DATE FILED: July 19, 2013 3:24 PM
FILING ID: 1B4646248F5FD

SUPREME COURT, STATE OF COLORADO
Court Address:
2 East 14th Avenue
Denver, Colorado 80203

Colorado Court of Appeals
Case No. 12CA0595
Opinion Announced: Apr. 25, 2013
Opinion By: Honorable Janice B. Davidson, Chief Judge

Arapahoe County District Court
Case No. 11CV1464
Honorable Elizabeth B. Volz, Judge

Petitioner: Brandon Coats

Respondent: DISH Network L.L.C.

Attorneys for Respondent:

NAMES: Meghan W. Martinez, #26295
Ann E. Christoff, #42032
Elizabeth Imhoff Mabey, #30136
Drew D. Hintze, #41391
ADDRESS: MARTINEZ LAW GROUP, P.C.
720 South Colorado Blvd.
South Tower, Suite 530
Denver, CO 80246
PHONE: (303) 597-4000
FAX: (303) 597-4001
EMAIL: martinez@mlgrouppc.com
christoff@mlgrouppc.com
mabey@mlgrouppc.com
hintze@mlgrouppc.com

COURT USE ONLY

Supreme Court Case No:
2013SC000394

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203 Colorado Court of Appeals Case No. 12CA0595 Opinion Announced: Apr. 25, 2013 Opinion By: Honorable Janice B. Davidson, Chief Judge Arapahoe County District Court Case No. 11CV1464 Honorable Elizabeth B. Volz, Judge **Petitioner:** Brandon Coats **Respondent:** DISH Network L.L.C. Attorneys for Respondent: NAMES: Meghan W. Martinez, #26295 Ann E. Christoff, #42032 Elizabeth Imhoff Mabey, #30136 Drew D. Hintze, #41391 ADDRESS: MARTINEZ LAW GROUP, P.C. 720 South Colorado Blvd. South Tower, Suite 530 Denver, CO 80246 PHONE: (303) 597-4000 FAX: (303) 597-4001 EMAIL: martinez@mlgrouppc.com christoff@mlgrouppc.com mabey@mlgrouppc.com hintze@mlgrouppc.com	**COURT USE ONLY** Supreme Court Case No: 2013SC000394
CERTIFICATE OF COMPLIANCE	

I hereby certify that this brief complies with all requirements of C.A.R. 53, C.A.R. 32, and C.A.R. 28, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 53(c).

Chose one:

☒ It contains 3,792 words.

☐ It does not exceed 12 pages.

MARTINEZ LAW GROUP, P.C.

By: */s/ Meghan W. Martinez*
Meghan W. Martinez, #26295

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. FACTUAL BACKGROUND 2

II. PROCEDURAL HISTORY 3

REASONS FOR DENYING THE PETITION 4

I. CERTIORARI IS UNWARRANTED. 5

A. The Grounds for Certiorari Under C.A.R. 49 Do Not Exist. 5

B. Coats' Issue(s) Are Policy Determinations for the Legislature. 6

II. THE COURT OF APPEALS CORRECTLY FOUND THAT COATS' MARIJUANA USE IS NOT "LAWFUL" UNDER FEDERAL LAW. 7

A. Marijuana Use Is Illegal Under Federal Law. 7

B. The Statute's Plain Meaning Mandates that Coats' Marijuana Use Is Not "Lawful." 8

C. The Legislature Did Not Intend for the Statute to Protect Schedule I Drug Use. 9

D. No Preemption Issue Exists. 12

E. Refraining from Federal Prosecution of Medical Marijuana Users Does Not Affect the CSA's Enforceability or Equate to Legality. 13

