IN THE SUPREME COURT OF THE STATE OF NEVADA

DEFENDANT FREEMAN EXPOSITIONS, LLC,

Petitioner,

vs.

The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, In and For the COUNTY OF CLARK, the Honorable VERONICA M. BARISICH, District Judge,

Respondent,

and

JAMES ROUSHKOLB

Real Party in Interest.

Supreme Court Case No.: 83172

District Court Case No. A-19-805268-C

ANSWER OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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PRELIMINARY STATEMENT

Real Party in Interest, James Roushkolb ("Roushkolb", "Plaintiff", or "Real Party in Interest"), files this Answer in response to the brief of Petitioner, Freeman Expositions, LLC, ("Petitioner" or Defendant") for a writ of mandamus or prohibition vacating the denial of Petitioner's Motion to Dismiss on four separate Causes of Action. Petitioner contends that the Eighth Judicial District Court's Decision on September 15, 2020, of the Honorable Trevor Atkin, to deny Petitioner's (1) Motion to Dismiss on Plaintiff's First Cause of Action for Unlawful Employment Practices against Freeman; (2) Motion to Dismiss on Plaintiff's Second Cause of Action for Wrongful Termination against Freeman; (3) Motion to Dismiss on Plaintiff's Fourth Cause of Action for Negligent Hiring, Training, and Supervision against Freeman; (4) Motion for Summary Judgment on Plaintiff's Fifth Cause of Action for "Violation of the Medical Needs of an Employee Pursuant to NRS 453A.010 *et seq.*" against Freeman were done in err. It is the Real Party in Interest's position that the District Court acted correctly in denying dismissal to Roushkolb's causes of action based on the legitimate existence of public policy in Nevada in favor of medical marijuana, which prohibits collective bargaining agreements, just as it does employers, from discriminating against employees based on drug screening results for marijuana.

SUMMARY

Generally, writ relief is available upon demonstration that: (1) an eventual appeal does not afford "a plain, speedy and adequate remedy in the ordinary course of law," and (2) mandamus is needed to compel the performance of an act that the law requires or to control the district court's manifest abuse of discretion. NRS 34.160; NRS 34.170; *Tallman v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 117-18 (2015). However, mandamus relief may also be issued within the discretion of this Court when petitions raise important issues of law in need of clarification, involve significant public policy concerns, and this Court's review would promote sound judicial economy. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Seventh Judicial District Court*, 132 Nev. Adv. Op. 6, 2016 WL 348036, *2, *citing Int'l Game Tech., Inc. v. Second Judicial District Court*, 122 Nev. 132, 142-43, 127 P.3d 1088, 1096 (2006).

In *Corporation of the Presiding Bishop*, this Court addressed a petition for writ relief "because it present[ed] a narrow legal issue concerning a matter of significant public policy, and its resolution [would] promote judicial economy." *Id.* There, the question was whether the State Engineer had improperly applied a statute retroactively, raising a "clear question of law." *Id.* In addition, the question affected hundreds of parties who had contested Southern Nevada Water

Authority's applications intended to pipe water from rural northern Nevada basins to Las Vegas, therefore making the matter one of "great public importance."

Finally, this Court concluded that judicial economy would be served by "determining the proper application of a statute that plays an important role in a matter that has spanned 25 years and multiple adjudications." *Id.* Here, the adjudication of Nevada's statutory laws regarding the legalization of marijuana, and further, the expressed intent of the Nevada legislature to prohibit employers from discriminating against employees based on drug screening for marijuana, affects hundreds of thousands of Nevada wage earners and Nevada employers, small and large. As in *Corporation of the Presiding Bishop*, this Court's "discretionary intervention is warranted" in that Roushkolb's matter should be allowed to proceed and tried on its merits, as the District Court has determined. *Id.*

Petitioner's entire argument, from its formulation of the issue presented by its petition through its entire analysis of the question of law presented, ignores the public policy of the claims at issue. Petitioner does so because recognition of the legitimacy of Nevada state laws and their effect on employers' inability to discriminate against marijuana users in the workplace would contradict the expressed intent of the Nevada legislature. Preventing an employer from discharging or failing to hire an employee for the legal use of medical marijuana is a matter of public interest because such practice greatly affects the employee or

prospective employee and the economy. Thus, Petitioner is seeking a result, and relief, that this Court can only grant by ignoring public policy established by the expressly defined statutes upon which Real Party in Interest relies.

