Supreme Court No. 83768-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JANE ROE,

Appellant,

v.

TELETECH CUSTOMER CARE
MANAGEMENT (COLORADO) LLC,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Jane Roe ("Roe") was terminated from her position with TeleTech Customer Care Management (Colorado), LLC ("TeleTech") after she tested positive for marijuana. Roe, at that time, used marijuana more than four times a day as treatment for migraine headaches, allegedly in compliance with Washington's Medical Use of Marijuana Act ("MUMA" or the "Act"). Roe then sued TeleTech for wrongful termination, claiming (1) that MUMA confers employment protections on medical marijuana users and creates an implied cause of action and (2) that her termination violated public policy.

Division 2 of the Washington Court of Appeals upheld the trial court's award of summary judgment in TeleTech's favor. It correctly found that MUMA "neither implies a private right of action nor expresses a public policy to establish a cause of action for wrongful termination of employment." *Roe v. TeleTech Customer Care Mgm't (Colorado), LLC*, --- Wn. App. ---, 216 P.3d 1055, 1058 (2009). The Court of Appeals found it clear from the Act's unambiguous language that the voters did not intend for MUMA to create a civil remedy for employment discrimination. In fact, the original version of the Act (and the version in effect at the time Roe was terminated), stated in plain language: ***"Nothing in this chapter requires any accommodation of any medical use of marijuana in any***

place of employment . . . ." Former RCW 69.51A.060(4) (1999) (emphasis added). The Court of Appeals noted that this was also consistent with the voters' limited intent to provide an affirmative defense to criminal prosecution for the use of medical marijuana—an intent that is memorialized in the Act itself. Finally, the Court of Appeals correctly concluded that, because the voters did not intend for MUMA to confer employment protections, Roe could not rely on MUMA as the basis for a public policy claim.

Roe's petition for Supreme Court review of the Court of Appeals' well-reasoned decision should be denied, as Roe cannot satisfy any of the elements for review under RAP 13.4(b). The Court of Appeals' decision is not in conflict with any decision of the Supreme Court. Nor, as Roe suggests, is it in conflict with prior Washington appellate decisions. To the contrary, both parties represented in the proceedings below that this is a case of first impression. Roe raises no constitutional issues in her petition for review. Finally, this case does not involve an issue of substantial public interest. MUMA was amended after Roe was terminated and after she filed this lawsuit. The amendments included a change to one of the key subsections at issue in this case—the subsection referencing employment. Roe acknowledges that this case must be

decided under the original version of the statute. It would therefore be a waste of this Court's time and resources to determine the meaning of version of the Act no longer in effect. Moreover, the public has no substantial interest in having this case reviewed because the Court of Appeals clearly reached the correct result. When interpreting a statute enacted through the initiative process, the role of the court is to determine the intent of the voters. Here, the court rightly rejected Roe's strained reading of the statute and instead honored the voters' limited intent in approving MUMA. By honoring the voters' intent, the Court of Appeals preserved the integrity of the initiative process. For all of those reasons, TeleTech respectfully requests that Roe's petition for review be denied.

II. STATEMENT OF THE CASE

A. MUMA

MUMA was enacted by the voters in November 1998 by way of Initiative Measure No. 692 ("I-692"). *See* former RCW 69.51A.005 (1999); Clerk's Papers ("CP") 177-86. It provided qualified patients with an affirmative defense to criminal charges for the use and possession of medical marijuana. *See* former RCW 69.51A.040(1). It conferred similar protections to the primary caregivers of qualified patients and to physicians who authorize the medical use of marijuana. *See id.*; former RCW 69.51A.030.

