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STATE OF WASHINGTON

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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.

SUPPLEMENTAL BRIEF OF PETITIONER – JANE ROE

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ORIGINAL

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I. INTRODUCTION

“As a compassionate gesture, the people of this state, by initiative, *allowed* patients afflicted with medical conditions that might be eased by marijuana to use it under limited circumstances.” *State of Washington v. Fry*, 168 Wn.2d 1, 7, --- P.3d ----, (2010) (Chambers, J, concurring) (emphasis supplied). This permission to use medical marijuana would be of little comfort or consequence if qualifying patients could be fired from their jobs solely for using medical marijuana at home and in full accordance with Washington’s Medical Use of Marijuana Act (“MUMA”), RCW 69.51A. For that reason, the People of Washington and the Legislature required employers to accommodate their employees’ off-site use of medical marijuana. That decision was a valid exercise of state power that is not preempted by federal law. By terminating Appellant Jane Roe solely because she used medical marijuana at home and in accordance with state law, TeleTech violated MUMA and Washington public policy.

II. ARGUMENT

A. This Court’s Decision in *State of Washington v. Fry* Did Not Address the Scope of MUMA’s Civil Protections.

This Court’s recent decision in *State of Washington v. Fry* examined how the affirmative defense created by MUMA operates in a

criminal prosecution for marijuana possession. Five members of this Court took a broad view of the statute. *See id.* at 7-12 (Chambers, Owens, C.W. Johnson, Stephens, JJ, concurring; Sanders, J, dissenting). Four members took a narrower view. *Id.* at 1-7 (opinion of J.M. Johnson, J, joined by Madsen, Fairhurst, Alexander, JJ). *Fry* did not address the application of MUMA in a civil context. Nor did it address an employer's obligation to accommodate its employees' off-site use of medical marijuana under MUMA or Washington public policy.

The specific question presented in *Fry* was whether police officers who were presented with an Authorization to Possess Medical Marijuana had probable cause to conduct a search that uncovered more than two pounds of marijuana. *Id.* at 2. The Court undertook a technical analysis of when and how a criminal defendant raises the affirmative defense established by RCW 69.51A.040(1). It held that the affirmative defense does not negate the elements of the charged offense nor negate probable cause for a search conducted with a valid warrant. *Id.* at 3, 10.

Fry does not stand for the proposition that MUMA provides no other protections to qualifying patients who use medical marijuana in accordance with the Act. In his concurrence, Justice Chambers described the voters' intent in approving I-692 in the following terms: "As a compassionate gesture, the people of this state, by initiative, *allowed*

patients afflicted with medical conditions that might be eased by marijuana to use it under limited circumstances.” *Id.* at 7 (emphasis supplied). This view of MUMA as *authorizing* the use of medical marijuana in certain, limited circumstances is consistent with the view held by the Washington State Legislature. In 2007, the Legislature amended MUMA “to clarify the law on medical marijuana so that the *lawful use* of this substance is not impaired.” CP 240 (emphasis supplied). As part of protecting that lawful use, the Legislature amended the accommodation mandate in RCW 69.51A.060(4). That provision now reads:

Nothing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment, in any school bus or on any school grounds, in any youth center, in any correctional facility, or smoking medical marijuana in any public place as that term is defined in RCW 70.160.020.

RCW 69.51A.060(4) (as amended) (emphasis supplied).

TeleTech insists that this Court should not look to the 2007 amendments to interpret the version of MUMA that was in place at the time of Ms. Roe’s termination. Respondent’s Brief at 30-32. However, it is well established Washington law that “[w]hen a former statute is amended, or an uncertainty is clarified by subsequent legislation, the amendment is strong evidence of what the Legislature intended in the first statute.” *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)). Indeed, the *Fry* plurality opinion of Justice J.M. Johnson relied on the 2007 amendments to MUMA to inform its reading of the original statute, even though the amendments were enacted three years after the defendant was arrested. *See Fry*, at 4. The Court should look to the same amendments to interpret the obligations MUMA places on TeleTech. Those amendments remove any doubt that MUMA requires employers to accommodate the off-site, but not the on-site, use of medical marijuana by qualifying patients. *See* Appellant's Opening Brief at 20-21; Appellant's Reply Brief at 13-14.

B. Ms. Roe is a "Qualifying Patient" with a "Debilitating Medical Condition."

TeleTech may rely on this Court's decision in *Fry* to argue that there is a genuine issue of material fact as to whether Ms. Roe had a "debilitating medical condition" that qualified her to use medical marijuana under MUMA. The Court should reject that argument for at least two reasons.

