FILED
DEC 22 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. 83768-6

SUPREME COURT OF THE STATE OF WASHINGTON

JANE ROE,

Petitioner,

v.

TELETECH CUSTOMER
CARE MANAGEMENT
(COLORADO), LLC,

Petitioner.

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STATE OF WASHINGTON
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AMICUS CURIAE MEMORANDUM OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

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FILED AS
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I. IDENTITY AND INTEREST OF AMICUS

Amicus adopts and incorporates its statement of interest contained in its accompanying motion.

II. STATEMENT OF THE CASE

Petitioner Jane Roe ("Roe") was a qualifying patient,[1] complying with all requirements of the Washington State Medical Use of Marijuana Act (MUMA),[2] at the time of her termination by TeleTech. CP 261-62, 269. She had disclosed her medical use of marijuana during the hiring process. CP 262. Her position as a Customer Service Consultant was non-safety sensitive. *Id.* She was terminated for the sole reason of failing a drug test due to her medical use of marijuana. CP 290. Prior to her termination, Roe worked at TeleTech for one week without issue. CP 263.

III. ARGUMENT

A. Roe's Petition for Review Involves an Issue of Substantial Public Interest.

Although no exact statistic is available, it is estimated that more than 35,000 Washington residents are qualifying patients under the MUMA.[3] Whether their medical use of marijuana in compliance with

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[1] RCW 69.51A.010(3).
[2] Chapter 69.51A RCW.
[3] *How many people in the U.S. use medical marijuana?*, MEDICAL MARIJUANA PROCON.ORG, Mar. 11, 2009, http://medicalmarijuana.procon.org/viewanswers.asp?questionID=001199; *see also* Oregon Medical Marijuana Program data available at

state law can serve as the sole basis for terminating their employment is an issue that impacts them, their families and loved ones, and the physicians who treat them. Accordingly, the issues involved in this case are of "substantial public interest" for RAP 13.4(b)(4) purposes.

B. Historically, Medical Use of Marijuana in the United States and Washington Has Been a Matter of Great Public Interest.

Prior to the passage of the Controlled Substances Act in 1970, almost all states that had criminalized marijuana maintained an exception for medical use. *Leary v. United States*, 395 U.S. 6, 16-17, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969). In 1978, the federal government established a "compassionate use" Investigational New Drug (IND) program that, to this day, provides patients with a monthly supply of marijuana.[4]

In 1998, Washington voters passed Initiative 692, enacting the MUMA by a large majority.[5] In 2007, 80% of Washington's Senate and 70% of its House of Representatives voted to amend the MUMA "so that

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http://www.oregon.gov/DHS/ph/ommp/data.shtml (number of patients holding voluntary registration cards as of Oct. 1, 2009, was 23,873). The U.S. Census Bureau estimates Oregon's population in 2008 as 3,790,060, or 58% of Washington's 6,549,224. Population estimates obtained from http://quickfacts.census.gov/qfd/states/41000.html and http://quickfacts.census.gov/qfd/states/53000.html.

[4] *See Kuromiya v. United States*, 78 F. Supp. 2d 367, 368-69 (E.D. Pa. 1999); *see also* Roger Parloff, *How Marijuana Became Legal*, FORTUNE, Sept. 11, 2009, available at http://money.cnn.com/2009/09/11/magazines/fortune/medical_marijuana_legalizing.fortune/index.htm.

[5] The measure was approved by a vote of 1,121,851 for, and 780,631 against, or 59 to 41 percent. Washington Secretary of State, http://www.sos.wa.gov/elections/initiatives/statistics_initiatives.aspx.

the lawful use of this substance is not impaired and medical practitioners are able to exercise their best professional judgment in the delivery of medical treatment."[6]

Most recently, the United States Department of Justice issued a policy memorandum to U.S. Attorneys in medical marijuana states, directing that federal resources should not be used to investigate or prosecute "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[7] Last month, at its 2009 Interim Meeting of the House of Delegates, the American Medical Association called on the federal government to revisit marijuana's status as a Schedule I substance.[8] Arguably, these events reflect a growing recognition that Congress' placement of marijuana on Schedule I,[9] and the last four decades of federal marijuana prohibition imposed by the Controlled Substances Act, may have been overbroad:

