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THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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118 MM 2019

MELISSA GASS, ASHLEY BENNETT, and ANDREW KOCH, individually and on behalf of all others similarly situated,

Petitioners

v.

52nd JUDICIAL DISTRICT, LEBANON COUNTY,

Respondent.

REPRODUCED RECORD

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MELISSA GASS, ASHLEY BENNETT, and ANDREW KOCH, individually and on behalf of all others similarly situated, **Petitioners,** **v.** **52nd Judicial District, Lebanon County,** **Respondent.**	**No. _____** **CLASS ACTION** **Original Jurisdiction**

NOTICE TO PLEAD

To the 52nd Judicial District, Lebanon County: You are hereby notified to file a written response to the Petitioners' enclosed Class Action Petition for Review within twenty (20) days from service hereof, or such other time as the Court prescribes, or judgment may be entered again you.

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days, or within the time set by order of the court, after this petition for review and notice are served, by entering a written appearance personally or by attorney and filling in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claims or relief requested by the plaintiff. You may lose money or property or other rights important to you. You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Lebanon County Bar Association
Lawyer Referral Service
547 South Tenth Street
Lebanon, PA 17042
(717) 273-3113

/s/ Witold J. Walczak

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MELISSA GASS, ASHLEY BENNETT, and ANDREW KOCH, individually and on behalf of all others similarly situated, **Petitioners,** **v.** **52nd Judicial District, Lebanon County,** **Respondent.**	**No. _____** **CLASS ACTION** **Original Jurisdiction**

CLASS ACTION PETITION FOR REVIEW
ADDRESSED TO THE COURT'S ORIGINAL JURISDICTION

I. SUMMARY OF THE LAWSUIT

1. Pennsylvania legalized medical marijuana in 2016 through the Medical Marijuana Act ("MMA"). Under the MMA, individuals with serious medical conditions can use medical marijuana after registering with the state and obtaining a doctor's certification. The law contains an immunity provision that protects patients from arrest, prosecution, or any manner of penalty and prohibits them from being denied any right or privilege for using medical marijuana. Despite this immunity provision, the 52nd Judicial District, sitting in Lebanon County, has adopted a policy prohibiting individuals from using medical marijuana if they are

on probation or otherwise under court supervision. This lawsuit challenges that policy as illegal under Pennsylvania law.

2. The Medical Marijuana Policy, No. 5.1-2019 & 7.4-2019 ("Policy"), which the 52nd Judicial District adopted on September 1 with an effective date of October 1, contradicts the unambiguous text of the MMA and the intent of the General Assembly. The Policy specifies that all individuals who use medical marijuana have 30 days to discontinue use. Although the Policy does not specify what will happen to individuals who continue to use medical marijuana, typical consequences for violations of terms of supervision include arrest, detention, and revocation of probation. The MMA, however, specifically *prohibits* such punishment, specifying that patients "shall not be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege . . . solely for lawful use of medical marijuana." 35 P.S. § 10231.2103(a). The plain text of the MMA thus prohibits all state, county, and local actors—which includes the 52nd Judicial District and its probation department—from punishing individuals for lawfully using medical marijuana in accordance with the MMA. The legislature could have explicitly exempted individuals under court supervision from the protections of the Act, but it did not do so. More than sixty people with serious medical issues in Lebanon County must now decide whether to discontinue their lawful use of a medical treatment that safely and effectively alleviates their serious medical

conditions, or risk revocation of their probation and possible incarceration. It is a choice between risking severe health consequences and going to jail.

3. Although the possession of marijuana is illegal under federal law, even for medical purposes, the federal Controlled Substances Act does not—and does not purport to—require that states enforce it. Instead, states are free to enact their own laws regarding medical marijuana. Indeed, Congress has explicitly prohibited the Department of Justice from using federal funds to prevent states from implementing laws that authorize the use, distribution, possession, or cultivation of medical marijuana, and courts have read that provision to bar the DOJ from prosecuting medical marijuana users for violating federal law or even prosecuting violations of supervised release based on state-law compliant use of medical marijuana.

4. Barring individuals who have been certified by a state-authorized physician from accessing medication to treat their serious medical conditions creates severe and potentially life-threatening medical risks. Notably, the 52nd Judicial District has not prohibited individuals from using opioids, antipsychotics, or other medications that pose a significant risk of harm. Already, Petitioners have begun to suffer serious physical and mental health consequences as a result of the Policy, ranging from severe and life-threatening seizures to significant weight loss, severe pain, and depression. They also face a risk of self-harm and even suicide.

Some medical marijuana patients have relied on marijuana to stop using far more dangerous opiates, and the ban on marijuana use could jeopardize their recovery. The harm that Petitioners and similarly situated individuals under the supervision of the 52nd Judicial District have suffered and continue to suffer as a direct result of the unlawful Medical Marijuana Policy is immediate and irreparable.

5. In light of the MMA's clear language barring policies like the one issued by the 52nd Judicial District, Petitioners move this Court for an order declaring the Policy unenforceable under the Act. Petitioners also seek special relief in the form of a preliminary and permanent injunction restraining enforcement of the Policy.

II. JURISDICTION

6. This Court has original jurisdiction over this Petition for Review pursuant to 42 Pa.C.S. § 761(a)(1).

III. PARTIES

52nd Judicial District

7. Respondent, the 52nd Judicial District, is the judicial district of Pennsylvania's Unified Judicial System sitting in Lebanon County, Pennsylvania, which includes the Lebanon County Court of Common Pleas and Lebanon County Probation Services Department.

Melissa Gass

8. Petitioner Melissa Gass is a 41-year-old woman who uses medical marijuana to treat grand mal seizures from her epilepsy. Ms. Gass has also been diagnosed with post-traumatic stress disorder, anxiety, and depression. A lifelong resident of Lebanon County, Ms. Gass is a mother of five and will soon be a grandmother for the first time. Ms. Gass has been suffering from seizures since she was in a car accident at age ten and can have multiple seizures per day if not properly medicated.

9. Ms. Gass is currently under court supervision by the 52nd Judicial District and will remain on probation until October 21, 2020. Ms. Gass was arrested for simple assault following an altercation she had with her husband in February 2016. She began her term of probation on November 29, 2018.

10. Prior to beginning probation last November, Ms. Gass had for years been successfully self-medicating with marijuana to control her seizures. Before turning to marijuana, she had been using benzodiazepines and other prescribed medications for seizure control and PTSD-related issues, which left her depressed. She engaged in self-harm and even attempted suicide. Marijuana use not only controlled her seizures more effectively, but it allowed her to dispense with the prescriptions that caused adverse mental health symptoms.

11. Ms. Gass was forced to stop using marijuana when she began probation on November 29, 2018. Almost immediately, she resumed having seizures. She was hospitalized on December 3, 2018—her birthday—for serious seizures. Between November 2018 and February 2019, when she received her medical marijuana ID card and began treating her seizures with marijuana again, Ms. Gass was hospitalized four times. During this period, an ambulance had to be called to her workplace three times.

12. Ms. Gass sought and obtained a medical marijuana ID card in February 2019, after her probation officer witnessed her repeatedly acting confused due to her prescription medications and encouraged her to get such a card.

13. After receiving her medical marijuana ID card, Ms. Gass has primarily used Rick Simpson Oil ("RSO"), a medical marijuana oil that she can apply to her gums when she is beginning to experience a seizure. When applied, the RSO ends her seizure almost instantaneously. When she began using medical marijuana in February, Ms. Gass once again was able to stop using or begin tapering off her other medications.

14. On September 10, 2019, during a regularly scheduled monthly probation visit, Ms. Gass's probation officer told her that because of the new Policy she needed to stop using medical marijuana. She immediately stopped using

medical marijuana for a period of two weeks. During this period, she had approximately twenty seizures.

15. During this time period, and previous times when she did not control her seizures with marijuana, Ms. Gass was forced to treat her seizures with 10 milligrams of diazepam rectal gel. This requires the insertion of a syringe into her rectum to inject the medication, which takes at least three minutes to take effect. This must be done by a third party because she is in the midst of a seizure and cannot administer it herself. If she does not insert the gel, Ms. Gass can have multiple consecutive seizures.

16. On or about September 24, 2019, Ms. Gass spoke with counsel and was informed that, per the 52nd Judicial District's Policy, she did not need to stop using medical marijuana until September 30, 2019. She resumed using medical marijuana, which effectively reduced and controlled her seizures.

17. On October 2, 2019, Ms. Gass's probation officer informed her that her lawyers had apparently misunderstood the court's position, and that in fact he would charge her with violating her probation if she continued to use medical marijuana. Ms. Gass promptly disposed of her medical marijuana and stopped administering it. Later that day, she had the first of multiple seizures.

18. At a meeting with her probation officer on October 3, he again reiterated that she would be drug tested at some point in the future and would be

reported to the court as violating her probation conditions if she was found to be using medical marijuana.

19. Ms. Gass had multiple seizures after she stopped using medical marijuana. On October 4 alone, she had six or seven seizures in one day.

20. Faced with the life-threatening seizures on the one hand and a probation violation on the other, Ms. Gass—on advice of counsel—has resumed using medical marijuana to manage her seizures. Indeed, she seized at the dispensary when she went to purchase the medication. Dispensary staff had to hold her up while her husband rubbed the RSO on her gums, which almost instantly stopped the seizure.

Ashley Bennett

21. Petitioner Ashley Bennett is a 33-year-old lifelong resident of Lebanon. She is the mother of two boys. She has worked regularly her entire adult life, except when medical problems have prevented her from doing so.

22. Ms. Bennett uses medical marijuana to treat her post-traumatic stress disorder, caused by repeated violence inflicted on her during childhood; it also provides incidental benefits for abdominal pain and nausea she has experienced following the removal of her gallbladder and attendant medical problems.

23. Prior to having access to medical marijuana, Ms. Bennett self-medicated with marijuana. It was the first treatment that actually addressed her

symptoms and allowed her to function. She began using marijuana several years ago to treat her PTSD. Conventional methods of treating her PTSD failed. Re-living the trauma in therapy was too painful to endure, and the prescription drugs that she took had significant side effects, including causing suicidal ideation and leading her to self-harm.

24. In addition to her mental health disorders, using medical marijuana has also had the salutary benefit of helping to alleviate chronic pain caused by gall bladder surgery four years ago and a related intestinal blockage. Ms. Bennett is unable to eat more than a small amount of food at a time without becoming nauseated, a problem that medical marijuana greatly alleviates.

25. In December 2018, Ms. Bennett was arrested for possessing marijuana and drug paraphernalia. Ms. Bennett did not receive her medical marijuana card until May 21, 2019. She was sentenced on September 4, 2019, and will be on probation until June 4, 2020.

26. Ms. Bennett learned in late August of 2019 that Lebanon County was implementing a policy prohibiting those on probation from using medical marijuana. When she began her sentence of probation on September 4, 2019, her probation officer confirmed that under the court's new Policy, she could no longer continue to use medical marijuana and that she would be in violation of her

probation conditions if she tested positive after October 1. He then told her that she will be drug tested on October 17.

27. Because of the Policy, Ms. Bennett stopped using medical marijuana because she is afraid that she will be arrested and her children will be deprived of their mother.

28. As a result of suspending medical marijuana use, Ms. Bennett is no longer able to sleep through the night. Her restless leg syndrome, related to her PTSD, has returned. She is also nauseous, and has lost nearly 15 pounds—10% of her body weight—in the past month because she is having difficulty eating. Her nausea is so severe that it is interfering with her daily life. For instance, she is unable to take her children places at times, and has to rely on her boyfriend to transport them to places such as football practice. She has low energy and finds it nearly impossible to do anything else when she is experiencing the nausea.

29. Her mental health is also deteriorating. Ms. Bennett has been forced to resume mental health care. Her health insurance limits her options. She has to wait at least sixty days to resume appointments with her psychiatrist. Even then, Ms. Bennett is frightened of the consequences of having to medicate with the same prescription drugs that caused her to harm herself and consider suicide.

Andrew Koch

30. Petitioner Andrew Koch is a 28-year-old father of two boys. He works in Lebanon as a floor installer. He suffers from constant back and hand pain caused by a 2014 car accident in which he was ejected from the vehicle. The impact crushed both the joints in his right hand and several vertebrae. He was hospitalized for several months and spent an entire month in a medically induced coma. Mr. Koch has titanium plates in his back to support the crushed vertebrae.

31. While hospitalized for his accident-related injuries, Mr. Koch became addicted to liquid morphine. When he eventually left the hospital, he went into withdrawal and managed to break the addiction. His experience with morphine left him scared to turn to opioids to control his constant back and hand pain, which is why Mr. Koch began self-medicating with marijuana. At one point, Mr. Koch explored receiving Social Security disability benefits, but he was informed by a lawyer that he should take opioids in order to strengthen his case. Mr. Koch decided it was not worth the risk to his health.

32. Mr. Koch has been able to successfully manage his pain using medical marijuana, allowing him to live a more normal life. While it does not entirely curtail the pain, marijuana reduces it to a tolerable level. Without marijuana, he has to move more slowly and is far less effective at work. The biggest problem,

though, comes with sleeping, as he finds it much harder to fall asleep, and the pain wakes him up during night, leaving him exhausted and sleep deprived.

33. Mr. Koch is under the supervision of the 52nd Judicial District after being convicted of possessing marijuana and driving on a suspended license on February 14, 2018. He is set to end probation on December 10, 2019.

34. Mr. Koch received his medical marijuana card on October 20, 2018. When he informed his probation officer that he was using medical marijuana, he explained that it was due to his back and hand pain, and his probation officer raised no objections.

35. On September 1, 2019, Mr. Koch's probation officer informed him that because of the 52nd Judicial District's new Policy, he must promptly stop using medical marijuana, which he did.

36. As a result, the severe pain that Mr. Koch has managed for years with marijuana has returned. In the past month, it has become so intolerable that Mr. Koch is considering asking a doctor for a prescription for opioids, as he simply cannot live with the pain without treatment. Mr. Koch prefers medical marijuana. He knows that he has never developed a dependency on marijuana and can stop using it at will, as he has done for the past five weeks. Once he starts using opioids, however, he fears his body will once again need to continue to use those drugs. Because the 52nd Judicial District has not barred the use of prescription opioids by

probationers, he will be able to use those dangerous and addictive medications without risking incarceration—but at the risk of developing a life-threatening addiction.

IV. MEDICAL MARIJUANA WAS LEGALIZED IN PENNSYLVANIA IN 2016 AND IS HIGHLY REGULATED BY THE COMMONWEALTH.

Background

37. In 2016, the Pennsylvania General Assembly overwhelmingly passed Act 16 of 2016, the Medical Marijuana Act ("the Act" or "MMA"), and Governor Wolf signed it into law. The vote in favor of the bill was 149-46 in the House and 42–7 in the Senate. The law established a medical marijuana program that allows individuals in Pennsylvania access to a "therapy that may mitigate suffering in some patients and also enhance [their] quality of life," while also protecting patient safety. 35 P.S. § 10231.102.

38. Marijuana refers only to parts of the plant or derivative products containing substantial levels of tetrahydrocannabinol (THC), but the Act covers a broad range of cannabis products and derivatives from the *Cannabis sativa* plant. Nat'l Academies of Scis., Engineering, and Med., *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* at 38 (2017) (hereinafter "Report").

39. Globally, many practitioners have ascribed medicinal properties to cannabis for centuries; in 1851, cannabis was included in the 3rd edition of *Pharmacopoeia of the United States*. Report at 43. The *United States Pharmacopeia* (USP), a compendium of drug information for the United States published annually by the United States Pharmacopeial Convention, specifically identified uses of cannabis as an analgesic, hypnotic, and anticonvulsant. *Id.*

40. The United States prohibited cannabis in 1937 with the passage of the Marihuana Tax Act ("MTA"), and in 1942, cannabis was removed from the 12th edition of *U.S. Pharmacopoeia*. *Id.* The MTA regulated production, distribution, and use of cannabis, and nonmedical supply or use violated the MTA and could result in a fine and imprisonment. *Id.* at 65.

41. Beginning in 1996, states began to enact medical cannabis laws. Policies vary state to state, and only a handful of states currently prohibit medical marijuana completely. Report at 75.

42. In 2009, the U.S. Department of Justice issued a policy memo of its intent not to prosecute individuals abiding by their state's medical cannabis laws. Report at 77.

43. A Committee on the Health Effects of Marijuana, established by the National Academies of Sciences, Engineering, and Medicine issued a report in

2017 on the health effects of cannabis and cannabinoids. The U.S. Food and Drug Administration and the Centers for Disease Control and Prevention were among the group of report sponsors. Report at *ix*. The report found conclusive or substantive evidence that cannabis or cannabinoids were effective in several medical contexts, including treatment of chronic pain, as antiemetics, and for improvement of multiple sclerosis spasticity symptoms. Report at 90, 94, 103.

44. Limited evidence is available on the efficacy of cannabis and cannabinoids for a range of other medical conditions, in part because marijuana's classification as a Schedule I drug under the federal Controlled Substances Act impedes advancement of cannabis and cannabinoid research. Report at 382.

Regulation of Patient Access

45. Under Pennsylvania's Medical Marijuana Act, only a small group of Pennsylvanians is eligible to use medical marijuana: those who have a serious medical condition as defined by either the Act or the Department of Public Health. 28 Pa. Code § 1141.21.

46. A patient under the terms of the Act is a person who: 1) has a serious medical condition; (2) has met the requirements for certification under this act; and (3) is a resident of the Commonwealth. See 35 P.S. § 10231.103.

47. The current list of covered conditions is limited to[1]:

- Amyotrophic lateral sclerosis
- Anxiety disorders
- Autism
- Cancer, including remission therapy
- Crohn's disease
- Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies
- Dyskinetic and spastic movement disorders
- Epilepsy
- Glaucoma
- HIV / AIDS
- Huntington's disease
- Inflammatory bowel disease
- Intractable seizures
- Multiple sclerosis
- Neurodegenerative diseases
- Neuropathies
- Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions
- Parkinson's disease

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[1] *See* 35 P.S. § 10231.103 (defining "serious medical condition"). The Department of Health also added anxiety disorders and Tourette syndrome as approved medical conditions as of July 20, 2019. This change is reflected on the Pennsylvania Department of Health's website, but has not been formally codified yet. *See* PA. DEP'T OF HEALTH, *Getting Medical Marijuana*, https://www.pa.gov/guides/pennsylvania-medical-marijuana-program/.

- Post-traumatic stress disorder
- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain
- Sickle cell anemia
- Terminal illness
- Tourette Syndrome

48. Access to medical marijuana is highly controlled in Pennsylvania. To gain access to medical marijuana, an individual must first register with the state-run Medical Marijuana Registry ("the Registry"). 28 Pa. Code § 1191.22(a–b); *see also* 28 Pa. Code § 1191.28. The Registry collects information such as legal name, current address, and contact information. *See* 35 P.S. § 10231.501(c)

49. An individual must also have a Pennsylvania driver's license or ID card issued by the Pennsylvania Department of Transportation to register for the medical marijuana program. 28 Pa. Code § 1191.25(b)(2).

50. After successfully registering, an individual must visit an approved physician and have the physician certify that the individual suffers from a qualifying medical condition. *See* 35 P.S. §§ 10231.501(a), 10231.403(a).