First, TeleTech has already conceded the issue. TeleTech's counsel previously stipulated that there were no issues of material fact in this case. CP 236. TeleTech also admitted that the "Authorization [to Possess Marijuana for Medical Purposes in Washington State issued to

Ms. Roe] was valid.” Def. S.J. Mot. at 3 n.1, CP 391. TeleTech further conceded that Ms. Roe falls within the class of persons MUMA was intended to benefit, Respondent’s Brief at 37, which presupposes that she is a “qualifying patient” under the Act.

Second, even if TeleTech had not conceded the issue, its argument fails. As set forth in Appellant’s Opening Brief at 12-13, Ms. Roe met all five statutory criteria of a “qualifying patient.” Unlike in *Fry*, the record in this case proves that Ms. Roe is a “qualifying patient” with a “terminal or debilitating medical condition” under RCW 69.51A.010(3)-(4). A “debilitating medical condition” includes “intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications.” RCW 69.51A.010(4)(b). The defendant in *Fry* was diagnosed with “severe anxiety, rage & depression related to childhood.” *Fry*, at 5. Mr. Fry’s Authorization to Possess Marijuana for Medical Purposes also noted that he suffered from neck and lower back pain and he had been kicked in the head three times by a horse. *Id.*, at 7 (Chambers, J, concurring). There was no evidence in the record indicating why Fry was prescribed medical marijuana. *See id.* at 8 (speculating that Fry *may* have been prescribed marijuana for chronic pain resulting from his injuries or to alleviate possible symptoms of anxiety and depression). In the absence of such evidence, a majority of the Court held that whether

Fry had a debilitating medical condition sufficient to be a qualifying patient under MUMA should have been a question of fact for the jury to decide. *Id.* at 7-8, 12 (Chambers, J, concurring; Sanders, J, dissenting).

Here, by contrast, the record establishes that Ms. Roe was prescribed medical marijuana to treat intractable pain caused by chronic migraine headaches. TeleTech speculates that Ms. Roe “did not exhaust all standard medical treatments or medications for her migraines before seeking an authorization to use medical marijuana” and, therefore, a jury could conclude that she is not a qualifying patient. Respondent’s Brief at 47. TeleTech’s argument is fundamentally flawed.

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. Such a heightened standard would be both unreasonable and inhumane. Instead, MUMA requires only that a patient’s pain is “unrelieved by standard medical treatments.” RCW 69.51A.010(4)(b). Ms. Roe easily meets this standard. She and her doctors experimented with traditional medicines for more than a year before she was authorized to use medical marijuana. *See* CP 314-18. Indeed, Ms. Roe tried six different over-the-counter medications and four different prescription medications before seeking authorization to use medical marijuana. *Id.* None of these medications effectively treated her

migraines and many caused adverse side-effects. CP 261. For these reasons, Ms. Roe's physician advised her to discontinue all use of over-the-counter medicine to treat her migraines. See CP 317. The evidence in Ms. Roe's medical records conclusively establishes that her pain was "unrelieved by standard medical treatments and medications." MUMA requires nothing more.

TeleTech alleges that nothing in the record "suggest[s] that Dr. Orvald or Dr. Minter examined whether there were other standard medications that might relieve Plaintiff's headaches." Respondent's Brief at 48. TeleTech then offers its own lay opinion that Ms. Roe "did not give the Inderal time to take effect or for the rebound headaches to subside before turning to marijuana." *Id.* Neither TeleTech nor its counsel are licensed health care providers. They have not offered a shred of competent medical evidence to support these unfounded assertions. TeleTech's unqualified critique of the medical opinions and treatment decisions of Ms. Roe's licensed physicians cannot create a genuine material issue of fact as to whether she is a qualifying patient.

C. Oregon's *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries* Decision is Far Removed from this Case and Wrongly Decided.

In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, --- P.3d ---, 2010 WL 1490352 (Or. April 14, 2010), a divided

Oregon Supreme Court ruled that Oregon's disability discrimination statute did not require employers to accommodate their employees' medical use of marijuana. *Id.* at 1. In reaching that decision, the majority held that provisions of the Oregon Medical Marijuana Act authorizing medical use of marijuana are preempted by federal law. The majority's preemption analysis is fundamentally flawed and should not be adopted by this Court. The remaining legal issues raised by *Emerald Steel* have no bearing on this case.

