

# DRUG POLICY ALLIANCE

Reason. Compassion. Justice.

November 28, 2005

**Via Hand Delivery**

California Supreme Court  
350 McAllister Street, Suite 1295  
San Francisco, CA 94102

RE: *Ross v. Ragingwire Telecommunications, Inc.* (Petition for Review filed October 17, 2005) California Supreme Court No. S138130, California Court of Appeal No. CO43392

To The Honorable Chief Justice and Associate Justices:

I write on behalf of the Drug Policy Alliance, as *Amicus Curiae*, to urge the Court to grant the petition, filed October 17, 2005 by Gary Ross, seeking review of the decision of the Court of Appeal, Third Appellate District, in *Ross v. Ragingwire Telecommunications, Inc.* (2005) 132 Cal. App. 4th 590.

The question this case presents is of great importance to the many thousands of Californians whom the Compassionate Use Act, Health & Safety Code § 11362.5, was enacted to help: whether an individual with a disability, who is qualified to perform essential job duties, may be denied employment for the sole reason that the treatment of his medical condition includes use of marijuana, pursuant to a physician's recommendation, during non-working hours and off employer premises.

The Court of Appeal held that California employers may maintain a policy of per se exclusion of disabled persons in these circumstances – without any showing that their medical treatment affects job performance or workplace safety in any way. According to the court, the protections provided under California's Fair Employment and Housing Act (FEHA), Gov. Code, § 12900 *et seq.*, to persons with disabilities are categorically unavailable to individuals who use physician-recommended marijuana – because such therapeutic use, while expressly authorized by State law, is “illegal under federal law,” 132 Cal. App. 4th at 595. The court further held that terminating a disabled individual's employment solely on account of doctor-supervised medical marijuana use offends no fundamental public policy of the State, reasoning that the Compassionate Use Act was meant to do no more than stay the hands of State prosecutors.

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In so ruling, the Court of Appeal committed a number of serious errors, on questions of broad legal and practical significance, which should not be permitted to stand. The State's fair employment laws – and its Constitution – stand against the notion that a private employer may dictate the medical treatment for an employee's disabling condition, overruling the medical judgment of that individual's physician – without any proven business justification, let alone a compelling one. And in recognizing a "right," Health & Safety Code § 11362.5(b)(1)(A), to use marijuana in appropriate medical treatment, the People of California did not mean to create a second class of citizenship, where individuals with serious illnesses would not be *jailed* for pursuing medically appropriate treatment – but could nonetheless be denied the right to earn a living or to live where they please for having done so.

## Interest of the Amici Curiae

The Drug Policy Alliance is the leading drug policy reform organization in the United States. With 25,000 individual members and offices across the Nation – including four in California – the Alliance has played – and continues to play – a central role in efforts, in this State and others, to bring marijuana regulation in line with medical reality, educating the public, their elected representatives, and courts concerning the scientific evidence of marijuana's medical benefits.

The Alliance (through its predecessor organizations) was part of the coalition that secured passage of the Compassionate Use Act in 1996; and since then, it has worked to assure that the Act is implemented and interpreted consistently with its core premise – that irrational, scientifically untenable assumptions about marijuana should not stand in the way of needed, medically appropriate treatment for individuals with serious illness. In addition to advocating legislation and administrative regulations aimed at making the rights and policies underlying the Act a reality, the Alliance, through its Office of Legal Affairs, has represented patients, caregivers, doctors, public health organizations, and local governments in cases before this Court, see, e.g., *People v. Mower* (2002) 28 Cal. 4th 457, and in federal courts, see, e.g., *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, concerning the scope of the protections afforded under State law and the legality of federal government efforts to interfere with California's policy choice.

Because we believe that the Third District's decision is incompatible with the individual rights and public benefits whose recognition is at the core of the Compassionate Use Act and are concerned that it will impede achievement of that law's basic aims, the Alliance respectfully submits this letter brief.

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## Reasons Why Review Should Be Granted

Under the Court of Appeal’s decision, workers and job applicants with disabilities may be compelled to choose between employment opportunity and medical treatment – without any inquiry as to whether their adherence to the physician-recommended course of treatment would burden the employer in any way, let alone a showing that such a burden is “undue” – or that accommodating the individual’s disability would frustrate a “compelling” need.

This Court should grant review to make clear that such plenary power is impermissible under the plain terms of the FEHA and is contrary to the basic policies expressed in that law, the Compassionate Use Act, and in the State Constitution – and that nothing in federal law requires or supports a different result.

