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 29 2022 03:38 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 PETITION FOR REHEARING

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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

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Dated this 29th day of August, 2022.

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Is recreational cannabis use "lawful" in the State of Nevada? Yes. 54% of Nevada voters made such use lawful in the 2016 election. Is cannabis use "unlawful" in the State of Nevada? Yes. It is *simultaneously* unlawful under federal law to use marijuana in the State of Nevada. Actions can be lawful under state law and, at the same time, be unlawful under federal law.[1]

In its August 11, 2022 Order (the "Order"), this Court erroneously applied selected canons and presumptions of interpretation, while not applying others, to find that the "lawful use in this state," as delineated in NRS 613.333, renders marijuana use unlawful in Nevada if it is unlawful under federal law. *See generally* Order. With all due respect to this Court, Ceballos asserts that the Court did not consider other mandatory canons which clearly contradict its conclusion. The Court mistakenly applied federal law to NRS 613.333.

[1] Cannabis is not alone in this dichotomy. For example, the federal Wiretap Act makes it illegal to secretly record a conversation that other parties to the communication reasonably expect to be private. 18 USC § 2511. Yet, under Nevada law, as long as one person gives prior consent to the recording of the conversation (usually the person recording), secretly recording the communication is entirely legal. NRS 200.620; *see also Lane v. Allstate Ins. Co.*, 114 Nev. 1176 (1998) (Nevada Supreme Court reversed motion to dismiss for violating the federal wiretapping law because "the plain language" of NRS 200.620 expressly permits the recording of a person as long as the person doing the recording provided consent).

The instant motion applies only to Ceballos's statutory claim under NRS 613.333. If the Court revises its opinion regarding Ceballos's cause of action under NRS 613.333, the case survives, and Ceballos moves forward in district court.

A. Principle of Interrelating Canons

The Court relied upon Scalia and Garner to reach its initial decision. If the Court is to rely on these jurists, it should properly apply their sound reasoning. In that regard, no single canon or presumption of statutory interpretation is absolute or dispositive. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 59 (2012). Different canons of interpretation frequently point to differing results. *Id; see also Xilinx, Inc. v. C.I.R.,* 598 F.3d 1191, 1196 (9th Cir. 2010) (canons of construction "are many and their interaction complex"). "The skill of sound construction lies in assessing the clarity and weight of each clue and deciding where the balance lies." Scalia & Garner, *supra,* at 59.

B. The Context of NRS 613.333 Support's Ceballos's Interpretation

1. Whole-Context Canon

The whole-context canon states that a text must be construed as a whole. Scalia & Garner, *supra*, at 167. Legal instruments often contain several interrelated parts that make up a whole. *Id.* Context is a primary determinant of meaning, and the entirety of a document provides context for each of its parts. *Id.* Under this canon, NRS 613.333 should be read in the context of NRS Chapter 613 ("NRS 613").

Some NRS 613 statutes explicitly reference federal law; NRS 613.333 does not.[2] For example, NRS 613.132 prohibits an employer from refusing to hire an applicant based on a screening test indicating the presence of marijuana. However, NRS 613.132(4)(b) then explicitly states that prior provisions do not apply to the extent they are inconsistent with federal law. This Court cited statutes with limited 'state law' application, but none of them appear alongside NRS 613.333 in NRS 613. Order, 5. Rather, NRS 613.333 appears alongside NRS 613 statutes which specify when federal law is to be considered. This context is vital to Ceballos's claim. Had the Court properly applied the whole-context canon, it likely would have reached a different result.

2. Omitted-Case Canon

The omitted-case canon states that nothing can be added to what a text states or reasonably implies. Scalia & Garner, *supra*, at 90. A matter that is not covered is treated as not covered, and the court cannot supply absent provisions. *Id.* at 90-91.

As discussed above, NRS 613 includes several statutes which (1) have federal counterparts and (2) explicitly address when to consider those counterparts in conjunction with the Nevada statute. Despite the CSA's existence, NRS 613.333 lacks similar provisions. Contrary to the Court's conclusion, this does *not* support that the Nevada legislature would have expressly indicated that only state law be

[2] *See* NRS 613.224, NRS 613.325, NRS 613.430, and NRS 613.580.

considered. Rather, it supports that the Nevada legislature would have expressly indicated if NRS 613.333 was intended to be limited by federal law. Consideration of federal law was not stated nor reasonably implied in NRS 613.333. The omitted-case canon therefore prevents the reading of consideration of federal law into the word 'lawful' and NRS 613.333 as a whole.

