THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2020-0470

SCOTT PAINE

v.

RIDE-AWAY, INC.

Appeal Pursuant to Rule 7

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND DISABILITY RIGHTS CENTER OF NEW HAMPSHIRE IN SUPPORT OF PLAINTIFF/APPELLANT

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QUESTION PRESENTED

Did the trial court err when it denied the Plaintiff/Appellant's Motion to Amend his Complaint by ruling that "as a matter of law, employers are not required to make reasonable accommodations for marijuana use" rather than engaging in the usual, fact-intensive analysis governing failure-to-accommodate claims, which has the effect of exempting from the Law Against Discrimination the thousands of people who are enrolled in New Hampshire's therapeutic cannabis program?

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the American Civil Liberties Union ("ACLU")—a nationwide, nonpartisan, public-interest organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of individual rights guaranteed under state and federal law, including the equal access to justice or the law of Granite Staters with disabilities. The ACLU-NH believes that its experience in these issues will make its brief of service to this Court.

The Disability Rights Center-NH ("DRC-NH"), which is part of a national network of protection and advocacy systems, is federally mandated to provide legal representation and related advocacy services to persons with disabilities in New Hampshire ("NH"). DRC-NH provides legal advice to individuals with disabilities on a vast array of employment issues including employment discrimination, access to vocational services, and working to remove barriers for Social Security beneficiaries who want to

return to work. Approximately 1 in 8 NH residents have a disability, many of which strive to be productively and meaningfully employed. Houtenville, A., & Boege, S., *Facts & Figures: The 2019 Report on Disability in New Hampshire,* University of New Hampshire, Institute on Disability, 1, 4 (2019), App., 6.[1] The Superior Court's ruling in this case precluding a fact-based assessment of what constitutes a reasonable accommodation in the workplace will adversely and unfairly impact persons who treat their disabilities with therapeutic cannabis.

STATEMENT OF FACTS AND OF THE CASE

Amici Curiae incorporate Plaintiff/Appellant's Statement of Facts and of the Case.

SUMMARY OF ARGUMENT

Amici write in support of Appellant's position that it was error to deny the Motion to Amend his Complaint, and focus their brief on his claim for failure to provide a reasonable employment accommodation.

The trial court's decision, if allowed to stand, will deny potentially thousands of people in New Hampshire the protections otherwise afforded to them under anti-discrimination laws. Specifically, there are over ten thousand people in the State who treat their conditions with therapeutic cannabis and many of them who would otherwise qualify for employment accommodations stand to be adversely affected by the decision. People with disabilities already face numerous barriers to employment and the trial court's decision could present yet another barrier. Despite this, and even as the legal landscape shifts towards increasing recognition of employment

[1] Citations to App., __ refer to the appendix to this brief.

benefits for therapeutic cannabis users, the trial court ignored the developed, fact-intensive rubric used across the state and country in determining whether an employer failed to provide a reasonable accommodation to an employee with a disability.

In doing so, the trial court erroneously concluded that use of therapeutic cannabis need not ever be—as a matter of law—a reasonable accommodation that an employer must offer an employee upon request. This decision was erroneous for two reasons. *First*, the trial court erred as a matter of statutory interpretation when it concluded that the Law Against Discrimination and the statute enabling the therapeutic cannabis program never require an employer to accommodate therapeutic cannabis use. This conclusion was contrary to the canons of statutory construction and would have rendered part of the statute mere surplusage. *Second*, the trial court erred by not rejecting Appellee's contention that cannabis being prohibited under the federal Controlled Substances Act means that an employer need not accommodate therapeutic cannabis when reasonable. An analysis under the preemption doctrine, as this Court recently recognized, reveals the limited impact of the federal Act on state statutory schemes such as the Law Against Discrimination.

For those reasons, the decision of the trial court to deny Appellant's Motion to Amend should be *reversed*, and the case should be *remanded*.

