients with terminal or debilitating illnesses, under their

physician's care, may benefit from the medical use of marijuana." RCW 69.51A.005. The fact that Ms. Roe's use of medical marijuana is not authorized under federal law does not excuse TeleTech from complying with Washington law.

C. TeleTech Violated Washington Public Policy By Discharging Ms. Roe Solely Based On Her At-Home Use Of Medical Marijuana.

MUMA establishes a clear mandate of public policy that the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon his or her physician's professional medical judgment. *See* RCW 69.51A.005. This public policy is expressly stated in the text of the statute in no uncertain terms. The policy has also been judicially recognized. Contrary to TeleTech's assertion that this public policy "confers no real rights, duties, or obligations," *cf.* Respondent's Brief at 42, Washington courts have uniformly ruled that the purpose of MUMA is to protect the right of qualifying patients to use medical marijuana under the care and supervision of their physicians. *See supra* at 5. This public policy was reaffirmed in 2007 when the Legislature enacted clarifying amendments to MUMA to ensure that "qualifying patients may fully participate in the medical use of marijuana." CP at 240.

A public policy need not address employment, or exclusively concern itself with employers' conduct, to provide the basis for a wrongful termination claim. *Danny v. Laidlaw Transit Services*, --- Wn.2d ---, --- P.3d ----, 2008 WL 4456457 at 9 (2008) (slip opinion). The proper analysis requires this Court to first ask "if any public policy exists whatsoever" and then ask whether, "on the facts of each particular case, the employee's discharge contravenes or jeopardizes public policy." *Id.* (quoting *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996)). Ms. Roe easily meets both tests in this case.

TeleTech's assertion that terminating Ms. Roe did not jeopardize this public policy is profoundly misguided. *See* Respondent's Brief at 42-44. To establish jeopardy, the plaintiff must show that he or she engaged in particular conduct, and that discouraging that conduct would jeopardize public policy. *Korslund v. Dyncorp Tri-Cites Servs Inc.*, 156 Wn.2d 168, 181, 125 P.3d 119 (2005). Ms. Roe used medical marijuana in accordance with MUMA and based on her physician's medical judgment. That is *precisely* the conduct that MUMA was designed to protect. TeleTech contends that MUMA does not affirmatively "encourage," "favor," or "require" patients to use medical marijuana and, therefore, it is "*of no consequence* . . . whether employment policies such as TeleTech's would lead some patients to opt not to use medical marijuana." Respondent's

Brief at 43 (emphasis supplied). MUMA may not require physicians to authorize medical marijuana as a treatment for their patients who qualify, but it surely encourages them to do so where they deem it medically necessary. MUMA was enacted to protect the right of qualifying patients to use medical marijuana to treat terminal and debilitating illnesses. Discharging an employee solely because she exercises that right *plainly* jeopardizes the policy underlying it.

TeleTech's interest in "refusing to employ individuals who report to work under the influence of illegal substances," Respondent's Brief at 44, does not justify overriding the strong public policy supporting Ms. Roe's at-home use of medical marijuana in accordance with state law.[9] Accommodating Ms. Roe's at-home use of medical marijuana would do absolutely nothing to jeopardize TeleTech's legitimate interest in maintaining a safe, healthy, productive, and efficient work environment. *Cf. id.* at 45. Nor would it expose TeleTech to vicarious liability for tortious acts committed in the workplace. *Cf. id.* at 46. MUMA in no way requires an employer to retain an employee who is impaired in her ability to perform her job and perform it safely. TeleTech does not claim Ms.

[9] Contrary to what TeleTech implies on page 46 of its Brief, nothing in MUMA prohibits an employer from performing pre-employment drug testing for marijuana. Therefore, TeleTech can fully comply with MUMA and its contractual obligations to Sprint Nextel. TeleTech's suggestion that Sprint Nextel might have terminated its contract with the company if it had not discharged Ms. Roe is nothing more than rank speculation.

Roe's work performance was unsatisfactory or that she was impaired in any way. To the contrary, Ms. Roe's at-home use of medical marijuana is what enabled her to come to work and she performed her job in a fully satisfactory manner.

Robinson v. Seattle, 102 Wn. App. 795, 10 P.3d 452 (2000), is of no assistance to TeleTech. *Robinson* invalidated the City of Seattle's drug testing program because it conflicted with employees' rights under the Constitution. *Robinson* held that the employer's interests in maintaining a drug-free workplace had to yield to its employees' legal rights, except where an employee carried a firearm or had duties involving public safety. *Id.* at 827. MUMA requires the exact same type of balancing of rights that the court performed in *Robinson*. MUMA provides that an employer's preference for not having employees who test positive for marijuana must yield to an employee's off-site physician-authorized use of medical marijuana unless the employer can show a fact-specific overriding justification based on the nature of the employee's job duties. *Robinson* supports Ms. Roe's position, not TeleTech's.

TeleTech fallaciously argues that "individuals are still free" to use marijuana for medicinal purposes even if they can be terminated and lose their livelihoods solely because of their exercise of that legal right. Respondent's Brief at 43-44. That claim reflects a callous disregard for

the plight of those Washington citizens who use medical marijuana in full compliance with state law who do not also happen to have trust funds. Neither TeleTech nor this Court should force Ms. Roe or other qualifying patients in Washington to make a Hobson's choice between her medical treatment and her employment. That was exactly the choice the voters and Legislature intended that people such as Ms. Roe should not have to make.

III. CONCLUSION

This is a case of first impression in Washington.[10] This Court's obligation is to interpret the intent of the voters and the Legislature in enacting Washington's MUMA. As set forth above and in Ms. Roe's Opening Brief, MUMA's clear intent was to protect the ability of qualifying patients such as Ms. Roe to use medical marijuana at home as authorized by their physicians and free from the threat of losing their jobs. The Superior Court's decision undermines that intent and jeopardizes the health and economic security of Washington citizens who use medical marijuana in full compliance with state law. Therefore, the Court should reverse the Superior Court's decision, order the grant of summary judgment to Ms. Roe, and remand for a trial on damages.

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[10] TeleTech's observation that RCW 69.51A.060(4) "has never been construed to impose a duty on employers" is meaningless since that provision has never been construed at all. *See* Respondent's Brief at 34.

Respectfully submitted this 15th day of October 2008.

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