INTRODUCTION AND STATEMENT OF INTEREST

Amici are actively involved in vindicating the legal rights of California workers under the State's antidiscrimination laws and in advocating public policies aimed at making the inclusive objectives of those laws a practical reality.

Protection & Advocacy, Inc. ("PAI") is a private non-profit agency established under federal law to protect, advocate for, and advance the human, legal and service rights of Californians with disabilities.[1] PAI works in partnership with people with disabilities, striving towards a society which values all people and supports their rights to dignity, freedom, choice and quality of life.

PAI works with individuals with all categories of disability - sensory, physical, medical, learning, cognitive, emotional and psychiatric. Services provided by PAI are client-directed, and include information and referral, technical assistance and direct representation in administrative and court proceedings. PAI has a direct interest in the outcome of this case. PAI's current goals and objectives include advocacy to persons with disabilities on issues such as the denial of reasonable accommodations and disability related terminations.

[1] PAI provides services pursuant to the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 15001, PL 106-402); the Protection and Advocacy for Mentally Ill Individuals Act (42 U.S.C. § 10801, PL 106-310); the Rehabilitation Act (29 U.S.C. § 794e, PL 106-402); the Assistive Technology Act (29 U.S.C. § 3011,3012, PL 105-394); the Ticket to Work and Work Incentives Improvement Act (42 U.S.C. § 1320b-20, PL 106-170); the Children's Health Act of 2000 (42 U.S.C. § 300d-53, PL 106-310); and the Help America Vote Act of 2002 (42 U.S.C. § 15461-62, PL 107-252).

PAI also has a direct interest in ensuring that people with disabilities and medical conditions have access to lawful forms of medical treatment without being subject to adverse consequences in their employment.

Equal Rights Advocates ("ERA") is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girl through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig v. Aiello* (1974) 417 U.S. 484, *Richmond Unified School District v.* Berg (1977) 434 U.S. 158, and *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), and is co-counsel in the current sex discrimination case of *Dukes v. Wal-Mart Stores*, in the United States District Court, Northern District of California. ERA has appeared as amicus curiae in numerous Supreme Court cases involving the interpretation of Title VII including *Meritor Savings Bank, FSB v. Vinson* (1986) 477 U.S. 57; *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17; *Faragher v. Boca Raton* (1998) 522 U.S. 1105; and *Burlington Industries v. Ellerth* (1998) 524 U.S. 742. ERA has similarly appeared as amicus curiae in numerous California Supreme Court cases involving the interpretation of California's Fair Employment Housing Act (Gov. Code § 12000 et seq.) [hereinafter "the FEHA"], including *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36

Cal.4th 1028; *Miller v. California Department of Corrections* (2005) 36 Cal.4th 446; *State Dept. of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal.4th 1026; and *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 6 Cal.Rptr.3d 457. ERA believes the issues raised by the instant case are equally critical to the right of California employees to receive the full anti-discrimination protections of the FEHA.

The decision of the court below is of deep concern to *Amici* and to the individuals with whom we work. The Court of Appeal read a categorical exception into the FEHA that has no support in the statutory text and it refused to apply one of that statute's most clear and important mandates: the requirement that an employer who invokes a generally applicable workplace rule to exclude a qualified individual with a disability must demonstrate that granting the *particular* accommodation would in fact be unduly burdensome. More troubling still, the court issued this decision in circumstances -- involving a person's choice of medical treatment for his own disabling condition -- where respect for individual autonomy has always been at its zenith and employer prerogatives, at their lowest ebb; where other, directly relevant State policies unequivocally support the employee; and where the employment rule at issue, which would disqualify applicants who use marijuana therapeutically while imposing no limitation on medical treatments with much greater demonstrated potential to impair work

performance -- is so irrational that immunizing it from any meaningful scrutiny is likely the only way it could survive.

Although reversal of the judgment below follows from a straightforward application of the plain language of the FEHA, the decision violates the principle -- codified in a legislative rule of construction -- that the statute must be interpreted liberally and in light of its purposes. It is not easy to imagine a rule less compatible with the Act's basic objective of enabling capable people with disabilities to overcome barriers to employment than one that allows employers to exclude disabled individuals for having availed themselves of the very medical treatment that makes them well enough to return to the work, without any showing of actual adverse effect on employer interests. Such a rule would reinstate and intensify the predicament the People of California sought to ease when they voted overwhelmingly to adopt the Compassionate Use Act -- placing individuals for whom marijuana is safe, effective and needed treatment in legal limbo, with their ability to earn a living dependent on the continued indulgence of their employers. The suggestion that an employer's decision to fire an individual based on his treatment is not discrimination based on disability is equally ominous: employers who preferred not to hire individuals with disabilities, whether for reasons of cost minimization or highly irrational stereotypes, could simply adopt policies attaching

disadvantages to particular *treatments* rather than to the disfavored or feared underlying *conditions*.

The intuition that employers should not permit employees to violate federal law is understandable, but the perceived need for a novel, special employer prerogative here is illusory. First, the accommodation here would in no way limit employers' ability to exclude applicants who engage in substance abuse -- the only exception would be for medical treatment that is not "illegal" in the eyes of the sovereign whose laws are being applied -- and the beneficiaries would be individuals whose motivation to work makes them likely to choose the treatment that best enables them to perform in the workplace. Moreover, the FEHA's general policy of requiring concrete justification not only smokes out exclusion based on disability, but forces employers to reflect on legitimate and seemingly "necessary" policies that operate as barriers and often to recognize that their fears are in fact overdrawn. Applying the FEHA as it is written would shift attention to the small subset of employers who could plausibly claim that accommodating medical use (and presumably medical use of other similar medications) *actually* impinges on some overriding interest – and focus on whether that interest could be achieved through means short of outright exclusion. By contrast, the employer defense approved below with a rule of "per se reasonableness," is not only an unimaginably weak candidate for such treatment, but shifts the focus from

workplace reality, rewarding defendants who spin out ever-more far-fetched worst-case scenarios.

To restore the ability of all capable members of society to contribute to the workplace, the court of appeal's decision should be reversed.

STATUTORY BACKGROUND

The State of California enacted its first statutory prohibition against disability-based employment discrimination in 1973 (Stats.1973, ch. 1189, §§ 6, 9), and its laws have been amended repeatedly in the intervening decades, consistently in the direction of providing more comprehensive protection. (See *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1027.) In its present form, the Fair Employment and Housing Act (Gov. Code § 12000 et seq.) [hereinafter "the FEHA"] "protect[s] and safeguard[s] the right and opportunity of all persons to seek and hold employment free from discrimination," recognizing that denial of employment opportunity "deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general." (Gov. Code § 12920.) As this Court explained in *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, "the FEHA is just one expression of a much broader policy against disability discrimination that appears in a variety of legislative enactments." (*Id.* at pp. 1157-1158 [citations omitted]; see also Gov.

Code §19230, subd. (a) [declaring State policy "to encourage disabled persons to participate in the social and economic life of the state"].)

Although the enactment of anti-discrimination legislation marked the beginning of an important "shift in society's conception of its responsibilities to people with disabilities -- a shift from charity to civil rights" (Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413, 426 (1991)), the goals of full and equal participation expressed in California law have remained frustratingly elusive. In enacting the Americans with Disabilities Act in 1990 [hereinafter "the ADA"], Congress found that fully "'[t]wo-thirds of all disabled Americans between the age of 16 and 64 [were] not working at all,' even though a large majority wanted to, and were able to, work productively" (S.Rep. No. 101-116, at p. 9), and that this unnecessary exclusion costs the United States economy billions of dollars annually (42 U.S.C. § 12101(9)). Exclusion from the workplace seriously aggravates the social isolation and stigmatization experienced by many people with disabilities. (See 42 U.S.C. § 12101(a)(6) [congressional finding that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally"].)

A defining feature of the FEHA's modern incarnation (and of the ADA) is the recognition that many of the barriers most effectively excluding people with disabilities from the workplace are not invidiously motivated – and that the aim of expanded opportunity and greater participation cannot be accomplished simply by mandating even-handed treatment. (*Tennessee v. Lane* (2004) 541 U.S. 509, 536 [conc. opn. of Ginsburg, J.] [the ADA reflects Congress's realization that "[i]ncluding individuals with disabilities . . . would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation"]; cf. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431 [recognizing that equal opportunity often requires "the posture and condition of the job-seeker [to] be taken into account"].)

