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COLORADO SUPREME COURT 2 East 14th Avenue, Denver, CO 80203	
Colorado majority Case #2012CA0595 Opinion by Davidson, CJ., Marquez, J., concur. Webb, J. dissents. Arapahoe County District Court, Hon. Elizabeth Volz, Case #2011CV1464	
Petitioner: **BRANDON COATS** v. Respondent: **DISH NETWORK, LLC**	♦ COURT USE ONLY ♦
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OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

It contains 9,500 words (exclusive of certificates, tables, and identified issues).

The brief complies with C.A.R. 28(k).

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and rule on, if applicable.

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ISSUES GRANTED FOR REVIEW

ISSUE 1: WHETHER THE MEDICAL MARIJUANA AMENDMENT MAKES THE USE OF MEDICAL MARIJUANA "LAWFUL" AND CONFERS A RIGHT TO USE MEDICAL MARIJUANA TO PERSONS LAWFULLY REGISTERED WITH THE STATE.[1]

ISSUE 2: WHETHER THE LAWFUL ACTIVITIES STATUTE, C.R.S. SECTION 24–34–402.5, PROTECTS EMPLOYEES FROM DISCRETIONARY DISCHARGE FOR LAWFUL USE OF MEDICAL MARIJUANA OUTSIDE THE JOB WHERE THE USE DOES NOT AFFECT JOB PERFORMANCE.

[1] This Court granted review of this issue originally identified as "Issue 2", however because this issue must be addressed to efficiently argue the application of § 24-34-402.5, C.R.S. in the case, this brief addresses this issue first.

STATEMENT OF CASE

Millions voted to amend the Colorado Constitution – twice. Brandon Coats, and the hundreds of thousands of Colorado patient-employees like him, are counting on a fair and accurate adjudication of legal merits and issues, regardless of the subject matter.[2] They cannot work with medical marijuana, "mmj", and they definitely cannot continue to work without it. Upholding the appellate majority below would result in a *de facto* repeal of the citizen-initiated constitutional amendment for the sick or disabled who are employed in Colorado. The Medical Marijuana Amendment, "M.M.A.", Colo. Const. art. XVIII, § 14, is currently little more than a meaningless academic exercise – mere words on the pages of this State's Constitution for those individuals.

Coats was terminated by Colorado-based Dish Network, L.L.C., "DISH" in June 2010 for testing positive for an unknown type and amount of Tetrahydrocannabinol, "T.H.C.". Coats is a quadriplegic and registered mmj patient within the State of Colorado who received a recommendation for marijuana use from his licensed Colorado physician. Coats successfully worked at DISH as a telephone customer service representative. He was never accused, nor suspected of being impaired or under the influence while at work, and received satisfactory

[2] The data collected by the C.D.P.H.E. states as of January 31, 2014, there are 111,030 Colorado citizens registered as patients.

performance reviews all three years. He never used nor possessed marijuana while at work - only in the privacy of his own home outside of working hours.

Coats' single-claim action under the Colorado Civil Rights Act, § 24-34-402.5, C.R.S. or the Colorado Lawful Off Duty Activities Statute, "C.L.O.D.A.S.", alleges DISH unlawfully terminated his employment based on his use of mmj, done in compliance with M.M.A., off company property, and outside of working of hours.

Coats' cased was dismissed and affirmed. The majority held that the word "lawful" in C.L.O.D.A.S. included federal law, and therefore, even if an mmj patient-employee was compliant with the M.M.A., their employment was not protected. The majority cited other factors, also addressed in this brief.

At-will employment is simply a non-contender in this case. C.L.O.D.A.S. is a recognized exception to Colorado's at-will employment doctrine.

There are no hazardous activities, safety concerns, work-place accommodations, company drug policies, "zero-tolerance" policies, "Drug Free Workplace" issues, federal contracts, or bona-fide occupational qualifications are not present in the facts of this case. Coats was a telephone customer service representative who sat in a wheelchair pushing a button at a desk every day. No company policy from DISH is in the record.

Existing employment laws in Colorado, § 24-34-402.5(1)(a)-(b), C.R.S., and Colo. Const. art. XVIII, § 14(5) and § 14(10)(b) already provide specific guidance and protection to employers.

Similarly, there are no issues of mmj adversely affecting employee performance, attendance, or customer relations. Coats was neither impaired nor under the influence at work, and even had satisfactory performance reviews for all three years. The mere identification of the presence of T.H.C. through inaccurate, antiquated testing procedures used by employers is not dispositive of a patient-employee's impairment.

Federal law under the Controlled Substances Act, "C.S.A." does not actually prohibit Colorado from creating mmj laws under the Tenth Amendment where there is not a positive conflict with the federal law. In December 2013, this state's appellate court finally confirmed that the C.S.A. does not preempt state marijuana laws in *People v. Crouse*.

The M.M.A. does more than just provide an affirmative defense. It addresses a wide variety of issues and an express statement that medical use of marijuana in Colorado "is lawful". The supporting legislative materials specifically state that medical use of marijuana shall be "lawful" under State law.

Colorado courts have issued a wide variety of differing and inconsistent opinions interpreting the M.M.A., and a decision from this Court in this case will bring much needed finality and guidance. The word "lawful" should not have two separate and distinct meanings. What is considered "lawful" under the State Constitution should be consistently interpreted with what is "lawful" under State statutes. Continuing to interpret Colorado law in accordance with the appellate majority's opinion creates not only a conflict in this case, but many other existing laws.

While both the petitioner and respondent present compelling issues in this case, a more practical solution must exist to avoid forcing a mutually exclusive choice between health care and employment. Those who would minimize or deny the potential effects on Colorado's unemployment also have actions that speak louder than words. If the appellate majority's decision is upheld, employers will do exactly what DISH has already done in this case. Job loss and employment discrimination for patient-employees are the very types of problems C.L.O.D.A.S. statute was created and designed to protect.

The arguments offered by Coats in this brief satisfactorily reconcile the parties' competing interests and illustrate a rational, successful solution for both sides. Judge Webb issued well-reasoned dissent in this case, just as Judge Gabriel

had done before him in *Beinor v. I.C.A.O.,* 262 P.3d 970, 978-982 (Colo.App. 2011). Both judges held that mmj use pursuant to the M.M.A. is lawful, and Judge Webb further found that a "lawful activity" under C.L.O.D.A.S. should be defined by Colorado law, not federal law.

This Court should adopt the dissent of Judge Webb and Gabriel by interpreting the laws and Constitution of this State, as expressly written by the legislature of this State, to say that mmj is a lawfully permitted activity in the State of Colorado, and therefore subject to all the protections of State law, in State courts, against State parties. Such an interpretation tracks the plain language of this State's statutes, Constitutional Amendments, and well-established canons of statutory interpretation. A reversal and remand is necessary and respectfully requested.

I. MATERIAL FACTS

The following facts were averred in the initiating Complaint accompanied with attachments. (12CA0595 Record PDF pp. 4-20) They were subsequently raised in the petitioner's appellate briefs. (Opening Brief 12CA0595 pp. 3-7; Reply Brief 12CA0595 pp. 2-4). All of the facts herein have been accepted as true in the light most favorable to Coats by both the district court and Colorado

majority. (12CA0595 Record PDF p. 174, ¶1); *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, ¶10 (Colo.App. 2013).

