IN THE SUPREME COURT OF THE STATE OF NEVADA

FREEMAN EXPOSITIONS, LLC,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE VERONICA BARISICH, DISTRICT JUDGE,

Respondents,

and

JAMES ROUSHKOLB,

Real Party in Interest.

No. 83172

AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION

(In Support of Real Party in Interest)

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NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

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

The Nevada Justice Association ("NJA"), an amicus curiae, is a non-profit organization of independent lawyers in the State of Nevada. Micah S. Echols, Esq.; Joseph N. Mott, Esq.; and Scott E. Lundy, Esq. of Claggett & Sykes Law Firm represent NJA in this matter.

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NJA and its counsel did not appear in the District Court in this matter. NJA submits this brief along with its motion for leave, pursuant to the order filed in this Court on January 3, 2022.

DATED this 21st day of January 2022.

CLAGGETT & SYKES LAW FIRM

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AMICUS INTEREST AND AUTHORITY TO FILE

NJA is a non-profit organization of independent lawyers in the State of Nevada who represent consumers and share the common goal of improving the civil justice system. NJA advocates for Nevadans, ensuring that Nevada consumers continue to have ready and meaningful access to the courts. NJA also works to advance the science of jurisprudence, to promote the administration of justice for the public good, and to uphold the honor and dignity of the legal profession.

NRAP 29 provides that an "amicus curiae may file a brief" with this Court's leave. Amicus intervention is appropriate where "the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). NJA files this brief with an accompanying motion under NRAP 29(c). The role of an amicus curiae is also to provide the Court with additional authorities not presented in the parties' briefs. *See Miller-Wohl Co. v. Comm'n of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (indicating that the classic role of an amicus curiae is to assist in cases of general public interest and to supplement the efforts of counsel by drawing the court's

attention to law that may have escaped consideration). Through this proposed brief, NJA will provide this Court with a robust analysis of whether a collective bargaining agreement can waive an employee's statutory rights absent a clear and unmistakable waiver. This analysis includes a review of applicable United States Supreme Court, Ninth Circuit Court of Appeals, and various federal district court decisions on this issue. Upon reviewing the above materials, this proposed brief demonstrates that an employee's statutory right cannot be waived unless the collective bargaining agreement contains language that clearly and unmistakably waives the specific statutory right. This includes an employee's statutory right to bring claims within NRS 613.333. Additionally, this proposed brief analyzes NRS 613.333 and discusses how this statute applies in this case.

Therefore, NJA is appropriately positioned to provide an amicus submission in this case.

INTRODUCTION

This matter bears on several important issues of public concern for Nevada employees, including, whether a collective bargaining agreement ("CBA") can waive a worker's statutory rights absent a clear and

unmistakable waiver and whether NRS 613.333 protects employees from termination for the legal use of medicinal marijuana during nonworking hours. Petitioner's arguments in this matter, if adopted by the Court, would limit employee rights in violation of United States Supreme Court precedent, Nevada law, and the public policy of the State of Nevada.

This brief will focus on the above two issues, in order. Specifically:

1) A CBA cannot waive an employee's statutory rights absent a clear and unmistakable waiver of those statutory rights; and

2) An employer that terminates an employee for the lawful use of medical marijuana during nonworking hours which does not affect the employee's ability to perform her job, or the safety of other employees is in violation of NRS 613.333.

LEGAL ARGUMENT

I. A Statutory Right Cannot Be Waived by a Collective Bargaining Agreement Unless the Agreement Contains Language That Clearly and Unmistakably Waives the Specific Statutory Right.

A. Collective Bargaining Agreements Generally Deal With Contractual Rights and Do Not Bar Employees From Filing Lawsuits to Enforce Statutory Right.

Though this Court has not yet addressed the issue, the United States Supreme Court and the Ninth Circuit have unambiguously

rejected the contention that employees' statutory rights can be waived by general CBA provisions.[1] Instead, courts' general position is that rights arising from a CBA are contractual rights and are "separate and distinct" from employee rights created by legislation. *See Albertson's, Inc. v. United Food & Commercial Workers Union, AFL-CIO & CLC*, 157 F.3d 758, 760 (9th Cir. 1998) ("The Supreme Court's decision in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 101 S. Ct. 1437 (1981) makes clear that the rights of employees arising out of the collective bargaining agreement are separate and distinct from those arising out of a statute such as the FLSA").

