SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 21, 2014 10:16 PM FILING ID: 461CFFC36CAE1 CASE NUMBER: 2013SC394
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2012CA595 **BRANDON COATS**, Petitioner, v. **DISH NETWORK, LLC**, Respondent.	▲**COURT USE ONLY**▲
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STATE OF COLORADO'S AMICUS BRIEF IN SUPPORT OF RESPONDENT DISH NETWORK, LLC

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 rules. Specifically, the undersigned certifies that:

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

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For the party raising the issue:

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 (R. , p.), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

[/s/ David C. Blake]

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INTERESTS OF AMICUS CURIAE

The eyes of the nation are watching as Colorado carries out an experiment by relaxing state laws on marijuana. Contrary to popular perception, Colorado has not simply legalized marijuana for medical and recreational purposes. Instead, its citizens have adopted narrowly drawn constitutional amendments that decriminalize small amounts of marijuana for patients with a debilitating medical condition, at issue in this case, or for recreational use by adults over the age of 21. *See* Colo. Const. art. XVIII, §§ 14, 15.

There is much at stake in the effective implementation of Colorado's challenging legal framework to regulate marijuana. And with the federal government *not* acting to relax the absolute prohibition on possession and use of marijuana it is all the more necessary to interpret Colorado's laws in a predictable and clear fashion. The State of Colorado has an interest in both the application of employment laws to its employees and in the interpretation of the constitutional provision governing medical marijuana. It is the state, after all, which implements and enforces the laws and regulations governing medical marijuana in Colorado.

Colorado has a strong interest in this Court's ultimate conclusions regarding the Lawful Activities Statute, C.R.S. § 24-34-402.5 as it relates to

the use of marijuana. An interpretation of this statute as contemplated in the dissenting opinion below would negatively affect the state and other employers. Zero tolerance drug use policies are employed by many employers, including the state, both as required by federal law in certain cases and as a matter of prudence. For these reasons this brief will address both statutory and constitutional issues.

ARGUMENT

I. Interpreting the lawful activities statute to cover illegal conduct under federal law would have a profound and detrimental impact on the employers in the state.

Reversal of the Court of Appeals' decision would reach far beyond private employers like Dish Network. Many employers, including the state, find it necessary to have employment policies prohibiting the use of marijuana. With more than 30,000 employees in the state personnel system alone, the State of Colorado is the state's largest employer. These policies will be called into question if the lawful activities statute were interpreted behind a veil of ignorance to federal law – as Petitioner Coats suggests.

The State of Colorado in particular must take steps to ensure that its vast workforce provides "qualified and competent" service to the citizens. *See Dep't of Human Servs v. May,* 1 P.3d 159, 166 (Colo. 2000) (overarching

purpose of state personnel system is assurance that a well-qualified work force serves Colorado residents). Thousands of these employees, particularly those in the Departments of Corrections, Public Safety, and Transportation, must be subject to limits concerning on- or off-duty marijuana use because they serve missions critical to the welfare, safety, and protection of Colorado's citizens. The state cannot risk that these employees will engage in the use of marijuana (medical or otherwise), that may impair their ability to perform their duties. Having this Court, without express legislative intervention, extend the Lawful Activities Statute to the medical use of marijuana would undercut many employers' workplace drug use policies.

A. Employers, including the State of Colorado, need to ensure that employees are not impaired by marijuana on the job.

The state, like many other employers, has several employment policies regarding drug use that could be impacted by an expansive interpretation of the Lawful Activities Statute. For example, recognizing that the "State of Colorado has a vital interest in maintaining a safe, healthful, and efficient working environment for its employees, clients, and the public," Governor Roy Romer declared that the State of Colorado would "comply with each of the provisions of the Drug Free Workplace Act of 1988 ...." Exec. Order No. D0002 91 (Jan. 14, 1991). The Drug Free Workplace Act requires federal

contractors and grantees to provide a drug-free workplace by complying with numerous requirements, including informing employees that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the workplace, specifying the actions to be taken against employees who violate the policy, and requiring employees to abide by this policy as a condition of employment. *See* 41 C.F.R. §§ 701(a)(1), 702(a)(1). Under the Executive Order, state employees are prohibited from use of alcohol, other drugs, or controlled substances that result in job impairment. *Id.* at ¶¶ 1, 3. The Executive Order has been in effect without incident since Section 14 was adopted in 2000. In order to implement the Executive Order the state has a universal policy concerning "Impairment in the Workplace" that cautions state employees that "alcohol and drug use that adversely impacts the employee's ability to perform his or her job or the work environment, or that creates risk to the general public, cannot be tolerated." *Universal State Personnel System Policy, Impairment in the Workplace* (Nov. 12, 2007), *available at* http://bit.ly/1ti45gD.