### A. Excluding Individuals From Employment Based on Their Medical Treatment *Is* Unlawful Disability Discrimination

Consistent with its broad objectives of assuring that individuals with disabilities are not unjustifiably excluded from the economic mainstream and that the State’s economy receives the contributions of all who are capable of working productively, see Gov. Code § 12920, the FEHA does not enumerate an exhaustive list of particular prohibited practices, instead setting forth general *standards* for courts to apply to *every* practice challenged as excluding a qualified disabled individual from employment.<sup>1</sup> Under these rules, the employee need not prove that a policy is illegitimate or irrational as *a general matter*; rather, the FEHA provides that even generally legitimate employment practices must be modified so as to accommodate an applicant’s or employee’s disability, see Gov. Code § 12940(m), unless the employer can show that doing so would entail “undue hardship,” *id.*; see also *id.* § 12993(a) (“The provisions of [the FEHA] shall be construed liberally for the accomplishment of [its] purposes”).

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<sup>1</sup>In attaching significance to the Legislature’s supposed “failure” to address specifically employer drug-use prohibitions, see, *e.g.*, 132 Cal. App. 4th at 605 (“[t]he initiative says nothing about protecting the employment rights” of individuals who use marijuana in compliance with State law), the decision failed to appreciate this basic feature of the *FEHA*’s operation. In any event, as explained below, the Legislature *did* consider the effect of the Compassionate Use Act on employment law – essentially endorsing the reasonableness of prohibitions on marijuana use during working hours and/or on employer premises. See Health and Safety Code § 11362.785(a).

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The Court of Appeal's decision erred in failing to recognize that these legislatively established standards govern Mr. Ross's statutory claim, and its reasons for doing so reflect a serious misunderstanding of the Compassionate Use Act and of the relationship between State and federal law.

## 1. The Employer Did Not – And Plainly Could Not – Establish That Accommodating Mr. Ross's Disability Would Be An Undue Hardship

There is no question how the FEHA framework would operate in the case of an employer's policy restricting therapeutic use of a "lawful" medication: a qualified disabled individual would be entitled to an exception – unless the employer could show that permitting the individual to use the drug would result in undue hardship or jeopardize workplace safety. See, e.g., *Christian v. St. Anthony Medical Center, Inc.* (7th Cir. 1997) 117 F.3d 1051, 1052 (employer must accommodate disabling effects of medical treatment that is "require[d], in the prudent judgment of the medical profession"). Nor is there any real question that these rules, if applied here, would ultimately entitle Mr. Ross to relief. Even if Respondent could show that Mr. Ross's medically-supervised marijuana use during non-working hours had *any* appreciable adverse effect on job performance or workplace safety, cf. 132 Cal. App. 4th at 596-97 (accepting complaint's allegation that medical treatment had no negative effect), it is unimaginable that it could further show that any such effects rise to the level of undue hardship. Putting aside the distinct importance *to the employee* of controlling his own medical treatment, see *infra*, medical science forecloses any serious argument that the adverse effects to *the employer's interests* of treatment with marijuana are greater than those associated with the alternatives its policy would allow – *i.e.*, (1) leaving the disabling condition untreated, see, e.g., Nat. Inst. Neurological Disorders & Stroke, Low Back Pain Fact Sheet at 1 (noting that "Americans spend at least \$50 billion each year on low back pain, the most common cause of job-related disability and a leading contributor to missed work") and/or (2) taking medications that, unlike marijuana, are prescribable under federal law (ones which Mr. Ross and his physician found less effective, see 132 Cal. App. 4th at 596), see Low Back Pain Fact Sheet at 1 (noting that medications "often prescribed to manage severe acute and chronic back pain are associated with "drowsiness, decreased reaction time, impaired judgment, and potential for addiction").

Indeed, the irrationality of limiting individuals to treatments that are both less beneficial *and* more impairing was highlighted by proponents of the Compassionate Use Act, whose official ballot argument expressly urged, "IF DOCTORS CAN PRESCRIBE MORPHINE, WHY NOT MARIJUANA?" ([Capitalized in original], Ballot Pamp., Gen. Elec. (Nov. 5, 1996) Argument in Favor of Proposition 215, p. 60). The Legislature amended FEHA in 2000 for a

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similar reason: to encourage disabled Californians to pursue effective treatment, by sparing them the “Catch-22” situation created by the United States Supreme Court’s construction of the Americans with Disabilities Act, see *Sutton v. United Air Lines, Inc.* (1999) 527 U.S. 471 – where individuals who are “too ill” to work without “mitigating measures,” lose statutory protection if a treatment makes them “too well,” *i.e.*, unable to satisfy the stringent test for “disability.” See Gov. Code § 12926.1(c); see also *Pettus v. Cole* (1st Dist.1996) 49 Cal. App. 4th 402 (an employer violates employee’s rights under the California Constitution by “requir[ing him] to submit to an unwanted and unnecessary course of medical treatment as a condition of continued employment”).

