IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY CEBALLOS, APPELLANT, v. NP PALACE LLC d/b/a PALACE STATION HOTEL & CASINO, RESPONDENT.	Electronically Filed Aug 16 2021 01:00 p.m. Elizabeth A. Brown Clerk of Supreme Court **Supreme Court Case No. 82797** Eighth Judicial District Court Case No.: A-20-823119-C

APPEAL

From the Eighth Judicial District Court, Department XIX
The Honorable Judge Bita Yeager, District Judge

APPELLANT'S OPENING BRIEF

Andre M. Lagomarsino, Esq.
Nevada Bar No. 6711
Lagomarsino Law Office
3005 W. Horizon Ridge Pkwy., Suite 241
Henderson, NV 89052
Telephone: (702) 383-2864
Facsimile: (702) 383-0065
aml@lagomarsinolaw.com
Attorney for Appellant Danny Ceballos

ATTORNEY'S NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. No such corporations exist as would require disclosure under NRAP 26.1(a). These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Danny Ceballos – Appellant

Andre M. Lagomarsino, Esq. – Attorney for Appellant

Dated this 16th day of August, 2021.

LAGOMARSINO LAW

/s/ Andre M. Lagomarsino

ANDRE M. LAGOMARSINO, ESQ.
Nevada Bar No. 6711
3005 W. Horizon Ridge Pkwy., Suite 241
Henderson, Nevada 89052
Telephone: (702) 383-2864
Facsimile: (702) 383-0065
Attorney of Record for Appellant Danny Ceballos

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT PURSUANT TO NRAP 28(a)(4)

This Court has jurisdiction over this matter pursuant to NRAP 3A(b)(1), as this matter is an appeal from a final judgment as to Appellant Danny Ceballos and Respondent NP Palace LLC d/b/a Palace Station Hotel & Casino. The Notice of Entry of Order Granting Motion to Dismiss was filed on March 17, 2021, and Appellant filed his Notice of Appeal on April 15, 2021. Appellant's appeal is timely because it complies with NRAP 4(a)(1).

ROUTING STATEMENT

NRAP 28(a)(5) requires all Appellant's briefs to contain a routing statement "setting forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17 and citing the subparagraph(s) of the Rule under which the matter falls." NRAP 17(a)(11) specifically assigns "[m]atters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law" to the jurisdiction of the Supreme Court. Additionally, NRAP 17(a)(12) assigns "[m]atters raising a principal issue of statewide public importance…" to the jurisdiction of the Supreme Court.

Ceballos contends that the Supreme Court retains jurisdiction of the instant case because the issues are both a matter of first impression involving Nevada common law *and* a question of statewide public importance. Further, the issues raised in the present case do not fall within the categories where the Court of Appeals

has presumptive jurisdiction. Therefore, this Appellant's Opening Brief should be assigned to the Nevada Supreme Court.

STATEMENT OF THE ISSUES PRESENTED

(1) Whether the District Court erred in finding that marijuana use does not constitute the lawful use of a product pursuant to NRS 613.333, and

(2) Whether the District Court erred in interpreting NRS 678D.510 to supersede Ceballos's rights under NRS 613.333.

STATEMENT OF CASE

PROCEDURAL HISTORY

On October 15, 2020, Appellant/Plaintiff DANNY CEBALLOS (hereinafter "Ceballos") filed a Complaint with Jury Demand for damages relating to his discharge for alleged marijuana use outside of the workplace. Ceballos named NP PALACE LLC d/b/a PALACE STATION HOTEL & CASINO (hereinafter "Defendant") as Defendant. On November 5, 2020, Defendant filed a Motion to Dismiss under Nevada Rule of Civil Procedure 12(b)(5). Ceballos filed an Opposition to Defendant's Motion to Dismiss on December 2, 2020. Defendant filed its Reply to Opposition to Motion to Dismiss on January 12, 2021. On March 16, 2021, an Order Granting Motion to Dismiss was filed, and the related Notice of Entry was filed on March 17, 2021. Ceballos filed his Notice of Appeal on April 15, 2021.