Since the age of sixteen, Coats has been confined to a wheelchair as a quadriplegic with limited use of his hands. (See photograph 12CA0595 Record PDF p.20) Despite the physical challenges he faced, he sought out full-time employment and was eventually hired as a telephone customer service representative by the respondent, Colorado-based DISH. He successfully worked there for three years until his untimely termination in June 2010.

The paralyzed condition of Coats causes involuntary muscle movements, or spasms, which are both painful and embarrassing. After prolonged medical treatment with conventional medications failed, Coats received a recommendation from a licensed Colorado physician to use marijuana. That document was attached to the Complaint and made part of the record. (12CA0595 Record PDF p. 15) Coats subsequently registered and received state-approval for mmj use under the M.M.A. Thereafter he only used marijuana in compliance with Colorado law from the privacy of his own home, outside of working hours, and off company property. The medical use of marijuana has been effective for Coats, dramatically decreasing his muscle spasms and improving his quality of life.

During his three year employment with DISH, Coats was a productive employee and received satisfactory performance reviews. DISH never accused, nor suspected Coats of being impaired or under the influence while at work. Coats never requested any work place accommodation, nor possessed or used marijuana while at work. Coats was never employed in an executive-level position, nor required to perform any occupationally hazardous activity pushing a button from a desk.

After a saliva test, the results of which were attached to the Complaint and part of the record. (12CA0595 Record PDF p. 17) DISH terminated Coats' employment solely based on the presence of an unknown type or amount of T.H.C. in Coats. DISH's explanation for Coats' termination was attached to the Complaint and part of the record. (12CA0595 Record PDF pp. 16-18) Colorado-based DISH claimed the mere existence of any T.H.C. found in an employee, regardless of type or amount, violated its drug-free work place policy. The existence of any policy, terms, effective date, or delivery to Coats is not part of the record, nor is any requirement by DISH to comply with any federal obligations. Because T.H.C. remains in the body for an extended period of time, the mere presence of it is not dispositive of a person's intoxication or impairment.

Coats remains unemployed to date despite continuing efforts. Based on the appellate opinion issued below, he - and hundred thousands more - will likely share the same fate if they must choose between an effective form of medical treatment and employment.

II. PROCEDURAL HISTORY

Coats filed a single claim action August 12, 2011 in the Arapahoe County District Court under a remedial statute within Colorado's Civil Rights Act, C.L.O.D.A.S. alleging his Colorado-based employer, DISH, unlawfully terminated his employment for his medical use of marijuana in compliance with M.M.A.. (12CA0595 Record PDF pp. 4-20) C.L.O.D.A.S. prohibits an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during nonworking hours." "Any lawful activity" has been interpreted to mean "all lawful activity" by the Colorado majority. Coats advanced that his physician-recommended, medical use of marijuana off the company's premises during nonworking hours is a protected "lawful activity" in Colorado.

DISH filed a lengthy motion to dismiss the complaint for failure to state a claim pursuant to C.R.C.P. 12(b)(5) on September 20, 2011. DISH primarily argued Colorado law violated federal law 21 U.S.C. § 801 *et. seq*. (12CA0595 Record PDF pp. 26-120)

Prior to any court proceedings, testimony, or presentation of evidence, the Arapahoe County District Court dismissed Mr. Coat's action on February 29, 2012, narrowly finding that the M.M.A. provides only an affirmative defense to a criminal prosecution and therefore was not a "lawful activity" protected under C.L.O.D.A.S.. The district court did not adopt DISH's arguments. (12CA0595 Record PDF pp. 173-175) An appeal was initiated by Coats.

On April 25, 2013 the Colorado majority affirmed in a split and published decision. The two judge majority did not adopt the district court's analysis, but found that the medical use of marijuana in Colorado under the M.M.A. is not a "lawful" activity protected under C.L.O.D.A.S. because marijuana is expressly proscribed by federal statute 21 U.S.C. § 844(a). In its analysis, the majority held that "…for an activity to be "lawful" in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law, but complies with state law cannot be "lawful" under the ordinary meaning of that term." *Coats,* 303 P.3d at ¶14. The majority did not address whether M.M.A. conferred a constitutional right on mmj use.

Judge Webb dissented, concluding that a "lawful activity" under C.L.O.D.A.S. should be defined by Colorado law, not federal law. He further concluded that mmj use pursuant to the Colorado Constitution is "lawful". *Coats,*

303 P.3d at ¶¶40-58. Petitioner's brief below closely tracks Judge Webb's dissent, as well as its predecessor, Judge Gabriel's dissent in *Beinor* 262 P.3d at 978-982.

ARGUMENT

I. WHETHER THE MEDICAL MARIJUANA AMENDMENT MAKES THE USE OF MEDICAL MARIJUANA "LAWFUL" AND CONFERS A RIGHT TO USE MEDICAL MARIJUANA TO PERSONS LAWFULLY REGISTERED WITH THE STATE.[3]

A. Standard of Review

This interpretation of a constitutional or statutory provision is a question of law that this Court reviews *de novo*. *Watson v. Public Serv. Co.*, 207 P.3d 860, 863-864 (Colo.App. 2008). The Court must adopt the statutory construction that "best effectuates the intent of the General Assembly and the purposes of the legislative *Id*.

B. The Plain Language of the M.M.A. Establishes that Use of MMJ is Lawful and Permitted Within Colorado.

Where the language of an amendment or statute is clear, the Court will not look beyond the plain meaning of the words or resort to other rules of statutory

[3] This Court granted review of this issue originally identified as "Issue 2", however because this issue must be addressed to efficiently argue the application of § 24-34-402.5, C.R.S. in the case, this brief addresses this issue first.

construction. *Id.* "If courts can give effect to the ordinary meaning of words used by the legislature, the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said." *State v. Nieto, 993 P.2d 493, 500 (Colo. 2000).* "Words and phrases shall be read in the context and construed according to . . . common usage." § 2-4-101, C.R.S. (2014).

The general rules of statutory interpretation and construction apply when interpreting citizen-initiated measures. *Independence Institute v. Coffman*, 209 P.3d 1130, 1136 (Colo.App. 2008). Thus, courts must "afford the language of constitutions and statutes their ordinary and common meaning" while "giving effect to every word and term contained therein." *Cacioppo v. Eagle Cnty. Sch. Dist. Re-50J*, 92 P.3d 453, 463 (Colo. 2004). Language cannot be added or subtracted from the express words of an amendment. *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007). Courts "must favor a construction of a constitutional amendment that will render every word operative, rather than one that may make some words meaningless or nugatory." *Patterson Recall Committee, Inc. v. Patterson*, 209 P.3d 1210, 1215 (Colo.App. 2009).

Both Judge Webb and Judge Gabriel issued well-reasoned dissents in their respective cases, and both held that mmj use pursuant to the M.M.A. is lawful in

Colorado. See *Coats,* 303 P.3d at ¶¶40-58, and *Beinor v. I.C.A.O., 262 P.3d 970 (Colo. App. 2011)*

The district court in this case, relying *Beinor*, held that the M.M.A. merely provided an affirmative defense to a criminal prosecution. (12CA0595 Record PDF pp. 173-175) citing *Beinor* 262 P.3d at 975.

