IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY CEBALLOS, an individual, Appellant/Plaintiff, vs. NP PALACE LLC d/b/a PALACE STATION HOTEL & CASINO, a Domestic Limited Liability Company, Appellee/Defendant.	Case No.: 82797 District Court Case No.: A-20-823119-C

RESPONDENT'S ANSWERING BRIEF

FISHER & PHILLIPS LLP
SCOTT M. MAHONEY, ESQ.
Nevada Bar No. 1099
300 S. Fourth Street
Suite 1500
Las Vegas, NV 89101
Telephone: (702) 252-3131
Attorney for Respondent,
NP Palace LLC

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Respondent, NP Palace LLC d/b/a Palace Station Hotel & Casino ("Palace"), is represented in this proceeding, and was represented in the case below, by the law firm of Fisher & Phillips, LLP. Palace is a wholly-owned subsidiary of Station Casinos LLC, all of the economic interests in which are owned by Station Holdco LLC, the economic interests in which are majority-owned by Red Rock Resorts, Inc., which is a publicly-traded corporation.

Dated this 28th day of September 2021.

FISHER & PHILLIPS LLP

By: _____

Scott M. Mahoney, Esq.
Nevada Bar No. 1099
300 South Fourth Street
Suite 1500
Las Vegas, NV 89101
Attorneys for Respondent

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

TABLE OF CONTENTS

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

TABLE OF AUTHORITIES

Page(s)

Cases

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Statutes

Other Authorities

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
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JURISDICTIONAL STATEMENT

Palace agrees with the Jurisdictional Statement contained in Appellant's Opening Brief ("AOB") filed by Appellant, Danny Ceballos.

ROUTING STATEMENT

Palace agrees with Ceballos that the case involves a matter of first impression and statewide public importance that should be decided by the Supreme Court.

STANDARD OF REVIEW

Palace agrees that an order granting a NRCP 12(b)(5) motion to dismiss is reviewed *de novo*.[1]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly determined that federal law should be considered to determine if the use of a product is "lawful" for purposes of NRS 613.333.

2. Whether the District Court correctly found that the Complaint failed to allege a violation of Nevada public policy on which to premise a claim for tortious discharge.

[1] *Buzz Stew, LLC v. City of North Las Vegas,* 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (citation omitted).

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STATEMENT OF THE CASE

Ceballos' rendition of the procedural history is accurate.

STATEMENT OF FACTS

While some of the allegations of the Complaint are over the top – e.g., that Ceballos was interrogated and placed in a holding cell,[2] the essence of his Statement of Facts section is correct – following an on-the-job fall, Ceballos tested positive for marijuana and was fired. The allegations of the Complaint that Ceballos had not used marijuana in the previous 24 hours and was not under the influence or impaired during his shift must be accepted as true for purposes of a motion to dismiss.[3]

SUMMARY OF ARGUMENT

With exceptions irrelevant to this appeal, NRS 613.333 makes it an unlawful employment practice to discharge an employee who "engages in the lawful use in this state of any product outside the premises of the employer during the employee's nonworking hours." The outcome of this appeal hinges on the meaning of the phrase "lawful use."

"Lawful" is not defined in the statute. Its generally understood plain meaning is something in accordance with or not forbidden by law.

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[2] JA000004 ¶ 15. (JA references are to the Joint Appendix filed August 16, 2021).

[3] *Buzz Stew,* 181 P.3d at 672.

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Las Vegas, Nevada 89101

To determine if something is "lawful," all applicable laws should be considered. Nevada has adopted various laws relating to the medical and recreational use of marijuana, but it remains, as Ceballos concedes, an unlawful Schedule I drug under the Controlled Substances Act ("CSA").[4]

Ceballos claims the words "in this state" in NRS 613.333 mean that only Nevada state law is to be considered in deciding whether the use of a product is lawful. As discussed below, his efforts to equate "in this state" with "lawful use under Nevada state law," "lawful use under the laws of this state" or a similar phrase are unavailing. Since "lawful" is not properly defined for NRS 613.333 purposes to include only state law, the District Court correctly held that Ceballos' statutory claim should be dismissed because he did not engage in the lawful use of a product.