ARGUMENT

I. The Trial Court's Decision Would Deny Potentially Thousands of Granite Staters Recourse Under the Law Against Discrimination

The trial court's decision places thousands of Granite Staters at risk of losing protections afforded under the Law Against Discrimination. Over ten thousand qualified patients are enrolled in the State's therapeutic cannabis[2] program for treatment of a qualifying medical condition. Granite Staters with disabilities face numerous barriers to employment, and, as a result, the law has evolved to create a fact-intensive inquiry that considers multiple factors that are designed to balance the interests of workers with disabilities and their employers in a way that is consistent with the legislature's findings and declarations that "practices of discrimination against any of its inhabitants . . . are a matter of state concern, [and] that such discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RSA 354-A:1. Yet even as the legal landscape is evolving to confirm employment protections exist for those using therapeutic cannabis, the trial court decided that, as a matter of law, an employer need never reasonably accommodate an employee using therapeutic cannabis away from work premises. This decision upends this doctrine and categorically denies legal protections under the Law Against Discrimination to the thousands of

[2] RSA ch. 126-X uses the term "cannabis" but the trial court uses the term "marijuana." This brief uses the terms interchangeably. *See Appeal of Panaggio*, 172 N.H. 13, 14 n.1 (2019).

Granite Staters who use therapeutic cannabis and who may seek accommodations from employers for their disabilities.

A. Therapeutic cannabis in New Hampshire

In 2013, the state legislature created the Therapeutic Cannabis Program through the passage of RSA ch. 126-X. The Therapeutic Cannabis Program allows for marijuana as a medical treatment for a variety of serious and debilitating disabilities. *See* RSA 126-X:1, IX. An individual's disability must be one that is considered a "qualifying medical condition" under RSA 126-X:1, IX in order to be certified. Examples of qualifying medical conditions include cancer, traumatic brain injury, multiple sclerosis, Alzheimer's disease, and moderate to severe post-traumatic stress disorder ("PTSD"). RSA 126-X:1, IX(1). Additionally, for those whose disability results in severe and chronic pain, therapeutic cannabis is an option when other medications and medical interventions have not eased their suffering. *See* RSA 126-X:1, IX (2)(b)(1)-(3).

The number of New Hampshire residents who benefit from the therapeutic cannabis program has increased substantially in recent years from 2,089 qualified patients in 2016 to 10,688 in 2020, an increase of over 300%. App., 15. As of 2019, the most common disabilities experienced by patients of the program were moderate to severe chronic pain, severe pain that has not responded to treatment, spinal cord injury or disease, and moderate to severe PTSD. *Therapeutic Cannabis Program 2019 Data Report,* New Hampshire Dept. of Health and Human Services, Division of Public Health Services, 1, 18 (2019), App., 16, 35. Additionally, about 10% of qualifying patients have one or more injuries that result in one or more qualifying symptoms, such as severe pain, severe muscle spasms, or

severe nausea. *Therapeutic Cannabis Program 2019 Data Report* at 18, App. 35. When asked about the effectiveness of therapeutic cannabis as a treatment for their disabilities, those that responded reported positive results at rates between 72% and 98% across New Hampshire's four treatment centers. *Id*. at 21, App. 38. Nearly 85% of respondents were able to reduce the amount of some or all of their other prescription medications through the use of therapeutic cannabis. *Id*. at 27, App. 44. The definition of those with a disability, RSA 354-A:2, IV, and with a qualifying medical condition for the purposes of therapeutic cannabis use, RSA 126-X:1, IX overlap significantly. A substantial number of the 10,688 individuals currently utilizing therapeutic cannabis as a medical treatment, and any future qualified patients, stand to be harmed by the trial court's holding, should they seek a reasonable accommodation in the hiring process or while on the job related to their medicinal use of therapeutic cannabis.