IN RESPONSE TO PETITIONER'S STATEMENT OF FACTS

Most of the material facts of this case are not in dispute. Roushkolb was employed by Freeman Expositions, LLC. Roushkolb tested positive for THC. Petitioner then terminated Roushkolb. Roushkolb then brought suit accordingly.

In response to Petitioner's statement of facts, specifically the terms under which Petitioner elaborates as to the justification for Respondent's termination based on the collectively bargained Drug and Alcohol Policy in his collective bargaining agreement (the "CBA" or the "Agreement") between Freeman and Local 631, Roushkolb finds material issues that warrant explanation under the law, as has been established by this Court previously.

Indeed, the statutory claims exist independent of the grievance mechanisms of the bargaining agreement as the Ninth Circuit just recently reversed summary judgment in a case where a police officer had not prevailed under the grievance process. See *Moser v. Las Vegas Metropolitan Police department*, 94 F. 3d 900 (9th Cir. 2021). In fact, the only time statutory causes of action may be subject to arbitration is where an arbitration agreement expressly provides for the arbitration of statutory claims. Petitioner has not provided that the agreement between Roushkolb

and Petitioner has included such express terms. Instead, Petitioner can only establish that a casual employee, such as Roushkolb, may challenge a Letter of No Dispatch through his or her Union under Article 14. This hardly proves to be a limitation or expressly defined agreement to resolution for employees under the CBA. Petitioner's only other reference to detailed grievance and arbitration procedures is through Article 13, which sets forth procedures for resolving alleged violations of the CBA, including allegedly improper terminations. A violation of the CBA is not all-encompassing as to Roushkolb's claim. Here, Roushkolb has appropriately pleaded a claim by way of his individual statutory rights. Articles 4, 13, 14 and 15 as Petitioner references in their statement of facts, make no mention of arbitrating statutory claims nor do they contain all-encompassing language that would exclusively require Roushkolb to resolve his discrimination claim through arbitration alone. NRS 613.333 is an anti-discrimination statute which confers certain statutory rights upon all employees. Like Title VII, such statutory rights cannot "be waived prospectively." See *Metropolitan Edison v. N.L.R.B*. 460 U.S. 693, 708, 103 S. Ct. 1467, 1477 (1983). (waiver of a statutory right must "explicitly state" and the "waiver must be clear and unmistakable.") Petitioner has made no attempt to argue that Roushkolb has waived his statutory rights. Because Roushkolb seeks to vindicate his statutory rights, he disputes the facts Petitioner applies as materially relevant to their claim(s) of

failure to exhaust contractual remedies, and he asks that this Court reject this notion throughout its analysis of the argument set forth.

IN RESPONSE TO PETITIONER'S ARGUMENT

The issue presented is not, as petitioner asserts, "[w]hether the parties to a *collective bargaining agreement* may discharge employees pursuant to negotiated drug policies in light of Nevada's legalization of marijuana use." (emphasis added) Indeed, whether Petitioner violated Roushkolb's rights as guaranteed by the Nevada Revised Statutes require absolutely no interpretation of the purported CBA that Petitioner claims Roushkolb failed to plead pursuant to his rights to challenge his termination as provided by the collective bargaining agreement, nor any contractual agreement. Petitioner has constructed this falsehood of the issue presented by asserting the allegation requires assessment of, and interpretation of, the duties and obligations set forth in the CBA. However, this is an inaccurate analysis and reading of Roushkolb's claims. Whether Petitioner terminated Roushkolb for his lawful use of medical marijuana outside of the Petitioner's business during non-working hours is, simply put, a question for the trier of fact solely based upon Nevada statutes and our common law. At the outset, Petitioner contends, incorrectly, that Roushkolb's NRS 613.333 claim should be dismissed because "as admitted in his Complaint, Roushkolb was discharged because the

Company concluded that he was ***under the influence*** of marijuana when, while working as a rigger, he dropped a large plate of glass (emphasis added)…"

Roushkolb's Complaint alleges no such thing. Instead, Roushkolb properly pleaded he was terminated by Petitioner "because he tested positive for marijuana use consistent with his physician-recommended usage." *See* Plaintiff's Complaint, p. 7, ¶ 66. Notably, Roushkolb did not allege that he was "under the influence" at work, nor does he allege he was terminated by Petitioner incorrectly concluding as such.