III. THE TRIAL COURT CORRECTLY FOUND THAT COATS' MARIJUANA USE WAS NOT "LAWFUL" UNDER STATE LAW. 14

A. The MMA Does Not "Legalize" Medical Marijuana. 14

B. Colorado Presumes Employment At-Will. 16

IV. THE COURT OF APPEALS PROPERLY REFRAINED FROM MAKING POLICY. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

In re B.B.O.,
277 P.3d 818 (Colo. 2012).....8

Bd. of Cnty. Comm'rs of Weld Cnty. v. Nineteenth Judicial Dist.,
895 P.2d 545 (Colo. 1995).....7, 18

Beinor v. Indus. Claim Appeals Office,
262 P.3d 970 (Colo. Ct. App. 2011), cert. denied,
2012 WL 1940833 (Colo. May 29, 2012) 5, 6, 7, 15

City of Colo. Springs v. Powell,
156 P.3d 461 (Colo. 2007).....3

Con't Air Lines, Inc. v. Keenan,
731 P.2d 708 (Colo. 1987).....16

DISH Network Corp. v. Altomari,
224 P.3d 362 (Colo. Ct. App. 2009).....8

Employers Ins. of Wausau v. RREEF USA Fund-II (Colo.), Inc.,
805 P.2d 1186 (Colo. Ct. App. 1991).....11

Gonzales v. Raich,
545 U.S. 1 (2005).....7, 9, 12

In re Marriage of Paige,
282 P.3d 506 (Colo. 2012).....10

Mason v. People,
932 P.2d 1377 (Colo. 1997).....10

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996).....12

Montez v. People,
269 P.3d 1228 (Colo. 2012).....10

People v. Sexton,
296 P.3d 157 (Colo. Ct. App. 2012) cert. denied,
2013 WL 119781 (Colo. Jan. 7, 2013) 5, 15

People v. Watkins,
282 P.3d 500 (Colo. Ct. App. 2012), cert. denied,
2012 WL 1940753 (Colo. May 29, 2012) 5, 15

In re Rent-Rite Super Kegs West Ltd.,
484 B.R. 799 (D. Colo. 2012).....13

Roe v. Teletech Customer Care Mgmt. (Colo.) LLC,
2011 WL 2278472 (Wash. June 9, 2011).....17

St. Croix v. Univ. of Colo. Health Sci. Ctr.,
166 P.3d 230 (Colo. Ct. App. 2007).....16

Town of Telluride v. Lot Thirty–Four Venture, L.L.C.,
3 P.3d 30 (Colo. 2000).....7, 18

Turbyne v. People,
151 P.3d 563 (Colo. 2007).....8

United States v. Washington,
887 F.Supp.2d 1077 (D. Mont. 2012).....12

Watson v. Pub. Serv. Co. of Colo.,
207 P.3d 860, 864 (Colo. 2008) 10

Statutes

C.R.S. §18-18-406.3 15

C.R.S. §22-30.5-104 10

C.R.S. §24-34-402.5 .....1, 8

21 U.S.C. §801, et seq.....7, 9, 13

21 U.S.C. §812, Schedule I, §(c)(10), (17) 7

21 U.S.C. §844 7

Other Authorities

Apr. 26, 2011 Letter from U.S. Attorney John F. Walsh to Attorney General John Suthers 14

C.A.R. 49 ..... 4, 5, 6

Colo. Const. art. XVIII §14 ..... 1, 6, 15

Colo. Const. art. XVIII §16 ..... 3, 16

Colorado Legislative Council, Research Pub. No. 475-6, An Analysis of the 2000 Statewide Ballot Proposals 14

Hearings Before the House Agric. Comm., House Bill 1123, Tape 1, Track 1 9

Hearing on H. B. 1123 (Feb. 7, 1990) (hearing before House on Third Reading), Tape 1:035-040 11

8 J.A. Simpson & E.S.C. Weiner, THE OXFORD ENGLISH DICTIONARY 717 (2d ed. 1991) 8

Labor & Employment, http://www.colorado.gov 16

Martin Gardner, BLACK'S LAW DICTIONARY (9th ed. 2009) 8

Memorandum for Selected United States Attorneys from Deputy Attorney General David W. Ogden 13, 14

U.S. CONST. amend. XV ("Tenth Amendment") 12

INTRODUCTION

In 2010, Brandon Coats ("Coats") was randomly selected for a drug test by his employer, DISH Network L.L.C. ("DISH"). He tested positive for tetrahydrocannabinol ("THC"), the psychoactive ingredient in marijuana, which was and remains illegal under federal law. Coats acknowledged he failed, then defiantly told DISH he would continue to use marijuana and fail future drug tests. Consistent with its drug-free policy and the at-will nature of the parties' employment relationship, DISH discharged Coats.