Emerald Steel involved a disability discrimination claim brought under Oregon's state anti-discrimination law. The Bureau of Labor and Industries ("BOLI") brought the action on behalf of an employee who was terminated after disclosing that he used medical marijuana in compliance with the Oregon Medical Marijuana Act. In January 2003, the employee was hired on a temporary basis as a drill press operator for Emerald Steel, a manufacturer of steel products. *Id.* at 2. Emerald Steel was considering hiring the employee on a permanent basis and required him to take a drug test. *Id.* He informed his supervisor that he had a "registry identification card" and used medical marijuana in compliance with the Oregon Medical Marijuana Act.¹ One week later the supervisor fired him. *Id.*

¹ "Registry identification cards" are issued to individuals who are authorized to use medical marijuana under the Act. See ORS 475.302(10).

BOLI filed charges against Emerald Steel alleging that the company violated state anti-discrimination law by terminating the employee because of his disability and by failing to accommodate his disability. *Id.* at 2. BOLI did not argue that Emerald Steel's conduct violated either the Oregon Medical Marijuana Act or Oregon public policy.

The Oregon Supreme Court rejected BOLI's disability discrimination argument by a vote of five to two. Oregon's employment discrimination law provides that the statute's protections from disability discrimination "do not apply to any . . . employee who is currently engaging in the illegal use of drugs if the employer takes action based on that conduct." *Id.* at 6 (citing ORS 659A.124(1)). The term "illegal use of drugs" is defined to mean:

any use of drugs, the possession or distribution of which is unlawful under state law or under the federal Controlled Substances Act, as amended, but does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized under the Controlled Substances Act or under other provisions of state or federal law.

ORS 659A.122(2).

The Court concluded that the Oregon Medical Marijuana Act "affirmatively authorizes the use of marijuana for medical purposes, and, as a statutory matter, brings the use of marijuana for medical purposes

within one of the exclusions from the ‘illegal use of drugs’ in ORS 659A.122(2).” *Emerald Steel*, at 7. However, the Court went on to hold that “to the extent ORS 475.306(1) authorizes the use of medical marijuana, the Controlled Substances Act preempts that subsection.” *Id.* at 17.² As a result, the Court reasoned that no effective state law authorized the use of medical marijuana and, therefore, the employee was engaged in the “illegal use of drugs.” Accordingly, the majority held Oregon’s disability discrimination protections did not apply to the employee’s discharge and *Emerald Steel* prevailed. *Id.*

Emerald Steel differs from Ms. Roe’s case in at least three crucial ways. First, *Emerald Steel* does not address whether the Oregon Medical Marijuana Act requires employers to accommodate employees’ use of medical marijuana outside the workplace.³ The Court’s analysis focused instead on its reading of Oregon disability discrimination law. Second, unlike Oregon’s anti-discrimination law, Washington’s Law Against Discrimination does not exclude people engaged in illegal drug use from

² ORS 475.306(1) provides:

A person who possesses a registry identification card issued pursuant to ORS 475.309 may engage in . . . the medical use of marijuana only as justified to mitigate the symptoms or effects of the person’s debilitating medical condition.

³ ORS 475.340(2) provides: “Nothing in [the Oregon Medical Marijuana Act] shall be construed to require . . . An employer to accommodate the medical use of marijuana *in any workplace.*” (Emphasis supplied).

its coverage. *See* RCW 49.60. Thus, the central question addressed by the Oregon Supreme Court – whether a medical marijuana user is engaged in the “illegal use of drugs” – has no application to Washington law. Third, in contrast to Ms. Roe, the *Emerald Steel* employee held a safety-sensitive position as a drill press operator.

The *Emerald Steel* decision is not only distinguishable from this case, its preemption analysis is also deeply flawed. The *Emerald Steel* majority fundamentally misconstrued the law of federal preemption. The mere fact that state law permits conduct that federal law prohibits does not trigger preemption. 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). As the United States Supreme Court has recently reemphasized, “In all preemption cases, and particularly those in which Congress has legislated in a field which the states have traditionally occupied, we start with the assumption that the historic police power of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95, 173 L. Ed. 2d 51 (2009) (internal citation omitted).