STATEMENT OF FACTS

On the evening of June 25, 2020, Ceballos was working in his capacity as a full-time table dealer for Defendant. **JA000003.** In the early morning hours of June 26, 2020, Ceballos was taking his final fifteen (15) minute break when he fell on the ground of the employee dining room after slipping on a wet substance. **JA000003-4.** Ceballos hit his lower back, buttock, and left elbow. **JA000004.** Ceballos reported that he was fine and did not need assistance, but security was called anyways. **JA000004.** Defendant's security manager interrogated Ceballos and placed him in a

holding cell for post-accident processing. **JA000004.** Ceballos again relayed, this time to both the security manager and his district supervisor, that he was okay and did not need medical attention. **JA000004.** Regardless, Ceballos was required to take an alcohol detection test and a drug detection test. The alcohol detection test came back negative. **JA000004.**

Ceballos never sought medical attention nor filed a worker's compensation claim. **JA000004.** Ceballos continued to work without incident through July 6, 2020, when he was instructed by his supervisor to report to human resources the next day. **JA000004.** When Ceballos reported to human resources on July 7, 2020, he was informed that he had tested positive for cannabis use and was placed on suspension. **JA000005.** On or about July 16, 2020, Defendant terminated Ceballos for testing positive for cannabis use. **JA000005.** Ceballos had not consumed cannabis in the twenty-four (24) hours preceding his scheduled graveyard shift on June 25, 2020. Furthermore, Ceballos was not under the influence, nor in any way impaired, during his June 25, 2020 shift. Any alleged cannabis consumption occurred at his home.

Regardless of these facts, Defendant's Motion to Dismiss was granted on the grounds that adult marijuana use does not constitute the lawful use of a product pursuant to NRS 613.333 and that Nevada employers may terminate adult employees for use of cannabis even if the cannabis use did not affect the employee's job performance. **JA000052-54.** On the basis of NRAP 3A(b)(1), Ceballos appeals from

the order granting Defendant's Motion to Dismiss.

STANDARD OF REVIEW

"We review an order granting an NRCP 12(b)(5) motion to dismiss de novo." *Dezzani v. Kern & Assoc., Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 64 (2018). A complaint should only be dismissed under this standard if it "appears **beyond a doubt** that the plaintiff could prove no set of facts, which, if accepted by the trier of fact, would entitle him or her to relief." *Blackjack Bonding v. City of Las Vegas Mun. Ct.*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000).

A Motion to Dismiss under NRCP 12(b)(5) is subject to a rigorous standard of review on appeal, and all inferences should be drawn in favor of the non-moving party. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). All factual allegations in the complaint must therefore be accepted as true. *Vacation Village, Inc. v. Hitachi America, Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994).

SUMMARY OF THE ARGUMENT

Ceballos brings two issues before this court. The first is whether the use of marijuana is considered "lawful" under NRS 613.333. The second is whether the rights of an employer under NRS 678D.510 supersede the rights of an employee under NRS 613.333.

In the instant action, Ceballos was fired as a result of a positive drug test indicating marijuana use. **JA000005.** Ceballos was not tested due to suspicious behavior, customer complaints, or any blatant violations of law or workplace policy. Instead, Ceballos was tested after he slipped and fell on an unknown wet substance on the floor of the employee cafeteria. **JA000003-4.** Defendant alleges that Ceballos's termination complied with Nevada law because (1) marijuana use is not lawful and therefore not protected under NRS 613.333 due to its federal illegality, and (2) it was within its rights under NRS 678D.510 to have and enforce a workplace marijuana use policy. **JA000015-17.**

In response to the first of Defendant's defenses, Ceballos contends that the plain, unambiguous language of NRS 613.333 clearly deems marijuana use lawful under the same because the only appropriate consideration is its legality under state law. Further, even if the Court were to find otherwise, the legislative history of Nevada's marijuana use statutes ("NRS 678A-D") clearly supports the consideration of marijuana use as lawful under NRS 613.333. Finally, Ceballos argues that the

Controlled Substances Act, which prohibits marijuana use at the federal level, does not preempt NRS 678A-D and therefore does not keep such use from being considered lawful under NRS 613.333.

In response to the second of Defendant's defenses, Ceballos asserts that there is no conflict between an employer's right to a marijuana workplace use policy under NRS 678D.510 and an employee's right to recreationally use marijuana outside of the workplace without being subject to adverse employment action under NRS 613.333. Even if there was found to be ambiguity in the application of the relevant statutes, the legislative history, which evidences extensive revisions to related statutes, supports this assertion. Finally, to allow such an interpretation would violate Nevada public policy by denying Ceballos the right to work despite protection for his conduct under state law and undermining Nevada's sovereign state powers.

Ceballos asks this Court to clarify whether marijuana use should be considered lawful under NRS 613.333 and whether an employer's rights under NRS 678D.510 supersede an employee's rights under NRS 613.333.