1. The voters' narrow intent

The voters' intent when approving I-692 is memorialized in the Act itself:

> **Purpose and intent.** The people of Washington state find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana . . . .
>
> The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.
>
> ***Therefore, the people of the State of Washington intend that: Qualifying patients*** with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, ***shall not be found guilty of a crime under state law*** for their possession and limited use of marijuana.
>
> ***Persons who act as primary caregivers*** to such patients ***shall also not be found guilty of a crime under state law*** for assisting with the medical use of marijuana; and
>
> ***Physicians also be excepted from liability and prosecution*** for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

Former RCW 69.51A.005 (bold emphasis in original; bold and italicized emphasis added). In other words, the stated purpose of MUMA was to allow some patients the ability to use marijuana; the intended method of

achieving that purpose was to provide an affirmative defense to criminal prosecution for qualified patients, caregivers, and physicians. *See id.*

This narrow scope of MUMA is consistent with the representations and information given to voters prior to the election. For example, the explanatory statement in the voters pamphlet, written by the Attorney General, focused on marijuana's status in Washington as an illegal drug. *See* CP 181-83. The Attorney General wrote that the effect of I-692, if approved into law, would be that qualifying patients "would be authorized to acquire and possess marijuana if they possessed no more than a sixty day supply for the patient's personal, medical use and if they could present valid documentation of authorization by a physician." CP 183. In the "Statement For" I-692 contained in the voters pamphlet, the proponents for the initiative stated that I-692 was "needed" because "patients who use medical marijuana, and doctors who recommend it, *are still considered criminals in this state*." CP 181 (emphasis added).

2. MUMA's sole reference to employment

MUMA contains only one reference to employment. At the time Roe was terminated, that reference provided: "Nothing in this chapter requires any accommodation of any medical use of marijuana in any place of employment . . ." Former RCW 69.51A.060(4) (1999). Consistent with that provision, the Attorney General assured voters in the voters

pamphlet that the measure would not "require the accommodation of any medical use of marijuana in any place of employment." CP 183. The Attorney General's explanatory statement, which described the effects of I-692 if approved into law, contained no other statement related to employment. *See* CP 177-86. The "Statement For" I-692 contained the following representation under the heading "**ADDITIONAL SAFEGUARDS IN I-692**": "Prohibits marijuana use . . . in the workplace."[1] CP 181 (emphasis in original). The "Statement For" I-692 contained no other language relating to employment, nor did it describe MUMA as having a broad remedial purpose. CP 181. To the contrary, one of the headings in the "Statement For" I-692 was "I-692 IS LIMITED AND FOCUSED ON MEDICAL NEEDS." *Id.* (emphasis in original). The "Statement Against" I-692 was silent on the issue of employment. *See* CP 182. In all of the pre-election newspaper articles and editorials that TeleTech could locate, not one mentioned employment. *See* CP 298-312, 503-535, 584-590.

[1] Interestingly, this would seem to be a blatant misrepresentation by the supporters of the initiative, as nothing in MUMA would appear to *prohibit* marijuana use in the workplace.

3. Amendments to MUMA

MUMA was amended by the Legislature in April 2007. *See* CP 168-76. Among other changes, former RCW 69.51A.060(4) was amended. It now reads:

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

RCW 69.51A.060(4) (2007) (emphasis added). The amendments to MUMA became effective on July 22, 2007. *See* CP 168-72.

4. Marijuana remains an illegal drug

Although MUMA provides medical marijuana users with an affirmative defense to criminal liability under state law, it did not legalize marijuana. *See* RCW 69.50. Marijuana remains listed as a Schedule I drug under state law. *See id.* Moreover, the use of marijuana for medical purposes remains illegal under federal law. *See* 21 U.S.C. § 841; *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."); *U.S. v. Oakland Cannabis Buyers' Corp.*, 532 U.S. 483, 491, 121 S. Ct. 1711, 149

L. Ed. 2d 722 (2001) (a medical necessity exception for marijuana is at odds with the terms of the federal Controlled Substances Act).

B. Roe's Use of Marijuana

In June 2006, Roe received an Authorization to Possess Marijuana for Medical Purposes in Washington State (the "Authorization"), authorizing her to use marijuana as treatment for migraine headaches. *See* CP 187-206. Roe received the Authorization from a doctor at THCF Medical Clinics, an acronym for The Hemp and Cannabis Foundation, after he saw her on just one occasion. *See id.* At the time she received the Authorization, Roe was already using marijuana more than four times a day. *See* CP 194. She was 21 years old. *See* CP 191.