51. Physicians must register with the Department of Health to be approved to recommend medical marijuana for patients in Pennsylvania. 35 P.S. §§ 10231.401(a–b)

52. Physicians who issue certifications may set forth recommendations, requirements, or limitations as to the form or dosage of a medical marijuana

product on the patient certification. 35 P.S. § 10231.403(b)(6). Medical cannabis remains highly individualized and resistant to specific dosing. The amounts necessary to control one individual's medical condition may not be appropriate to control the same medical condition in a different individual. Any recommendations, requirements, or limitations will be accessible to dispensaries when the patient certification is accessed in the Registry. Pa Code. §§ 1161.23(b)(2)(i), 1161.22(b)(1).

53. Once certified by an approved physician, individuals may complete their application for a medical marijuana ID card with the registry. *See* PA. DEP'T OF HEALTH, *Getting Medical Marijuana*, https://www.pa.gov/guides/pennsylvania-medical-marijuana-program/ (hereinafter "PA. DEP'T OF HEALTH, *Guide*").

54. Individuals must pay a fee of $50 for a medical marijuana ID card. 35 P.S. § 10231.501(c)(5). Patients in public assistance programs such as Medicaid, PACE/PACENET, CHIP, SNAP, and WIC may be eligible for fee reductions. PA. DEP'T OF HEALTH, *Guide*. Medical marijuana ID cards must be renewed annually. 28 Pa. Code §§ 1191.28(d)(1), 1191.29(a).

55. Once an individual has received a medical marijuana ID card, they may purchase medical marijuana from a dispensary. 28 Pa. Code § 1191.31(a–b)

56. The following forms of marijuana are approved for medical use[2]:

- Pill
- Oil
- Topical forms, including gels, creams, or ointments
- Tincture
- Liquid
- A form medically appropriate for administration by vaporization or nebulization, including dry leaf or plant form

57. Medical marijuana products must have a specific concentration of total THC and total CBD, and must have a consistent cannabinoid profile. The concentration of 10 different cannabinoids[3] must be reported to the Department by an approved laboratory and be included on the product label. 28 Pa. Code § 1151.29(a).

58. A dispensary may not dispense an amount of medical marijuana product greater than a 30-day supply to a patient or caregiver, until the patient has

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[2] 28 Pa. Code § 1151.28

[3] The concentrations of the following cannabinoids must be reported and included on labels: tetrahydrocannabinol (THC); tetrahydrocannabinol acid (THCA); tetrahydrocannabivarin (THCV); cannabidiol (CBD); cannabinadiolic acid (CBDA); cannabidivarine (CBDV); cannabinol (CBN); cannabigerol (CBG); cannabichromene (CBC); any other cannabinoid component at › 0.1%. *See* 28 Pa. Code § 1151.29(a).

exhausted all but a 7-day supply provided pursuant to the patient certification currently on file with the Department. 28 Pa. Code § 1161.24(b).

59. Prior to dispensing the product, the dispensary employee must prepare a receipt of the transaction and file it with the Department using the electronic tracking system. The receipt must include all of the following information: the name, address and any permit number assigned to the dispensary by the Department; the name and address of the patient and, if applicable, the patient's caregiver; the date the medical marijuana product was dispensed; any requirement or limitation noted by the practitioner on the patient's certification as to the form of medical marijuana product the patient should use; and the form and the quantity of medical marijuana product dispensed. 28 Pa. Code § 1161.23(c). A copy of this receipt must also be given to the patient and/or caregiver, unless that individual declines a receipt. This is the end of the "seed to sale" tracking system: the system will reflect that the product left dispensatory inventory and is in the possession of the patient.

60. Petitioners have followed all applicable rules and guidelines in securing their medical marijuana ID cards, purchasing medical marijuana, and using it.

61. The MMA allows the Department to notify any appropriate law enforcement agency of information relating to any violation or suspected violation

of the Act and directs the Department to verify to law enforcement personnel whether a certification, permit, registration or an identification card is valid, including release of the name of the patient. 35 P.S. § 10231.1103.

62. If the Department determines that a patient intentionally, knowingly or recklessly violates any provision of the MMA, it can suspend or revoke the identification card of the patient. *Id.* at § 10231.509.

63. The MMA makes it a misdemeanor of the second degree for a patient to intentionally, knowingly or recklessly provide medical marijuana to a person who is not lawfully permitted to receive medical marijuana. *Id.* at § 10231.1304.

V. THE MMA PROHIBITS THE 52ND JUDICIAL DISTRICT FROM PENALIZING MEDICAL MARIJUANA PATIENTS WHO COMPLY WITH STATE LAW.

64. On September 1, 2019, the 52nd Judicial District adopted a Policy (attached hereto as Exhibit 1) that in relevant part states:

> Lebanon County Probation Services shall not permit the active use of medical marijuana, regardless of whether the defendant has a medical marijuana card, while the individual is under supervision by the Lebanon County Probation Services Department. Offenders under supervision who are currently using medical marijuana will have 30 days to discontinue use.

65. The Policy provides for no exceptions.

66. It applies to all individuals under court supervision, which would include individuals on pretrial release, Accelerated Rehabilitative Disposition (ARD), probation and parole.

67. The Policy violates the MMA.

68. A core component of the MMA is its broad protection for patients from any form of punishment, or the denial of rights or privileges, stemming from their use of medical marijuana under the MMA. To that end, the MMA protects not only patients, but also doctors, caregivers, and others involved in lawful practice under the MMA from governmental sanctions. According to the MMA, "none" of those individuals:

> shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by a Commonwealth licensing board or commission, solely for lawful use of medical marijuana or manufacture or sale or dispensing of medical marijuana, or for any other action taken in accordance with this act.

35 P.S. § 10231.2103(a).

69. Section 10231.2103(a) prohibits *any* arrest, prosecution or other penalty. Likewise, medical marijuana patients cannot be denied *any* right or privilege for using medical marijuana under this Section.

70. Probation is a privilege under Pennsylvania law, but a plain reading of the Act includes probation within the privileges protected by Section 10231.2103(a).

71. The Pennsylvania General Assembly could have excluded individuals who are under court supervision from using medical marijuana, but it did not.

72. The Act expressly prohibits use of medical marijuana in correctional institutions, including one "which houses inmates serving a portion of their sentences on parole." 35 P.S. § 10231.1309(1). If the General Assembly intended to prohibit all parolees from using medical marijuana, there would be no need for a separate exception to prohibit its use by patients in facilities serving parolees, as those individuals would be barred from using medical marijuana *regardless* of their location.

73. The MMA also expressly excludes certain individuals with specified convictions from being employed with a medical marijuana organization or from being a caregiver. *See* 35 P.S. §§ 10231.614, 10231.502(b). No such exclusion applies for patients.

74. In justifying the Policy, Lebanon County Court of Common Pleas President Judge John Tylwalk cited federal law, claiming that since marijuana remains classified as a Schedule I substance[4] and is illegal under federal law, "the

[4] The Federal Controlled Substances Act of 1970 classified marijuana as a Schedule I substance, which is defined as having a "high potential for abuse and dependency, with no recognized medical use or value." 21 U.S.C. § 812. In the Policy, however, Judge Tylwalk himself acknowledged that the use of medical marijuana "may have benefits for some medical conditions and under some circumstances may be helpful." Ex. 1.

Court and the Probation Department should not knowingly allow violation of law to occur."[5]

75. The Policy contradicts the unambiguous intent of the General Assembly, and unless it is enjoined, will subject medical marijuana patients to adverse consequences that the Act sought to prevent. These consequences include the revocation of a medical marijuana patient's probation or arrest for violating the terms of supervision. Revocation or arrest can be understood as a denial of privileges and/or penalization under the immunities clause of the Act.

76. Lebanon County's 52nd Judicial District is not the only Pennsylvania court to adopt a policy of prohibiting people on supervised release from using medical marijuana. Upon information and belief, the judicial systems in the following counties have adopted or are implementing similar policies: Lycoming, Jefferson, Elk, Forest, Potter, Indiana and Northampton.

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[5] The federal Controlled Substances Act ("CSA"), however, does not require the 52nd Judicial District to prohibit individuals on probation from using medical marijuana. State courts cannot be compelled to enforce federal law, and the CSA does not purport to require such enforcement. *See generally Printz v. United States*, 521 U.S. 898, 935 (1997); *see also Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 538 (Mich. 2014) (CSA does not "require that the City, or the state of Michigan, enforce that [federal] prohibition.").

77. Other judicial districts allow people on supervised release to use medical marijuana, including Philadelphia, Allegheny, and Centre counties.

78. Petitioners do not know how the remaining Pennsylvania courts handle the matter.

79. On September 16, 2019, undersigned counsel sent a letter to President Judge Tylwalk setting forth the arguments about why the Policy violates state law and asking the Court to rescind it (attached hereto as Exhibit 2). After a week of negotiations, via lawyers with the Administrative Office of the Pennsylvania Courts (AOPC), the 52nd Judicial District refused to provide sufficient assurances that it would not violate probationers for using medical marijuana. This litigation follows.

VI. CLASS ACTION ALLEGATIONS

80. Petitioners bring this action pursuant to Pennsylvania Rule of Civil Procedure 1701, et. seq., on their own behalf and on behalf of a class of others similarly situated.

81. Petitioners collectively are entitled to bring this action for declaratory judgment because there is a justiciable controversy that is concrete and ripe for judicial resolution, and no adequate remedy at law exists.

82. Petitioners seek to represent the following class on claims for declaratory and injunctive relief:

The Class

> **All individuals who meet the requirements for certification under the Medical Marijuana Act and who are currently or in the future will be under the supervision of the 52nd Judicial District.**

83. The prerequisites of Pennsylvania Rule of Civil Procedure 1702, as well as the criteria specified in Pennsylvania Rules of Civil Procedure 1708 and 1709, are all satisfied by this class action.

84. The information as to the size of the class and the identity of the individuals who are in the class are in the exclusive control of Respondent. Upon information and belief, the number presently exceeds sixty (60), with unknown and unknowable people assuredly being added in the future. The number of persons who are members of the class described above are so numerous and impossible to ascertain that joinder of all members in one action is impractical.

85. Questions of law or fact are common to the entire class because the actions of Respondent complained of herein are generally applicable to the entire class. These legal and factual question include but are not limited to:

a. the nature and type of injury caused by the Respondent;

b. the nature and type of relief appropriate for the class; and

c. whether Respondent's Policy is prohibited by the clear language of the MMA, as applied to individuals under court supervision in the 52nd Judicial District.

86. Petitioners' claims are typical of the members of the class because Petitioners and all class members are injured by the same Policy of Respondent as described in this Petition. Petitioners' claims arise from the same practices and courses of conduct that give rise to the claims of the class members, and are based on the same legal theories.

87. The representative Petitioners will fairly and adequately assert and protect the interests of the class. Petitioners have retained counsel with substantial experience in the conduct of complex class actions, including actions against state actors, who will adequately represent the interests of the class. There are no conflicts between the representative Petitioners and the class as a whole. Petitioners' counsel are not charging for representation in this matter and have adequate financial resources to assure that the interests of the class will not be harmed.

88. A class action is a fair and efficient method of adjudicating the controversy. Common questions of law and fact predominate over any question or questions that may affect only individual class members. The size of the class, known only to Respondent at this time, should not present any serious difficulties in managing the class action. Prosecution of separate actions by individual

members of the class could result in inconsistent adjudications with respect to individual members of the class, which would confront the Respondent with incompatible standards of conduct. To Petitioners' knowledge, no other litigation has already been commenced by other members of the class involving the Policy.

89. The Commonwealth Court is the appropriate forum for the litigation of the claims of the entire class because Petitioners bring a claim against the 52nd Judicial District, which is an entity of the Commonwealth.

90. Finally, Respondent has acted and refused to act on grounds generally applicable to the class, and thereby making final equitable and declaratory relief appropriate with respect to the class as a whole.

VII. CLAIMS

COUNT I

The 52nd Judicial District's Policy of Requiring People on Supervised Release to Abstain from the Lawful Use of Medical Marijuana Violates Pennsylvania's Medical Marijuana Act, 35 P.S. § 10231.101 *et seq.*

91. Petitioners hereby incorporate and adopt each and every allegation set forth in the foregoing paragraphs of the Petition for Review.

92. The Medical Marijuana Act protects patients, doctors, caregivers, and other health care providers involved in lawful practice under the Act from governmental sanctions.

93. Section 10231.2103(a) of the Medical Marijuana Act provides that "none" of those individuals:

> shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by a Commonwealth licensing board or commission, solely for lawful use of medical marijuana or manufacture or sale or dispensing of medical marijuana, or for any other action taken in accordance with this act.

35 P.S. § 10231.2103(a).

94. This provision prohibits *any* arrest, prosecution, or other penalty. In addition, a medical marijuana patient cannot be denied *any* right or privilege for using medical marijuana pursuant to the Medical Marijuana Act.

95. Probation is a privilege under Pennsylvania law. *See Commonwealth v. Newman*, 310 A.2d 380, 381 (Pa. Super. Ct. 1973) (en banc) (describing the "privilege of probation").

96. The plain language of the MMA prohibits courts from denying privileges to patients using medical marijuana in accordance with the MMA.

97. The Policy adopted by the 52nd Judicial District will subject medical marijuana patients to arrest, detention, and the revocation of their probation solely for the lawful use of medical marijuana in violation of the MMA.

PRAYER FOR RELIEF

98. Petitioners and the class they seek to represent have no adequate remedy at law to redress the wrongs suffered as set forth in this petition. Petitioners

and the class they seek to represent have suffered and will continue to suffer irreparable harm as a result of the unlawful acts, omissions, policies, and practices of Respondent, as alleged herein, unless this Court grants the relief requested.

99. **WHEREFORE**, Petitioners respectfully request that this Honorable Court enter judgment in their favor and against the 52nd Judicial District and:

a. Assume jurisdiction of this suit and certify, pursuant to Rule 1710 of the Pennsylvania Rules of Civil Procedure, that this action be maintained as a class action;

b. Declare that Policy No. 5.1-2019 & 7.4-2019 is prohibited by the Medical Marijuana Act and is therefore invalid, ineffective, and without the force of law;

c. Preliminarily and permanently enjoin Respondent, its agents, servants, officers, and others acting in concert with them, including but not limited to the Court of Common Pleas judges and probation department staff, from enforcing or otherwise implementing Policy No. 5.1-2019 & 7.4-2019; and

d. Award Petitioners costs and such other and further relief that this Honorable Court deems just and appropriate.

Dated: October 8, 2019

Respectfully submitted,

/s/ Witold J. Walczak

Witold J. Walczak (PA ID No. 62976)
Sara J. Rose (PA ID No. 204936)
Andrew Christy (PA ID No. 322053)
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Counsel for Petitioners

VERIFICATION

I, Witold Walczak, counsel for the Petitioners in this matter, hereby verify on this 8th day of October, 2019, that the statements made in the foregoing Petition for Review are true and correct to the best of my knowledge, information and belief. None of the parties, individually, has sufficient knowledge or information about all of the facts to verify this petition, so accordingly I verify it pursuant to Pa.R.C.P. 1024(c). I understand that false statements herein are made subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.

/s/ Witold J. Walczak
Witold J. Walczak

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Witold J. Walczak
Witold J. Walczak

Exhibit 1

	Lebanon County Probation Services	Policy No.	5.1-2019 & 7.4-2019
		Pages:	2
		Section:	Adult and Juvenile Supervision
Related Standards:		Subject:	Medical Marijuana
Issuing Authority:		Revised Date:	SEPTEMBER 1, 2019

I. PURPOSE:

The purpose of this Medical Marijuana Policy is to establish guidelines to be referenced by Lebanon County Probation Officers when supervising offenders who declare the certified use of Medical Marijuana.

The Medical Marijuana Act (Act 16 of 2016) was signed into law on April 17, 2016 and became effective May 17, 2016. This Act is intended to "serve as temporary measure until there is Federal Approval of and access to Medical Marijuana through traditional medical and pharmaceutical avenues."

The medical marijuana card is **not a prescription** for medication, but rather a recommendation by a physician as to a form of treatment. Medical marijuana has not been approved as a MAT (medically assisted treatment) by the FDA (Food and Drug Administration). The use of medical marijuana may have benefits for some medical conditions and under certain circumstances may be helpful. Individuals, however, who are involved in substance abuse and issues surrounding addiction which may have played a part in the defendant's criminal violations of law, must be dealt with in a humane but effective manner so the defendant can be rehabilitated and become a contributing member of society.

Under the Federal Controlled Substances Act (CSA) of 1970, marijuana is classified as a Schedule I substance. By definition under the law, Schedule I drugs have a high potential for abuse and dependency, with no recognized medical use or value. Any marijuana possession, cultivation, or use is a federal crime, subjecting a defendant to fines, prison time, or both. Since marijuana use (medical or recreational) is deemed illegal under Federal law, the Court and the Probation Department should not knowingly allow violations of law to occur, the prohibition against such use is required.

II. APPLICABILITY:

To all Probation Department employees and all offenders under the direct supervision of Lebanon County Probation Services.

III. POLICY:

Lebanon County Probation Services shall not permit the active use of medical marijuana, regardless of whether the defendant has a medical marijuana card, while the individual is under supervision by the Lebanon County Probation Services Department. Offenders under supervision who are currently using medical marijuana will have 30 days to discontinue use. Offenders may use CBD hemp oil as this product is legal, pursuant to the Agricultural Act of 2014, the Farm Bill.

Offenders are prohibited from using oil derived from the marijuana plant, or what most people call CBD cannabis oil. The use of CBD cannabis oil follows the same regulations as medical marijuana and shall likewise be prohibited while the defendant is under supervision.

Exhibit 2

September 16, 2019

Hon. John C. Tylwalk
Lebanon County Court of Common Pleas
400 South 8th Street
Lebanon, PA 17042

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AMERICAN CIVIL LIBERTIES UNION
Pennsylvania

Eastern Region Office
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Central Region Office
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Harrisburg, PA 17108
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Western Region Office
PO Box 23058
Pittsburgh, PA 15222
412-681-7736 T
412-681-8707 F

Dear President Judge Tylwalk:

We write to urge you to reconsider the Court's new policy that prohibits any individual who is on court supervision from using medical marijuana in accordance with the Medical Marijuana Act ("MMA"). As written, the Court's Policy No. 5.1-2019 and 7.4-2019 is in direct conflict with the MMA, and we believe that the policy is therefore unlawful. As we explain in more detail below, the MMA prohibits this Court from punishing individuals who lawfully use medical marijuana, and federal law has no bearing on the restrictions that the legislature has placed on the Court's authority. Moreover, we are extremely concerned that the Court's policy will immediately and substantially harm individuals with significant disabilities who rely on medical marijuana to cope with debilitating disorders—indeed, we have already been contacted by such individuals. The result is that individuals will either go untreated, or be forced to use other, more dangerous drugs such as opioid pain killers to treat their illnesses.

Accordingly, we respectfully request that the Court rescind its policy before the end of September, when individuals who lawfully use medical marijuana must end their use or face sanctions from the Court. We would welcome the opportunity to discuss this issue with the Court in a private setting before that date.