The M.M.A. clearly does more than just provide an affirmative defense. It addresses a wide variety of issues including the creation of a confidential registry, age requirements, caregiver definition, physician and patient guidelines, and an express statement that medical use of marijuana in Colorado "is lawful". When properly read as a whole giving effect to each word, the M.M.A. establishes the use of mmj is lawful and permitted within Colorado.

Subsection (4)(a) expressly tells a state-approved patient in plain language that the use of mmj "is lawful". Subsection (2)(e) even creates a legal and enforceable property interest in mmj, wherein a court may award damages. See also *Beinor* 262 P.3d at 980-981; *Coats,* 303 P.3d at ¶¶55-57.

Section 1	Definitions
Section 2	Affirmative defense to criminal prosecution
Section 3	Requires confidential registry and provides guidelines and penalties

Section 4	**"A patient's medical use of marijuana, within the following limits, is lawful . . . ."**
Section 5	Prohibits use that would harm the public and prohibits use in public *NOTE: This Section does not create a new criminal penalty, but instead provides for when and how patients may lose their **right** to use mmj.
Section 6	Prescribes a minimum age for mmj patients
Section 7	Requires government to designate health agency responsible for oversight
Section 8	Orders legislature to pass enabling legislation
Section 9	Requires production of a form for registration
Section 10	Exempts insurers from covering mmj
Section 11	Establishes effective date

- M.M.A., Colo. Const. art. XVIII, § 14

Because section 14(2)(a)-(c), on the one hand, and § 14(4)(a), on the other hand, appear to be separate and do not modify one another, one could reasonably read the amendment, as creating a right to use mmj within established limits. *Beinor* 262 P.3d at 979.

The word “lawful” should not have two separate and distinct meanings. What is considered “lawful” under the State Constitution should be consistently interpreted with what is “lawful” under State statutes.

The majority opinion in this case did not adopt the M.M.A. legal analysis in *Beinor*, and in fact chose not to reach this issue because it decided the word “lawful” within C.L.O.D.A.S. included federal law, which proscribes all marijuana use under the C.S.A.. *Coats,* 303 P.3d at ¶14; See 21 U.S.C. 844(a). Before a determination on whether the legislature intended C.L.O.D.A.S. to protect activity under the M.M.A., one must first correctly ascertain what it is the M.M.A. did. See also *Perry v. Sindermann,* 408 U.S. 593, 597 (1972) (doctrine of unconstitutional conditions); *Sosa v. I.C.A.O. of State*, 259 P.3d 558 (Colo.App. 2011) (unemployment benefits awarded even if test positive for T.H.C.).

The majority in this case has created obvious disparity where only mmj patients can be terminated by their employers for off duty drug use - even for use in compliance with the M.M.A.. Employees who use conventional prescription medications, or any other substance such as alcohol off the job cannot be fired. Judge Gabriel wrote in his dissent in *Beinor,* “I believe that claimant's lawful use of mmj outside of the workplace - particularly where, as here, there is no evidence of any impairment of performance in the workplace - cannot constitutionally be

used as a basis for denying claimant unemployment benefits." *Beinor* 262 P.3d at 982.

The text of unambiguous legislation is dispositive, and the Court should interpret the M.M.A. consistent with this clear language and answer this Issue I in the affirmative.

C. Interpretation of the M.M.A. with Extrinsic Sources Confirms that Use of MMJ is Lawful and Permitted Within Colorado.

If an amendment or statute is reasonably susceptible to multiple interpretations, it is ambiguous, and the Court will apply principles of statutory interpretation. *Watson, 207 P.3d at 863-864.* To reasonably effectuate the legislative intent, an amendment or statute should be construed as a whole, giving consistent, harmonious, and sensible effect to all of its parts. *Id.*

Statutory interpretation "demands careful attention to the nuances and specialized connotations that speakers of the relevant language attach to particular words and phrases in the context in which they are being used." *Id.*

The court may consider the legislative history and legislative declaration or purpose. *Id.* (citing C.R.S. § 2-4-203(1)(c), (g) (2008)). It is the duty of the Court to provide an interpretation that "give[s] effect to the will of the people."

Washington Cnty. Bd. of Equalization v. Petron Dev. Co., 109 P.3d 146, 150 (Colo. 2005).

If the language of a citizen-initiated measure is ambiguous, "a court may ascertain the intent of the voters by considering other relevant materials such as the ballot title and submission clause and the biennial 'Bluebook,' which is the analysis of ballot proposals prepared by the legislature." *In re Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549, 554 (Colo. 1999).* "We consider the object to be accomplished and the mischief to be prevented by the provision." *Harwood v. Senate Majority Fund, LLC,* 141 P.3d 962, 964 (Colo.App. 2006).

The spirit of a statute may be considered instead of simply applying the letter of the law. *People v. Manzanares,* 85 P.3d 604, 607 (Colo.App. 2003). Strict statutory interpretation is relaxed when a statute is "designed to declare and enforce a principle of public policy." *Phillips v. Monarch Recreation Corp.,* 668 P.2d 982, 985 (Colo.App. 1983). "One of the primary uses of legislative history as an aid to statutory construction is to discern the policy objective to be achieved by a statute, so that a court may consider the consequences of a proposed construction and adopt a reading that will achieve consequences consistent with legislative intent." *Allstate Ins. Co. v. Schneider Nat'l Carriers*, 942 P.2d 1352, 1356

(Colo.App. 1997). In Colorado, marijuana use is both a lawful activity and matter of public policy.

Colorado's current statutory and constitutional law, (especially citizen-initiated constitutional law), as well as supporting legislative materials such as Bluebooks and ballot titles provide this Court with clear and ample direction as to this State's policy on marijuana. *Grossman v. Columbine Medical Group, Inc.*, 12 P.3d 269, 271 (Colo.App. 1999), (it is for the legislature, and not the courts, to enunciate the public policy of the state.)

Both the ballot title and Bluebook for this citizen-initiated Amendment in 2000 specifically state that medical use of marijuana shall be "lawful" under State law.

I. *Ballot Title*

The M.M.A.'s ballot title, as read by the Colorado voters who passed it, provided in its first stated purpose, "An amendment to the Colorado Constitution authorizing the medical use of marijuana for persons suffering from debilitating medical conditions…." Colorado Legislative Council, Research Pub. No. 475-0, *An Analysis of 2000 Ballot Proposals* (Bluebook) 35 (2000).[4] See also *Beinor* 262

[4] It is only after this statement that the ballot title then notes that such authorization of course would "establish[] an affirmative defense to Colorado Criminal laws . . . ." *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 979 (Colo. Ct. App. 2011) (Gabriel, J., dissenting).

P.3d at 978-980 (Gabriel, J. dissenting); *Coats*, 303 P.3d at ¶56 (Webb, J. dissenting).

II. *Bluebook*

A 'Bluebook' is considered an equivalent source of legislative history. *Macravey v. Hamilton*, 898 P.2d 1076, 1079 n.5 (Colo. 1995); *Grossman v. Dean*, 80 P.3d 952, 962 (Colo.App. 2003). Based on its contents, Colorado voters approved "patients diagnosed with a serious or chronic illness and their care-givers to legally possess marijuana for medical purposes..." It also specified that the M.M.A. "allows a doctor to legally provide a seriously or chronically ill patient with a written statement that the patient might benefit from medical use of marijuana." Finally, the Bluebook states "[t]he proposal…amends the Colorado Constitution to legalize the medical use of marijuana for patients who have registered with the state." *Supra*. Colorado Legislative Council. Notably, there is nowhere in the Bluebook of any mention of immunity from or exception to state criminal laws. See *Beinor* 262 P.3d at 980.