The State of Colorado has practices in place for enforcing this drug policy by conducting certain drug screening tests of employees. Employers often adopt drug policies that have zero tolerance for marijuana use. Application of the Lawful Activities Statute to medical marijuana use would

effectively bar these common policies and instead force employers, including the State of Colorado, to engage in a complex, fact-finding determination of the circumstances giving rise to a positive test for marijuana use. And even so, many employers would be compelled to avoid termination as a consequence for employees who violate a clear and predictable zero tolerance drug policy. The statutory interpretation urged by Mr. Coats would eliminate employers' discretion to enforce a zero tolerance policy for marijuana use. As an adverse consequence, compelling employers to throw out zero tolerance drug policies could, in many instances, force employers to conduct intrusive investigations into the personal life of an employee. Simply put, zero tolerance policies provide businesses with an efficient means of avoiding difficult employment decisions and even litigation.

To be sure, employers would still be free, technically, to terminate an employee for use of marijuana that was not truly off premises and off the job. But even after a diligent investigation and candid consideration of all the available evidence, if an employer determines that an employee used marijuana or is under the influence of marijuana while on the job and

terminates that person's employment, there could still be a challenge under the Lawful Activities Statute.[1]

Even more burdensome, the lack of predictable zero tolerance drug policies could lead to employers determining that the employee's off-duty use of marijuana impaired the employee's ability to perform the job, leading to discipline. This too would engender litigation about the claimed impairment. The answer is far from clear and may depend on the individual circumstances. The State of Colorado and other employers should not be put in the burdensome position having to litigate a prohibition of the use of marijuana resulting in job impairment caused by an employee's choice to consume marijuana in violation of a contract with an employer that they entered into voluntarily.

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[1] Separately, as to the state, certified employees in the state personnel system are entitled to a hearing as to whether his or her termination is arbitrary, capricious, or contrary to rule or law. *See* COLO. CONST. art. XII, § 13(8); C.R.S. §24-50-125; *see generally Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1245-47, 1251-52 (Colo. 2001).

B. Federal law expressly prohibits certain employees from using marijuana, regardless of being on- or off-duty.

In addition to the Drug Free Workplace Act, the Omnibus Transportation Employee Testing Act of 1991 requires employers of safety-sensitive transportation workers subject to U.S. Department of Transportation (US DOT) agency regulations to conduct drug tests of those workers. 49 U.S.C. § 31306. The State of Colorado employs almost two thousand such safety-sensitive transportation workers.

Federal Motor Carrier Safety Administration (FMSCA) regulations require the state and others to comply with drug and alcohol testing rules governing Commercial Driver License (CDL) drivers. *See generally* 49 C.F.R. Part 382. It is a violation of these drug and alcohol testing regulations to test positive for marijuana. 49 C.F.R. § 382.213. On December 3, 2012, and again on February 22, 2013, US DOT issued a compliance notice stating that "marijuana remains a drug listed in Schedule I of the Controlled Substances Act" and "[i]t remains unacceptable for any safety-sensitive employee subject to drug testing under the [US DOT's] drug testing regulations to use marijuana." DOT Office of Drug and Alcohol Policy and Compliance Notice (Dec. 3, 2012), *updated* (Feb. 22, 2013) *available at* http://1.usa.gov/RT4f0g. In essence, the State of Colorado and other employers remain required by

federal law to impose a zero tolerance policy for marijuana use on CDL drivers.

As a reference, at least 1700 state employees are subject to the FMCSA regulations, many of whom serve the traveling public as the state's snow plow drivers and transportation maintenance workers. As a condition of employment, these employees are not permitted to use marijuana and if they test positive for marijuana during a random test, they are deemed to have violated the federal law and CDOT policy. Such a violation does not mean they will automatically be terminated, but termination may, and should, be within the range of possible personnel actions.

