THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2020-0470

SCOTT PAINE

v.

RIDE-AWAY, INC. D/B/A MOBILITY WORKS

ON APPEAL FROM FINAL DECISION
OF THE ROCKINGHAM COUNTY SUPERIOR COURT

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT SCOTT PAINE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

I. RSA 354-A does not contain any language that permits employers to refuse to accommodate employees who use medical marijuana to treat non drug-related disabilities.

Mobility Works argues that language in RSA 354-A's ("354-A") definition of disability relieves employers of any obligation to provide reasonable accommodations to employees who use medical marijuana to treat disabilities. RSA 354-A:2(IV). When this Court analyzes statutory language, it begins by "examining the language of the statute, and if possible," it ascribes "the plain and ordinary meanings to the words used." *EEOC v. Fred Fuller Oil Co., Inc.*, 168 N.H. 606, 608 (2016). This Court will not "consider what the legislature might have said" or "add language that the legislature did not see fit to incorporate in the statute." *Id.* Furthermore, when interpreting 354-A, this Court is "mindful of the legislative directive to liberally construe the statutory scheme in [354-A] to effectuate its purpose." *Id.* at 609. As discussed below, Mobility Works' arguments lack merit and this Court should reject them.

A. The drug proviso in 354-A's definition of disability is irrelevant to this case.

Contrary to Mobility Works' argument, 354-A's definition of disability does not foreclose Mr. Paine's claims. 354-A defines "disability" as follows:

> "Disability" means, with respect to a person:
> (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.
> Provided, that "disability" does not include current, illegal use of or

> addiction to a controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802 sec. 102).

RSA 354-A:2(IV). Mobility Works relies on the last sentence of the definition, hereafter referred to as the "drug proviso," to argue that Mr. Paine is not entitled to protection under 354-A because he uses medical marijuana. Brief of Appellee at 16. Contrary to Mobility Works' argument, 354-A's drug proviso is irrelevant to this case. The drug proviso precludes any argument that illegal drug use or addiction is a disability. Mr. Paine has made no such argument. He is disabled because of his PTSD, not his marijuana use. If, hypothetically, Mr. Paine did not have any other disabilities and just wanted an accommodation for a marijuana addiction, the drug proviso would exclude him from protection under 354-A; but that is not this case.

Mobility Works essentially asks the Court to ignore the plain language of the drug proviso and just focus on the fact that it refers to the federal Controlled Substances Act ("CSA"). In *Hudnell v. Thomas Jefferson U. Hosps., Inc.*, the court rejected this same argument. CV 20-01621, 2021 WL 63252 (E.D. Pa. Jan. 7, 2021). Like Mobility Works, the defendant argued that the drug proviso in the Pennsylvania Human Rights Act's definition of disability – which also refers to the CSA – precluded the plaintiff's claim but the court rejected that argument because the plaintiff had disabilities separate and apart from "use or addiction to" marijuana. *Id.* at *2. Like Hudnell, Mr. Paine has a disability, PTSD, that is separate from his medical marijuana use and, thus, the drug proviso does not impact his claims.

In essence, Mobility Works wants this Court to rewrite 354-A by improperly expanding the drug proviso from an exclusion of a type of claimed disability ("current, illegal use of or addiction to a controlled substance") into an exclusion from statutory coverage altogether for any accommodation of marijuana use even when authorized by state law and prescribed by a doctor. This erroneous interpretation of 354-A would undermine the purpose of the statute. 354-A's reasonable accommodation requirement empowers individuals with disabilities to work and support themselves. The statute's definition of "reasonable accommodation" is broad by design. RSA 354-A:2(XIV-b). Mobility Works' erroneous interpretation, if adopted, would do fundamental violence to this legislative scheme by inflating a restriction on the type of disabilities covered into a much broader prohibition against a type of medication that people use for a wide range of disabilities. For these reasons, the Court should reject Mobility Works' argument and refuse to rewrite the statute.

B. The drug proviso in 354-A's disability definition materially differs from the drug use provisions in the ADA and Rehab Act.

Mobility Works' reliance on case law interpreting the drug use provisions in the Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("Rehab Act") is fatally flawed because it ignores key differences in language and structure between those two federal statutes and 354-A. Appellee's Brief at 21-22. Under the ADA, "a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the employer acts on the basis of such use." 42 U.S.C. § 12114(a). Similarly, under the Rehab

Act, "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use." 29 U.S.C. § 705(20)(C)(i).

In contrast to 354-A's drug proviso, these drug use provisions in the ADA and Rehab Act define the term "qualified individual with a disability," not "disability." To have any right to reasonable accommodations under the ADA and Rehab Act, a person must be a "qualified individual with a disability." 42 U.S.C. § 12112(b)(5) and 29 U.S.C. § 794. Thus, when an employer refuses to accommodate a disabled employee because he illegally uses drugs, that employee is entitled to no protections under the ADA or Rehab Act because he is, by definition, not a "qualified individual with a disability." These drug use provisions in the ADA and Rehab Act apply even if the employee suffers from a disability separate and apart from the effects of his illegal drug use. *See EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* at § 8.3 ("An employer can discharge or deny employment to [an individual with a disability] on the basis of his/her illegal use of drugs.")[1] Thus, unlike 354-A, the drug use provisions in the ADA and Rehab Act bar a class of employees from protection – not just a type of disability – because they define who can be a "qualified individual with a disability."

[1] § 8.3 of this Technical Assistance Manual is included in the Addendum to this brief and it can also be found here: https://www.eeoc.gov/laws/guidance/technical-assistance-manual-employment-provisions-title-i-americans-disabilities-act (visited June 15, 2021).

354-A also requires an employee to be a "qualified individual with a disability" to have any entitlement to reasonable accommodations but, contrary to the ADA and Rehab Act, 354-A's definition of the term "qualified individual with a disability" says nothing about drug use. RSA 354-A:2(XIV-a) and 354:A-7(VII). If the New Hampshire Legislature intended 354-A to track the ADA and Rehab Act, it would have added to 354-A the same language from the ADA's and Rehab Act's drug use provisions. The Legislature chose not to add that language to 354-A and this Court should not rewrite 354-A as though the Legislature had. Therefore, the ADA and Rehab Act have no bearing on the meaning of the different and much more limited drug proviso in 354-A.