C. TeleTech and Its Applicant Drug Policy

TeleTech is an outsourcing company that provides a full range of front- to back-office outsourced solutions to its clients. *See* CP 215-16 (at ¶ 2). One of TeleTech's customers is Sprint Nextel. *See* CP 216 (at ¶ 3). TeleTech contracts with Sprint Nextel to provide certain telemarketing and telesales services. *See id.* As a part of its services to Sprint Nextel, TeleTech operates a customer service call center in Bremerton, Washington. *See id.*

TeleTech has a substance abuse policy that applies to all applicants (the "Applicant Drug Policy"). *See* CP 217 (at ¶ 6), 220-31. The

Applicant Drug Policy provides: "All applicants . . . to whom TeleTech has given a conditional offer of employment, are required to submit to a pre-employment drug test and must receive a negative result as a condition of employment." CP 221. The Applicant Drug Policy further provides: "Any applicant who receives a confirmed positive drug test result will be ineligible for employment." *Id.* TeleTech implemented the Applicant Drug Policy because the "unlawful or improper presence or use of drugs or alcohol in the workplace presents a danger to everyone." *Id.* As stated in the Applicant Drug Policy: "TeleTech is firmly committed to ensuring a safe, healthy, productive, and efficient work environment for its employees as well as its customers and to the general public." *Id.* In addition, Sprint Nextel requires TeleTech to perform pre-employment drug testing. *See* CP 217 (at ¶ 6). TeleTech makes no exception for medical marijuana in its drug policy and has not done so in practice. *See id.*; CP 219 (at ¶ 11).

D. Roe's Employment at TeleTech

In October 2006, Roe applied for a customer service consultant position at TeleTech. *See* CP 217 (at ¶ 7). Roe was given a conditional offer of at-will employment. *See id.;* CP 224-25. The offer letter stated: "This offer is contingent upon receiving favorable results from . . . drug screening . . . ." CP 225. TeleTech permitted Roe to begin training for

work on October 10, 2006 while waiting for the results of the drug screen. *See* CP 218-19 (at ¶ 10). Thereafter, TeleTech learned that Roe's drug screen tested positive for marijuana, which made her ineligible for employment. *See* CP 217 (at ¶ 6), 219 (at ¶ 11-12), 220-27, 232-33. As a result of Roe's failed drug screen, TeleTech terminated her employment. *See* CP 217 (at ¶ 6), 219 (at ¶¶ 11-12), 234-35.

Roe then initiated this lawsuit in February 2007, stating claims for violation of MUMA and wrongful termination in violation of public policy. *See* CP 1-4, 52-55. Notably, Roe did *not* bring a reasonable accommodation claim under state or federal disability laws.

E. The Court of Appeals' Decision

The Court of Appeals upheld the trial court's award of summary judgment in TeleTech's favor. It found that "the average informed lay voter would understand from reading MUMA's preamble that it was intended to address one subject—criminal prosecutions . . ." *Roe*, 216 P.3d at 1060. The court recognized that an employer's drug policies might impact a qualified patient's decision to use medical marijuana, but held that "the plain language of MUMA's preamble does not demonstrate any intent to address employers' hiring practices nor does it preclude the operation of drug-free businesses." *Id.* The Court of Appeals also noted that former RCW 69.51A.060(4) (1999) "implies that MUMA will place

no requirements on employers or places of employment." *Id.* The Court of Appeals therefore concluded that MUMA "neither implies a private right of action nor expresses a public policy to establish a cause of action for wrongful termination of employment." *Id.* at 1058.

