INTRODUCTION AND STATEMENT OF INTEREST

Amici curiae John Vasconcellos,[1] Mark Leno,[2] Loni Hancock,[3] Jackie Goldberg,[4] and Paul Koretz[5] respectfully submit this memorandum on behalf of plaintiff/petitioner Gary Ross. All amici are current or former California legislators who are authors of Senate Bill 420, Stats. 2003, ch. 875, (Health & Safety Code § 11362.7, et seq.) [hereinafter "SB 420"].) The purpose of this amicus brief is to explain our understanding of the application of the Fair Employment and Housing Act (Gov. Code § 12900, et seq.) [hereinafter "the FEHA"] to employed medical cannabis patients after the passage of the Compassionate Use Act of 1996 (Health & Safety Code § 11362.5), as we understood this when we drafted SB 420 in 2003. It is our belief that the FEHA, together with the Compassionate Use Act, authorize and protect the use of medical cannabis by employees away from the workplace and during non-business hours, as exemplified by plaintiff-petitioner Gary Ross, and that the court of appeal's decision erred in concluding otherwise.

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1 Former California Senator and author of SB 420.

2 California Assembly member and principal coauthor of SB 420.

3 California Assembly member and coauthor of SB 420.

4 California Assembly member and coauthor of SB 420.

5 California Assembly member and coauthor of SB 420.

SUMMARY OF ARGUMENT

Prior to the enactment of the Compassionate Use Act, the possession and use of marijuana was illegal for nearly all purposes in the State of California. The voters' enactment of the initiative in 1996 not only changed this, but it caused ripple effects with respect to other laws. One area of law that was a subject of much questioning involved employment discrimination law and, in particular, the question whether employers had an obligation under the FEHA to accommodate the legal use of medical cannabis under California law. It was our belief that the FEHA does require accommodation of the legal use of medical cannabis, but we did not believe that such accommodation extended to medical cannabis possession or use in the place of employment or during working hours. To express both of these views in an efficient manner, we enacted Health and Safety Code section 11362.785, subdivision (a), which states: "Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment . . . ." (Health & Safe. Code § 11362.785(a).) We believed that this statutory enactment clearly and sufficiently expressed our belief that that the FEHA *does* require employers generally to accommodate off-duty, off-premises medical cannabis use by their employees, absent an undue hardship.

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ARGUMENT

THE FAIR EMPLOYMENT AND HOUSING ACT, TOGETHER WITH THE COMPASSIONATE USE ACT, PROVIDE A REMEDY FOR EMPLOYMENT DISCRIMINATION AGAINST MEDICAL CANNABIS PATIENTS

At all relevant times, the California Health and Safety Code has banned the possession, processing, and sale of marijuana in California, "except as otherwise provided by law." (See Health & Safety Code §§ 11357, 11358, 11359, 11360, & 11361.) For years, the "except as otherwise provided by law" portion of the statute was a dead letter in many respects, because no law generally authorized the use of marijuana. That all changed in November 1996, however, when the voters of California enacted Proposition 215, the "Compassionate Use Act of 1996," which added a new section 11362.5 to the California Health and Safety Code. This new section established that "seriously ill Californians have the *right* to obtain and use marijuana for medical purposes."[6] (Health & Safety Code § 11362.5, subd. (b)(1)(A) (Italics added); see also Office of the Attorney General, Opinion No. 04-

[6] The Compassionate Use Act provided exceptions contemplated by Health and Safety Code Section 11357, which prohibits the possession of marijuana "[e]xcept as authorized by law," and Section 11358, which prohibits the cultivation of marijuana "except as otherwise provided by law." (See Health & Safety Code § 11362.5, subd. (d) ["Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purpose of the patient upon the written or oral recommendation or approval of a physician."].)

709, 88 Ops. Cal. Atty. Gen. 113, 2005 WL 1502081 (June 23, 2005) [observing that the Compassionate Use Act "give[s] Californians the right to obtain and use marijuana in the medical treatment of illnesses"].)

Following the passage of the Compassionate Use Act, questions arose over the precise scope of the "right" of Californians "to obtain and use marijuana for medical purposes." Consequently, the Legislature enacted SB 420 in 2003 because it was "the intent of the Legislature to address additional issues that were not included within the [Compassionate Use Act], and that must be resolved in order to promote the fair and orderly implementation of the act." (Stats. 2003, ch. 875, § 1, subd. (c).) In particular, the Legislature considered the interplay between the Compassionate Use Act and the FEHA, and we concluded that the protections of the FEHA extended to qualified medical cannabis patients. We believed that the voters did not intend for the Compassionate Use Act to apply only to unemployed medical cannabis patients, but to all qualified patients, including those who could be productive members of the workforce.