III. *Dictionary*

For those like the majority in this case, who prefer to use a dictionary as an extrinsic source, the word "legalize" means "[t]o make lawful; to authorize or justify by legal sanction." *Black's Law Dictionary* 977 (9th ed. 2009); *accord*

Webster's Third New International Dictionary 1290 (2002) (defining "legalize" to mean "to make legal: give legal validity or sanction to"). Judge Gabriel considered these very dictionary definitions, in part, when issuing his dissent in *Beinor* that held the use of mmj lawful and permitted under the M.M.A.. *Beinor* 262 P.3d at 980.

It was erroneous for the majority to solely rely on a narrow dictionary definition of "lawful" while ignoring the plain language, legislative history, and public policy in Colorado. *Coats*, 303 P.3d at ¶¶12-13. As Judge Webb pointed out in his dissent, Courts should use dictionary definitions "as sources of statutory meaning only with great caution." *Coats*, 303 P.3d at ¶¶45-45.

D. State Statutes and Case Law Also Establish that Use of MMJ is Lawful and Permitted Within Colorado.

Since 1996, almost half of the states in this nation (20 and Washington D.C.) have passed laws either de-criminalizing or permitting marijuana use for a variety of medical conditions.[5] In 2010, an ABC News poll showed that 81 percent of Americans believed that medical cannabis should be legal in the United States.[6]

[5] http://norml.org/legal/medical-marijuana-2
[6] http://abcnews.go.com/PollingUnit/Politics/medical-marijuana-abc-news-poll-analysis/story?id=9586503

Of those twenty-one states, currently Colorado and Nevada are the only states with express constitutional Amendments.[7] Alaska's constitution recognizes a right to home privacy, which has been interpreted to protect marijuana use and possession in the home.[8] Florida and Missouri are considering constitutional amendments. Washington and Colorado are the only states who also permit recreational use.[9]

Of all the states, and even the world, Colorado has the most powerful legislative regime having both Constitutional Amendments and State statutes addressing marijuana use. Therefore, this Court should be wary of those would quickly draw comparison to the laws and adverse judicial rulings of other states. The majority in this case cited the non-binding case of *Roe v. TeleTech Customer Care Mgt. (Colo.), LLC*, 257 P.3d 586, 598, (Wash. No. 83768-6, 2011) to reject a public policy argument on mmj use in Colorado. However, the Washington State Medical Use of Marijuana Act, as Judge Gabriel points out in his dissent in *Beinor*, "is quite different from that of the relevant portions of Colorado's M.M.A.." *Beinor* 262 P.3d at 980-981.

[7] Colo. Const. art. XVIII, §§ 14, 16; Nev. Const. art. IV, § 38
[8] Alaska Const. art. I, § 22; *Ravin v. State*, 537 P.2d 494 (Alaska 1975).
[9] Colo. Const. art. XVIII § 16; Wash. Rev. Code Ann. § 69.50.101, et seq.

Other states have similar issues present in their laws. Maine and Rhode Island state that an employer may not penalize or refuse to hire a person because the person is a mmj patient.[10] Michigan protects mmj patients from disciplinary action by a business and being denied rights or privileges.[11] But it also protects employers from having to accommodate any employee working "while under the influence of marijuana."[12]

Colorado's combination of citizen-initiated constitutional amendments, statutory laws, taxation and regulation, as well as supporting legislative materials like the Bluebooks and ballot titles addressed above, all provide this Court with clear and ample direction as to mmj use as lawful and permitted within Colorado. Examples are: § 14(4)(a) and (2)(e); § 16(1)(a), (3)(a), (3)(d), and (8); C.R.S. § 13-22-601 (contracts pertaining to mmj are enforceable); C.R.S. § 18-18-406.3(1)(f); C.R.S. §§ 12-43.3-101 *et. seq*.; C.R.S. § 25-1.5-101 *et. seq*., C.R.S. §§ 39-26-726, 39-28.8-101 *et. seq*. (taxation of marijuana); *Supra*. Colorado Legislative Council. The general assembly in plain language recognized a person's "fundamental right" to make their own medical treatment and health care benefit decisions, without

[10] Me. Rev. Stat. Ch. 22 § 2423, subsection 6); R.I. Gen. Laws Ann. § 21-28.6-4.
[11] Mich. Comp. Laws Ann. 333.26424.
[12] Mich. Comp. Laws Ann. 333.26427.

discouraging "any particular medical treatment". C.R.S. § 15-18.5-101. See also Colo. Const. art. II (fundamental rights).

The General Assembly enacted and codified C.R.S. § 18-18-406.3(1)(f) states, "[s]ection 14 of article XVIII of the state constitution sets forth the lawful limits on the medical use of marijuana." Both contracts and property interests in marijuana are lawful and enforceable. See § 13-22-601; § 14(2)(e) as upheld in *People v. Crouse*, 2013 COA 174, ¶2 (Colo.App. 2013).

Interpretive appellate decisions in this State, while frequently inconsistent and still have favorable implications and merit review. *See People v. Watkins*, 2012 COA 15, ¶23 (Colo.App. 2012) (mmj use as lawful under the § 14(4)(a) and § 18-18-406.3(1)(f), C.R.S); *Beinor*, 262 P.3d at 978-980; *Sosa v. I.C.A.O. of State*, 259 P.3d 558; *Coats*, 303 P.3d at ¶ 56 ; and *Crouse*, 2013 COA 174, ¶2.

In *Sosa*, even though a patient-employee appeared impaired and tested positive for mmj in a company drug test, under certain circumstances he was still qualified to receive unemployment benefits after being terminated. *Sosa v. I.C.A.O. of State*, 259 P.3d 558; *compare Beinor*, 262 P.3d 970 (denial of workman's compensation).

In *Crouse*, this state's appellate court finally confirmed that the C.S.A. does not preempt the Colorado M.M.A. A district court order for a law enforcement

agency to return marijuana and marijuana plants after a jury acquitted a mmj patient of criminal charges pursuant to § 14(2)(e) was upheld. *People v. Crouse*, 2013 COA 174, (Colo.App. 2013).

There are also some non-binding, but persuasive judicial rulings which are favorable to employees that the Court may review: *Johnson v. So Others Might Eat, Inc.*, 53 A.3d 323 (D.C. 2012) and *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

States like Connecticut, Maine, Rhode Island, and Illinois prohibit employers from discriminating against employees because they are mmj patients.[13] Arizona and Delaware even prohibit employers from discriminating against employee-patients who fail a drug test for marijuana.[14] Employers in all these states can defend those claims either by providing evidence that the discipline was based on legitimate, non-discriminatory reasons or that the employee either used, possessed or was impaired by marijuana on the job. Coats advances a similar theory on employer protections in this brief.