ARGUMENT

A. Did The District Court Err In Finding That Marijuana Use Does Not Constitute The Lawful Use Of A Product Pursuant To NRS 613.333?

Defendant argued and the District Court held, in part, that Plaintiff failed to state a claim for which relief was available. The Court concluded that his termination

did not violate NRS 613.333 because his alleged marijuana use was not 'lawful'. **JA000014-15, 52-54.** Defendant/Respondent argued that the federal legality of marijuana use must be considered in determining whether said use is lawful under **state law. JA000053.** However, this analysis is inappropriate. All of Plaintiff's original claims *and* the issues raised on appeal concern only the legality of all relevant conduct under Nevada law. **JA000002-9.** Not only do the plain language and legislative history of NRS 613.333 and 678A-D clearly indicate that Ceballos's alleged marijuana use was lawful, but relevant federal laws do not preempt the state-authorized conduct in question. The federal legality of marijuana use, therefore, has no bearing on the instant case. As such, the District Court erred in finding that marijuana use does not constitute the 'lawful' use in this state of a product pursuant to NRS 613.333 and dismissing Ceballos's complaint on those grounds.

1. The Plain Language Of NRS 613.333 Unambiguously Deems Marijuana Use 'Lawful' Under Nevada State Law

The objective of statutory interpretation is to give effect to the legislature's intent. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). However, it is not within the court's discretion to "enlarge or improve or change" the law. *Doe Dancer I v. La Fuente, Inc*., 481 P.3d 860, 872 (Nev. 2021). The court's duty is only to interpret the document. *Id.* Courts accomplish this by applying the rules of statutory interpretation and look first to a statute's plain language. *Hobbs*, 127 Nev. at 237. If the language is clear and unambiguous, the apparent intent of that language

must be given effect. *Edgington v. Edgington*, 119 Nev. 577, 582–83, 80 P.3d 1282, 1286 (2003). Further, any interpretation that renders a statute's language meaningless or superfluous should be avoided. *Hobbs*, 127 Nev. at 237.

The District Court held that Plaintiff's alleged use of marijuana did not constitute the 'lawful' use of a product pursuant to NRS 613.333 because marijuana use is prohibited under federal law. **JA000053.** However, as properly argued by Plaintiff, the plain language of NRS 613.333 clearly deems Plaintiff's alleged use of marijuana "lawful." **JA000027-28.** In relevant part, NRS 613.333 states:

> **"1. It is an unlawful employment practice for an employer to:**
> (a) Fail or refuse to hire a prospective employee; or
> **(b) Discharge** or otherwise discriminate against **any employee** concerning the employee's compensation, terms, conditions or privileges of employment,
> **because the employee engages in the lawful use in this state of any product outside the premises of the employer during the employee's nonworking hours**, if that use does not adversely affect the employee's ability to perform his or her job or the safety of other employees." (emphasis added).

'Lawful' is ordinarily defined as "being in harmony with the law; constituted, authorized, or established by law."[1] NRS 678D.200 unambiguously allows, without the threat of legal punishment, the recreational use of marijuana by adults 21 years of age or older in the state of Nevada, pursuant to the parameters found in NRS

[1] *Lawful, MERRIAM-WEBSTER.COM*, https://www.merriam-webster.com/dictionary/lawful (last visited July 15, 2021).

678A-D. Therefore, the adult use of marijuana is **in harmony with and authorized by** Nevada state law, making it lawful by the ordinary definition of the word.

Additionally, NRS 613.333 specifies that it is unlawful to terminate an employee for engaging in the use of a product lawful **in this state.** The inclusion of the emphasized language is extremely important in this analysis because statutes are to be interpreted in a way that gives meaning to **every** word and avoids rendering any language meaningless. *Hobbs,* 127 Nev. at 237. The language makes clear that the Nevada Legislature intended to limit any analysis under this statute to consider the legality of a product under **Nevada state law only**. It does not leave open the possibility that federal law be considered[2]; had the legislature intended that, it would have drafted the statute as such. For the judiciary to decide otherwise would render the statute's language superfluous. As such, whether or not the use of a product is lawful under NRS 613.333 is entirely dependent on the product's legality under Nevada law and Nevada law only.