Act 16 of 2016, the Medical Marijuana Act ("MMA"), created a medical marijuana program that allows individuals in Pennsylvania access to a "therapy that may mitigate suffering in some patients and also enhance [their] quality of life" while protecting patient safety. 35 P.S. § 10231.102. Only a small group of Pennsylvanians is eligible to use medical marijuana: those who have a "serious medical condition" as defined by either the MMA or the Department of Public Health.[1] That list is limited to:

[1] 28 Pa. Code § 1141.21.

Amyotrophic lateral sclerosis.
Anxiety Disorders.
Autism.
Cancer, including remission therapy.
Crohn's disease.
Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies.
Dyskinetic and spastic movement disorders.
Epilepsy.
Glaucoma.
HIV / AIDS.
Huntington's disease.
Inflammatory bowel disease.
Intractable seizures.
Multiple sclerosis.
Neurodegenerative diseases.
Neuropathies.
Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions.
Parkinson's disease.
Post-traumatic stress disorder.
Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain.
Sickle cell anemia.
Terminal illness.
Tourette Syndrome.

In a statement to the Lebanon Daily News, Your Honor was reported as suggesting that certain medical conditions may not be deserving of treatment through medical marijuana, and that Your Honor may view this as a matter of "convenience or preference or whatever" for certain people who use medical marijuana.[2] We urge Your Honor to review the list of actual disorders set forth above. It is simply not the case that an individual can recreationally use medical marijuana or effectively do so by claiming a minor ailment. All of the medical conditions for which access to medical marijuana is authorized are serious, debilitating conditions, which is why the Legislature—the body charged with making such policy decisions—has included them as qualifying conditions under the MMA. Forcing people to stop using medical marijuana will only exacerbate other, greater harms, such as opioid addiction and overdoses.[3]

[2] Nora Shelly, "Lebanon judge on medical marijuana probation rule: 'I don't think we want to be heartless,' LEBANON DAILY NEWS (Sept. 12, 2019), https://www.ldnews.com/story/news/2019/09/12/lebanon-county-pa-judge-medical-marijuana-probation-policy/2287509001/.

[3] For example, a study published in the Journal of the American Medical Association found that states with medical marijuana laws have "significantly lower state-level opioid overdose mortality rates." Marcus Bachhuber, et al., "Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010" JAMA INTERNAL MEDICINE, Vol. 174, No. 10 (2014), https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/1898878. Indeed, given that the stated goal of supervision such as probation is to rehabilitate a defendant, it makes little sense to deny that individual a medically-

The Court's new policy is premised on the illicit nature of marijuana under federal law. The federal Controlled Substances Act ("CSA"), however, does not require this Court to prohibit individuals on probation from using medical marijuana. First, this Court cannot be compelled to enforce federal law, and the CSA does not purport to require such enforcement. *See generally Printz v. United States*, 521 U.S. 898, 935 (1997); s*ee also Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 538 (Mich. 2014) (CSA does not "require that the City, or the state of Michigan, enforce that [federal] prohibition."). And second, the CSA does not preempt the MMA. *See Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 141 (Az. 2015) (Arizona's substantively identical version of the MMA creates no conflict with federal law because the "trial court would not be authorizing or sanctioning a violation of federal law, but rather would be recognizing that the court's authority to impose probation conditions is limited by statute."). Indeed, Congress has explicitly restricted the use of federal funds to prevent states, including Pennsylvania, from implementing medical marijuana programs. *See* Pub. L. No. 115-141.

Because the MMA is not preempted by federal law, it, and not federal law, defines this Court's authority to impose probation conditions regarding the use of medical marijuana. The MMA contains no language restricting the use of marijuana by individuals under court supervision. But it explicitly protects patients from any form of punishment, or the denial of rights or privileges, stemming from their use of medical marijuana under the MMA. According to the MMA, "none" of those individuals:

> shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by a Commonwealth licensing board or commission, solely for lawful use of medical marijuana or manufacture or sale or dispensing of medical marijuana, or for any other action taken in accordance with this act.

35 P.S. § 10231.2103(a). This provision prohibits *any* arrest, prosecution, or other penalty. *Id*. In addition, a medical marijuana patient cannot be denied *any* right or privilege for using medical marijuana pursuant to the MMA.

Because the legislature did not exempt individuals under court supervision from the protection of the MMA, the MMA *prohibits* this Court from imposing any penalty on patients for the lawful use of medical marijuana under state law, regardless of the drug's status under federal law. This is so even though probation is a privilege under Pennsylvania law,[4] as the MMA explicitly prohibits the denial of any privilege to patients who use medical marijuana in compliance with the law.

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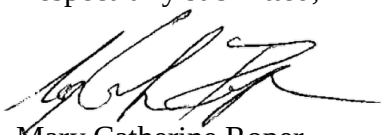
needed treatment for one of those serious and debilitating disabilities. Imposing additional barriers for a person who is trying to cope with a debilitating, serious medical condition will only make it more difficult for that person to successfully complete probation. That, of course, violates the purpose of 42 Pa.C.S. § 9754 and serves no benefit to society at large.

[4] *See Commonwealth v. Newman*, 310 A.3d 380, 381 (Pa. Super. Ct. 1973) (en banc) (describing the "privilege of probation").

We are aware that courts across the state have taken different positions on whether to prohibit patients under court supervision from using medical marijuana. Many courts, consistent with state law, permit medical marijuana patients to use the drug while on probation or other forms of court supervision. Other courts, however, have imposed blanket bans like the one recently issued by this Court. Those restrictions ignore the immunity clause in the MMA, 35 P.S. § 10231.2103(a). Indeed, earlier this month the Lycoming County Court of Common Pleas issued a decision denying a medical marijuana patient's motion to modify the terms of his probation so that he could continue to use the drug pursuant to the MMA. Critically, the court failed to address the MMA's immunity clause in its opinion even though it was raised by the patient and the ACLU-PA and is plainly the most important provision at issue in determining whether state law allows courts to condition probation on abstaining from medical marijuana.[5] *See Hoggatt*, 347 P.3d at 139 (holding that because Arizona's medical marijuana law did not explicitly exclude probationers, such an exclusion would "constitute denial of a privilege" in violation of the law).

Since Policy No. 5.1-2019 and 7.4-2019 was announced, the ACLU-PA has been contacted by several medical marijuana patients under court supervision in Lebanon County who will be irreparably harmed if they are forced to choose between using medical marijuana or facing probation revocation or other penalties. Your Honor told the Lebanon Daily News that the Court does not want to be "heartless or lacking in sympathy or lacking in empathy." But a blanket policy that prohibits all patients from using medical marijuana while under court supervision ignores the finding of the Pennsylvania legislature that "medical marijuana is one potential therapy that may mitigate suffering in some patients and also enhance quality of life." 35 P.S. § 10231.102. It also conflicts with state law. Accordingly, we respectfully request that the Court rescind Policy No. 5.1-2019 and 7.4-2019 and allow patients under the supervision of the Lebanon County Court of Common Pleas to use medical marijuana in accordance with state law. We would welcome the opportunity to meet with the Court at its convenience to discuss this issue further.

Respectfully submitted,



Mary Catherine Roper
Deputy Legal Director

Sara Rose
Senior Staff Attorney

Andrew Christy
Criminal Justice and Poverty Attorney

[5] The Lycoming Court acknowledged that the MMA is not preempted by federal law because it "does not render compliance with federal law impossible or stand as an obstacle to the congressional objectives underlying" the CSA. *Commonwealth v. Wood*, CR-2065-2012, 15 (Lycoming Cnty. Ct. Common Pleas Sept. 12, 2019).

cc: Gregory Dunlop, Chief Counsel, AOPC
Stephanie Axarlis, District Court Administrator
Sally Barry, Director of Lebanon County Probation Services
David Warner, Jr., Lebanon County Solicitor

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MELISSA GASS, ASHLEY BENNETT, and ANDREW KOCH, individually and on behalf of all others similarly situated, **Petitioners,** **v.** **52nd Judicial District, Lebanon County,** **Respondent.**	**No. 574 MD 2019** **CLASS ACTION** **Original Jurisdiction**

NOTICE TO PLEAD

To the 52nd Judicial District, Lebanon County: You are hereby notified to file a written response to the Petitioners' enclosed Application for Special Relief in the Nature of a Preliminary Injunction and Brief in Support Thereof within twenty (20) days from service hereof, or such other time as the Court prescribes, or judgment may be entered again you.

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days, or within the time set by order of the court, after this petition for review and notice are served, by entering a written appearance personally or by attorney and filling in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claims or relief requested by the plaintiff. You may lose money or property or other rights important to you. You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Lebanon County Bar Association
Lawyer Referral Service
547 South Tenth Street
Lebanon, PA 17042
(717) 273-3113

s/ Sara J. Rose
Witold Walczak (PA ID No. 62976)
Sara J. Rose (PA ID No. 204936)
Andrew Christy (PA ID No. 322053)
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Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MELISSA GASS, ASHLEY BENNETT, and ANDREW KOCH, individually and on behalf of all others similarly situated, **Petitioners,** **v.** **52nd Judicial District, Lebanon County,** **Respondent.**	**No. 574 MD 2019** **CLASS ACTION** **Original Jurisdiction**

PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION

Petitioners, by counsel, hereby move pursuant to Rule 1532(a) of the Pennsylvania Rules of Appellate Procedure for special relief in the form of a preliminary injunction enjoining the Respondent, 52nd Judicial District, Lebanon County, from enforcing the Medical Marijuana Policy, No. 5.1-2019 & 7.4-2019 ("the Policy"), which went into effect on October 1, 2019, until resolution of this litigation. In support of their application, Petitioners hereby incorporate the Class Action Petition for Review Addressed to the Court's Original Jurisdiction filed in this action on October 8, 2019, along with the exhibits filed in support of the Petition for Review. Petitioners further state the following:

BACKGROUND

1. As set forth more fully in the Petition for Review and the Brief in Support of Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction, filed in conjunction with this Application, Petitioners allege that the Policy violates the express terms of 35 Pa. Cons. Stat. § 10231.2103(a) of the Medical Marijuana Act ("MMA").

2. The details of the Policy and its implementation are described in greater detail in the Petition for Review, incorporated herein. The core of the Policy is a blanket prohibition on the use of medical marijuana by individuals subject to court supervision, regardless of whether an individual is certified to do so under the MMA. The Policy was adopted as of September 1, 2019, and gave affected individuals 30 days to discontinue use of medical marijuana. The Policy provides for no exceptions.

3. The individual Petitioners in this case have been directly injured by the adoption of the Policy by the 52nd Judicial District. When the Policy was adopted, medical marijuana patients under court supervision were given an untenable choice: cease using an effective treatment for their serious physical and mental health conditions, or risk a probation violation, revocation, or even incarceration. One of the Petitioners suffered multiple and severe seizures when she was forced to stop using medical marijuana. Another Petitioner, unable to

manage his chronic pain, is considering using prescription opioids again, despite his previous addiction struggles. Their experiences illustrate the immediate, irreparable harms already being caused by the Policy.

4. While medical marijuana use remains illegal under federal law, states are free to enact their own laws governing medical marijuana. In 2016, the Pennsylvania General Assembly enacted the MMA and made the decision to allow individuals with certain serious medical conditions to use medical marijuana. The vote in favor of the bill was 149-46 in the House and 42–7 in the Senate. The General Assembly sought to provide residents of the Commonwealth with access to a "therapy that may mitigate suffering in some patients and also enhance [their] quality of life," while also protecting patient safety by creating a highly regulated medical marijuana program. 35 P.S. § 10231.102.

5. The MMA contains broad protections for patients from any form of punishment, or the denial of any rights or privileges, stemming from their use of medical marijuana. The MMA protects not only patients, but also doctors, caregivers, and others involved in the medical marijuana program from adverse actions. None of these actors "shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege . . . solely for lawful use of medical marijuana." 35 P.S. § 10231.2103(a). The Policy enacted by the 52nd Judicial District does exactly what this provision prohibits: It allows an individual's

probation to be revoked for lawfully using medical marijuana under the MMA. The clear terms of the MMA alone justify an injunction of the Policy.

6. Additionally, the 52nd Judicial District has no authority to require that medical marijuana patients comply with the federal Controlled Substances Act while under court supervision. Pennsylvania courts should be loath to "set aside [] existing rights or remedies in deference to uncertain federal law." *Miller v. SEPTA*, 103 A.3d 1225, 1236 (Pa. 2014). Because federal law does not preempt the MMA, the General Assembly was free to authorize the use of medical marijuana in the MMA.

INJUNCTIVE RELIEF

6. Petitioners move this Court for an Order declaring that the Policy of the 52nd Judicial District is prohibited by 35 P.S. § 10231.2103(a). To effectuate that ruling, Petitioners now seek a preliminary injunction restraining further enforcement and implementation of the Policy pending final determination of the case.

7. Pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), this Court may order special relief, including a preliminary or special injunction "in the interest of justice and consistent with the usages and principles of law." The standard for obtaining a preliminary injunction under this rule is the same as that

for a grant of a preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. *Shenango Valley Osteopathic Hosp. v. Dep't of Health*, 451 A.2d 434, 441 (Pa. 1982); *Commonwealth ex rel. Pappert v. Coy*, 860 A.2d 1201, 1204 (Pa. Commw. Ct. 2004). Preliminary injunctive relief may be granted at any time following the filing of a Petition for Review. *See* Pa. R. App. P. 1532(a).

8. The factors for the Court to consider before issuing a preliminary injunction are as follows: 1) whether the injunction is necessary to prevent immediate and irreparable harm; (2) whether petitioners are likely to prevail on the merits; (3) whether greater injury would result from refusing the injunction than from granting it, and whether granting it will not substantially harm other interested parties; (4) whether the injunction will adversely affect the public interest; (5) whether the injunction will properly restore the parties to their status immediately prior to the issuance of the Order; and (6) whether the injunction is reasonably suited to abate the offending activity. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

9. Petitioners meet all of the elements for the entering of a preliminary injunction in this case. *See id.*

10. ***First,*** an injunction is necessary to prevent immediate and irreparable harm. The Policy has already exacted significant harm, and will continue to do so, by forcing Petitioners to decide whether to continue medical treatment or risk the

revocation of their probation. All of the Petitioners initially complied with the Policy and suffered serious physical and mental health issues due to their cessation of medical marijuana. Petitioner Gass, however, decided to resume use of medical marijuana to control debilitating seizures, thus risking a possible probation violation under the challenged Policy as well as incarceration.

11. ***Second,*** Petitioners are likely to prevail on the merits of their claim that the 52nd Judicial District exceeded its authority when it barred individuals under its supervision from using medical marijuana because that prohibition violates the MMA. This is an issue of first impression in this Court and affects not just Petitioners and others similarly situated in Lebanon County, but also medical marijuana patients under court supervision in many other counties in Pennsylvania. The MMA directs that no medical marijuana patient "shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by a Commonwealth licensing board or commission, solely for lawful use of medical marijuana," 35 P.S. § 10231.2103(a), thus depriving the 52nd Judicial District of authority to impose a blanket condition of probation requiring medical marijuana patients to abstain from using the drug.

12. ***Third,*** greater injury would result from refusing the injunction than from granting it, and granting it will not substantially harm any other interested parties. Prior to the adoption of the Policy, the 52nd Judicial District condoned

Petitioners' use of medical marijuana while under court supervision. Probation officers did not discourage this conduct, and in fact made copies of their probationers' medical marijuana cards. On the other hand, Petitioners have already suffered—and will continue to suffer—serious physical and mental health consequences if they cannot use medical marijuana to treat their serious medical conditions.

13. ***Fourth,*** the requested injunctive relief will not adversely affect the public interest. Petitioners here were lawfully using medical marijuana under the terms of the MMA. Indeed, they did so while on probation without issue or injury to the public interest until the adoption of the Policy. The public interest is best served by "respecting the power conferred by the electorate on the General Assembly." *Costa v. Cortes*, 143 A.3d 430, 442 (Pa. Commw. Ct. 2016). The public's interest has been harmed by this circumvention of the clear intent of the General Assembly, and will continue to be harmed, if this Policy is allowed to stand in direct contravention of the terms of the Medical Marijuana Act.

14. ***Fifth,*** the injunction would properly restore the parties to their status immediately prior to the issuance of the Order. As discussed above, the 52nd Judicial District previously tolerated the lawful use of medical marijuana by those subject to its supervision, and the requested injunctive relief would simply restore

the parties to the status quo in place before the Policy's adoption and implementation.

15. ***Sixth***, the injunction is reasonably suited to abate the offending activity. Enjoining the Policy will free Petitioners from the impossible dilemma they currently face: forgoing medical marijuana and suffering serious physical and mental health consequences, or violating the Policy and risking the revocation of their probation and possible incarceration. Enjoining the Policy until a final resolution of this case is the only way to allow Petitioners to resume medical treatment without fear of reprisal by the 52nd Judicial District.

WHEREFORE, for all of the foregoing reasons and those alleged in the Petition for Review and Brief in Support of this Application for Special Relief, Petitioners respectfully request that this Honorable Court grant their Application for Special Relief in the Nature of a Preliminary Injunction and enter an order enjoining Respondent, its agents, servants, and officers, and others from implementing, enforcing, or continuing to take any steps toward implementing or enforcing the Policy and provide any ancillary relief necessary to effectuate the Court's order.

Dated: October 9, 2019

Respectfully submitted,

s/ Sara J. Rose

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Sara J. Rose (PA ID No. 204936)
Andrew Christy (PA ID No. 322053)
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Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MELISSA GASS, ASHLEY BENNETT, and ANDREW KOCH, individually and on behalf of all others similarly situated, **Petitioners,** **v.** **52nd Judicial District, Lebanon County,** **Respondent.**	**No. 574 MD 2019** **CLASS ACTION** **Original Jurisdiction**

DECLARATIONS OF PETITIONERS

Exhibit **Page Number**

Declaration of Melissa Gass

I, Melissa Gass, hereby state that the facts set forth below are true and correct to the best of my knowledge, information, and belief. Further, I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

1. I am 41 years old and live in Lebanon, Pennsylvania.
2. I have been married to Michael Gass for 19 years. I have one son and four daughters, two of whom are minors. One of my daughters is expecting, and I will soon be a grandmother.
3. I am currently unable to work because I have seizures. I have managed to work on and off over the years, but I left my last job at a nursing home because I had periodic seizures that were both a danger to me and left the residents frightened.
4. When I was ten, I was in a car accident and my head hit the windshield. Since then, I have suffered from epilepsy and grand mal seizures. When my seizures are not treated with marijuana, I have multiple seizures throughout the week and sometimes even multiple seizures per day. For example, on October 4, 2019—when I stopped using medical marijuana—I had six to seven seizures in one day.
5. The seizures I have are life-threatening for at least two reasons. First, they are "drop" seizures; I black out and collapse, usually face-forward. A fall can easily lead to additional head injuries for me. Second, without intervention I can have multiple seizures in a row. This takes a tremendous toll on my body, and I generally feel like someone has physically assaulted me.
6. In addition to the seizure disorder, I also have post-traumatic stress disorder ("PTSD"), anxiety, and depression from repeated childhood trauma and violence.