B. Persons with Disabilities Already Face Numerous Barriers to Employment

Over 30 million people in the United States over the age of 16 have a disability. United States Bureau of Labor Statistics, *Persons with a Disability: Barriers to Employment and Other Labor-Related Issues News Release* (July 2019), https://www.bls.gov/news.release/archives/dissup_05012020.htm#:~:text=A%20person's%20own%20disability%2C%20lack,duties%20because%20of%20their%20disability. Many of those people desire to work, but face individual, environmental, and social barriers to do so. Idya Sundar, et al., *Striving to work and overcoming barriers: Employment strategies and successes of people with disabilities*, 48 J. Vocational Rehabilitation, 93,

94-95 (2017), App. 67-68. Examples of barriers that persons with disabilities report experiencing while searching for work or at their current place of employment include employers assuming the person cannot do the job because they have a disability, lack of job counseling, education or training, inferior pay compared to their peers without disabilities, and requiring accommodations on the job. Sundar, et. Al., at 102, App. 75. In a 2017 study, nearly half of those with disabilities responded that they require an accommodation at work due to their disability. *Id.*

In New Hampshire, people with disabilities are less likely to be employed than those without. Houtenville, A., & Boege, S., *Facts & Figures: The 2019 Report on Disability in New Hampshire,* University of New Hampshire, Institute on Disability, 4 (2019), App. 6. A 2019 report found that 42.0% of NH residents ages 18-64 with a disability are employed, compared to an employment rate of 82.2% for their non-disabled peers. *Id.* The trial court's decision that accommodations for medical marijuana are unreasonable as a matter of law will have far reaching adverse impacts on the disability community. This decision has the potential to prevent people with disabilities who are currently unemployed from seeking employment should they require an accommodation related to therapeutic use of marijuana. As a consequence, the employment-gap in New Hampshire between persons with disabilities and persons without disabilities could become even wider, especially as participation in the Therapeutic Cannabis program continues to grow every year.

C. Accommodations involving therapeutic cannabis are not unreasonable as a matter of law and require individualized consideration

The reasonable accommodation process is well-established in New Hampshire. The New Hampshire Law Against Discrimination makes it unlawful for an employer to "refuse to hire or employ or to bar or to discharge from employment" an individual on the basis of their disability. RSA 354-A:7. Further, failure to provide a reasonable accommodation to an employee with a disability, absent a showing of undue hardship, is also considered unlawful discrimination. *See* RSA 354-A:7, VII(a). While the legal requirement for reasonable accommodation is clearly established in RSA 354-A, the specific requirements of the reasonable accommodation process are not enumerated in the statute or supporting regulations. This Court has previously looked to federal statutes and case law from other jurisdictions to guide its analysis of employment discrimination issues that arise under RSA 354-A. *See Reed v. New Hampshire Dept. of Health and Human Services,* 2018 WL 2213798 (N.H. 2018).

As recognized by this Court, "[t]he hallmark of a reasonable accommodation is effectiveness." *Id. at *1 (*citing *Wright v. New York State Dept. of Corrections*, 831 F.3d 64,72 (2d Cir. 2016)). What is considered reasonable for one employee and/or one employer is not going to be universally effective, therefore, a specific inquiry involving the employee with a disability and the employer is paramount to determining whether a particular accommodation is reasonable and if not, what other options may be effective. *See* United States Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA* (2002) https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting, App. 83. This

is accomplished through a "fact-specific" analysis on an individualized basis. *See Reed,* 2018 WL 2213798 at *1.

Here, trial court, in its *Order on Motion for Judgment* on the Pleadings, and again in its *Order on Motion to Amend*, held that "as a matter of law, employers are not required to make reasonable accommodations for marijuana use." *Order on Mot. to Amend*, 4, Sept. 15, 2020. The Supreme Court of Massachusetts considered analogous facts and therapeutic cannabis law and held that an accommodation involving medical marijuana is not per se unreasonable, despite the fact that marijuana possession in general, remains illegal at the Federal level. *See Barbuto v. Advantage Sales and Marketing, LLC*, 78 N.E.3d 37, 46 (Mass. 2017). The *Barbuto* court further held that even if the requested accommodation seems unreasonable on its face, the employer still has a duty to engage in the interactive process with the employee. *See id.* at 47.

Amici do not suggest that every employee should be able to ingest cannabis, only that the standard reasonable-accommodation should occur in the context of therapeutic cannabis use. The bright-line rule established by the trial court's orders here, declaring therapeutic cannabis accommodations per se unreasonable, will unfairly and adversely impact thousands of people with disabilities across the state and departs from the established practice of a fact-based inquiry into the reasonableness of a requested accommodation.