Accordingly, the FEHA not only proscribes adverse employment actions "because of . . . disability" (Gov. Code § 12940, subd. (a)); the law makes it an unlawful for an employer to "fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee" (Gov. Code § 12940, subd. (m)); or to "fail to engage in a timely, good faith, interactive process with [an] employee to determine effective reasonable accommodations" (Gov. Code § 12940, subd. (n)). Under these provisions, an employer refusing to modify a standard or practice so as to enable an otherwise qualified disabled individual to get a job may not defend its action by showing that a non-disabled applicant would

have been denied the same accommodation. Rather, the FEHA requires employers to demonstrate that the accommodation would cause it "undue hardship" (see Gov. Code § 12940, subd. (m)) – or that applying the standard to the particular disabled individual was truly necessary to the achievement of some important workplace need (see 2 Admin. Code §§ 7287.4(a), (e); H.R. Rep. No. 101-485, pt. 2, at p. 68 (1990) [emphasizing that stringent standard of reasonableness was "necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities"]; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256-57 [employee "need not initially . . .. produce evidence showing that the accommodation would *not* impose an undue hardship on the employer"] [Italics in original].)

The basic principle that practices that unnecessarily or unjustifiably exclude persons with disabilities are unlawful -- and that the burden of showing necessity is the defendant's -- is found in a wide range of the FEHA provisions and other disability discrimination laws. That an applicant's disability prevents him from performing certain job tasks is not a lawful basis for denying employment, unless the particular duties are shown to be "essential," (Gov. Code § 12926, subd. (a)(1)); nor may a standard be defended as a "bona fide . . . qualification," absent proof that its modification would "undermine" "the essence of the business operation" (2 Cal. Code. Regs. § 7286.7, subd. (a); *Sterling Transit Co., Inc. v.*

Fair Employment Practice Comm'n (1981) 121 Cal.App.3d 791, 799; see also 42 U.S.C. § 12182(b)(2)(A)(ii) [the "policies, practices, [and] procedures" of a public accommodation must be reasonably modified "unless doing so would fundamentally alter what is offered"].)

An employer who seeks to rely on these and other defenses available under the FEHA (see, *e.g.*, *Raytheon Co. v. California Fair Employment & Housing Comm'n* (1989) 212 Cal.App.3d 1242, 1252 [discussion based on "[]danger to] . . . health or safety"]) bears the burden of proof, and such determinations are almost inevitably particularized and fact-intensive. (See *PGA Tour, Inc. v. Martin* (2001) 532 U.S. 661, 688 [holding that the ADA contemplates an "*individualized* inquiry . . . whether a *specific* modification for a *particular* person's disability would be reasonable under the circumstances . . . [and] necessary for *that person*"] [Italics added]; cf. Equal Opportunity Commission, ADA Technical Assistance Manual, I-4.3 ["Disabilities vary so much that it is difficult, if not impossible, to make general determinations about the effect of various standards, criteria and procedures on 'people with disabilities.'. . . As with other determinations under the ADA, the exclusionary effect of a selection procedure usually must be looked at in relation to a particular individual who has particular limitations caused by a disability"].

Notwithstanding the important similarities between the aims and approaches of the state and federal statutes, both the plain terms of the FEHA and the declared intent of the State Legislature establish that California law provides broader and more comprehensive protection. The FEHA's coverage extends to a larger share of employers (those who employ 5 workers or more) than does the ADA, (42 USC § 12111(5)(A)), reflecting the Legislature's considered judgment (see Gov. Code § 12940.3) that the societal benefits of holding smaller firms to the law's reasonable accommodation mandate justify the costs such accommodations entail. Moreover, as the United States Supreme Court has issued decisions narrowly defining the class of persons entitled to the protections of the federal statute (see, *e.g., Sutton v. United Air Lines, Inc.* (1999) 527 U.S. 471), the Legislature has responded by enacting laws affirming state law's broad intended sweep. Thus, to claim the protections of the FEHA, a person need not show a "*substantial* limitation on [multiple] major life activities," only that at his condition "limits," *i.e.*, "makes . . . difficult," any one such activity. (See Gov. Code § 12926, subd. (k)(1)(B)(ii).)

The Legislature has declared that the FEHA's amendments "were intended to result in broader coverage under the law of this state than under [the federal ADA]" (Gov. Code § 12926.1, subd. (c) & subd. (d)), and it has enacted a provision designed to assure that California's leadership position would not be eclipsed: "[i]f the definition of 'disability' used in the Americans with Disabilities

Act of 1990 . . . would result in broader protection of the civil rights of individuals with a mental disability or physical disability, . . . then that broader protection or coverage shall be deemed incorporated by reference into [California law]." (Gov. Code § 12926 (l); see also Stats.1992, ch. 913, § 1, p. 4282 [stating Legislature's intent "to strengthen California law where it is weaker" than the ADA "and to retain California law when it provides more protection for individuals with disabilities than" does federal law].) For its part, the ADA includes an anti-preemption rule, which provides that the statute is not to be read to "invalidate or limit the remedies, rights,. . . or law of any State... that provides greater or equal protection for the rights of individuals with disabilities." (42 USC § 12201(b).)

Furthermore, the Legislature has enacted an express instruction for courts charged with interpreting the law in particular cases: the FEHA "shall be construed liberally for the accomplishment of [its] purposes." (Gov. Code § 12993, subd. (a).) This Court and others have heeded that directive, repeatedly rejecting invitations by employers to give the FEHA's protections a technical or narrow construction. (See, *e.g.*, *Brown v. Superior Court* (1984) 37 Cal.3d 477, 486-87 [employees entitled to choose convenient venue to pursue FEHA claims]; *Commodore Home Sys, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215-221 [employee not limited to back pay in FEHA action]; *Moorpark*, *supra*, 18 Cal.4th at pp. 1157-1158 [employee not barred from pursuing FEHA disability

discrimination claim by workers' compensation exclusivity]; *State Personnel Bd. v. Fair Employment & Housing Comm'n* (1985) 39 Cal.3d 422, 429-435 [State Personnel Board may not prevent employees from pursuing discrimination claims with Fair Employment and Housing Commission]; *Romano v. Rockwell Int'l, Inc.* (1996) 14 Cal.4th 479, 493-494 [limitation period interpreted to facilitate consideration of employee claims on the merits]; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823-824 [holding that "continuing violation" doctrine applied to failure-to-accommodate claim].

Among the Legislature's recent amendments was a provision, codified at section 12926.1(c) of the Government Code, affirming that, irrespective of the ADA, "whether a condition limits a major life activity [under FEHA] shall be determined without respect to any mitigating measures." The purpose of this law was to spare disabled Californians the widely-decried "Catch-22" situation created by the United States Supreme Court's construction of the ADA in *Sutton v. United Air Lines, Inc.* (1999) 527 U.S. 471, where individuals who are too ill to work without medical treatment or other "mitigating measures," can lose statutory protection if such treatment makes them "too well," *i.e.*, no longer able to satisfy that law's stringent test for "disability."

In assuring that individuals with disabilities should not be required to choose between seeking appropriate medical treatment and their rights under the FEHA,

this amendment echoes other laws aimed at removing barriers to needed medical treatment. (See Gov. Code § 12945.2 [California Family Rights Act] [protected medical leave for an employee attending to "serious health condition"]; Health & Saf. Code § 124960 [Pain Patients' Bill of Rights] [recognizing rights of individuals "suffering from severe chronic intractable pain" to access to medically appropriate opiate medications]; Evid. Code § 1014 [recognizing evidentiary privilege, lest "persons in need of [psychological] treatment . . . refuse such treatment . . . because the confidentiality of their communications cannot be assured"]; Lab. Code § 1025 [protecting employment rights of those who "voluntarily enter and participate in an alcohol or drug rehabilitation program"].) For the same reasons that excluding individuals with disabilities from the workplace "substantially and adversely affects the interest of employees, employers, and the public in general" (Gov. Code § 12920), encouraging them to avail themselves of treatment without fear of jeopardizing rights under the FEHA helps to accomplish the overarching goal of "fulle[r] utilization of [the State's] capacities." (See *ibid.*; see *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 434-435 [noting importance of employees' obtaining "the health care they need to be productive workers and members of society"]; cf. *Fulk v. Illinois Central Railroad Co.* (7th Cir. 1994) 22 F.3d 120, 126 ["healthy employees are productive employees"].)

Although these measures affirm the public interest in a healthy workforce -- and evince respect for professional medical treatment -- they do not depart from the law's longstanding recognition that medical treatment decisions, both because they concern a person's body and because they often implicate his conception of what is important in life, are ones that ultimately must be made by the individual. (See *Pettus*, *supra*, 49 Cal.App.4th at pp. 434-435 [recognizing a person's "'autonomy privacy' interest under the [State] Constitution in making intimate personal decisions about an appropriate course of medical treatment for his disabling . . . condition"]; accord Health & Saf. Code § 124960(h) ("A patient suffering from severe chronic intractable pain has the option to request or reject the use of any or all modalities [of pain relief]").