Further, Petitioner cites to *Coats v. Dish Network, LLC*, 350 P.3d 849 (2013), which held that medical marijuana was not lawful under a Colorado 'lawful use' statute because it is prohibited under federal law. However, *Coats* is inapplicable to Roushkolb's NRS 613.333 claim because the Colorado statute is distinguishable from Nevada's 613.333. Further, unlike in Colorado, the Nevada Legislature intended to interpret medical marijuana laws under a state law.

That Petitioner looks to the purported CBA for a defense does not rise to the level of substantially dependent analysis required under *Burnside v. Kiewit*, 491 F.3d 1053, 1059 (9th Cir. 200*7)* to warrant preemption.

Moreover, Petitioner relies on additional incorrect assertions that the Nevada legislature did not intend to include protection for lawful marijuana users, stating that there is no legislative history in support of this inclusion in NRS 613.333.

I. The Nevada Legislative History Clearly Intends for "Lawful" to mean Lawful Under Nevada State Law.

Unlike in Colorado to which Roushkolb summarizes for purposes of precedent, the Nevada Legislature intended to interpret medical marijuana laws under a state law. Indeed, Nevada's lawful use statute is explicitly tailored to Nevada state law, unlike the Colorado statute examined in *Coats*. Colorado's statute prohibits an employer from terminating an employee for engaging in "any lawful activity off the premises . . . during nonworking hours," whereas Nevada's statute prohibits discrimination based on "the lawful use in **this state**." *See* NRS 613.333 (emphasis added). Nevada's lawful use statute is more specific in that it restricts its reach to Nevada. Additionally, unlike Colorado law, as discussed more fully below, Nevada law explicitly requires that an employer attempt to make reasonable accommodations for the medical needs of an employee who lawfully engages in the use of the medical marijuana. See NRS 453A.800(3).

In *Coats*, the statute at issue precluded the termination of an employee, "due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours." 350 P.3d at 852. The Colorado Supreme Court held that this 'lawful use' statute does not protect medical marijuana use because there was no evidence to demonstrate that the Colorado Legislature intended the word 'lawful' to be limited to state law. Thus, *Coats* held that absent any directive from

the legislature, 'lawful' was to be interpreted as lawful under both federal and state law. *Id.*

The *Coats* holding was based on legislative intent. Particularly, *Coats* held, "we find nothing to indicate that the General Assembly [of Colorado] intended to extend . . . protection for "lawful" activities to activities that are unlawful under federal law." 350 P.3d at 853. *Coats* concluded that since federal law preempts state law, medical marijuana use is not protected under Colorado law. *Id.*

In Nevada, on the other hand, there is no absence of legislative intent. On the contrary, the Nevada Legislature explicitly expressed an intent to interpret "lawful" for marijuana laws under state law only. The Legal Division of the State of Nevada Legislative Counsel Bureau ("Legislative Counsel"), which acts as the legal adviser to the Nevada Legislature, responded to questions posed by Senator Segerblom in an advisory letter. (September 10, 2017).

Accordingly, on September 10, 2017, the Legislative Counsel responded with a statutory analysis of Chapter 453A. *Id.* The Legislative Counsel stated that the "lawful" language in Chapter 453A **shall not be interpreted to include violations of federal law.** (emphasis added). Particularly, the Legislative Counsel explained that:

> A court will strive to interpret these provisions in harmony with NRS 453.316. *Id.* If the word "unlawfully" in NRS 453.316 were interpreted in a way that includes a violation of federal law, such an interpretation would

> essentially render chapters 453A and 453D of NRS void by continuing to criminalize activities that the Legislature by statute or the people by initiative explicitly made legally permissible.