C. Massachusetts' Law Against Discrimination contains a drug proviso almost identical to 354-A's and the Massachusetts Supreme Judicial Court still held that disabled employees may be entitled to reasonable accommodations for medical marijuana use.

In *Barbuto v. Advantage Sales and Marketing, LLC*, the Massachusetts Supreme Judicial Court held that disabled employees may be entitled to reasonable accommodations for medical marijuana use. 78 N.E.3d 37 (Mass. 2017). Mobility Works argues that *Barbuto* lacks persuasive force because Massachusetts' Law Against Discrimination ("MLAD") does not contain a drug proviso in its definition of disability that incorporates federal law. Brief of Appellee at 18. Mobility Works is wrong. The MLAD's definition of "handicap" is as follows: "(a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment, but such term shall not include

current, illegal use of a controlled substance as defined in [G.L. c. 94C, § 1]." G. L. c. 151B, § 1(17). The drug proviso at the end of this definition refers to a state law *but* that state law incorporates federal law because Massachusetts regulations incorporate federal law when they define what constitutes a controlled substance, including marijuana. G. L. c. 94C, §§ 1 and 2(a); and 105 Code Mass. Regs. 700.002.[2] Thus, the drug proviso in the MLAD's disability definition is virtually identical to 354-A's drug proviso and, nevertheless, the Massachusetts Supreme Judicial Court still held that employers may have to accommodate medical marijuana use.

D. Even if 354-A's drug proviso were relevant to this case, the Court should hold that Mr. Paine did not engage in an "illegal use" of marijuana because of RSA 126-X.

Even assuming, for the sake of argument, that 354-A's drug proviso were relevant to this case, the Court may rule in Mr. Paine's favor on an alternate ground. The drug proviso only excludes the "illegal use of" marijuana from the range of possible disabilities which could entitle an employee to the protections of 354-A. Courts in other states have interpreted similar laws to mean that state law, as opposed to federal law, must proscribe marijuana use in order to deprive individuals of the protections of anti-discrimination laws. *Cease v. Hous. Auth. of Indiana County,* 247 A.3d 57, 63-65 (Pa. Comm. Ct. 2021) (term "illegally using a controlled substance" meant that the drug use had to violate state law) and *Emerald Steel Fabricators, Inc. v. Bureau of Lab. and Industries*, 230 P.3d

[2] Marijuana is a Schedule I drug under both Massachusetts and federal regulations. 105 Code Mass. Regs. § 700.002(A) (incorporating 21 C.F.R. § 1308.11(d)(23)).

518, 525 (Or. 2010) (term "illegal use of drugs" only applied if drug use violated state law).[3]

Similar to these other courts, this Court should interpret the term "illegal use" in 354-A's drug proviso to mean illegal under state law. Under this interpretation, the reference to the CSA in the drug proviso would just serve to define the term "controlled substance." RSA 354-A:2(IV). This interpretation comports with the mandate in RSA 126-X ("126-X") that a "qualifying patient shall not be…denied any right or privilege for" medical marijuana use. RSA 126-X:2(I). It also comports with the statutory directive to construe 354-A "liberally for the accomplishment of the purposes" of the statute. RSA 354-A:25. Thus, even if the drug proviso were relevant to this case, it should not preclude Mr. Paine's claim because he legally uses marijuana under 126-X.

E. The case law that Mobility Works relies upon is inapposite and unpersuasive.

Mobility Works relies on case law which is inapposite and unpersuasive. Mobility Works argues that *Harrisburg Area Community College v. Pennsylvania Human Rel. Comm'n.*, 245 A.3d 283, 292 (Pa. Comm. Ct. 2020) ("*HACC*") supports its argument. Not so. In *HACC*, the

[3] The *Emerald Steel* court also held that the CSA preempted Oregon's medical marijuana law but that holding is irrelevant to this case because Mobility Works has abandoned its preemption argument. Brief of Appellee at 18 fn.6. Because the *Emerald Steel* court held that the CSA preempted Oregon's medical marijuana law, it also held that the employee's use of marijuana no longer constituted a legal use since the preemptive effect of the CSA nullified the medical marijuana law. *Emerald Steel*, 230 P.3d at 529.

Pennsylvania Human Relations Commission ("PHRC") argued that the Pennsylvania Human Rights Act ("PHRA") prohibited HACC's removal of a student from its nursing program because she used medical marijuana. The court sided with HACC but not, as Mobility Works argues, because the PHRA's definition of disability contained a drug proviso similar to 354-A's. Instead, the court based its holding on language in Pennsylvania's Medical Marijuana Act ("MMA").

The *HACC* court made clear that it was "not PHRA or any particular interpretation thereof that commands our conclusion here." *Id.* at 295. Instead, it was Pennsylvania's MMA, "or, more specifically, the absence of any provision in the MMA providing the sort of mandate that the PHRC" sought, that drove the holding. *Id.* The Pennsylvania MMA contains provisions that prohibit discrimination against medical marijuana users and the *HACC* court held that those more specific provisions should govern cases involving discrimination against medical marijuana users, instead of the PHRA. *Id.* 126-X, unlike Pennsylvania's MMA, does not contain any provisions prohibiting employment discrimination against medical marijuana users. Thus, the reasoning from *HACC* is irrelevant to this case because 126-X contains no anti-discrimination provisions that could supplant the protections of 354-A. Furthermore, to the extent the *HACC* court held that Pennsylvania's MMA limited the scope of the PHRA, that reasoning conflicts with this Court's reasoning in *Pannagio I* where it held that 126-X does not limit the rights that medical marijuana users have under other statutes. *Appeal of Panaggio*, 172 N.H. 13, 16 (2019). Therefore, *HACC* is inapposite and not persuasive authority.

