THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0685

APPEAL OF ANDREW PANAGGIO

On Appeal from the Compensation Appeals Board

BRIEF OF *AMICUS CURIAE* AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION

Dana M. Horton
(NH Bar #266851)
ROBINSON & COLE LLP
One Financial Plaza
14th Floor
Providence, RI 02903
Tel. 401-709-3300
Fax 401-709-3399
E-mail: dhorton@rc.com

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IDENTITY OF *AMICUS CURIAE* AND ITS INTEREST IN THE CASE

American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA was formed at the beginning of 2019 through a merger of two longstanding trade associations, American Insurance Association and Property Casualty Insurers Association of America. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe. On issues of importance to the property and casualty insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this Court. *See, e.g.*, *In re Appeal of Harleysville Ins. Co.*, 156 N.H. 532 (2007); *Grand China, Inc. v. United Nat'l Ins. Co.*, 156 N.H. 429 (2007); *Marcotte v. Timberlane/Hampstead School Dist.*, 143 N.H. 331 (1999). This allows APCIA to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCIA's interests are in the clear, consistent and reasoned development of law that affects its members and the policyholders they insure.

APCIA believes that the issue presented in this appeal will have a significant impact on its members, their policyholders (New Hampshire employers), and the New Hampshire workers' compensation system as a whole. Accordingly, APCIA respectfully submits this *amicus curiae* brief.

SUMMARY OF ARGUMENT

APCIA submits this brief to provide the Court with additional background and analysis relevant to the issues before the Court, and to explain possible ramifications of the Court's decision.

First, APCIA explains why insurance companies (and self-insured employers) should not be forced to risk violating federal criminal law, by funding the use of medical marijuana, in order to participate in the New Hampshire workers' compensation system. Under the United States Supreme Court's preemption decisions, a proper preemption analysis here focuses on whether federal law, at its core, forbids what state law requires, and that does not depend on the likelihood of prosecution or proof of elements of a crime. Most importantly from the perspective of APCIA and its member companies, insurers have brands and reputations to protect, and corporate ethics policies and procedures to maintain and enforce. Prudent companies do not risk violating criminal laws. No insurer should be forced to take such a risk, simply to participate in the workers' compensation insurance marketplace. The unanimous decision below of the Compensation Appeals Board ("Board"), adopting the decision of the Maine Supreme Judicial Court in *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10 (Me. 2018), correctly recognized that insurers and self-insured employers should not be required to assume a risk of violating federal criminal law, regardless of whether federal prosecution is likely. To require insurers to reimburse injured workers for medical marijuana has the potential to destabilize the New Hampshire workers' compensation insurance marketplace. To the extent that some policymakers desire to have injured workers reimbursed for medical marijuana under the workers'

compensation system, they should lobby Congress to change federal law. State courts cannot properly force insurers to disregard federal law.

Second, the result reached by the Board is consistent with the safety goals of the Workers' Compensation Act. Employers and insurers alike have a keen interest in safeguarding the health of injured workers, their co-workers and the general public, as well as the economic viability of the workers' compensation system. At present, there is insufficient evidence supporting the medical value of marijuana in treating injuries and conditions covered by the workers' compensation laws. Furthermore, many employers are subject to federal or state regulations requiring a drug-free workplace and drug testing of their employees. The safety of medical marijuana is of substantial concern because appropriate dosages of marijuana are not sufficiently defined, the effects of marijuana vary significantly from product to product and from individual to individual, and currently-available testing cannot measure impairment at the time of the test, the timing of exposure, or the dose consumed. All of this makes it very challenging, if not impossible, for employers to maintain safety in a workplace where employees are using medical marijuana (even if they do so only while at home). For these reasons, among others, the Federal Motor Carrier Safety Administration prohibits the use of medical marijuana for employees under its jurisdiction. In the interests of workplace safety, all employers need to be able to establish and enforce rules intended to keep the workplace drug-free. This cannot be adequately achieved today based on current science if workers' compensation insurers are required to fund medical marijuana.

APCIA respectfully submits that the decision below should be affirmed, and this Court should hold that CNA Insurance Company ("CNA") was not required to pay for Andrew Panaggio's ("Panaggio") medical marijuana.