Federal preemption of state law may only occur in one of three situations: (1) Congress passes a statute that expressly preempts state law

(express preemption); (2) Congress occupies the entire field of regulation (field preemption); or (3) state law creates an actual conflict with federal law (conflict preemption). *Stevedoring Servs. of America, Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996). Conflict preemption only occurs if: (1) it is physically impossible to comply with both state and federal law; or (2) state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.*

The *Emerald Steel* majority recognized that neither express preemption nor field preemption barred Oregon from enacting its Medical Marijuana Act. To the contrary, the Controlled Substances Act contains an “anti-preemption” provision that expressly provides that “states are free to pass laws ‘on the same subject matter’ . . . unless there is a ‘positive conflict’ between state and federal law ‘so that the two cannot consistently stand together.’” *Emerald Steel*, at 9 (quoting 21 U.S.C. § 903).⁴ The majority also acknowledged that “it is not physically impossible to comply with both the Oregon Medical Marijuana Act and the federal Controlled Substances Act.” *Id.* at 10. Indeed, the majority conceded, “To be sure,

⁴ 21 U.S.C. § 903 states in full:

No provision of the this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so.” *Id.* at 11. Nonetheless, the majority concluded that when state law affirmatively authorizes what federal law prohibits, the state law “stands as an obstacle to the implementation and execution of the full purposes and objectives” of the federal law. *Id.* This conclusion was in error.

In reaching that decision, the *Emerald Steel* majority relied on *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 116 S. Ct. 1103, 134 L. Ed. 2d 337 (1996), and *Michigan Cannery and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 104 S. Ct. 2518, 81 L. Ed. 2d 399 (1984). Neither case supports the majority’s conclusion. As the *Emerald Steel* dissent rightly concluded, both *Barnett* and *Michigan Cannery* stand for the proposition that a state law that prohibits or interferes with the exercise of a right guaranteed by federal law creates a direct conflict with that law and is preempted. *Emerald Steel*, at 23 (Walters, J, dissenting). Neither case addressed whether state laws that *permit* conduct that is prohibited by federal law are preempted.

Barnett addressed whether a federal statute that permits national banks to sell insurance in small towns preempts a state statute that forbids

them to do so. *Barnett*, at 27. The *Barnett* Court explained that “normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted.” *Id.* at 33. It held that a state law that prohibits or impedes a right that Congress expressly created plainly “stands as an obstacle to the accomplishment” of Congress’s objectives. *See id.* at 31.

Michigan Cannery addressed whether a state law which granted agricultural associations exclusive bargaining authority for the sale of certain agricultural products was preempted by a federal law protecting the right of individual producers to choose whether to bring products to market on their own or to sell them through a cooperative association. *Michigan Cannery*, at 464-65. The express intent of the federal law was to “shield producers from coercion” from associations and to protect the producers’ “exercise of free choice” and their “right to remain independent.” *Id.* at 473-74. The state law was in direct conflict with federal law because it “impose[d] on the producer the same incidents of association membership” that Congress intended to free them from. *Id.* at 478.

Barnett and *Michigan Cannery* stand for the proposition that a state law that prohibits or directly interferes with a right guaranteed by federal law is preempted. However, the converse is not necessarily true. State

law may permit conduct that federal law prohibits without creating a direct conflict between the two laws. Neither Oregon's Medical Marijuana Act nor Washington's MUMA permit state residents to violate the federal Controlled Substances Act. Nor do the statutes bar the federal government from continuing to enforce the federal Act. See *Emerald Steel*, at 18 (Walters, J. dissenting). Therefore, there is no actual conflict between the statutes and the state laws are not preempted.

The majority's conclusion that federal law preempts ORS 475.306(1)'s authorization of medical marijuana usage cannot be squared with its effort to preserve the sections of the statute that exempt medical marijuana users from criminal liability. See *Emerald Steel*, at 20-21 (Walters, J. dissenting). The majority stated, "In holding that federal law does preempt [ORS 475.306(1)], we do not hold that federal law preempts the other sections of the Oregon Medical Marijuana Act that exempt medical marijuana use from criminal liability." *Id.* at 7, n. 12. Nor did the majority foreclose the possibility that the legislature could write a differently-worded statute that could require employers to reasonably accommodate disabled employees who used medical marijuana to treat their disabilities, which would not be preempted by federal law. *Id.* Rather, the majority emphasized that its opinion "arises from and is limited to the laws that the Oregon legislature has enacted." *Id.*

If this Court were to adopt the *Emerald Steel* majority's flawed preemption analysis, it would have to strike down Washington's MUMA in its entirety, including the affirmative defense created by RCW 69.51A.040(1). There is no way to separate MUMA's affirmative defense from the statute's provisions authorizing the use of medical marijuana. The very purpose of MUMA was to permit qualifying patients to use medical marijuana in certain circumstances. Indeed, that statute is titled the Medical *Use* of Marijuana Act. The ballot title for Initiative 692 confirms that purpose. The ballot title read: "Shall the medical use of marijuana for certain terminal or debilitating conditions be *permitted*, and physicians *authorized* to advise patients about medical use of marijuana?" CP at 253 (emphasis supplied).