3. Ordinary-Meaning Canon

Under the ordinary-meaning canon, words should be interpreted according to their ordinary, everyday meanings and pursuant to their context. Scalia & Garner, *supra*, at 69. The rule presumes that a thoroughly fluent reader can tell, from context and idiomatic clues, which of the possible senses a word or phrase bears. *Id.* at 70.

NRS 613.333's context partly guides the interpretation of "lawful use in this state." The proper reading can also be gleaned from *Black's Law Dictionary*:

- In: "An elastic preposition… expressing relation of presence, existence, situation, inclusion, action, etc.; inclosed or surrounded by limits…; also meaning for, in and about, on, within etc…" *In, Black's Law Dictionary* 758 (6th ed. 1990).
- This: "… a demonstrative adjective, used to point out with particularity a person or thing present in place or in thought." *Id.* at 1480.
- State: "… A territorial unit with a distinct general body of law. Restatement, Second, Conflicts, § 3. Term may refer either to body politic of a nation… or to an individual government unit of such nation." *Id.* at 1407.

The word 'in' signals that the related subject (here, 'lawful use') is enclosed within a specific limit. 'This' is used to "point out with particularity" the area which the

related subject is limited to. As NRS 613.333 is a state law, the territorial limit is clearly Nevada. For the same reason, 'state' can appropriately be taken to mean the individual government unit of Nevada and its "distinct general body of law." Thus, "…in this state" can be properly interpreted to mean within the state of Nevada and pursuant to its distinct body of law. The ordinary-meaning canon, when applied, supports that an analysis of 'lawful' is limited to lawful under Nevada state laws.

This Court cited *Black's* definition of "lawful," but applied only half: "not contrary to or forbidden by law." Order, 4. Something is also lawful if it is "legal; warranted or authorized by law." *Lawful, Black's Law Dictionary* 885 (6th ed. 1990). Marijuana may remain unlawful at a federal level and be lawful at the Nevada state level. NRS 613.333(1)(b) uses the word "lawful," not unlawful. This Court asked whether it is unlawful, but that is not the concern. Ultimately, this Court held that something lawful and legal under Nevada law is unlawful and illegal for the purposes of NRS 613.333. This runs contrary to the ordinary-meaning canon and defies the will of the majority of Nevada voters. *See* Secretary of State, Statewide Ballot Question No. 2, 14 (Nev. Nov. 8, 2016). The Court's conclusion further reaches into legislative territory and beyond the judicial function.

C. The Court's Interpretation of "…lawful use in this state" Obstructs, Rather than Furthers, the Purpose of NRS 613.333.

1. Title-and-Headings Canon

The title-and-headings canon states that titles and headings are permissible

indicators of meaning. Scalia & Garner, *supra*, at 212; *see also Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.,* 554 U.S. 33, 47, 128 S.Ct. 2326, 2336 (2008). Titles and headings do not override the plain language, but these elements are also adopted by the legislature and are given credence. Scalia & Garner, *supra*, at 221-22. The Nevada Constitution requires that the subject and matter of a law should be briefly expressed in the title. NV Const., Art. 4, § 17.

NRS 613.333 is entitled "Unlawful employment practices: Discrimination for lawful use of any product outside premises of employer which does not adversely affect job performance or safety of employees." The title unambiguously identifies the statute's purpose: to **protect** Nevada employees from discrimination based on the lawful use of products which does not jeopardize performance or safety.

2. Presumption Against Ineffectiveness

The presumption against ineffectiveness favors a textually permissible interpretation that furthers a statute's purpose over one that obstructs it. Scalia & Garner, *supra*, at 63. As discussed, NRS 613.333's title unambiguously identifies its purpose. The Court's interpretation of "lawful use in this state" strips Nevada employees of the protection clearly intended by NRS 613.333. It gives employers more rights than employees and conditions continued employment on surrendering the ability to partake in a state-sanctioned and -protected activity. This interpretation *clearly* obstructs the statute's purpose. In contrast, Ceballos's interpretation furthers

the statute's purpose. It protects employees from discrimination for engaging in activities lawful in Nevada. It does not require employees to surrender more than needed to ensure satisfactory performance and safety at work and prioritizes employees over employers. Under the presumption against ineffectiveness, Ceballos's interpretation should be favored.

D. "…[I]n this state" Is Idle And Inconsequential If Interpreted As A Mere Geographical Boundary

1. Extraterritoriality Canon

The extraterritoriality canon holds that a statute presumptively has no extraterritorial application. Scalia & Garner, *supra*, at 268. Drafters do not need language limiting its reach to the territorial jurisdiction of the appropriate state. *Id.*

2. Surplusage Canon

The surplusage canon states that every word and provision should be given independent, operative effect when possible. Scalia & Garner, *supra*, at 174. This canon often prevents an interpretation which renders the language idle. *Id.* at 176.