ARGUMENT

I. INSURANCE COMPANIES SHOULD NOT BE FORCED TO RISK COMMITTING VIOLATIONS OF FEDERAL CRIMINAL LAW IN ORDER TO PARTICIPATE IN NEW HAMPSHIRE'S WORKERS' COMPENSATION SYSTEM

As the Board's unanimous decision correctly recognized, an insurer (or self-insured employer) should never be forced by a state administrative agency or state judiciary to pay for something (marijuana) that is indisputably contraband under federal law. The United States Supreme Court's preemption decisions under the Supremacy Clause, U.S. Const. art. VI, § 6, do not permit this result.

As the Supreme Court has made clear, "[w]hen federal law forbids an action that state law requires, the state law is 'without effect.'" *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 486 (2013) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). "[F]or example, if the federal law said, 'you must sell insurance,' while the state law said, 'you may not,'" the state law would be preempted. *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (finding state law preempted where, at its core, "the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids"); *see also PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618, (2011) (state law was preempted where "[i]t was not lawful under federal law for the Manufacturers to do what state law required of them").

Here, if Panaggio's position were adopted, state law would require insurers and employers to reimburse injured employees for marijuana, which is contraband under federal law. *See* 21 U.S.C. § 812(b)(1), (c)(10); 21 U.S.C. §§ 823(a), 844(a); *Gonzales v. Raich*, 545 U.S. 1, 14 (2005). Such a result squarely conflicts with the Supremacy Clause and U.S. Supreme Court decisions, and "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." *PLIVA*, 564 U.S. at 622 (plurality portion of opinion). Rather, courts must focus on whether "the 'ordinary meaning' of federal law blocks a private party from independently accomplishing what state law requires," rather than attempting to "potentially reconcile federal duties with conflicting state duties" where the plain intent of federal law squarely conflicts with state law. *Id.* at 623. That is especially true in the context of federal *criminal* law because state agencies and state courts should never force a party into a position of risking potential *criminal* liability.

In a case relied upon by Panaggio, a New Jersey intermediate appellate decision (which is now being reviewed by the New Jersey Supreme Court) improperly focused on whether the insurer or employer had "established the <u>requisite intent and active participation</u> necessary for an aiding and abetting charge" or presented "evidence that it faces a <u>credible threat of prosecution</u>" by federal law enforcement authorities. *Hager v. M & K Construction*, 225 A.3d 137, 148-49 (N.J. Super. Ct. App. Div. 2020) (emphasis added), *cert. granted*, 2020 WL 2557143 (N.J. May 12, 2020); *see also Bourgoin*, 187 A.3d at 25-27 (Jabar, J., dissenting) (dissenting opinion focused on whether federal government could prove beyond a reasonable doubt that employer paying for medical marijuana had

requisite *mens rea* for aiding and abetting). The New Jersey Appellate Division in *Hager* and the *Bourgoin* dissent improperly "strain[ed] to find ways to [attempt to] reconcile federal law with seemingly conflicting state law," rather than focusing on the basic, "ordinary meaning" of federal law. *PLIVA*, 564 U.S. at 622-23 (plurality).

The legal analysis on this appeal should *not* depend on whether the federal government will be able to prove that CNA had criminal intent, whether a criminal case against CNA could be proven beyond a reasonable doubt, or whether there is a "credible threat" of prosecution of CNA. Responsible insurance companies are not in the business of handicapping their chances in criminal court. They have brands and reputations that they must protect. Many insurers (and employers) have corporate ethics policies, and procedures to enforce those policies. Those policies typically include standards intended to avoid the *appearance* of impropriety, let alone coming close to aiding and abetting a federal crime. Some insurers (and large employers) are public companies with extensive obligations to their shareholders under securities laws. They do not want to risk having to disclose in a securities filing that the company has been accused of aiding and abetting a federal crime, even if that risk is small.

No insurer should be forced to take a risk that a current or future Department of Justice might choose to prosecute the insurer. No insurer should be required to try to handicap its chances of prevailing in a criminal trial. No insurer should be required by a court to come even close to the line of being accused of violating a federal criminal statute to simply conduct its business. Even being accused of such a violation carries collateral consequences and reputational and litigation costs that no insurer (or

employer) should be required to risk. Insurers and employers should be entitled to operate their businesses in a manner that avoids any risk of a corporate criminal charge, regardless of whether some might view that risk as remote at a particular point in time, and regardless of whether many state governments have expressed disagreement with a federal law that remains the supreme law of our land. The answer for those who believe injured workers should be reimbursed by insurers for medical marijuana is for them to lobby Congress to change federal law, not to ask this Court and others to force insurance companies to ignore federal law at their peril.