Here, then, the adult use of marijuana in accordance with Nevada statutes is clearly lawful under NRS 613.333. To hold otherwise would blatantly violate the

[2] The language in NRS 613.333 is what places Plaintiff's claims in stark contrast with those in *Coasts v. Dish Network, LLC.,* 350 P.3d 849 (Colo. 2015). In *Coats,* the statute at issue did not contain any language limiting the analysis of what was lawful under the relevant statute. Here, the NRS specifically included "in this state," which places these two cases apart. Further, the cases which *Coats* cited in this decision also lacked the limiting language seen in NRS 613.333.

rules of statutory interpretation.

2. The Nevada Legislature Clearly Intended That NRS 613.333 Apply To Adult Marijuana Use

Even if the Court determines that NRS 613.333's plain language is ambiguous in its application, the Legislature's intent is not. When construing a statute, the objective is to give the legislature's intent effect. *Hobbs*, 127 Nev. at 237. If a statute's plain language is ambiguous, the drafter's intent becomes the controlling factor. *Harris Assoc. v. Clark Cnty. School Dist.,* 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). Additionally, under Nevada law, statutes operate prospectively unless specified otherwise. *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, 688 F.Supp.2d 1148, 1164 (D. Nev. 2010).

Contrary to the District Court's implication, Plaintiff does not suggest that NRS 613.132 applies to his specific situation. **JA000053.** However, as properly argued by Plaintiff, NRS 613.132 is an obvious example of the Legislature's intent to protect Nevada workers from adverse employment actions related to legal cannabis use outside of the workplace. **JA000026-27.** Even if NRS 613.132 did not exist, Nevada statues are presumed to apply prospectively unless specified otherwise. The Nevada Legislature did not limit the prospective application of NRS 613.333, and it should therefore be assumed to apply to adult marijuana use.

Further, the Legislature itself signaled that Nevada's cannabis use laws were written with the purpose of keeping the federal government out of the industry.

Assemblyman Yeager, who spearheaded A.B. 533 (later NRS 678A-D), stated as much in legislative proceedings. Nev. Gen. Assemb., Nevada Assembly Committee Minutes, 80th Sess., at 23 (May 29, 2019). It is apparent that the Nevada Legislature wanted all cannabis industry related issues to exclude federal involvement and rely on state regulation. As such, considering the federal legality of marijuana use when interpreting a Nevada statute clearly goes against the Legislature's intent in protecting employees who engage in adult cannabis use that is legal under **state law.**

Even if this Court finds that the plain language does not support the classification of marijuana use as lawful under NRS 613.333, the legislative history clearly does. As such, it would go against the rules of the court to interpret the statute against the clearly demonstrated legislative intent.

3. Federal Law Should Not Be Considered When Interpreting NRS 613.333 Because It Does Not Preempt The State Laws At Issue

The Supremacy Clause of the United States Constitution holds that federal law preempts state law when the two conflict. U.S. Const. art VI, cl. 2; *Teva Parenteral Meds., Inc. v. Eighth Jud. Dist. Ct. in and for Cnty. of Clark*, 481 P.3d 1232, 1239 (Nev. 2021). Federal preemption falls under one of two categories: express or implied. *Teva Parenteral*, 481 P.3d at 1239. Express preemption occurs when a federal statute's language clearly expresses Congress's intent to preempt state law. *Id.* If the statute's language does not explicitly state this intent, implied preemption may still occur if federal law "dominates a particular legislative field

(field preemption) or actually conflicts with state law (conflict preemption)." *Id.*

Conflict preemption occurs only when it is impossible for a party to comply with both federal and state law or when state law presents an obstacle to Congress's accomplishment of its objectives (implied obstacle preemption). *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011); *U.S. v. California*, 921 F.3d 865, 879 (9th Cir. 2019). Implied obstacle preemption begins with a strong presumption against the preemption of historic state police powers unless clearly intended otherwise by Congress. *Arizona v. U.S.*, 567 U.S. 387, 400, 132 S.Ct. 2492, 2501 (2012). The argument for preemption becomes especially weak when Congress is aware of conflicting state regulations but "stand[s] by both concepts and [] tolerate[s] whatever tension is between them." *Wyeth v. Levine*, 555 U.S. 555, 575, 129 S.Ct. 1187, 1200 (2009) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

The Tenth Amendment provides a powerful countermeasure to federal preemption powers in the form of the anticommandeering doctrine. U.S. Const. amend. X; Erwin Chemerinsky et al., Cooperative Federalism and Marijuana Regulation, 62 UCLA L. Rev. 74, 102 – 103. Under this doctrine, the federal government cannot "commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1457 (2018)(internal quotation marks

omitted). This doctrine does not stop the federal government from enforcing its own regulations within a state's territory but rather limits the means by which it can do so.[3]

The District Court stated that federal law must be considered in determining whether adult marijuana use is "lawful" under NRS 613.333. Consequently, because marijuana use is prohibited under federal law, marijuana use could not be considered "lawful" under NRS 613.333. However, in addition to the plain language and legislative intent strongly supporting a conclusion to the contrary, federal law does not inhibit Nevada from holding marijuana use to be lawful within the state and should thus not be considered in the analysis. *See generally* Chemerinsky, supra.