Nor do the general observations concerning employee drug use found in this Court’s opinion in *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, see 132 Cal. App. 4th at 599 (quoting 14 Cal. 4th at 865), establish that the accommodation sought in this case would be “beyond the realm of the reasonable,” 132 Cal. App. 4th at 599. The *Loder* decision, obviously, did not address this individual employee’s physician-recommended use of marijuana – or address medical use of marijuana generally. Rather, the language quoted by the Court of Appeal summarized ““problems . . . associated with the *abuse* of drugs and alcohol by employees”” and ““illegal drug use.”” See *id.* (emphasis added). But the whole thrust of the Compassionate Use Act, both its premise and its operative effect, is to acknowledge that, like other medications, marijuana can be medically appropriate treatment – and to draw a sharp line between medical use, pursuant to physician recommendation, and possession for other reasons, which remains prohibited under State (as well as federal) law. See *Mower*, 28 Cal. 4th at 482 (equating possession of marijuana in compliance with Compassionate Use Act to “the possession . . . any prescription drug with a physician’s prescription”). Similarly, accepting that an ““employer. . . has a legitimate . . . interest in ascertaining whether persons to be employed in any position currently are abusing drugs or alcohol,”” 132 Cal. App. 4th at 599 (quoting *Loder* at 882), does not support the conclusion below. That it may be permissible to *test* applicants for marijuana – or drugs, such as methadone or morphine, which have illegal (as well as therapeutic) uses – does not establish the lawfulness of terminating the employment of an individual with a disability whose “positive” result on a drug screen reflects medically appropriate, physician-recommended use.<sup>2</sup>

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<sup>2</sup>The Court of Appeal’s decision further speculated that a policy of excluding employees who use marijuana with a doctor’s recommendation might be justified by the possibility that any such recommendation may have been obtained through ““misrepresentation to the physician regarding [the applicant’s] physical well being.”” 132 Cal. App. 4th at 599 (quoting *McDaniel v. Mississippi Baptist Medical Center* (S.D. Miss.1994) 869 F. Supp. 445, 449). But as the

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Nor was the Court of Appeal correct to suggest that enforcing the FEHA as written would create tension with the State’s Drug Free Workplace law, Gov. Code § 8350, let alone present employers with a “Hobson’s Choice,” 132 Cal. App. 4th at 603. It is patently clear from the language of the relevant statutes that the accommodation Mr. Ross actually sought – to continue to use marijuana medically off company premises and on his own time – raises no conflict with the Drug-Free Workplace Act. But cf. 132 Cal. App. 4th at 602 (invoking “circumstances[,] not entirely speculative” of disabled employee asserting right to bring marijuana to the workplace). In fact, any potential tension between the statutes was foreseen – and resolved – by enactment of Health and Safety Code § 11362.785(a), which provides that “Nothing in [the Compassionate Use Act] shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment.” It was only by re-writing the Complaint (as asserting a right not advanced, *i.e.*, “to possess medicinal marijuana at the workplace,” 132 Cal. App. 4th at 603) *and* the demurrer (which did not assert that Respondent was or intended to be a State contractor) – *and* overlooking this directly pertinent statutory provision – that the decision was able to identify “problems” with giving the FEHA its proper, legislatively-intended effect.

## 2. The Decision Fundamentally Mistook The Significance of Federal Criminal Law To The Questions of *State Employment Law* Actually Presented

The principal reasons given for sustaining the employer’s action, however, relate to federal law. The Court of Appeal held that accommodating Mr. Ross’s disability was “beyond the realm of the reasonable” for FEHA purposes, 132 Cal. App. 4th at 599, because medical use of marijuana is “illegal under federal law,” 132 Cal. App. 4th at 595 – and observed, as well, that an employee who uses marijuana medically might not be a “qualified individual with a disability” for purposes of federal employment law, see *id.* at 605 (discussing 42 U.S.C. § 12114(a)).