7. For many years, I had taken prescription drugs to deal with both my seizure disorder and my mental health disabilities, including Viibryd, Xanax, sleeping pills such as Ambien, benzodiazepines, Keppra, and Gabapentin. These drugs have significant side effects. They made me feel lethargic and depressed. I was an alcoholic. I cut myself and burned myself so that I could feel something. At one point, I attempted suicide before a family member intervened to stop me.
8. Before I was on probation, I self-medicated with marijuana to control my seizures and manage my mental health. The marijuana did not entirely stop the seizures, but it did significantly reduce their frequency and made my life livable.
9. In February 2016, I hit my husband. I blacked out and have no memory of what happened. I was sentenced by the Lebanon County Court of Common Pleas for that crime, simple assault, and began probation on November 29, 2018.
10. I was forced to stop using marijuana when I began probation. A few days later, on December 3, 2018, I began having multiple seizures. I was hospitalized for my seizures on December 3, 2018, December 6, 2018, January 3, 2019, and January 11 through January 15, 2019. Between December and February, my coworkers also called an ambulance to my place of work three times. The treatment at the hospital was unable to stop my seizures, which is why, for example, I was hospitalized for a four-day span starting on January 11. I thus stopped going to the hospital, since the drugs they gave me were ineffective.
11. In February 2019, after my probation officer repeatedly saw me acting confused as a result of the prescription medications that I took, we discussed the possibility of my

getting a medical marijuana card. He encouraged me to get my medical marijuana card so that I could start managing my seizures again. I received it that month.

12. The medical marijuana was transformative. When I felt a seizure coming on, I could rub the medical marijuana oil, called Rick Simpson Oil ("RSO"), on my gums and prevent the seizure almost instantaneously. It was not a perfect solution, as I still had occasional seizures. But I went from having multiple seizures a day to at most a few seizures a month. I was able to start tapering off of my prescription seizure medications such as benzodiazepines and Gabapentin.

13. On September 10, my probation officer told me at our regular meeting that the court had adopted a new policy and I had to stop using medical marijuana. I thought that I needed to stop immediately and have my system clean by the end of September, so I did as he instructed. Over the next two weeks, I had approximately 20 seizures.

14. During this time, I treated my seizures with 10 milligrams of diazepam rectal gel. This requires the insertion of a syringe into my rectum to inject the medication, which takes at least three minutes to take effect. I have to have a family member do this, since it has to be done while I am mid-seizure, and I therefore cannot do it to myself. Without that treatment, I can continue to have one seizure after the next. I also had to stop the tapering of my prescription medications and begin to take more of them.

15. Around September 24, I spoke with one of my lawyers in this case who told me that the court's policy did not require that I stop using the medical marijuana until the end of September. I started using the RSO again, which quickly helped with my seizures.

16. On October 2, I spoke with my probation officer who said that he was still instructed to charge me with violating the terms of my probation if I continued to use medical

marijuana. I again discontinued use and disposed of my medical marijuana. My probation officer reiterated that on October 3 when I met with him in person: if I used medical marijuana, my probation would be revoked.

17. On October 4, I had six or seven seizures in one day. In the evening, after consulting with my attorneys, I decided to resume using the medical marijuana to manage my seizures. One of my seizures was at the medical marijuana dispensary. Using RSO stopped my seizures.

18. Using medical marijuana is a matter of life or death for me. I have to continue using it or I risk having repeated, frequent seizures that make me incapable of functioning. After the October 4 seizures, I spent the next day in bed because I was so exhausted. Having seizures takes an incredible toll on me. I have no choice but to risk a probation violation so that I can continue to use medication—the medical marijuana—that actually works.

19.

Pursuant to 18 Pa.C.S. § 4904, I, Melissa Gass, declare under penalty of perjury that the foregoing is true and correct.

Dated: 10/8/14

Melissa Gass

Declaration of Michael Gass

I, Michael Gass, hereby state that the facts set forth below are true and correct to the best of my knowledge, information, and belief. Further, I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

1. I am 43 years old and live in Lebanon, Pennsylvania.
2. I have been married to Melissa Gass for 19 years and have known her since 1996.
3. Because of Ms. Gass's health issues, I am the sole financial support for our family.
4. Ms. Gass has had seizures for the entire time that I have known her. She eventually started managing her seizures by using marijuana, and she went long periods of time without having any seizures. She was effectively controlling her seizures until she stopped using marijuana when she went onto probation.
5. I was present when she had seizures on December 3, 2018, which resulted in her hospitalization. That occurred after she had to stop using marijuana in order to comply with the terms of probation. I also witnessed numerous additional seizures that she had until she started using medical marijuana in February 2019. She was hospitalized at least four times. The medical marijuana has not entirely eliminated her seizures. She still has them on occasion, but it has significantly reduced the frequency.
6. When Ms. Gass has seizures and has access to medical marijuana, all it takes to stop them is rubbing some of the marijuana oil on her gums. Otherwise, either one of our children or I must insert an injection into her rectum and wait several minutes for her to stop seizing.

7. Most recently, Ms. Gass had a series of seizures on October 4. After she spoke with her attorneys, I drove her to the dispensary so that she could get medical marijuana and end her seizures. She had a seizure on the way there, in the car, and again on her way out of the dispensary. The security guard held her up for me while I rubbed the medical marijuana on her gums. Her seizure stopped nearly instantaneously.

8. Ms. Gass cannot function or do anything when she is having uncontrolled seizures. I have repeatedly seen with my own eyes that the prescription medications she takes are ineffective. They leave her in a foggy mental state and dampen her personality. The medical marijuana has been more effective not only at controlling her seizures, but also at allowing her to live more of a normal life with our family.

Pursuant to 18 Pa.C.S. § 4904, I, Michael Gass, declare under penalty of perjury that the foregoing is, to the best of my knowledge, information and belief, true and correct.

Dated: 10-8-19

Michael Gass

Declaration of Ashley Bennett

I, Ashley Bennett, hereby state that the facts set forth below are true and correct to the best of my knowledge, information, and belief. Further, I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

1. I am 33 years old and live in Lebanon, Pennsylvania.
2. I have two sons, a seven-year-old and an eight-year-old.
3. Because of my disabilities, I have struggled to work, but I recently started a new job at a warehouse soon, doing packaging.
4. I have significant mental health and physical disabilities. I have been diagnosed with post-traumatic stress disorder ("PTSD") stemming from repeated childhood violence that I suffered. In addition, I have been diagnosed with anxiety and bipolar disorder. I also have chronic pain related to gall bladder surgery and have an intestinal blockage.
5. Because of my PTSD, I cannot sleep through the night. I awaken at least twice a night and struggle to fall back asleep. I am also kept awake by restless leg syndrome, which is also a result of my PTSD. This leaves me tired and unable to function, even when I am able to block out and not think about the events for which I have PTSD.
6. After gall bladder surgery, I lost about 100 pounds, which was about half of my body weight. Thanks to self-medicating with marijuana, I later put most of that weight back on. Without marijuana, I have severe nausea and am unable to eat more than a few bites at a time. I have low energy and am frequently cold. All I can do is lay down and try to recover.
7. Conventional treatments for my PTSD have proven ineffective. Re-living my childhood trauma in therapy is too painful to endure, and despite repeated attempts at therapy, it

simply does not work for me. I also was prescribed medications including Seroquel, Depakote, and Zoloft. When I took these drugs, all I could do was eat and sleep; I had no energy or willpower to do anything else. I started cutting myself, so that I could watch the blood flow and know that I was still alive. I considered committing suicide.

8. Conventional treatments have also failed to treat my nausea. I have received prescription-strength anti-nausea medications, but they did not abate my nausea.
9. I eventually started self-medicating with marijuana to treat these symptoms. It has allowed me to end my use of prescription medications for both my mental health and physical disabilities.
10. In December 2018, I was arrested for possessing marijuana and drug paraphernalia. I was sentenced to probation on September 4, 2019 and will be on probation until June 4, 2020.
11. On May 21, 2019, I received my medical marijuana card after a doctor certified me for its use.
12. I have used both medical marijuana flower and oils to treat my disabilities.
13. I was told at the end of August that I would not be able to use medical marijuana once I was sentenced because of a new policy adopted by the Lebanon County Court of Common Pleas. My probation officer has made it clear to me that medical marijuana is illegal and that he would violate my probation if I used it.
14. After I was sentenced, I stopped using medical marijuana. I spoke to my public defender, who said she was unable to help me with this issue.
15. Without medical marijuana, I have been unable to eat regularly and have lost 15 pounds in the past month. I have been too tired to take my children to things like football practice

and have had to rely on my boyfriend to step in. I have been missing out on being as fully involved in their lives as I was when I was using medical marijuana.

16. Before using marijuana to manage my mental health disabilities, I previously received psychiatric services through TW Ponessa & Associates. Now that I can no longer use medical marijuana, I need to explore resuming psychiatric treatment there. Unfortunately, I will be considered a new patient and have to wait 60 to 90 days for an appointment. I have limited options because my insurance is through Medicaid.
17. Placing me back on the same drugs to treat my PTSD will simply lead to the same results as last time—to the extent they help my PTSD, they will cause me to once again feel dead inside and it will only be a matter of time before I consider harming myself. No drugs other than marijuana have been effective at treating my nausea.
18. Medical marijuana has saved my life and made it bearable for the first time in many years.

Pursuant to 18 Pa.C.S. § 4904, I, Ashley Bennett, declare under penalty of perjury that the foregoing is true and correct.

Dated: 10-8-19

Ashley Bennett

Ashley Bennett

Declaration of Andrew Koch

I, Andrew Koch, hereby state that the facts set forth below are true and correct to the best of my knowledge, information, and belief. Further, I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

1. I am 28 years old and live in Lebanon, Pennsylvania.
2. I currently work as a floor installer in Lebanon. I have two sons, a ten-year-old and an eight-year-old.
3. I have significant physical disabilities resulting from a 2014 car accident in which I was ejected from a car and landed on the side of the road. On impact, the joints in my right hand and several of my vertebrae were crushed. I was hospitalized for several months, and spent one month in a medically-induced coma. I underwent surgery and have titanium plates in my back now to support the crushed vertebrae. I still suffer from constant back and hand pain.
4. When I was hospitalized after the accident, I was given liquid morphine for my injuries and became addicted to it. After being discharged from the hospital, I went into withdrawal but ultimately beat my addiction to opioids.
5. I am determined to avoid using opioids and becoming addicted again. At one point, I was advised by a lawyer that taking opioids could strengthen a case for Social Security disability benefits, but I decided this was not worth risking my health. I never want to be in the position where my body *needs* a drug.
6. As a result of determination to avoid turning to opioids, I instead tried self-medicating with marijuana and found that to be successful at helping to manage my pain. Medical marijuana does not completely cure my pain, but it reduces it to a tolerable level and

allows me to live a more normal life. Whereas my pain had caused me to move very slowly and deliberately, which negatively impacted my ability to work, the medical marijuana allowed me to work at a normal pace. I was no longer constantly dealing with intense pain at every moment. Medical marijuana also helped to alleviate pain that used to interfere with my ability to sleep through the night, which left me exhausted and sleep deprived.

7. On February 14, 2018, I was placed under court supervision following convictions for possession of marijuana and driving on a suspended license. My term of probation is set to end on December 10, 2019.
8. On October 20, 2018, I received my medical marijuana card. After receiving my card, I told my probation officer, who raised no objections to my use of medical marijuana.
9. I was told by my probation officer on September 1, 2019 that I would not be able to use medical marijuana because of a new policy adopted by the Lebanon County Court of Common Pleas. I was told that I would need to stop using medical marijuana promptly, which I did.
10. Without medical marijuana, the severe pain I had been successfully managing with marijuana has returned. The pain has become so bad that I am thinking about seeing a doctor for a prescription for opioids, because I am finding it impossible to live with the pain. I am not dependent on marijuana, and can stop using it at will (and I have during this past month). I know the addictive qualities of opioids because I became addicted to them before, and I experienced withdrawal when I stopped using them for pain management. I am afraid to resume using the opioids because of the potential for addiction, but I feel like I have no choice. The ongoing pain is too much to bear and need

to take something. At this point, my options appear to be some opiate based relief or medical marijuana. The marijuana works and is not nearly as dangerous.

11. I am finding it much harder to move and work effectively without the medical marijuana, and I am also having serious difficulties sleeping at night because of my pain. All of the progress I have made on managing my pain has been undone.

Pursuant to 18 Pa.C.S. § 4904, I, Andrew Koch, declare under penalty of perjury that the foregoing is true and correct.

Dated: 10/7/19

Andrew Koch

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: October 9, 2019

s/ Sara J. Rose
Sara J. Rose

CERTIFICATE OF SERVICE

I, Sara Rose, certify that I am on this day of October 9, 2019, serving the foregoing Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction and Brief in Support Thereof upon the following counsel for the respondent, who have agreed to accept service by electronic mail, which satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

Geri Romanello St. Joseph
Robert J. Krandel
Legal Counsel
Supreme Court of Pennsylvania
Administrative Office of Pennsylvania Courts

s/ Sara J. Rose
Sara J. Rose

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MELISSA GASS, ASHLEY BENNETT, and ANDREW KOCH, individually and on behalf of all others similarly situated, **Petitioners,** **v.** **52nd Judicial District, Lebanon County,** **Respondent.**	**No. 574 MD 2019** **CLASS ACTION** **Original Jurisdiction**

ORDER GRANTING APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION

AND NOW, this day of , 2019, upon consideration of Petitioners' Petition for Review and Application for Special Relief in the Nature of a Preliminary Injunction, it is hereby **ORDERED** that said Application is **GRANTED**.

IT IS FURTHER ORDERED that Respondent and its agents, servants, and officers and others are hereby **ENJOINED** from implementing, enforcing, or taking any steps to implement or enforce enforcing Policy No. 5.1-2019 & 7.4-2019, that is the subject of said Petition and Application.

BY THE COURT:

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

118 MM 2019

MELISSA GASS, ET AL.

PETITIONERS

V.

52ND JUDICIAL DISTRICT, LEBANON COUNTY

RESPONDENT

ANSWER TO PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION

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INTRODUCTION

In September 2019, the 52nd Judicial District ("Judicial District") enacted a Medical Marijuana Policy ("Policy") prohibiting probationers, parolees and other offenders under the supervision of its Probation Services Office from using medical marijuana. This Policy relied upon the General Conditions of Probation/Parole that were already in place in Lebanon County. While the Policy bars the use of medical marijuana by probationers and parolees, it does not result in immediate detention. Rather, the Policy was amended in October to clarify that probationers and parolees may request to be excused from this condition of probation/parole by providing appropriate medical documentation. The Judicial District's Policy is an appropriate balance of the authority of the Judicial District to supervise probationers and parolees while considering a probationer/parole's possible need for medical marijuana. Given that Petitioners have an appropriate remedy in the Judicial District, the Petitioner's request for a Preliminary Injunction should be denied.

STATEMENT OF FACTS

Due to concerns about potential abuse of medical marijuana by criminal defendants under its jurisdiction, the 52nd Judicial District enacted a Medical Marijuana Policy prohibiting probationers, parolees and other offenders under the supervision of its Probation Services Office ("Office") from using medical

marijuana. *Exhibit 1*, "Declaration of President Judge John C. Tylwalk," at ¶ 2. The Judicial District promulgated the Policy after the Office began to experience disruption in probation services and persistent difficulty supervising probationers and parolees who use medical marijuana. *See Exhibit 1* at ¶ 2 and *Exhibit 2*, "Declaration of Sally Barry," at ¶ 2. For instance, some individuals under court supervision with medical marijuana prescriptions are unable to identify the health condition that led to the medical marijuana prescription. *Exhibit 2* at ¶ 4. The Office also found a significant amount of individuals under supervision, who possess a medical marijuana card, that have a history of marijuana abuse and/or their underlying charges are related to the unlawful possession of marijuana. *Exhibit 2* at ¶ 5. Additionally, drug testing for illicit use of marijuana is also rendered meaningless if an individual has a prescription for the legal use of medical marijuana as the laboratory is unable to discern between legal and illegal strands of marijuana. *Exhibit 2* at ¶ 5.

The Board of Judges enacted the Policy after careful review of numerous factors, including:

(a) review of research and acknowledgment that the Food and Drug Administration (FDA) does not recognize medical marijuana as a treatment for medical conditions;

(b) evaluation of safety concerns for the community; and

(c) determination of substance abuse treatment options for probationers as some providers have shared they will not treat anyone who has a medical marijuana card because of the risk of relapse.

Exhibit 1 at ¶ 3. Indeed, the fact that treatment providers will not admit persons with medical marijuana prescriptions limits the Office's ability to place probationers and parolees into treatment programs and the Court of Common Pleas' ability to help rehabilitate these individuals. *Exhibit 2* at ¶ 3.

Further, the use of medical marijuana conflicts with the general conditions of probation and parole established for Lebanon County. *Exhibit* ¶¶ 4 - 5. Under the Lebanon County General Conditions of Probation/Parole, all probationers and parolees agree to the following conditions:

a. You may not possess or drink alcoholic beverages nor use any narcotic drugs and you will abstain from the possession, use or abuse, manufacturing, or sale of any legal or illegal mind/mood altering chemical/substance, including but not limited to Synthetic Drugs. (Rule 3)

b. Comply with all Municipal, County, State and Federal criminal laws… (Rule 4)

Exhibit 1 at ¶ 4. A probationer or parolee generally will not comply with the General Conditions of Probation/Parole if they use medical marijuana because they will be violating Rules 3 and 4. *Exhibit 1* at ¶ 5. It has generally been the experience of the Judicial District that requiring adherence to general conditions

assists with rehabilitation of offenders and reduces the risk of recidivism. *Exhibit 2* at ¶¶ 6 - 7.

Though it bars the use of medical marijuana for probationers/parolees on court supervision, the Policy does not automatically result in detention for probationers or parolees who test positive or constitute a final determination that the offender has violated the terms of probation or parole. *Exhibit 1* at ¶ 7. As recently amended by the Board of Judges, the Policy provides an individual the opportunity to ask the Court of Common Pleas for relief. *Exhibit 1* at ¶ 8. The Policy, as amended, states:

> Any person on supervision who believes they are aggrieved by this policy may petition the Court for a full and fair hearing to determine whether they should be excused from its application to them. At that hearing, the Petitioner will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana.

Exhibit 1 at ¶ 8.

Operationally, the Policy works as follows:

- A probationer or parolee who uses medical marijuana and tests positive for marijuana during routine testing is not immediately detained.
- Before a violation hearing is scheduled, a discussion of treatment options often will occur. The probationer or parolee would be given a chance to stop using medical marijuana.

- If no agreement can be reached, the probationer or parolee would be scheduled for a violation hearing.
- The probationer or parolee has the right to legal counsel at the *Gagnon II* hearing, with Public Defender services available.
- A violation hearing is usually scheduled within 30 days after a positive drug test. At that hearing, an individual who uses medical marijuana may present evidence and argument to support his/her need for medical marijuana consistent with the guidelines set forth in the Medical Marijuana Act.

Exhibit 1 at ¶¶ 10 - 14.