D. The local and national landscape is evolving to increase protections for employees who treat their disabilities with therapeutic cannabis

According to the Marijuana Policy Project, it is estimated that there are over 4 million people in the United States using therapeutic cannabis as a treatment for their disabilities. Medical Marijuana Policy Project, *Medical Marijuana Patient Numbers* (Updated Dec. 2, 2020), https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/. Thirty-six states have approved medical marijuana or therapeutic cannabis as a treatment for disabilities. National Conference of State Legislatures, *State Medical Marijuana Laws* (Updated Mar. 1, 2021), App., 159. In recent years, states are considering or have already passed legislation enhancing the protections in place for employees that are patients of a therapeutic cannabis program. For example, Nevada law states that "the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medicinal use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not: (a) pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) prohibit the employee from fulfilling any and all of his or her job responsibilities." NRS 453A.800 (3).

In Massachusetts, a bill is currently pending in the senate that would amend the law to prevent discrimination against the use of marijuana in hiring, termination or any terms and conditions of employment provided that, "(i) the use of marijuana by the employee is neither in the work place during work hours, nor while the employee is performing tasks related to employment; and (ii) an employee is not impaired due to the consumption of marijuana in the workplace or while performing tasks related to

employment." An Act relative to the fair treatment of employees, SD.284, 192nd Gen. Court, ¶ 6-11 (Mass. 2021), App., 166. The amendment would also explicitly provide for civil actions to be brought against an employer that violates those protections. *Id*. at ¶ 21-27.

While New Hampshire law does not currently include specific protections beyond a general rule against discrimination, enhanced employment protections for patients of the Therapeutic Cannabis program are on the horizon. The New Hampshire House of Representatives is currently considering a bill (which just went through an interim study) that prevents employers from firing a qualified patient of the therapeutic cannabis program who tests positive for cannabis on a drug test. *See* An Act relative to employment protection for qualified patients of New Hampshire's therapeutic cannabis program, HB 1386, 2020 Session, ¶ 3-6 (N.H. 2020), App., 170. The landscape nationally and locally in New Hampshire is moving towards increased protections for therapeutic cannabis patients in the workplace.

II. The Trial Court Erred When It Denied the Motion to Amend

The trial court's denial of Appellant's Motion to Amend was an error because it did not properly apply the canons of statutory construction in concluding that New Hampshire law did not require employers, under some circumstances, to accommodate therapeutic use of marijuana. It also erred by failing to conduct an appropriate analysis of the therapeutic cannabis program and the federal Controlled Substances Act under the preemption doctrine. As a result, if the trial court's decision is allowed to stand, Granite Staters who are enrolled in the State's therapeutic cannabis program will be automatically denied the fact-intensive analysis of failure-

to-accommodate claims to ensure that they are not discriminated against on the basis of disability.

A. The Trial Court Erred in Concluding That New Hampshire Statutes Do Not Require Employers to Accommodate Therapeutic Cannabis

In denying the Appellant's Motion to Amend, the trial court incorporated rulings it made in granting Appellee's Motion for Judgment on the Pleadings regarding Appellant's original complaint. The court wrote: "in its order dismissing Plaintiff's complaint, the Court held that 'a reading of RSA 126-X in conjunction with RSA 354-A does not create an affirmative obligation for an employer to accommodate marijuana use by an employee, even if such use is authorized by state law.'" *Order on Mot. to Amend*, 2, Sept. 15, 2020 (*quoting Order on Mot. for J. on the Pleadings*, 9, Mar. 16, 2020). The trial court continued, after recounting Appellant's proposed additional factual allegations, "Plaintiff's additional facts are of no avail. Even assuming that Plaintiff's suggested accommodations would have been feasible or easy for Mobility Works to implement, the Court has made it clear that, as a matter of law, employers are not required to make reasonable accommodations for marijuana use." *Id.*, p. 4.

