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SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

WILLIAM ANDREW KURTZ,

Appellant.

AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization with over 20,000 members that is dedicated to the preservation and defense of constitutional and civil liberties. It has particular interest and expertise in the areas of drug policy reform and criminal justice, and has long had extensive involvement in the development of Washington law concerning medical marijuana. The ACLU's interest in this matter is further detailed in the statement of interest contained in its Motion for Leave to File Amicus Curiae Brief filed herewith, which is hereby incorporated by reference.

II. INTRODUCTION

It is a fundamental and long-standing principle of law in Washington that a statute will not be interpreted as superseding the common law absent a clear and explicit expression of legislative intent in the statutory language or legislative history. Division Two's erroneous decision here that the common law medical necessity defense in marijuana cases was abrogated by statute, despite no indication of any such legislative intent, not only raises serious criminal justice and public health consequences but also threatens to erode this important tenet of statutory construction. The decision should be reversed.

In *State v. Butler*, Division Two summarily concluded – without any reasoning or analysis – that the Medical Use of Marijuana Act, RCW 69.51A.005 *et seq.* (the "Act"), superseded the common law medical

necessity defense that has been recognized in Washington for decades.[1] *See State v. Butler*, 126 Wn. App. 741, 750, 109 P.3d 494 (2005). In reliance on *Butler*, the trial court here excluded evidence of Defendant/Appellant William Kurtz's common law medical necessity defense at trial, and Division Two affirmed.

The decisions below (and the decision in *Butler*) were error because there is no legal basis for concluding that the Act superseded the common law defense. Critically, there is no indicia of any intent to supersede the common law medical necessity defense in the Act itself, and there was never any expression of any such intent by the voters who overwhelmingly passed the initiative that led to the original codification of the Act, or by the legislature that codified and has subsequently amended the Act on three separate occasions. To the contrary, the Act expressly provides that it does *not* address the medical necessity or medical appropriateness of marijuana use.

Nor is the Act inconsistent with the common law medical necessity defense such that it necessarily must be interpreted as abrogating the common law. Although certainly touching generally on the same subject matter (the use of substances for medicinal purposes), the statutory defense and the common law defense are not *contrary* or *repugnant* to one another; they can (and do) coexist. The common law provides a narrow

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[1] The Medical Use of Marijuana Act name was changed to the Medical Use of Cannabis Act in 2011, RCW 69.51A.900.

potential affirmative defense to a different and broader class of persons than those covered by the Act, which provides additional statutory protections to certain persons under the care of a licensed health care professional who have certain specified medical conditions (and is entirely silent as to whether other persons might have a medical necessity to use marijuana or whether they have a common law defense).

In the absence of any expression of intent for the Act to abrogate the common law defense – let alone the kind of clear and explicit statement of such intent that would be required for such abrogation by Washington law – the Court of Appeals erred in holding that the medical necessity defense had been abrogated and that Kurtz could not offer evidence to support his defenses. Accordingly, and for the reasons set forth herein, the ACLU as amicus curiae respectfully requests that this Court hold that the Act did not supersede the common law medical necessity defense, and reverse.

III. STATEMENT OF THE CASE

In 2010, police executed a search warrant at the home of Defendant/Appellant William Kurtz and found marijuana.[2] Kurtz contends that he used the marijuana to treat a serious medical condition. Kurtz was later charged with one count of manufacturing and one count of possession of marijuana with the intent to deliver.

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[2] This brief statement is based on the decision below and the briefing of the parties.

Before trial, the State sought to exclude any evidence supporting Kurtz's medical marijuana and medical necessity defenses. Kurtz objected based on his qualifying condition and his authorization for the use of marijuana from a medical doctor. Kurtz also submitted an offer of proof demonstrating that he suffered from a progressive hereditary disorder, that he used marijuana to treat his condition, and that the marijuana seized by the police was for this purpose. The trial court ruled that neither defense could be presented to the jury. The Court of Appeals (Division Two) affirmed. This appeal follows.

IV. ARGUMENT

As discussed below, it is a well-settled tenet of statutory construction in Washington that a statute does not supersede the common law unless there is an express and clear indication of an intent to do so in the statute itself or in the legislative history. This rule is premised in part on Washington's fundamental respect for and commitment to the common law – a commitment that has existed as law in Washington since long before it became a state.