These considerations figured centrally in the deliberations that led California voters to adopt the Compassionate Use Act (Health & Saf. Code § 11362.5). In view of scientific evidence that marijuana use is medically beneficial -- and, for some individuals, therapeutically indispensable -- proponents of Proposition 215 urged that state laws that treated marijuana differently from morphine and other, similarly potent, but therapeutically valuable drugs -- and prevented seriously ill people from obtaining treatment their physicians would otherwise recommend -- were irrational and unjust. This law is not agnostic about whether marijuana is medically beneficial, nor does it embody a "hands off" approach; instead, it

explicitly cites marijuana's value in the treatment of [among other conditions] "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, [and] migraine." (Health & Saf. Code § 11362.5, subd. (b)(1)(A).) The Compassionate Use Act declares that "seriously ill Californians" have a "right to obtain and use marijuana for medical purposes" and commits the State to an affirmative policy of "encouraging . . . safe and affordable distribution of marijuana to all patients in medical need." (*Id.* at subd. (b)(1)(A) & (C).)

These views, however, did not result in a general repeal of laws treating marijuana as a subject of the criminal law or a broad exemption of possession for medical purposes. Rather, the Compassionate Use Act enacts a sharp distinction between therapeutic and non-medical use, and it places decisions about treating illness with marijuana within the confines of the physician-patient relationship. (See Medical Board of California, *Statement re: Medical Marijuana* (May 7, 2004) [standards governing treatment with marijuana "are the same as any reasonable and prudent physician would follow when recommending or approving any other medication"]; *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 639 [conc. opn. of Kozinski, J.] [physicians recommending marijuana in compliance with California 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"].)[2]

SUMMARY OF ARGUMENT

For purposes of this Court's decision, it is accepted that Mr. Ross is an "individual with a disability," *i.e.*, a back condition that, untreated, makes it difficult for him to work; that he was generally qualified for the position he sought (indeed, the Employer had extended him an offer); and that his disability did "not affect his ability to do the essential functions of the job." (See Complaint ¶ 3; *Ross v. RagingWire Telecommunications, Inc.* (2005) 33 Cal.Rptr.3d 803, 806.) Likewise, the court below was required to accept that Ross's positive test for THC based on the employer's drug screen was the result of physician-recommended treatment for his condition. (See *ibid;* see also Complaint ¶¶ 20 & 21 [alleging that Ross "ha[d] not had any problems performing satisfactorily" in prior job].) There is no dispute that RagingWire terminated or refused to hire Ross because it maintains a categorical policy that this is the fate of individuals who test positive for marijuana -- irrespective of whether the test reflects medical use or whether the person's condition places him within the class protected by the FEHA.

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[2] The structure of the Act bears a distinct similarity to the Pain Patients' Bill of Rights, which includes findings affirming the State's interest in "controlling the illegal use of opiate drugs," (a) and the benefits of such medications, recognizing

RagingWire indicates that its automatic disqualification policy will not exclude applicants in Mr. Ross's situation who avail themselves of "any and all" other treatments (so long as these are "lawful"). (Respondent's Answering Brief [hereinafter "AB"] at p. 42.)

Under the plain language of the FEHA, the office of the courts below was clear: because RagingWire did not claim that its decision was pursuant to a "State or federal safety regulation" or a bona fide occupational qualification (Gov. Code § 12940), or that it was required by State or federal law, *see infra,* Mr. Ross was entitled to judgment on his FEHA claim, unless the Employer could carry its burden of proving that the accommodation he requested -- relief from the employer's general practice of treating a positive result on a drug screen as conclusive, irrebutable proof of disqualifying "substance abuse" -- would cause it "undue hardship." (Gov. Code § 12940, subd. (m).) RagingWire did not even attempt to make such a showing.

Indeed, a claim to "reasonable accommodation" could hardly be stronger than the one presented here. As a matter of state constitutional law, Mr. Ross has a right to make decisions about his own medical treatment, and (save for extraordinary circumstances) his employer has a correlative duty to stand aside.

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that patients "suffering from severe chronic intractable pain" have the "option" to "request or reject" such treatment.

The course of treatment Ross has settled on -- however controversial generally -- is one that the State of California has not only specifically authorized but is committed to "encourag[ing]" -- and one that (according to the Complaint) Mr. Ross has used, without adverse work performance effects, for a sustained period of time. On the employer's side, the accommodation entails only modifying the categorical no-hiring rule (so as to exclude therapeutic use). Ross did not seek any alteration of RagingWire's work performance standards; RagingWire represents that it has no policy against hiring individuals whose treatment involves any other drug, no matter how performance-affecting; and, to the extent it had concerns about whether the medical use by Mr. Ross is *bona fide*, the employer presumably was entitled, in the "the interactive process" provided by Government Code section 12940(n), to assure itself that this was the case.

The court below took a radically different path from the one charted by the Legislature. Rather than require the Employer to show that conditioning employment on Ross's forgoing his physician-recommended course of treatment for his disabling condition, served some important workplace purpose, the Court of Appeal held that an employer policy that treated an applicant's marijuana use as automatically disqualifying was not merely "legitimate," but exempt from scrutiny under the FEHA. In view of the fact that the federal Controlled Substances Act

continues to treat therapeutic marijuana use as unlawful and this Court's decision in *Loder v. City of Glendale* (1997) 14 Cal.4th 846, upholding the legality of preemployment drug-testing, the court held, it would be "unreasonable" as a matter of law to require RagingWire to modify its categorical policy so that an otherwise qualified applicant with a disability would not be automatically disqualified based on treatment that fully complies with California law.

Whatever surface appeal it may have, the court's rule of decision reflects a series of significant and stark legal errors. The notion that courts have broad powers to exempt "legitimate" policies from FEHA review represents a startling and unsupportable repudiation of the FEHA's textual mandate and overarching principle: that employment decisions involving persons with disabilities (and judicial decisions in they give rise to) should be based on facts, rather than on sweeping generalities. The Legislature's general mandate applies with even greater force in a case like this one, where the individual's *constitutional* right to control his medical treatment is squarely implicated -- and where the purposes FEHA was enacted -- and amended -- to achieve are likewise at stake.

Were this Court to sustain the decision below, it would deal a real and serious blow to the civil rights and employment opportunities of the many seriously ill Californians whose physicians have recommended medical marijuana, no small number of whom have been able to return to the workplace *because of*

such treatment. These individuals will be relegated to what may fairly be described as second-class citizenship -- required to choose between their medical well-being and their rights under the FEHA. Moreover, endorsing the reasoning of the judgment below -- or the arguments advanced in its defense by the employer here -- would weaken the employment protections of the FEHA for all Californians.

The animating premise of the decision below -- that employers' interest in seeing that employees' off-duty conduct conforms with federal law always trumps' rights under anti-discrimination statutes – does not withstand scrutiny. In cases involving violations much less sympathetic than what is at issue here, courts regularly look behind the fact that an employee has violated the law to weigh the substance of the interests and public policies at issue -- and no lesser authority than the U.S. Supreme Court, in an unanimous, recent decision, has rejected arguments that the policies behind the Controlled Substances Act preclude such balancing.

ARGUMENT

I. The Relief Ross Sought -- Simple Non-Interference With His Physician-Approved Choice of Medical Treatment -- Was Plainly Due Him Under the FEHA's "Reasonable Accommodation" Mandate

A. The FEHA Prohibits Discrimination Based on Medical Treatment

To the extent that the employer claims that the FEHA obliged it to accommodate only Mr. Ross's back condition – and not the treatment for that

condition (see AB at p. 44) [Ross was not disqualified "based on immutable characteristic, but for violating a rule"], any such distinction is contrary to the plain language and purposes of the FEHA.[3]

To begin, paradigm examples of accommodations contemplated under FEHA -- wheelchair ramps and "additional breaks from work . . . to permit medical visits" (see *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 398) -- refute the notion that the statute draws a distinction between accommodating an individual's condition and accommodating the measures an individual takes to treat that condition. Indeed, even the U.S. Supreme Court's decision in *Sutton v. United Airlines, Inc.* (1999) 527 U.S. 471, which has been criticized as unduly narrowing the meaning of "disability" under the ADA and expressly rejected by the California Legislature for that reason, affirmed that "measures to correct for, or mitigate, a physical or mental impairment -- both positive and negative -- must be taken into account." (*Id.* at p. 482; see also *School Bd. Of Nassau County, Fla. v.*

[3] The rules that allow an employer to defend an adverse action against a member of a protected class by articulating a legitimate nondiscriminatory reason have no application to this case. That framework is appropriate when a plaintiff's *prima facie* case is circumstantial -- e.g., that he was a member of a protected class and denied a job; and that a non-protected class was selected -- and the court's job is to decide the "real reason" for the employer's decision. This analysis has no utility where, as here, there is no dispute over the basis for the employer's decision: Mr. Ross was denied employment (pursuant to the employer's policy) based on his use of marijuana, in compliance with state law, as treatment for his disability. (See Complaint ¶¶ 13, 14 & 19.)

