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2 East 14th Avenue, Denver, CO 80203</td><td rowspan="3"></td></tr>
<tr><td>Colorado Court of Appeals Cases12CA0595 & 12CA1704
Opinion by Davidson, CJ., Marquez, J., concur. Webb, J. dissents.

District Court of Arapahoe County
The Honorable Elizabeth Volz
Case Number 2011CV1464</td></tr>
<tr><td>Petitioner:

BRANDON COATS

v.

Respondent:

DISH NETWORK, LLC</td></tr>
<tr><td>Counsel for Amicus Curiae:
Kimberlie K. Ryan, #28124
Ryan Law Firm, LLC
Mail: 283 Columbine St. #157
Denver, CO 80206
Telephone: (303) 355-0639
Email: kim@ryanfirm.com</td><td>σ COURT USE ONLY σ

Case Number:

2013SC000394</td></tr>
<tr><td colspan="2">BRIEF AMICUS CURIAE OF
THE COLORADO PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI</td></tr>
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CERTIFICATE OF COMPLIANCE

The undersigned certifies this brief complies with C.A.R. 53's word limit and 32's formatting requirements. According to the computer word processing program, it is within the 3800 word limit at 3637 words, excluding appendix.

By: s/Kimberlie K. Ryan
Kimberlie K. Ryan, #28124
For Ryan Law Firm, LLC
Mail: 283 Columbine St. #157
Denver, CO 80206
Telephone: (303) 355-0639
Email: kim@ryanfirm.com

Counsel for Amicus Curiae
The Plaintiff Employment
Lawyers Association

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Letter, Dr. Robert A. Petzelto Michael Krawitz, (July 6, 2010)

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Colorado Plaintiffs Employment Lawyers Association (PELA) is the State of Colorado's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving employment civil rights violations. Founded in 1989, PELA is a nonprofit organization created to increase public awareness of the rights of individual employees and workplace fairness, while promoting the highest standards of professionalism and ethics. PELA is dedicated to preserving laws protecting workers from unfair labor practices including unlawful employer interference with off-duty conduct.

PELA is committed to protecting workers with disabilities and enforcing laws guaranteeing protections against disability discrimination, including the Colorado Anti-Discrimination Act, C.R.S. § 24-34-402.5 (2012)("CADA"). To further this goal, PELA's attorney members act as private attorneys general assisting in the enforcement of the anti-discrimination laws. *See N.S. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (Congress has cast anti-discrimination plaintiffs in the role of private attorneys general, vindicating a policy "of the highest priority").

Historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, discrimination against individuals

with disabilities continues to be a serious and pervasive social problem, according to the Congressional findings and purposes supporting the Americans with Disabilities Act (ADA). *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2013). Discrimination against individuals with disabilities persists in employment, and these individuals continually encounter various forms of discrimination, including outright intentional exclusion and failure to make modifications to existing practices. *Id*.

The proper goals of state and federal laws are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals. *See id*. The continuing existence of unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and costs billions of dollars in unnecessary expenses resulting from dependency and non-productivity. *Id*.

Because this case strikes at the heart of disabled workers' access to their Constitutionally-authorized medical treatments, and addresses the limits of employer interference in off-the-job medical decisions of workers where there is no evidence of a negative impact on work performance, the importance of this decision cannot be overstated.

REASONS AMICUS BRIEF IS DESIRABLE

Amicus curiae has considerable experience addressing legally protected employment rights in the State of Colorado. The ruling of the lower court threatens workers' rights which this *amicus* strives to protect. It also conflicts with statutory protections and with workers' abilities to access a medical treatment authorized by the State Constitution. As subject matter experts with extensive experience litigating employment civil rights laws, PELA brings a unique perspective that would assist the Court.

Full and equal employment opportunities are of critical interest to the residents of the State of Colorado and society as a whole. Unlawful employer interference in workers' lawful off-duty and off-premises conduct is a well-established legal protection in the State of Colorado. By wrongly narrowing the meaning of "lawful activities" for the purposes of the Lawful Activities Statute, the Court of Appeals would open the door for employers to engage in unfair labor practices in contravention of Colorado's statutes and Constitution by dictating the off-duty medical activities of employees under threat of job loss for hundreds of thousands of medical patients with debilitating medical conditions.

This case is of great concern to *amicus*, as the Petition raises significant substantive issues of interest for workers who live their lives overcoming

debilitating medical conditions while fighting to remain productive members of society. These workers daily must step out of the shadows of the very stereotypes and biases CADA and the ADA were enacted to eliminate. The Court of Appeals' decision departs from the well-established purposes of the statute, as well as Colorado's public policies promoting equal employment opportunities and freedom from unwarranted employer intrusions into workers' off-duty conduct.