Mobility Works also relies on a case where the court held that the federal Fair Housing Act ("FHA") permitted discrimination against tenants who used medical marijuana to treat disabilities. *Assenberg v. Anacortes Hous. Auth.*, 268 Fed. Appx. 643 (9th Cir. 2008). The *Assenberg* court did not explain the reasoning for its holding but it did cite to the definition of disability in the FHA which contains a drug proviso similar to 354-A's. The U.S. Department of Housing and Urban Development ("HUD") has persuasively explained why the *Assenberg* court erroneously relied on the FHA's drug proviso. *See* Memorandum of U.S. Dep't of Housing and Urban Development, *Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing* at 7 fn.12 (Jan. 20, 2011) ("HUD memo").[4] As HUD correctly explained, the FHA's drug proviso "does not categorically exclude individuals from protection under the [FHA]." *Id.* at 7. Instead, as Mr. Paine has argued in this brief, HUD determined that the FHA's drug proviso merely "prevents a current illegal drug user or addict from asserting that the drug use or addiction is itself the basis for claiming that he or she is disabled under the [FHA]." *Id.* Consequently, according to HUD, "a person who is otherwise disabled (e.g., cancer, multiple sclerosis) is not disqualified from the definition of 'handicap' under the [FHA] merely because the person is also a current illegal user of marijuana." *Id.* In its memorandum, HUD went on to

[4] The HUD memo is included in the Addendum to this brief and can be found here: https://www.hud.gov/sites/dfiles/FHEO/documents/BAY%20Medical%20Marijuana%20Reas%20Accom%20Final%20Version%20Accessible%20_020411_.pdf (visited June 15, 2021).

explain why it would not be reasonable to accommodate medical marijuana use in public housing because of the government's central programmatic goal of providing tenants with a drug-free living environment, which is a consideration not relevant here, but HUD only analyzed that issue because it had already rejected the interpretation of the FHA that Mobility Works articulated in its brief. This Court, similarly, should reject Mobility Works' interpretation. For all these reasons, the case law that Mobility Works relies on is inapposite and unpersuasive.[5]

II. This Court would not open the door to claims that employers must accommodate the use of other illegal drugs if it ruled in favor of Mr. Paine.

Mobility Works argues that, if Mr. Paine prevails, this Court will unleash a flood of accommodation requests from disabled employees asking their employers to accommodate their use of other controlled substances, like cocaine. Brief of Appellee at 23-24. This argument is nonsense. First of all, medical marijuana materially differs from other controlled substances because it is legal under state law and, in recent years, Congress has barred the federal government from prosecuting medical marijuana users. *See* Appellant's Brief at 34. Given the potential for criminal liability, it is highly unlikely that an employee would reveal to his employer that he illegally used controlled substances other than marijuana.

[5] As discussed above, Mobility Works' reliance on ADA and Rehab Act cases is also misplaced because of the material differences between those two federal statutes and 354-A.

Furthermore, unlike medical marijuana, it is highly unlikely that a doctor would ever prescribe an illegal drug like cocaine. This distinction matters because when an employee asks his employer to accommodate a disability, the employer may ask the employee to produce a doctor's note confirming that the employee actually needs the requested accommodation because of a disability. When an employer asks for such a doctor's note and the employee fails to produce one, the employer may legally deny the accommodation request. *See e.g., Templeton v. Neodata Services, Inc.*, 162 F.3d 617 (10th Cir. 1998). It is hard to imagine a doctor writing a note which states that she has prescribed an illegal drug other than marijuana, like cocaine; and if the employee could not produce such a doctor's note, 354-A would not require the employer to accommodate his drug use.

Moreover, there is no evidence that court decisions in places like Massachusetts and New Jersey, which required employers to accommodate medical marijuana use, have opened the flood gates to claims that employers should also accommodate the use of other illegal drugs. Even if they had, this consequence could not justify a deviation from the statutory language. For all these reasons, Mobility Works' argument that this Court would open the door to claims that employers must accommodate the use of illegal drugs like cocaine if it ruled in favor of Mr. Paine lacks merit.

Conclusion

For the reasons stated in this brief and his opening brief, Mr. Paine requests that this Court vacate the judgment for Mobility Works, remand this case to the Superior Court, order the Superior Court to grant his Motion to Amend Complaint, and permit his case to move forward.

Respectfully submitted,

Date: June 15, 2021 /s/ Allan K. Townsend

/s/ Jon Meyer

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STATEMENT OF COMPLIANCE

Undersigned counsel 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) in that it contains 2,949 words from the page immediately after the Table of Authorities to the signature of counsel.

Date: June 15, 2021 /s/ Allan K. Townsend

CERTIFICATE OF SERVICE

This brief has been served on all counsel of record through this Court's electronic filing system on the date below.

Date: June 15, 2021 /s/ Allan K. Townsend

ADDENDUM

TABLE OF CONTENTS

remove certain exercise machines simply because an employee who is a paraplegic could not use them.

- Employees with disabilities must be given an equal opportunity to participate in employer-sponsored sports teams, leagues, or recreational activities such as hiking or biking clubs. However, the employer does not have to discontinue such activities because a disabled employee cannot fully participate due to his/her disability. For example, an employer would not have to discontinue the company biking club simply because a blind employee is unable to ride a bicycle.
- Any transportation provided by an employer for use by its employees must be accessible to employees with a disability. This includes transportation between employer facilities, transportation to or from mass transit and transportation provided on a occasional basis to employer-sponsored events.

VIII. DRUG AND ALCOHOL ABUSE

8.1 Introduction

The ADA specifically permits employers to ensure that the workplace is free from the illegal use of drugs and the use of alcohol, and to comply with other Federal laws and regulations regarding alcohol and drug use. At the same time, the ADA provides limited protection from discrimination for recovering drug addicts and for alcoholics.

8.2 Overview of Legal Obligations

- An individual who is currently engaging in the illegal use of drugs is not an "individual with a disability" when the employer acts on the basis of such use.
- An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.
- It is not a violation of the ADA for an employer to give tests for the illegal use of drugs.
- An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.
- An employer may not discriminate against a drug addict who is not currently using drugs and who has been rehabilitated, because of a history of drug addiction.
- A person who is an alcoholic is an "individual with a disability" under the ADA.
- An employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol impairs job performance or conduct to the extent that s/he is not a "qualified individual with a disability."
- Employees who use drugs or alcohol may be required to meet the same standards of performance and conduct that are set for other employees.
- Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by Federal agencies pertaining to drug and alcohol use in the workplace.