Coats sued, alleging DISH violated Colorado's Lawful Off-Duty Conduct Statute, C.R.S. §24-34-402.5 (the "Statute"), when it terminated his employment. Coats argued his use of marijuana was "lawful" conduct under the Statute, relying on Colo. Const. art. XVIII §14 (the Medical Marijuana Amendment/"MMA"), despite the fact **the MMA only creates an affirmative defense** to criminal prosecution and **does not "legalize" marijuana**.

Coats' claim was dismissed. For separate reasons, both the trial court and Court of Appeals found that marijuana is not a "lawful" activity under the Statute.

Now, Coats petitions this Court to write new language into the Statute so as to render his illegal conduct protected. His accompanying arguments fail, for several reasons:

- Coats' policy arguments are not a matter for **judicial** determination;
- The lower courts correctly decided that Coats' marijuana use is not a "**lawful**" activity under the Statute. The plain meaning and legislative history of the Statute mandate that an activity that expressly violates federal law and is not legalized by the MMA cannot be "**lawful.**"
- Requiring an employer to employ someone who violates federal law eviscerates Colorado's at-will employment doctrine.
- Such an interpretation of the Statute yields absurd results.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Coats' Petition lists "facts" he claims are undisputed. Coats never alleged many of them before, nor has DISH admitted them. Further, this matter was decided prior to the commencement of discovery, so many allegations are unproven (including whether Coats was ever intoxicated at work). DISH therefore does not admit, nor should the Court accept, Coats' "Material Facts."

The following facts are undisputed, as stated in DISH's Motion to Dismiss:

- DISH hired Coats as a customer service representative in July, 2007 (42632592_Final-draft-of-coats-motion-to-dismiss--MWM--1, CD page 27);

- Coats' employment was at-will (id.);
- on May 21, 2010, Coats submitted to a random drug test (id. at CD page 28);
- Coats conceded to DISH that he was using marijuana (id.);
- Coats' marijuana use was off-duty and off-premises (id.);
- Coats tested positive for THC (id.);
- Coats met with DISH multiple times about his marijuana use (id.); Coats told DISH he "plan[ned] to continue using marijuana" and "would continue to render positive drug test results" (id. (citing Aug. 3, 2010 Letter from Katie Shortsleeve to Coats));
- on June 7, 2010, DISH terminated Coats' employment (id.).

II. PROCEDURAL HISTORY

On August 12, 2011, Coats filed a lawsuit alleging DISH's termination of his employment violated the Statute. Coats alleged his marijuana use was a "legally permissible activity" under the MMA.[1] DISH moved to dismiss.

On February 29, 2012, the District Court dismissed the complaint as a matter of law, finding that marijuana use is not "lawful" under state law: "the effect of

[1]Amendment 64 (enacted as Colo. Const. art. XVIII §16), legalizing recreational marijuana in Colorado, is not at issue here. It was passed on November 6, 2012, years after Coats' termination, and did not become effective until December 10, 2012. It is not retroactive. See City of Colo. Springs v. Powell, 156 P.3d 461, 464 (Colo. 2007).

the amendment [is limited] as an affirmative defense to criminal prosecution. The amendment does not make the use of marijuana a lawful activity, so as to preclude an employer from termination based on this conduct." (46548064_ORDER-re--Coats-v-Dish-Network-11cv1464--Motion-to-Dismiss--Medical-Marijuana-, CD page 175.) Coats appealed.