Arline (1987) 480 U.S. 273, 282 [rejecting argument "that . . . the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant"]; *Howell v. New Haven Bd. of Educ.* (D. Conn. 2004) 309 F. Supp. 2d 286, 291-292 [holding that teacher's claim that he was excluded from educational field because of his use of medication to treat diabetes sufficient to state a cause of action under the ADA]; *Alvarez v. Fountainhead, Inc.* (N.D. Cal. 1999) 55 F. Supp. 2d 1048, 1055 [granting preliminary injunction on finding that failure of pre-school to reasonably accommodate child with asthma by administering or allowing child to take albuterol at school constitutes a violation of the ADA]). And the California Family Rights Act (like the federal FMLA) determines whether an impairment is a "'serious health condition,'" entitling an employee to protected medical leave based upon whether it "involves . . . (2) continuing treatment or continuing supervision by a health care provider." (Gov. Code § 12945.2, subd. (c)(8).)

Accordingly, the court in *Sullivan v. Vallejo City Unified School Dist.* (E.D. Cal. 1990) 731 F. Supp. 947, rejected the defendant's argument that its refusal to permit a disabled student to bring her service dog to school was nondiscriminatory. (*Id.* at p. 958.) Concluding that this position was contrary "to both the letter [of the federal Rehabilitation Act] and [its] purpose of 'increase[ing] the participation of

handicapped persons in society,'" (quoting *Alexander v. Choate* (1985) 469 U.S. 287, 300), the court explained:

> [D]eference must be shown to the manner in which a handicapped person chooses to overcome the limitations created by her disabling condition. . . .[A]s long as the choices the handicapped person makes concerning how to effectively address her circumstances are reasonable, the Rehabilitation Act both protects those choices from scrutiny, and prohibits discrimination against the disabled person on the basis of those choices.

(See also *Christian v. St. Anthony Medical Center, Inc.* (7th Cir. 1997) 117 F.3d 1051, 1052 [employer must accommodate disabling effects of medical treatment that is "require[d], in the prudent judgment of the medical profession"].)

Similarly, in *Crowder v. Kitagawa* (9th Cir.1996) 81 F.3d 1480, the Ninth Circuit held that the ADA authorized visually impaired travelers to challenge a Hawaii law requiring quarantine of all newly arrived dogs, including guide dogs, as "discriminat[ion] . . . by reason of their disability." (*Id.* at p. 1485 & fn. 1.) And federal courts have held that zoning ordinances excluding facilities providing methadone treatment to those with substance abuse problems to be "facially discriminatory" under the ADA -- notwithstanding that they did not prohibit such individuals "any other . . . treatment[]," (AB 44). (See *Bay Area Research & Treatment, Inc. v. City of Antioch* (9th Cir. 1999) 179 F.3d 725; *MX Group, Inc. v. City of Covington* (6th Cir. 2002) 293 F.3d 326, 345; *McWright v. Alexander* (7th

Cir. 1992) 982 F.2d 224, 228 [a hypothetical "policy excluding wheelchairs would be . . . discrimination"].)[4]

The general principle that an employer has no broader power to discriminate based upon a disabled person's *treatment* for a condition than based on the condition itself applies with even greater force under California law. Indeed, the Court of Appeal below did what the court in *Pettus* pronounced "unprecedented" in California jurisprudence: it held "that an employer may dictate to an employee the course of medical treatment he or she must follow, under pain of termination, with respect to a nonoccupational illness or injury." (*Pettus*, *supra,* 49 Cal.App.4th

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[4] Although RagingWire notes cases in which courts have rejected ADA claims seeking to require employers to misconduct "caused by" a disability, these cases are entirely different. For example, *Despears v. Milwaukee County* (7th Cir. 1995) 63 F.3d 635, rejected the employee's claim that his alcoholism entitled him to have the employer overlook his conviction for driving under the influence – what he sought was not a reasonable accommodation of *his disability*. (*Id.* at p. 636.) The decision specifically noted that "the criminal law, by refusing to recognize alcoholism as a defense to a charge of driving under the influence of alcohol, takes the not irrational position that alcoholics *are* capable of avoiding driving while drunk." California law, of course, does recognize use in compliance with the Compassionate Use Act as a defense, but, more importantly, it settles that a person has no reason to "avoid" using marijuana on their physician's recommendation. A number of the other decisions cited do not announce any general rule concerning that disability-related actions -- let alone recognize a broad authority to punish employees for the medical treatment they are receiving. Instead, these cases discuss certain ADA provisions that provide unique rules for claims by individuals whose claim of "disability" is based on a substance abuse disorder. As explained below, these provisions have no relevance at all here, both (1) because they are not part of the FEHA and (2) because Ross's protection under the FEHA is based on

at p. 459.) The court explained that it was "aware of no law or policy which suggests that a person forfeits his or her right of medical self-determination by entering into an employment relationship. . . ." (*Ibid.*) Rather, "employees expect that their employers will respect--i.e., not attempt to coerce or otherwise interfere with – their decisions about their own health care." (*Id.* at p. 461.)

RagingWire's attempts to blunt the force of *Pettus* are wholly unpersuasive. An employer who "permits" its employee to use "any and all . . . treatments" for his disabling medical condition – *except the one he chooses, on his physician's recommendation* -- "dictates treatment" no less than did the employer in *Pettus, supra.* Mr. Ross's claim differs from the one in *Pettus* only in that it is substantially stronger. It arises under a statute specifically intended to protect individuals with disabilities and promote their inclusion into the economic mainstream. The decision Ross seeks to have respected can be expected to render him a *more* productive employee than any other alternative. And the particular therapy he is undergoing is one that no health care professional has questioned and California law has specifically recognized as beneficial.[5]

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his *back condition*.

[5] RagingWire's attempt to enlist cases like *Rutherford v. United States* (10th Cir. 1980) 616 F.2d 455, in support of its policy is especially ill-conceived. Those decisions applied a deferential standard of review out of recognition that the government's power to promote health and welfare includes measures to *protect* those who are ill from *fraudulent* medicine. California, of course, has exercised its

The decision below did not give the terms of the FEHA their plain meaning -- let alone the "liberal[]" construction directed by the Legislature, and it shows no sign of having even considered whether its rule is consistent with the purposes of the statute. (Gov. Code § 12993(a).) Despite the Act's avowed intent to protect "all" Californians (Gov. Code § 12920.), the decision below singles out a significant subset of persons with disabilities -- those whose conditions respond favorably to therapeutic marijuana -- for what amounts to second-class citizenship. Unlike the illusory "Hobson's choice" conjured by the decision below, individuals in Ross's position find themselves on the horns of a very genuine trilemma: either (1) they withdraw from the workforce, in which case the Act's core aim of enabling those who are willing and capable of being productive to find a place in the State's workforce is undermined; (2) or they continue to work, but do so on the employer's terms – *i.e.*, foregoing medication or pursuing treatment they find less beneficial or more difficult to tolerate -- precisely the situation the FEHA was intended to avoid and that the California Constitution prohibits (see *Pettus, supra*; cf. Health & Saf. Code § 124960, subd. (d) ["A patient suffering from severe

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police power in a way entirely inconsistent with RagingWire's policy -- undertaking to promote distribution to those in "medical need"; and RagingWire has never suggested that its policy reflects any independent medical judgment that marijuana is not medically beneficial. But even if it had, RagingWire's burden under the FEHA would have been to persuade a court of its entitlement to the narrow "threat . . .to self" defense.

chronic intractable pain should have access to proper treatment of his or her pain"]) or (3) they continue to work *and* adhere to their physician's treatment recommendation – but do so aware that the have forfeited FEHA protections to which they would otherwise be entitled , *i.e.*, remaining part of the class the Legislature determined were vulnerable to discrimination and deserving of special protection, but retaining no FEHA rights their employer would be bound to respect.

These direct and foreseeable effects on the well-being of this subset of individuals in no ways exhausts the ways in which the rule below disserves the objectives of the FEHA. If the Court were to accept RagingWire's extraordinary "discrimination based on treatment is not actionable" argument – it would create a loophole so large that the Act would be swallowed up. If "treatment," as distinct from an individual's "underlying condition," is *not* a basis for accommodation (or a grounds for actionable discrimination), disabled applicants and employees could be cast aside simply by adopting a "general workplace rule" prohibiting a particular treatment. In certain situations, of course, such rules would be little more than a pretext for discrimination based on the condition itself -- a "no AZT" policy would screen out persons with AIDS; others might reflect a general preference to reduce the payroll by terminating employment of those entitled as of right to "accommodation."