8.3 Illegal Use of Drugs

An employer may discharge or deny employment to current illegal users of drugs, on the basis of such drug use, without fear of being held liable for disability discrimination. Current illegal users of drugs are not "individuals with disabilities" under the ADA.

The illegal use of drugs includes the use, possession, or distribution of drugs which are unlawful under the Controlled Substances Act. It includes the use of illegal drugs and the illegal use of prescription drugs that are "controlled substances".

For example: Amphetamines can be legally prescribed drugs. However, amphetamines, by law, are "controlled substances" because of their abuse and potential for abuse. If a person takes amphetamines without a prescription, that person is using drugs illegally, even though they could be prescribed by a physician.

The illegal use of drugs does not include drugs taken under supervision of a licensed health care professional, including experimental drugs for people with AIDS, epilepsy, or mental illness.

For example: A person who takes morphine for the control of pain caused by cancer is not using a drug illegally if it is taken under the supervision of a licensed physician. Similarly, a participant in a methadone maintenance treatment program cannot be discriminated against by an employer based upon the individual's lawful use of methadone.

An individual who illegally uses drugs but also has a disability, such as epilepsy, is only protected by the ADA from discrimination on the basis of the disability (epilepsy). An employer can discharge or deny employment to such an individual on the basis of his/her illegal use of drugs.

What does "current" drug use mean?

If an individual tests positive on a test for the illegal use of drugs, the individual will be considered a current drug user under the ADA where the test correctly indicates that the individual is engaging in the illegal use of a controlled substance.

"Current" drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an on-going problem. It is not limited to the day of use, or recent weeks or days, in terms of an employment action. It is determined on a case-by-case basis.

For example: An applicant or employee who tests positive for an illegal drug cannot immediately enter a drug rehabilitation program and seek to avoid the possibility of discipline or termination by claiming that s/he now is in rehabilitation and is no longer using drugs illegally. A person who tests positive for illegal use of drugs is not entitled to the protection that may be available to former users who have been or are in rehabilitation (see below).

8.4 Alcoholism

While a current illegal user of drugs has no protection under the ADA if the employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection simply because of the alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of accommodation, if s/he is qualified to perform the essential functions of a job. However, an employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that s/he is not "qualified."

For example: If an individual who has alcoholism often is late to work or is unable to perform the responsibilities of his/her job, an employer can take disciplinary action on the basis of the poor job

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WASHINGTON, DC 20410-0500

OFFICE OF GENERAL COUNSEL

Jan. 20, 2011

MEMORANDUM FOR: John Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity

David Stevens, Assistant Secretary for Housing/ Federal Housing Commissioner

Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing

FROM: Helen R. Kanovsky

SUBJECT: Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing.

I. *Introduction*

The Office of Fair Housing and Equal Opportunity (FHEO) requested our opinion as to whether Public Housing Agencies (PHAs) and owners of other federally assisted housing may grant current or prospective residents a reasonable accommodation under federal or state nondiscrimination laws for the use of medical marijuana.[1] Commensurate with the relatively recent upsurge of states passing medical marijuana laws, there has been a significant increase in the number of requests by residents of those states for exceptions to federal drug-free laws and policies to permit the use of medical marijuana as a reasonable accommodation for their disabilities. In 1999, this Office issued a Memorandum concluding that any state law purporting to legalize the use of medical marijuana in public or other assisted housing would conflict with the admission and termination standards found in the Quality Housing and Work and Responsibility Act of 1998 (QHWRA)[2] and be subject to preemption.[3] With this Memorandum, we reaffirm the Laster Memorandum's conclusions, and we address those conclusions in the context of requests for reasonable accommodation under federal and state nondiscrimination laws.

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[1] For purposes of this Memorandum, "medical marijuana" refers to marijuana authorized by state medical marijuana laws, and the "use" of medical marijuana encompasses the use, unlawful possession, manufacture, and distribution of marijuana, as prohibited by the Controlled Substances Act. *See infra* Section III.B.2.

[2] QHWRA amended the United States Housing Act of 1937, 42 U.S.C. § 1437. Two of QHWRA's provisions, codified at 42 U.S.C. §§ 13661 and 13662, cover admission and termination standards, respectively, in federally assisted housing.

[3] *See* Sept. 24, 1999 Memorandum from Gail W. Laster, General Counsel, to William C. Apgar, Assistant Secretary, Office of Housing/Federal Housing Commissioner, and Harold Lucas, Assistant Secretary for Public and Indian Housing, on "Medical use of marijuana in public housing" [hereinafter Laster Memorandum] (attached).

As discussed below, federal and state nondiscrimination laws do not require PHAs and owners of other federally assisted housing to accommodate requests by current or prospective residents with disabilities to use medical marijuana. In fact, PHAs and owners may not permit the use of medical marijuana as a reasonable accommodation because: 1) persons who are currently using illegal drugs, including medical marijuana, are categorically disqualified from protection under the disability definition provisions of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act; and 2) such accommodations are not reasonable under the Fair Housing Act because they would constitute a fundamental alteration in the nature of a PHA or owner's operations. Accordingly, PHAs and owners may not grant requests by current or prospective residents to use medical marijuana as a reasonable accommodation for their disabilities, and FHEO investigators should not issue determinations of reasonable cause to believe a PHA or owner has violated the Fair Housing Act based solely on the denial of a request to use medical marijuana as a reasonable accommodation.

While PHAs and owners may not grant reasonable accommodations for medical marijuana use, they maintain the discretion either to evict or refrain from evicting current residents who engage in such use, as set forth in QWHRA. *See infra,* Section V.

II. *Background*

A. *Federal Drug Laws*

Marijuana is categorized as a Schedule I substance under the Controlled Substances Act (CSA). *See* 21 U.S.C. § 801 *et seq*. The manufacture, distribution, or possession of marijuana is a federal criminal offense, and it may not be legally prescribed by a physician for any reason. *See* 21 U.S.C. §§ 841(a)(1); 844(a); 812(b)(1)(A)-(C).