The Court of Appeals affirmed dismissal of the complaint on different grounds. Observing that marijuana remains **illegal** under federal law, the Court determined that Coats' marijuana use cannot be a "lawful" activity:

> [A]n activity that violates federal law but complies with state law cannot be "lawful" under the ordinary meaning of that term. Therefore, applying the plain and ordinary meaning, the term "lawful activity" in section 24-35-402.5, means that the activity – here, plaintiff's medical marijuana use – must comply with both state and federal law.

(Ct. of Appeals Op. at 6.)

REASONS FOR DENYING THE PETITION

Several independent bases exist to deny certiorari: First, none of the C.A.R. 49 reasons for granting certiorari exist, and the "Issue**(s)**" Coats raises are (at most) a matter for the legislature. Second, the Court of Appeals correctly decided that Coats' activity was **not** "**lawful**" because **it violated federal law**. Third, the District Court correctly decided that Coats' marijuana use was **not** "**lawful**" under existing **Colorado law**. Fourth, Colorado public policy mandates that employers

be allowed to enforce their drug policies, and not be required to alter the at-will employment doctrine to protect marijuana users.

I. CERTIORARI IS UNWARRANTED.

A. The Grounds for Certiorari Under C.A.R. 49 Do Not Exist.

The Court should deny Coats' Petition because he fails to establish any of the "character of reasons" for granting certiorari under C.A.R. 49.

First, the District Court did not decide any "questions of substance not heretofore determined" by this Court. See C.A.R. 49(a)(1). As explained (supra §II), multiple decisions have concluded that (a) the use of marijuana is illegal under federal law; and (b) the MMA merely creates an affirmative defense to criminal prosecution. See, e.g., People v. Sexton, 296 P.3d 157 (Colo. Ct. App. 2012) cert. denied, 2013 WL 119781 (Colo. Jan. 7, 2013); People v. Watkins, 282 P.3d 500 (Colo. Ct. App. 2012), cert. denied, 2012 WL 1940753 (Colo. May 29, 2012); Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. Ct. App. 2011), cert. denied, 2012 WL 1940833 (Colo. May 29, 2012). This Court reviewed – and denied – petitions for certiorari in those cases; Coats does not present a novel issue.

Second, the Court of Appeals decision ("Decision") did not conflict with, but is consistent with Sexton, Watkins, and Beinor. See C.A.R. 49(a)(2).

Third, because this Court denied certiorari in each of those cases, the Decision was determined in accordance with the applicable decisions of this Court. See C.A.R. 49(a)(3).[2]

Fourth, it is indisputable that the Decision is not "so far departed from the accepted and usual course of judicial proceedings" that supervision by this Court is required. See C.A.R. 49(a)(4).

B. Coats' Issue(s) Are Policy Determinations for the Legislature.

What Coats seeks is at most a policy determination for the legislature. Coats identifies several areas of policy (and slippery slopes): the "additional evidence of impairment" required before employment termination; the degree of "poor performance" a marijuana-using employee must reach before termination; the threshold for establishing an "occupational safety risk" and whether that risk includes mishandling of sensitive financial or personal identity information; and the "conflict with federal obligation" that he believes must exist before lawful termination. It would be premature for this Court to rule on any of these clear

[2] Coats cites to Beinor indicating that Justices Bender and Marquez would "grant certiorari on whether art. XVIII §14 conferred a right to use medical marijuana or merely protection from criminal prosecution." (Pet. at 19.) Yet, Justice Marquez, sitting by assignment of Chief Justice Bender, **concurred** with Chief Judge Davidson in reaching the decision that medical marijuana is not a "lawful activity." Coats, 2013 COA 62.

policy issues before the legislature can address them in the proper forum.[3] See, e.g., Town of Telluride v. Lot Thirty–Four Venture, L.L.C., 3 P.3d 30, 38 (Colo. 2000) ("It is not up to the court to make policy or to weigh policy."); Bd. of Cnty. Comm'rs of Weld Cnty. v. Nineteenth Judicial Dist., 895 P.2d 545, 548 (Colo. 1995) ("the separation of powers…principle bars a court from intruding into the affairs of the legislative or executive branches.")