This case has the potential to impact hundreds of thousands of Colorado workers and their families. A record number of Colorado residents and citizens have exercised their rights to use marijuana for medical purposes over the past 13 years. According to Amendment 20, "patient" is defined as a person who has a debilitating medical condition. Colo. Const. art. XVII, §14(4)(d) (2013). Since the registry began operating in June 2001, 217,465 patient applications have been received, according to the Colorado Department of Public Health and Environment. *See* Colo. Dep't of Pub. Health & Env't, Ctr. for Health & Envt'l Info. & Statistics, Medical Marijuana Registry Program Update (April 30, 2013), *available at* http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044 (retrieved July 5, 2013). The total number of patients who currently possess valid Registry ID cards is 107,262. Sixty-seven

percent of approved applicants are male. *Id*. The average age of all patients is 41. *Id*. More than 800 physicians have signed for current patients in Colorado. *Id*.

At this time, "debilitating medical conditions" includes: 1) cancer, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), or treatment for such conditions; 2) a chronic or debilitating disease or medical condition, or treatment for such conditions, which produces one or more of the following, and for which, in the professional opinion of the patient's physician, such condition reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those characteristic of epilepsy; persistent muscle spasms, including those characteristic of multiple sclerosis; or 3) any other medical condition, or treatment for such condition, approved by the state health agency pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided. *See* Colo. Const. art. XVIII, § 14(1)(a)(2013). This case is important because the numbers of participating patients in the State are likely to increase substantially over time as new medical conditions are listed.

It is estimated that nearly 458,000 Colorado residents, or 10% of Colorado's population, are considered to be individuals with disabilities, using the ADA definition and the Census, and significant employment disparities exist between

individuals with disabilities and those without. *See* Exhibit 1, attached, Colorado Cross Disability Coalition Statistics (2011).

Amicus respectfully seeks a ruling that Colorado law does not permit an employer to deprive an employee with a debilitating medical condition of his livelihood based on the employer's unlawful prohibition of the employee's exercise of his right to minimize his severe pain and suffering by using a medical treatment authorized by the Colorado Constitution and recommended by his physician, and as approved by Colorado's implementing statutes and regulatory model.

SUMMARY OF ARGUMENT

Although PELA supports Petitioner's request that certiorari be granted as to both issues, this *amicus* brief addresses only the first issue presented by the Petition; namely, whether Colorado's Lawful Activities Statute protects employees from discriminatory discharge for lawful use of medical marijuana outside the job where the use does not affect job performance.

While both Petitioner and Justice Webb in his dissent argue that the lawfulness of Petitioner's use of medical marijuana should be determined solely by reference to state law, this approach is not required in order for this Court to reach the conclusion that Petitioner's termination violated Colorado's Lawful Activities

Statute. Not only was Petitioner's use of medical marijuana undoubtedly "lawful" under state law as set forth in the Petition for Certiorari, but as shown below, the U.S. Department of Justice also has decided as a matter of policy not to prosecute Petitioner or other medical marijuana patients in unambiguous compliance with state law, regardless of the language of the Controlled Substances Act, 21 U.S.C. § 812 (2006)("CSA"). Moreover, the Court of Appeals' construction of C.R.S. § 24-34-402.5 leads to an absurd result inconsistent with both the language and the purpose of the statute and the Colorado Constitution.

ARGUMENT

1. State-licensed medical marijuana use is "lawful activity" under both federal and state law for the purposes of Section 24-34-402.5.

The Colorado Lawful Activities Statute is part of CADA and prohibits an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during nonworking hours," subject to certain exceptions. C.R.S. § 24-34-402.5. Despite the fact that CADA is a remedial statute which is to be interpreted liberally in light of its protective purposes, the Court of Appeals applied a narrow dictionary definition to the term "lawful" to determine its "ordinary" meaning and found that "an activity that violates federal law but complies with state law cannot be 'lawful' under the ordinary meaning of that term." *Coats v. DISH Network, LLC*, 2013 COA 62, at *5 (Colo. App. April

25, 2013); *see also Watson v. Pub. Serv. Co. of Colo.*, 207 P.3d 860, 864 (Colo. 2008) (Act is a "remedial statute" that "should be broadly construed" to accomplish its objective).

According to the court, since "all marijuana use was prohibited by federal law" at the time of Mr. Coats' termination from employment, his claim for violation of C.R.S. § 24-34-402.5 must be dismissed. *Coats*, 2013 COA 62, at *3. This conclusion is erroneous as a matter of law.

As a practical matter, the federal government does not treat the personal use of medical marijuana in compliance with state law as "unlawful." On the contrary, the federal government has taken the position that it will not prosecute medical marijuana patients, such as Mr. Coats, whose "actions are in clear and unambiguous compliance with existing state law providing for the medical use of marijuana." *See* Exhibit 2, Memorandum from Deputy Attorney General David W. Ogden to Selected United States Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), at 2.