ARGUMENT

To obtain a preliminary injunction, Petitioners must demonstrate the following:

> (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

SEIU Healthcare Pennsylvania v. Com., 628 Pa. 573, 583-84, 104 A.3d 495, 501-02 (2014) (citing *Warehime v. Warehime*, 580 Pa. 201, 860 A.2d 41, 46-47 (2004)). Petitioners must meet all six requisite elements for the preliminary injunction to issue. *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 646, 828 A.2d 995, 1001 (2003).

In this case, Petitioners are not likely to prevail on the merits. First, the Judicial District's Policy reasonably balances the needs of the Judicial District to supervise probationers and parolees with an individual's possible need for medical marijuana. The General Assembly did not intend for the Medical Marijuana Act ("MMA") to supersede the abilities of the courts to supervise probation and parole. Consequently, an injunction would not serve the public interest.

Second, because the Policy affords probationers and parolees the opportunity for a full and fair hearing to determine if they should be excused from this condition of probation/parole, the likelihood of immediate and irreparable harm is low and greater injury thus would not result if this Court were to deny the injunction.

A. Petitioners are not likely to prevail on the merits.

Petitioners are not likely to prevail on the merits in this case because the Policy recently amended by the Judicial District's Board of Judges on October 7, 2019, carefully balances the need to rehabilitate offenders against the need for

medical marijuana and gives individual consideration for the Petitioners' specific circumstances.

Though probationers and parolees generally are prohibited under the Policy from using medical marijuana, they are informed that:

> Any person on supervision who believes they are aggrieved by this policy may petition the Court for a full and fair hearing to determine whether they should be excused from its application to them. At that hearing, the Petitioner will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana.

Exhibit 1 at ¶ 8.

The Policy was enacted as a careful balance between safety concerns for the community and the fact that some providers of substance abuse treatment will not treat anyone with a medical marijuana card due to the risk of relapse. *See generally Exhibit 1* at ¶ 3 and *Exhibit 2* at ¶ 3. Restricting offenders from engaging in conduct that is otherwise lawful is permitted as part of the Judicial District's obligation to ensure that the offender is effectively rehabilitated. The MMA does not override or change these powers and, therefore, Petitioners are unlikely to prevail on the merits in this case.

1. Courts have broad powers to regulate the activity of probationers in order to rehabilitate probationers and protect the public; this power includes the ability to regulate otherwise lawful conduct.

Probation and parole are increasingly viewed as attractive alternatives to incarceration as state and county prisons continue to suffer from overcrowded

conditions. *Short and long term effects of imprisonment on future felony convictions and prison admissions,* Proceedings of the National Academy of Sciences of the United States of America. <https://www.pnas.org/content/early/2017/09/26/1701544114.full> (last accessed October 11, 2019). In Pennsylvania, sentencing courts and the Board of Probation and Parole always have enjoyed broad powers to ensure that probation is effectively rehabilitating offenders and protecting the general public. The Judicial District's Medical Marijuana Policy is entirely consistent with the legitimate aims of probation and does not unnecessarily restrict any fundamental right of Petitioners.

a. Courts have broad powers to protect the public and rehabilitate probationers.

After conviction or entry of a guilty plea, the sentencing court or individual judge is the ultimate arbiter of the sanction to be imposed, subject to the limitations set by the General Assembly in the Crimes Code and the Sentencing Code. *See* 18 Pa.C.S. §§ 1101-08 (relating to authorized disposition of offenders); *Com. v. Knighton*, 490 Pa. 16, 22-23, 415 A.2d 9, 12-13 (1980) (sentencing judge is the ultimate adjudicator of criminal sentences).[1]

[1] This Brief will refer to both standards for parole and probation as conditions of probation are examined under the same standards as conditions of parole. *Commonwealth v. Hermanson*, 449 Pa. Super. 443, 449 n.4, 674 A.2d 281, 284 n.4 (1996) (citing 42 Pa.C.S. §§ 9755(d) and 9754).

One possible sentencing option is probation, which is generally understood as a sentence served under community supervision rather than in prison or jail. The United States Supreme Court considers probation to be a form of criminal sanction imposed upon an offender after a verdict, finding or plea of guilty, and is simply one point on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of community service. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). This Court has held that an order of probation "is not a judgment of sentence as that term is construed for purposes of procedure." *Commonwealth v. Nicely*, 536 Pa. 144, 638 A.2d 213 (1994); *Commonwealth v. Vivian*, 426 Pa. 192, 231 A.2d 301 (1967); *Fleegle v. Pennsylvania Board of Probation and Parole*, 532 A.2d 898 (Pa. Cmwlth. 1987), *appeal denied*, 518 Pa. 614, 540 A.2d 535 (1988).

A court or judge imposes conditions of parole or probation in order to serve two critical purposes: (1) to assist the offender's rehabilitation and reintegration into society; and (2) to protect society. *Commonwealth v. Walton*, 483 Pa. 588, 397 A.2d 1179 (1979); *Lee v. Pennsylvania Board of Probation and Parole*, 885 A.2d 634 (Pa. Cmwlth. 2005); *Commonwealth v. Crosby*, 390 Pa. Super. 140, 568 A.2d 233 (1990); *Commonwealth v. Quinlan*, 488 Pa. 255, 412 A.2d 494 (1980) (parole and probation are primarily concerned with the offender's rehabilitation and restoration to a useful life); *see also* 42 Pa.C.S. § 9754(c)(7) (ensuring public

safety by requiring a probationer to remain within the jurisdiction of sentencing court). It is generally expected that a probationer or parolee must strictly adhere to the conditions, otherwise the purpose of probation or parole is rendered completely meaningless. *Commonwealth v. Rudy*, 304 Pa. Super. 64, 450 A.2d 102 (1982).

This Court has observed that the General Assembly has expressly listed among its purposes for adopting both the Sentencing Code and the Prisons and Parole Code the rehabilitation, reintegration, and diversion from prison of appropriate offenders. *Fross v. Cty. of Allegheny*, 610 Pa. 421, 439, 20 A.3d 1193, 1203-04 (2011) (citing 42 Pa.C.S. §§ 9721(b) (court to consider rehabilitative needs of defendant in determining sentence); 9754(c) (court to impose conditions of probation that assist defendant in leading law-abiding life); 61 Pa.C.S. § 6102(1)); *accord Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) ("Society has a stake in whatever may be the chance of restoring [a parolee] to normal and useful life within the law."); *Commonwealth v. Walton*, 483 Pa. 588, 397 A.2d 1179, 1184 (1979) ("conditions of probation, though significant restrictions on the offender's freedom, are primarily aimed at effecting, as a constructive alternative to imprisonment, his rehabilitation and reintegration into society as a law-abiding citizen"); *Commonwealth v. Basinger*, 982 A.2d 121, 128 (Pa. Super. 2009) (conditions of probation "must be constructive measures directed at rehabilitation through behavioral modification").

So long as the courts impose conditions that are tailored to the offenders, the courts have broad authority to impose any conditions that will assist with the rehabilitation of offenders. *Fross*, 610 Pa. at 442-43, 20 A.3d at 1206 (citing *Walton*, 397 A.2d at 1184 (courts "are traditionally and properly invested with a broader measure of discretion in fashioning conditions of probation appropriate to the circumstances of the individual case")); *Sheridan*, 502 A.2d at 696 ("sentences must be imposed individually, taking into account not only the offense but the characteristics of the offender"); *see, e.g.*, *Woodling v. Bd. of Prob. & Parole*, 537 A.2d 89, 89 (Pa. Cmwlth. 1988) (sex offender whose victim was a minor was subject to condition of probation "that he not associate with minors (under age eighteen) who were not close relatives (first degree) without his parole agent's prior approval"). Nevertheless, general conditions may apply to a broad category of persons within the jurisdiction of the court or the Parole Board. *See, e.g.*, 61 Pa.C.S. § 6141 (relating to general rules and special restrictions); 37 Pa. Code § 63.5(a) (Parole Board's power to impose special conditions that are applicable only to particular parolees).

This broad power extends to curtailing otherwise lawful conduct or rights that the general public might enjoy. Parolees and probationers are in a different position than are members of the general public in that they are still subject to an existing term of imprisonment and are the focus of society's rehabilitation efforts.

Morrissey v. Brewer, 408 U.S. 471, 483 (1972) ("Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole"). This naturally means that parolees and probationers are properly subject to conditions that restrict their liberty substantially beyond those ordinary restrictions that are imposed by the law upon ordinary citizens. *Commonwealth v. Homoki*, 423 Pa. Super. 320, 327, 621 A.2d 136, 140 (1993) (prohibition against probationer using prescription medications), *appeal denied*, 535 Pa. 675, 636 A.2d 634 (1993); *Commonwealth v. Edwards*, 400 Pa. Super. 197, 201, 583 A.2d 445, 447 (1990), *rev'd on other grounds*, 535 Pa. 241, 634 A.2d 1093 (1993); *Commonwealth v. Hermanson*, 449 Pa. Super. 443, 447, 674 A.2d 281, 283 (1996) (prohibition against probationer driving a motor vehicle). These conditions are not unusual when one remembers that offenders on probation or parole are still technically serving a sentence of imprisonment, albeit outside of the prison's walls. *Lee v. Pa. Board of Probation and Parole*, 885 A.2d 634, 638-39 (Pa. Cmwlth. 2005) (Parole Board is vested with broad powers to fashion appropriate conditions of parole where such conditions are intended to effectuate the offender's rehabilitation and reintegration into society as a law-abiding citizen); *Homoki*, 423

Pa. Super. at 327, 621 A.2d at 140; *Commonwealth v. Crosby*, 390 Pa. Super. 140, 568 A.2d 233 (1990).

With this backdrop in mind, the sentencing court or the Parole Board has the discretion to limit or prohibit an offender's use of a controlled substance or medication that is legitimately prescribed to the offender. *Commonwealth v. Homoki*, 423 Pa. Super. 320, 621 A.2d 136 (1993). In *Homoki*, the Superior Court upheld a sentencing court's imposition of a condition of probation that restricted the offender's use of a prescription medication for a back injury to only those medications that were dispensed to the offender while he was incarcerated. *Id.* at 327, 421 A.2d at 140. In upholding the restrictive condition, the Superior Court observed that the offender did not establish that the prohibited medications were essential for his welfare. *Id.* at 327-28, 621 A.2d at 140.

Therefore the law is clear that courts, sentencing judges and the Board of Probation and Parole all have the power to restrict otherwise lawful activity in the interests of rehabilitating the offenders and protecting the general public.

b. The 52nd Judicial District's policies are consistent with these powers.

In this case, the Judicial District has both general conditions of probation and a specific policy that applies to the use of medical marijuana. Pursuant to the Lebanon County General Conditions of Probation/Parole, all probationers agree to the following general conditions:

a. You may not possess or drink alcoholic beverages nor use any narcotic drugs and you will abstain from the possession, use or abuse, manufacturing, or sale of any legal or illegal mind/mood altering chemical /substance, including but not limited to Synthetic Drugs. (Rule 3).

b. Comply with all Municipal, County, State and Federal criminal laws... (Rule 4).

Exhibit 1 at ¶ 4.

Pursuant to the Policy, probationers are prohibited from using medical marijuana and are informed that:

> Any person on supervision who believes they are aggrieved by this policy may petition the Court for a full and fair hearing to determine whether they should be excused from its application to them. At that hearing, the Petitioner will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana.

Exhibit 1 at ¶ 8. The Policy was enacted as a careful balance between safety concerns for the community and the fact that providers of substance abuse treatment will not treat anyone with a medical marijuana card due to the risk of relapse. *See generally Exhibit 1* at ¶ 3 and *Exhibit 2* at ¶ 3. Some individuals under court supervision with medical marijuana prescriptions are unable to identify the health condition that led to the medical marijuana prescription. *Exhibit 2* at ¶ 4. The Probation Office also found a significant amount of individuals under supervision, who possess a medical marijuana card, that have a history of marijuana abuse and/or their underlying charges are related to the unlawful possession of marijuana. *Exhibit 2* at ¶ 5. Drug testing for illicit use of marijuana

is also meaningless if an individual has a prescription for the legal use of medical marijuana as the laboratory is unable to discern between legal and illegal strands of marijuana. *Exhibit 2* at ¶ 5.

Further, assuming no other aggravating factors are present, probationers/parolees are not automatically detained if they test positive for marijuana. *Exhibit 1* at ¶ 7. Instead, the Judicial District schedules the probationers/parolees for a violation hearing. At such hearing the probationer/parolee will be able to utilize legal counsel and introduce evidence of the need for medical marijuana. *Exhibit 1* at ¶¶ 10 - 14.

These conditions are entirely consistent with the Judicial District's powers to balance the needs of rehabilitating offenders against the general need for public safety. Further, as detailed below, given that the MMA provides only a very limited and proscribed right to use medical marijuana, the Policy is not overly broad or unduly restrictive of a fundamental right of probationers. *E.g.*, *Homoki*, 423 Pa. Super. at 327, 621 A.2d at 140.

Consequently, because sentencing courts and judges have wide discretion to supervise probationers and set general and specific conditions of probation, the 52nd Judicial District's Medical Marijuana Policy is a reasonable exercise of supervisory powers.

2. The MMA does not alter, change, or conflict with the broad powers of the courts to take all necessary actions to rehabilitate and reintegrate probationers into society while at the same time protecting public safety.

Contrary to Petitioners' assertions, the MMA is entirely silent on the use of medical marijuana by individuals under court supervision. The MMA clearly shows the General Assembly intended the law ***not*** to supersede the ability of the courts to prescribe reasonable probation restrictions consistent with the Sentencing Code and the Crimes Code.

First, in the opening sections of the MMA, the General Assembly clearly demonstrated the MMA would not otherwise supersede other laws because the use of medical marijuana must not be in violation of "any provision of law" to the contrary:

> **(a) General rule.**—Notwithstanding ***any provision of law to the contrary***, use or possession of medical marijuana as set forth in this act is lawful within this Commonwealth.

35 P.S. § 10231.303 (emphasis added). In this case, the use of medical marijuana would be contrary to the reasonable restrictions of the Judicial District's medical marijuana policy and the aforementioned powers of the courts to prescribe conditions of probation and parole.

Second, the General Assembly permitted only the very limited use of medical marijuana within the confines of a strict system:

(b) Requirements.—The lawful use of medical marijuana is subject to the following:

(1) Medical marijuana may only be dispensed to:

(i) a patient who receives a certification from a practitioner and is in possession of a valid identification card issued by the department;[2] and

(ii) a caregiver who is in possession of a valid identification card issued by the department.

(2) Subject to regulations promulgated under this act, medical marijuana may only be dispensed to a patient or caregiver in the following forms:

(i) pill;

(ii) oil;

(iii) topical forms, including gels, creams or ointments;

(iv) a form medically appropriate for administration by vaporization or nebulization, excluding dry leaf or plant form until dry leaf or plant forms become acceptable under regulations adopted under section 1202;

(v) tincture; or

(vi) liquid.

(3) Unless otherwise provided in regulations adopted by the department under section 1202, medical marijuana may not be dispensed to a patient or a caregiver in dry leaf or plant form.

---

[2] The "department" in the MMA refers to the Department of Health. *See* 35 P.S. § 10231.103.

> (4) An individual may not act as a caregiver for more than five patients.
>
> (5) A patient may designate up to two caregivers at any one time.
>
> (6) Medical marijuana that has not been used by the patient shall be kept in the original package in which it was dispensed.
>
> (7) A patient or caregiver shall possess an identification card whenever the patient or caregiver is in possession of medical marijuana.
>
> (8) Products packaged by a grower/processor or sold by a dispensary shall only be identified by the name of the grower/processor, the name of the dispensary, the form and species of medical marijuana, the percentage of tetrahydrocannabinol and cannabinol contained in the product and any other labeling required by the department.

35 P.S. § 10231.303. Under this strict system, patients are not free to obtain immediate access to medical marijuana. They are also not able to dictate the form of the medical marijuana. Again, these prohibitions undermine Petitioners' arguments about the MMA giving a broad right of access to medical marijuana.

Similarly, under Section 510, there are also safety-sensitive restrictions in the MMA that recognize potential harmful side effects associated with users under the influence of medical marijuana. That section applies the following restrictions:

> (1) A patient may not operate or be in physical control of any of the following while under the influence with a blood content of more than 10 nanograms of active tetrahydrocannabis per milliliter of blood in serum:

> (i) Chemicals which require a permit issued by the Federal Government or a state government or an agency of the Federal Government or a state government.
>
> (ii) High-voltage electricity or any other public utility.
>
> (2) A patient may not perform any employment duties at heights or in confined spaces, including, but not limited to, mining while under the influence of medical marijuana.
>
> (3) A patient may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.
>
> (4) A patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

35 P.S. § 10231.510(4). In addition, medical marijuana patients may be restricted from using medical marijuana in the workplace if their employer elects to deny such use at work. 35 P.S. § 10231.2103(b)(2).

All of these restrictions show that the MMA was not intended to give broad fundamental or absolute rights to use medical marijuana. The limited uses of medical marijuana and the numerous proscriptions show that the General Assembly did not intend for medical marijuana to create a broad absolute right for users. Indeed, even Petitioners would have to agree that they are arguing for an

absolute right to use medical marijuana while on probation even though the offenders' employers could deny them employment in a safety sensitive position for using medical marijuana. 35 P.S. § 10231.510(4). If safety sensitive employment is worthy of protection, why is the rehabilitation of probationers not as worthy?

Third, the MMA is not intended to create a permanent right for the citizens of Pennsylvania because it is intended that the MMA only "serve as a temporary measure, pending Federal approval of and access to medical marijuana through traditional medical and pharmaceutical avenues." 35 P.S. § 10231.102. Far from creating some kind of permanent right to use medical marijuana, the MMA is at most a temporary placeholder that is subject to change.

Fourth, while the MMA does state that users cannot be "subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by the Commonwealth licensing board or commission," 35 P.S. § 10231.2103(a), the Judicial District has broad powers to restrict lawful conduct in the interest of rehabilitating offenders on probation. This statement in the MMA is virtually meaningless in the probation context. Persons on probation are already subject to restrictions they would not otherwise be subject to ***but for*** the fact that they were sentenced to probation for committing a crime. Consequently, a plain reading of the MMA shows that the General Assembly did

not intend for the MMA to create all-encompassing powers that automatically restrict the courts in a way that creates on-demand access to medical marijuana by offenders.

Petitioners cite to cases such as *Reed-Kaliher v. Hoggatt* for the proposition that the MMA grants a broad right to Petitioners and that a probation condition that restricts the use of medical marijuana actually violates Pennsylvania law. 237 Ariz. 119, 123, 347 P.3d 136, 140 (2015). *Reed-Kaliher* involved an Arizona law and the Arizona Supreme Court did not address the foregoing restrictions that are specifically set forth in Pennsylvania's medical marijuana law with regard to accessing medical marijuana. Further, the Arizona Supreme Court incorrectly considered the general probation condition at issue in that case as a specific mandate for the probationer to violate Arizona law. *Id.* However, this analysis overlooks the fact that probation is a form of criminal sanction and the probationer has agreed to accept probation in lieu of some other possible sanction such as prison. *See generally Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (probation is simply one form of possible sanctions for criminal conduct). Thus, the probationer or parolee is not compelled to violate any law. Rather, he or she has elected to choose community supervision over a prison sentence; the probationer or parolee is not compelled do anything.