AOB takes some inexplicable detours. For example, considerable time is devoted to reaching the conclusion that NRS 678A-D, which is not a basis for any claim, is not preempted by the CSA even though preemption was not an issue raised in the lower court and not a subject of the Order Granting Motion to Dismiss.[5] The lack of CSA preemption has no bearing on whether only state law is to be considered to determine

[4] 21 U.S.C. § 801 *et. seq.*

[5] JA000052-54 (hereafter the "Order").

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Las Vegas, Nevada 89101

lawful use under NRS 613.333. Ceballos also raises as an appellate issue that NRS 613.333 is not superseded by NRS 678D.510, which is strange since the District Court never made such a determination.

Finally, the District Court properly dismissed Ceballos' claim for tortious discharge in violation of public policy. This claim requires more than a mere public policy violation and has been recognized only on a rare and exceptional basis. Given that this Court has declined to recognize such a claim in the context of age discrimination and racial discrimination by a small employer, it is dubious that it would be cognizable if an employee is terminated for testing positive after alleged off-duty marijuana use. Moreover, if Ceballos' NRS 613.333 claim is deemed viable (which it should not be) the tortious discharge claim cannot be asserted because Ceballos has a comprehensive remedy under that statute.

ARGUMENT

THE DISTRICT COURT CORRECTLY FOUND THAT FEDERAL LAW SHOULD BE CONSIDERED FOR PURPOSES OF DETERMINING A "LAWFUL" ACTIVITY UNDER NRS 613.333

Relevant Rules of Statutory Interpretation

"The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute," with "the statute's plain

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Las Vegas, Nevada 89101

meaning" being the best indicator of such intent.[6] "If the statute's language is clear and unambiguous, we enforce the statute as written."[7] "Only when the statute is ambiguous . . . [i.e.] subject to more than one reasonable interpretation, do we look beyond the language [of the statute] to consider its meaning in light of its spirit, subject matter and public policy."[8]

NRS 613.333 Unambiguously Considers Federal Law in Determining Whether a Product is Lawfully Used in Nevada

NRS 613.333 generally prohibits discharging an employee who "engages in the lawful use in this state of any product outside the premises of the employer during the employee's nonworking hours." The Order correctly found that not just state law should be considered for purposes of determining whether the use of a product is lawful under NRS 613.333.

Ceballos dissents. While he concedes marijuana use is still illegal under the CSA,[9] Ceballos claims the use of the words "in this state" makes it "clear that the Nevada Legislature intended to limit any analysis under [NRS 613.333] to consider the legality of a product under **Nevada state**

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[6] *Dezzani v. Kern & Associates, Ltd.,* 134 Nev. 61, 64, 412 P.3d 56, 59 (2018) (citations omitted).

[7] *Hobbs v. State,* 127 Nev. 234, 237, 251 P.3d 177, 179 (2011) (citation omitted).

[8] *Id.,* at 179 (citation and internal quotation marks omitted).

[9] AOB at 5.

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law only [and] does not leave open the possibility that federal law be considered."[10] Therefore, he posits, since "NRS 678D.200 unambiguously allows, without threat of legal punishment, the recreational use of marijuana by adults 21 years of age or older in the state (sic) of Nevada, pursuant to the parameters found in NRS 678A-D," his termination violated NRS 613.333 (accepting as true the allegations of the Complaint).[11]

Ceballos is wrong. First, NRS 678D.200(1) "exempt[s] from state prosecution" certain activities relating to marijuana by persons 21 years or older; i.e., certain acts have been decriminalized.[12] Query if these activities are "lawful" under Nevada law.