Without argument, the Tenth Amendment prohibits the federal government from commandeering states by forcing them to enact laws or to enforce federal laws.

[3] *See generally* New York v. U.S., 505 U.S. 144 (1992) (Wherein federal provision found unconstitutional because it gave state governments no option other than to implement legislation enacted by Congress); *see also* Printz v. U.S., 521 U.S. 898, 117 S.Ct. 2365 (1997) (U.S. Supreme Court holds that interim provisions of Brady Handgun Violence Prevention Act commanding state/local law enforcement to conduct background checks on handgun purchasers and to complete certain related tasks violated anticommandeering doctrine); *see also* Murphy,138 S.Ct. 1461 (U.S. Supreme Court finds that federal law which prohibited states from authorizing sports gambling violated anticommandeering doctrine and was not constitutional); *see also* United States v. California, 921 F.3d 865 (9th Cir. 2019) (California laws protecting undocumented workers from federal action held constitutional because it placed no burden on federal government and thus did not present obstacle; portion of law placing unique burden on federal activity held unconstitutional as it did present obstacle).

Chemerinsky, supra at 102. As such, Nevada can choose not to criminalize federally illegal conduct, and the federal government cannot force it to do so unless some form of preemption applies. Here, the federal law in question, the Controlled Substances Act ("CSA"), provides for express preemption only in limited circumstances:

> "No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, **including criminal penalties**, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, **unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."** 21 U.S.C. § 903 (emphasis added).

Congress unequivocally states that it does not intend to preempt state law unless the relevant state statute and CSA provision cannot consistently stand together. This is otherwise known as positive conflict, which has been narrowly interpreted to limit CSA preemption to cases where "compliance with both federal and state regulations is a physical impossibility." Chemerinsky, supra at 105-6. NRS 678A-D and the CSA are clearly not in positive conflict with one another. Nothing in NRS 678A-D **requires** an individual to use marijuana and thus be in conflict with the CSA. It simply exempts individuals who use marijuana, in strict accordance with Nevada statutes, from state prosecution. As such, the requirements for express preemption under 21 U.S.C. § 903 are not met and the CSA does not expressly preempt Nevada state marijuana laws.

NRS 678A-D are not impliedly preempted by federal law either. The CSA

addresses, in part, marijuana prohibition, which falls under the traditionally state-regulated fields of public health and medical care and state/local governmental power to criminalize conduct.[4] As explicitly stated in 21 U.S.C. § 903, Congress declined to wholly occupy the controlled substance field in the absence of a positive conflict between state and federal law. Consequently, no field preemption can occur. Further, for conflict preemption to occur, it would have to be physically impossible to comply with both a state and federal statute. As discussed previously, it is not impossible to comply with both NRS 678A-D and the relevant CSA provisions, rendering the requisite positive conflict nonexistent. The CSA neither expressly or impliedly preempts Nevada's state marijuana laws.

Finally, permissive state marijuana laws do not frustrate the federal government's purpose in enacting the CSA as required by implied obstacle preemption. Nevada's legalization of cannabis does not attempt to regulate federal activity[5], change the fact that the CSA remains in effect, nor affect the federal government's ability to enforce its own regulations within the state. As such, there is no implied obstacle preemption.

Congress was and is fully aware of the state laws that do not punish marijuana-

[4] *See generally* 21 USC § 801 *et. seq.*
[5] *See* United States v. California, 921 F.3d 865, 879-80 (9th Cir. 2019) (California law in conflict with federal law held not to place a burden on federal government because it regulated conduct of employers within the state, not the federal government).

related conduct in the same way the CSA does. Again, the federal government can enforce the CSA in states with lenient cannabis laws, as is undeniably within its power. However, the federal government has never argued, and no court has ever held, that the CSA fully preempts state cannabis laws that are more permissive than federal law. Chemerinsky, supra at 110. The argument for preemption becomes extremely weak under this additional consideration.