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[1] In addition to the United States Supreme Court and the Ninth Circuit, nearly every other federal Circuit Court of Appeals holds that employees seeking to sue to enforce statutory rights are not barred from doing so by general CBA provisions. *See Albertson's, Inc. v. United Food & Commercial Workers Union, AFL-CIO & CLC*, 157 F.3d 758, 761-762 (9th Cir. 1998) (citing *Penny v. United Parcel Service*, 128 F.3d 408, 413-14 (6th Cir. 1997) (Americans with Disabilities Act (ADA)); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453-54 (10th Cir. 1997) (Title VII), *vacated on other grounds*, 118 S. Ct. 2364 (1998); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526-27 (11th Cir. 1997) (ADA); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 364-65 (7th Cir.) (Title VII, ADA and Age Discrimination in Employment Act (ADEA)), *cert. denied*, 139 L. Ed. 2d 227, 118 S. Ct. 294, 295 (1997); *Varner v. Nat'l Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996) (Title VII); *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995) (FLSA); *Fujikawa v. Gushiken*, 823 F.2d 1341, 1345 (9th Cir. 1987) (ERISA); *Zipf v. ATT*, 799 F.2d 889, 893 n.5 (3d Cir. 1986) (ERISA).

In *Barrentine*, respondents argued that statutory FLSA claims are well suited to resolution via CBA arbitration agreements because wage and hour issues are "at the heart of the collective bargaining process." *Barrantine*, 450 U.S. at 738. The Supreme Court rejected this argument, holding that the at-issue statute specifically granted individual employees a right of action and allowed individual employees to file a lawsuit to enforce their statutory rights. *Id* at 740 (citing 29 USC § 216(b)). The Ninth Circuit similarly held that, although employees can vindicate contractual rights within a CBA grievance process, employees also have an independent right to file suit to uphold individual rights arising from statutes. *See Albertson's Inc.*, 157 F.3d at 760-761.

One of the most succinct statements of the law regarding statutory claims in the context of CBAs came in *Albertson's Inc.*: "[W]e hold that employees covered by a collective bargaining agreement are entitled to take their [statutory] claims to court regardless of whether those claims may also be covered by the grievance-arbitration procedure." 157 F.3d at 762. This is because, "'[t]he statutory enforcement scheme grants individual employees broad access to the courts…permitting an aggrieved employee to bring his statutory wage and hour claim 'in any

Federal or State court of competent jurisdiction.' No exhaustion requirement or other procedural barriers are set up, and no other forum for enforcement of statutory rights is referred to or created by the statute.'" *Id*. at 760 (quoting *Barrantine*, 450 U.S. at 740). Moreover, "[i]n submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under [the statute], an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly, no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.'" *Id*. at 760-761 (quoting *Barrantine*, 450 U.S. at 745-746). Thus, "it is irrelevant whether the employees' claims may present an arbitrable dispute; **they have an independent statutory right under the FLSA that they are entitled to pursue in court**." *Id*. at 761 (emphasis added).

Respectfully, this Court should adopt and apply the U.S. Supreme Court and various federal circuit courts' general rule that employees' statutory rights are separate and distinct from those rights dealt with in

a CBA and that employees are entitled to a judicial forum for their statutory claims.

B. Waiver of Statutory Rights via a CBA is the Exception to the General Rule and Can Only Occur When the CBA Clearly and Unmistakably Waives Specific Statutory Rights.

Although the existence of a CBA does not bar an employee from filing a lawsuit to enforce statutory rights, there is a very limited circumstance in which employees' statutory rights can be waived in a CBA. The U.S. Supreme Court has held that a waiver of statutory rights in a CBA is effective only if the waiver of a judicial forum for the statutory claims is "clear and unmistakable." *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S.Ct. 1467, 1477 (1983) ("[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' **More succinctly, the waiver must be clear and unmistakable**.") (emphasis added); *see also Wright v. Univ. Maritime Serv. Corp.*, 525 U.S. 70, 79-81, 119 S.Ct. 391, 397 (1998) (citing to *Metro. Edison* and holding that the important right to a judicial forum is "protected against less-than-explicit union waiver in a CBA."); *see also Livadas v. Bradshaw*, 512

U.S. 107, 125, 114 S. Ct. 2068, 2078 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409 n.9, 108 S.Ct. 187 (1988).

