No. 83768-6

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**IN THE SUPREME COURT**
**OF THE STATE OF WASHINGTON**

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JANE ROE,

Petitioner,

v.

TELETECH CUSTOMER CARE
MANAGEMENT (COLORADO) LLC,

Respondent.

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# BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITIONER

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## I. INTRODUCTION

The voters, legislature, and courts of this state have recognized and articulated a clear public policy of permitting patients and their doctors to use medical marijuana to treat certain terminal or debilitating illnesses. Accordingly, qualifying patients have the right under state law to receive such treatment subject to well-defined restrictions and procedures.

Petitioner Jane Roe was terminated by her employer, TeleTech, for exercising that right, even though her medical use of marijuana occurred at home and had no effect on workplace safety or job performance. In reviewing the trial court's award of summary judgment to TeleTech on Roe's claim for wrongful termination in violation of public policy, the Court of Appeals concluded—without in-depth analysis—that no clear mandate of public policy exists to support that claim.

The Court of Appeals' analysis of Washington public policy regarding medical marijuana was unduly narrow and ignored the legal standards that this Court has articulated to determine that issue. For this reason, *Amicus Curiae* American Civil Liberties Union of Washington respectfully urges the Court to reverse the Court of Appeals' decision.

## II. IDENTITY AND INTEREST OF AMICUS

The ACLU of Washington adopts and incorporates its statement of interest contained in its accompanying motion.

## III. STATEMENT OF ISSUES

First, whether Washington has established a clear public policy recognizing the right of patients and their physicians to use medical marijuana to treat certain terminal or debilitating illnesses.

Second, whether that policy is jeopardized by an employer's termination of an employee for lawful, at-home medical use of marijuana, where that use does not affect safety or job performance.

Third, whether any overriding justifications exist to permit the termination of an employee for lawful, at-home medical use of marijuana not affecting safety or job performance.

## IV. ARGUMENT

### A. Applicable Legal Standards

Washington recognizes the common law tort of wrongful termination in violation of public policy, and "Washington courts have generally recognized the public policy exception when an employer terminates an employee as a result of his or her . . . exercise of a legal right or privilege . . ." *Danny v. Laidlaw*, 165 Wn.2d 200, 208, 193 P.3d 128 (2008). This Court has identified four elements that must be proven to sustain the tort: (1) "the existence of a clear public policy (the *clarity* element)"; (2) "that discouraging the conduct in which [the employee] engaged would jeopardize the public policy (the *jeopardy* element)";

(3) "that the public-policy-linked conduct caused the dismissal (the *causation* element)"; and (4) that the employer is unable "to offer an overriding justification for the dismissal (the *absence of justification* element)." *Id.* at 207; *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 935, 913 P.2d 377 (1996). Where an employee asserts wrongful termination in violation of public policy, a court should first examine the clarity element to determine whether "any public policy exists" to support the claim and then examine the other elements if necessary. *Gardner*, 128 Wn.2d at 941.

This brief will address the clarity element (section IV.B below), the jeopardy element (section IV.C below), and the absence of justification element (section IV.D below).

### B. <u>The "Clarity" Element</u>: Washington Has Established a Clear Mandate of Public Policy Recognizing the Right of Patients and Physicians to Use Medical Marijuana.

Whether Washington has established a clear mandate of public policy recognizing a particular right is a question of law. *Danny*, 165 Wn.2d at 207; *see also* Respondent's Brief at 39 (citing *Roberts v. Dudley*, 140 Wn.2d 58, 65 (2000)). To qualify as a public policy for purposes of wrongful discharge, a policy must be "truly public" and sufficiently clear. *Id.* at 208 (citing *Sedlacek v. Hillis*, 145 Wn.2d 379, 389, 36 P.3d 1014 (2001)).

In determining whether the clarity element is satisfied, a court should examine whether the "policy is demonstrated in a constitutional, statutory, or regulatory provision or scheme." *Danny*, 165 Wn.2d at 207-08 (internal citations and quotations omitted). Further, "[j]udicial decisions may establish public policy." *Id.* at 208.