The phrase "in this state" is idle if used, as this Court found, as a geographic limitation. Pursuant to the extraterritoriality canon, neither Nevada laws nor the laws of other states have extraterritorial applicability. It is also presumed that federal laws reach into the states. These presumptions render it unnecessary to add language specifying that "laws applicable to conduct occurring *in* Nevada are to be considered in assessing the legality of an employee's product use" under a Nevada law. Order,

5 (emphasis added). If this was needed, similar language would be in every conduct-regulating Nevada statute, yet it is not. Under the surplusage and extraterritoriality canons, "in this state" is idle surplus as a geographical limitation because the limitation is already implied. Therefore, an interpretation avoiding surplus and giving the phrase independent meaning is favored. Ceballos's interpretation is textually permissible and avoids unnecessary surplus. As such, it should be favored.

E. Presumption Against Federal Preemption

The presumption against federal preemption states that federal statutes are presumed to supplement, not displace, state law. Scalia & Garner, *supra*, at 290. Congress explicitly addressed preemption as it relates to the Controlled Substances Act ("CSA") in 21 U.S.C. § 903.

This Court reasoned that marijuana's federal illegality renders its use unlawful under NRS 613.333. However, Congress explicitly stated it did not intend to exclude any State law regarding marijuana which would otherwise be within the authority of the State under the CSA unless there is a **positive conflict**. 21 U.S.C. § 903. As Ceballos addressed in his briefs, there is no positive conflict between the CSA and NRS 613.333. Further, employment regulation is well within the purview of the state legislature. This indicates that the CSA does not displace or preempt NRS 613.333.

II. CEBALLOS'S INTERPRETATION OF NRS 613.333 DOES NOT CONFLICT WITH NRS 678D.510(1)(a)

Whenever possible, courts should interpret separate statutes harmoniously.

Watson Rounds, P.C. v. Eighth Jud. Dist. Ct., 131 Nev. 783, 789, 358 P.3d 228, 232 (2015). Relying in part on this canon, this Court held that "read as Ceballos urges, NRS 613.333(1)(b) would conflict with NRS 678D.510(1)(a), which expressly permits employers to enforce workplace policies prohibiting or restricting employees' recreational marijuana use." Order, 7. Ceballos's interpretation does no such thing, and he has **never** suggested that employers cannot restrict employee marijuana use in a way noncompliant with NRS 613.333.

Ceballos acknowledges that employees cannot use marijuana on the employer's premises or in a way which affects performance or safety. Read with NRS 613.333, NRS 678D.510(1)(a) allows employers to restrict employees' lawful use of marijuana in the same way they can restrict the lawful use of alcohol. Employees cannot be drunk or drink alcohol at work. Similarly, employees cannot be under the influence of or ingest marijuana at work. Some jobs may even require stricter controls. However, it is unjust and dangerous to extend NRS 678D.510(1)(a) into the off-duty, off-premises time of any employee, regardless of the nature of their job. Read as this Court urges, NRS 678D.510 grants employers intrusive power beyond what is needed to protect their best interests. When read according to Ceballos's interpretation, NRS 678D.510 is in harmony with NRS 613.333, provides the intended protection to employees, and still protects the employer's best interest.

III. NRS 613.133(1)(b) DOES NOT RENDER NRS 613.332 IDLE

Separate statutes should be interpreted harmoniously and to avoid surplus in related statutes. This Court held that if marijuana use is lawful under NRS 613.333, NRS 613.132 becomes almost purposeless. Ceballos argues that this is inaccurate.

NRS 613.132 is a specific, narrow statute which addresses the failure to hire an applicant due to the presence of marijuana in a **screening test**. The statute discusses excluded positions, limits to its application, and the rights of affected applicants. In contrast, NRS 613.333 makes it a broadly unlawful employment practice to fail or refuse to hire a prospective employee "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...". NRS 613.333 does not contemplate specifics, nor is "product" limited to marijuana or drugs in general. NRS 613.132 addresses a narrow set of circumstances which NRS 613.333 does not. As such, Ceballos's reading of NRS 613.333 does not render NRS 613.132 idle.

IV. CONCLUSION

By finding marijuana to be unlawful, the Court has stripped Nevada employees of the protections they voted for, and protections enacted by Nevada's duly elected representatives, in favor of employers who can test for marijuana without any cause to justify termination. With an incomplete application of judicial canons, this Court has effectively legislated federal law into NRS 613.333. Ceballos respectfully asks that this Court reconsider and reverse its prior decision.

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 2,430 words or fewer.

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FINALLY, I CERTIFY that I have read this Petition for Rehearing, 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 29th day of August, 2022.

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