B. An Employer's Interest in Screening Out Applicants Engaged in Drug and Alcohol Abuse Does Not Defeat the FEHA Rights of Applicants Excluded Based on Medical Treatment

A central premise of the decision below -- one pressed especially ardently by RagingWire in this Court -- is that Ross's claim under the FEHA is controlled by the decision in *Loder*, *supra*, which held that an employer's interest in "ascertaining whether persons to be employed in any position currently are abusing drugs or alcohol" was sufficient to warrant the "minor intrusion" on individual privacy that the urine testing at issue entailed. (14 Cal.4th at pp. 882-883.) As the employer is quick to point out, Ross has not challenged its entitlement to test for drugs preemployment; indeed, he complied with that policy and, with the one exception at issue here, he received a "clean" result. Nor does Ross challenge an employer's prerogative to refuse to hire an individual found to be *abusing* drugs. Rather, Ross only claims that the FEHA entitles him to an exception from RagingWire's policy that treats a "positive" test as supporting an unrebuttable inference of nontherapeutic use.

Loder obviously did not hold -- or even imply -- that under the FEHA, an employer could exclude an individual based on a drug test result reflecting only physician-recommended use as treatment for his disabling condition. No such prerogative was claimed by the employer in *Loder* (and no such FEHA challenge

was presented), and the reasoning of that decision provides no support at all for the decision below.

Blackletter law holds that whether a rule is "legitimate" in its *general* application does not establish its sufficiency to exclude a qualified disabled individual from employment. Many, if not most, disability discrimination claims proceed from the premise that the challenged practice or policy is generally legitimate. For instance, the plaintiffs in *Crowder*, *supra*, did not contend that Hawaii had no legitimate basis for quarantining newly-arrived dogs (let alone that non-impaired individuals who brought dogs into the State would not be subject to the same requirements); rather, they claimed that this facially legitimate policy would not be undermined by a narrow exception for guide dogs. (See also *Fry v. Saenz* (2002) 98 Cal.App.4th 256, 270 [noting that nondisabled children who "need additional time to complete school" were are not relevant to court's analysis because such individuals "do not require reasonable accommodation *under the ADA*"] [Italics added].) As the Supreme Court explained in *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, a case upon which RagingWire places heavy reliance: "The simple fact that an accommodation would permit the worker with a disability to violate a rule that others must obey cannot, in and of itself, automatically show that the accommodation is not 'reasonable.'" (*Barnett, supra,* 535 U.S. at pp. 397-98, 404-05.) Were this so, the Court continued, the very kinds

of measures Congress identified as exemplars of "reasonable accommodation" would be beyond an individual's right to seek:

> Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral "break-from-work" rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk. *See* 42 U.S.C. § 12111(9)(b) (setting forth examples such as "job restructuring," "part-time or modified work schedules," "acquisition or modification of equipment or devices," "and other similar accommodations").

(535 U.S. at p. 398; see also *Garcia-Ayala v. Lederle Parenterals, Inc.* (1st Cir. 2000) 212 F.3d 638, 646 [statutory language shows that it is "flatly wrong" to assume that facial neutrality is sufficient].) In fact, the "general rule" is the opposite of the one assumed by the decision below: "an employer *may not* hold a disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity." (*Den Hartog v. Wasatch Academy* (10th Cir. 1997) 129 F.3d 1076 [Italics in original]; cf. *Morton v. U.P.S.* (9th Cir. 2001) 272 F.3d 1249, 1258 ["[a]n employer may require disabled employees as well as others to meet an across-the-board qualification standard if it can establish the stringent elements of the business necessity defense"]; *Hendricks-Robinson v. Excel Corp.* (7th Cir.

1998) 154 F.3d 685, 699 [requiring exception to employer's neutral "physical fitness" job requirement].)

Even more important, neither the legitimacy of an employer's "interest in ascertaining whether [applicants]. . . currently are abusing drugs or alcohol,'" *Ross*, *supra*, 132 Cal.App.4th at p. 599 [quoting *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 882] -- nor its power to refuse employment on that basis -- establishes or even suggests the employer has unfettered authority to deny employment to individuals whose "positive" result on a preemployment drug screen reflects appropriate, physician-recommended medical treatment, not "drug abuse." (Cf. *Hunsaker v. Contra Costa County* (9th Cir. 1998) 149 F.3d 1041 [sustaining testing policy, because positive test triggered follow-up interview, rather than denial of benefits].)

Although RagingWire seeks to minimize the significance of *Loder*'s precise description, it is plain that the "well documented problems" to which the Court referred were not the result of the *use* of particular substances for which employers test -- which presumably include OxyContin, methadone, Marinol, and alcohol -- but rather to their "*abuse*." While many medications have properties that would give rise to legitimate employer concerns, *e.g.*, opioid use by those in safety-sensitive positions, it is not the "hallucinogenic effects" (AB at p. 23) of such medications that account for the problems the Court listed, but rather the antisocial

behaviors *associated with nontherapeutic* use. (Cf. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* (2006) 126 S. Ct 1211, 1222 [declining to read CSA to mean that "any Schedule I substance is in fact always highly dangerous . . . no matter how used"].) Indeed, in one respect RagingWire *understates* what the Court held in *Loder*: that decision did not find merely that "businesses are free to test applicants for illegal drugs, including marijuana" (AB at p. 2); it described an employer interest that concerned substances -- legal, as well as illegal -- that applicants are prone to *abuse*. (See *Loder, supra*, 14 Cal.4th at p. 882 [holding that employer is entitled to find out "whether persons to be employed . . . are abusing drugs *or alcohol*"].)

The other distinction drawn in *Loder* -- between job *applicants*, who may be required to submit to drug tests, and current employees, who may not be, undercuts rather than supports RagingWire's position. To be sure, *Loder* emphasized employers' relative lack of information about whether an applicant is engaged in substance abuse -- unlike long-serving employees, whose work *performance* can be monitored directly. But even if it might be permissible for an employer to infer abuse from a positive drug screen *in the absence of any other information* (AB at p. 10), it does not follow that an employer is entitled to disregard other, more probative information when presented with it. Here -- contrary to RagingWire's remarkable assertion -- Ross did present it with an individualized basis for making

a more "particularized determination" (AB at p. 9): objectively verifiable evidence that his one positive result on its drug screen was for medication he was taking on his physician's recommendation to treat his disabling back condition. (See Complaint ¶ 17.) Ross asks no more than to be treated the same as an individual taking physician-prescribed OxyContin for his back condition would be treated if a preemployment drug screen showed opioid use. (Cf. AB at p. 42 (asserting that, under its rules, no "[]lawful" treatment would be automatically disqualifying); see also Gov. Code § 12940, subd. (n) [unlawful to deny "interactive process" for exploring reasonable accommodation]; 2 Cal. Code Regs. § 7294.2 ["Where the results of . . . medical examination would result in disqualification, an applicant . . . may submit independent medical opinions for consideration before a final determination on disqualification is made"].)

For purposes of California law, physician-recommended medical treatment with marijuana is not abuse. (Cf. *People v.* Mower (2002) 28 Cal. 4th 457, 482 [equating possession of marijuana in compliance with the Act to "the possession of . . . any prescription drug with a physician's prescription"]; *Oregon v. Ashcroft* (9th Cir. 2004) 368 F.3d 1118, 1166, *aff'd* 126 S. Ct. 904 (2006) [contrasting "drug abuse" and "medical practice"].) This is so not just because of the language in the initiative passed by the California electorate (see Health and Saf. Code § 11362.5, subd. (b)(1)(A) & (C) [noting scientific evidence establishing the benefits of

marijuana "in the treatment of [among other conditions] cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, [and] migraine" and committing state to affordable "distribution of marijuana to all *patients* in *medical need* [of it]"]) (Italics added)), but also because of the manner in which the Legislature and its medical regulatory authorities have implemented the law -- imposing the same legal and professional standards of patient care that apply to all other treatment decisions. See *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) [conc. opn. of Kozinski, J.] [under the Compassionate Use Act, "doctors 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"]; *Washington v. Harper* (1990) 494 U.S. 210, 223 ["we will not assume that physicians will prescribe . . . drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to the contrary"].)

To the extent that RagingWire argues that an applicant's (medical) use of a drug with a "*potential* for abuse" is grounds for a blanket exclusion, it is wrong for a number of other reasons. First, it is simply not conceivable that those who enacted the FEHA would expect that employers could lawfully condition job offers on disabled applicants' refraining from *medical* use of any Schedule II drug -- which also have a high "potential for abuse" (see 21 U.S.C. § 812(b)(2)), without any showing of job-relatedness or threat to workplace safety. Moreover, a rule that

excludes qualified individuals based on the mere *potential* that, in the future, they might cease to be able to perform essential duties is contrary to blackletter fair employment law. (See 2 Cal. Code Regs. § 7293.8, subd. (e) ["it is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to [safely] perform the job"]; *Johnson v. Civil Service Comm'n* (1984) 153 Cal. 585, 590.)[6]

Finally, as did the court below, RagingWire highlights the fact that marijuana may be obtained by recommendation, rather than prescription; that the Compassionate Use Act does not require ongoing physician supervision; and that physicians might be "tricked" into recommending marijuana, *i.e.*, that an applicant's positive test result plus a medical recommendation does not *rule out* abuse.[7] The latter, general point, of course, applies to many other substances --

[6] That a substance has been determined to have a "high potential for abuse" does not mean that it has the same "potential" when administered as part of course of medical treatment in the context of a doctor-patient relationship. (Cf. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* (2006) 126 S. Ct 1211, 1222.) This is not to deny that chemical dependency does occur in such situations -- but norms of professional responsibility require doctors to take greater care in recommending such drugs and in overseeing their administration to patients who are at higher risk of developing addictions.