II. THE COURT OF APPEALS CORRECTLY FOUND THAT COATS' MARIJUANA USE IS NOT "LAWFUL" UNDER FEDERAL LAW.

A. Marijuana Use Is Illegal Under Federal Law.

It is undisputed that **all** marijuana use is **illegal** under the federal Controlled Substances Act, 21 U.S.C. §801, et seq. ("CSA"). See 21 U.S.C. §812, Schedule I, §(c)(10), (17) (listing marijuana and THC); 21 U.S.C. §844. The U.S. Supreme Court confirmed this. Gonzales v. Raich, 545 U.S. 1, 14 (2005) ("By classifying marijuana as a Schedule I drug,…the manufacture, distribution, or possession of marijuana became a criminal offense…."). The Colorado Court of Appeals agrees. Beinor, 262 P.3d at 977 (MMA "has no bearing on federal laws, under which marijuana remains an illegal substance").

[3] It may soon do so, given the recent legalization of recreational marijuana.

B. The Statute's Plain Meaning Mandates that Coats' Marijuana Use Is Not "Lawful."

Coats' marijuana use cannot be a "lawful" activity under the Statute when it violates federal law. The Statute provides: "It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours…." C.R.S. §24-34-402.5.

Applying the plain meaning of the Statute, Coats' marijuana use is not "lawful." "In interpreting a statute, a court begin[s] with the language of the Statute." In re B.B.O., 277 P.3d 818, 820 (Colo. 2012). "When the language is clear and unambiguous, [courts] do not resort to other rules of statutory construction," but interpret the Statute according to its plain and ordinary meaning. DISH Network Corp. v. Altomari, 224 P.3d 362, 366 (Colo. Ct. App. 2009). A court does "not add words to the Statute or subtract words from it," and "may determine the meaning of undefined statutory words by referring to the dictionary." Turbyne v. People, 151 P.3d 563, 567 (Colo. 2007).

The plain meaning of the key word – "lawful" – is clear. It means "[a]ccording or not contrary to law, permitted by law." 8 J.A. Simpson & E.S.C. Weiner, THE OXFORD ENGLISH DICTIONARY 717 (2d ed. 1991); Martin Gardner, BLACK'S LAW DICTIONARY (9th ed. 2009). The Statute does not restrict "lawful"

to a single jurisdiction. For an activity to be "lawful," it must be permitted by, and not contrary to, **all** laws governing it. And all marijuana users, including Coats, remain subject to the CSA. See Gonzales v. Raich, 545 U.S. 1, 9 (2005) (the CSA, regulating even locally consumed marijuana, is a valid exercise of Congress' power). No Colorado law purports to (or could) exempt its citizens from the CSA (see also infra, §II.D). Thus, Coats' marijuana use, which violates federal law, cannot be a "lawful" activity.

C. The Legislature Did Not Intend for the Statute to Protect Schedule I Drug Use.

The legislative history of the Statute reflects clear intent to protect only unquestionably lawful activities. When the issue of whether the Statute would extend to protect drugs arose in legislative hearings, Pancho Hays, on behalf of the Tobacco Institute, said:

> As far as I know, **drugs is an illegal activity, not a legal activity**. So, assuming we are talking about illicit drugs ... if it's a prescription drug that would be a legal activity ... assuming you got it legally. **Any illegal activity, the employer can do whatever its policies are. This only has to do with legal activity.**

Hearings Before the House Agric. Comm., House Bill 1123, Tape 1, Track 1, 5:27-5:35, 6:21-7:12 (Jan. 24, 1990) (emphasis added).