I. *Inconsistent Treatment of M.M.A. in Appellate Courts*

Colorado appellate courts have issued a wide variety of differing and inconsistent opinions interpreting the M.M.A., not to mention garnered lengthy

[13] R.I. Gen. Laws Ann. §§ 21-28.6-4, 21-28.6-7; Me. Rev. Stat. tit. 22, §§ 2383-B, 2423-A, 2423-E; Conn. Gen. Stat. Ann. § 21a-408, *et seq*.; 410 Ill. Comp. Stat. § 130/25, et seq.
[14] Ariz. Rev. Stat. Ann. § 36-2801, *et seq*.; Del. Code Ann. tit. 16, §§ 4903A, 4905A.

dissents, and a decision from this Court in this case will bring much needed finality and guidance.

MMJ has been recognized as "lawful" by the Colorado majority in cases like *People v. Watkins*, 2012 COA 15, ¶23 (Colo.App. 2012) (mmj use as lawful under the § 14(4)(a) and § 18-18-406.3(1)(f), C.R.S); *Sosa v. I.C.A.O. of State*, 259 P.3d 558; and *People v. Crouse*, 2013 COA 174, ¶2.

However, it has been treated adversely by two judge appellate majorities in *Beinor*, 262 P.3d at 978-980; *Coats*, 303 P.3d at ¶ 56. As indicated, both Judge Gabriel and Judge Webb issues strong dissents in these cases, with Webb adopting the dissent in *Beinor*.

a. Beinor

In *Beinor*, 262 P.3d at 976, the majority concluded that art. XVIII, § 14 is expressly limited to protecting patients against criminal prosecution, while Judge Gabriel dissented and found art. XVIII, § 14 ambiguous, concluding it conferred limited constitutional rights to lawfully possess and use mmj. *Beinor*, 262 P.3d at 978-981.

A construction that would render any clause or provision unnecessary, contradictory, or insignificant should be avoided. *Watson*, 207 P.3d at 864. The court must also seek to "avoid an interpretation that leads to an absurd result." *Id*.

Judge Gabriel specifically addressed the absurd results of the M.M.A. and C.L.O.D.A.S. in his dissent in *Beinor*, which was adopted by dissenting Judge Webb in this case. *Beinor* 262 P.3d at 980 (an overbroad interpretation of § 14(10(b) might cause patient-employees to abandon lawful use of mmj to avoid risking their jobs.)

The district court adopted the *Beinor* holding in interpreting the M.M.A. was not a "lawful activity" protected under C.L.O.D.A.S.. (12CA0595 Record PDF pp. 173-175).

b. Coats

Given the *Beinor* published precedent, it is noteworthy that the appellate court in *Coats* published its decision, which indicated a lack of reliance on *Beinor* as binding legal authority and precedence. The actual text of the opinion itself contains very little mention of prior cases. Notably, the appellate court issued another published decision December 19, 2013 in *People v. Crouse*, 2013 COA 174, which held the contrary position to the majority in both *Beinor* and *Coats*.

The majority did not adopt the district court's analysis in this case, but found, through substantial assistance of a dictionary, that the medical use of marijuana in Colorado under the M.M.A. is not a "lawful" activity protected under C.L.O.D.A.S. because marijuana is expressly proscribed by federal statute 21

U.S.C. § 844(a). "[F]or an activity to be "lawful" in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law, but complies with state law cannot be "lawful" under the ordinary meaning of that term." *Coats*, 303 P.3d at ¶14. The majority did not address whether M.M.A. conferred a constitutional right on mmj use.

Judge Webb issued a well-reasoned dissent, concluding that a "lawful activity" under C.L.O.D.A.S. should be defined by Colorado law, not federal law. He further concluded that mmj use pursuant to the Colorado Constitution is "lawful". *Coats*, 303 P.3d at ¶¶40-58.

E. The M.M.A. Permits Lawful Use in Colorado, But Cannot Currently Confer a "Right" to Use

The M.M.A. establishes that use of mmj is lawful and permitted within Colorado, but it does not currently confer a "right" to use.[15] "To be lawful under the off-duty conduct statute, however, conduct need not rise to the level of a constitutional right." *Coats*, 303 P.3d at ¶56 (Webb, J. dissenting).

[15] "Currently" only because recent memorandums by U.S. Attorneys and the President of the United States seem to foreshadow the amendment of the C.S.A. and question marijuana being classified as more dangerous than cocaine, heroin, and methamphetamine. National banks are now "authorized" by the federal government to lend and accept money from marijuana businesses. Colorado taxes, co-mingles, and profits from all forms of marijuana. Almost half of the country now permits some form of mmj, including federally governed Washington D.C.. See D.C. Code § 7-1671.01, *et seq*.

The State of Colorado retains sovereign "police powers" under the Tenth Amendment, which permit it to enact laws concerning the State's health and welfare (like the M.M.A.) and employment matters (like C.L.O.D.A.S.). *In re Interrogatories of Governor*, 52 P.2d 663 (Colo. 1935) (Tenth Amendment generally); *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660 (Colo. 1972) (Tenth Amendment applied to Colorado); *Dunbar v. Hoffman*, 468 P.2d 742, 744 (Colo. 1970) (employment matters typically reserved for states); *Coats*, 303 P.3d at ¶62 (Webb, J. in dissent holding employment matters are for states). Colorado's use of police powers is expressly stated in the ballot title and bluebook for Colo. Const. art. XVIII, § 14 (proposal does not affect federal criminal laws, but amends the Colorado Constitution). *Supra*. Colorado Legislative Council; *Beinor*, 262 P.3d at 980 (Gabriel, J. citing in dissent). See also legislative declaration of C.R.S. § 12-43.3-101 *et. seq*., located under Title 12 'Health Care'. The general assembly in plain language recognized a person's "fundamental right" to make their own medical treatment and health care benefit decisions, without discouraging "any particular medical treatment". C.R.S. § 15-18.5-101. See also Colo. Const. art. II (fundamental rights).

Police powers are presumed to not be superseded by federal statute, and Congress has expressly disavowed field preemption on drug and marijuana

regulation in the federal C.S.A..[16] See Tile 21 U.S.C. § 903 (state marijuana laws can exist unless positive, irreconcilable conflict). *Middleton v. Hartman*, 45 P.3d 721, 731-732 (Colo. 2002) citing *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, (1947); *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1147-1152 (Colo. 1997).

The U.S. Supreme Court limitedly held in *Gonzales v. Raich*, 545 US 1 (2005) that Congress may regulate marijuana activity under the C.S.A. using the very tenuous use of the Interstate Commerce Clause, but declined to opine or analyze Tenth Amendment implications.[17] *United States v. Patton*, 451 F.3d 615, 626-627 (10th Cir. Kan. 2006); *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355, 382-383 (Cal.App. 2008).

Previously, Colorado appellate courts did the same. *Coats*, 303 P.3d at ¶23; *Beinor*, 262 P.3d at 975-977; *Watkins*, 2012 COA 15, ¶20-39. However, in *People v. Crouse*, 2013 COA 174, (Colo.App. 2013), issued December 19, 2013, a

[16] In 1970, all marijuana was "temporarily" listed as a Schedule I listing pending further research having no known "currently accepted medical use" in the United States. See 21 U.S.C. 812(1)(b)(1) (no currently known medical use); 21 USC 811(h) (temporary listing lasting 1 year) In 2008 Washington D.C. enacted medical marijuana use, D.C. Code § 7-1671.01, *et seq*. which as a federally controlled government could be construed as Congress finding a "current accepted medical use".