The trial court's legal reasoning in its *Order on Motion for Judgment on the Pleadings*, which was incorporated into its *Order on Motion to Amend*, was wrong as a matter of statutory interpretation because neither the Law Against Discrimination (RSA ch. 354-A) nor the therapeutic cannabis program (RSA ch. 126-X) provides a blanket exemption from the standard requirement that employers provide employees with disabilities a reasonable accommodation merely because the accommodation sought is therapeutic use of cannabis. Moreover, the trial court's interpretation of the

therapeutic cannabis program statute would read words out of that statute and impermissibly renders them mere surplusage.

"In matters of statutory interpretation, [this court is] the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole." *Casey v. N.H. Sec'y. of State*, 173 N.H. 266, 271 (2020) (per curiam). This court first looks "to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." This Court will not presume that the legislature would "waste words" and will construe statutes so that "every word" is "given effect." *Town of Amherst v. Gilroy*, 157 N.H. 275, 279 (2008). A trial court should not view words in a statute as "mere surplusage." *Glick v. Ossipee*, 130 N.H. 643, 645 (1988). This Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Casey*, at 271. And this Court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Id.*

Under the Law Against Discrimination, it is an unlawful discriminatory practice "For any employer not to make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability who is an applicant or employee, unless such employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business or the employer." RSA 354-A:7, VII (a). A "disability" is defined as "(a) A physical or mental impairment which substantially limits one or more of such person's major life activities; (b) A record of having such an impairment; or (c) Being regarded

as having such an impairment." RSA 354-A:2, IV.[3] A "Reasonable accommodation" is defined to include "(a) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities[, and] (b) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." RSA 354-A:2, XIV-b. Nowhere does the Law Against Discrimination provide that therapeutic cannabis use cannot be a reasonable accommodation.

Nor does RSA ch. 126-X (Use of Cannabis for Therapeutic Purposes) provide that use of cannabis may not be a reasonable accommodation for an employer to be required to provide. In fact, it does the opposite by implicitly requiring reasonable accommodations absent special circumstances.

The therapeutic cannabis program enacted by the legislature and codified RSA ch. 126-X represents a legislative judgment that it is in the public interest to permit those under the care of a medical professional to use cannabis to treat one of the legislatively enumerated qualifying medical conditions. The program is comprehensive, and includes limits on the

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[3] While the statute makes clear that "disability" does not include current, illegal use of . . . a controlled substance as defined in the Controlled Substances Act," *id.*, Appellant did not allege that he was *disabled* by cannabis use—rather, he alleged a disability of Post Traumatic Stress Disorder, and requested cannabis as an *accommodation*.

amount of cannabis a patient may possess, RSA 126-X:2, I, who may diagnose a qualifying medical provision, RSA 126-X:1, VII, and what conditions qualify for enrollment in the program, RSA 126-X:I, IX. It further includes provisions for the creation of registry identification cards, RSA 126-X:4, and annual reports to be issued by the Department of Health and Human Services, RSA 126-X:10.

The statutory scheme includes a list of prohibitions and limitations on the use of therapeutic cannabis. Of particular relevance to this case is RSA 126-X:3, III, which states "Nothing in this chapter shall be construed to require: . . . (c) Any accommodation of the therapeutic use of cannabis *on the property or premises of any residential care facility, nursing home, hospital or hospice house, jail, correctional facility, or other type of penal institution where prisoners reside or persons under arrest are detained. This chapter shall in no way limit an employer's ability to discipline an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis.*" (emphasis added). In this section, the legislature specifically exempted the property of certain types of institutions in which it determined that it is not in the public interest to permit the use of cannabis. There is no dispute that Appellee's business is not a residential care facility, nursing home, hospital, hospice house, jail, correctional facility, or other type of penal institution. There is likewise no dispute at the pleading stage that Appellant did not request an accommodation to use cannabis in the workplace or to work while under the influence of cannabis.

RSA 126-X:3, III(c) demonstrates that the legislature did not create a blanket rule that therapeutic use of cannabis need never be a reasonable accommodation under the Law Against Discrimination. To the contrary, the legislature enumerated specific places that need not permit its use and limited an employer's ability to discipline an employee for therapeutic use of cannabis to situations in which an employee is using cannabis at the workplace or is working under the influence of cannabis. Were the trial court's decision—that an employer need never accommodate therapeutic cannabis use—correct, it would render this section surplusage. However, courts will not presume that the legislature would "waste words" and will construe statutes so that "every word" is "given effect." *Gilroy*, 157 N.H. at 279. As a matter of statutory interpretation, this Court should conclude that the statutes do not provide a blanket exemption from the reasonable accommodation mandate to the use of therapeutic cannabis.