Similarly, in 2011, Deputy Attorney General James M. Cole reiterated that the position of the federal government remains "unchanged" and that the U.S. Department of Justice continues to take the position that federal resources should not be devoted to enforcing the CSA against "individuals with cancer or other

serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers." *See* Exhibit 3, Memorandum from Deputy Attorney General James M. Cole to United States Attorneys (June 29, 2011), at 1.

Although the Court of Appeals cites *Gonzales v. Raich*, 545 U.S. 1, 29 (2005), for the proposition that "all marijuana use was prohibited by federal law" at the time of Mr. Coats' termination, this is an overstatement of the actual holding. *Raich* did not hold that California's Compassionate Use Act of 1996 was invalid, nor did it hold that federal law preempts state law regarding medical marijuana. Nor did *Raich* say that federal officials must prosecute patients. Instead, the Court denied a motion for injunctive and declaratory relief asking to prohibit the enforcement of the CSA and to return six marijuana plants seized by federal agents. *See id*, at 5-9 (Commerce Clause authorizes Congressional action).

At the time of the 2005 *Raich* decision only nine states authorized medical marijuana programs. At present, a total of eighteen states, plus Washington, D.C., have legalized medical marijuana under state law, including Colorado, Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

The federal government has permitted implementation of all of these states' medical marijuana programs. The federal government has not attempted to invalidate any of the state programs after *Raich*. As a result, Colorado's program has operated successfully for more than 13 years.

The federal government has shown similar deference to states' medical marijuana laws in other contexts. The U.S. Department of Veteran Affairs has drawn a clear distinction between the "use of illegal drugs, and *legal medical marijuana*" in its pain management agreements with veterans. *See* Exhibit 4, Letter from Dr. Robert A. Petzel to Michael Krawitz (July 6, 2010) (addressing VHA's policy regarding the practice of prescribing opioid therapy for pain management for veterans using medical marijuana pursuant to state law) (emphasis added).

The evidence in this case, viewed in the light most favorable to Mr. Coats, establishes that at all relevant times, in accordance with the federal Attorney General Memoranda and the other federal and state guidance and legal authorities cited herein, Mr. Coats was in unambiguous compliance with the law. Mr. Coats possessed a valid Colorado state-issued marijuana card. *See* Record PDF at 15; 124, ¶17; 143, ¶1. He used and possessed equal to or less than the amount permitted by Colorado law. *See id.* at 124, ¶17, 143, ¶1. A state-approved

Colorado physician diagnosed and recommended marijuana use to Mr. Coats as a patient after a legitimate examination. *See id.* at 27, ¶2; 124, ¶ 17; 143, ¶1.

There is no evidence that Mr. Coats ever was accused, much less found guilty of violating any state or federal law; indeed he never was arrested. In fact, DISH never accused or suspected Mr. Coats of being intoxicated or under the influence while on company property, whether before, during, or after work hours. *Id.* at 36, ¶5; 151, ¶¶1-2. Mr. Coats limited his use of medical marijuana to the privacy of his home. *Id.* at 28, ¶3; 173, ¶2. He never possessed or used medical marijuana while on company property. *Id.* at 28, ¶3; 125, ¶19; 143, ¶1.

Given that the federal government has taken the position that it will not prosecute or otherwise penalize individuals who use medical marijuana in accordance with state law, Mr. Coats should be permitted to seek redress under Colorado's Lawful Activities statute for his termination for participating in the Colorado Medical Marijuana Registry Program under the supervision of his physician. There is no evidence or suggestion that any federal statute requires the termination of his employment under these circumstances. There has been no finding that he violated state or federal law, and it is undisputed that there was no performance-based justification for his termination. *See Coats*, 2013 COA 62, at

*1 (“Nothing in the record indicates that defendant had any other justification for the discharge”).

2. The Court of Appeals’ construction of C.R.S. § 24-34-402.5 leads to an absurd result inconsistent with both the language and the purpose of the statute and the Colorado Constitution.

When construing a statute, the court should not follow a statutory construction that leads to an absurd result. *See Colo. Dept. of Soc. Servs. v. Bd. of City Comm'rs*, 697 P.2d 1 (Colo. 1985) (words and phrases should be given effect according to their plain and ordinary meaning, “*unless* the result is absurd”) (*emphasis added*). The legislative purpose and the objects sought to be accomplished by the enactment always are to be borne in mind in the interpretation of a statute. *City & County of Denver v. Holmes*, 300 P.2d 901, 903 (Colo. 1965). And the court should not adopt an interpretation which produces absurd, unreasonable, unjust, or oppressive results, if such interpretation can be avoided. *Id.* (*citing* Am. Jur. *Statutes*, §§ 370,377) (“it is stated that a *construction should be avoided which renders the statute unfair or unjust in its operation, where the language of the statute does not compel such a result*”) (*emphasis added*).