Regardless of the outcome of that question, Ceballos misinterprets NRS 613.333. The statute does not say "lawful use under Nevada state law," "lawful use under the laws of this state" or a similar phrase that suggests only Nevada state law should be considered for purposes of determining legality. In the phrase "in this state," the word "in" is a preposition that is used to indicate inclusion within a place – the "state" of

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[10] AOB at 8 (emphasis in original).
[11] AOB at 7-8.
[12] *United States v. Malik,* 963 F.3d 1014, 1016 (9th Cir. 2020).

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Las Vegas, Nevada 89101

Nevada.[13] Thus, the relevant consideration is whether the product can be used in a "lawful" manner within the confines of the State of Nevada, not whether the use of marijuana is allowed if only state law is considered.

NRS 613.333 does not define "lawful." When interpreting statutory terms, the court is to give words their plain meaning.[14] Interpreting Colorado's "lawful activities" statute,[15] the Colorado Supreme Court held that the "generally understood meaning" of "lawful" is "in accordance with the law or legitimate."[16] *Coats* noted cases from other jurisdictions had reached a similar conclusion.[17]

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[13] *Merriam-Webster.com* (defining "in" as a "function word to indicate inclusion, location, or position within limits"). This interpretation of "in this state" should alleviate Ceballos' concern (e.g. at AOB, p. 8) that no words in a statute should be rendered superfluous. *Hobbs,* 251 P.3d at 179.

[14] *In re: Estate of Murray,* 131 Nev. 64, 67, 344 P.3d 419, 421 (2015) (citation omitted).

[15] C.R.S. 24-34-402.5

[16] *Coats v. Dish Network, LLC.,* 350 P.3d 849, 852 (Colo. 2015) (citation omitted). Ceballos claims *Coats* is distinguishable because the words "in this state" are not included in the language of Colorado's lawful activities statute. AOB at 8 n. 2. That is true, but *Coats'* significance is not that it interprets a lawful activities statute with language identical to NRS 613.333. Rather, the significance lies in its interpretation of the meaning of "lawful" and its proper refusal to limit the meaning to state law only.

[17] *Id.,* at 852, *citing, In re: Adoption of B.C.H.,* 22 N.E.3d 580, 585 (Ind. 2014) (citation omitted); ("lawful" means "not contrary to law"); *Hougum v. Valley Memorial Homes,* 574 N.W.2d 812, 821 (N.D. 1998) (citation omitted) (interpreting "lawful" in North Dakota's lawful activity statute as meaning "authorized by law and not contrary to, nor forbidden by law"). These holdings are all consistent with Ceballos' position that "lawful"

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Las Vegas, Nevada 89101

It is axiomatic that there are a variety of laws that apply to persons residing in Nevada – federal, state and local. All these laws need to be considered to determine if an employee is engaging in a "lawful" use of a product under NRS 613.333. This is demonstrated by *Riddle v. Washington,* which involved a claim that an employee's "use of cigarettes outside the premises of the [employer] was a factor in having his employment terminated."[18] The City of Las Vegas went beyond the "Nevada State Law prohibit[ing] the smoking of tobacco in public buildings"[19] and "enforce[d] a stricter policy by prohibiting tobacco . . . in city vehicles." The court found "the City may legitimately prohibit its employees from smoking in city vehicles without running afoul of § 613.333."[20] It did not just consider whether smoking in city vehicles was prohibited by "state" law and then cease its analysis.[21]

In summary, it is unambiguous that the phrase "in this state" refers to the State of Nevada as a location, and not as synonymous with "under

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should be defined as "being in harmony with the law." AOB at 7, *citing, Merriam-Webster.com.*

[18] *Id.,* 2012 WL 3135381 at *5 (D. Nev. 2012).

[19] The law is not specified by citation in the opinion. Presumably, it is NRS 202.2483(1)(d).

[20] *Id.,* at *5.

[21] As a matter of candid disclosure, NRS 202.2483(8) provides that localities can have more restrictive laws than the state law. However, there is no indication this was the basis for the *Riddle* decision.

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Las Vegas, Nevada 89101

Nevada law" or a similar phrase. Unless defined otherwise, the word "lawful" encompasses things that are not contrary to law, and the laws of all jurisdictions need to be considered. The District Court correctly determined that Ceballos did not engage in the lawful use of a product in this state for purposes of NRS 613.333 based on marijuana's continuing illegality under federal law.