If the Court of Appeals' decision is reversed and marijuana use is deemed "lawful" for purposes of Colorado's Lawful Activities Statute, employers will stand in the awkward and uncertain position of having to defend compliance with a federal law intended to protect the public's safety and welfare.[2] It may also lead to Colorado's Lawful Activity Statute being preempted. The US DOT regulations provide for the preemption of any state law to the extent that compliance with both the state law and the regulations

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[2] The State of Colorado contends these employees would qualify under the bona fide occupational requirement exemption. C.R.S. § 24-34-402.5(1)(a).

is not possible. *See* 49 C.F.R. §382.109(a). Employers should not be forced to defend compliance with federal law, or invoke preemption of the Lawful Activities Statute, simply to terminate someone like a safety-sensitive transportation worker for using marijuana and potentially risking the safety of others.

C. Employers need flexibility to monitor and enforce zero tolerance policies for marijuana use for safety-sensitive employees.

In addition to Colorado employees subject to the Drug Free Workplace Act and DOT regulations, the State of Colorado employs at least 7700 other individuals who are responsible for ensuring the safety and security of the general public. They include: correctional officers charged with supervising offenders in Colorado's correctional facilities, Colorado State Patrol troopers enforcing traffic laws on the state's highways, peace officers patrolling the state's parks and campgrounds, and employees in numerous other law enforcement-related positions, many of whom may carry a firearm in the course of their official duties. Employees in law enforcement positions must be subject to zero tolerance for marijuana because possession of marijuana remains a federal crime. *See* 28 U.S.C. § 812, Schedule I, § (c)(10) (identifying marijuana as a Schedule I controlled substance); § 28 U.S.C. § 844 (providing

penalties for possession of marijuana). The employing state agencies thus impose a policy of zero tolerance for marijuana use on these important "safety-sensitive" positions.

As with other categories of employees, a ruling in favor of the Petitioner would substantially interfere with existing drug use policies and raise the prospect of litigation under the Lawful Activities Statute. While the state agency would have the burden of demonstrating that a zero tolerance requirement is either a bona fide occupational requirement (undefined in the statute), or is reasonably and rationally related to the employment activities and responsibilities of that particular employee, *see* C.R.S. § 24-34-402.5(1), drug use policies governing safety-sensitive positions would lack the same federal law defenses available for employees subject to DOT regulations. This would interfere with existing employment relationships and likely require courts to micro-manage the employment policies across the state.

This Court should not place employers in the untenable position of having to demonstrate that its policies satisfy the bona fide occupational qualification or "reasonably and rationally related" test for each individual safety-sensitive employee. Employers, including the State of Colorado, are in the best position to determine which positions are so vital to safeguarding the public that marijuana use may not be tolerated under any circumstances.

II. It would be a mistake to interpret Article XVIII, Section 14 as "conferring a right," in general, to use medical marijuana.

The second certiorari question in this case raises the possibility of the Supreme Court describing Section 14 as "conferring a right to use medical marijuana." The nomenclature of rights can cause confusion – especially when the parties and lower courts do not appear to have a viable legal theory for implementing the right. The State of Colorado contends there is no reason in this case to address the question of describing the medical use of marijuana as a "right" under the state constitution. Resolving this case does not require this Court to reach the question of what type of a right, if any, protects medical marijuana patients and caregivers. As a matter of statutory interpretation the undeniable and unambiguous illegality of marijuana under federal law answers the question in this case. *E.g. Gonzales v. Raich*, 541 U.S. 1 (2005); *see also United States v. Bartkowicz*, No. 10-cr-118-PAB *Hearing*, p.174 (D. Colo. Sept. 22, 2010) ("There is no relevance to the fact that Mr. Bartkowicz thought that he was in compliance with state law

because federal law here is supreme…"), *available at* http://bit.ly/1j8qfu7.[3] This case is simply a bad vehicle to opine on marijuana use as a "right."

If, however, the language of rights is applied to Section 14 the Court should provide a careful description of the right and clear guidance to lower courts that Section 14 *only* provides a legal avenue for medical marijuana users to avoid criminal prosecution. In fact, given the exceedingly narrow reach of Section 14, invoking the language of "rights" would only lead to confusion as citizens and jurists alike may misunderstand both the nature of the right and the scrutiny associated with the right. Given language used in Section 14 and the overall purpose and structure of that provision, the legal protection for possession and use of medical marijuana should be strictly limited to providing protection from criminal prosecution – nothing more. In fact, when compared to other well-established constitutional rights the limited reach of Section 14 (and thus any "right" therefrom) comes into clear relief.