By definition, a qualifying patient cannot establish an affirmative defense under MUMA without being authorized by a physician to use medical marijuana. RCW 69.51A.040(1); RCW 69.51A.010(3)-(5). *See also State of Washington v. Fry*, 168 Wn.2d 1, 5, --- P.3d ----, (2010) (finding that I-692 "provided an *authorized user* with an affirmative defense" if the user complies with the Act) (emphasis supplied). Physicians, in turn, are excepted from liability and prosecution for "the *authorization* of marijuana use" to qualifying patients. RCW 69.51A.005 (emphasis supplied). If this Court were to follow the *Emerald Steel*

majority's reasoning and conclude that MUMA's authorization to use medical marijuana is preempted by federal law, it would have to invalidate the entire statute.

Moreover, *Emerald Steel* cannot be squared with *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d. 1 (2005), in which the Supreme Court examined the interplay between federal and state authority to regulate the medical use of marijuana. The question in *Raich* was whether the Congress even had the authority to enforce the CSA in states with laws permitting the medical use of marijuana. Three Justices would have held that federal prohibitions on the use of medical marijuana cannot be enforced in those states. *Id.* at 42-57 (O'Connor, Rehnquist and Thomas, JJ, dissenting). There is not one word in *Raich* suggesting that California's Compassionate Use Act is an invalid exercise of state power or preempted by federal law. To the contrary, the *Raich* Court recognized California as "a pioneer in the regulation of marijuana." *Id.* at 5. As the Oregon Attorney General rightly concluded, "*Raich* does not hold that state laws regulating medical marijuana are invalid nor does it require states to repeal existing medical marijuana laws." *Emerald Steel*, at 20 (Walters, J, dissenting) (quoting Attorney General's Letter of Advice dated June 17, 2005 to Susan M. Allen, Public Health Director, Department of Human Services). Indeed, the fact that the Controlled

Substances Act contains an anti-preemption provision demonstrates that Congress did *not* intend to prevent states from enacting drug laws that differed from federal law.

The only preemption question raised in the present case is whether MUMA's requirement that employers accommodate their employees' off-site use of medical marijuana conflicts with any obligations imposed on employers under federal law. The answer is a resounding "No." The fact that medical marijuana remains illegal under federal law is of no consequence to TeleTech. The company is not charged with enforcing federal criminal law. The Controlled Substances Act imposes no obligations on employers of individuals who use medical marijuana (or any drug) in violation of the Act. No law requires TeleTech to monitor its employee's drug use or maintain a drug-free workplace. The only law regarding medical marijuana that TeleTech is required to comply with is MUMA. TeleTech can comply with MUMA's mandate to accommodate off-site use of medical marijuana without violating federal law. Because both laws operate without conflict, MUMA is not preempted.

As the *Emerald Steel* dissenters explained: "One sovereign may make a policy choice to prohibit and punish conduct; the other sovereign may make a different policy choice not to do so and instead to permit, for the purposes of state law only, other circumscribed conduct." *Emerald*

Steel, at 26 (Walters, J, dissenting). Absent express preemption, which is not present here, “a particular policy choice by the federal government does not alone establish an implied intent to preempt contrary state law. A different choice by a state is just that – different.” *Id.* This is “federalism at work.” *Id.*

Washington has a long history of breaking with the federal government on important policy issues. *See* Appellant’s Opening Brief at 32-33. That history is a testament to our dual system of government. A ruling that MUMA is preempted by federal law would not only be legally wrong, it would also severely curtail the authority of the citizens and legislators of this state to make their own laws now and in the future.

D. Ms. Roe has Relied on the Same Washington Public Policy Throughout this Litigation.

In its Answer to *Amicus Curiae* Memorandum of the American Civil Liberties Union of Washington in Support of Petition for Review, TeleTech suggests that the basis for Ms. Roe’s public policy claim has changed over the course of this litigation. *Id.* at 2-3. That charge is unfounded. Both Ms. Roe and the ACLU rely on the same Washington public policy: MUMA’s express statement 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 and discretion.” RCW 69.51A.005. Ms. Roe and the ACLU have described that policy at different levels of specificity, but the public policy remains the same. There is nothing inconsistent about Ms. Roe’s wrongful termination claim. By terminating Ms. Roe solely because she used medical marijuana at home, under her physician’s supervision, and in full accordance with MUMA, TeleTech violated Washington public policy.

III. CONCLUSION

This Court should reverse the decision of the Court of Appeals and order the Superior Court to grant Ms. Roe’s summary judgment motion.

Respectfully submitted this 3rd day of May, 2010.

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