Nothing in The Language of NRS 678A-D or NRS 613.132 Warrants Reversal

Ceballos suggests that "[e]ven 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."[22]

Palace agrees that if a statute is ambiguous – and it submits NRS 613.333 is not – legislative history can be relevant to the Legislature's intent. Interestingly, however, in this section of AOB, Ceballos does not reference the legislative history of NRS 613.333; instead he talks about the history of NRS 678A-D (and also mentions NRS 608.132).

Discussing NRS 678A-D, Ceballos states: "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

[22] AOB at 10.

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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."[23]

The primary question posed in this appeal is whether NRS 613.333 considers only state law to determine if a product is being used lawfully. Nothing in the legislative history of *NRS 678A-D* sheds light on the thinking of the Legislature decades earlier when *NRS 613.333* was enacted. Ceballos cites nothing from the legislative history of the latter statute which suggests federal law can be ignored in deciding whether the use of a product is "lawful."

Ceballos finds it significant that when NRS 678A-D was enacted, unlike certain other statutes, no steps were undertaken to amend NRS 613.333 "to exclude activities legalized under NRS 678A-D."[24] Ceballos believes that if the Legislature had wanted "marijuana's illegality under federal law . . . to play a role in determining a person's rights under . . . NRS 613.333, it would have specified as much.[25]

This should be viewed differently. Since marijuana cannot be lawfully used under NRS 613.333 (properly interpreted) because of the

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[23] AOB at 10.
[24] AOB at 18.
[25] AOB at 18-19.

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Las Vegas, Nevada 89101

CSA, there would have been no need to amend the statute. If the Legislature had wanted to make sure that employees, once hired, were not later terminated for using marijuana on their own time away from work in a manner that did not impact their employment, it could have amended NRS 613.333, or some other statute, to so provide. That it did not do so is what is significant.

Finally, Ceballos mentions NRS 613.132 as "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."[26] All this statute does is ensure that certain employees[27] are not eliminated from being hired because they have a positive pre-employment drug test for marijuana. It does not prevent employees, like Ceballos, from being terminated for positive tests occurring later in their employment. (Also, as discussed more fully below, NRS 678D.510(1)(a) allows employers to maintain and enforce drug policies pertaining to marijuana).

The Lack of CSA Preemption Has No Bearing on This Case

Almost a quarter of AOB is spent discussing whether the CSA

[26] AOB at 9.

[27] Those that do not fall within the scope of NRS 613.132(2)(a)-(d).

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Las Vegas, Nevada 89101

preempts state law, concluding that no preemption exists. This entire exercise is curious because Palace did not make a preemption argument in seeking the dismissal of this action and the Order makes no reference to preemption.

Equally curious is that Ceballos does not analyze whether the CSA preempts NRS 613.333 – the statutory basis for his purported claim. Instead, the analysis centers on whether the CSA preempts NRS 678A-D.[28] According to Ceballos, since "the CSA has no impact on the issues at hand, [t]he 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."[29]

Palace agrees CSA preemption is irrelevant to this case.[30] However, such a conclusion does nothing to resolve the question of whether only state law should be considered in deciding if marijuana use is "lawful"

[28] AOB at 13 ("NRS 678A-D and the CSA are clearly not in positive conflict with one another . . . [T]he CSA does not expressly preempt Nevada's state marijuana laws. NRS 678A-D are not impliedly preempted by federal law either").

[29] AOB at 15.

[30] NRS 613.333 prohibits the discharge of an employee for the "lawful" use of a product on his or her own time. The CSA makes certain things illegal relating to marijuana but does not address employee discharge. Since "lawful" is properly interpreted as encompassing federal law, the two statutes are perfectly compatible.

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Las Vegas, Nevada 89101

under NRS 613.333. This entire section of AOB is nugatory.