B. The Law Against Discrimination is not Preempted by Federal Law

While the trial court did not explicitly rule that the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq* preempts application of the Law Against Discrimination to Appellant's case, the Appellee argued that the federal statute precludes use of therapeutic cannabis as a reasonable accommodation. *Order on Mot. for J. on the Pleadings*, 9, Mar. 16, 2020, ("Although Mobility Works concedes that RSA chapter 126-X provides an exception to the criminal code that allows for marijuana use under a specific set of circumstances, it asserts that the default under New Hampshire law is that marijuana use is still illegal and that marijuana use is both illegal and criminalized under federal law. As such, Mobility Works

argues that Plaintiff's claims must be dismissed because the requested accommodation to use marijuana is unreasonable as a matter of law."). Moreover, this issue is likely to arise on remand and should be addressed now. *See State v. Brawley*, 171 N.H. 333, 240 (2018) (addressing an issue not raised in the notice of appeal "because this question will likely arise on remand, it presents a question of statutory interpretation, which we would review *de novo*, and deciding it now will avoid unnecessarily burdening the parties with additional steps in the litigation process.") (citation and quotations omitted).

Whether the federal prohibition on possession of marijuana provides a blanket exemption from the Law Against Discrimination for use of therapeutic cannabis as a reasonable accommodation for disability turns on whether the Controlled Substances Act preempts the state statutes. The federal preemption doctrine is based on the Supremacy Clause of the United States Constitution. Federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. This Court recently discussed the preemption doctrine and the Controlled Substances Act in the context of a worker's compensation award:

> Two basic principles guide all preemption analyses. First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic

police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Broadly speaking, there are three different types of federal preemption: "express," "field," and "conflict." Express preemption occurs when Congress preempted state authority by so stating in express terms. Field preemption occurs when federal law occupies a "field" of regulation so comprehensively that it has left no room for supplementary state legislation. "Conflict preemption" may occur either when it is impossible for a private party to comply with both state and federal requirements, or when compliance with both state and federal laws is possible, but state law stands as an impermissible obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Because the [Controlled Substances Act] contains a saving clause, our task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent. Section 903 of the CSA provides: No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

…

> [21 U.S.C.] Section 903 is an express invocation of conflict preemption. Some courts have ruled that, given the language in Section 903, the CSA preempts a state law only under impossibility preemption, and not under obstacle preemption. Other courts have disagreed.
>
> For the purposes of this appeal, we assume without deciding that, even if Section 903 refers only to impossibility preemption, we must still analyze whether obstacle preemption applies.

Appeal of Panaggio, 2021 N.H. LEXIS 20, **4-8 (March 2, 2021) (citations, quotations, and brackets omitted). In that case, this Court determined that neither doctrine preempted a worker's compensation insurer from reimbursing a worker for use of therapeutic cannabis. *Id.* at *1. Similarly, neither impossibility preemption nor obstacle preemption precludes employers from allowing therapeutic use of cannabis away from work as a reasonable accommodation for employees with disabilities

Impossibility preemption does not preclude an employer from permitting therapeutic use of cannabis of premises as a reasonable accommodation because it is not impossible for the employer to comply with such an accommodation and the Controlled Substances Act. "Impossibility pre-emption is a demanding defense." *Panaggio*, 2021 N.H. LEXIS 20 at *9 (quoting *Wyeth v. Levine*, 555 U.S. 555, 573 (2009)) "It requires the party asserting preemption to show that it is 'impossible for a private party to comply with both state and federal requirements.'" *Id.* quoting *Merck Sharp & Dohme Corp. v. Albrecht*, 130 S. Ct. 166, 1672 (2019). "However, for impossibility preemption to apply, the conflict must be actual, not hypothetical or speculative." *Id.*

All the state statutes do is require an employer to offer reasonable accommodations to employees with disabilities. As discussed above, reasonable accommodations include not retaliating against an employee who uses therapeutic cannabis off company premises and while not working. The state statutes specifically *do not* require an employer to permit cannabis at the workplace, and *do not* require an employer to allow employees to work under the influence of cannabis. Cannabis—or any other controlled substance—does not need to ever enter the workplace.