Based on all of the foregoing, it is unlikely that Petitioners will ultimately succeed on the merits in this case because the 52nd Judicial District's Medical Marijuana Policy is reasonably tailored toward ensuring compliance with federal law, ensuring public safety, and finding effective treatment options for offenders. Any offender who needs medical marijuana is given the chance to explain that need to a judge with the assistance of legal counsel. *Exhibit* 1 at ¶8.

B. Petitioners are not likely to suffer irreparable harm.

Petitioners argue that the Policy will cause them irreparable harm because they will essentially have to choose between ceasing the use of medication that might mitigate suffering or have to face detention. *Brief,* pp. 7-8. To the contrary, as highlighted above, Petitioners have the absolute right under the Policy to argue their specific needs for medical marijuana to the Court of Common Pleas of Lebanon County. *Exhibit 1* at ¶8.

No individual in Petitioners' circumstance will be immediately detained. *Exhibit 1* at ¶ 7. Instead, the Judicial District schedules the probationer for a violation hearing. At that hearing, the probationer will be able to utilize legal counsel and introduce evidence of the need for medical marijuana. These probation violation hearings are typically scheduled promptly within 30 days after a positive drug test. *Exhibit 1* at ¶¶ 10 - 14. Thus, their individual circumstances

will be considered and the Judicial District can elect to release Petitioners from the requirements of the Medical Marijuana Policy.

Further, the medical consequences that might arise from a probationer not having access to the medication of their choice does not create irreparable harm absent a definitive showing of life or death circumstances. *E.g.*, *Homoki*, 423 Pa. Super. 320, 621 A.2d 136 (1993). In this case, while Petitioners certainly have invoked concern over their health, the Judicial District will be able to consider their individual needs for medical marijuana and whether Petitioners should be relieved from the requirements of the Policy. *See Exhibit 1* at ¶¶ 10 - 14. As in *Homoki*, the Judicial District will allow the offender to establish that medical marijuana is essential for his or her welfare.

C. Greater injury would not result if this Court were to deny the injunction given that Petitioners have the chance to argue their need for medical marijuana before the Court of Common Pleas.

Petitioners incorporate much of their same argument on the issue of irreparable harm; namely, that they are faced with the dilemma of choosing between medical treatment and violating the conditions of their probation. *Brief*, pp. 29-30. That argument was addressed, *supra*, in Section A.

D. The General Assembly did not intend for the MMA to supersede the abilities of the courts to supervise probation and parole and, consequently, an injunction would not serve the public interest.

As stated above, the MMA permits the limited use of medical marijuana only in narrow circumstances. The MMA also contains safety restrictions and employment limitations, and curtails the use of certain types of marijuana beyond the permissible forms set forth in the MMA. Far from being a broad, unrestricted right, medical marijuana is limited in Pennsylvania. An injunction would only serve to thwart the various common pleas courts that are attempting to address medical marijuana use by probationers throughout the state.

E. Petitioners' remaining arguments do not support an injunction.

Many of Petitioners' remaining arguments for an injunction restate their arguments regarding Petitioners' particular need to use medical marijuana without regard to the conditions of their probation or parole. For the reasons stated above, the 52nd Judicial District has already responded to all of these arguments.

CONCLUSION

Based on the foregoing arguments, Respondent, the 52nd Judicial District, respectfully requests this Honorable Court deny Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction.

Respectfully submitted,

s/Geri Romanello St. Joseph
GERI ROMANELLO ST. JOSEPH, ESQUIRE
s/Robert Krandel
ROBERT KRANDEL, ESQUIRE

EXHIBIT 1

IN THE SUPREME COURT OF PENNSYLVANIA

MELISSA GASS, et al.	:	
	:	
	:	
v.	:	No. 118 MM 2019
	:	
	:	
52nd JUDICIAL DISTRICT	:	

DECLARATION OF PRESIDENT JUDGE JOHN C. TYLWALK

1. I am the President Judge for the Lebanon County Court of Common Pleas, 52nd Judicial District. I am familiar with the facts set forth herein.

2. Due to recent concerns about potential abuse of medical marijuana by probationers and parolees, the Court enacted a Policy prohibiting probationers and parolees from using medical marijuana.

3. This Policy was enacted after careful review of numerous factors including: review of research and acknowledgment that the Food and Drug Administration (FDA) does not recognize medical marijuana as a treatment for medical conditions; safety concerns for the community; substance abuse treatment options for probationers as some providers have shared they will not treat anyone who has a medical marijuana card because of the risk of relapse; and the general conditions of probation and parole established for Lebanon County.

4. Under the Lebanon County General Conditions of Probation / Parole (attached as Exhibit A), all probationers and parolees agree to the following conditions:

   a. "You may not possess or drink alcoholic beverages nor use any narcotic drugs and you will abstain from the possession, use or abuse, manufacturing, or sale of any

legal or illegal mind/mood altering chemical /substance, including but not limited to Synthetic Drugs." (Rule 3)

b. "Comply with all Municipal, County, State and Federal criminal laws..." (Rule 4)

5. A probationer or parolee generally will not comply with the General Conditions of Probation / Parole if they use medical marijuana because they will be violating Rules 3 and 4.

6. It has generally been the experience of the Court that requiring adherence to general conditions assists with rehabilitation of offenders and reduces the risk of recidivism.

7. However, the Medical Marijuana Policy, which bars the use of medical marijuana for probationers/parolees on court supervision, does not automatically result in a detention for probationers or parolees who test positive.

8. The Policy was recently amended (attached as Exhibit B) to explain the process which is provided to individuals who believe they are aggrieved by this probation condition. The Policy states:

> "Any person on supervision who believes they are aggrieved by this policy may petition the Court for a full and fair hearing to determine whether they should be excused from its application to them. At that hearing, the Petitioner will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana."

9. Probationers or parolees who use medical marijuana, and test positive for medical marijuana, during routine testing, are not immediately detained by their probation officers.

10. Often, before a violation hearing is scheduled, a discussion of treatment options will occur - a probationer or parolee will be given a chance to stop using medical marijuana.

11. If no agreement is reached, then the probationer or parolee will be scheduled for a violation hearing.

12. These probationers or parolees always have the right to legal counsel at the Gagnon II hearing and Public Defender services are available too.

13. A violation hearing is usually scheduled within 30 days after a positive drug test.

14. Any individual who uses medical marijuana may present evidence and argument at the violation hearing to support a need for the use of medical marijuana consistent with the guidelines set forth in the Medical Marijuana Act.

I hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: OCTOBER 15, 2019

John C. Tylwalk, J.

EXHIBIT A

LEBANON COUNTY GENERAL CONDITIONS OF PROBATION/PAROLE

NAME: _____ **DOCKET #:** _____

ADDRESS: _____

SSN: _____ **DOB:** _____

In accordance with authority conferred by law, you have been placed on probation/parole on _____ for a period until _____ by the Honorable _____ of the Court of Common Pleas of Lebanon County, Lebanon, Pennsylvania.

1) You shall report to the probation/parole office **weekly** unless directed otherwise by your probation/parole officer.

2) Work regularly. Unless previously excused, you shall obtain and maintain full-time employment and support your legal dependents; if employment is lost or changed, notify your probation officer within 72 hours and cooperate with your Probation Officer in finding other employment. Do not cause, resign, or become unemployed due to behavior attributed to actions by yourself.

3) You may not possess or drink alcoholic beverages nor use any narcotic drugs and you will abstain from the possession, use or abuse, manufacturing, or sale of any legal or illegal mind/mood altering chemical/substance, including but not limited to Synthetic Drugs.

4) Comply with all Municipal, County, State and Federal criminal laws, as well as the provisions of the PA Vehicle Code and Pa Liquor Code and you will notify your probation officer within 72 hours of any arrest, citation, or investigation by any law enforcement agencies.

5) Every time a written or oral request is made for the information, you must give to any probation/parole officer a truthful account of the way you are living, your employment status, your associations, and of any other matter or thing he/she desires to know.

6) You may not change your residence without permission from your Probation Officer. Once you have permission to change your residence, you shall notify the Probation Department within 72 hours of changing your residence.

7) You may not be outside of your approved residence **between the hours of 11:00 PM and 7:00 AM** each day except for employment purposes. Deviation from this condition and/or overnight travel requires permission your probation/parole officer; travel which exceeds (3) three days requires a written travel pass from your probation/parole officer.

8) You are required to make bi-weekly or monthly payments on fines, costs and restitution so that they are paid in full at least two (2) weeks prior to the expiration of your maximum sentence, unless other wise directed by the Court or the probation/parole department.

9) You will submit to urine testing at your own expense at the direction of your officer at anytime, day or night **A REFUSAL TO SUBMIT TO A URINE SAMPLE WILL BE DEEMED A FAILURE TO COMPLY.** You will have to pay for any tests you request to double-check positive results of the original test.

10) Refrain from overt behavior which threatens or presents clear and present danger to yourself or others.

Amended 05/2021

11) You may not possess, have available to your control, or have in your place of residency contraband such as: stolen property, drugs and drug paraphernalia, firearms (hand-guns, rifles, shotguns), other weapons, and instruments of crime.

12) In addition to all of the foregoing rules, you must abide by all SPECIAL CONDITIONS that are imposed by the Court and your probation/parole officer, including but not limited to the following:

(A) **DRUG CONVICTIONS**. You may not own or have on your possession any pagers, cellular telephones, police scanners or $50.00 or more without a receipt of origin. Int. _____

(B) **DUI CONVICTIONS.** You shall attend and successfully complete Alcohol Safe Driving Classes; the Pennsylvania Court Reporting Evaluation; a Drug and Alcohol Evaluation and any recommended treatment. You shall refrain from operating a motor vehicle until receiving permission from both the Pennsylvania Department of Transportation and your supervising Probation/Parole Officer. Int. _____

(C) **SEX OFFENDER RULES.** I acknowledge I have received a copy of the SPECIAL CONDITIONS that apply for sex offenders. Int. _____

13) If you request transfer of supervision from Lebanon County to another county in the Commonwealth via Inter-County Transfer, you will be assessed an administrative fee to cover processing and administrative costs. This fee shall be collected prior to the submission of the requests to the receiving county and shall not be refunded upon rejection of the request for transfer by the receiving county.

14) Pennsylvania law (Act 185 of 2004) requires that all offenders having a felony conviction submit to DNA testing prior to placement on a work release program, release from incarceration or discharge from supervision. Results of that testing will be forwarded to the Commonwealth of Pennsylvania State Police.

I hereby certify and state that I have carefully read the above rules and conditions which I now know I must follow while on probation/parole. I understand them and do solemnly promise that I will faithfully comply with them in every detail.

Signature: _____ Date: _____

Witness: _____ Date: _____

NOTIFICATION OF POINTS OF LAW:

Within the period or probation/parole/intermdiate punishment, you are hereby subject to a search of your person, property, and place of residence and seizure of all contraband found therein. You are hereby advised, that under the law, the Court may at any time revoke or modify any conditions of the probation/parole or intermediate punishment. You shall be subject to arrest, for cause, upon order of the Court, or without order, for violation of any of the above conditions by the Probation/Parole Officer. If your probation or intermdiate punishment is revoked, you may be sentenced to the maximum penalty for the offense for which you were convicted. If your parole is revoked, you may be required to serve the balance of your sentence in the Lebanon County Prison without credit for the time you were on parole.

During the course of supervision, if you believe that your rights as a probationer/parolee have been violated by an employee of Lebanon County Adult Probation and Parole Department, you may file a written complaint to his/her immediate supervisor who will investigate the complaint and respond in writing. If you feel the need for further review, you may proceed in a similar fashion according to the chain of command in the department.

EXHIBIT B

	Lebanon County Probation Services	Policy No.	5.1-2019 & 7.4-2019
		Pages:	2
		Section:	Adult and Juvenile Supervision
Related Standards:		Subject:	Medical Marijuana
Issuing Authority:	JAC, PJ	Revised Date:	OCTOBER 7, 2019

I. PURPOSE:

The purpose of this Medical Marijuana Policy is to establish guidelines to be referenced by Lebanon County Probation Officers when supervising offenders who declare the certified use of Medical Marijuana.

The Medical Marijuana Act (Act 16 of 2016) was signed into law on April 17, 2016 and became effective May 17, 2016. This Act is intended to "serve as temporary measure until there is Federal Approval of and access to Medical Marijuana through traditional medical and pharmaceutical avenues."

The medical marijuana card is **not a prescription** for medication, but rather a recommendation by a physician as to a form of treatment. Medical marijuana has not been approved as a MAT (medically assisted treatment) by the FDA (Food and Drug Administration). The use of medical marijuana may have benefits for some medical conditions and under certain circumstances may be helpful. Individuals, however, who are involved in substance abuse and issues surrounding addiction which may have played a part in the defendant's criminal violations of law, must be dealt with in a humane but effective manner so the defendant can be rehabilitated and become a contributing member of society.

Under the Federal Controlled Substances Act (CSA) of 1970, marijuana is classified as a Schedule I substance. By definition under the law, Schedule I drugs have a high potential for abuse and dependency, with no recognized medical use or value. Any marijuana possession, cultivation, or use is a federal crime, subjecting a defendant to fines, prison time, or both. Since marijuana use (medical or recreational) is deemed illegal under Federal law, the Court and the Probation Department should not knowingly allow violations of law to occur, the prohibition against such use is required.

II. APPLICABILITY:

To all Probation Department employees and all offenders under the direct supervision of Lebanon County Probation Services.

III. POLICY:

Lebanon County Probation Services shall not permit the active use of medical marijuana, regardless of whether the defendant has a medical marijuana card, while the individual is under supervision by the Lebanon County Probation Services Department. Offenders under supervision who are currently using medical marijuana will have 30 days to discontinue use. Offenders may use CBD hemp oil as this product is legal, pursuant to the Agricultural Act of 2014, the Farm Bill.

Offenders are prohibited from using oil derived from the marijuana plant, or what most people call CBD cannabis oil. The use of CBD cannabis oil follows the same regulations as medical marijuana and shall likewise be prohibited while the defendant is under supervision.

Any person on supervision who believes they are aggrieved by this policy may petition the Court for a full and fair hearing to determine whether they should be excused from its application to them. At that hearing, the Petitioner will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana.

EXHIBIT 2

IN THE SUPREME COURT OF PENNSYLVANIA

MELISSA GASS, et al.	:	
	:	
	:	
v.	:	**No. 118 MM 2019**
	:	
	:	
52nd JUDICIAL DISTRICT	:	

DECLARATION OF SALLY BARRY

1. I am the Director of Probationer Services for the Lebanon County Court of Common Pleas, 52nd Judicial District. I am familiar with the facts set forth herein.

2. My office has seen disruption in probation services and experienced difficulty for some time now with respect to supervising probationers and parolees who use medical marijuana.

3. By way of one example, several substance abuse treatment providers within the county will not treat anyone who has a medical marijuana card because of the risk of relapse. This limits our ability to place probationers and parolees into treatment programs and our ability to help rehabilitate these individuals.

4. Further, our office frequently finds that the individuals with medical marijuana prescriptions cannot identify the underlying health condition that led to

the medical marijuana prescription in the first place. My current analysis of individuals on probation/parole shows that of 76 persons with medical marijuana prescriptions, 14 cannot identify the health condition that led to the prescription.

5. Additionally, we have found a significant number of individuals under supervision, who possess a medical marijuana card, have a history of marijuana abuse and/or their underlying charges are related to the unlawful possession of marijuana. There is little usefulness in conducting urinalysis screening as a condition of their supervision, because the laboratory is unable to discern between the legal and "illegal" strand of marijuana.

6. A general condition of probation and parole that limits the use of illegal narcotics under Federal law has an overall positive impact on the rehabilitation of offenders and prevents inconsistent enforcement of probation general conditions.

7. It has generally been the experience of the Probation Services office that requiring adherence to general conditions assists with rehabilitation of offenders and reduces the risk of recidivism.

I hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the

statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: October 2, 2019

Sally Barry

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

118 MM 2019

MELISSA GASS, ET AL.

PETITIONERS

V.

52ND JUDICIAL DISTRICT, LEBANON COUNTY

RESPONDENT

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on *October 17, 2019,* they personally caused to be served upon the following a true and correct copy of the foregoing Answer to Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction by filing and serving via PACFile to all counsel of record (which service satisfies the requirements of Pa.R.A.P. 121).

s/Geri Romanello St. Joseph
GERI ROMANELLO ST. JOSEPH, ESQUIRE
s/Robert Krandel
ROBERT KRANDEL, ESQUIRE

THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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118 MM 2019

MELISSA GASS, ASHLEY BENNETT, and ANDREW KOCH,

Petitioners,

v.

52nd JUDICIAL DISTRICT, LEBANON COUNTY,

Respondent.

APPENDIX – UNREPORTED CASES

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1. *Commonwealth v. Wood*, No. CR-2065-2012 (Lycoming Co. Ct. C.P. Sept. 12, 2019)
2. *United States v. Martin*, No. 2:09-cr-98 (W.D. Pa. April 24, 2019)

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLANIA,	: No. CR-2065-2012 : CR-102-2013 : CR-1393-2013 : CR-1438-2016 : CR-1654-2016
vs.	: CRIMINAL ACTION
GAGE WOOD, Defendant.	: : *Defendant's* : *Motion to Modify Terms* : *& Conditions of Probation*

MEMORANDUM OPINION
Submitted: July 11, 2019
Decided: September 12, 2019

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PER CURIAM

BEFORE: LINHARDT, J., BUTTS, P.J., & McCOY, J.[1]

Before this Court is Defendant Gage Wood's ("Defendant") *Motion for Modification of Probation Conditions* (the "Motion").[2] On February 12, 2019, the Honorable Marc F. Lovecchio ordered that an argument *en banc* be convened in this matter and briefing submitted, as a ruling in Defendant's favor would alter Lycoming County Court of Common Pleas' policy and potentially impact others on supervision.[3] The Court requested that the parties, and any *amici curiae*, provide supplemental briefing regarding two questions: (1) "whether Pennsylvania's Medical Marijuana Act permits Defendant to use marijuana regardless of federal law, court policy or signed probation conditions," and (2) "whether Defendant should be permitted to use medical marijuana under the circumstances of this case."

On March 8, 2019, Peter T. Campana, Esquire entered his appearance on behalf of Defendant and filed an uncontested *Motion for Extension of Time*. On March 11, 2019, the Honorable Nancy L. Butts granted Defendant's *Motion for Extension of Time*. The deadline for Defendant's brief, as well as any briefing by *amici curiae*, was rescheduled to April 17, 2019, with the Commonwealth's responsive brief due by May 17, 2019. The *en banc* argument was rescheduled from May 3, 2019 to June 7, 2019. On April 12, 2019, the *en banc* argument was again rescheduled to July 11, 2019. The

[1] The Honorable Marc F. Lovecchio took no part in the consideration of this matter or this decision. *See infra* note 3.
[2] Defendant's Motion to Modify Terms & Conditions of Probation (Jan. 7, 2019) [hereinafter "Defendant's Motion"]. Defendant filed the motion *pro se*.
[3] Ultimately, Judge Lovecchio was forced to recuse himself based on Defendant retaining Peter T. Campana as counsel, who is Judge Lovecchio's brother-in-law.