But assertions that Mr. Ross’s possession of marijuana for medical purposes is not “exempt from federal criminal statutes,” 132 Cal. App. 4th at 602, or that he could not sue under

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authority the decision itself cited illustrates, this risk of misrepresentation is not particular to marijuana, see *McDaniel* – and neither the court below nor the employer cited any substantiation for the assumption that such patient deception is significant with respect to marijuana, let alone greater than for other drugs. Indeed, the decision’s freewheeling speculations concerning the adequacy of the safeguard mechanism gives drastically short shrift to the policy judgments reflected on the face of the Act.

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the ADA cannot settle the question actually presented here. There is no claim under the federal statute. See Gov. Code § 12926.1(a) (“the law of this state in the area of disabilities provides protections independent from” and “additional [to]” the “floor of protection” established by the federal statute).<sup>3</sup> Nor is Respondent prosecuting Ross criminally. See *People v. Tilekooh* (3d Dist. 2003) 113 Cal. App. 4th 1433, 1446 (“State tribunals have no power to punish crimes against the laws of the United States, *as such*”) (emphasis in original); *Mower*, 28 Cal. 4th at 465 n.2 (federal law “has no bearing upon the question[s] presented, which involve state law alone”).

Nor, significantly, is there any real contention that construing the FEHA to require accommodation of Mr. Ross’s disability would actually *conflict* with federal law. No federal statute *requires* California employers to fire employees who use marijuana off-premises as part of medical treatment. See 54 Fed. Reg. 4946-01 (Jan. 31, 1989); *Parker v. Atlanta Gas Light Co.* (S.D. Ga. 1993) 818 F. Supp. 345, 347.). Thus, whether it might be “unreasonable” *per se* to seek an accommodation that would entail the employer’s *violating* federal law, that situation is not presented here. Federal law simply does not “apply” to Ross’s claim, compare 132 Cal. App. 4th at 602; both the right asserted and the defenses of “[un]reasonable accommodation” and “undue hardship” are “solely . . . creature[s] of state law,” *Tilekooh*, 113 Cal. App. 4th at 1446.<sup>4</sup>

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<sup>3</sup>The *policies* underlying the cited ADA provision plainly do not support denying relief here: (1) the ineligibility worked by § 12114 derives directly (indeed, is little more than a restatement of) the California-rejected federal “determination” that marijuana use can never be medically appropriate, *see infra*, and (2) reflects the premise (also accepted in California law, see Gov. Code § 12926) that use of drugs *in connection with a substance abuse disorder* is behavior that requires treatment, not accommodation. But marijuana use in compliance with the Compassionate Use Act is not a symptom of a condition *requiring* treatment; it *is* treatment.

<sup>4</sup>Even if California law were not crystal clear concerning bringing marijuana to the workplace, see *supra*, the decision’s invocation of the specter of an “employer’s workplace being subject to a search conducted by federal authorities pursuing an employee’s violation of federal criminal laws,” warrants careful analysis. Surely, the possibility that “federal authorities” – who convict some 186 individuals for simple marijuana possession annually out of the 28.5 million they estimate use the drug, see Office of Nat’l Drug Control Policy, Marijuana Fact Sheet 4 (Feb. 2004) – would actually “pursue” a violation (an offense that carries a civil penalty, 21 U.S.C. 844a(A)) by searching the “suspect’s” place of work is infinitesimal. But even were that staggeringly unlikely circumstance to occur, it is hardly self-evident that the employer’s interest in avoiding such a search – one, presumably, that would consist primarily of opening the

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The Court of Appeal nonetheless assumed that, as a matter of State law, private employers have a uniquely strong, essentially plenary, power to refuse employment to an individual whose off-duty private conduct offends federal marijuana possession law – that their interest in limiting employment to individuals who abide by that law, *unlike other presumptively legitimate employer interests*, trumps the protections California affords individuals with disabilities. This premise, whatever its surface appeal, cannot withstand careful scrutiny.