**1. Washington voters have recognized and articulated the right of patients and physicians to use medical marijuana to treat terminal or debilitating illnesses.**

In 1998, Washington voters passed Initiative 692 ("I-692"), permitting the medical use of marijuana by "qualifying patients." RCW 69.51A, the Washington State Medical Use of Marijuana Act ("MUMA"). The Official Ballot Title for I-692 posed the following question:

> Shall the use of marijuana for certain terminal or debilitating conditions be permitted, and physicians authorized to advise patients about medical use of marijuana?

WASHINGTON SECRETARY OF STATE, STATE OF WASHINGTON VOTERS PAMPHLET, GENERAL ELECTION, NOVEMBER 3, 1998, at 8 (2d ed.). Further, the voters' pamphlet and initiative text contained the following statement of purpose and intent:

> The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patents with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

I-692, Sec. 2 (codified at RCW 69.51A.005) (emphasis supplied).

The operative language of the measure also made a clear policy statement that qualifying patients should not suffer negative repercussions for engaging in the medical use of marijuana:

> Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

RCW 69.51A.040(2) (emphasis added).

The initiative was passed in an "overwhelming vote" by a margin of 59 to 41 percent. *State v. Tracy*, 158 Wn.2d 683, 692, 694 (2006) (Johnson, J., dissenting). In approving I-692, Washington voters were exercising their constitutional right "to propose bills, laws, and to enact or reject the same at the polls." WASH. CONST. art. II, § 1. I-692's passage was, therefore, a quintessentially "public" expression of policy. *See Danny*, 165 Wn.2d at 208 ("To qualify as a public policy for purposes of the wrongful discharge tort, a policy must be 'truly public' ...") (citing *Sedlacek*, 145 Wn.2d at 389).

**2. Washington legislators have recognized and affirmed the right of patients and physicians to use medical marijuana to treat terminal or debilitating illnesses.**

After the passage of I-692, Washington legislators clarified and strengthened the voters' statement of public policy. In 2007, the legislature passed Senate Bill 6032, which was intended in part to "clarify

the law on medical marijuana so that the lawful use of this substance is not impaired and medical practitioners are able to exercise their best professional judgment in the delivery of medical treatment." 2007 Wash. Laws 371 § 1 (emphasis added).

Among a number of clarifications made by the bill, SB 6032 clarified that the exemption of employers from any requirement to accommodate the "medical use of marijuana in any place of employment," RCW 69.51A.060(4) (emphasis supplied), was to be read as exempting employers from accommodating "on-site" use. The amendment only clarified the logical reading of the original language rather than substantively changing it. The markup of the code provision provided:

> (4) Nothing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment, in any school bus or on any school grounds, ((~~or~~)) in any correctional facility, or smoking medical marijuana in any public place as that term is defined in RCW 70.160.020.

2007 Wash. Laws 371 § 6.

The provision has always related specifically to the "medical use of marijuana" – its "production, possession, or administration," RCW 69.51A.010(3) – within specified physical locations: places of employment, school buses, school grounds, and correctional facilities. It was never intended, and a logical reading of the original text does not

suggest, that simply the status of being a medical marijuana patient should justify exclusion from employment or education. The legislature plainly clarified what it understood Washington's public policy already to be.

### 3. Washington courts have recognized and articulated the right of patients and physicians to use medical marijuana to treat terminal or debilitating illnesses.

In the years since MUMA became law, Washington courts have likewise recognized and articulated the public policy favoring patients' right to use medical marijuana. Several cases examining MUMA note that the "purpose of the Act is to allow patients with terminal or debilitating illnesses to use marijuana when authorized by their treating physician." *State v. Ginn*, 128 Wn. App. 872, 877, 117 P.3d 1155 (2005), *review denied*, 157 Wn.2d 1010, 139 P.3d 349 (2006); *see also State v. Hanson*, 138 Wn. App. 322, 329 n.1, 157 P.3d 438 (2007); *State v. Butler*, 126 Wn. App. 741, 748, 109 P.3d 493 (2005); and *State v. Shepherd*, 110 Wn. App. 544, 549, 41 P.3d 1235 (2002).