The Legislative Counsel further stated that, when possible, a court "will avoid rendering any part of a statute inconsequential." *Id.* (citing *Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007)). The Legislative Counsel concluded that:

> "[s]ince considering whether a sale or use violates federal law for the purpose of determining whether the sale or use is "unlawful" . . . would have the effect of rendering entire chapters of NRS nugatory and that consequence can be avoided by considering only whether a sale or use violates the laws of this State[.]"

Id.

The Nevada Legislature clearly intends for "lawful" to mean lawful under Nevada state law. Thus, the analysis in *Coats* should not be followed in Nevada. Therefore, Roushkolb states a valid claim under NRS 613.333.

In addition, since *Coats*, the case heavily relied upon by Petitioner, three additional states have decided that similar 'lawful use' statutes, anti-discriminatory employment provisions, and reasonable accommodation laws for medical marijuana use, are not preempted by federal law.

On August 8, 2017, *Noffsinger v. SSC Niantic Operating Co. LLC*, held that a plaintiff who uses medical marijuana is protected under a Connecticut law that prohibits employers from terminating an employee who lawfully uses medical

marijuana. No. 3:16-CV-01938(JAM), 2017 WL 3401260, at *2 (D. Conn. Aug. 8, 2017). The Controlled Substance Act ("CSA") does not preempt state "lawful use" and anti-discriminatory employment statutes, such as NRS 453A. *Id.*

Noffsinger explained that state anti-discriminatory medical marijuana laws are not preempted because the CSA does not make it illegal to employ a marijuana user. Nor does it purport to regulate employment practices in any manner. It also contains a provision that explicitly indicates that Congress did not intend for the CSA to preempt state law 'unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.' 2017 WL 3401260, at *4 (quoting 21 U.S.C. § 903).

On May 23, 2017, the Superior Court of Rhode Island held that the CSA does not preempt the state anti-discrimination in employment medical marijuana statute because, "[t]o read the CSA as preempting [the anti-discriminatory statute] would imply that anyone who employs someone that violates federal law is thereby frustrating the purpose of the law." *Callaghan v. Darlington Fabrics Corporation*, 2017 WL 2321181, at *14 (R.I. Super. 2017). *Callaghan* further explained that, "it is a direct and unambiguous indication that Congress has decided to tolerate the tension," between state and federal marijuana laws. *Id.* at *15.

On July 17, 2017, the Massachusetts Supreme Court held that an employee could bring a claim under a state disability discrimination statute for refusing to

accommodate her medical marijuana use. *Barbuto v. Advantage Sales & Mktg.*, LLC, 477 Mass. 456, 464, 78 N.E.3d 37, 45 (2017). *Barbuto* held:

> [I]n the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation.

Id. Barbuto concluded that if an employer did not attempt to accommodate an employee's medical marijuana use, "the employee effectively would be denied this 'right or privilege' solely because of the patient's use of medical marijuana." *Id.*

Likewise and recently in *Whitmire v. Wal-Mart*, 3:17-cv-08109, (February 7, 2019 J. Teilborg) the United States District Court for the District of Arizona upheld a claim and found a private cause of action involving the Arizona Medical Marijuana Act where an employee was terminated for testing positive for THC.

In light of *Noffsinger*, *Whitmire, Callaghan*, and *Barbuto*, Roushkolb states a valid claim under NRS 613.333. Thus, this Honorable Court should uphold the decision by the District Court in Denying Petitioner's Motion to Dismiss as to Roushkolb's First Cause of Action Pursuant to NRS 613.333.

II. Roushkolb was Wrongfully Terminated as a result of Petitioner's Conduct Violating Strong and Compelling Public Policy

The decision of this Honorable Court is imperative as Petitioner's attempt to reverse the District Court's ruling would establish precedent in direct contradiction

with a public policy interest in protecting employees from termination for partaking in lawful activities outside of work. At the heart of the purpose and intent of Nevada's medical marijuana laws is compassion for those suffering from serious medical conditions and acknowledgement of the right to determine their own course of treatment. This right to medical marijuana use, without fear of termination, is such an essential public policy concern that Nevada law provides explicit statutory protection for in NRS 453.800. If Nevada employees are not protected by Nevada's medical marijuana laws, such employees will be forced to choose between employment or effectively treating their serious medical condition. *See* Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 Case. W. Res. L. Rev. 209, 222-24 (2015). Individuals should not be forced to choose between employment and their well-being, when such employee consumes medical marijuana outside of work. Here, there is an existence of a clear public policy favoring a patient's right to seek his or her own legal course of treatment for their serious disability, and a public policy of allowing a patient to rely on and follow his physician's advice, and state law, without penalty. Roushkolb acted consistently with public policy when, after consultation and after the recommendation of his physician, he engaged in the lawful use of medical marijuana.