Further, it is well-established that, where the legislature could have restricted the application of a statute, but chose not to, courts will not read additional

language into the Statute. See, e.g. Mason v. People, 932 P.2d 1377, 1380 (Colo. 1997) (courts presume that if the General Assembly intended the Statute to achieve a certain result, it would have used terminology clearly expressing that intent). Colorado courts routinely decline to insert qualifying language into a statute. See, e.g. Montez v. People, 269 P.3d 1228, 1232 (Colo. 2012); In re Marriage of Paige, 282 P.3d 506, 508 (Colo. 2012).

The General Assembly could have drafted the Statute to define "lawful" as "under Colorado law" as it has done in other statutes. See, e.g., C.R.S. §22-30.5-104 (Title 7 "shall not affect its status as a public school for any purposes **under Colorado law**"). Because the General Assembly could have included this limitation, but chose not to, the Court must not read that limitation into the Statute. See Mason, 932 P.2d at 1380.

Coats argues that if the Decision stands, it would require overruling Watson v. Pub. Serv. Co. of Colo., 207 P.3d 860, 864 (Colo. 2008), which held that "any" means "all" lawful activity. Coats is wrong. Foremost, Watson did not address the meaning of "lawful activity" and whether it includes activity illegal under **federal** law. And, just because the Statute protects all lawful activity does not make Coats' marijuana use lawful.

The Coats Dissent likens marijuana to cigarettes and eating habits leading to obesity, and argues these should be protected activities. But that reasoning is contrary to legislative intent. Unlike marijuana, no federal law criminalizes smoking cigarettes or eating habits. And, the intent of the Statute is only to protect legal activities, not illegal Schedule I drug use. See Hearing on H. B. 1123 (Feb. 7, 1990) (hearing before House on Third Reading), Tape 1:035-040 (Sponsor, Senator Richard Mutzebaugh: "This basically says that anything that's legal, you can do when you're not working.").

Finally, interpreting "lawful" to encompass an activity that violates federal law would be absurd, thus impermissible. Employers Ins. of Wausau v. RREEF USA Fund-II (Colo.), Inc., 805 P.2d 1186, 1187-88 (Colo. Ct. App. 1991) (legislative intent prevails over statutory interpretation yielding absurd results). If a poorly performing employee was a known medical marijuana user, the employer (under Coats' scheme) could be forced to retain the employee in spite of his marijuana-induced performance problems, lest it face litigation over its termination decision. Or, a Colorado federal contractor, whose employees have security clearance, may have to retain an employee who is prosecuted for marijuana under federal law and loses clearance, thus having no practical use at the company. This

is just a sampling of absurd results that could be achieved by – impermissibly – rendering medical marijuana use "lawful" under the Statute. See id.

D. No Preemption Issue Exists.

Contrary to Coats' assertion, the Decision did not "eviscerate" the Tenth Amendment. Historically left to the states are police powers to enact laws regarding the health, safety, and welfare of the population. Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996). It is well-settled, however, that federal power trumps states' police powers:

> The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be.

Gonzales, 545 U.S. at 29. Thus, although Colorado has police powers over the health and welfare of its citizens, Congress' power to regulate marijuana and more broadly, interstate commerce, controls. Accordingly, no Tenth Amendment issue exists. See United States v. Washington, 887 F.Supp.2d 1077, 1100-01 (D. Mont. 2012) (no viable Tenth Amendment claim based on federal prosecution of marijuana distribution that was legal under Montana law).

Nor is the MMA being rendered unconstitutional. The MMA only creates an affirmative defense to criminal prosecution under **state** laws. See MMA

§14(2)(a) ("a patient or primary caregiver charged with a violation of the **state's** criminal laws…."). Although Coats complains that the Court of Appeals "avoided" the preemption issue, it was not addressed for good reason – no issue exists:

> Federal preemption is not an issue because no part of the Colorado law must give way in order for federal authorities to fully enforce the CSA. . . .[T]hat there is a difference in legislative philosophy creates no conflict that requires an analysis of federal preemption under the Supremacy Clause.