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[3] John Ingold, *Man Charged with Growing Pot Loses Early Court Tussle to Feds*, Denver Post, Sept. 23, 2010, http://www.denverpost.com/news/ci_16148516?source=pkg.

A. The Petitioner has forfeited the issue of whether Section 14 conferring a "right" to use marijuana.

The Petitioner in this case admitted that Section 14 does not confer a right to use medical marijuana as stated in the second certiorari question. Opening Br. at 38 ("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.") By admitting that Section 14 does not confer a "right," the Petitioner has forfeited the legal issue raised by the second certiorari question. *See Gorman v. Tucker by & Through Edwards*, 961 P.2d 1126, 1131 (Colo. 1998) ("We will not consider issues raised only by amicus curiae and not by the parties."); *Schempp v. Lucre Mgmt. Group, LLC*, 75 P.3d 1157, 1161 (Colo. App. 2003) (Failure of counsel to "cite any legal authority in addressing this issue" resulted in conclusion "that the issue has not been adequately briefed, and we do not consider it."). The failure to address the question of what "right," if any, exists under Section 14 has resulted in a dearth of legal analysis and briefing on the question. The issue should be treated as forfeited.

B. There is no reason to decide whether Section 14 confers a "right" to use marijuana because that constitutional question is not necessary to the resolution of this case.

As this Court has recognized, it is "[a]xiomatic to the exercise of judicial authority is the principle that a court should not decide a constitutional issue

unless and until [the] issue is actually raised by a party to the controversy and the necessity for such decision is clear and inescapable." *People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985). Even the dissenting judge below gave short shrift to the constitutional "rights" issue – recognizing the issue as dicta. *See* 2013 COA 62, ¶ 55 (Webb, J., dissenting); *see also id.* at ¶ 56 ("To be lawful under the off-duty conduct statute, however, conduct need not rise to the level of a constitutional right."). While this Court certainly has the power and paramount role in describing the nature of rights in the Colorado Constitution, it should refrain from doing so in this case.

The State of Colorado agrees with the court of appeals holding that the Lawful Activities Statute accounts for both federal and state law. Thus, there is no need to decide an abstract question about the scope of a new constitutional right when the claim in this outcome in this case would not turn on the question of a new right. Consider the paradigm situation of an employee being protected from termination for smoking tobacco off-premises and after hours. Nobody claims that there is a constitutional right to smoke a cigarette, but the statute applies all the same. Thus, any holding about a "right" to medical marijuana would be gratuitous. For good reason this Court avoids reaching constitutional issues, particularly of first impression, when not necessary to resolve the case at issue.

There are other reasons to stop short of recognizing a "right" to use medical marijuana. Colorado's experiment with partial decriminalization of marijuana is complex and fast-developing. Both medical and retail marijuana are highly regulated by the State, cities and counties. *E.g.* 1 CCR 212-1 (M 100) – (M 1400) (Medical Marijuana Rules); 1 CCR 212-2 (R 100) – (R 1400) (Retail Marijuana Rules). The legislature now annually passes a bevy of new marijuana related statues. E.g. H.B.14-1366, 69th Gen. Assem., 2d Sess. (CO 2014) (legislation addressing marijuana edibles). These are just the state law complexities that, considering that the federal law treatment of marijuana, only further underscores the complex legal landscape of marijuana in Colorado. Perhaps contrary to popular perception the federal government, with the specter of the Supremacy Clause lurking in the shadows, continues to evolve and change its position on the legality of marijuana.[4] Given this

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[4] Compare James M. Cole, Mem. "Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use" (June 29, 2011) ("The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law."), *available at* http://1.usa.gov/1h6Lvki; *with* James M. Cole Mem. "Guidance Regarding Marijuana Enforcement" (August 29, 2013) ("If state enforcement efforts are not sufficiently robust to protect against harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring

background, there would be many unforeseen consequences from finding a broad "right" to use medical marijuana.