As a logical matter, the fact that Congress conferred on *federal prosecutors* authority to bring criminal charges against disabled persons who possess marijuana for medical reasons, see *Gonzales v. Raich* (2005) 125 S. Ct. 2195 – a power whose exercise, as a practical matter, is tempered by the need to obtain the concurrence of twelve individual jurors before punishment may be imposed – simply does not establish that it intended for private *employers* to wield unchecked discretion to deprive such individuals employment. As a matter of law, courts – mindful of the fundamental differences between the policies served by antidiscrimination law and by criminal law and of the very different roles and responsibilities of private employers and public prosecutors – have long rejected broad assertions that *any* illegal conduct by an employee triggers an automatic forfeiture of antidiscrimination protections, *i.e.*, that courts have “no legitimate authority,” 132 Cal. App. 4th at 604, under fair employment law to provide relief to individuals whose private conduct violates a criminal prohibition. See, e.g., *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804 (federal anti-discrimination law requires employer to rehire black individual who violated the law if “white employees involved in [unlawful] acts . . . of comparable seriousness . . . were . . . retained or rehired”). Indeed, courts have rejected such arguments even in areas of law (1) where the federal interest is especially strong; (2) where Congress unambiguously directed that private employers play a law enforcement role; and (3) where the employee wrongs were directed at the employer. See, e.g., *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal. App. 4th 833, 849 (“plaintiff’s status as an undocumented alien does not bar her from the protections of employment law”); *Farmers Bros. Coffee v. Workers’ Comp. Appeals Bd.* (2005) 133 Cal. App. 4th 533, 538; see also Bus. & Prof. Code § 480(a) (prior conviction may support license denial “only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made”); Labor Code § 432.7 (prohibiting employers from giving any effect to applicant’s participation in pre- or post-trial diversion program). Even in the context of probation – a judicial setting, where Due Process protections apply, involving individuals who have already been duly convicted of a crime and in which conditions that impinge on constitutional rights are permissible – blanket directives to comply with “all laws” have been reviewed to assure they are “reasonably related to the crime of

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individual employee’s locker or desk drawers – should suffice to justify a blanket exclusion of disabled employees.

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which the defendant was convicted or to future criminality,” *Tilekooch*, 113 Cal. App. 4th. at 1433 – and have been rejected for failing that test. See *id.* (refusing to enforce probation condition against individual medical marijuana user); cf. *People v. Bianco* (3d Dist. 2001) 93 Cal. App. 4th 748, 754 (sustaining probation condition barring marijuana use as “directly related to defendant’s criminal offense and . . . reasonably related to the goal of ensuring that defendant does not commit subsequent criminal offenses under California law”).<sup>5</sup>

And for obvious reasons, an employer’s abstract interest in a workforce whose private conduct is “law-abiding” is at its nadir where, as here, the “violation” at issue – the only arguably “illegal” off-duty conduct to which the employer seeks to attach a heavy sanction – has been expressly recognized to be *a right* by the People of California, see *Tilekooch* 113 Cal. App. 4th at 1446 (“There was no contention in [*People v. Beaudrie* (1983) 147 Cal. App. 3d 686] that a state law barred the imposition of a sanction for the conduct made a violation of the federal law”).

Indeed, the *reasons* why possession of medical marijuana is “illegal” under federal law – but medical use of other drugs is not – highlight the incongruity of the rule embraced below.<sup>6</sup> Many drugs that have strong potential to impair performance and safety are not controlled at all – because they are not prone to abuse nor dependence, see 21 U.S.C. § 812; *Christian*, 117 F.3d at 1052 (noting potentially disabling effects of chemotherapy), and the federal government’s *asserted* basis for distinguishing between marijuana and drugs subject to less restrictive, but nonetheless stringent, controls (*e.g.*, morphine) – has nothing to do with considerations of job performance or safety. See *United States v. Oakland Cannabis Buyers’ Cooperative* (2001) 532 U.S. 483, 491 (emphasizing that “for purposes of the Controlled Substances Act,” Schedule II drugs, but not marijuana, have been determined to have some “currently accepted medical use”) (quoting 21 U.S.C. § 812). Of course, that judgment is precisely the one from which California (and numerous other States – and the overwhelming weight of expert medical

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<sup>5</sup>Although *Bianco* alternatively held that State courts have plenary power to compel probationers to comply with federal law, the same court’s later decision in *Tilekooch* rejected that reasoning, noting that *Bianco*’s understanding of the law predated this Court’s decision in *Mower*. Notably, the decision in this case cited only *Bianco*, but not *Tilekooch*.

<sup>6</sup>While it may be assumed, for purposes of this analysis, that medical *use* of marijuana – as distinct from possession – is within the federal prohibition, the court in *Tilekooch* properly observed, see 113 Cal. App. 4th at 1441 n. 11, that that proposition is not self-evident from the statutory text. See also *id.* n. 9.

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opinion) have dissented. See *supra*.<sup>7</sup>

## B. Termination of Employment Because an Individual Refuses To Conform Medical Treatment For a Serious Illness to an Employer's Standards Is Contrary to Fundamental Public Policies

As the review petition explains, the Court of Appeal's rejection of Ross's common law tort claims is also infected by serious legal error.