In this case, there is no direct conflict because the Controlled Substances Act does not criminalize an employer accommodating an employee's use of therapeutic cannabis out of work, and the Law Against Discrimination does not require an employer allow employees to use cannabis while working. It is not impossible for the employer to comply with the state statute and the federal statute. *Accord Callaghan v. Darlington Fabrics Corp.*, 2017 R.I. Super. LEXIS 88, *38-*44 (R.I. Super. Ct. May 23, 2017) (finding anti-discrimination statute not preempted by the Controlled Substances Act: "There is no physical impossibility here. As detailed above, the [state statute] does not require an employer to accommodate the medical use of marijuana in any work place. Marijuana need not enter the employer's premises. . . What an employee does on his or her off time does not impose any responsibility on the employer.") (Citations, brackets, and quotations omitted). Impossibility preemption is not a defense to Appellant's request for a reasonable accommodation in this case.

Nor is obstacle preemption a defense available here. "A party making an argument under obstacle preemption faces a heavy burden."

Panaggio, 2021 N.H. LEXIS 20, at *17 (citation, quotations, and brackets omitted). To find obstacle preemption, there must be "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As this Court recently explained:

> The Supreme Court has found obstacle preemption in only a small number of cases. First, where the federal legislation at issue involved a uniquely federal area of regulation, the Court has inferred a congressional intent to preempt state laws that directly interfered with the operation of the federal program. Second, the Court has inferred that Congress made a considered judgment or a deliberate choice to preclude state regulation when a federal enactment clearly struck a particular balance of interests that would be disturbed or impeded by state regulation. Absent such circumstances, the Supreme Court has frequently rejected claims of obstacle preemption.

Panaggio, 2021 N.H. LEXIS 20, at *18. "The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." *Id.* at *18 (quoting *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 241 (2d Cir. 2006)) (brackets omitted). "[T]he main objectives of the [Controlled Substances Act] were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzalez v. Raich*, 545 U.S. 1, 12 (2005). In *Panaggio*, this Court noted that the Act does not make it illegal for an insurer to reimburse an employee for his or her own purchase of medical marijuana, and the insurer had not met the high burden for

demonstrating that an order requiring an insurer to reimburse the cost of medical marijuana would create an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Similarly, here, there is nothing in the text of the Controlled Substances Act to demonstrate that an employer accommodating the use of therapeutic cannabis off work premises would frustrate Congress' objectives. As a result, obstacle preemption does not bar this reasonable accommodation. Other courts considering similar state statutory schemes have reached similar results. *Accord Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 326, 333-36 (D. Conn. 2017) (Controlled Substances Act did not preempt state statue prohibiting an employer from firing or refusing to hire an employee who uses medical marijuana); *Smith v. Jensen Fabricating Eng'r, Inc.*, 2019 Conn. Super. LEXIS 439, *4 (Conn. Super. Ct. March 4, 2019) (same); *Chance v. Kraft Heinz Foods Co.*, 2018 Del. Super. LEXIS 1773, *6-9 (Del. Super. Ct. December 17, 2019) (state statute prohibiting employment discrimination based on medical marijuana use not preempted); *Callaghan v. Darlington Fabrics Corp.*, 2017 R.I. Super. LEXIS 88, *38-*44 (R.I. Super. Ct. May 23, 2017) (same).

CONCLUSION

For the reasons discussed above, the decision of the trial court to deny Appellant's Motion to Amend should be *reversed*, and the case should be *remanded*.

Respectfully Submitted,

American Civil Liberties Union of New Hampshire and Disability Rights Center of New Hampshire,

By and through their attorneys,

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STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 5,654 words (including footnotes) from the "Question Presented" to the "Conclusion" of the brief.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 26th day of March, 2021 through the electronic-filing system on all counsel of record.

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