This Court has specifically acknowledged Washington voters' declaration that "humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion." *Tracy*, 158 Wn.2d at 688 (quoting RCW 69.51A.005). This judicial recognition of

the public policy interest animating MUMA is further evidence of the clear mandate supporting Roe's claim.

### 4. The right of doctors and patients to treat certain illnesses with medical marijuana is a necessary part of the strong public policies protecting the doctor-patient relationship, doctors' professional judgment/discretion, and the right of medical self-determination.

In addition to the clear mandate of public policy expressed and recognized by the voters, the legislature, and the courts, the right of patients and doctors to treat certain illnesses with medical marijuana is a necessary component of the related—and equally clear—public policies protecting the doctor-patient relationship, doctors' professional judgment and discretion, and patients' right of medical self-determination.[1]

The relationship between a patient and his or her physician is given special treatment by the law. Because it embodies an "imperative need for confidence and trust," *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906 (1980), the relationship is privileged for evidence purposes. RCW 5.60.60(4); FED. R. EVID. 501. The evidentiary privilege has long been recognized by Washington courts. *State v. McCoy*, 70 Wn.2d 964, 965, 425 P.2d 874 (1967); *Toole v. Franklin Inv.*, 158 Wash. 696, 698, 291 P. 1101 (1930).

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[1] Standards of medical practice provide physicians great leeway in how best to treat their patients, and the medical profession is primarily governed by the states. *Gonzales v. Oregon*, 546 U.S. 243, 270, 126 S. Ct. 904 (2006).

The importance of, and privileges afforded to, the doctor-patient relationship have been recognized in the medical marijuana context. In *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002), the Ninth Circuit upheld an injunction barring the federal government from threatening the Drug Enforcement Administration registrations (the licenses that allow doctors to prescribe controlled substances) of California physicians who recommended marijuana to their patients. The Court held that such intimidation tactics "threaten[ed] to interfere with expression protected by the First Amendment," *id.* at 632, and that a physician's right to discuss the risks and benefits of medical marijuana use would be "chilled by the threat of federal investigation." *Id.* at 638. In his concurring opinion, Judge Kozinski specifically noted that physicians recommending marijuana in compliance with state law "are performing their normal function as doctors. . . . [T]hey are acting in their professional role in conformity with the standards of the state where they are licensed to practice medicine." *Id.* at 647.

For the same reasons, the U.S. District Court of Eastern Washington quashed a grand jury subpoena seeking production of medical marijuana patient records. *In re Grand Jury Subpoena for THCF Medical Clinic Records*, 504 F. Supp. 2d 1085 (E.D. Wash. 2007). Part of the rationale for the court's ruling was that disclosing the records would

"negatively affect the patient-physician relationship." *Id.* at 1091.

Similarly, this Court has long held that a fiduciary duty exists between a patient and his or her physician. *Foster v. Brady*, 198 Wash. 13, 18, 86 P.2d 760 (1939). As the Court has described it:

> Mutual trust and confidence are essential to the physician-patient relationship, and from these elements flow the physician's obligations to fully inform the patient of his or her condition, to continue to provide medical care once the patient-physician relationship has been established, to refer the patient to a specialist if necessary, and to obtain the patient's informed consent to the medical treatment proposed.

*Carson v. Fine*, 123 Wn.2d 206, 218, 867 P.2d 610 (1994).

MUMA, and the policy underlying it, seek to protect this relationship, providing that the "decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion." RCW 69.51A.005. Similarly, a physician's duty to fully inform the patient of his or her condition is embodied in the MUMA. By definition a "qualifying patient" requires a diagnosis by the authorizing physician of a "terminal or debilitating medical condition," to be informed about the "risks and benefits" of medical marijuana, and advisement that the he or she "may benefit from the medical use of marijuana." RCW 69.51A.010(4).