Whether an insurer or employer is likely to be prosecuted is irrelevant to the preemption analysis, which focuses instead on whether "federal *law* forbids an action that state law requires," *Bartlett*, 570 U.S. at 486, not whether *enforcement* of federal law is likely. *See United Energy Servs., Inc. v. Fed. Mine Safety & Health Admin.*, 35 F.3d 971, 977 (4th Cir. 1994) ("enforcement history" irrelevant in preemption analysis); *Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City*, 154 F. Supp. 3d 1185, 1189 (D. Colo. 2016), *vacated*, 861 F.3d 1052 (10th Cir. 2017) (even if "prosecutors and bank regulators might 'look the other way' if financial institutions don't mind violating the law" in providing financial services to marijuana businesses, "[a] federal court cannot look the other way").

As the Maine Supreme Judicial Court correctly recognized in addressing the same issue presented here, an insurer or employer should not be required to rely on a Department of Justice policy about its prosecution priorities because such a policy is "transitory," and was revoked by the current presidential administration. *Bourgoin*, 187 A.3d at 21; *see also*

Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Justice, Memorandum for All United States Attorneys Regarding Marijuana Enforcement (Jan. 4, 2018). "Most importantly . . . the magnitude of the *risk* of criminal prosecution is immaterial" because an insurer or employer should not be required to assume any such risk. *Bourgoin*, 187 A.3d at 21.

Furthermore, the potential risk of a federal criminal violation may not be as insubstantial as Panaggio contends. *See, e.g.*, *United States v. Ibarra-De La Cruz*, 492 F. Supp. 2d 646, 647 (W.D. Tex. 2006), *aff'd*, 235 F. App'x 307 (5th Cir. 2007) (concluding that "financing the manufacture or delivery of marijuana does constitute 'aiding and abetting'" because "[t]he knowing or intentional provision of funding for the manufacture or delivery of marijuana constitutes participation in that venture, and contributes to the success of that venture"); *United States v. Fuller*, 768 F.2d 343, 346 (1st Cir. 1985) (reimbursement of co-defendant for purchase of gun and being present during purchase was sufficient to prove "aiding and abetting" an illegal purchase).

The Maine Supreme Judicial Court ultimately concluded that "were [an employer] to comply with the administrative order by subsidizing [the employee's] use of medical marijuana, <u>it would be engaging in conduct that meets all the elements of criminal aiding and abetting</u> . . . ." *Bourgoin*, 187 A.3d at 17 (emphasis added). A judge of the federal Tenth Circuit similarly concluded, in a case involving a credit union that sought to provide banking services for marijuana-related businesses, that "[b]y providing banking services to these businesses, the Credit Union would -- by its own admission -- facilitate their illegal activity" because the businesses' conduct "plainly violates the CSA." *Fourth Corner Credit Union v. Fed. Reserve*

Bank of Kansas City, 861 F.3d 1052, 1055 (10th Cir. 2017) (opinion of Moritz, J.). It should not matter whether this Court agrees with the conclusion of the Maine Supreme Judicial Court or Judge Moritz. Where the majority of a state supreme court has concluded that paying for medical marijuana *would constitute a crime* under federal law, even if the state supreme court on the other side of the Piscataqua River Bridge were to disagree, no insurance company (or employer) should be forced by court order to take such a *risk*. "No prudent corporate management would incur the risk of criminal penalties . . . ." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 n.18 (1978).

If this Court concludes that insurers choosing to participate in the New Hampshire workers' compensation program are required to make payments for the purchase of marijuana by injured workers notwithstanding the applicable federal criminal law, an insurer with a strong corporate ethics policy may not be comfortable getting even close to the line of violating federal criminal law where judges have disagreed on whether such an insurer would be committing a federal crime. Insurers should not be forced to choose between maintaining high corporate ethics standards and providing workers' compensation coverage, and the stability of the New Hampshire workers' compensation marketplace should not be jeopardized by the potential consequences of such a choice.