Here, there is no evidence whatsoever that the Act was intended to supersede the common law. To begin with, nothing in the language of the Act itself suggests that it was intended to supersede the common law medical necessity defense. To the contrary, if anything the text and purpose of the Act suggest that it was *not* intended to supersede common law rights. Nor is there any indication that the people who voted for the initiative that was codified as the Act or the legislature that codified and

amended the Act on three occasions ever intended the Act to abrogate common law rights. Moreover, the Act and the common law are not contradictory to one another so as to preclude them from coexisting. In the absence of any such proof, and consistent with long-standing Washington law, it is clear that the Act did not supersede the common law medical necessity defense.

A. The Common Law Defense of Necessity and the Medical Use of Marijuana Act

Washington has long recognized the common law defense of necessity. *See, e.g., State v. Diana*, 24 Wn. App. 908, 917, 604 P.2d 1312 (1979) (collecting common law necessity defense cases); *see also, e.g., State v. Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995) (recognizing necessity as a defense to the crime of unlawful possession of a firearm). The defense was first articulated in a case involving marijuana more than thirty years ago in *State v. Diana*, 24 Wn. App. 908, 604 P.2d 1312 (1979), and was thereafter repeatedly recognized and applied in similar matters by Washington trial and appellate courts. *See, e.g., State v. Pittman*, 88 Wn. App. 188, 193-97, 943 P.2d 713 (1997); *State v. Cole*, 74 Wn. App. 571, 578, 874 P.2d 878 (1994), *overruled by State v. Williams*, 93 Wn. App. 340, 347, 968 P.2d 26 (1998).

In 1998, nearly twenty years after the courts of this state began applying the medical necessity defense in marijuana cases, the voters of Washington passed Initiative 692 ("I-692"), which authorizes the medical use of marijuana by "qualifying patients" in certain instances. RCW

69.51A. The text of I-692 explained that the People enacted the initiative out of compassion for those with terminal or debilitating illnesses, stating:

> 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.

I-692, Sec. 2 (previously codified at RCW 69.51A.005 (1999)). The Act has since been amended on three occasions – in 2007, 2010, and 2011. Laws of 2011, ch. 181, eff. July 22, 2011; Laws of 2010, ch. 284, eff. June 10, 2010; Laws of 2007, ch. 371, eff. July 22, 2007. The Act ensures that certain individuals who use marijuana for medical purposes are not found criminally liable for doing so. It is entirely silent as to the existing common law medical necessity defense, and nothing in I-692 or the Act itself indicates that the statute was intended to supersede any common law rights.

B. Absent Express Legislative Intent, a Statute Does Not Supersede Common Law.

For more than 150 years, it has been the settled law of Washington that the common law is binding unless inconsistent with and repugnant to constitutional or statutory law.[3] The modern version of this rule is now codified at RCW 4.04.010, which provides:

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[3] *See* Laws of 1873, Civil Practice Act, ch. 1, §1 (stating that "the common law of England, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States and the organic act and laws of Washington Territory, shall be the rule of decision in all the courts of this Territory"); Laws of 1856, Act to Repeal the Laws of Oregon Territory, §1 (stating that "the common law, in all civil cases, except where otherwise provided by law, shall be in force").

> The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

RCW 4.04.010.

In accord with this fundamental principle of Washington law, "[i]t is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be *clear and explicit* for this purpose." *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008) (internal quotation omitted) (emphasis added); *see also, e.g.*, *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994) ("[A] statute will not be construed in derogation of the common law unless the Legislature has *clearly expressed* its intention to vary it.") (emphasis added). As this Court has explained, "the Legislature is presumed to know the existing state of the case law in those areas in which it is legislating[.]" *Price*, 125 Wn.2d at 463. Accordingly, the "legislature will not be presumed to intend to overturn long-established legal principles of law . . . unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication." *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 26, 380 P.2d 730 (1963); *see also, e.g.*, *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982) ("In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be

presumed to be in line with the prior judicial decisions in a field of law.") (emphasis added); *In re Marriage of Williams*, 115 Wn.2d 202, 208, 796 P.2d 421 (1990) (same). These rules of construction apply to both statutes and initiatives. *See Roe v. Teletech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 746, 257 P.3d 586 (2011).