Both the voting public and the legislature have also expressed intent that, as a public policy matter, medical marijuana authorizations be as analogous to prescriptions as possible without running afoul of the federal prohibition on prescribing Schedule I substances. A prescription "must be issued in good faith for a legitimate medical purpose by one authorized to prescribe the use of such controlled substance." RCW 69.50.308(e). A medical marijuana authorization must be "signed and dated by a qualifying patient's health care professional" and state that, "in the health care professional's professional opinion, the patient may benefit from the medical use of marijuana." RCW 69.51A.010(7). "Health care professionals" include only those who possess prescriptive authority. *See* RCW 69.51A.010(2). Prescriptions must be "written on a tamper-resistant prescription pad or paper." RCW 18.64.500(1). Medical marijuana authorizations must be "written on tamper-resistant paper." RCW 69.51A.010(7)(a). In other words, prescriptions and medical marijuana authorizations require the same level of medical oversight, professional medical judgment, and effort to prevent diversion of a controlled substance to non-medical purposes. The clear mandate of public policy reflected in these intentional parallels is that medical marijuana authorizations should be accorded the same deference as prescriptions.

Finally, it is a hallmark of medical practice that a patient has the

right to determine his or her own course of treatment. Lack of patient consent for a treatment is grounds for a medical malpractice claim. RCW 7.70.030(3). In Washington patients can even choose to end their own lives under certain circumstances. RCW 70.245. MUMA embodies the same public policy interest in respecting the patient's right of medical self-determination.

### 5. Washington's medical marijuana policy does not conflict with federal law.

TeleTech contends incorrectly that "Roe's claimed public policy . . . is in direct conflict with federal law." Respondent's Brief at 42. While the Controlled Substances Act ("CSA") provides federal penalties for possession, manufacture, and distribution of marijuana (*see* 21 U.S.C. §§ 841(a), 844(a)), the statute also respects states' longstanding practice of enacting widely varying penal drug laws. Specifically, Congress included an express anti-preemption clause in the CSA, limiting preemption to the narrow set of circumstances in which a state law creates a "positive conflict" with the CSA. 21 U.S.C. § 903. Congress thus accorded states wide latitude to define the scope of their own penal drug laws and to decide how to enforce them.

Consistent with that latitude, the U.S. Department of Justice has advised United States Attorneys not to "focus federal resources" on

"individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana"—such as MUMA. *See* Memorandum from David W. Ogden, Deputy Attorney General, to Selected United States Attorneys (Oct. 19, 2009).[2] This is neither the first nor the only time that the federal government has accommodated the medical use of marijuana. To this day, patients admitted to a "compassionate use" Investigational New Drug (IND) program established in 1978 but closed to new applicants in 1992 continue to receive a monthly supply of medical marijuana from the federal government. *See Kuromiya v. United States*, 78 F. Supp. 2d 367, 368-370 (E.D. Pa. 1999). And on July 22, 2010, the U.S. Department of Veterans Affairs issued VHA Directive 2010-035, "Medical Marijuana,"[3] declaring that "VHA policy does not prohibit Veterans who use medical marijuana from participating in VHA substance abuse programs, pain control programs, or other clinical programs," and that "patients participating in state medical marijuana programs must not be denied VHA services."

Clearly, the CSA does not prevent federal agencies from accommodating medical use of marijuana.[4] More fundamentally, it poses

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[2] Available at http://www.justice.gov/opa/documents/medical-marijuana.pdf.
[3] Available at http://www1.va.gov/vhapublications/ViewPublication.asp?pub_ID=2276.
[4] In addition to federal accommodation of medical use of marijuana, the United States Supreme Court has held that the CSA's prohibitions do not categorically trump

no conflict—direct or indirect—with Washington state policy toward employers and employees. Federal law imposes no penalties on those who employ marijuana users, nor does it require state policy to facilitate enforcement of the federal prohibition.[5] Simply put, the CSA provides no justification for firing a patient for exercising her right to engage in the medical use of marijuana in conformity with state law and Washington's clear mandate that she "not be penalized in any manner, or denied any right or privilege" for doing so.