II. REQUIRING INSURERS TO PAY FOR MEDICAL MARIJUANA USE IS INCONSISTENT WITH THE SAFETY GOALS OF THE NEW JERSEY WORKERS' COMPENSATION LAW

One of the main goals of the workers' compensation system is to achieve greater safety in the workplace. *See*, *e.g.*, N.H. RSA § 281-A:64 (imposing various safety requirements on employers, including "adopting work methods and procedures which will protect the life, health, and safety of the employees"); § 281-A:64-a (safety incentive program). Given the current state of the science surrounding medical use of marijuana, requiring insurers to pay for marijuana use by injured workers is likely to present significant safety risks for employees, their co-workers and the general public, inconsistent with the goals of the statutory scheme. In order to safeguard both the health of these stakeholders and the economic viability of the workers' compensation system, the efficacy of *all* modalities of medical treatment must be borne out by objective scientific evidence. Notwithstanding the possibility that marijuana may ultimately be found to have some legitimate medical uses for work-related injuries, there is simply not enough scientific evidence at this time to support the medical value of marijuana in treating such injuries. It is also well-settled that marijuana use generally has deleterious health effects, including altered perceptions and mood, impaired coordination, difficulty with thinking and problem solving, disrupted learning and memory, respiratory problems, increased risk of heart attack, and mental illness and other mental health problems. *See* National Institute on Drug Abuse, "Marijuana: Drug Facts" (available at drugabuse.gov/publications/drugfacts/marijuana). Even more troubling,

some of the most serious side effects of marijuana use likely pose additional risks during the COVID-19 pandemic, given the virus's targeting of respiratory and coronary functions.

From a broader safety perspective, many workers operate vehicles or other machinery as part of their work, and currently there is no generally recognized test to accurately determine a driver's (or machine operator's) level of impairment as a result of marijuana use, in contrast to, for example, breath and blood tests used to assess impairment from alcohol use. As the National Highway Traffic Safety Administration (NHTSA) explained in a 2017 report to Congress:

> [T]here are currently no evidence-based methods to detect marijuana-impaired driving. . . .Currently, there is no impairment standard for drivers under the influence of marijuana. Many of the reasons for this are discussed elsewhere in this report. They include the fact that there is no chemical test for marijuana impairment, like a BAC or BrAC test for alcohol that quantifies the amount of alcohol in their body, indicates the degree of impairment, and the risk of crash involvement that results from the use of alcohol. The psychoactive ingredient in marijuana, delta-9-tetrahydrocannabinal (THC), does not correlate well with impairment. While very high levels of THC do indicate recent consumption (by smoking marijuana) it is very unlikely a police officer would encounter a suspect and obtain a sample of blood or oral fluid within a short enough time for high THC levels to be detected. As was mentioned earlier, impairment is observed for two to three hours after smoking; whereas by an hour after smoking peak THC levels have declined 80% - 90%.

NHTSA, "Marijuana-Impaired Driving: A Report to Congress," pp. 12-13 (July 2017) (emphasis added) (available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf).

This is consistent with Congressional findings that marijuana, as a Schedule I drug under the Controlled Substances Act, has "(1) 'a high potential for abuse,' (2) 'no currently accepted medical use in treatment in the United States,' and (3) 'a lack of accepted safety for use of the drug or other substance under medical supervision.'" *Washington v. Sessions*, No. 17 CIV. 5625 (AKH), 2018 WL 1114758, at *2 (S.D.N.Y. Feb. 26, 2018) (quoting 21 U.S.C. § 812(b)(1)) (emphasis added), *appeal held in abeyance sub nom. Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019).

Efforts to remove marijuana from the Schedule I list have been repeatedly rejected based on safety concerns, among other reasons. *See id.* at *2. In 2016, the Drug Enforcement Administration, taking into account advice from the Department of Health and Human Services, concluded that "[m]arijuana has a high potential for abuse," and marijuana has no currently accepted medical use because "[a]s detailed in the HHS evaluation, the drug's chemistry is not known and reproducible; there are no adequate safety studies; there are no adequate and well-controlled studies proving efficacy; the drug is not accepted by qualified experts; and the scientific evidence is not widely available." *Denial of Petition To Initiate Proceedings To Reschedule Marijuana*, 81 FR 53767-01, 2016 WL 4240243 (Aug. 12, 2016) (emphasis added). The DEA further concluded as follows with respect to marijuana's safety:

> Marijuana lacks accepted safety for use under medical supervision. At present, there are no U.S. Food and Drug Administration (FDA)-approved marijuana products, nor is marijuana under a New Drug Application (NDA) evaluation at the FDA for any indication. The HHS evaluation states that marijuana does not have a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions. At this time, the

> known risks of marijuana use have not been shown to be outweighed by specific benefits in well-controlled clinical trials that scientifically evaluate safety and efficacy.