[17] *Gonzales* may be ripe for review given Colorado's unique combination of constitutional amendments and statutory regime, which contains an extensive intrastate nexus (in-state citizens, investors, physicians, plant growth, owners and managers, etc. such as in C.R.S. §§ 12-43.3-101 *et. seq*.) , and since 2005 thirteen more states have permitted various forms of marijuana use, including Washington D.C. The more wide-spread and common marijuana use becomes, the less the impact on interstate marijuana commercial transactions there is, assuming they were ever there to begin with.

division of the Colorado Courts of Appeal finally held that the C.S.A. does not preempt the M.M.A.. The extensive legal analysis required is too lengthy for the word limit of this brief, and Coats would incorporate the *Crouse* majority analysis by reference herein.

Notwithstanding *Crouse*, Colorado has never prohibited federal enforcement of the C.S.A., and only permits (as opposed to conferring a "right" in contravention of 21 U.S.C. § 844(a)), lawful use of mmj within the State under State law. Therefor the two laws may be reconciled and peaceably co-exist - just as they do in 21 other states.[18]

Based on the foregoing, the majority's reliance on 21 U.S.C. § 844(a) and *Gonzalez* as authoritative in their decision was in error. *Coats*, 303 P.3d at ¶¶9, 14. In fact, under that analysis, the M.M.A. could not even exist since the plain language says mmj use is "lawful" in § 14(4)(a). The word "lawful" should not have two separate and distinct meanings. What is considered "lawful" under the State Constitution should be consistently interpreted with what is "lawful" under State statutes. Since the M.M.A. establishes that use of mmj is lawful and permitted within Colorado, then the word "lawful" must necessarily be defined by

[18] Another example are differing, co-existing state and federal laws are minimum wage.

state law, and therefore C.L.O.D.A.S. must protect acts under the M.M.A. as "lawful activities".

This Court should adopt the well-reasoned dissents of Judge Webb and Judge Gabriel in their respective cases, as well as the majority in *People v. Crouse*, and hold that mmj use under the M.M.A. is lawful and permitted within Colorado. *Coats*, 303 P.3d at ¶¶40-58; Beinor, 262 P.3d at 978-982. See also Emma S. Blumer, Comment, *Beinor v. Industrial Claims Appeals Office*, 57 N.Y.L. Sch. L. Rev. 205, 206 (2012/2013).

II. WHETHER THE LAWFUL ACTIVITIES STATUTE., C.R.S. SECTION 24–34–402.5, PROTECTS EMPLOYEES FROM DISCRETIONARY DISCHARGE FOR LAWFUL USE OF MEDICAL MARIJUANA OUTSIDE THE JOB WHERE THE USE DOES NOT AFFECT JOB PERFORMANCE.

A. Standard of Review

Issue II has the same standard of review for Issue I and is reincorporated herein.

B. C.L.O.D.A.S. is Defined By Colorado Law

I. *Plain Language of C.L.O.D.A.S.*

The cannons of statutory interpretation for Issue II are the same for Issue I, and are reincorporated herein, including but not limited to plain language, ambiguity, legislative history, public policy, and avoiding an absurd result.

Judge Webb found that a "lawful activity" under C.L.O.D.A.S. should be defined by Colorado law, not federal law. *Coats*, 303 P.3d at ¶ 41. The word "lawful" should not have two separate and distinct meanings. What is considered "lawful" under the State Constitution should be consistently interpreted with what is "lawful" under State statutes. The court must construe statutes (both internally and when reading more than one statute) harmoniously whenever possible and avoid interpretations that result in inconsistency. *People v. Cross,* 127 P.3d 71, 74 (Colo. 2006).

II. *The Purpose of C.L.O.D.A.S. is a Remedial Statute Created to Protect Employees and to be Construed Broadly*

C.L.O.D.A.S. codifies clear policy goals to prevent discriminatory and unfair employment practices against individuals that live their lives within the boundaries of the law. *Watson,* 207 P.3d at 864. C.L.O.D.A.S. is located under the Colorado Civil Rights Act. It is a "remedial statute" that "should be broadly construed" to accomplish its objective. *Id*.

The legislature's intent in creating C.L.O.D.A.S. was to protect the public policy of one's freedom to engage in lawful activities after work without fear of losing one's job. C.L.O.D.A.S. was "originally dubbed the 'Smoker's Rights Act.'" Wall & Johnson, 35 COLO. LAW. at 41 (Dec. 2006).It was intended to prevent employers from firing smokers and overweight employees, whom employers were increasingly seeking to terminate because of increasing insurance costs. Wall & Johnson, 35 COLO. LAW. at 41 (Dec. 2006). This case deals with something even more important - whether employment can be terminated for conduct sanctioned and permitted by the State, not to mention recommended by a licensed physician.

Notwithstanding, the majority the majority has sided with employers on a statute that was designed specifically to protect employees. *Coats*, 303 P.3d at ¶19. If upheld, Colorado-based employers like DISH will have no incentive to retain these patient-employees, and everything to gain by terminating them.

These are the types of dynamics that caused C.L.O.D.A.S., also referred to as the "Smoker's Rights Bill, to be passed in the first place in 1990. This statute advances this State's public policy of one's freedom to engage in lawful activities after work without fear of losing one's job, whether smoking cigarettes, drinking alcohol, eating fatty foods, and even sexual orientation. Job loss and employment

discrimination for patient-employees are the very types of problems this remedial statute was created and designed to protect.

The majority's opinion that C.L.O.D.A.S. includes all federal law has no logical stopping point: under that logic, the statute could refer to any other law such as county ordinances, municipal codes, treaties, common law, and administrative regulations. This would obviously be an absurd result. C.L.O.D.A.S. was not intended to sweep so broadly. If it did, it would render the entire statute meaningless, and the at-will doctrine would be revived because employees could be terminated for any conduct. See *Wisehart v. Meganck*, 66 P.3d 124, 126-127 (Colo.App. 2002) (cert. denied) (Webb, J. dissenting on other grounds).

Coats' interpretation avoids other absurd results in having patient-employees decide between their jobs and their healthcare options as recommended by their licensed physicians. C.L.O.D.A.S. would protect the people it was intended for, and the State could avoid financially supporting those who choose their health and as a result become unemployed.

III. *"Any" Lawful Activity Meant "All" Lawful Activity*

Section 24-34-402.5 does not define "lawful activity." Nor does it refer to either state law or federal law. Therefore, the statute is ambiguous because that

phrase could incorporate state law, federal law, or both. *See People v. Trusty*, 53 P.3d 668, 676 (Colo.App. 2001) (“When the statutory language is susceptible of more than one reasonable interpretation, leading to different results, the statute is ambiguous.”).

Prior to *Coats*, “any lawful activity” in C.L.O.D.A.S. was interpreted as “all” legal activity. *Watson*, 207 P.3d at 864. As "one of the broadest of its kind in the United States," C.L.O.D.A.S. prohibits the termination of an employee for engaging in "any lawful activity." Wall & Johnson, 35 COLO. LAW. at 41 (Dec. 2006). Any and all lawful activity, would necessarily include Colorado law such as the M.M.A.. *Supra.* at 864.