Here, when Petitioner terminated Roushkolb because he tested positive for a drug test when he was legally treating his disability, such termination violated public policy. Public policy was further violated because such withdrawal prevented Roushkolb from working.

Indeed, Petitioner's reliance on *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 257 P.3d 586 (2011) is therefore misplaced. In short, the factual predicate of Nevada's public policy toward this exceptional case, as demonstrated above, was simply not present before the Washington court.

As a result, Roushkolb readily states a claim for tortious discharge here in Nevada. Further, and although not binding, our State Court has allowed such a claim to proceed in *Nellis v. Sunrise Hospital and Medical Center,* A-17-761981, (Nev. Dist. Court 2018, J. Bailus). For the reasons stated herein, Roushkolb's second cause of action was properly allowed to proceed.

III. Petitioner had a duty to exercise reasonable care to protect Roushkolb from Negligent Hiring, Training, and Supervision.

Generally, to state a negligent hiring, training, and supervision claim, a claimant must show (1) a general duty on the employer to use reasonable care in the hiring, training, and/or supervision of employees to ensure that they are fit for their positions; (2) breach; (3) injury; and (4) causation. *Okeke v. Biomat USA, Inc.*, 927 F. Supp. 2d 1021, 1028 (D. Nev. 2013). Such claims are based upon the

premise that an employer will be held liable when it places an employee who it knows or should have known behaves wrongfully in a position in which that employee can harm another. *Id.* To that end, courts consider whether antecedent circumstances would "give the employer reason to believe that the person, by reason of some attribute of character or prior conduct, would create an undue risk of harm to others in carrying out his or her employment responsibilities." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1392, 930 P.2d 94, 99 (1996).

Petitioner argues that NRS 613.330 *et seq*. preempts Roushkolb's claim for negligent hiring, training and supervision. This is wholly inaccurate. Under the theory of general negligence, upon which this cause of action is based, the standard is "the failure to use ordinary or reasonable care," and for the trier of fact to then decide the reasonableness of the acts in question. Nevada Negligence Instruction 4NG.12. Nowhere in the statutory scheme of NRS 613.330 *et seq*. is an employer's negligence preempted.

To support its position, Petitioner cites to *Brinkman v. Harrah's Operating Co.*, Inc. and *Sands Regent v. Valgardson*. These cases are not analogous to Roushkolb's claims for negligence, and as such, do not apply. In these cases, the Roushkolbs brought tort actions of discrimination, and did not allege further actions based in tort. For example, in *Brinkman* (a non-binding decision for this Court), the court found the plaintiff's claim was based solely in age discrimination.

Brinkman v. Harrah's Operating Co., Inc., 2:08-cv-00817-RCJPAL, 2008 U.S. Dist. LEXIS 123992 at *3 (D. Nev. October 16, 2008). Similarly, in *Valgardson*, the plaintiff brought an age discrimination claim in the context of tortious conduct and the court declined to find tortious discharge. 777 P.2d at 900.

Here, Roushkolb's Complaint alleges facts sufficient to show a plausible claim for negligent hiring, training, and supervision. For instance, Roushkolb's Complaint contains the following relevant allegations:

> 104. Defendant had a duty to exercise reasonable care to protect Roushkolb from negligent and/or careless actions of Defendant's own agents, officers, employees, and others.
> 105. Defendant owed a duty to Roushkolb to not hire individuals with a propensity towards committing unlawful acts against Roushkolb.
> 106. Defendant owed a duty to Roushkolb to adequately train and supervise its employees in regards to all correct policies and procedures relating to medical marijuana laws and/or termination policies and procedures.
> 107. Defendant breached its duty to protect Roushkolb by failing to properly hire, train, and/or supervise its employees, whereby a reasonable person could have foreseen the injuries of the type Roushkolb suffered would likely occur under the circumstances.
> 108. As a direct and proximate cause of the foregoing conduct, Roushkolb suffered harm including loss of income and benefits, severe emotional distress including but not limited to great mental and emotional harm, anguish, anxiety, insecurity, damage to self-esteem and self-worth, shame and humiliation, lack of appetite, and loss of sleep and/or anxiety.