The State of Nevada was within its constitutional rights when it legalized adult marijuana use under **state** law. The Tenth Amendment guarantees that the federal government cannot force Nevada to change these laws or criminalize marijuana usage in the absence of preemption. As discussed above, the applicable Nevada statutes trigger neither express nor implied federal preemption. While the federal government can still enforce the CSA within the state if it so chooses, it cannot force Nevada to penalize individuals for marijuana use that complies with the constitutional state regulatory scheme.

The **only law in question here is Nevada state law.** It is clear that Nevada is constitutionally able to enact cannabis usage laws without being preempted by the CSA. As such, the CSA has no impact on the issues at hand. The District Court's determination that marijuana use does not qualify as the "lawful use in this state of any product" because it is federally illegal is therefore incorrect. NRS 613.333. Nevada state law constitutionally legalized adult marijuana use, and such use is

therefore lawful within the meaning of NRS 613.333.

B. Did The District Court Err In Interpreting NRS 678D.510 To Supersede Ceballos's Rights Under NRS 613.333?

1. An Employer's Rights Under NRS 678D.510 Do NOT Conflict With Plaintiff's Rights Under NRS 613.333

When interpreting a statute, the objective is to give the legislature's intent effect. *Hobbs,* 127 Nev. at 237. However, it is not within the court's discretion to "enlarge or improve or change" the law. *Doe Dancer I,* 481 P.3d at 872. The court's duty is only to interpret the document. *Id.* To accomplish this, the courts employ rules of statutory interpretation and look first to the statute's plain language. *Id.* If the language is clear and unambiguous, the apparent intent of that language must be given effect. *Edgington*, 119 Nev. at 582-83. Further, any interpretation that renders a statute's language meaningless or superfluous should be avoided. *Hobbs,* 127 Nev. at 237.

When statutes are potentially conflicting, courts will attempt to construe them to avoid conflict. *In re Estate of Murray*, 131 Nev. 64, 67, 344 P.3d 419, 421 (2015). However, if statutes are truly irreconcilable, the more specific statute takes precedence and is construed as an exception to the more general statute. *Doe Dancer I,* 481 P.3d at 871.

Here, the District Court emphasized that NRS 678D.510(1)(a) allows employers to maintain a workplace policy regarding employee marijuana use.

JA000053. Plaintiff does not contend that NRS 613.333 restricts Defendant's right under NRS 678D.510 to maintain a **workplace** policy restricting marijuana use on the job. Nothing in the plain language of either statute suggests that the Legislature intended such a result. In fact, to read it as such would create a conflict, and courts strive to avoid this. Rather, the issue here is that Plaintiff was fired for the adult use of marijuana on personal time. Plaintiff was not using marijuana in the workplace, he was not under the influence on the job, and he was not endangering himself or those around him. When Defendant discharged Plaintiff, it did so for private, lawful conduct that did not occur in, near, or anywhere around the workplace.

As shown, an employer's right to maintain a workplace policy regarding marijuana usage under NRS 678D.510 is not limited by an employee's right to engage in the lawful adult use of cannabis without adverse employment actions under NRS 613.333. Instead, it is the Defendant's application of its workplace policy onto Plaintiff's personal and private actions occurring outside the workplace that creates a conflict between the two laws and renders Defendant's conduct illegal.

2. The Legislature's Actions While Drafting And Passing 678A-D Indicate That NRS 678D.510 Was Not Intended To Supersede The Rights Secured Under NRS 613.333

When attempting to discern the intent of the Legislature, courts can look to its contemporaneous actions for guidance. *See Halverson v. Sec'y of State*, 124 Nev. 484, 488-89, 186 P.3d 893, 897 (2008). The Nevada Legislature made substantial

and detailed references to standing Nevada statutes that it designated as containing exceptions to the provisions of NRS 678A-D. The Legislature also made substantial and detailed changes to standing Nevada statutes as it deemed necessary to harmonize with NRS 678A-D.[6] Clearly, the Legislature expended significant time and energy to ensure that NRS 678A-D was integrated into Nevada law in accordance with its intent, including any exceptions it may create to standing laws and vice versa.