In re Rent-Rite Super Kegs West Ltd., 484 B.R. 799, 805 (D. Colo. 2012) (Colorado's MMA does not impede enforcement of the CSA; Colorado's laws have no bearing on whether a marijuana operation violates the CSA).

E. Refraining from Federal Prosecution of Medical Marijuana Users Does Not Affect the CSA's Enforceability or Equate to Legality.

The *Amicus Curiae* Brief supporting Coats asserts that, because the federal government has chosen not to focus resources on prosecuting medical marijuana users who violate the CSA, Coats has practically "compli[ed] with the law" and "should be permitted to seek redress under Colorado's Lawful Activities statute." See Brief *Amicus Curiae* of The Colorado Plaintiff Employment Lawyers Association, at 15, 16 (relying on the Memorandum for Selected United States Attorneys from Deputy Attorney General David W. Ogden ("Ogden Memo")). This is wrong for two reasons. First, it misstates the Ogden memo, which exhorts:

> This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any … rights … enforceable by any individual … in any administrative, civil, or criminal matter.

Ogden Memo, at 1-2. Second, just because Coats has not been prosecuted under federal law does not mean he is exempt from or complies with it. Nor does it mean Coats has a viable claim under the Statute. Coats' marijuana use remains illegal under federal law.

III. THE TRIAL COURT CORRECTLY FOUND THAT COATS' MARIJUANA USE WAS NOT "LAWFUL" UNDER STATE LAW.

A. The MMA Does Not "Legalize" Medical Marijuana.

The MMA does not "legalize" marijuana; it only creates an affirmative defense for a user criminally prosecuted under Colorado's laws. See MMA §14(2)(a); id. at §14(2)(a)(III) and §14(4)(b) ("affirmative defense"); see also Colorado Legislative Council, Research Pub. No. 475-6, An Analysis of the 2000 Statewide Ballot Proposals 35 ("Bluebook") (Ballot Title describing the MMA as "establishing an affirmative defense to Colorado criminal laws for patients…relating to the medical use of marijuana"); Apr. 26, 2011 Letter from U.S. Attorney John F. Walsh to Attorney General John Suthers, 2 n.1 ("the Amendment authorized a medical marijuana 'affirmative defense' to state criminal prosecution for the possession of marijuana.").

The Colorado Court of Appeals confirmed this multiple times. Beinor, 262 P.3d at 976 ("the General Assembly understood Colorado's medical marijuana amendment to have created an exception to criminal prosecution, and not to be a grant to medical marijuana users of an unlimited constitutional right to use the drug in any place or in any manner"); Watkins, 282 P.3d at 504 ("the Amendment created a defense to criminal prosecution"); Sexton, 296 P.3d at 160 ("Once registered, the patient may raise medical use as an affirmative defense if he is thereafter charged with a violation of the state's criminal laws related to his medical marijuana use.").

Nonetheless, Coats suggests that marijuana use is "lawful" under MMA §14(4)(a), which provides: a "patient's medical use of marijuana, within the following limits, is lawful…." But §14(4)(a) merely establishes "the limits beyond which prosecution is not exempted, and not the creation of a separate constitutional right." Beinor, 262 P.3d at 975; see also §18-18-406.3(1)(f) ("[The MMA] sets forth the lawful limits on the medical use of marijuana.").

Where the MMA did not grant Coats a constitutional right to use medical marijuana, but merely the ability to establish an affirmative defense to criminal (Colorado) prosecution, his use cannot be "lawful" under the Statute.

B. Colorado Presumes Employment At-Will.

Colorado law presumes at-will employment. Con't Air Lines, Inc. v. Keenan, 731 P.2d 708, 711 (Colo. 1987). Coats admits his employment was at-will. (43135625_2011-1006-Response-to-Motion-To-Dismiss, at ¶6). Interpreting the Statute to require employers to protect activity that violates federal law would not only put an undue burden on Colorado's employers, it would defeat Colorado's institution of at-will employment. Colo. Dep't of Labor & Employment, http://www.colorado.gov ("the general principle behind…employment-at-will is [to] promote[] efficiency and flexibility in the employment context.") See also supra, §IV.