However, the appellate majority relied on a narrow dictionary definition of the term “lawful” instead of the statutes plain language or well established cannons of statutory interpretation in the available legislative history, interpretive case law, and public policies in this State. *Coats*, 303 P.3d at ¶14.

While it may be only been interpreting the word “lawful” within C.L.O.D.A.S. such a definition from the majority for a powerful term like “lawful” in a published opinion has serious implications.

IV. *All Federal Law Is Not Implicit to Colorado Law*

Employment law is primarily a state concern, and should not be interpreted to implicitly include federal law. *People ex rel. Dunbar*, 493 P.2d 660; *Dunbar,* 468 P.2d at 744.

When the Colorado legislature intends to define a term with reference to both state and federal law, it does so specifically. *State v. Cote*, 945 A.2d 412, 421-422 (2008); *Nika v. State*, 198 P.3d 839, 850-851 (Nev. 2008). See e.g. § 38-35-201(4)(a), C.R.S. ("is not provided for by a specific Colorado or federal statute or by a specific ordinance or charter of a home rule municipality…")

The very suggestion for the Colorado legislature to write federal law out of a statute seems to directly undermine the entire holding of the majority in this case.

The absence of any reference to federal law in a state off-duty statute is probative of legislative intent. *See, e.g., Students for Concealed Carry on Campus, LLC v. Regents of University of Colorado,* 280 P.3d 18, 23 (Colo.App. 2010). Courts in other states have declined to consider federal law in their state off-duty statutes. See e.g. *Coats,* 303 P.3d at ¶50 (Webb, J. dissent).

Congress has legislated extensively in the field of employer-employee relations, including discriminatory or unfair employment practices. See, e.g., 29 U.S.C. § 621 et seq. (Age Discrimination in Employment Act); 42 U.S.C. § 12132 et seq. (Americans with Disabilities Act Title I and Title V); 42 U.S.C. § 2000e et

seq. (Title VII of the Civil Rights Act of 1964 and 1991). However, none of these federal statutes broadly protect employees from discharge for lawful off-duty activity as C.L.O.D.A.S. does.

In fact, despite these federal protections, Colorado still chose to create separate and distinct employment laws to define the types of discriminatory and unfair practices it wished to regulate and enforce in this state and codified them under the Colorado Civil Rights Act.

As stated above, there is no similar version of C.L.O.D.A.S. in the federal Code, making it unique to Colorado law. See *Coats,* 303 P.3d at ¶50. Second, there is obviously no similar version of the M.M.A. in the federal Code, making it unique to Colorado law. See 21 U.S.C. §§ 844(a), 903. Federal law cannot be used to define terms that are only unique to state law.

While the majority argues that it has applied the language of statute as written, apparently through a dictionary, it definitely overlooked *who* wrote it. State laws are made by the state legislature, who only as the jurisdiction, and therefore the intent, to govern and control state actions through state agencies. See generally Colo. Const. art. V, § 1.

Each of the tools of statutory construction lead to the inexorable conclusion that employees in Colorado cannot be fired for their "lawful" activities as defined

by Colorado, including the use of mmj pursuant to the M.M.A.. This Court should adopt the dissent of Judge Webb and Gabriel by interpreting the laws and Constitution of this State. Such interpretations track the plain language of this State's statutes, Constitutional Amendments, and well-established canons of statutory interpretation.

C. Dispelling Phantom Defenses Raised by Employers

Those who would desire to raise any of the following defenses or theories should wait for a different day and a different case. They do not exist here. Only the specific facts of this case are before the Court and proper to consider.

I. *At-Will Doctrine Does Not Apply to C.L.O.D.A.S.*

C.L.O.D.A.S. is a recognized exception to Colorado's at-will employment doctrine. *Wisehart*, 66 P.3d at 126-127. As the majority in this case noted, it is precisely because employers frequently abuse this doctrine as some overbroad safety net that enumerated statutory exceptions like this exist. *Coats*, 303 P.3d at ¶16.

DISH terminated Coats specifically based the presence of an unknown amount or type of T.H.C. in his system. (12CA0595 PDF Record p.16, ¶3). Coats was a M.M.A. patient who lawfully used mmj outside of the job where it clearly

did not affect his performance at work. Therefore, DISH "triggered a recognized exception" to the at-will employment doctrine by violating C.L.O.D.A.S.

II. *Record Void of Evidence of "Drug Free Work Place", Company Drug Policy, "Zero-Tolerance" Policy, or Federal Contract*

There are no company drug policies, "zero-tolerance" policies, federal contracts, or "Drug Free Work Place" issues present here. DISH has made at least two similar arguments against another terminated employee. *See* 2011CA1982, 2012CA2318.

If any work place policies existed, they may be voidable for contravening, frustrating, or interfering with the goals of clearly stated public policies in Colorado. *Huizar v. Allstate Ins. Co*., 952 P.2d 342, 355 (Colo. 1998). Both the M.M.A. and C.L.O.D.A.S. establish clear policy goals, as so explained in this brief. *See Watson*, 207 P.3d at 863-864.

III. *No Safety Concerns, Hazardous Occupations or Activities, or Workplace Accommodation Exist in this Case*

There are no hazardous activities, safety concerns, or work-place accommodations issues present here. Coats was a quadriplegic telephone customer service representative who sat in a wheelchair pushing a button at a desk every day. Coats never possessed, used, or requested accommodation for marijuana use

while at work, during work hours, or on company property. He only used mmj in the privacy of his own home, outside of working hours, in compliance with M.M.A.. Throughout his three year employment, Coats had satisfactory performance reviews and DISH never accused or suspected him of being impaired or under the influence while at work.

IV. *No Adverse Effects on Employee Performance*

Coats' use of mmj outside of working hours and off company property did not adversely affect his job performance, attendance, or customer relations. In fact, the evidence indicates the contrary. Throughout his three year employment, Coats had satisfactory performance reviews and DISH never accused or suspected him of being impaired or under the influence while at work. The use of mmj decreased painful muscle spasms, allowing Coats to work and perform better for an employer.

D. Employers Do Not Accurately Understand or Test For T.H.C. Impairment

Unlike every other drug already used by employees in the work place, including prescription medications (like Vicodin and OxyContin), illicit drugs (like cocaine and heroin), and over the counter substances (like cold medicine, energy drinks, alcohol, and nicotine), the inactive form of T.H.C. uniquely remains in a

human body for an extended period of time after use. The mere identification of its presence through a basic, antiquated drug test without accurately discerning the type or amount of T.H.C. is not dispositive of a person's intoxication or impairment. F. Musshoff and B. Madea, *Ther Drug Monit*, Volume 28, Number 2, pp. 155-163, April 2006; E. Karschner *et al*., Society for the Study of Addiction. *No claim to original US government works*. 2009. This was the case with Coats. (12CA0595 PDF Record p.16, ¶3). Judge Gabriel agreed in *Beinor* 262 P.3d at 980-981 (holding that presence of T.H.C. in a patient is not synonymous with possession or contemporaneous use).

Despite suggestions by employers to the contrary, the technology to accurately test large numbers of individuals for marijuana impairment or intoxication already exists, is accessible to employers, and has been regularly used for a variety of reasons, including D.U.I.D. cases. More accurate drug testing would lead to better, more informed decisions by employers.