This Court has consistently applied these principles to hold that statutory enactments have not superseded the common law in the absence of an express statement in the statutory language or legislative history that the common law was to be abrogated. For example, in *Van Dyke v. Thompson*, 95 Wn.2d 726, 630 P.2d 420 (1981), this Court found that a statute did not supersede common law where "[n]othing in the legislative history indicates such an intention" and the statute itself was silent on the issue. *Id.* at 730. This Court reasoned: "If the legislature had intended the departure from the common law urged by defendants, it could have chosen clear, unambiguous language." *Id.* Likewise, in *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982), this Court held that a statute did not supersede common law because no "expression of intent to change the case law is contained in the statutory language." *Id.* at 888. Numerous other decisions of this Court are in accord. *See, e.g.*, *McNeal v. F.F. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980) (upholding trial court's finding that a statute did not supersede common law because the statute "reveals no legislative intent to abrogate the common law"); *State v. Fischer*, 23 Wn. App. 756, 759, 598 P.2d 742 (1979) (finding that "the provisions of the new criminal code were not intended to abrogate

common law self-defense requirements"); *Green Mountain Sch. Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 161, 351 P.2d 525 (1960) ("There is no statutory provision which in any way expresses an intention to substitute it for [the common law]."); *see also, e.g.*, *Williams*, 115 Wn.2d at 208; *State v. Calderon,* 102 Wn.2d 348, 351, 685 P.2d 1293 (1984).

C. There Is No Evidence Overcoming the Presumption that the Act Did Not Abrogate the Common Law Medical Necessity Defense.

There is no indicia of any intent for the Act to supersede the common law medical necessity defense, let alone the kind of express, clear, and unambiguous statement of such an intent that would be sufficient to overcome the legal presumption that the defense continues to exist. The Act itself contains absolutely no statement even remotely indicative of any intent to abrogate the medical necessity defense. Indeed, to the contrary, the Act indicates that it simply does not speak to the issue of medical necessity, providing: "Nothing in this chapter establishes the *medical necessity* or medical appropriateness of cannabis for treating terminal or debilitating medical conditions as defined in RCW 69.51A.010."[4] RCW 69.51A.005 (emphasis added). Although the legislative history is silent as to the intent behind this provision, its plain language appears contradictory to the notion that the Act was intended to abrogate the defense of medical necessity. Moreover, there is no

[4] Notably, this statutory language was added in the 2011 amendments to the Act and is not found in the original initiative or original codification by the legislature of the initiative. Laws of 2011, ch. 181, § 102, eff. July 22, 2011.

indication whatsoever in the legislative history, committee reports, or floor debates that the Act was intended to supersede the common law. Nor is there evidence of any such intent in the original I-692, and in fact the purpose of the initiative – compassion for those with serious medical conditions who use marijuana medicinally – is inconsistent with the notion that the Act would secretly (without any express statement it was doing so) impose new limitations on the existing common law rights of such individuals.[5]

In summary, there is absolutely no evidence that the legislature or the voters who passed I-692 intended for the Act to supersede the common law medical necessity defense, and the legal presumption in favor of common law rights continuing to exist has not been overcome. Consistent with well-established principles of statutory construction, the Act did not supersede the common law.

D. The Common Law is Not Contradictory to the Act.

Notwithstanding the lack of any evidence that the Act was intended to abrogate the common law medical necessity defense, Division Two concluded in *State v. Butler* and here that the defense no longer exists

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[5] Division Two has reasoned in an unpublished decision that the Act was silent as to any intent to overrule the medical necessity defense because this Court had already ruled in *Seeley v. State*, 132 Wn.2d 776, 798, 940 P.2d 604 (1997), that the defense no longer existed. *See State v. Stephens*, No. 38412-4-II, 2010 Wash. App. Lexis 567, at *20 (Mar. 16, 2010) (this case is listed for reference only and not as precedent). But this Court has never made any such ruling and in fact the medical necessity defense was not even at issue in *Seeley*. In *Seeley*, this Court recognized that *State v. Diana* had established "a medical necessity defense to a criminal marijuana possession charge," but did not overturn *Diana* or otherwise hold that the defense no longer existed. *See Seeley*, 132 Wn.2d at798.

because it was somehow inconsistent with the Act. *Butler*, 126 Wn. App. at 750. This conclusion was reached without any reasoning or analysis, and is wrong. The Act and the common law can (and do) coexist.