Commonwealth claimed "no position" on the matter and did not submit a brief.

On July 11, 2019, the Court heard argument from Mr. Campana, Esquire, arguing on behalf of Defendant, and Sara J. Rose, Esquire, arguing on behalf of *amici curiae* the American Civil Liberties Union of Pennsylvania and Pennsylvania Association of Criminal Defense Lawyers (collectively, the "ACLU").[4] This is the Court's final decision on Defendant's Motion. For reasons articulated below, the Court holds that it may require probationers to comply with federal law while on probation supervision as a reasonable condition of probation. This will apply even if the condition acts as a blanket prohibition against a probationer's use of medical marijuana as permitted under Pennsylvania law.

I. BACKGROUND

On March 26, 2015, Defendant was placed on probation under docket number CR-2065-2012 for four and one-half years under the supervision of the Lycoming County Adult Probation Office (the "Office"). On December 21, 2016, Defendant was sentenced to 30 days to 1 year and 1 year of consecutive probation under docket number CR-1438-2016 under the supervision of the Office. Because of Defendant's violation of probation under CR-2065-2012, the four and one-half year period was

[4] "The American Civil Liberties Union [] is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Pennsylvania is one of its state affiliates, with more than 39,000 members throughout Pennsylvania." *See* Amicus Curiae Brief of the American Civil Liberties Union of Pennsylvania & the Pennsylvania Association of Criminal Defense Lawyers in Support of Defendant Gage Wood's Motion to Modify Conditions of Supervision 1 (Apr. 17, 2019) [hereinafter "ACLU's Brief"]. "The Pennsylvania Association of Criminal Defense Lawyers [] is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. As amicus curiae, [the association] presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed in Pennsylvania, and work to achieve justice and dignity for defendants. [The association] includes

ordered to remain in effect and run consecutively to Defendant's sentences ordered by the Court in its December 21, 2016 Order. Hence, Defendant's probationary period under docket number CR-1438-2016 ended on June 21, 2019 and his probationary period under docket number CR-2065-2012 began on June 21, 2019. Defendant's probationary sentence under CR-2065-2012 involved possession with intent to deliver marijuana, and CR-1438-2016 involved tampering and possession of drug paraphernalia.[5]

On August 11, 2018, Defendant was issued a "Medical Marijuana Identification Card" as a patient under the Pennsylvania Medical Marijuana Program.[6] At the February 12th hearing, Defendant testified to using medical marijuana, and the Office testified that use of medical marijuana under current policy would constitute a violation of probation.[7] Also, at the February 12th hearing, Defendant testified that he suffers from Post-Traumatic Stress Disorder, a qualified condition under the Pennsylvania Medical Marijuana Act, 35 P.S. § 10231.101, *et seq.* ("MMA").[8] Judge Lovecchio found probable cause to believe that Defendant violated the conditions of his probation; however, Judge Lovecchio scheduled argument *en banc* for the previously enumerated questions.

II. QUESTION PRESENTED

The crux of Defendant's dispute concerns two conditions of his probation

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approximately 900 private criminal defense practitioners and public defenders throughout the Commonwealth." *Id.* at 1-2.

[5] At the February 12th hearing, the parties agreed that only CR-2065-2012 and CR-1438-2016 remain active.

[6] Defendant's Motion, Exhibit A.

[7] Official Transcript 9, 17-18 (Jan. 31, 2019) [hereinafter "Tr."].

imposed pursuant to the Pennsylvania Administrative Code by the aforementioned Court Orders. The first condition requires compliance "with municipal, county, state and federal criminal statutes, as well as the Vehicle Code and the Liquor Code (47 P. S. §§ 1-101--9-902)."[9] The Court will refer to this first condition's requirement that Defendant adheres to "Federal criminal statutes" as the "federal condition." The second condition ("use condition") requires Defendant "[a]bstain from the unlawful possession or sale, of narcotics and dangerous drugs and abstain from the use of controlled substances within the meaning of the Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. §§ 780-101--780.144) without a valid prescription."[10]

Because the Court finds the federal condition a lawful and reasonable condition, the Court declines to consider whether the use condition—or the equivalent requirement that Defendant adhere to "state law" under the first condition—is unlawful given that the MMA specifically preempts Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-101, *et seq.*, as it relates to the use of medical marijuana.[11]

III. THE PARTIES' CONTENTIONS

In Defendant's Motion, he argues that his status as a patient under the MMA

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[8] 35 P.S. § 10231; Tr. at 8.
[9] 37 Pa. Code § 65.4(4).
[10] 37 Pa. Code § 65.4(5)(i).
[11] 35 P.S. § 10231.2101 ("The growth, processing, manufacture, acquisition, transportation, sale, dispensing, distribution, possession and consumption of medical marijuana permitted under this act shall not be deemed to be a violation of the act of April 14, 1972 (P.L. 233, No. 64), [35 P.S. § 780-101 et seq.] known as The Controlled Substance, Drug, Device and Cosmetic Act. If a provision of the Controlled Substance, Drug, Device and Cosmetic Act relating to marijuana conflicts with a provision of this act, this act shall take precedence." (footnote omitted)). The ACLU argues that the existence of the MMA places medical marijuana in a different category than alcohol use, which the Court is able to prohibit as a reasonable condition of probation. ACLU's Brief at 6-7 n.3 (citing *State v. Nelson*, 195 P.3d 826, 832

permits him to engage in the use of medical marijuana while on probation.[12] Defendant asserts that the MMA prevents the Court from imposing *any* conditions that curtail his lawful right to use medical marijuana while serving his probation.[13]

On April 17, 2019, Defendant submitted his *Memorandum of Law* in support of his Motion. Defendant argues that based on a plain reading of the judicial procedure statute for sentencing and probation, 42 Pa.C.S. § 9754, and the MMA, the Court is constrained related to both the federal condition and use condition.[14] Defendant does not draw a distinction between the federal condition and the use condition.

Defendant primarily argues that the Court's ability to prevent the use of a "prescription controlled substance" is limited to 42 Pa.C.S. § 9754(c)(13), which requires that "any other conditions" must be "reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience."[15] Defendant argues the prohibition on medical marijuana use is not "reasonably related" to his rehabilitation.[16]

Secondarily, Defendant relies on the MMA's language that patients will not be "subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by the Commonwealth licensing board or commission."[17] Defendant asserts that although the MMA does not directly address individuals on probation, Defendant could be subject to arrest, prosecution, or penalty if

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(Mont. 2008)).
[12] Defendant's Motion at 2.
[13] *Id.* at 7. Defendant reiterated this position at argument. Official Transcript 9 (July 11, 2019).
[14] *See generally* Defendant's Memorandum of Law in Support of *Pro Se* Motion to Modify Conditions of Probation Supervision (Apr. 17, 2019) [hereinafter "Defendant's Brief"].
[15] *Id.* at 3-5.
[16] *Id.* at 5.

the Court finds either the federal condition or use condition reasonable.[18] Further, probation's status as a "privilege" in the Commonwealth also falls within the gambit of the MMA's prohibition.[19]

Defendant further argues that the Arizona Supreme Court's reasoning in *Keenan Reed-Kaliher v. Hoggatt* is persuasive authority that should be considered since the language in Arizona's medical marijuana act mirrors the language in the MMA.[20] Defendant deferred to the ACLU brief regarding the issues underlying the Preemption Doctrine and disability discrimination under Pennsylvania's Human Relations Act, 43 P.S. § 951, *et seq.* ("HRA").[21]

Also on April 17, 2019, the ACLU submitted its *Brief in Support of Defendant Gage Wood's Motion to Modify Conditions of Supervision*.[22] The ACLU's first argument also focuses on a "plain reading" philosophy. The ACLU's claim regarding the plain language of the MMA echoes Defendant's memorandum.[23] However, the ACLU further developed the argument by asserting that the MMA's broad language of applicability and failure to exclude probationers implies an intent for the MMA to apply to all probation conditions, regardless of whether they concern federal law.[24]

The ACLU relies on the fact that the MMA specifically restricts its application to "[p]ossessing or using medical marijuana in a State or county correctional facility"; a

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[17] *Id.* (quoting 35 P.S. § 10231.2103(a)).
[18] *Id.* at 6.
[19] *Id.*
[20] *Id.* at 6-7 (citing *Keenan Reed-Kaliher v. Hoggatt*, 347 P.3d 136 (Ariz. 2015)).
[21] *Id.* at 2-3.
[22] *See generally* ACLU's Brief.
[23] The Court does not intend this as a slight, but desires to avoid repetition. The ACLU's brief is detailed and well-written.
[24] ACLU's Brief at 4-5.

restriction that would not warrant mention if the MMA did not apply to probationers.[25] The ACLU leans on *Keenan Reed-Kaliher* as persuasive authority for this argument.[26] The ACLU does not draw a distinction in its first argument between the federal condition and the use condition.

The ACLU's second argument contends that the federal condition "is not reasonably related to the purposes of probation."[27] This argument focuses on the individuality of probationers' circumstances and the harm that could result if a "blanket prohibition" on medical marijuana use while serving probation was instituted.[28] The ACLU next argues that the HRA requires Lycoming County to accommodate individuals with disabilities.[29] The ACLU avers that because Defendant's Post-Traumatic Stress Disorder is a "disability" under the HRA,[30] the HRA's language prohibiting discrimination against a patron of a "public accommodation" because of his disability is applicable.[31] Likewise, the ACLU argues that the Court cannot deny Defendant the reasonable accommodation of medical marijuana while on probation.[32] The ACLU relies on the interpretation of the American with Disabilities Act by federal courts as persuasive

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[25] *Id.* at 5.
[26] *Id.* at 5-6 (citing *Keenan Reed-Kaliher*, 347 P.3d at 139).
[27] *Id.* at 7.
[28] *Id.* at 8-9.
[29] *Id.* at 9.
[30] 43 P.S. § 954(p.1)(1) ("The term 'handicap or disability,' with respect to a person, means: [. . .] a physical or mental impairment which substantially limits one or more of such person's major life activities [. . .]").
[31] 43 P.S. § 955(i)(1).
[32] ACLU's Brief at 12 (quoting 16 Pa. Code § 44.5(b)); *see also* 16 Pa. Code 44.5(b)("Handicapped or disabled persons may not be denied the opportunity to use, enjoy or benefit from employment and public accommodations subject to the coverage of the act, where the basis for the denial is the need for reasonable accommodations, unless the making of reasonable accommodations would impose an undue hardship.").

authority.[33]

In its fourth argument, the ACLU posits that this Court cannot be commandeered to enforce federal law.[34] The ACLU points to *Printz v. United States* where the United States Supreme Court held that the federal government cannot pressure a state to enforce a "federal regulatory program."[35] The ACLU argues that implementation of the federal condition would result in the implementation of a federal regulatory program.[36] Additionally, the ACLU postulates that the MMA's enactment indicates the legislature's intent that such a condition not be imposed.[37]

In a similar vein, the ACLU's fifth argument concerns the preemption doctrine. The ACLU argues the Supremacy Clause[38] cannot be utilized to force this Court to capitulate to federal law as the United States Controlled Substances Act, 21 U.S. Code § 801 *et seq.* ("USCSA") does not prohibit the states from adopting their own laws regarding drug use.[39] Hence, because Congress has not indicated an intent to "exclusively govern" the conduct of illegal drug use, "express preemption" and "field preemption" are not applicable to this case.[40] Predicating its argument on federalist principles, the ACLU argues that Pennsylvania retains sovereignty in this field and is able to promulgate the MMA.[41] Further, the ACLU claims the final type of preemption, "conflict preemption," is also inapplicable here because the MMA neither renders

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[33] *Id.* at 10.
[34] *Id.* at 14.
[35] *Id.* at 15 (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997)).
[36] *Id.*
[37] *Id.*
[38] U.S. CONST., art. VI, ¶2.
[39] *Id.* at 16.
[40] *Id.* at 17 (quoting *Arizona v. United States*, 567 U.S. 387, 398-99 (2012)) (internal quotation marks omitted).

compliance with the USCSA a "physical impossibility" nor does it "stand[] as an obstacle to [its] accomplishment and execution."[42]

Moreover, the ACLU notes that while patients under the MMA may be subject to federal prosecution according to *Gonzales v. Raich*,[43] the United States Department of Justice ("Department of Justice") disallows the use of federal funds to prosecute a patient's legal use of medical marijuana pursuant to state law.[44] In the ACLU's view "[t]his Court has the authority to determine, consistent with Pennsylvania law, which conditions to impose on individuals under its supervision."[45]

On April 18, 2019, the Honorable Daylin Leach ("Senator Leach"), a democratic state senator representing constituents in Montgomery County and Delaware County, filed his *Brief in Support of Defendant Gage Wood's Motion to Modify Conditions of Supervision*.[46] Senator Leach wrote the Court to "provide the Court with information about the General Assembly's general intent in passing the Act and its specific intent as it relates to people like the defendant—medical marijuana patients serving probation."[47] Echoing arguments maintained by Defendant and the ACLU, Senator Leach asserts that the failure of the legislature to reference probationers was a deliberate action to indicate the inclusion of probationers within the MMA's purview.[48] Senator Leach's argument also relies on a plain language analysis, claiming the MMA "clearly and

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[41] *Id.* at 16-17.
[42] *Id.* at 18 (quoting *Arizona*, 567 U.S. at 399) (internal quotation marks omitted).
[43] *See* 545 U.S. 1, 15 (2005).
[44] *Id.* at 19 (citing Consolidated Appropriations Act, 2018, Pub. L. No. 115-41 § 537).
[45] *Id.* at 20.
[46] Brief for Amicus Curiae State Senator Daylin Leach in Support of Defendant Gage Wood's Motion to Modify Conditions of Supervision 1 (Apr. 18, 2019) [hereinafter "Senator Leach's Brief"].
[47] *Id.*
[48] *Id.* at 2.

unambiguously shows that legislators intended to permit patients serving probation to use medical marijuana."[49]

IV. DISCUSSION[50]

The use of marijuana remains a violation of federal law as a Schedule I substance under the USCSA.[51] Nevertheless, Congress expressed in the USCSA that it was not its intent to prohibit states from implementing their own laws related to drug possession, use, or distribution unless there exists a "positive conflict" between the state and federal statutes.[52]

On April 17, 2016, Pennsylvania enacted the MMA to provide a "program of

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[49] *Id.* at 2-4.

[50] The Court finds that the HRA is not applicable to probationary services. Relevant to the case *sub judice*, the HRA prevents discrimination by "any person being the owner, lessee, proprietor, manager, superintendent, agent or employe of any public accommodation [. . .] [to] [r]efuse, withhold from, or deny to any person because of his race, color, sex, religious creed, ancestry, national origin or handicap or disability, [. . .], either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such public accommodation [. . . .]" 43 P.S. § 955(i)(1). The HRA defines a "public accommodation" as "any accommodation, resort or amusement which is *open to, accepts or solicits the patronage of the general public* [. . .] and all Commonwealth facilities and services, including such facilities and services of all political subdivisions thereof, but shall not include any accommodations which are in their nature distinctly private." 43 P.S. § 954(l) (emphasis added). Just as a prison is a Commonwealth facility that does not serve the public, probationary services are Commonwealth services, but are not for the benefit of the public and; therefore, do not fall under the HRA's definition of a "public accommodation." *See Blizzard v. Floyd*, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992) ("Although a state correctional institution is a Commonwealth facility, it does not accept or solicit the patronage of the general public. Moreover, a common theme runs throughout the Act's definition of a public accommodation which is to provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire."). As the ACLU noted, this Court is permitted to allow federal cases addressing the ADA to guide its analysis, *See Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996). However, the Court declines to do so here because the Pennsylvania Commonwealth Court's interpretation is based on dissimilar language in the ADA. *See, e.g.*, *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) ("State prisons fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.' ").

[51] 21 U.S. §§ 812(C)(a)(c)(10), 841(a)(1).

[52] 21 U.S. Code § 903 ("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.").

access to medical marijuana which balances the need of patients to have access to the latest treatments with the need to promote patient safety."[53] The legislature expressed that this program was necessary as "[s]cientific evidence suggests that medical marijuana is one potential therapy that may mitigate suffering in some patients and also enhance quality of life."[54]

The MMA prohibits a "Patient"[55] from being "subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by a Commonwealth licensing board or commission, solely for lawful use of medical marijuana [. . . .]"[56] The MMA does not address probationers, but it does carve out certain exceptions to its applicability. For instance, the MMA does not "require an employer to commit any act that would put the employer or any person acting on its behalf in violation of federal law."[57]

Concomitantly, the MMA allows civil or criminal penalties for: (1) "[u]ndertaking any task under the influence of medical marijuana when doing so would constitute negligence, professional malpractice or professional misconduct," (2) "[p]ossessing or using medical marijuana in a state or county correctional facility, including a facility owned or operated or under contract with the Department of Corrections or the county which houses inmates serving a portion of their sentences on parole or other community correction program" and (3) "[p]ossessing or using medical marijuana in a

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[53] 35 P.S. § 10231.102(3)(i) (2016).
[54] § 10231.102(1).
[55] 35 P.S. § 10231.103 (2016) (defining "patient" as "[a]n individual who: (1) has a serious medical condition; (2) has met the requirements for certification under this act; and (3) is a resident of this Commonwealth"). The definition of a "serious medical condition" includes post-traumatic stress disorder. § 10231.103(12).
[56] 35 P.S. § 10231.2103(a) (2016).

youth detention center or other facility which houses children adjudicated delinquent, including the separate, secure State-owned facility or unit utilized for sexually violent delinquent children [. . .]"[58] Conversely, the MMA does prohibit a patient's use of medical marijuana from being "considered by a court in a custody proceeding."[59]

A. The United States Controlled Substances Act, 21 U.S. Code § 801 *et seq.*, does not preempt the Pennsylvania Medical Marijuana Act, 35 P.S. § 10231.101, *et seq.*

The status of medical marijuana in the United States has been described as "Schrödinger's Cat of legality"—that is, the use of medical marijuana is both lawful and unlawful in the metaphoric experimental box of Pennsylvania.[60] Notwithstanding this amalgamation, the USCSA does not preempt the MMA.

The Preemption Doctrine is grounded in the Supremacy Clause of the United States Constitution:

> Article VI, cl. 2, of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Consistent with that command, we have long recognized that state laws that conflict with federal law are "without effect."[61]

The Pennsylvania Supreme Court has described the three types of preemption that embody the doctrine:

> In determining the breadth of a federal statute's preemptive effect on state law, we are guided by the tenet that "the purpose of Congress is the ultimate touchstone in every pre-emption case." Congress may

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[57] § 10231.2103(b)(3).
[58] 35 P.S. § 10231.1309(1)-(3).
[59] § 10231.2103(c).
[60] Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. Va. L. Rev. 1, 11 (2013).
[61] *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

> demonstrate its intention in various ways. It may do so through express language in the statute (express preemption). [. . .]
>
> In the absence of express preemptive language, Congress' intent to preempt all state law in a particular area may be inferred. This is the case where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation. That is to say, Congress intended federal law to occupy the entire legislative field (field preemption), blocking state efforts to regulate within that field.
>
> Finally, even where Congress has not completely displaced state regulation in a specific area, state law is nullified if there is a conflict between state and federal law (conflict preemption). Such a conflict may arise in two contexts. First, there may be conflict preemption where compliance with state and federal law is an impossibility. Furthermore, conflict preemption may also be found when state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress.[62]

As previously noted, the United States Congress included a provision in the USCSA that forecloses an argument based on express or field preemption by requiring a "positive conflict" between the federal and state statutes.[63] Congress's reasoning for drafting § 903 was likely grounded in the fact that states have more expansive enforcement capabilities than the federal government.[64] Regardless, based on the clear language of § 903, only conflict preemption remains potentially applicable.