[7] Much the same can be said in response to RagingWire's flyspecking argument about the respective meanings of "use" and "possession." (AB at p. 34) If RagingWire truly were concerned that Mr. Ross might take advantage of any such possible loophole in and bring marijuana with him to the workplace, it surely could

including those obtained by doctor's prescription -- and it would be extraordinary, given the laws of California and the canons of professional ethics, for an employer to adopt -- and a court to accept, without any evidence -- an irrebuttable presumption that physician recommendations are inadequate. (Cf. *Thompson v. W. States Med. Ctr.* (2002) 535 U.S. 357, 374 [refusing to analyze law based on the "questionable assumption that physicians would prescribe unnecessary medications"].)[8] At this stage of the proceedings, RagingWire is bound by Mr. Ross's well-pleaded allegations that the marijuana use that led to his exclusion was *bona fide* and medically legitimate. And, in any event, if RagingWire truly were concerned about the supervision issue, it could have required Ross to have his doctors supervise his use of marijuana at regular intervals. This case, however, did not arise from RagingWire's conditioning an employment offer on Mr. Ross's agreeing to consult regularly with his physician (and his then protesting that such a

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have raised such concerns with him in the "interactive process" contemplated under Government Code section 12940(n).

[8] In fact, the authority cited by the decision below for its observation that a doctor's recommendation under the Compassionate Use Act might be obtained through "'misrepresentation to the physician regarding [the applicant's] physical well being,'" 132 Cal. App. 4th at 599 (quoting *McDaniel v. Mississippi Baptist Medical Center* (S.D. Miss.1994) 869 F. Supp. 445, 449) attests that the risk of misrepresentation is *not* particular to marijuana. (See *McDaniel, supra*, 869 F. Supp. at p. 448 [plaintiff had fraudulently obtained prescriptions for "opium-based medications"].) Neither the court below nor RagingWire cited any substantiation for the assumption that such patient deception is significant with respect to

requirement would not be a reasonable accommodation); the employer barred Ross categorically, under a policy that applies to closely supervised, no less than merely physician- recommended use.

The employer's claim that the Court of Appeal's reading of *Loder* is supported by the "plain language" of the FEHA and its regulations rests on an egregious misreading of the cited provisions. (See AB at pp. 15 & 20.) Although Government Code sections 12926 (i) and (k)(6) specify that the terms "mental disability" and "'physical disability' do not include . . . psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs," Mr. Ross's disability is not a substance abuse disorder. (See Complaint ¶ 3; see also 2 Cal. C. Regs. § 7293.6, subd. (d) ["The unlawful use of controlled substances or other drugs shall not be deemed, *in and of itself*, to constitute a physical disability or a mental disability"] [Italics added].) Those provisions have nothing to say about the statutory significance of drug use – whether therapeutic or unlawful -- by an individual who *otherwise* satisfies the FEHA definition of a disability.

Notably, what those provisions say on the subject stands in sharp contrast with federal law, which includes a provision (with no analog under the FEHA) that sweepingly excludes "any person currently using illegal drugs" from the definition

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marijuana, let alone greater than for other medications.

of "qualified individual with a disability" (42 U.S.C. § 12114(a)), as well as another provision stating that employers may hold alcoholics and drug users "to the same qualification standards for . . .job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the[ir] drug use or alcoholism" (42 U.S.C. § 12114(c)(4)). (See *Pernice v. City of Chicago* (7th Cir. 2001) 237 F.3d 783, 785.) RagingWire's entire argument consists of reading FEHA *as if* it included provisions that the Legislature in fact omitted.[9]

In fact, even if the FEHA did include similar provisions, they would not doom Ross's claim. Although the Employer (AB 20 n.5) baldly asserts that a (hypothetical) statutory exclusion based on the "unlawful use of drugs" must, as a matter of "plain language," include use that is in full compliance with California State law, it does not offer any support for that counterintuitive assertion. In fact,

[9] In fact, decisions construing federal statutes including provisions like the one in FEHA – but, unlike the unusual, sweeping ADA language – strongly support the contrary rule: that limiting a *claimant's* affirmative reliance on substance abuse does not mean that the *defense* may rely on "unlawfulness" of use to avoid duties that FEHA would otherwise impose. For example, Social Security Disability Law, which (like FEHA) provides that "[a]n individual shall not be considered to be disabled" *based upon* alcoholism or drug addiction (42 U.S.C. § 423(d)(2)(C)), but contains no provision analogous to the ADA, providing that drug use renders an otherwise eligible beneficiary ineligible. Numerous federal courts have relied on this plain language to reinstate benefits of individuals, who independently satisfy the statute's "disability" criteria, but who have been found to be actively *abusing*

the *ADA* definition of the "illegal use of drugs" provides that the term "*does not include the use of a drug taken under the supervision by a licensed health care professional,* or other uses authorized by the Controlled Substances Act or other provisions of Federal law." (42 U.S.C. § 12111(6) (emphasis added).)[10]

II. Marijuana's Status Under Federal Law Does Not Entitle Employers to a Judicially-Crafted Exception Under the FEHA

A. The Lower Court's Rule of Per Se Unreasonableness Is Incompatible with the FEHA

RagingWire's assertions that the FEHA is silent about whether the exception Ross sought is a "reasonable accommodation" -- and its argument that the Legislature's agreement with the reasoning below can be inferred from its repeated

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drugs or alcohol. (See, *e.g.*, *Kangail v. Barnhart* (7th Cir. July 14, 2006) 2006 WL 1970311, at * 1 [collecting decisions].)

[10] While those ADA provisions have no application to this case -- even the *policy* they express fails to support the decision below. Those provisions no doubt reflect an intent to enable employers to respond to workplace problems associated with substance abuse, but they also must be understood in the context of a strong federal policy of encouraging individuals with drug, alcohol and other substance abuse problems to avail themselves of treatment. Thus, the same section of the ADA that *withdraws* protection from persons whose current drug use results from an untreated substance abuse problem includes a "safe harbor" provision that restores statutory rights those who participate in "a supervised drug rehabilitation program." (See 18 U.S.C. § 12114(b); *Ambrosino v. Met. Life Ins. Co.* (N.D. Cal. 1995) 899 F. Supp. 440 [describing and applying "rehabilitation exception"]; see also Labor Code § 1025 [providing statutory protection for employees who seek alcohol and drug treatment].) This policy, of course, is wholly inapposite in this case: in the contemplation of California law, marijuana use in compliance with the Compassionate Use Act is not a symptom of a condition *requiring* treatment; it *is* treatment.

"failure" to amend the FEHA after the Compassionate Use Act was adopted and even from its "inaction" in the face of the decision below -- proceed from a basic misunderstanding of the text and structure of the FEHA and of the legislative judgments they reflect.[11]

As an initial matter, the Legislature *has* passed legislation indicating that it believes the FEHA requires employers to accommodate off-duty, off-premises medical marijuana use (see Health & Saf. Code § 11362.785, subd. (a)), which follows from the text and purposes of the FEHA. By using terms such as "reasonable" and "undue," the Act contemplates and directs that courts will perform a detailed, fact-specific balancing of the individual claims -- and make judgments that are consistent with the statue as a whole and promote the Legislature's purpose. The FEHA is a statute that directs "courts to 'strik[e] sensible balances between' competing legitimate interests." (See *O Centro*, s*upra*, 126 S.Ct at p. 1215.) It "makes clear that it is the obligation of the courts to consider whether exceptions [to generally applicable rules] are required" and to do so "under the test set forth" by the Legislature." (See *ibid.*; see also *Crowder*, *supra* [reasonable accommodation requires "highly fact-specific, . . . case-by-case

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[11] On the latter point, it would be hazardous -- if not counterintuitive -- to infer approval of Appeal Court decisions from legislative inaction *during the time the case is pending in this Court on petition for review*.

inquiry"]. Under such a regime, the authority to except an individual from an otherwise applicable and legitimate rule does not require any specific grant from the Legislature. Rather, as Chief Justice Roberts explained in *O Centro*, statutes like FEHA "contemplate[] that courts [will] recognize exceptions -- that is how the law works." (*O Centro, supra,* 126 S.Ct. at p. 1222; see also *U.S. v. Logan* (7th Cir. 2006) 2006 WL 1841635, at *1 ["Statutes do not depend, for their force, on some statement in the legislative history along the lines of 'We really mean it!'"]; *PGA Tour, Inc. v. Martin* (2001) 532 U.S. 661, 689 ["the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."].)