THE DISTRICT COURT DID NOT FIND THAT NRS 613.333 IS SUPERSEDED BY NRS 678D.510

The second issue presented by Ceballos for review is "Whether the District Court erred in interpreting NRS 678D.510 to supersede Ceballos's rights under NRS 613.333."[31] The District Court did not make such a ruling.

The Order makes only two references to NRS 678D.510. The first is the accurate statement that "NRS 678D.510(1)(a) provides that Nevada's laws pertaining to the adult use of cannabis do not prevent an employer from having and enforcing policies relating to the use of marijuana by employees."[32] The second reference is to NRS 678D.510 being a basis for finding that "the Complaint does not allege a violation of public policy . . . upon which to assert a tortious discharge in violation of public policy claim."[33] The Order never states that NRS 678D.510 supersedes NRS 613.333.

NRS 678D.200(3)(c) exempts from prosecution a person age 21 or older who "[e]ngages in the adult use of cannabis in accordance with the

[31] AOB at x.
[32] JA000053:7-9.
[33] JA000053:15-17.

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300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

provisions of this title." However, NRS 678D.510(1)(a) states that "[t]he provisions of this chapter do not prohibit . . . [a] private employer from maintaining, enacting and enforcing a workplace policy prohibiting or restricting actions or conduct *otherwise permitted under this chapter*" (emphasis added).

Thus, while adult recreational marijuana use is generally non-prosecutable as a matter of Nevada state law, NRS 678D.510 leaves an employer free to adopt policies that impose restrictions on that right, which would include the right to terminate an employee who tests positive for marijuana use. In other words, an employee is free to use marijuana on his or her own time, but there can still be employment consequences for doing so.

Ceballos contends "[t]he 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."[34] There is no basis for this conclusion. Nothing in the plain language of NRS 678.510(1)(a) limits employer drug policies regarding marijuana to things that occur in the workplace during work hours.[35] If the

[34] AOB at 19 (emphasis in original).

[35] In the AOB, Ceballos highlights the words "workplace policy" in NRS 678D.510(1)(a) to suggest the statute is only intended to regulate things

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Las Vegas, Nevada 89101

Legislature had intended to limit in such a manner the policies that employers could maintain, enact or enforce in such a manner, presumably it would have added such language to do so.

Even if the District Court had addressed this issue and the two statutes were truly irreconcilable, "the more specific statute will take precedence, and is construed as an exception to the more general statute."[36] Here, to the extent there is a conflict between NRS 613.333 and NRS 678D.510(1)(a), the latter statute would take precedence – NRS 613.333 generally sets forth the rule on lawful use, and NRS 678D.510(1)(a) creates an exception for employer policies relating to the use of marijuana.

THE DISTRICT COURT CORRECTLY FOUND THAT THE COMPLAINT DOES NOT STATE A CLAIM FOR RELIEF FOR TORTIOUS DISCHARGE IN VIOLATION OF PUBLIC POLICY

In Nevada, all employees are presumed to be employed at-will,

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that happen in the "workplace." The presupposes that a "workplace policy" can only pertain to conduct that occurs at the workplace or during work hours. Employers typically have work policies that capture things that occur outside of work hours and/or off the work premises, for example, policies about off-duty conduct that reflects adversely on the employer and the use of social media or technology away from the workplace. Using Ceballos' interpretation, it would not be a violation of a "workplace policy" if an employee constantly harasses another employee with sexual comments and sexual advances after hours outside of work.

[36] *Doe Dancer I v. La Fuente, Inc.*, 137 Nev. Adv. Op. No. 3, 481 P.3d 860, 871 (2021) (citation omitted).