Id. (emphasis added). Safety concerns cited by HHS included the following:

> [T]he chemistry of marijuana, as defined in the petition, is not reproducible in terms of creating a standardized dose. The petition defines marijuana as including all Cannabis cultivated strains. Different marijuana samples derived from various cultivated strains may have very different chemical constituents including delta9-THC and other cannabinoids (Appendino et al., 2011). As a consequence, marijuana products from different strains will have different safety, biological, pharmacological, and toxicological profiles.

Id. at 53779 (emphasis added).

Many employers are subject to federal regulations requiring a drug-free workplace and drug testing of their employees. For example, federal Department of Transportation regulations require drug testing, which includes marijuana. *See* 49 C.F.R. §§ 40.1, 40.3. An employer receiving a verified positive drug test result must immediately remove the employee from a safety-sensitive role. *Id.* § 40.23. The Federal Motor Carrier Safety Administration has advised that the use of medical marijuana is not permitted under its regulations. *See* DOT "Medical Marijuana" Notice (available at https://www.transportation.gov/odapc/medical-marijuana-notice).

The safety concerns related to marijuana use present a substantial problem for employers because if workers' compensation insurers (and self-insured employers) are required to fund the use of medical marijuana

by injured employees, employers may have difficulty enforcing safety rules prohibiting employees from being impaired on the job. Significantly, New Hampshire law governing the therapeutic use of cannabis provides that "[t]his 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." N.H. RSA § 126-X:3(III)(c). However, determining impairment on the job, even assuming medical marijuana is not being used during or shortly before work hours, is particularly challenging because the testing currently available cannot determine impairment at the time of the test, when the marijuana was consumed, or the dose consumed (and also cannot determine if certain related products were consumed). *See* American College of Medical Toxicology, "ACMT Position Statement: Interpretation of Urine for Tetrahydrocannabinol Metabolites," at 1 (Jan. 2020) (explaining that "test results do not identify . . . specific timing of exposure, [or] dose," and "are not designed to identify synthetic cannabinoids or CBD or to determine impairment").

If the federal government were to legalize medical marijuana, these safety concerns potentially could be addressed through newly-developed testing methods and regulatory action that the FDA takes with respect to prescription drugs. Funding for necessary studies and potential new tests undoubtedly would become more available if medical marijuana were legalized at the federal level. APCIA respectfully submits that this Court should defer to potential future action by Congress and the FDA rather than forcing insurers who wish to continue to participate in New Hampshire's workers' compensation insurance marketplace to disregard current federal

law, a decision that potentially could destabilize the state's workers' compensation insurance marketplace.

CONCLUSION

APCIA respectfully urges the Court to affirm the Board's decision and conclude that CNA was not required to pay for the employee's medical marijuana.

Respectfully submitted,

Dated: August 4, 2020 By *<u>/s/ Dana M. Horton</u>*_____

Dana M. Horton
(NH Bar #266851)
ROBINSON & COLE LLP
One Financial Plaza
14th Floor
Providence, RI 02903
Tel. 401-709-3300
Fax 401-709-3399
E-mail: dhorton@rc.com

Attorneys for *Amicus Curiae*
American Property Casualty
Insurance Association

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing brief complies with N.H. Supreme Court Rule 16(11) and includes 3,996 words exclusive of pages containing the table of contents, tables of citations and any addendum.

I further certify that, on August 4, 2020, the foregoing brief was served, by first-class mail, postage prepaid, on the following:

Jared P. O'Connor, Esq.
Shaheen & Gordon, P.A.
80 Merrimack Street
Manchester, NH 03101

Robert S. Martin, Esq.
Tentindo, Kendall, Canniff & Keefe LLP
510 Rutherford Avenue
Boston, MA 02129

/s/ Dana M. Horton
Dana M. Horton