B. *State Medical Marijuana Laws*

Since 1996, fifteen states and the District of Columbia have enacted laws that allow certain medical uses of marijuana despite the federal prohibition against its use.[4] Rather than permitting physicians to prescribe marijuana, these laws allow physicians to discuss the benefits and drawbacks of marijuana when determining whether to "recommend" it or "certify" that the patient qualifies for it under the medical conditions listed in the state statute. These state laws offer qualifying patients narrow exemptions from prosecution and/or arrest under state—but not federal—laws. The laws vary in how they protect medical marijuana users from state criminal laws, but all share the following features: 1) exemptions from arrest and/or prosecution for patients and caregivers who grow, possess, and use marijuana in conjunction with a doctor's "recommendation" or "certification"; 2) rules governing the caregiver's role in the procurement and administration of medical marijuana to the patient; 3) documentation requirements; and 4) quantitative limits on marijuana possession, cultivation, and usage.[5]

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[4] *See* Procon.org, "Medical Marijuana," *available at* http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881; *Arizona Becomes 15th State to Approve Medical Marijuana*, N.Y. TIMES, Nov. 14, 2010, *available at* http://www.nytimes.com/2010/11/15/us/politics/15arizona.html.

[5] *See* MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS 6-7 (2008), *available at*

C. *Federal Admission and Termination Standards under QHWRA*

Section 576(b) of QHWRA addresses admissions standards related to current illegal drug use for all public housing and other federally assisted housing. Pursuant to that section, PHAs or owners

> shall establish standards that prohibit admission to the program or admission to federally assisted housing for any household with a member – (A) who the public housing agency or owner determines is illegally using a controlled substance; or (B) with respect to whom the public housing agency or owner determines that it has reasonable cause to believe that such household member's illegal use (or pattern of illegal use) of a controlled substance . . . may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

42 U.S.C. § 13661(b)(1).

QHWRA therefore requires PHAs and owners to deny admission to those households with a member who the PHA or owner determines is, at the time of consideration for admission, illegally using a "controlled substance" as that term is defined by the CSA. *See* Laster Memorandum at 2-3 & n.4. The Laster Memorandum advised that to determine whether an applicant is using a controlled substance at the time of consideration for admission, the use of the drug must have occurred recently enough to warrant a reasonable belief that the use is ongoing. *See id* at 3-4. This requires a highly individualized, fact-specific examination of all relevant circumstances. *Id*. at 4.

In contrast, under QHWRA's termination standards, PHAs and owners have the discretion to evict, or refrain from evicting, a current tenant who the PHA or owner determines is illegally using a controlled substance. PHAs or owners must establish standards or lease provisions that

> allow the agency or owner (as applicable) to terminate the tenancy or assistance for any household with a member – (1) who the public housing agency or owner determines is illegally using a controlled substance; or (2) whose illegal use (or pattern of illegal use) of a controlled substance . . . is determined by the public housing agency or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

42 U.S.C. § 13662(a).

Thus, while PHAs and owners may elect to terminate occupancy based on illegal drug use, they are not required to evict current tenants for such use. *See* Laster Memorandum at 6-7. Further, PHAs and owners may not establish lease provisions or policies that affirmatively permit occupancy by medical marijuana users because doing so would divest PHAs and owners of the very discretion which Congress intended for them to exercise. *See id*. at 6. As with admission standards, the use of the illegal controlled substance must have occurred recently enough to warrant a reasonable belief that the use is ongoing.

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http://www.mpp.org/.../state-by-state-medical-marijuana-laws.html.

III. *Federal nondiscrimination laws do not require PHAs and owners to allow marijuana use as a reasonable accommodation for disabilities.*

The Fair Housing Act, Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act (ADA) prohibit, among other things, discrimination against persons with disabilities in public housing and other federally assisted housing. 42 U.S.C. § 3604 (f)(1)-(3); 29 U.S.C. § 794(a); 42 U.S.C. § 12132. One type of disability discrimination prohibited by all three statutes is the refusal to make reasonable accommodations in rules, policies, and practices when such accommodations are necessary to provide the person with disabilities with the full opportunity to enjoy a dwelling, service, program or activity.[6]

To establish discrimination for failure to accommodate a disability, a plaintiff must prove the following elements: 1) the plaintiff meets the statute's definition of "disability" or "handicap"; 2) the accommodation is necessary to afford him or her an equal opportunity to use and enjoy the dwelling (Fair Housing Act) or is necessary to avoid discrimination against him or her in the public service, activity, or program (Section 504 and ADA); 3) the plaintiff actually requests an accommodation; 4) the accommodation is reasonable; and 5) the defendant refused to make the required accommodation.[7] The relevant elements for purposes of this Memorandum are the first and fourth: whether a medical marijuana user falls within the definition of "disability" or "handicap," and whether an accommodation allowing the use of medical marijuana is reasonable in the context of public housing or other federally assisted housing.

A. *Under Section 504 and the ADA, current illegal drug users, including medical marijuana users, are excluded from the definition of "individual with a disability" when the provider acts on the basis of the illegal drug use.*

An individual must be disabled to be entitled to a reasonable accommodation. Although medical marijuana users may meet this standard because of the underlying medical conditions for which they use or seek to use marijuana, Section 504 and the ADA categorically exempt current illegal drug users from their definitions of "disability" when the covered entity acts on the basis of such use:

> [T]he term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.[8]

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[6] 42 U.S.C. § 3604 (f)(3)(B) ("discrimination includes . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling"); 28 C.F.R. § 35.130(b)(7) ("[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity"); *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (Section 504 requires recipients of federal financial assistance to provide reasonable accommodations to disabled persons).

[7] *See, e.g.,* Joint Statement of HUD and the Department of Justice, "Reasonable Accommodations Under the Fair Housing Act," at question 12 [hereinafter "Joint Statement"].

[8] 29 U.S.C. § 705(20)(C)(i); 42 U.S.C. § 12210(a).