Absent a finding of an enumerated exception under the M.M.A. (like workplace accommodation), C.L.O.D.A.S. (like bona fide occupational qualification), active form of T.H.C. while at work, or specific and articulable facts regarding impairment, the mere presence of T.H.C. in the body of a mmj patient-employee should not serve as the sole basis for a Colorado employer to lawfully

terminate an employee under C.L.O.D.A.S. Yet this is what happened to Mr. Coats. See other exceptions under *Sosa v. I.C.A.O. of State*, 259 P.3d 558 (upholding award of unemployment benefits even though appeared impaired and tested positive). *Compare Beinor*, 262 P.3d 970 (denial of workman's compensation).

E. Employment Law Remains Unchanged: Employers & Employees Retain All Protections & Rights Under Colorado Law

The status quo of the law in Colorado for employers and employees has not changed. The at-will employment doctrine never applied to claims brought under C.L.O.D.A.S.. *Wisehart*, 66 P.3d at 126-127.

Problems and concerns anticipated to be raised by employers are imaginary as applied to the specific facts of this case, which are the only facts to properly consider.

Employers should, and continue to retain all rights and protections already established under Colorado law. The existing language of both § 24-34-402.5(1)(a)-(b), C.R.S., and Colo. Const. art. XVIII, § 14(5) and § 14(10)(b) have, and will continue to provide specific guidance and protection to employers with their employees. This necessarily includes situations where accommodation for mmj use is requested, used at work, would be a specific conflict, or poor fit for a

bona-fide occupational qualification, like driving a school bus or operating a forklift.

Employers may still conduct drug testing on employees, so long as the correct testing procedures are used, applicable laws are followed, and the test results are accurately understood and interpreted, i.e. active v. inactive T.H.C. Judge Gabriel wrote a very detailed, very powerful analysis of § 14(10)(b) and drug testing in his dissent in *Beinor*, which was adopted by dissenting Judge Webb in this case. The word restriction in this brief will not permit its inclusion, so it is adopted by reference herein. *Beinor* 262 P.3d at 980-981; *Coats*, 303 P.3d at ¶55.

Those employees who choose to work impaired or under the influence at work, whether by alcohol, drugs, or even mmj, could be terminated. In that regard, employers should not treat mmj patient-employees any differently than any other employee assuming accurate testing is used or specific and articulable facts regarding impairment or safety.

Employees who perform well, are not impaired or under the influence at work, and otherwise in compliance with Colorado law, like Coats, should continue to retain both their employment and their ability to choose legitimate health care options as recommended by their licensed physician. For these employees, the

mere identification of the presence of T.H.C. should never serve as the sole basis for termination.

Employers can still propagate company policies, so long as those work place policies do not contravene, frustrate, or interfere with the goals of a clearly stated public policy of Colorado. *Huizar*, 952 P.2d 342, 355 (Colo. 1998).

Based on the foregoing, there should be no weight accorded to any allegation that Colorado-based employers will flee or "abandon ship" since nothing has changed.

F. Appellate Decisions Are Creating Widespread Problems for Colorado Laws, Employees, and Economy

Colorado courts have issued a wide variety of differing and inconsistent opinions interpreting the C.L.O.D.A.S. and M.M.A., and a decision from this Court in this case will bring much needed finality and guidance.

In this case the majority held that mmj use in Colorado, even under the M.M.A., is not a "lawful" activity protected under C.L.O.D.A.S. because according to a dictionary "…for an activity to be "lawful" in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law, but complies with state law cannot be "lawful" under the ordinary meaning of that term." *Coats*, 303 P.3d at ¶14.

Continuing to interpret Colorado law in that way creates not only a conflict in this case, but unnecessarily in many other existing laws.

In this case alone, the appellate majority materially abrogated prior interpretations of C.L.O.D.A.S. under *Watson*, 207 P.3d at 864; Wall & Johnson, 35 COLO. LAW. at 41 (Dec. 2006). In reaching their decision, the traditional canons of statutory interpretation were not followed. Instead of using of the plain language of a variety of laws, legislative history, interpretive case law, and public policies in this State, a narrow dictionary definition of the term "lawful" was used. C.L.O.D.A.S., a statute that specifically created and designed to protect employees, is now being used to protect their employers to their detriment.

Upholding the appellate majority below would confer upon Colorado-based employers a power over that supersedes the medical advice of their employees' licensed physicians, and exceeds the authority of any law enforcement officer - who still must obtain the authority of a court to enter your private life.

MMJ use pursuant to the M.M.A. is lawful, and a "lawful activity" under C.L.O.D.A.S. should be defined by Colorado law, not federal law. This is the only consistent, accurate interpretation of the laws and Constitution of this State, as expressly written by the legislature of this State, and the public policy of this State. *See also Coats,* 303 P.3d at ¶¶40-58 ; *Beinor* 262 P.3d at 978-982.

CONCLUSION

No higher court can justify, defend, or support what is in this State's Constitution or statutory code. While it may be more popular or generally accepted to defend employer rights, no other court will equally protect the hundreds of thousands of sick and disabled mmj patient-employees in this State from unlawful termination. A more practical solution must be achieved instead of forcing a mutually exclusive choice between health care and employment for hundreds of thousands of people.

Inconsistent interpretations of M.M.A., like the one in in this case, are prevalent throughout the state and desperately need this Court's guidance and finality. Due to the specific facts and law in this case, the Court can reach a rational, albeit narrow, decision without ever changing existing State law, violating federal law, or setting overbroad, irrational restrictions on employers.

Colorado employers like DISH should be required to respect the laws of the State where they are incorporated. They should also continue to retain the right to terminate employees absent specific protections already established under Colorado law. They need not run and jump over this State's border like lemmings.

Employees who comply with state law, should be protected by state law. Good employees, who are not impaired or under the influence at work, and

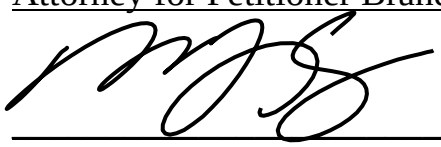
otherwise in compliance with Colorado law like Coats, should retain both their employment and ability to choose legitimate health care options as recommended by their licensed physician.

Termination of employment should not be allowed to lawfully continue for conduct recommended by a licensed physician, sanctioned and permitted by the State, not to mention benefiting the State financially, and where there is a state statute specifically designed to protect against it. If a seriously disabled patient like Coats, who was a model employee and law abiding citizen, cannot prevail against a Colorado corporation like DISH with these set of facts, it is hard to imagine whom might and under what circumstances.

WHEREFORE, Coats respectfully asks this Court to reverse the dismissal of his case and to remand the case to the district court with instructions that Coats' use of mmj within the prescribed limits and conditions is a "lawful activity" in Colorado under the M.M.A. and C.L.O.D.A.S..

Respectfully submitted by the following undersigned counsel for the Coats this 24th day of March, 2014:

Attorney for Petitioner Brandon Coats:



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CERTIFICATE OF SERVICE

Parties: Coats v. DISH
Case #: 13SC0394

This is to certify that I have duly served the within **OPENING BRIEF** upon all counsel of record, by e-serving a copy via ICCES and mailing a hard copy via USPS 1st Class mail this 24th day of March 2014.

Colorado Supreme Court

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