Notably, there is no reference or change to NRS 613.333 in this extensive list of revisions. The Legislature does not state that adult marijuana use legalized under NRS 678D.200 constitutes an exception to NRS 613.333, nor does it revise NRS 613.333 to exclude activities legalized under NRS 678A-D. In considering the Legislature's vast revisions in relation to its intent, it is clear that it would have made the above distinction had it meant to do so. Its failure to do so must be considered intentional. The Nevada Legislature was assumedly well aware of marijuana's illegality under federal law when it drafted A.B. 533 – had it meant for that to play

[6] *See generally* A.B. 533, 2019 Leg., Reg. Sess. (Nev. 2019) (e.g. §§ 62(1)(c), 63(7), 64(1), 66(6)(b); 69(3), 144(b)-(c), 159(1), 163(b), 166(1), 180; 188 amending NRS 52.400, 189 amending NRS 159.0613, 190 amending NRS 159A.061, 191 amending NRS 176.01247, 192 amending NRS 207.335, 193 amending NRS 212.160, 196 amending NRS 233B.039, 198 amending NRS 244.35253, 205 amending NRS 289, 218 amending NRS 455B.460, 229 amending NRS 586.550, and 230 amending NRS 630.306) (references provided as example of extensive changes, not for particular substance of amendments).

a role in determining a person's rights under state statute NRS 613.333, it would have specified as much. It is not up to the court, then, to expand the law when it so clearly goes against the Legislature's intent.

The lack of any change or reference to NRS 613.333 in A.B. 533, nor later in NRS 678A-D, must be assumed intentional. The Legislature did not intend for an employer's **workplace policy** against marijuana use to limit an employee's ability to engage in the legal adult use of cannabis outside of working hours. Ceballos did not use marijuana at his workplace, during working hours, or close enough to his shift to affect his performance or the safety of those around him. Ceballos abided by Defendant's workplace policy, which they are entitled to enforce. However, Defendant's workplace policy does not supersede Ceballos's rights under NRS 613.333 – he cannot be discharged for alleged marijuana use on his personal time.

3. Allowing NRS 678D.510 To Limit Employees' Use Of Marijuana Outside Of The Workplace Violates Nevada Public Policy

A tortious discharge occurs when an individual's employment is interrupted by means which are considered contrary to the public policy of the state. *D'Angelo v. Gardner*, 107 Nev. 704, 718, 819 P.2d 206, 216 (1991). To prove tortious discharge, Ceballos must first establish that his termination was in violation of public policy. *Id.* As properly pled in his Opposition, Ceballos was fired in violation of several of Nevada's public policies. **JA000003-5.**

First, Nevada has a strong public policy interest in protecting its citizens'

statutory rights *and* in ensuring its citizens are not denied the right to work and support their families as a result of engaging in statutorily protected activities.[7] Second, as explicitly stated by the Nevada Legislature, Nevada has a strong public policy interest in maintaining a well-regulated cannabis industry based on transparency and trust within the community. Nev. Gen. Assemb., Nevada Assembly Committee Minutes, 80th Sess., at 23 (May 29, 2019). Nevada also has a strong public policy interest in maintaining its sovereignty and keeping the federal government out of state proceedings and law making.[8]

The Nevada Legislature made it clear that it drafted NRS 678A-D to establish a tightly regulated cannabis industry and send a clear message to the federal government to not intrude. Nev. Gen. Assemb., Nevada Assembly Committee Minutes, 80th Sess., at 23 (May 29, 2019). The District Court justified Ceballos's discharge based on a positive marijuana test because of marijuana's federal illegality. Ceballos's claims are brought solely under Nevada state law, and Nevada state law explicitly allows for the adult use of marijuana outside of the workplace. It also explicitly prohibits an employee discharge for this conduct. The District Court completely nullified Nevada state law in favor of federal legislation, which clearly violated the public policy behind these statutes.

[7] As supported and codified in NRS 613.333.
[8] As supported by the framers of the United States in enacting the Tenth Amendment and Nevada legislative history re: cannabis laws

Finally, justifying Ceballos's discharge in spite of the legality of his alleged actions under state law frustrates the Nevada public policy interest in maintaining a strongly regulated marijuana industry based on transparency and trust within the community. It becomes impossible to build trust within the community when the state judicial system sends a clear message that it will not respect the statutory protections granted to citizens under state law. Clearly, holding that an employer's rights under 678D.510 allow it to discharge an employee for engaging in the "legal use in this state" of a product, in accordance with state regulations, is a severe violation of this public policy. An employer's rights under NRS 678D.510 should not be interpreted as superseding an employee's rights under NRS 613.333.