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Las Vegas, Nevada 89101

meaning they can usually be terminated without notice at any time for any or no reason without the employer incurring liability.[37] In rare and exceptional cases, the Nevada Supreme Court has recognized exceptions to the at-will doctrine when the employer's conduct violates strong and compelling public policy.[38]

In his Complaint, Ceballos described the public policy implicated as follows:

> It is Plaintiff's statutory right, under NRS 678D, to engage in adult cannabis consumption pursuant to the chapter's guidelines . . .
>
> Nevada has a strong public policy interest in protecting the statutory rights of its citizens. Even more so, Nevada has a strong public policy interest in ensuring its citizens are not denied the ability to support themselves and their families due to engagement in statutorily protected *and* completely lawful activities.[39]

Regarding Ceballos' claimed statutory right to use cannabis on his own time without being fired, the mere existence of an alleged violation of public policy is not enough for a tortious discharge claim.[40] In addition to

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[37] *Ozawa v. Vision Airlines, Inc.,* 125 Nev. 556, 560, 216 P.3d 788, 791 (2009) (citation omitted).

[38] *Id.*

[39] JA000007 ¶ 43-44 (emphasis in original).

[40] *See, e.g., Sands Regent v. Valgardson*, 105 Nev. 436, 440, 777 P.2d 898, 900 (1989) (declining to create such a claim for age discrimination even though such discrimination is clearly against Nevada public policy).

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Las Vegas, Nevada 89101

age discrimination, this Court has also declined to recognize a tortious discharge claim for race discrimination in businesses having less than fifteen employees.[41] It is difficult to believe that the Court would reject a public policy tort for something as repulsive as race discrimination (even though an employee may have no statutory remedy for such racism against a small employer), but would find a tortious discharge claim cognizable for persons discharged for testing positive for marijuana.

In AOB, Ceballos also mentions that (1) "Nevada has a strong public policy interest in maintaining a well-regulated cannabis industry based on transparency and trust within the community;" and (2) "Nevada also has a strong policy interest in maintaining its sovereignty and keeping the federal government out of state proceedings and law making."[42] These alleged public policies are not even recited in the Complaint and should not be considered.[43]

Finally, if the Court finds that the Complaint states a viable claim for relief under NRS 613.333 (which it should not), then the tortious

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[41] *Chavez v. Sievers,* 118 Nev. 288, 43 P.3d 1022, 1025-26 (2002).

[42] AOB at 20.

[43] Regarding the public policy interest in the cannabis industry, the Nevada gaming authorities have not embraced this industry. JA000020-21. *See, also, Brown v. Eddie World, Inc.,* 131 Nev. 150, 151, 348 P.3d 1002, 1005 (2015) (declining to recognize a third-party retaliatory discharge claim even when the enforcement of gaming laws was implicated).

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300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

discharge claim must be dismissed because such claims are not recognized when a sufficiently-comprehensive statutory remedy exists.[44] *Shoen* held that the remedy under NRS 50.070(2)(c) was comprehensive enough to preclude a tortious discharge claim.[45] The damages available under NRS 613.333(2) are virtually identical to those under NRS 50.070(2)(c), and thus Plaintiff cannot assert a tortious discharge claim as a matter of law if his NRS 613.333 claim is allowed to proceed.

CONCLUSION

For the reasons set forth herein, the order of the District Court granting the Motion to Dismiss should be affirmed.

Respectfully submitted,

FISHER & PHILLIPS LLP

SCOTT M. MAHONEY, ESQ.
300 S. Fourth Street
Suite 1500
Las Vegas, Nevada 89101
Attorneys for Respondent

[44] *Shoen v. Amerco, Inc.*, 111 Nev. 735, 744, 896 P.2d 469, 475 (1995) (citations omitted).
[45] *Id.*, at 745.

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

CERTIFICATE OF COMPLIANCE

1. 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 2013 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate 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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of September 2021.

FISHER & PHILLIPS LLP

By: _____

Scott M. Mahoney, Esq.
300 South Fourth Street
Suite 1500
Las Vegas, NV 89101
Attorneys for Respondent

/

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

I hereby certify service of the foregoing Respondent's Answering Brief was made this date by electronic filing and/or service with the Supreme Court of the State of Nevada and by mailing a true and correct copy, addressed as follows:

Dated: September 28, 2021

By: /s/ Sarah Griffin
An employee of Fisher & Phillips LLP

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101