The experience of Colorado courts to date underscores the far-ranging potential for an interpretation of Section 14 to reach legal issues beyond the Lawful Activities Statute. Already courts have faced situations ranging from parole conditions, *People v. Watkins*, 282 P.3d 500 (Colo. App. 2012), unemployment benefits, *Beinor v. Indus. Claim Appeals Office of Colorado*, 262 P.3d 970 (Colo. App. 2011), child custody conditions, *In re Marriage of Parr*, 240 P.3d 509 (Colo. App. 2010), and the qualification of a caregiver, *People v. Clendenin*, 232 P.3d 210 (2009). Interpretative questions under Section 14 that are not necessary to decide this case should be left for another day.

C. If this Court reaches the issue of what "right," if any, exists, then Section 14 must be strictly limited to creating the ability for citizens to avoid criminal prosecution or conviction.

While the State of Colorado does not contend that the question of a "right" to use medical marijuana should be reached, it nonetheless will

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individual enforcement actions, including criminal prosecutions, focused on those harms."), *available at* http://1.usa.gov/1j6GSGL.

provide reasons why Section 14 must be interpreted in a narrow and circumspect fashion. On this point, the two dissenting opinions in the courts of appeals that have opined on this issue should be rejected. The citizens of Colorado did not intend to create a broad "right" when they adopted Section 14 and this Court should likewise refrain from doing so.

1. The scope of a "right," if so-called, should extend only to criminal law.

The best reading of Section 14 is that it *only* extends to the application of Colorado criminal statutes that generally make it illegal to possess marijuana for personal use. Indeed, almost every provision in Section 14 is focused on Colorado's criminal laws. Section 14 –

> (2)(a)("…state's criminal laws…");
> (2)(b)("…it shall be an exception from the state's criminal laws…");
> (2)(c)("It shall be an exception from the state's criminal laws…");
> (2)(e)("…while in the possession of state or local law enforcement…");
> (3)(a)("…authorized employees of state or local law enforcement agencies…");
> (3)(d)("…questions by any state or local law enforcement official…");
> (3)(g)("Authorized employees of state or local law enforcement agencies…");
> (4)(b)("…an affirmative defense to charges of violation of state law");
> (8)("…criminal penalties…").

When taken as a whole, the provision evidences an unmistakable purpose: decriminalizing small amounts of marijuana, under specific conditions, for patients with specific debilitating medical conditions.

Section 14 is not a freestanding, generally applicable pronouncement like the free exercise clause: *Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.* By contrast, Section 14 contains 3,075 words, runs for six pages, and is specific and replete with references and connections to the state's criminal law. As evidenced above, most generally applicable "rights" are simply stated in a sentence or clause, and indeed, the original U.S. Constitution only contained 4,543 words. The long, technical provision governing medical marijuana looks nothing like a simple statement of a generally applicable right.

The voters simply did not adopt a generally applicable right to use marijuana, such as "*Colorado shall make no law prohibiting the possession or use of medical marijuana."* Indeed, the people did not even use language indicating that Section 14 was intended to broadly trump other laws, such as signaling "*notwithstanding any provision of law to the contrary*." Section 14 was a rifle-shot aimed at the criminal laws of Colorado, not a general constraint on government conduct.

The limited scope of Section 14 is also confirmed by the peculiarly limited ability of patients to get medical marijuana. Judge Loeb concurred in *Clendenin* to note the "bizarre practical anomaly" whereby the voters *intended* to permit medical marijuana patients and caregivers to grow

marijuana, but not to acquire marijuana in the first instance. 232 P.3d at 217-18. Thus, absent the later-enacted legislative grace on this issue, Section 14 did not even allow for the relevant citizens to legally acquire marijuana. This underscores the extremely limited and specific reach of Section 14.

2. *The dissenting judges in* Coats *and* Beinor *offer no sound reason to extending Section 14 beyond the criminal law.*

The dissenting judge in this case "endorsed" the view the dissenting judge in *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 975 (Colo. App. 2011) regarding a "right" to medical marijuana. In *Beinor* the dissent suggested that Section 14 should be interpreted to create a "right to possess and use medical marijuana in the limited circumstances described therein." *Id.* at 978. Based on this ill-defined right, the dissenting opinion went on to compare the plaintiff's denial of unemployment benefits to the denial of government benefits that *burden the free exercise of religion* in three federal cases. *Id.* at 981-82 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963) (denial of unemployment compensation as burden on free exercise right); *Hobbie v. Unempl. Appeals Comm.*, 480 U.S. 136 (1987) (same); *Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981) (same)). The *Beinor* dissent thus elevated, *sub silintio,* Section 14 to the same constitutional status as the "special solicitude" given to religion in the First Amendment. *See Hosanna-*

Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 697 (2012).