While Colo. Const. art. XVIII, §16 (legalizing recreational marijuana) is not applicable here – **it is not retroactive** – even that amendment upholds Colorado's at-will doctrine: "Nothing in this section is intended…to affect the ability of employers to have policies restricting the use of marijuana by employees." Id. at §16(6)(a).

IV. THE COURT OF APPEALS PROPERLY REFRAINED FROM MAKING POLICY.

Employers must be allowed to maintain a drug-free workforce if they so choose. It is not the Court's role to sit as a "super-personnel department" and second guess an employer's business judgment. See St. Croix v. Univ. of Colo.

Health Sci. Ctr., 166 P.3d 230, 238 (Colo. Ct. App. 2007). If Colorado mandated that employers could not discharge employees who use marijuana outside of work, employers would be forced to retain employees who violate federal law, and likely also develop significant performance and attendance issues. See Brief for Pacific Legal Foundation as Amicus Curiae Supporting Respondent, at 7-10, Roe v. Teletech Customer Care Mgmt. (Colo.) LLC, 2011 WL 2278472 (Wash. June 9, 2011) ("Marijuana compromises the ability to learn and remember information, so that a user's intellectual, job performance, or social skills are more likely to diminish. Other studies also associate marijuana smoking with increased absences, tardiness, accidents, workers' compensation claims, and job turnover."). Additionally, employers must be allowed to select drug-free employees who represent the company to the public, and who handle sensitive information such as customer lists, personal identity and financial information. Although Coats argues his job is not "hazardous," he fails to appreciate the risks – to DISH and its customers – of mishandling sensitive information.

Coats and Amicus attempt to expand the Decision's implications to apocalyptic proportions. They predict that "hundreds of thousands" of Coloradans will either face employment termination or give up their "medication" if the Decision stands. (Pet., at 19; Amicus Br. at 8-9.) This is unsupported hyperbole.

Amicus acknowledges there are 107,262 (not hundreds of thousands) medical marijuana license holders in Colorado. And Coats assumes these individuals are all actively using marijuana, employed, with employers that test for marijuana and automatically discharge for positive results.

In reality, Coats is not seeking certiorari on one legal issue; he is seeking legislative changes on several policy issues, even offering the Court suggestions for such changes: "consideration should be made for those sick or disabled patient-employees who are in non-hazardous occupations, perform well, and only use medical marijuana in compliance with [the MMA] after work hours, and off company property." (Pet. at 21.) In other words, Coats wants this Court to amend the Statute regarding what constitutes a non-hazardous occupation, good job performance, and a level of THC above which termination is lawful. That is not the Court's responsibility or role. See, Town of Telluride, 3 P.3d at 38; Bd. of County Comm'rs of Weld County, 895 P.2d at 548; see also §I, supra.

CONCLUSION

For the reasons set forth above, Respondent, DISH Network L.L.C., respectfully requests that the Court deny the Petition.

Respectfully submitted this 19th day of July, 2013.

MARTINEZ LAW GROUP, P.C.

By: */s/ Meghan W. Martinez*
Meghan W. Martinez, #26295
Ann E. Christoff, #42032
Elizabeth Imhoff Mabey, #30136
Drew D. Hintze, #41391
720 South Colorado Blvd.
South Tower, Suite 530
Denver, Colorado 80246
Telephone: (303) 597-4000
Fax: (303) 597-4001

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2013, I served a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**, via the Integrated Colorado Courts E-filing System (ICCES) on the following:

Michael D. Evans
The Evans Firm, LLC
4610 South Ulster St., Suite 150
P.O. Box 371896
Denver, CO 80237
info@theevansfirm.com

Thomas K. Carberry
149 West Maple Avenue
Denver, Colorado 80223
tom@carberrylaw.com

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

s/Beth Reinhardt
Beth Reinhardt, paralegal