**6. Recognizing the right of patients and doctors to treat certain illnesses with medical marijuana may be narrowly confined to the facts presented in this case.**

The Court has "always been mindful that the wrongful discharge tort is narrow and should be applied cautiously." *Danny*, 165 Wn.2d at 209 (quoting *Sedlacek*, 145 Wn.2d at 390). Application of the tort in the context of employment of medical marijuana patients can be narrowly limited to cases like this one, presenting the following circumstances:

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protections afforded individuals by <u>other</u> laws and policies. In *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211 (2006), the Court held that the government failed to demonstrate a compelling interest justifying its refusal to accommodate religious use of a hallucinogenic sacramental tea made illegal by the CSA. The Court rejected the argument that recognizing exceptions to the CSA would be incompatible with Congress's intent to prohibit use of the substance. Indeed, the Court found that "the Act itself contemplates that exempting certain people from its requirements would be 'consistent with the public health and safety'" in some circumstances. *Id.* at 432-33.

[5] In fact, it could not, under the commandeering doctrine. *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997).

- The employee meets the definition of "qualifying patient" and is in compliance with all other conditions of the statute.
- The employee's medical use of marijuana occurs <u>outside</u> the workplace.
- The employee's medical use of marijuana does not affect safety or job performance.

Accordingly, the Court may "proceed cautiously" and still recognize a clear mandate of public policy that would protect employees like Roe—as the voters and legislature clearly intended.

### C. <u>The "Jeopardy" Element</u>: Permitting an Employer to Terminate an Employee for Lawful, At-Home Use of Medical Marijuana Jeopardizes the Right of Patients and Their Physicians to Use Medical Marijuana to Treat Certain Terminal or Debilitating Illnesses.

To satisfy the second element of the test for wrongful termination in violation of public policy—the "jeopardy" element—an employee must show that "discouraging the conduct in which [she] engaged would jeopardize the public policy." *Danny*, 165 Wn.2d at 222, 193 P.3d 128 (citing *Gardner*, 128 Wn.2d at 941, 913 P.2d 377). Further, the employee must show that her conduct "directly relates to the public policy, or was necessary for the effective enforcement of the public policy." *Id.*

Here, there can be little question that TeleTech's termination of Roe "discouraged" her medical use of marijuana, or that her medical use of marijuana was "directly" related to the policy favoring protection of patients' right to use medical marijuana. Termination for exercising a

right or privilege is precisely the type of "jeopardy" the tort is intended to prevent. *See, e.g.*, *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995) (nonunion employees terminated for exercising their statutory right to engage in concerted action); *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991) (employees terminated for exercising their right to file workers' compensation claims); *see also McClung v. Marion Cty. Comm'n*, 360 S.E.2d 221 (W.Va. 1987) (employee terminated for exercising right to file wage claims); *Bowman v. State Bank of Keysville*, 331 S.E.2d 797 (Va. 1985) (termination of employees for exercising their rights as shareholders to vote their shares).

TeleTech argues that Roe has not satisfied the jeopardy element because "MUMA does not encourage the use of medical marijuana—it merely decriminalizes that use for purposes of state law." Respondent's Brief at 43. TeleTech goes on to argue that "[i]t is of no consequence . . . whether policies such as TeleTech's would lead some patients to opt not to use medical marijuana."

This argument fundamentally misconstrues MUMA and its underlying public policy. MUMA seeks to ensure that patients are able to use medical marijuana and "not be penalized in any manner, or denied any right or privilege"; the legislature has expressed its intent to ensure that "lawful use of this substance is not impaired"; and the courts have

acknowledged that the purpose of the statute is "to allow patients with terminal or debilitating illnesses to use marijuana when authorized by their treating physician." *See* sections IV.B.1-3, above.