Without qualification, except for "undue hardship" or "applicable security regulations established by the United States or the State of California," the FEHA requires employers to "reasonably accommodate" an applicant or employee's disability or medical condition. (Gov. Code §§ 12920, 12940, subd. (a) & subd. (m).) The FEHA states:

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification or, except where based upon applicable security regulations established by the United States or the State of California:
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> (a) For an employer, because of . . . physical disability . . . [or] medical condition . . . of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.
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> (m) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee . . . [unless] demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(Gov. Code § 12940(a) & (m).) Because we assumed that these provisions applied to medical cannabis patients, just as they would to any other person with a disability or medical condition, we believed that the FEHA required employers reasonably to accommodate medical cannabis use by such employees, unless doing so would constitute an undue hardship or run afoul of applicable security regulations.

Employers were concerned that the FEHA, when read in light of the Compassionate Use Act, would compel them to accommodate medical cannabis use at work. This prompted us to clarify our understanding of the State's anti-discrimination laws, as affected by the Compassionate Use Act. Although we

believed that a straightforward application of the FEHA to disabled medical cannabis patients requires employers to accommodate patients' off-duty medical use, absent an undue hardship, we did not see the need to state this expressly. Instead, because we were aware of the doctrine of statutory construction *expressio unius est exclusio alterius*, we believed that we sufficiently and succinctly expressed our belief that this was so by using the term of art "accommodation" from the FEHA and stating the instances under which employers are *not* required to accommodate medical cannabis use. (Cf. *Dyna-Med, Inc. v. Fair Employment and Housing Com.* (1987) 43 Cal.3d 1379, 1391 fn. 13 ["The statutory construction doctrine of *expressio unius est exclusio alterius* means 'the expression of certain things in a statute necessarily involves exclusion of other things not expressed'"] [quotation omitted]; see also *Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 410 ["[W]here exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed."] [quotation omitted].) Thus, to assuage the concerns of employers that they would have to accommodate medical cannabis use by employees while the employees were "on the job," we enacted Health and Safety Code section 11362.785(a) to provide: "Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during

the hours of employment . . . ." (Health & Safety Code § 11362.785, subd. (a).)[7] This expressed our recognition that employers must generally "accommodate" medical cannabis use, but they do not have to do so where this might impair the safety of their employees or increase their risk of liability, which would constitute an "undue hardship."

Likewise, we were concerned about the effects of secondhand smoke on other employees. (See Senate Rules Committee, Rep. on Sen. Bill 420 (Sept. 13, 2003) p. 6.) [the bill "[r]estricts the use of medical marijuana in workplaces . . . [and] in other places where smoking tobacco is prohibited"]; cf. Lab. Code § 6404.5 [barring the "the smoking of tobacco products in all . . . enclosed places of employment in this state . . . in order to reduce employee exposure to environmental tobacco smoke"].)

We were, of course, aware that we could have simply stated that "nothing in this article shall require any accommodation of any medical marijuana use by employers," but that would not have comported with our intent. The Legislature understands that courts, if possible, are to give meaning to every word, phrase, sentence, and part of an act and not to presume that any portion is surplusage.

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[7] It bears noting that this provision appeared in the bill as introduced on February 20, 2003, and was considered by the Legislature with all subsequent drafts.

(*Beaty v. Imperial Irrigation Dist.* (1986) 186 Cal. App. 3d 897, 902; see also *People v. Tilehkooh* (2003) 113 Cal. App. 4th 1433, 1443 ["We are directed to give sense to all of the terms of an enactment. To do so requires that we give effect to the purposes of section 11362.5 to ensure the right to obtain and use marijuana."].) Thus, we believed that we sufficiently and efficiently stated our belief that the FEHA generally requires accommodation of medical cannabis use by disabled persons with medical conditions, aside from specific enumerated exceptions, through our enactment of Health and Safety Code section 11362.785(a).

CONCLUSION

It is our considered belief that the decision of the court of appeal misstates the intent of the Legislature with respect to the application of the FEHA to medical cannabis patients. We respectfully request that this Court reverse the decision of the court of appeal below.

DATED: July 24, 2006

Respectfully submitted,

ROBERT A. RAICH
Attorney at Law
1970 Broadway, Suite 1200
Oakland, California 94612
Tel: (510) 338-0700

Attorney for *Amici Curiae*

CERTIFICATE OF WORD COUNT

Pursuant to Rule 14 of the California Rules of Court, counsel for *Amici Curiae* certifies that this brief is 1,684 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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ROBERT A. RAICH

DECLARATION OF SERVICE

I, Robert A. Raich, declare my business address is 1970 Broadway, Suite 1200, Oakland, California 94612; 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 in this action to be served via first-class mail to:

D. Gregory Valenza
Timothy C. Travelstead
JACKSON LEWIS LLP
199 Fremont Street, 10th Floor
San Francisco, CA 94105

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 _____, California.

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ROBERT A. RAICH