First, in refusing to recognize that the claim asserted *is* "tethered to fundamental policies that are delineated in constitutional or statutory provisions," *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889, the decision gave no effect to the policy evident from the face of the FEHA – and distinct from the federal law – of encouraging people with disabilities to pursue the most effective "mitigating measures," Gov. Code § 12926.1(c), without fear that doing so will forfeit the protections (especially the right to reasonable accommodation) afforded by the statute. This specific rule – reflective of the overarching aim of assuring that individuals who are able to contribute to the State's economy are not unjustifiably excluded – is flouted by an employer policy that conditions employment on an individual's foregoing the medical treatment that he and his physician have found most to be most effective (and tolerable).

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<sup>7</sup>Although the Supreme Court held that the federal Controlled Substances Act, in which marijuana was initially placed along side heroin and LSD on Schedule I, should be construed *as if* it reflects a legislative finding of "lack of current accepted use," see 532 U.S. at 493, it acknowledged that no such finding was actually made, *id.* As even a growing number of federal court opinions have been constrained to recognize, that proposition – whatever its status under federal law – is, as a matter of medical science, simply counterfactual. See *Raich*, 125 S. Ct. at 2212 n.37; *Conant*, 309 F.3d at 640-43 (Kozinski, J., concurring); see generally NAT. ACAD. OF SCIENCES, INST. OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (1999).

To be sure, marijuana's legal status also reflects a (presumptive) determination of "a high potential for abuse," 21 U.S.C. § 812(b)(1) – but that characteristic does not distinguish it from morphine or other drugs permitted, see *id.* § 812(b)(2), and in fact highlights the legislatively-recognized *difference* between "abuse," which raises substantial employer concerns, and medical treatment – which can sometimes affect performance – but which must, in the absence of special hardship, be accommodated.

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More startling still is the decision's narrow reading of the Compassionate Use Act. By its express terms, that law *does not* "simply permit[] a person to use marijuana for medicinal purposes . . . without incurring state criminal law sanctions," 132 Cal. App. 4th at 595. Rather, *in addition to* seeking to "ensure that patients . . . are not subject to criminal prosecution or sanction," Health & Safety Code § 11362.5(b)(1)(C), the Act *further* recognizes "that seriously ill Californians have *the right* to obtain and use marijuana for medical purposes," Health & Safety Code § 11362.5(b)(1)(A) (emphasis added); see generally *Pettus*, 49 Cal. App. 4th at 464 (common law action for wrongful termination in violation of public policy lies, *inter alia*, when employer's action was a sanction for "exercising (or refusing to waive) a statutory or constitutional right or privilege") – a right expressly tied to scientific evidence establishing the benefits of marijuana "in the treatment of [among other conditions] cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, [and] migraine." § 11362.5(b)(1)(A). Moreover, in view of the evidence that, for significant numbers of individuals suffering serious illness, marijuana has uniquely beneficial effects, the Act goes further still, announcing a policy of affirmatively "encouraging . . . safe and affordable distribution of marijuana to all patients in medical need." *Id.* It would be extraordinary enough if State law permitted private employers to punish individuals for taking actions off-duty that State law expressly "encourage[s]" – but it is all the more so here, given that the "conduct" at issue involves obtaining beneficial, potentially life-saving *medical treatment*.

Finally, the decision stands in square conflict with precedent holding that Article I, Section 1 of the California Constitution denies private employers the power to dictate an employee's choices concerning his own medical treatment, overruling his physician's medical judgment "that the person's health would benefit." Health & Safety Code § 11362.5(b)(1)(A). See *Pettus v. Cole* (1996) 49 Cal. App. 4th 402. As in *Pettus*, Mr. Ross – and any other individual who uses marijuana in compliance with the Compassionate Use Act – has:

an 'autonomy privacy' interest in making intimate personal decisions about an appropriate course of medical treatment for his disabling . . . condition, without undue intrusion or interference from his employer. . . . [W]e are aware of no law or policy which suggests that a person forfeits his or her right of medical self-determination by entering into an employment relationship. . . . it 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 461.

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For those same reasons, the policy at issue here is an “an egregious breach of the social norms underlying the privacy right,” *id.* at 443 (quoting *Hill v. NCAA* (1994), 7 Cal.4th 1, 37), one that may only be sustained by a showing – surely impossible here – that it is truly necessary to accomplish a “compelling” purpose, which could not be achieved through any less intrusive means, *id.*

Conclusion

For the foregoing reasons, the Court should grant the petition for review.

Respectfully submitted,

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