Under Washington law, a statute will not be interpreted as necessarily abrogating the common law unless its provisions are "*so inconsistent with and repugnant to* the prior common law that both *cannot* simultaneously be in force." *Potter*, 165 Wn.2d at 77 (emphasis added). In other words, the statute and common law will be found to coexist unless they "cannot" coexist – i.e., unless they are so contradictory to one another that no possible interpretation would allow Washington courts to enforce both. *Id.*; *see also* Black's Law Dictionary 689 (5th ed. 1979) (defining "inconsistent" as "mutually repugnant or contradictory").

Importantly, the mere fact that a statute and the common law touch on the same subject matter is not a basis for concluding that the statute supersedes the common law. Indeed, a statute almost always addresses an issue that was previously addressed by common law and Washington law requires that the common law be allowed to stand so long as there is some way to interpret it consistently with the statute. As this Court long ago explained and has repeatedly affirmed:

> No statute enters a field which was before entirely unoccupied. . . . Whether the statute affirms the rule of the common law upon the same subject, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law; for in this way alone is it possible to reach a just appreciation of its purpose and effect. Again, the *common*

> *law must be allowed to stand unaltered as far as is consistent with the reasonable interpretation of the new law.*

In re Tyler's Estate, 140 Wn. 679, 689, 250 P. 456 (1926) (emphasis added), *superseded by statute on other grounds as stated in In re Welch's Estate,* 200 Wn. 686, 94 P.2d 758 (1939); *see also, e.g., Green Mountain,* 56 Wn.2d at 161 (stating the "settled rule" that "the common law must be allowed to stand unaltered as far as is consistent with the reasonable interpretation of the new law") (citation omitted).

Here, the Act did not abrogate the common law medical necessity defense because, although touching on the same subject matter, the Act and the common law defense are not inconsistent or contradictory. Indeed, even the State recognizes here that the defenses afforded by the medical necessity defense and the Act are not contradictory. Supplemental Brief of Respondent at 11. The Act provides additional, clear statutory protections for "qualified patients," defined in part as those using marijuana under the care of a licensed health care professional who have been diagnosed by that health care professional as having a certain defined "terminal or debilitating medical condition." RCW 69.51A.010 (defining "qualified patient") & RCW 69.51A.040 (setting forth the affirmative defense). The common law medical necessity defense, by contrast, provides a potential affirmative defense to a broader class of people. The common law defense could apply to all persons (not just statutorily defined patients) who are using a medicinal substance (not just

marijuana) to treat any number of medical conditions (not just statutorily defined conditions), assuming they are able to satisfy their burden of establishing the elements of the narrow affirmative defense. *See Pittman*, 88 Wn. App. at 193-96 (discussing elements of medical necessity defense); *Jeffrey*, 77 Wn. App. at 225 (discussing elements of necessity defense generally). It does not contradict the Act that such persons may also have a defense to criminal conviction (particularly given that the Act was enacted out of compassion for those with medical conditions and without any indication of an intent to limit common law rights).

For these reasons, the Act is not so inconsistent with or repugnant to the common law medical necessity defense so as to render the common law defense necessarily abrogated. *See Cushman v. Cushman*, 80 Wn. 615, 619-20, 142 P. 26 (1914) ("[T]his statute, being merely cumulative or supplementary to the common law, does not displace that law any further than is clearly necessary."); *cf. Bundrick v. Stewart*, 128 Wn. App. 11, 17, 114 P.3d 1204 (2005) (finding statute and common law not inconsistent where they each protected "different values"). The continued existence of the defense should be confirmed.

V. CONCLUSION

For the reasons set forth herein, the ACLU as amicus curiae respectfully requests that this Court hold that the Medical Use of Marijuana Act, RCW 69.51A.005 et seq., did not supersede the common law medical necessity defense.

Respectfully submitted this 13th day of September, 2012.

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DECLARATION OF SERVICE

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Dear Clerk of the Court:

Attached for filing please find the following:

- MOTION OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOR LEAVE TO FILE AMICUS CURIAE BRIEF; and

- AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Thank you,

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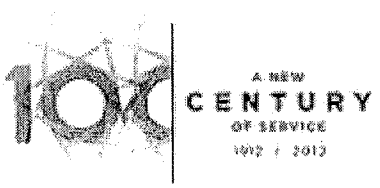

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