Invoking language of "rights" without doing the necessary work of describing the nature of the right and the level of judicial review that is required, as the two dissenting judges have done, only begs questions. These dissenting opinions merely offer a conclusion that Section 14 creates a right, they do not provide any of the required legal analyses for applying this part of the constitution.

3. The nature of the "right," if so-called, must be carefully described and defined.

If this Court were going to adopt a standard of review, however, it should carefully describe the right, including the level of judicial review that would be required. There are, after all, vast arrays of different standards applied to constitutional rights. Contrary to the implication of the dissent in *Beinor*, not all constitutional rights require strict scrutiny. Consider just a few examples:

- **Contracts Clause** – The contracts clause applies when there (1) is a contractual relationship which requires the party to demonstrate contract gave him a vested right; and (2) is a substantial impairment of a contract relationship by a law that was not foreseeable and thus disrupts the parties expectations; and (3) the substantial impairment fails to meet the standard of necessity and reasonableness. *See In re Estate of DeWitt*, 54 P.3d 849, 858-59 (Colo. 2002).

- **Free Exercise of Religion** – A neutral law of general applicability need not be justified by a compelling government interest, however, a law that is not neutral or generally applicable, or which targets religion "is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993).

- **Establishment Clause** – The "three familiar considerations" look to whether government action has (1) a secular legislative purpose, (2) the action neither advances nor inhibits religion; and (3) the action does not excessively entangle government with religion. *See generally Lemon v. Kurtzman*, 403 U.S. 602 (1971).

- **Equal Protection** – Classifications based on race "must meet strict scrutiny" and be "precisely tailored to serve a compelling government interest." *Fisher v. Univ. of Texas*, 133 S.Ct. 2411 (2013). Classifications based on gender "must demonstrate an 'exceedingly persuasive justification' for that action." United States v. Virginia, 518 U.S. 515, 531 (1996). Non-protected class distinctions need only satisfy rational-basis review where "any reasonably conceivable state of fact that could provide a rational basis for the classification" will suffice. *Heller v. Doe*, 509 U.S. 312, 320 (1993).

- **Procedural Due Process** – Government decisions which deprive an individual of certain liberty or property interests the court should weigh [1] the interest of the individual and the injury threatened, with [2] the risk of error through the procedures used and the probative value of additional procedural safeguards; and [3] the costs and administrative burden of additional process and the interest of the government in efficient adjudication. *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976).

- **Substantive Due Process** – "[T]he Due Process Clause specially protects those fundamental rights and liberties which are, [1] objectively, deeply rooted in this Nation's history and tradition… and [2] we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

- **Cruel and Unusual Punishment** – By "referring to the evolving standards of decency that mark the progress of a maturing society [the court will] determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (citation and quotation omitted).

This smattering of constitutional standards highlights the particularized development of the standard of review required by a constitutional right.

* * *

The State of Colorado suggests the interpretation of Section 14 should be carefully cabined to the intent of the people to provide a carefully defined exception to criminal law. It should not extend to any other state law issues. If the Court chooses to describe the use of marijuana as a "right," however, the Court should act with caution, and provide a deferential level of review akin to rational basis. To the extent any level of review is appropriate, it should be highly deferential as to capture the spirit of the voters who enacted a specific, criminal-law focused provision. Any other result would undermine the need for the executive branch and the General Assembly to regulate and legislate in this complicated and fluid policy arena. If the People want to enact a broadly applicable "right' to use marijuana as the dissent in *Beinor* declared, then a new amendment to the Colorado Constitution should be required.

CONCLUSION

For the foregoing reasons, the court of appeals decision below should be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **STATE OF COLORADO'S AMICUS BRIEF IN SUPPORT OF RESPONDENT DISH NETWORK, LLC** upon all parties herein by Integrated Colorado Courts E-filing System (ICCES) or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 21st day of May, 2014 addressed as follows:

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