III. ARGUMENT IN OPPOSITION TO DISCRETIONARY REVIEW

Roe's petition for discretionary review should be denied. Review will be granted only if a Court of Appeals decision conflicts with a decision of the Supreme Court or another Court of Appeals, if the decision involves a significant constitutional issue, or if there is an issue of significant public interest. *See* RAP 13.4(b)(1)-(4). Here, Roe contends that review is appropriate because the Court of Appeals' decision conflicts with other appellate court decisions and the case involves an issue of significant public interest. Neither argument has merit.

A. There Are No Inconsistent Appellate Court Decisions

Roe contends that review is appropriate under RAP 13.4(b)(2) because the Court of Appeals' decision in this case is in conflict with four other decisions of the Court of Appeals: *State v. Hanson*, 138 Wn. App. 322, 157 P.3d 438 (2007); *State v. Ginn*, 128 Wn. App. 872, 117 P.3d 1155 (2005); *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005); and *State v. Shepherd*, 110 Wn. App. 544, 41 P.3d 1235 (2002). None of those

cases, however, address the issue involved in this case: whether MUMA confers employment protections to users of medical marijuana. In fact, both parties represented in their prior appellate briefing that this is a case of first impression. *See* Appellant's Statement of Grounds in Support of Direct Review at 6 ("This is a case of first impression in Washington.") (filed March 12, 2008); Brief of Respondent at 2 (referring to Roe's lawsuit as "a case of first impression") (filed August 27, 2008).

Roe suggests that those cases are contrary to the Court of Appeals' decision here because they stand for the proposition that the scope of MUMA is broader than just creating an affirmative defense to criminal prosecution. She cites to a statement in each to the effect that the *purpose* of MUMA is to allow patients with terminal or debilitating illnesses to use marijuana when authorized by their treating physician. *Hanson*, 138 Wn. App. at 329, n.1; *Shepherd*, 110 Wn. App. at 549; *Ginn*, 128 Wn. App. at 877-78; *Butler*, 126 Wn. App. at 748. Those statements, however, are not in any way inconsistent with the Court of Appeals' decision in this case. In fact, the Court of Appeals expressly recognized that MUMA's preamble "expressed a broad purpose of allowing physicians to 'authorize the medical use of marijuana by patients with terminal or debilitating illness.'" *Roe*, 216 P.3d at 1060. The Court of Appeals then drew a

distinction between purpose and intent, noting that the preamble explicitly expresses the voters' *intent* that qualified patients, physicians, and primary caregivers not be found guilty of a crime under state law for the use of medical marijuana. *See id.* The cases to which Roe cites do not hold that MUMA was intended to do anything more, which is not surprising given that all involved the application of MUMA's affirmative defense to criminal charges for the possession or manufacture of marijuana.[2] Even if those cases suggest that the effect of MUMA is broad (which they did not), such a suggestion would be mere *dicta*. More on point is *State v. Tracy*, 158 Wn.2d 683, 691, 147 P.3d 559 (2006), in which this Court

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[2] In *State v. Hanson* (Division 3), the defendant was convicted of manufacturing marijuana. The day after police seized his marijuana, Hanson obtained a valid authorization from his physician to use marijuana for medical purposes. The court held that the defendant should have been permitted to assert the affirmative defense, as MUMA only requires that a valid authorization be presented when asked by the police, not that the authorization pre-date the seizure of marijuana. *See Hanson,* 138 Wn. App. at 326. In *State v. Ginn* (Division 2), the defendant was convicted of manufacturing marijuana and unlawful possession of marijuana with intent to deliver. The question presented was whether the trial court erred when it found that Ginn had not presented sufficient evidence to allow the jury to consider whether she qualified for MUMA's "qualifying patient" or "primary caregiver" affirmative defenses. *See Ginn,* 128 Wn. App. at 879-83. Notably, Judge Quinn-Brintall, who authorized the decision in this case, also authored *Ginn.* In *State v. Butler* (Division 2), the defendant was convicted of manufacturing and possessing marijuana. Butler did not have a physician's authorization to use medical marijuana but sought to raise the common law defense of medical necessity. The Court of Appeals held that MUMA superseded the common law defense of medical necessity. *See id.* at 750. Notably, two of the judges on the panel that decided this case—Judge Quinn-Brintall and Judge Hunt—were also on the *Butler* panel. In *State v. Shepherd* (Division 3), the defendant was convicted of felony possession of marijuana. The question presented was whether Shepherd had made a showing sufficient to satisfy MUMA's primary caregiver affirmative defense. The Court of Appeals found that the authorization was insufficient. *See Shepherd,* 110 Wn. App. at 546.