1. "Illegal" use of drugs

Under Section 504 and the ADA, whether a given drug or usage is "illegal" is determined exclusively by reference to the CSA. *See* 29 U.S.C. § 705(10)(A)-(B); 42 U.S.C. §12110(d)(1). Because the CSA prohibits all forms of marijuana use, the use of medical marijuana is "illegal" under federal law even if it is permitted under state law. *See* 21 U.S.C. §§ 841(a)(1); 844(a); 812(b)(1)(A)-(C).

While Section 504 and the ADA contain language providing a physician-supervision exemption to the "current illegal drug user" exclusionary provisions, this exemption does not apply to medical marijuana users. The ADA's physician-exemption language, which mirrors Section 504, states:

> The term 'illegal use of drugs' means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act . . . . Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act . . . or other provisions of Federal law.[9]

Because the phrase "supervision by a licensed health care professional" is modified by the subsequent phrase "or other uses authorized by the Controlled Substances Act," the exemption applies only to those uses that are sanctioned by the CSA. *See Barber v. Gonzales*, 2005 WL 1607189, at *1 (E.D. Wash. July 1, 2005); *James v. City of Costa Mesa*, 2010 WL 1848157, at *4 (C.D. Cal. April 30, 2010). Accordingly, because medical marijuana use violates the CSA, medical marijuana users are excluded from the definition of "individual with a disability" under Section 504 and the ADA, regardless of whether state laws authorize such use. *Barber*, 2005 WL 1607189, at *2.

2. Acting "on the basis of such use"

Section 504 and the ADA's exclusion of "current illegal drug users" applies to current medical marijuana users only when the PHA or owner is acting on the basis of that current use: "[T]he term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, *when the covered entity acts on the basis of such use*." 29 U.S.C. § 705(20)(C)(i); 42 U.S.C. § 12210(a) (emphasis added); *see also* 28 C.F.R. § 35.131(a)(1) ("this part does not prohibit discrimination against an individual *based* on that individual's current illegal use of drugs.")(emphasis added).

A housing provider is acting on the basis of current drug use, when, for example, the provider evicts a tenant for violating the provider's drug-free policies. In that context, the tenant, even if suffering from a serious impairment such as cancer or multiple sclerosis, would not be

[9] 42 U.S.C. § 12210(d)(1); *see also* 29 U.S.C. § 705(10)(B) (Section 504). Similarly, the Fair Housing Act House Report states that the "current illegal drug user" exclusionary provision in that law "does not eliminate protection for individuals who take drugs defined in the Controlled Substances Act for a medical condition under the care of, or prescription from, a physician." H.R. REP. NO. 100-711, at 22 (1988), *reprinted in* 1998 U.S.C.C.A.N. 2173, 2183.

"disabled" under the ADA or Section 504 for purposes of filing a claim under those laws challenging the eviction as disability discrimination. *See, e.g., Blatch v. Hernandez*, 360 F. Supp. 2d 595, 634 (S.D.N.Y. 2005) (concluding that otherwise disabled public housing residents with mental illnesses are not considered disabled if a provider evicts them based on their current illegal drug use). A tenant who has a disabling impairment and is a current illegal drug user could, however, bring a claim under the ADA or Section 504 for disability discrimination where the housing provider evicted the tenant because the tenant asked to have grab bars installed in the shower. In that case, the provider would not have acted on the basis of the illegal drug use, but because the tenant requested grab bars.

For the same reason, an otherwise disabled tenant – a tenant with cancer, for example – is not "disabled" under the ADA or Section 504 for purposes of challenging a housing provider's refusal to grant a tenant's request for a reasonable accommodation to use medical marijuana as a cancer treatment. In denying the cancer patient's request to use medical marijuana because it is an illegal drug, the housing provider would have been acting on the basis of current illegal drug use.[10]

Courts have specifically addressed this drug-use exclusion in medical marijuana cases, finding that otherwise disabled plaintiffs were excluded from protection under Section 504 and the ADA when housing entities took actions against them based on their use of medical marijuana. For example, one court rejected an ADA claim from a student with serious lower back problems who had requested an accommodation to use medical marijuana in a state university housing facility. *See Barber v. Gonzales,* 2005 WL 1607189, at *1 (E.D. Wash. July 1, 2005). The court noted that "a federal claim under the ADA *does not exist* because the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs when the covered entity acted on the basis of such use." *Id.* (emphasis added).

In another case, a medical marijuana user requested an accommodation to a PHA's drug-free policy that would allow him to continue using and cultivating marijuana in his unit. *See Assenberg v. Anacortes Hous. Auth.*, 2006 WL 1515603, at *2 (W.D. Wash., May 25, 2006), *aff'd*, 268 Fed.Appx. 643 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 104 (2008). The court concluded that although the tenant had a "debilitating" back injury, "because [he] was an illegal drug user, [the PHA] had no duty to accommodate him." 2006 WL 1515603 at *2, *5. The court of appeals affirmed and — with no analysis — stated that the ADA and Section 504 "expressly exclude illegal drug use" and "[the PHA] did not have a duty to reasonably accommodate [the plaintiffs'] medical marijuana use." *Assenberg*, 268 Fed. Appx. at 643; *see also Blatch v. Hernandez*, 360 F. Supp. 2d at 634 (finding that, in the context of general illegal drug use in public housing, under Section 504 and the ADA "the mentally disabled status of a current illegal drug user against whom action is taken based on that drug use . . . is [not] a viable basis for a claim that [the Housing Authority] is required to accommodate the disabled person by changing its generally-applicable rules.").

Thus, persons seeking an accommodation to use medical marijuana are not "individuals with a disability" under Section 504 and the ADA and therefore do not qualify for reasonable accommodations that would allow for such use. Furthermore, because requests to use medical

[10] We note that PHAs or owners that choose to exercise their discretion under QHWRA not to evict a current tenant for medical marijuana use may not later use this drug use as pretext for refusing to provide other, non-marijuana-related accommodations.

marijuana prospectively are tantamount to requests to become a "current illegal drug user," PHAs are prohibited from granting such requests. However, current medical marijuana users are disqualified from protection under the ADA and Section 504 only when the housing provider takes actions based on that illegal drug use.