The District Court held that Defendant's rights under NRS 678D.510 superseded Ceballos's rights under NRS 613.333. As a result, Ceballos's termination was determined not to violate public policy or constitute a tortious discharge and thus the claims warranted dismissal. However, the plain language of both statutes and the legislative history of NRS 678D.510 clearly demonstrate that the two statutes exist side by side without conflict. Regardless of Defendant's rights, Ceballos was discharged for the adult use of marijuana that markedly occurred outside of the workplace. Ceballos's discharge was therefore in violation of several state public policies, including protecting Nevada citizens' rights and maintaining a strong cannabis regulatory scheme based on transparency and trust within the community.

As such, the District Court erred in ruling that NRS 678D.510 superseded Ceballos's rights under NRS 613.333, eliminating his tortious discharge claim, and dismissing the Complaint.

CONCLUSION

Ceballos brings two issues before this Court, both of which are framed by state law. The first is whether the use of marijuana is considered lawful under NRS 613.333. The second is whether the rights of an employer under NRS 678D.510 supersede the rights of an employee under NRS 613.333.

The plain language and legislative history of NRS 613.333 clearly demonstrate that marijuana use is lawful under the statute's ordinary meaning. Further, any consideration of federal law in the present analysis is inappropriate, as the relevant federal statutes do not preempt the state-regulated conduct at issue here. The District Court thus erred in determining that marijuana use is not lawful under NRS 613.333 and that Ceballos was therefore not protected from adverse employment actions.

Additionally, the plain language of NRS 678D.510 and 613.333 clearly do not create a conflict between one another. However, Defendant terminated Ceballos for alleged personal marijuana use occurring outside of the workplace and in the privacy of his home. This conduct violated NRS 613.333 and operated against the unambiguous legislative intent to protect Nevada workers from adverse employment

actions related to the adult use of marijuana. It simultaneously violated several of Nevada's public policies and constituted a tortious discharge. The District Court erred in determining that Defendant's rights under NRS 678D.510 superseded Ceballos's rights under NRS 613.333 and no tortious discharge occurred.

Ceballos's alleged conduct is protected under NRS 613.333 regardless of related federal law or Defendant's rights under NRS 678D.510. As such, the District Court erred by holding otherwise and dismissing the Complaint.

ADDENDUM OF RELEVANT STATUTES

NRS 613.333 (in relevant part):

1. It is an unlawful employment practice for an employer to:

   (a) Fail or refuse to hire a prospective employee; or

   (b) Discharge or otherwise discriminate against any employee concerning the employee's compensation, terms, conditions or privileges of employment,

   because the employee engages in the lawful use in this state of any product outside the premises of the employer during the employee's nonworking hours, if that use does not adversely affect the employee's ability to perform his or her job or the safety of other employees...

NRS 678D.510

1. The provisions of this chapter do not prohibit:

   (a) A public or private employer from maintaining, enacting and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under this chapter;

   (b) A state or local governmental agency that occupies, owns or controls a building from prohibiting or otherwise restricting the

consumption, cultivation, processing, manufacture, sale, delivery or transfer of cannabis in that building;

(c) A person who occupies, owns or controls a privately owned property from prohibiting or otherwise restricting the smoking, cultivation, processing, manufacture, sale, delivery or transfer of cannabis on that property; or

(d) A local government from adopting and enforcing local cannabis control measures pertaining to zoning and land use for adult-use cannabis establishments.

2. Nothing in the provisions of this chapter shall be construed as in any manner affecting the provisions of chapter 678C of NRS relating to the medical use of cannabis.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14-point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitation of NRAP 32(a)(7) because, including the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 point, or more, and complies with the type-volume limitation because the applicable portions consist of 6,132 words or fewer.

. . .

. . .

. . .

. . .

. . .

. . .

FINALLY, I CERTIFY that I have read this Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedures.

Dated this 16th day of August, 2021.

LAGOMARSINO LAW

/s/ Andre M. Lagomarsino

ANDRE M. LAGOMARSINO, ESQ.
Nevada Bar No. 6711
3005 W. Horizon Ridge Pkwy., Suite 241
Henderson, Nevada 89052
Telephone: (702) 383-2864
Facsimile: (702) 383-0065
Attorney of Record for Appellant Danny Ceballos

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing *Appellant's Opening Brief* was made this 16th day of August, 2021, by electronic service through the Nevada Supreme Court's electronic filing system, to each of the following:

Scott Mahoney, Esq.
FISHER & PHILLIPS LLP
smahoney@fisherphillips.com
Attorney for Defendant/Respondent

/s/ Denise J. Valdivia
An employee of LAGOMARSINO LAW