It is irrelevant that MUMA does not "encourage (or favor or require)" the medical use of marijuana. *See* Respondent's Brief at 44. The statute was intended to give patients like Roe the choice of obtaining such treatment. TeleTech's termination of Roe "discouraged" her choice and thereby jeopardized the policy expressed by the voters, the legislature, and the courts that "the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision," that should be made by the patient in consultation with her physician. *See Tracy*, 158 Wn.2d at 688.

Permitting an employer to terminate an employee for exercising her right to choose medical marijuana as treatment for a terminal or debilitating illness would not only discourage the very choice MUMA provides to patients and physicians, it would intrude on the physician-patient relationship and physicians' professional judgment and discretion, and would effectively permit an employer to dictate the course of an employee's medical treatment. And, perhaps most perversely, it would threaten to prevent employees with debilitating illnesses from obtaining

treatment that may enable them to participate productively in the workforce.[6]

### D. <u>The "Absence of Justification" Element</u>: No Overriding Justifications Exist To Permit the Termination of an Employee for Lawful, Off-Site Use of Medically-Authorized Marijuana.

The last element "inquires whether the employer has an overriding reason for terminating the employee despite the employee's public-policy-linked conduct." *Gardner*, 128 Wn.2d at 947. This inquiry is intended to acknowledge that some public policies may not "warrant interfering with employers' personnel management." *Id.* Here, no overriding justifications exist to justify terminating an employee for lawful, at-home use of medically-authorized marijuana, where such use has no impact on safety or performance.

#### 1. The public policy described here does not require employers to accommodate medical marijuana use where doing so would impact safety or performance.

TeleTech and *Amicus Curiae* Pacific Legal Foundation both have expressed concern for workplace safety and workforce performance, but such concerns do not provide an overriding justification for termination. *See* Respondent's Brief at 44-46; *Amicus Curiae* Brief of Pacific Legal

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[6] In this way, the public policy here is analogous to that of protecting victims of domestic violence in *Danny*; in that case, the Court noted that "it is in an employer's best interest to work with employees experiencing domestic violence and that such work will ultimately result in a stronger and more stable workforce." 165 Wn.2d at 226 (citations omitted).

Foundation at 6-15. Neither Roe nor the ACLU of Washington has suggested that public policy favors the accommodation of medical marijuana use where such use has an impact on safety or performance. *See* Petitioner's Response to *Amicus Curiae* Brief of Pacific Legal Foundation at 5. The clear mandate of public policy described herein is limited to circumstances in which an employee's lawful, off-site use of medical marijuana has no effect on safety or job performance.

**2. Generalized concerns about liability for impaired employees do not justify interference with an employee's medical treatment.**

TeleTech and *Amicus Curiae* Pacific Legal Foundation also argue that an employer may be held vicariously liable for tortious acts that may be committed by employees whom employers know to be medical marijuana patients. *See* Respondent's Brief at 46; *Amicus Curiae* Brief of Pacific Legal Foundation at 16-18.

This concern is addressed both by MUMA's provision that employers are not required to accommodate the medical use of marijuana in the workplace and the fact that neither Roe nor the ACLU of Washington is arguing that public policy requires the accommodation of use that affects safety or job performance. A generalized concern about impairment does not justify an employer's intrusion into the medical treatment of its employees. If it did, employers would be entitled to

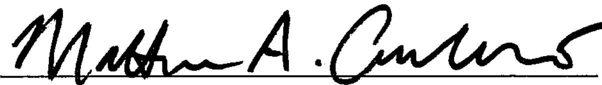
terminate employees for the lawful use of any number of prescription medications. Here, Roe simply seeks to be treated the same as any other employee taking physician-authorized drugs for a medically debilitating condition.

## V. CONCLUSION

For all of these reasons, *Amicus Curiae* American Civil Liberties Union of Washington respectfully urges the Court to reverse the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 20th day of December, 2010.

**ACLU OF WASHINGTON FOUNDATION**



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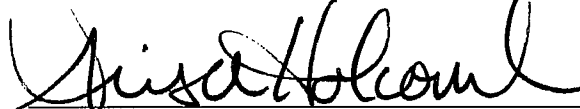

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