B. *Though otherwise disabled medical marijuana users are not excluded from the Fair Housing Act's definition of "handicap," accommodations allowing for the use of medical marijuana in public housing or other federally assisted housing are not reasonable.*

The Fair Housing Act's illegal drug use exclusion is defined differently from the exclusion found in Section 504 and the ADA. Under the Fair Housing Act,

> "Handicap" means, with respect to a person—
>
> > (1) a physical or mental impairment which substantially limits one or more of such person's major life activities . . .
> > . . .
> > But such *term* does not include current, illegal *use* of or addiction to a controlled substance (as defined in Section 802 of Title 21 [CSA]).[11]

Unlike the language in Section 504 and the ADA, this provision does not categorically exclude individuals from protection under the Fair Housing Act. Rather, it prevents a current illegal drug user or addict from asserting that the drug use or addiction is itself the basis for claiming that he or she is disabled under the Act. Thus, if a person claims that medical marijuana use or addiction is the sole condition for which that person seeks a reasonable accommodation, that individual is not "handicapped" within the meaning of the Fair Housing Act, and no duty arises to accommodate such use. However, a person who is otherwise disabled (e.g., cancer, multiple sclerosis) is not disqualified from the definition of "handicap" under the Act merely because the person is also a current illegal user of marijuana. Because persons suffering from underlying disabling conditions not related to drug use are not disqualified from the Fair Housing Act's definition of "handicap" by virtue of their current medical marijuana use, we must examine whether accommodating such use is reasonable under the Act.[12]

1. Accommodations allowing the use of medical marijuana in public housing or other federally assisted housing are not reasonable under the Fair Housing Act.

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[11] 42 U.S.C. § 3602(h) (emphasis added).

[12] In *Assenberg v. Anacortes Hous. Auth.*, the trial court, with no analysis, determined that because the tenant was an illegal drug user, the PHA had no duty to accommodate him under the Fair Housing Act, the ADA, or Section 504. *See* 2006 WL 1515603, at *5. The court of appeals affirmed, stating only that the Fair Housing Act, the ADA, and Section 504 "all expressly exclude illegal drug use, and [the PHA] did not have a duty to accommodate [the tenant's] medical marijuana use." 268 Fed. Appx. at 644. Although the district court and the court of appeals, in unpublished opinions, each cited to the exclusionary provisions in the three statutes to support this conclusion, both courts failed to recognize the distinction between the statutory language in the Fair Housing Act, on the one hand, and the language in Section 504 and the ADA, on the other. *See* 2006 WL 1515603, at *5; 268 Fed. Appx. at 644.

Under the Fair Housing Act and other civil rights statutes protecting persons with disabilities, an accommodation may be denied as not reasonable if either: 1) granting the accommodation would require a *fundamental alteration in the nature* of the housing provider's operations; or 2) the requested accommodation imposes an *undue financial and administrative burden* on the housing provider. *See, e.g.,* Joint Statement, *supra* note 7, at 3.

Accommodations that allow the use of medical marijuana would sanction violations of federal criminal law and thus constitute a fundamental alteration in the nature of the housing operation. Indeed, allowing such an accommodation would thwart a central programmatic goal of providing a safe living environment free from illegal drug use. Since the inception of the public housing program in 1937, Congress and HUD have consistently maintained that one of the primary concerns of public housing and other assisted housing programs is to provide "decent, safe, and sanitary dwellings for families of low income." United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (1937); 42 U.S.C. § 1437a(a)(5)(C)(b)(1); *see also* 24 C.F.R. § 880.101 (same with respect to Section 8 program). Congress has made it clear that providing drug-free housing is integral to the government's responsibility in this regard: "[T]he Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and *free from illegal drugs*." 42 U.S.C. § 11901(1) (emphasis added). Toward this end, Congress specifically vested PHAs and owners with the authority to take action against illegal drug use, including the use of medical marijuana. Illegal drug use renders the user ineligible for admission to public or other assisted housing,[13] conflicts with drug-free standards that PHAs and owners are required to establish for current tenants,[14] and would violate a user-tenant's lease obligation to refrain from engaging in any drug-related criminal activity on or off the premises.[15]

Although PHAs and owners are not charged with enforcing federal criminal laws, requiring them to condone violations of those laws would undermine a PHA or owner's operations. In the public housing context, courts considering accommodations requiring PHAs to alter their drug-free policies to allow tenants with disabilities to use medical marijuana have found them unreasonable because they would have the perverse effect of mandating that PHAs violate federal law. *See Assenberg*, 2006 WL 1515603, at * 5 ("'Reasonable' accommodations do not include requiring [a PHA] to tolerate illegal drug use or risk losing its funding for doing so"); *Assenberg*, 268 Fed.Appx. at 643 ("Requiring public housing authorities to violate federal law would not be reasonable"). For similar reasons, courts have been unwilling even to require employers to modify their drug-testing and termination policies to allow *off-site* use of marijuana in states authorizing medical marijuana use. *See, e.g., Ross v. Ragingwire Telecommunications, Inc.*, 33 Cal. Rptr. 2d 803, 808 (Cal. Ct.

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[13] *See* 42 U.S.C. § 13661 (requiring PHAs or owners to establish admission standards that "prohibit admission to . . . federally assisted housing for any household with a member who the [PHA] or owner determines is illegally using a controlled substance . . . ."); 24 C.F.R. § 5.854 (same as applied to federally assisted housing); 24 C.F.R. § 960.204 (same as applied to public housing).

[14] *See* 42 U.S.C. § 13662 (requiring PHAs or owners to establish standards that "allow the agency or owner . . . to terminate the tenancy or assistance for any household with a member . . . who the [PHA] or owner determines is illegally using a controlled substance . . . ."); 42 U.S.C. § 1437d(l)(6) (requiring public housing leases to state that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy."); 24 C.F.R. § 966.4(l)(5)(i)(B) (same).