> To those unfamiliar with the issue, it may seem faddish or foolish for a doctor to recommend a drug that the federal

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[6] 2007 Wash. Laws ch. 371 § 1.
[7] Memorandum from David W. Ogden, Deputy Attorney General, to Selected United States Attorneys (Oct. 19, 2009) ("Ogden Memo"), available at http://www.justice.gov/opa/documents/medical-marijuana.pdf.
[8] John Hoeffel, *Medical marijuana gets a boost from major doctors group*, LOS ANGELES TIMES, Nov. 11, 2009, available at http://www.latimes.com/news/nationworld/nation/la-na-ama11-2009nov11,0,3003312.story; a copy of the AMA resolution submitted for approval is available at http://www.ama-assn.org/assets/meeting/mm/i-09-policy-marijuana.pdf.
[9] 21 U.S.C. § 812.

> government finds has "no currently accepted medical use in treatment in the United States," 21 U.S.C. § 812(b)(1)(B). But the record in this case, as well as the public record, reflect a legitimate and growing division of informed opinion on this issue. A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs.

Conant v. Walters, 309 F.3d 629, 604-41 (9th Cir. 2002) (Kozinski, J., concurring).

At the heart of all medical marijuana laws lie both compassion for the seriously ill and respect for their right to determine an individualized course of treatment in consultation with their doctors:

> The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

RCW 69.51A.005 **Purpose and intent**.

C. Terminating a Non-Impaired Qualifying Patient Solely for Medical Use of Marijuana Violates Public Policy.

To sustain the tort of wrongful termination in violation of public policy, four elements must be proven: the existence of a clear public policy (the "clarity element"); that discouraging the conduct in which the employee engaged would jeopardize the public policy; that the public-policy-linked conduct caused the dismissal; and that the employer cannot offer an overriding justification for the dismissal. *Roberts v. Dudley*, 104

Wn.2d 58, 64-65, 993 P.3d 901 (2000). Whether Washington has established a clear mandate of public policy is a question of law, subject to de novo review. *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 207, 193 P.3d 128 (2008).

The fact that a statutory remedy may not be available to an employee does not deprive her of the ability to make out a claim when her firing "contravenes the letter *or purpose* . . . of a . . . statutory . . . scheme." *Roberts*, 104 Wn.2d at 73 (quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982))). "Washington courts have generally recognized the public policy exception when an employer terminates an employee as a result of his or her . . . *exercise of a legal right or privilege* . . .." *Danny*, 165 Wn.2d at 208 (emphasis added).

1. Washington recognizes the right of medical self-determination as a public policy mandate.

It is a hallmark of medical practice that a patient can determine her own course of treatment. The United States Supreme Court has recognized, though not clearly defined, a constitutional "interest in independence in making certain kinds of important decisions," *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977),

including a patient's "right to decide independently, with the advice of his physician, to acquire and use needed medication." *Id.* at 603. Washington has codified medical self-determination as a public policy matter separate and apart from constitutional considerations. For example, lack of patient consent for a treatment is grounds for a medical malpractice claim. RCW 7.70.030(3). In Washington, patients can even choose to end their own lives under certain circumstances. Chapter 70.245 RCW. The MUMA explicitly confirms that public policy favoring medical self-determination applies equally to qualifying patients. RCW 69.51A.005.

A corresponding hallmark of the practice of medicine is the special, protected nature of the relationship between the patient and physician – one that cannot be intruded into lightly. This Court has long held that this relationship imposes a fiduciary duty on the doctor. *Foster v. Brady*, 198 Wash. 13, 18, 86 P.2d 760 (1939); *see also Lockett v. Goodill*, 71 Wn.2d 654, 656, 430 P.2d 589 (1967). This duty has been described as follows:

> We are of the opinion that members of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients. They owe their patients more than just medical care for which payment is exacted; there is a duty of total care . . .

Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142, 146 (1962) (per curiam) (quoted in *Carson v. Fine,* 123 Wn.2d 206, 231, 867 P.2d 610

(1994) (Johnson, J., dissenting)).

It has been recognized that a patient is entitled, as a public policy matter, to rely on and follow his physician's advice without penalty:

> Public policy dictates, and other jurisdictions have held, that a patient does not have an obligation or duty to determine whether an injury is being properly treated by a physician. Any other rule would offend common sense by requiring the patient to be the judge of a physician's professional competence.