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recognized that MUMA created a compassionate use defense against marijuana charges. *See Tracy*.[3] For all of those reasons, the Court of Appeals decisions to which Roe cites are not in conflict and do not necessitate Supreme Court review of this case.

B. This Case Does Not Present an Issue of Substantial Public Interest

Nor does this case present an issue of substantial public interest that would merit review by the Supreme Court. The version of MUMA that was interpreted by the Court of Appeals has been amended and is no longer in effect. Moreover, the Court of Appeals clearly reached the correct result.

1. This case involves the interpretation of the former version of MUMA

Roe admits that this case must be decided based on the version of MUMA that was in effect at the time she was terminated. That version was amended by the Washington State legislature more than two years ago. Among the subsections of MUMA that were amended is one of the

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[3] Even the dissent in *Tracy*, which would have interpreted MUMA more liberally than the majority, noted that the purpose of the initiative was "to allow persons suffering from specified medical conditions to use marijuana as part of their physician-directed treatment ***without running the risk of prosecution for a drug crime***." *Id.* at 693 (Johnson, J., dissenting) (emphasis added).

key subsections at issue in this case—the subsection that addresses employment. *Compare* former RCW 69.51A.060(4) (1999) *with* RCW 69.51A.060(4) (2007). Because this case involves the interpretation of a version of the statue no longer in effect, the resolution of this case would not necessarily provide guidance for employers or employees going forward. Moreover, Roe has not presented any evidence that other employment cases are pending in the court system that also involve the former version of the statute. Accordingly, it would be a waste of this Court's time and resources to interpret the outdated version of the Act. If and when the Supreme Court takes up the issue of whether MUMA creates an implied cause of action for employment discrimination, it should base its analysis on current law.

2. The Court of Appeals reached the right result

Second, the Court of Appeals clearly reached the correct conclusion in this case when it found that the version of MUMA that was in effect at the time of Roe's termination did not confer employment protections to medical marijuana users. The parties agree that when determining the meaning of a statute enacted through the initiative process, "the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11

P.3d 762 (2001). Voter intent is determined from the language of the initiative "as the average informed voter voting on the initiative would read it." *Id.* When possible, the intent of the electorate is derived from the plain language of the statute itself. *See SuperValu, Inc. v. DLI*, 158 Wn.2d 422, 429, 144 P.3d 1160 (2006); *State v. Thorne*, 129 Wn.2d 736, 762-63, 921 P.2d 514 (1996). "Where the language of an initiative enactment is 'plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation.'" *Amalgamated Transit*, 142 Wn.2d at 205 (*quoting Thorne*, 129 Wn.2d at 762-63).

Here, the Court of Appeals was correct when it found, based on the plain language of MUMA, that the voters did not intend for the Act to provide a private right of action for wrongful termination. While Roe tries to find error in the Court of Appeals' decision, her strained interpretation of the Act is simply contrary to the statute's plain language. None of her arguments present a question substantial enough to merit further review.

a. MUMA's preamble and ballot title do not create a cause of action for employment discrimination