The Legislature has identified certain categorical exemptions and defenses, but ordinary rules of statutory construction, as well as the law's express rule of liberal construction make clear that, where these do not apply, courts should not fashion broad rules of per se lawfulness. (See *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195; *Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 411 ([exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.']); cf. *Martin, supra*, 532 U.S. at p. 689 ["[defendant's] claim that all the substantive rules . . . are sacrosanct and cannot be modified under any circumstances" is tantamount to an "exempt[ion] from [the] reasonable modification requirement" which that the statute did not provide].)

This structure, where courts make independent, fact-specific judgments and employers (and other defendants) shoulder the burden of establishing that the particular accommodation would be unduly burdensome or dangerous -- is closely bound up with the central aims of disability law. First, because one of the major premises of the FEHA is that employers who do not harbor any animus toward individuals with disability, nonetheless make decisions based on unrealistic, unexamined assumptions about such individuals' ability to be productive employees, the law is intended to require employers presented with the application of an individual with a disability to scrutinize their own job requirements and workplace policies and identify which ones are essential and necessary. (See *Trustees, University of Alabama v. Garrett* (2001) 531 U.S. 356, 377 [conc. opn. of Kennedy, J.] ["statutes designed to assist those with impairments [give] citizens . . . an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society"].) Moreover, the statute's recognition of a right to "reasonable accommodation" necessarily accepts that employment of individuals with disabilities often will entail *some* additional costs to the employer -- meaning that employers might have rational, as well as irrational, reasons to fence individuals with disabilities out of the workplace. These realities -- that sweeping, unsupported generalities are part of the problem that the Legislature was

addressing and that employers will have legitimate cost-based reasons for denying employment -- makes disability statutes unusually intolerant of categorical assertions, supported by speculation, rather than concrete, particularized evidence. (See EEOC Compl. Man. (CCH) § 902.8, ¶ 6888 at p. 5325 ["Quite often, employers will assume, without any objective evidence, that a person's physical or mental condition will cause problems in these areas. The ADA is designed to prevent employment discrimination based on [such] mere speculation"]; cf. Gov. Code § 12926, subd. (n) [providing that reasonable accommodation requires a dynamic, "interactive process"]; see *Martin, supra*, 532 U.S. at p. 688 [holding that the ADA requires an "*individualized* inquiry . . . whether a *specific* modification for a *particular* person's disability would be reasonable under the circumstances . . . [and] necessary for *that person*"] [emphasis added].)

Thus, in *Crowder, supra*, the court acknowledged the substantiality of the interests defendants asserted -- the possibility that accommodating visually disabled plaintiffs would compromise the state's legitimate interest in keeping the state free of rabies infestation, as well as "the general principle that courts will not second-guess the public health and safety decisions of state legislatures acting within their traditional police powers" and the fact that the State Legislature had in fact considered alternatives to its quarantine law. (81 F.3d at p. 1485.) Nevertheless, the court held that the ADA entitled the plaintiffs to an independent,

judicial determination whether applying the law to guide dogs was necessary. "When Congress has passed antidiscrimination laws . . . which require reasonable modifications, it is incumbent upon the courts to insure that the mandate of [the] law is achieved." (*Id.* at p. 1486.) The Court concluded:

> [W]hether the plaintiffs' proposed alternatives to Hawaii's quarantine for guide dogs constitute reasonable modifications . . . cannot be determined as a matter of law on the record before us. . . . The determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry, necessitat[ing] findings of fact regarding the nature of the rabies disease, the extent of the risk posed by the disease, and the probability that the infected animals would spread it.

81 F.3d at p. 1486.

B. Per Se Exemption Based on the Legal Status of Medical Marijuana Under Federal Law Is Contrary to the FEHA

The particular categorical rule that the Court of Appeal adopted has no plausible basis in the text or purposes of the FEHA. First, the plain language of the FEHA identifies one instance when federal law provides a complete defense: when a decision to bar a disabled individual from employment is "based on a federal security regulation." (See Gov. Code § 12940; see also 2 Cal. Code. Regs. § 7286.7, subd. (f) ["an employment practice is lawful where *required by* . . . federal law or . . . pursuant to an order of [a] federal court of proper jurisdiction"].) [Italics added].) RagingWire does not and could not contend that the Controlled Substances Act's prohibition on medical marijuana possession is a "federal

security regulation" and it accepts that excluding Mr. Ross was not "required by federal law." There is no reason to assume that the Legislature intended by its silence to grant another exception to FEHA's general requirement of individualized, fact-specific proof, for other categories of "federal . . . regulations." This is especially so where, as here, the Legislature has not been silent. (See Health & Saf. Code § 11362.775, subd. (a).)

Furthermore, while workplace safety is not only a fundamental public policy of the State, but a legally enforceable duty, the FEHA does not permit employers to rest on generalized -- and even facially reasonable -- concerns that employing an individual with a disability will endanger himself, his co-workers, or members of the public. Rather, the law mandates that the employer establish that such concerns are, in fact, substantial enough to warrant denying the individual employment. (Cf. *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App. 4th 327 [holding that arbitrator's order reinstating employee who had threatened to shoot co-worker and members of his family was not judicially unenforceable on "public policy" grounds, explaining that "the City has not shown that [his] reinstatement . . . is *necessarily incompatible* with the public policy requiring employers to provide a safe workplace"].)

Here, of course, the employer has not set forth even generalized evidence that the exception Ross sought would be work impairing, let alone that it would be

more onerous relative to what its policy already allows -- "any and all" other treatments, as long as they are not federally unlawful, a class that would include many medications commonly and appropriately prescribed for pain and back relief that have extremely potent effects. Moreover, as the statute's treatment of the workplace-safety defense attests, mere speculation about the possibility of third-party actions against the employer based on its accommodation of the disabled individual is not nearly enough to render an exclusionary policy reasonable as a matter of law.[12] (Cf. *Garcia-Ayala v. Lederle Parenterals, Inc.* (1st Cir. 2000) 212 F.3d 638, 650 [when "record . . . contains no evidence whatever of any form of hardship to [employer] as a result of the requested accommodation. [plaintiff] is entitled to judgment as a matter of law"]; see also *Ambrosino v. Met. Life Ins. Co.* (N.D. Cal. 1995) 899 F. Supp. 440, 444 [granting judgment as a matter of law where "Defendant expressly disclaims any attempt to demonstrate that these

[12] Although RagingWire professes concern that accommodating Ross might lead to a forfeiture of its property, there obviously is no case sustaining a forfeiture based on an owner's *employing* an individual who (for medical reasons and in compliance with state law) possesses a drug in violation of federal law. That *United States. v. 141st Street Corp.* (2d Cir. 1990) 911 F.2d 870 is the closest analogy RagingWire can find – a case where landlords were found to have consented to "narcotics trafficking," based on the presence of open drug dealing on every floor, drug use in the building's common areas, and a "constant[]" presence of "lookouts" and "steerers" inside and around the building – only confirms how unrealistic these asserted concerns are.

qualifications are essential for the protection of Defendant's customers [or] . . . for the protection of any of its legitimate interests"].)

Nor was the decision below correct to assume that the fact that RagingWire's policy is consistent with -- although not required by-- the policy judgment expressed in federal law should place it beyond the reach of the reasonable accommodation mandate. Even the fact that an accommodation requires an exception to *State* law does not make it unreasonable per se. On the contrary, as the court explained in *Fry v. Saenz* (2002) 98 Cal.App.4th 256, it is settled law that "[i]f a requirement is not essential. . . , the fact that it is embodied in a statute . . . makes no difference." (*Id.* at p. 264.) It is the courts' "duty to see that 'the mandate of [disability discrimination] law is achieved,'" which means that "statutes are no[t] immune to judicial scrutiny for ADA compliance." (*Ibid.* [quotation omitted].) If a general consistency with *state* law and policy do not provide a blanket defense to a claim of disability discrimination, then consistency with the policies – rather than compliance with the requirements – of federal law surely do not. (Cf. *Mower, supra,* 28 Cal. 4th at 465 fn.2 [federal law "has no bearing upon the question[s] presented"].)