Roushkolb has readily prevailed on such standard as articulated in *Okeke* and *Hall* and pursuant to *Twombly*. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (U.S.,2007). Roushkolb has undoubtedly alleged Petitioner's duty, its breach of that duty, Roushkolb's injury, and causation thereof. Taking Roushkolb's allegations as true, Petitioner knew or should have known that its agents could potentially harm Roushkolb if they were not adequately trained in regards to correct policies and procedures relating to workplace safety, as well as employees' medical and workplace rights, including Constitutionally-protected rights, and/or termination policies and procedures.

Specifically, Petitioner failed Roushkolb in its duty to provide safe workplace practices when its management forced Roushkolb and his coworker to remove the sheet of plexiglass without proper equipment, resulting in the aforementioned incident and Roushkolb's subsequent termination; and Petitioner further failed to protect Roushkolb's Constitutionally-provided right, as provided by this State, to the protected use of medical marijuana.

Petitioner falsely argues that Roushkolb only asserts that Petitioner was negligent in hiring or training its employees "so they are aware of the complexities of medical marijuana law under state and federal standards." Motion at 10, lines 24-25. In no way has Roushkolb asserted that Petitioner must train its employees in the "complexities" of medical marijuana law. However, Petitioner, as a

sophisticated actor, should endeavor to reasonably protect its employees from violations of all Constitutionally-protected rights. In fact, as mentioned above, Petitioner was negligent in more than one way, including failing to reasonably protect Roushkolb from unsafe decisions of its management. Even though Petitioner knew or should have known of these risks, Petitioner negligently failed to correct this problem. As a direct and proximate result of this failure, Roushkolb suffered the damages alleged in his Complaint.

In addition, the Seventh Circuit recently held that an employer may be held liable for a claim of negligent hiring, supervision, or retention claim based on the supervisory authority an employer has over an employee. *Anicich v. Home Depot U.S.A., Inc*., No. 16-1693, 2017 WL 1101090 (7th Cir. Mar. 24, 2017). Though not binding on this Court, the decision no less supports the basis that Petitioner may be held liable for its own negligence in the hiring, training, and supervising of Roushkolb's former superiors at Petitioner's business.

Indeed, as Roushkolb has alleged sufficient facts to show that Petitioner breached its duty of reasonable care and should have known an employee might violate Roushkolb's rights, Roushkolb's fourth cause of action should not be dismissed.

This Court has held that whether the type of employment is at-will is immaterial to a tortious discharge claim. *Allum v. Valley Bank of Nevada*, 114 Nev.

1313, 1317, 970 P.2d 1062, 1064 (1998) (citing *D'Angelo v. Gardner*, 107 Nev. 704, 718, 819 P.2d 206, 216 (1991)). The Court recognizes such a claim in tort where an employer discharges an employee for reasons that violate public policy. *D'Angelo*, 107 Nev. at 718, 819 P.2d at 216. In *D'Angelo*, the Court stated that "[t]he essence of a tortious discharge is the wrongful, usually retaliatory, interruption of employment by means which are deemed to be contrary to the public policy of this state." *Id*. An employer may be liable for discharge if it terminates an employee for reasons that violate policy. *D'Angelo*, 107 Nev. at 704, 819 P.2d at 211.

This case is rare and exceptional because Petitioner's actions violate the compelling public policy of favoring a patient's right to seek his or her own legal course of treatment for their serious disability, based upon their physician's professional medical judgment. *Whalen v. Roe*, 429 U.S. 589, 599–600, 603, 97 S. Ct. 869 (1977) (recognizing a constitutional "interest in independence in making certain kinds of important decisions," including a patient's "right to decide independently, with the advice of his physician, to acquire and use needed medication").