Roe argues that because MUMA's preamble and title state a broad purpose, the voters must have intended to create broad remedies. Roe disregards the distinction between the voters' purpose and the voters'

intent. As the Court of Appeals recognized, MUMA does express the broad purpose of permitting the medical use of marijuana and allowing doctors to authorize that use. *See Roe*, 216 F.3d at 1060. A broad purpose, however, does not equate to broad remedies. In enacting I-692, the voters authorized the means by which their stated purpose was to be achieved. The voters expressed their intent in the Act itself—that qualified patients shall not be found guilty of a crime under state law for the use of medical marijuana. In all of the briefing that has been done in this case, Roe has never once provided an alternate explanation of the voters' stated intent that would support her position. Instead, she simply ignores the second half of MUMA's preamble. The Court of Appeals rightly did not. When the voters' intent is clearly expressed in the statute, "the court is not required to look further." *Amalgamated Transit*, 142 Wn.2d at 205; *see also McGowan v. State*, 148 Wn.2d 278, 288-89, 60 P.3d 67 (2002) ("Where the people's intent is clearly expressed in the initiative measure, the court need not look to the voters' pamphlet or other extrinsic sources to ascertain the voters' intent.").[4]

[4] Roe claims that the Court should ignore the voters' stated intent and instead focus on the claimed intent of the drafter of the initiative, Timothy Killian, that MUMA provide broad remedies. There is no evidence, however, that the voters were informed of, understood, or shared Mr. Killian's intent. To the contrary, Mr. Killian was quoted in a newspaper article published days prior to the election as stating: "The simple question

(...continued)

b. The Court of Appeals' interpretation does not render portions of MUMA superfluous

Roe contends that if the only effect of MUMA was to provide an affirmative defense to criminal prosecution, then portions of the Act are superfluous. Roe's argument fails. The portions of the Act to which she cites affirm the limited scope of the Act. In clarifying the scope of the Act, those provisions help prevent lawsuits such as these. They also might serve to limit MUMA's impact on other laws. For example, the reference to accommodation in employment could be read to mean that MUMA was not intended to require employers to accommodate the use of medical marijuana *under federal and state disability laws*—an issue not presented in this case, since Roe did not bring a claim for disability discrimination.[5]

c. MUMA cannot be read to provide a private cause of action for the denial of any "right or privilege"

Roe contends that MUMA prohibits the denial of any right or privilege. She relies on former RCW 69.51A.040(1), which provides:

(...continued)
that needs to be asked is: Do we as Washington citizens feel ***we need to arrest*** seriously ill patients if they find relief from using marijuana?" CP 299 (emphasis added).

[5] Roe also argues that the Court of Appeals' interpretation of MUMA renders meaningless the 2007 addition of "on-site" to RCW 69.51A.060(4). However, that amendment may have been intended to leave open the possibility that an employer might have an obligation under state or federal disability laws to accommodate the off-site use of medical marijuana—again, a question not presented in this case.

> If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

Roe contends that the last sentence implies a civil remedy for employment discrimination. She wholly ignores the preceding sentence of the subsection. To discern the meaning of the statute, it is important that the Court read the entire provision as a whole. *See Thorne*, 129 Wn.2d at 763. As the Court of Appeals correctly decided:

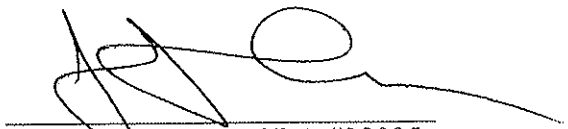
> An average lay voter reading this provision in context would not understand it to prohibit private employers from maintaining a drug-free workplace and terminating employees who use medical marijuana. The prohibition against "penaliz[ing] in any manner, or den[ying] any right or privilege" follows that provision's earlier limiting reference to those charged with violating a state criminal law relating to marijuana—that is, those charged an subject to criminal prosecution . . . . The average voter would interpret this language as restricting the State from imposing penalties ancillary to criminal prosecution.

Roe, 216 F.3d at 1060 (internal citation omitted). There simply is nothing in the original version of MUMA (or the voters pamphlet or the media coverage of I-692) from which a court could conclude that the voters

intended to create a private cause of action for employment discrimination. Roe presents a strained and implausible interpretation of the Act which would not have been evident to the average voter and which the Court of Appeals was right to reject. Roe's petition for Supreme Court review should therefore be denied.

DATED: November 16, 2009.

STOEL RIVES LLP



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