Worse still, the federal policy invoked by RagingWire is not merely untethered to California law, it is directly contrary to it. California voters overwhelmingly rejected the specific policy judgment the federal rule expresses --

that marijuana's medical efficacy has not been established. California law not only recognizes "that seriously ill Californians have the right to obtain and use marijuana for medical purposes," but this right is expressly tied to scientific evidence establishing the benefits of marijuana "in the treatment of [among other conditions] cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, [and] migraine." (See Health & Saf. Code § 11362.5, subd. (b)(1)(A).) Moreover, in view of the evidence that, for significant numbers of individuals suffering from serious illness, marijuana has uniquely beneficial effects, the electorate went further and announced a policy affirmatively "encouraging . . . safe and affordable distribution of marijuana to all patients in medical need." (Health & Saf. Code § 11362.5, subd. (a)(1)(C).)[13] It would be extraordinary enough to construe State statute (FEHA) permitted private employers to punish individuals for taking actions off-duty that other provisions of State law expressly "encourage[s]" and treats as a "right" -- and to do so without any showing of actual workplace necessity -- but it is all the more remarkable here, given that the "conduct" at issue involves the individual's obtaining beneficial, potentially life-saving medical treatment.

[13] That the California electorate seeks to encourage the state to develop distribution channels for marijuana belies RagingWire's contention that it was narrowly intended only as a defense to criminal sanctions.

Nor does the fact that the federal policy judgment is expressed in a statute that authorizes *criminal* penalties dictate a different analysis. The federal statute at issue is not one that imposes any criminal -- or civil -- liability on those who employ individual violators, nor one that requires them to play a law enforcement role. Although the decision below assumed that it is "unknown to the law" for a court to prevent an employer's attaching adverse consequences to a violation of a criminal law, such decisions are not at all uncommon. Courts have long rejected broad assertions that any illegal conduct by an employee triggers an automatic forfeiture of anti-discrimination protections. See, e.g., *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804 [federal anti-discrimination law requires employer to rehire black individual who violated the law if "white employees involved in [unlawful] acts . . . of comparable seriousness . . . were . . . retained or rehired"]; *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 849 ["plaintiff's status as an undocumented alien does not bar her from the protections of employment law"]; *Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 533, 538 [same].) Indeed, the U.S. Supreme Court has twice rejected employer claims that federal courts' authority to refuse enforcement of arbitral awards on grounds of "fundamental public policy" translates into a power to withhold reinstatement of whose conduct ran afoul of federal controlled substances laws. (See *Eastern Associated v. United Mine Workers* (2001) 121 S.Ct.

462; *United Paperworkers Int'l Union v. Misco, Inc.* (1987) 484 U.S. 29, 44 (1987); see also Bus. & Prof. Code § 480, subd. (a) [prior conviction may support license denial "only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made"].)[14]

These cases make clear why the existence of a plenary power for private employers should *not* be assumed from the fact of a criminal prohibition. First, prosecutors are publicly accountable and bound by numerous practical, legal, and ethical restraints that have no application in the private employment setting: thus, while the federal government's power to bring criminal charges against persons with disabilities who possess marijuana for medical reasons has been sustained (see *Gonzales v. Raich* (2005) 125 S. Ct. 2195), the rarity of exercises of such

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[14] Even in the context of probation -- a judicial setting, where due process protections apply and in which conditions that impinge on constitutional rights are permissible -- blanket directives to comply with "all laws," including federal laws against medical marijuana use, have been reviewed to assure they are "reasonably related to the crime of which the defendant was convicted or to future criminality" and have been rejected for failing that test. (*People v. Tilehkooh* (2005) 113 Cal.App.4th. 1433, 1444-1446 [refusing to enforce probation condition against individual medical marijuana user]; cf. *People v. Bianco* (2001) 93 Cal.App.4th 748, 754 [sustaining probation condition barring marijuana use as "directly related to defendant's criminal offense and . . . reasonably related to the goal of ensuring that defendant does not commit subsequent criminal offenses under California law"].) Although *Bianco, supra,* alternatively held that state courts have the plenary power to compel probationers to comply with federal law, the same court's later decision in *Tilehkooh* rejected that reasoning, noting that *Bianco*'s understanding of the law predated this Court's decision in *Mower*. Notably, the

power reflect the fact that prosecutors would have to obtain the concurrence of twelve California jurors before punishment could be imposed -- and would have to proceed publicly, thereby reckoning with the protests of California citizens and elected officials (and from other jurisdictions as well). Private employers, by contrast, face no such constraints -- and allowing them to rely on such laws to avoid their duties under anti-discrimination statutes (which already take business necessity into account) would give them unfettered power over individuals whom the public has sought to protect.

If this were not enough, even *federal* law does not accord the policies of the Controlled Substances Act the kind of uniquely potent gravitational force the court below gave them under California employment law. As noted above, courts applying federal Social Security Disability law award benefits to individuals, notwithstanding their proven *abuse* of alcohol and drugs, and the Supreme Court, applying the federal common law of labor relations, has rejected claims that the "public policy" exception permits, let alone requires federal courts to reinstate individuals who violated federal drug laws (and federal policies concerning workplace safety).

Even more telling is *O Centro*, *supra*, where the U.S. Supreme Court unanimously granted the respondents an ongoing right, enforceable against federal

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decision in this case cited only *Bianco*, but not *Tilehkooh*.

prosecutors to act in violation of criminal laws prohibiting importation of Schedule I drugs.[15] In holding that the government failed to demonstrate a compelling interest for refusing to accommodate a religious sect's use of a hallucinogenic sacramental tea that is illegal under the Controlled Substances Act, the Court forcefully rejected arguments that individualized exceptions to the Controlled Substances Act were incompatible with congressional determinations reflected in the Act. Specifically, the Court rejected the federal government's contention that "any Schedule I substance is in fact always highly dangerous in any amount no matter how used" and that "Congress['s] determination that [a substance] should be listed under Schedule I . . . provide[s] a categorical answer that relieves the Government of its [ordinary] burden" of demonstrating the reasonableness of its refusal to accommodate the sect. (See *id.* at pp. 1221 & 1222.) Instead, the Court found that "exempting[] certain people from [the Controlled Substances Act's] requirements . . . could be 'consistent with the public health and safety'" in certain

[15] Although *Misco, supra,* and *Eastern Associated, supra,* involved reinstatement of employees whose violations of controlled substances law were "complete," *O Centro,* which affirmed forward-looking relief, rules out any attempt to limit those decisions on that basis. In fact, even if the law supported such a distinction, it would not avail the policy at issue here. RagingWire's policy attaches consequences to a single occurrence -- an applicant's positive result on a pre-employment drug test. RagingWire *does not* claim a right to broadly test *employees* -- and terminate them based on positive drug screen results; on the contrary, it embraces the logic of *Loder* -- that once hired, an employer's interest in

circumstances. (*Id.* at 1224 [quotation omitted].) If a drug's placement in Schedule I by Congress is insufficiently compelling to relieve those actually authorized to enforce federal law of the burden of justifying their denial of an exception it surely cannot be used to excuse private employers -- in a state that has expressly rejected the policy judgment underlying the federal law -- from having to meet their burden in a state court suit involving claims brought solely under California law. (Cf. *Tilehkooh, supra,* 113 Cal.App.4th at pp. 1445-1447 [noting that state courts do not generally enforce federal law].)

The Supreme Court's decision in *O Centro* also forcefully explains why the one precedent RagingWire cites for a rule of per se unreasonableness -- *U.S. Airways v. Barnett* -- has no application to this case. The accommodation sought in *Barnett,* an exception to seniority rules, was pronounced unreasonable not because seniority rules are *legitimate,* but rather because the granting of exceptions (for any reason) undermines their central benefit - substituting "consistent, uniform treatment" for "management decisionmaking, with its inevitable discretionary elements." (535 U.S. at p. 404.) *O Centro* likewise recognized that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws" but emphasized that such preclusion

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testing ebbs, because it can make decisions based on objective evidence of work performance.

would not be assumed -- rather "the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested . . . accommodation[] would seriously compromise its ability to administer the program." (126 S.Ct. at p. 1215.) RagingWire's acknowledgment that a California employer could, consistently with federal law, grant the accommodation requested here, underscores that the test for per se unreasonableness cannot be met.

CONCLUSION

For the foregoing reasons, the decision of the court of appeal should be reversed.

DATED: July 24, 2006

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 14 of the California Rules of Court, counsel for *Amici Curiae* certifies that this brief is 13,250 words in length, according to the word count of the word processing program used to prepare this brief.

DATED: July 24, 2006

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THEODORE CODY

DECLARATION OF SERVICE

I, Theodore Cody, declare my business address is One Embarcadero, Suite 2440, San Francisco, CA 94111; I am over the eight of eighteen and I am not a party to this action.

On July 24, 2006, I caused the attached Amicus Brief by Protection and Advocacy, Inc. and Equal Rights Advocates in Support of Plaintiff/Petitioner Gary Ross in this action to be served via first-class mail to:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 24, 2006, in Oakland, California.

_____
Theodore Cody