Furthermore, the public policy interest in compassion for patients with disabilities seeking medical marijuana treatment was expressed and recognized by the voters and the Legislature. In 2000, Nevada voters approved a constitutional

initiative that added Article 4, Section 38, to the Nevada Constitution. Under Nev. Cons. Art. IV, § 38, the Legislature "shall provide by law . . . [t]he use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of . . . severe, persistent . . . chronic or debilitating medical conditions."

In 2001, the Legislature exercised its power under the initiative by passing A.B. 453, which established Nevada's laws, codified in NRS Chapter 453A. *See* A.B. 453, 2001 Nev. Stat., ch. 592, §§ 2-33, at 3053-66. Before A.B. 453 was passed by the Assembly, Assemblywoman Giunchigliani stated that "I think the public knew very well what they were voting on and recognized that under extreme medical conditions, they supported the issue of a registry card and allowing an individual to have access to this." *Assembly Daily Journal*, 71st Leg., at 41 (Nev. May 23, 2001). A.B. 453 was intended to "carry out the will of the people of this state and to regulate the health, medical practices and well-being of those people in a manner that respects their personal decisions concerning the relief of suffering through the medical use of marijuana." A.B. 453, 2001 Nev. Stat., ch. 592, preamble, at 3053. As stated previously, at the heart of the purpose and intent of Nevada's medical marijuana laws is compassion for those suffering from serious medical conditions and acknowledgement of the right to determine their own course of treatment.

Further, this right to medical marijuana use, without fear of termination, is such an essential public policy concern that Nevada law has provided explicit statutory protection regarding the claims alleged. *See* NRS 453.800.

This important background, shown through analysis and explicit interpretation as well as acted upon intent, by the legislature, is imperative to maintaining the public policy for which these statutes were created to give effect. It is imperative to employees, like Roushkolb, who choose to work and stimulate our economy, despite their disabilities, remain protected. In this case, the lawful activity is Roushkolb's right to choose his medical treatment. In fact, this is a statutory right in Nevada. *See* NRS 613.333; *See also O'Brien v. R.C. Willey Home Furnishings*, 2016 WL 4548674, at *4 (D. Nev. Aug. 31, 2016) (holding that NRS 613.333 protects employee who lawfully consume other legal, taxed products outside of work).

Additionally, preventing an employer from discharging or failing to hire an employee for the legal use of medical marijuana is a matter of public interest. These laws greatly affect employees or prospective employees and the economy. If Nevada employees are not protected by Nevada's medical marijuana laws, such employees will be forced to choose between employment or effectively treating their serious medical condition. *See* Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 Case. W. Res. L. Rev. 209, 222-24 (2015).

Individuals should not be forced to choose between employment and their well-being when such employee consumes medical marijuana outside of work. Public policy undoubtedly favors a patient's right to seek his or her own legal course of treatment for his or her serious disability. The critical statute by which Roushkolb seeks redress protects the fundamental right of Nevadans to consider and implement their physician's advice, under our law, without jeopardy of losing their livelihood.

CONCLUSION

For the reasons stated above, this Honorable Court should deny Petitioner's request to disturb the District Court's sound judgment and, rather, allow the Real Party in Interest to have his claim determined on their merits before the trier of fact. Roushkolb respectfully attests this Court need not (1) read a CBA interpretation issue into a Complaint where none exists to justify preemption and (2) ignore the well-pleaded allegations and voter-approved, Constitutionally-provided claims readily

/ / /

apparent on the face of the Complaint.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)94), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as it is prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 37(a)(7) because, excluding parts of the brief excepted by NRAP 32(a)(7)(C), it does not exceed 14,000 words.

Finally, I hereby certify that I have read this Answer, and to be best of my knowledge, information, and belief, it is not frivolous or interposed for any proper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **ANSWER OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 15th day of December 2021, to the following:

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And a true and correct copy of the foregoing **ANSWER OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was served via first class, postage-paid U.S. Mail on this 15th day of December 2021, to the following:

The Honorable Veronica M. Barisich
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