To determine whether state-licensed use of medical marijuana is “lawful activity” within the meaning of the Colorado Lawful Activities Statute, the Court should consider the object sought to be attained, the circumstances under which the

statute was enacted, the legislative history, laws upon the same or similar subjects, the consequences of a particular construction, the administrative construction of the statute, and the legislative declaration or purpose. *See* C.R.S. § 3-4-203.

The legislative history of the off-duty conduct statute reflects a desire to protect employees' autonomy in their off-the-job activities, such as smoking and eating patterns that lead to obesity. *See Coats*, 2013 COA 62, at *24. In light of those protections, it cannot be doubted that the legislature had an even greater interest in protecting private medical choices that alleviate medical patients' severe pain and debilitating conditions. *Amicus* is unaware of any Colorado case that has reached so far into an employees' private medical decisions, especially where there is no evidence that the recommended medical treatments had no impact on their jobs.

Able-bodied employees are not put into this position, and no other Colorado decision so blatantly discriminates between disabled and non-disabled workers by penalizing disabled employees for following the treatment decisions recommended by their doctors. *C.f., Pettus v. Cole*, 57 Cal.Rptr. 2d 46, 84-85 (Cal. Ct. App. 1996) ([“N]o law or policy . . . suggests that a person forfeits his or her right of medical self determination by entering into an employment relationship . . . Indeed,

it would be unprecedented to hold that an employer may dictate to an employee the course of medical treatment he or she must follow, under pain of termination... “).

Additionally, this Court should consider the purpose and intent of Colorado’s Amendment 20, which “amends the Colorado Constitution to legalize the medical use of marijuana for patients who have registered with the state” to “alleviate pain and suffering.” *See* Colo. Legis. Council, Research Pub. No. 475-0, An Analysis of 2000 Ballot Proposals (2000), at 4. Allowing an employer with an alleged “zero-tolerance” drug policy to permit no exemptions for state-authorized medical patients would lead to the absurd result that employees with debilitating medical conditions could be terminated from employment based solely on their off-duty, Constitutionally-authorized medical treatments.

This would eviscerate the purpose of the Colorado Confidential Medical Marijuana Registry Program by effectively creating a scenario in which the medical marijuana treatments would be available only to the unemployed. Such an outcome would be contrary to well established public policies of full employment, and would leave some of our State’s most vulnerable citizens with no means of personal financial support.

Workers’ personal medical decisions would be left to the whims of their employers, who could prevent individuals from following their doctor’s

recommendations to treat their debilitating medical conditions through threats of job losses and actual deprivations of their livelihoods, important health insurance benefits, and even unemployment benefits. *See Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 978 (Colo. App. 2011). This Court should uphold the letter and the spirit of CADA's Lawful Activities Statute and should fully enforce the Act to protect employees from unwarranted employment discrimination based on their medical marijuana treatments.

CONCLUSION

For the reasons stated herein, PELA respectfully requests this Court to grant the Petition for Writ of Certiorari in this case, reverse the Colorado Court of Appeals decision below, and rule in favor of Petitioner Mr. Brandon Coats.

Dated: July 5, 2013

Respectfully submitted,

Kimberlie K. Ryan
For RYAN LAW FIRM, LLC
Mail: 283 Columbine Street #157
Denver, CO 80206
Telephone: (303) 355-0639
E-mail: Kim@ryanfirm.com
Counsel for Amicus Curiae
The Plaintiff Employment Lawyers Association

CERTIFICATE OF MAILING

I certify that on July 5, 2013, I E-Filed a copy of this BRIEF AMICUS CURIAE OF THE COLORADO PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to:

Attorneys for Petitioner:
Michael D. Evans, Atty. Reg. #39407
THE EVANS FIRM, LLC
4610 South Ulster St., Suite 150
P.O. Box 371896
Denver, CO 80237
(303) 221-3634 (Telephone)
(303) 221-3063 (Fax)
info@theevansfirm.com

Thomas K. Carberry # 19707
149 West Maple Avenue
Denver, Colorado 80223
(303) 722-3929 (Telephone)
(303) 929-0067 (Cellular)
tom@carberrylaw.com

Attorneys for Defendant-Appellee:
Meghan W. Martinez, #26295
Martinez Law Group, PC
720 South Colorado Blvd. Suite 530-S
Denver, Colorado 80246
(303) 597-4000
(303) 597-4001
martinez@barmarlaw.com

s/Kimberlie K. Ryan
Kimberlie K. Ryan, #28124
For Ryan Law Firm, LLC
On Behalf of Amicus Curiae
The Plaintiff Employment Lawyers Association