The Ninth Circuit and courts in the U.S. District Court for the District of Nevada follow this precedent. *See, e.g., Small v. Univ. Med. Ctr. of S. Nev.*, 2012 U.S. Dist. LEXIS 162664, at *2 (D. Nev. Nov. 14, 2012) ("any agreement to submit statutory claims to the grievance and arbitration procedure contained in a CBA – and thus to waive the right to a judicial forum for such claims – must be 'clear and unmistakable.'") (citing *Wright,* 525 U.S. at 80-81); *see also Wawock v. CSI Elec. Contractors, Inc.*, 649 Fed. Appx. 556, 558-559 (9th Cir. 2016) (holding that a CBA's requirement that "all grievances or questions in dispute" be arbitrated did not constitute a clear and unmistakable waiver of employees' statutory rights); *Butler v. Clark Cty.*, 2017 U.S. Dist. LEXIS 222289, at *14 (D. Nev. Dec. 28, 2017) (rejecting argument that employee's statutory claim is barred by CBA's arbitration clause because employer "has not identified where the CBA clearly and unmistakably requires employee to arbitrate and give up a judicial forum for their [statutory] claims"); *Sifre v. City of Reno*, 2014 U.S. Dist. LEXIS 118970, at *16 (D. Nev. 2014) (finding that the CBA's grievance scope of "disputes

concerning the interpretation, application, and enforcement of the express provisions of this agreement" did not constitute clear and unmistakable waiver of employees' statutory rights in part because the article concerning grievances did not mention the statute, specifically, or statutory rights, generally).

The NJA respectfully urges this Court to adopt this standard and hold that a CBA's general grievance policy does not waive an employee's statutory rights absent a clear and unmistakable waiver.

C. The CBA at Issue Here Does Not Clearly and Unmistakably Waive Real Party in Interest's Statutory Rights.

In the instant case, Petitioner argues that Real Party in Interest's statutory claims within NRS 613.333 should fail because the CBA provided for termination for testing positive for marijuana and because he did not pursue a grievance within the CBA. Both arguments should be roundly rejected.

Here, the CBA contains no language purporting to waive employees' rights within NRS 613.333, nor does Petitioner argue that it does. *See* PA 46–109. Specifically, the CBA's grievance provision states: "A grievance shall be limited and only defined as a dispute regarding the

interpretation and/or application of the provisions of this Agreement arising during the term of this Agreement filed by the Union signatory to this Agreement or by an employee covered by this Agreement alleging a violation of terms and provisions of this Agreement." PA 76. Courts have refused to hold that broad language such as this is sufficient to waive an employee's statutory rights. For example, in *Small v. Univ. Med. Ctr. of S. Nev.*, 2012 U.S. Dist. LEXIS 162664 (D. Nev. Nov. 14, 2012), the at-issue grievance provision in the CBA included language which defined "grievance" as "a dispute regarding the interpretation and application of the provisions of the Agreement…alleging a violation of the terms and provisions of this Agreement." *Small*, 2012 U.S. Dist. LEXIS 162664, *3. The *Small* court decided that "[t]his language does not clearly and unmistakably require the plaintiffs to submit their statutory claims to the CBA's grievance-arbitration procedure. In fact, it is limited to disputes arising out of the agreement itself." *Small*, 2012 U.S. Dist. LEXIS 162664, at *3. Similarly, the CBA in this case limits the scope of its grievance provision to disputes regarding "the interpretation and/or application of the provisions of this Agreement…." PA 76. Critically, the

grievance provision does not include a clear and unmistakable waiver of employees' statutory claims, including those arising out of NRS 613.333.

More pointedly, the CBA expressly states that, **"[n]othing herein shall preclude the union or an employee covered by this Agreement from exercising the statutory rights of the employee** to process an alleged case(s) of illegal discrimination with any regulatory authority having jurisdiction over such cases **or in court**." PA 79 (emphasis added). Thus, rather than clearly and unmistakably waiving employees' statutory rights, the CBA expressly excludes statutory claims from the scope of the agreements' grievance provision.

Thus, because the subject CBA does not clearly and unmistakably waive Real Party in Interest's right to judicially pursue statutory claims within NRS 613.333, he was under no obligation to seek relief via the CBA's grievance process. Additionally, because there was no waiver of claims within NRS 613.333, Real Party in Interest's claims within that statute should not be dismissed based on Petitioner's CBA related arguments.

II. The Court Should Apply the Plain Language of NRS 613.333 and Hold That the Statute Applies to Medical Marijuana, and Other Products Devised or Legalized After the Statute Was Enacted.

In its reply brief, Petitioner argues that the Legislature did not intend to include medical marijuana in the definition of "products" within NRS 613.333. In support of this argument, Petitioner posits that had the Legislature intended to include medical marijuana, it would have amended the statute after legalization of medical marijuana to indicate as much. Petitioner's argument, however, ignores basic legal concepts related to statutory interpretation, as Petitioner attempts to support its position by inappropriately referencing legislative intent and history despite the fact that the statute's language is plain and unambiguous. This section will address A) legislative intent and B) statutory application and amendment.