Mack v. Garcia, 433 So. 2d 17, 18 (Fla. App. 1983) (*reh'g denied*).

This relationship is no different in the medical marijuana context. Regardless of the federal prohibition, "[p]hysicians must be able to speak frankly and openly to patients" without threat of investigation and potential loss of their DEA registrations. *Conant*, 309 F.3d at 636. The fact that enforcement might "negatively affect the patient-physician relationship" has been identified as a factor weighing in favor of quashing a federal grand jury subpoena seeking records of medical use of marijuana. *In re Grand Jury Subpoena for THCF Medical Clinic Records*, 504 F. Supp. 2d 1085, 1091 (E.D. Wash. 2007).

Ultimately a clearly mandated public policy "concerns what is right and just and what affects the citizens of the State collectively . . . a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed." *Dicomes v. State*, 113

Wn.2d 612, 618, 782 P.2d 1002 (1989) (quoting *Palmeteer v. International Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876 (1981)). The ability of employees to pursue a course of treatment authorized under state law, and recommended by their physicians, without fear of being summarily dismissed, strikes at the heart of every Washingtonian's rights.

2. **TeleTech's conduct jeopardizes employees' right of medical self-determination.**

When job performance is not at stake, forcing employees to choose between physician-recommended treatment and their livelihoods constitutes an impermissible insertion of the employer into the doctor-patient relationship in contravention of clear public policy favoring medical self-determination. *See, e.g., Pettus v. Cole*, 49 Cal. App. 4th 402, 458, 57 Cal. Rptr. 2d 46 (1996) (employee had an "autonomy privacy" interest in making decisions about his medical treatment "without undue intrusion of interference from his employer"):

> [I]t would be unprecedented for this court to hold that an employer may dictate to an employee the course of medical treatment he or she must follow, under pain of termination, with respect to a nonoccupational illness or injury. It is, thus, eminently reasonable for employees to expect that their employers will respect – i.e., not attempt to coerce or otherwise interfere with – their decisions about their own health care . . .

Id. at 459.

3. Roe's medical use of marijuana was the sole cause of her termination.

This is uncontested by the parties. Petition for Review at 7-8; Answer to Petition for Review at 8-10.

4. TeleTech cannot offer an overriding justification for terminating Roe's employment.

TeleTech has proffered no reason for terminating Roe's employment other than her positive drug test confirming her previously disclosed medical use of marijuana and the company's refusal to make an exception to its Applicant Drug Policy to accommodate the medical use of marijuana in compliance with state law. It is undisputed that Roe's position was not safety-sensitive and that she had performed her duties without issue for a week.

In its Answer to Petition for Review, TeleTech points out that marijuana use remains illegal under federal law. While that is true, marijuana law enforcement is, in practice, overwhelmingly a state matter. Over ninety-nine percent of arrests for any marijuana offense (possession, sale, or manufacture) are made by state and local law enforcement.[10] The federal government cannot commandeer state actors to enforce its laws.

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[10] FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2008, Table 29 and "Arrests for Drug Abuse Violations," http://www.fbi.gov/ucr/cius2008/arrests/; NATIONAL DRUG INTELLIGENCE CENTER, U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT (2009), Appendix B, Table B1 (2008), available at http://www.justice.gov/ndic/pubs31/31379/appendb.htm#TableB1.

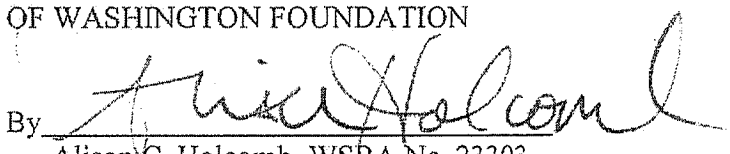
Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). The medical use of marijuana is protected under Washington state law, and the U.S. Department of Justice has adopted a formal written policy directing that federal resources should not be directed at the investigation or prosecution of individuals in compliance with state medical marijuana laws. Ogden Memo, *supra* at n.6.

V. CONCLUSION

For the above reasons, Amicus respectfully requests that this Court grant Roe's petition for review.

Respectfully submitted this 14th day of December, 2009.

AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION



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