[15] *See* 24 C.F.R. § 966.4(f)(12)(i)(B) (requiring lease to provide that tenant is obligated to assure that no tenant, member of the household, or guest engages in drug-related criminal activity on or off premises); 24 C.F.R. § 5.858 (same as applied to all federally assisted housing).

App. 2005) (stating that "[i]t is not reasonable to require an employer to accommodate a disability by allowing an employee's drug use when such use is illegal."). Because they would require that PHAs and owners condone illegal drug use and would undermine the long-standing programmatic goal of providing a safe living environment free from illegal drug use, accommodations allowing marijuana-related activity constitute a fundamental alteration in the nature of the PHA or owner's operations and are therefore not reasonable.

2. Other marijuana-related conduct that is not reasonable

The CSA prohibits not only the use of marijuana, but also its manufacture, possession, and distribution, regardless of state medical marijuana laws. *See* 21 U.S.C. §§ 841(a)(1); 844(a). The drug-free policy to which PHAs and owners must adhere, as expressed in the mandatory lease terms described above, requires that PHAs and owners have the discretion to evict tenants for "any drug-related criminal activity on or off such premises." *Supra* note 14. Tenants likewise must refrain from engaging in drug-related criminal activity. *Supra* note 15. As a result, mandatory drug-free policies prohibit all forms of "drug-related criminal activity," including the possession, cultivation, and distribution of marijuana. *See* 24 C.F.R. §§ 966.2 and 5.100 (defining "drug-related criminal activity" in relation to the CSA). Consequently, just as accommodations allowing the *use* of medical marijuana are not reasonable, accommodations allowing other marijuana-related conduct prohibited by the CSA are also not reasonable.

IV. *In the unlikely event that state nondiscrimination laws are construed so as to require PHAs and owners to permit medical marijuana use as a reasonable accommodation, those laws would be subject to preemption by federal law.*

Because PHAs and owners are also bound by the laws of the state in which they operate, medical marijuana users might attempt to avail themselves of the reasonable accommodation provisions found in state nondiscrimination laws. Some state nondiscrimination statutes do not have explicit provisions excluding current illegal drug users from their definitions of "disability." Furthermore, while some states do exclude current illegal drug users from protection, they may not consider behavior that complies with state law, such as the state-authorized use of medical marijuana, to be illegal drug use.

We nonetheless believe it is unlikely that state nondiscrimination laws would be interpreted to require PHAs and owners of federally assisted housing to permit the use of federally-prohibited drugs. For example, the Supreme Court of California held that an otherwise disabled plaintiff failed to state a cause of action under a state nondiscrimination law when he alleged that his employer had unlawfully discharged him because of his off-site medical marijuana use. *See Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal. 4th 920, 924 (Cal. 2008). The court reasoned, in part, that because employers have a legitimate interest in considering the use of federally-illicit drugs when making employment decisions, the employer had no duty to accommodate the plaintiff's medical marijuana use: "[California law] does not require employers to accommodate the use of illegal drugs. The point is perhaps too obvious to have generated appellate litigation . . . ." *Id.* at 926.

If a state nondiscrimination law were construed to require accommodations allowing for the use of medical marijuana, such an interpretation would be subject to preemption by the federal laws governing drug use in public housing and other federally assisted housing, and by the CSA. The CSA expressly preempts state laws that "positively conflict" with the CSA. *See* 21 U.S.C. § 903. A state law that would require accommodation of medical marijuana use "positively conflicts" with the CSA because it would mandate the very conduct the CSA proscribes. *See* 21 U.S.C. § 903; 21 U.S.C. 841(a)(1); 844(a) (criminalizing marijuana-related conduct); *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1100 (N.D. Cal. 1998) (interpreting the "positive conflict" language in the CSA to preempt state laws that "purport to make legal any conduct prohibited by federal law"); *see also Columbia v. Washburn Products, Inc.*, 134 P.3d 161, 166-67 (Or. 2006) (Kistler, J., concurring) (concluding, in state employment discrimination case involving the use of medical marijuana, that "the federal prohibition on possession is inconsistent with the state requirement that defendant accommodate its use . . . . The fact that the state may choose to exempt medical marijuana users from the reach of state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits.").

Although federal laws governing public housing and federally assisted housing do not expressly state an intention to preempt state law, a state law interpreted to require accommodation of medical marijuana use would nonetheless be subject to preemption under the doctrine of implied conflict preemption. Implied conflict preemption arises where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Wastes Mgmt.*, 505 U.S. 88, 98 (1992) (internal citations and quotations omitted). State nondiscrimination laws requiring accommodation of medical marijuana use would be subject to preemption by federal laws governing drug use in public housing and other federally assisted housing because: 1) by requiring an accommodation when federal admissions standards mandate the exclusion of the applicant, they would render compliance with federal law impossible; and 2) by requiring an accommodation that divests PHAs and owners of the discretion to evict provided by QHWRA and HUD regulations, they would stand as an obstacle to the accomplishment and execution of federal law objectives. *See supra* Section II.C. and notes 13-14.

V. *Conclusion*

In sum, PHAs and owners may not grant reasonable accommodations that would allow tenants to grow, use, otherwise possess, or distribute medical marijuana, even if in doing so such tenants are complying with state laws authorizing medical marijuana-related conduct. Further, PHAs and owners must deny *admission* to those applicant households with individuals who are, at the time of consideration for admission, using medical marijuana. *See* 42 U.S.C. § 13661(b)(1)(A); Laster Memorandum at 2.

We note, however, that PHAs and owners have statutorily-authorized discretion with respect to evicting or refraining from evicting *current residents* on account of their use of medical marijuana. *See* 42 U.S.C. § 13662(a)(1); Laster Memorandum at 5-7. If a PHA or owner desires to allow a resident who is currently using medical marijuana to remain as an occupant, the PHA or owner may do so as an exercise of that discretion, but not as a

reasonable accommodation. HUD regulations provide factors that PHAs and owners may consider when determining how to exercise their discretion to terminate tenancies because of current illegal drug use. *See* 24 C.F.R. §§ 966.4(l)(5)(vii)(B) (factors for PHAs); 5.852 (factors for PHAs and owners operating other assisted housing programs).