A. The Court Should Not Consider Legislative Intent Because the Language of NRS 613.333 is Unambiguous.

When a statute's language is clear on its face, the Court must apply the plain meaning and cannot look beyond the statutory language. *See State v. Lucero*, 127 Nev. 92, 95-96, 249 P.3d 1226, 1228 (2011) ("Our analysis begins and ends with the statutory text if it is clear and

unambiguous.") ("when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent.") (internal quotation omitted); *see also State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) ("We must attribute the plain meaning to a statute that is not ambiguous."). Statutory ambiguity exists only when the statute's language "lends itself to two or more reasonable interpretations." *Catanio*, 127 Nev. at 1033.

In its writ petition, Petitioners argue that Respondent seeks to "repurpose" NRS 613.333 and argues that the Nevada Legislature did not intend to protect employees who legally use medical marijuana. *See* Pet. at 13. This argument is ineffective, however, because the statute is clear and unambiguous on its face. The at-issue statutory language reads as follows:

> **NRS 613.333 Unlawful employment practices: Discrimination for lawful use of any product outside premises of employer which does not adversely affect job performance or safety of other employees.**
>
> 1. It is an unlawful employment practice for an employer to:
>
> (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.

Petitioner's argument turns on the theory that the Nevada Legislature could not have intended for the statute to include medical marijuana as a "product" because medical marijuana was not legalized until ten years after NRS 613.333 was enacted. *Id.* As noted above, however, this argument is completely irrelevant because the Court cannot look to the Legislature's intent unless the statute is ambiguous. Critically, Petitioner does not argue that Real Party in Interest's lawful use of medical marijuana affected his ability to perform his job or the safety of other employees. Accordingly, the only question is whether the statute is ambiguous as to the phrase "any product."

Statutory ambiguity exists only when a statute's language can be reasonably interpreted in more than one way. That is simply not the case here. The Nevada Legislature's chosen wording "any product" is clear and not subject to any interpretation beyond the plain and simple definition of the words. On its face, the statute is all-encompassing in referencing the "lawful use in this State of any product."

Petitioner would have the Court essentially modify the statute to read "lawful use in this State of any product *that is currently legal*," or something similar. This is not only not the Court's role, but, within the "plain meaning" rule, the Court is prohibited from reading words into statutes where the plain language is unambiguous. *See Berkson v. Lepome*, 126 Nev. 492, 508, 245 P.3d 560, 571 (2010) (holding that "adding words the statute doesn't contain" would violate the "plain meaning" rule); *see also Young Elec. Sign Co. v. Erwin Elec. Co.*, 86 Nev. 822, 825, 477 P.2d 864, 866 (1970) ("If the intention of a statute is clear, courts do not resort to the rule of *ejusdem generis* because the statute must control. Courts may not read something into the statute which is not there.").

B. The Court Should Reject Petitioner's Argument That the Legislature Would Have Amended NRS 613.333 if it Wanted the Statute to Include Protections for Use of Medical Marijuana.

Petitioners also argue that the Legislature would have amended NRS 613.333 after the legalization of medical marijuana if it intended for the statute to include medical marijuana as a "product." This argument also fails and should be rejected by the Court.

This Court has held that a statute "promulgated for…public benefit…should be liberally construed and broadly interpreted." *Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 94, 64 P.3d 1070, 1075 (2003) (quoting 85-19 Op. Att'y Gen. 90, 93 (1985)); *see also Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 218 P.3d 847 (2009). Here, the fact that the Legislature did not amend NRS 613.333 after the legalization of medical marijuana to specifically incorporate medical marijuana into the statute is meaningless. The statute's plain language – "all products" – already includes medical marijuana so long as the employee uses it lawfully and it does not affect his or her job performance or the safety of other employees. *See* NRS 613.333. Because the Legislature selected such broad language that could apply prospectively, the better argument would actually belong to Real Party in Interest; that is, if the Legislature did not want the statute's broad language to include medical marijuana, the Legislature would have amended the statute to specifically *exclude* it. Regardless, because consideration of any such arguments is inappropriate in this context, the Court should reject Petitioner's argument that the Legislature would have amended the statute if it intended for it to include medical marijuana.

CONCLUSION

Based on the foregoing, NJA respectfully urges the Court to hold that a CBA cannot waive an employee's statutory rights absent a clear and unmistakable waiver. Furthermore, the plain and unambiguous language of NRS 613.333 would clearly encompass legalized medical marijuana into its definition of "product." Application of this framework to the facts of the underlying case mandate that this Court should uphold the District Court's order denying Petitioner's motion to dismiss.

DATED this 21st day of January 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this amicus curiae brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook 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 is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 3,354 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this 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 the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of January 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION (In Support of Real Party in Interest)** with the Supreme Court of Nevada on the 21st day of January 2022. I will electronically serve the foregoing document in accordance with the Master Service List as follows:

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