In the Court's view, if this matter concerned the question of whether a defendant could be federally charged for the use of medical marijuana that is legal under state law, then the doctrine of preemption would prevent reliance on the state's medical

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[62] *Dooner v. DiDonato*, 971 A.2d 1187, 1193–94 (Pa. 2009) (internal citations omitted).
[63] 21 U.S. Code § 903.
[64] *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. Health Care L. & Pol'y 5, 12 (2013).

marijuana act as a viable defense.[65] Alternatively, if Defendant was sentenced to probation in the federal system, then conflict preemption would be triggered as the MMA would not apply, and the federal district court would be unable to condition probation on a violation of federal law.[66] In the present matter, however, the MMA is applicable to Defendant and does not render compliance with federal law impossible or stand as an obstacle to the congressional objectives underlying the USCSA.

1. Legal Impossibility under Conflict Preemption

Compliance with federal law is not rendered impossible under the MMA. While "tension" certainly exists between a state's sovereignty to address marijuana use and the USCSA, this tension does not create an "impossibility" under the law.[67] If the law did recognize such tension as a legal impossibility, then Congress's power under the Supremacy Clause would be expansive—necessitating that the states govern according to congress's criminal preferences. This is not the current legal landscape.[68] Indeed, the Commandeering Doctrine would be rendered a nullity with such expansive congressional interference.[69]

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[65] *See Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (holding that the USCSA could be used to prosecute an individuals' growth, possession, use, and distribution of marijuana for medical use).
[66] *See, e.g.*, *United States v. Bey*, 341 F. Supp. 3d 528, 531 (E.D. Pa. 2018) (quoting *United States v. Johnson*, 228 F. Supp. 3d 57, 62 (D.D.C. 2017)) ("We therefore join what Judge G. Michael Harvey has described as 'the chorus' of federal courts around the country concluding a federal supervisee's state-authorized possession and use of medical marijuana violates the terms of federal supervised release.").
[67] Erwin Chemerinsky, Jolene Forman, Allen Hopper, Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 110–11 (2015).
[68] *See New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress'[s] instructions.").
[69] *See Printz v. United States*, 521 U.S. 898, 935 (1997) ("We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States'

A legal impossibility under conflict preemption is better understood as a "physical impossibility."[70] A physical impossibility exists where state law requires violation of federal law.[71] In the present matter, the MMA does not *require* Defendant to "engage in an action specifically forbidden by the [USCSA]."[72] Such would be the case only if the MMA required Defendant to possess, use, manufacture, or distribute marijuana.[73] Because the MMA is a mere codification of inaction, conflict preemption's "legal impossibility" is not implicated.[74] In other words, the question is whether both statutes can be enforced.[75] As summarized by Justice Walters in *Emerald Steel Fabricators v. Bureau of Labor* –

> One sovereign may make a policy choice to prohibit and punish conduct; the other sovereign may make a different policy choice not to do so and instead to permit, for purposes of state law only, other circumscribed conduct. Absent express preemption, a particular policy choice by the federal government does not alone establish an implied intent to preempt contrary state law. A different choice by a state is just that — different. A state's contrary choice does not indicate a lack of respect; it indicates federalism at work.[76]

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officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

[70] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("We will find preemption where it is impossible for a private party to comply with both state and federal law [. . . .]").

[71] *Gonzales v. Oregon*, 546 U.S. 243, 276, 289–90 (2006) (Scalia, J., dissenting) ("In any event, the [Interpretive Rule issued by the Attorney General, which determined authorizing the administration of federally controlled substances for suicidal purposes violated the USCA] does not purport to pre-empt state law in any way, not even by conflict pre-emption—unless the Court is under the misimpression that some States *require* assisted suicide. The Directive merely interprets the CSA to prohibit, like countless other federal criminal provisions, conduct that happens not to be forbidden under state law (or at least the law of the State of Oregon).").

[72] *See supra* note 67, at 105-06.

[73] *See supra* note 67, at 106.

[74] *See* Michael A. Cole, Jr., *Functional Preemption: An Explanation of How State Medicinal Marijuana Laws Can Coexist with the Controlled Substances Act*, 16 Mich. St. U. J. Med. & L. 557, 572 (2012).

[75] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

[76] *Emerald Steel Fabricators v. Bureau of Labor*, 230 P.3d 518, 348 Or. 159, 204 (Or. 2010) (Walters, J., dissenting).

2. Legal Obstacle under Conflict Preemption

Explained by the learned Erwin Chemerinsky, currently Dean of U.C. Berkeley School of Law:

> The argument that state laws legalizing marijuana activity prohibited by the [USCSA] pose an obstacle to the purposes and objectives of federal law has an intuitive appeal. After all, these states have removed criminal sanctions for, and thus allow citizens to engage in, conduct that federal law prohibits. How could that not pose an obstacle to the [USCSA's] objectives of "combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances"? The problem with this argument is that it confuses the common definition of "obstacle" with the distinct legal concept developed in the Supremacy Clause jurisprudence governing federal preemption of state law.[77]

Concerning such an obstacle, the Supreme Court of the United States has stated,

> What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects:
>
> > "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."[78]

Based on the Supreme Court's rationale, this Court disagrees with the Oregon Supreme Court that the USCSA's classification of marijuana as a schedule one substance alongside the MMA's allowance of medical marijuana creates an insurmountable obstacle to the USCSA's purposes.[79] Conflict preemption is not

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[77] *See supra* note 67, at 110–11.
[78] *Crosby*, 530 U.S. at 373 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).
[79] *See Emerald Steel Fabricators*, 348 Or. at 178 (Kistler, J., majority).

triggered merely by unharmonious statutes.[80] In the present case, disagreement does not obstruct the federal government's ability to prosecute, which is the central purpose of the USCSA.[81] The historical underpinnings of the USCSA support such a purpose:

> [I]n 1970, after declaration of the national "war on drugs," federal drug policy underwent a significant transformation. A number of noteworthy events precipitated this policy shift. First, in *Leary v. United States,* [. . .] this Court held certain provisions of the Marihuana Tax Act and other narcotics legislation unconstitutional. Second, at the end of his term, President Johnson fundamentally reorganized the federal drug control agencies. The Bureau of Narcotics, then housed in the Department of the Treasury, merged with the Bureau of Drug Abuse Control, then housed in the Department of Health, Education, and Welfare (HEW), to create the Bureau of Narcotics and Dangerous Drugs, currently housed in the Department of Justice. Finally, prompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act.
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> Title II of that Act, the CSA, repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.
>
> To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.[82]

Therefore, by its terms and history, the USCSA is undeniably concerned with the prosecution of illegal substances. The MMA's allowance of limited marijuana use for medical purposes does not obstruct this purpose. Absent a contrary decision by the

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[80] Importantly, the Court notes that the USCSA does not grant new powers or rights. *See Michigan Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 465–66, 477-78 (1984) (preemption found where Michigan act violated the rights of farmers and producers to join cooperative associations, which was created by the federal Agricultural Fair Practices Act).

[81] 21 U.S.C. § 801.

[82] *See Gonzales v. Raich*, 545 U.S. 1, 11–13 (2005) (internal citations omitted) (internal footnotes omitted).

President, the Department of Justice is free to enforce the terms of the USCSA.[83] In fact, under the Honorable Jefferson B. Sessions, III, the Department of Justice repealed the "Memorandum for All United States Attorneys" by the Honorable James M. Cole ("Cole Memo."), Deputy Attorney General under President Obama's administration.[84] The memorandum by Attorney General Sessions expressly revoked the Cole Memo.'s admonishment that department resources would not be allocated for the prosecution of "small amounts of marijuana for personal use on private property."[85] Thus, no sound argument exists that the MMA stands as an obstacle to the Department of Justice pursuing legal action for violations of the USCSA.

B. The MMA's Preemption Survival Does Not Curtail a State Court's Ability to Impose a Reasonable Condition of State Probation.

Although the USCSA does not preempt the MMA, this Court is not prevented from directing reasonable conditions of probation. The arguments of Defendant and the *amici curiae* engage in the causation fallacy. Specifically, a disconnect exists between their analysis that the MMA is a valid Pennsylvania law and that the USCSA's lack of preemption prevents this Court from imposing the federal condition as a reasonable condition of probation. The federal government certainly cannot

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[83] On February 15, 2019, President Donald J. Trump signed the Consolidated Appropriations Act, funding the federal government through September 30, 2019, which provided in § 537 that the federal funds could not be utilized by the Department of Justice to prevent Pennsylvania "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *See United States v. Jackson*, 2019 WL 3239844, at *3 (E.D. Pa. June 5, 2019); *see also* Consolidated Appropriations Act, 2019 Pub. L. No. 116-6, 133 Stat. 13 (2019), https://www.congress.gov/bill/116th-congress/house-bill/648/text (last visited August 25, 2019). Since 2014, § 537's language has remained in each appropriation bill. *See Jackson*, 2019 WL 3239844, at *3.

[84] Jefferson B. Sessions, III, Memorandum for All United States Attorneys, "Marijuana Enforcement," (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download (last visited Aug. 25, 2019) [hereinafter "Sessions Memo."]; *see also* James M. Cole, Memorandum for All United States Attorneys, "Guidance Regarding Marijuana Enforcement," (Aug. 29, 2013), https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf (last visited Aug. 25, 2019) [hereinafter "Cole Memo."].

commandeer this Court to proceed as a federal actor and apply federal law; however, the Court imposes the federal condition not as a federal actor, but of its own volition pursuant to Pennsylvania law. Quite simply, the ability for the Commonwealth to enact the MMA does not speak to this Court's ability to impose reasonable probation conditions. The two legal spheres do not intersect.

Nevertheless, assuming *arguendo* that Defendant and the ACLU are correct that the MMA's survival of preemption dictates this Court's ability to proscribe reasonable probation conditions, the MMA is silent on whether it is applicable to probationers. The Court remains unconvinced by the ACLU's position that silence indicates a legislative intent to allow a probationer's use of medical marijuana.[86] In addition, the MMA's "Declaration of policy" does not provide any insight into the legislature's view regarding the narrow question before this Court.[87] An argument that the legislature's broad goal of providing a "program of access to medical marijuana" evidences its intent as to the confined question before this Court ignores the complicated, intertwining aspects of implementing a medical marijuana program. In the Court's view, such an argument is analogous to arguing from silence.[88]

Given that the MMA contains provisions that specifically exclude certain individuals from the act's grasp, it appears more logical to presume the legislature's intent was to leave the question of probation applicability for the trial courts.[89] To this

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[85] Sessions Memo. at 1; Cole Memo. at 1-2.
[86] *See Mars Emergency Med. Servs., Inc. v. Twp. of Adams*, 740 A.2d 193, 196 (Pa. 1999) (noting that an act's silence requires the analyzing court to delve into the legislation's pronouncement of its own intent).
[87] 35 P.S. § 10231.102(3)(i).
[88] *Contra* Defendant's Brief at 6; ACLU's Brief at 5; Senator Leach's Brief at 2.
[89] *See Cali v. City of Phil.*, 177 A.2d 824, 832 (Pa. 1962) ("This i[s] fortified by the general canon of interpretation that the mention of a specific matter in a general statute implies the exclusion of others not

effect, Senator Leach's admonishment that the legislature intended to protect probationers under the MMA is unpersuasive. First, the Court cannot accept as law the assurances of one senator.[90] The democratic process does not proceed so efficiently. Second, ignoring for a minute that Senator Leach authored and sponsored the MMA bill and is being represented by the same law firm that represents Defendant, his *amicus curiae* brief fails to address the "reasonable condition" argument. As previously expressed, the failure to bifurcate the use condition from the federal condition is fatal to Senator Leach's argument. Candidly, a "clear and unambiguous" showing from the legislature would have been to explicitly address probationers in the MMA.[91]

Moreover, even if the MMA was inclusive of probationers, the Court is empowered with broad discretion in fashioning specific conditions—as long as they are reasonable—of lawful activities.[92] It is unclear how the Court's discretion does not extend to Defendant's use of medical marijuana. Nevertheless, the federal condition does not implicate a lawful activity, as the use of marijuana even for medical purposes under federal law is not permitted.

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mentioned (expressio unius est exclusio alterius) [. . . .]"). Defendant indicated at the January 31st hearing that a proposed amendment regarding probationers' rights under the MMA was struck down by the legislature prior to the MMA's enactment; however, the amendment was not submitted into evidence. Tr. at 5-6.

[90] Interestingly, there is a proposed amendment to 42 Pa.C.S. § 9771 that proposes a limitation on sentence of total confinement conditions in revocation proceedings for a probationer who tests positive for marijuana and possesses an identification card under the MMA. *See* 203 Pa. House Bill No. 1555 (2019).

[91] *Contra* Senator Leach's Brief at 4 ("[Senator Leach] believes the plain language of the [MMA] clearly and unambiguously shows that legislators intended to permit patients serving probation to use medical marijuana.").

[92] *See Com. v. Vilsaint*, 893 A.2d 753, 757 n.4 (Pa. Super. Ct. 2006) (noting trial courts may impose a

C. A Probation Condition that Dictates a Probationer Not Violate Federal Law is a Reasonable Condition of Probation.

The purpose of probation has been previously outlined by the Superior Court:

> It is constructed as an alternative to imprisonment and is designed to rehabilitate a criminal defendant while still preserving the rights of law-abiding citizens to be secure in their persons and property. When conditions are placed on probation orders they are formulated to insure or assist a defendant in leading a law-abiding life.[93]

The legislature has delegated wide-latitude to trial courts to attach "reasonable" conditions to probation "necessary to insure or assist the defendant in leading a law-abiding life."[94] Pennsylvania law permits a trial court under § 9754(c)(13) to attach "conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience."[95] Important to the case *sub judice*, an implied condition of probation exists in every probationary period that the probationer not commit a new crime while on probation.[96] Of course, a condition imposed under § 9754 must be lawful.[97]

The federal condition is surely lawful since the Superior Court has recognized the requirement that a probationer not violate the law as an implicit condition of

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condition of probation regarding alcohol under the "catch-all" provision of 42 Pa.C.S. § 9754(c)(13)).

[93] *Com. v. Reichenbach*, 2015 WL 6112246, at *3 (Pa. Super. Ct. Aug. 28, 2015); *accord Com. v. Parker*, 152 A.3d 309, 316–17 (Pa. Super. Ct. 2016) (quoting *Com. v. Smith*, 85 A.3d 530, 536 (Pa. Super. Ct. 2014)) (""The aim of probation and parole is to rehabilitate and reintegrate a lawbreaker into society as a law-abiding citizen.").

[94] 42 Pa.C.S.A. § 9754 (1988); *Com. v. Hall*, 80 A.3d 1204, 1212 (Pa. 2013); *accord id.*; *Vilsaint*, 893 A.2d at 757.

[95] § 9754(c)(13); *accord Vilsaint*, 893 A.2d at 757.

[96] *Com. v. Martin*, 396 A.2d 671, 674 n.7 (Pa. Super. Ct. 1978) (citing *Com. v. Duff*, 192 A.2d 258, 262 (Pa. Super. Ct. 1963), *rev'd on other grounds*, 200 A.2d 773 (Pa. 1964)); *Vilsaint*, 893 A.2d at 757 n.5.

[97] *See Com. v. Rivera*, 95 A.3d 913, 915 (Pa. Super. Ct. 2014); *accord Com. v. Wilson*, 67 A.3d 736, 745 (Pa. 2013).

probation.[98] Granted, pursuant to this lawful consideration, "[s]upervisory release conditions are subject to the constitutional doctrines of vagueness and overbreadth."[99] The Superior Court summarizes these doctrines as follows:

> Arising from the Fourteenth Amendment's Due Process Clause, the void-for-vagueness doctrine requires that a statute or rule under attack be sufficiently definite so that people of ordinary intelligence can understand what conduct is prohibited, and so as not to create or encourage arbitrary or discriminatory enforcement. When a statute is purportedly vague and arguably involves constitutionally protected conduct, vagueness analysis will necessarily intertwine with overbreadth analysis.
>
> A form of First Amendment challenge, the overbreadth doctrine prohibits an enactment, even if clearly and precisely written, from including constitutionally protected conduct within its proscriptive reach. In order to prevail on an overbreadth challenge, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[100]

This Court does not find that the federal condition is vague since an "ordinary" person can understand what conduct he or she cannot perform (i.e., crime) or broad, as the condition does not envelop constitutional conduct within its prohibitions. Neither is the federal condition illegal since, by its very terms, it requires adherence to the law. Indeed, as the Superior Court has noted, this implied condition seems "obvious in nature."[101]

Other than the ACLU's conclusory statement that the federal condition is not "reasonably related" to Defendant's rehabilitation, Defendant and the ACLU avoid explaining how the federal condition is unlawful or unreasonable. Defendant and the

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[98] *See Martin*, 396 A.2d at 674 n.7.
[99] *Com. v. Perreault*, 930 A.2d 553, 559 (Pa. Super. Ct. 2007).

[100] *Id.* at 559 n.1 (internal citations omitted).
[101] *Vilsaint*, 893 A.2d at 757 n.5.

ACLU argue simply that the legislature has evidenced an intent by enacting the MMA that a probation condition curtailing the lawful use of medical marijuana in Pennsylvania is *per se* unreasonable.[102] Framing the argument in this manner erases the distinction between the use condition and federal condition. As noted above, while the use condition may problematically usurp the MMA, the federal condition's foundation is not so fraught.[103]

In *Reed-Kaliher v. Arizona*, the Arizona Supreme Court fell for the same mistake when it spliced the argument related to a general condition to "obey all laws" and the argument for a specific condition that the probationer "not possess or use marijuana."[104] Germane to the present inquiry, the *Reed-Kaliher* Court found that any condition which demanded the probationer refrain from using medical marijuana compliant with the AMMA was an illegal condition.[105] In so holding, the Arizona Supreme Court similarly commingled the probation conditions. This consolidation becomes apparent when the Arizona Supreme Court states that the trial court is unable to "impose a term that violates Arizona law."[106] Naturally, the *Reed-Kaliher* Court's requirement that the probationer adheres to federal law under the "obey all laws" condition is not a violation of state or federal law, despite the fact that the "not possess or use marijuana" probation condition is illegal under Arizona law.

Referencing the Preemption Doctrine, the *Reed-Kaliher* Court attempted to

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[102] Defendant's Brief at 6; ACLU's Brief at 7.
[103] *See supra* page 5 and note 11.
[104] *See Reed-Kaliher v. Arizona*, CV-14-0226-PR, at 2-3 (Ariz. 2014). The Arizona Supreme Court in *Reed-Kaliher* also focused on the broad language of the Arizona Medical Marijuana Act ("AMMA"). *Id.* at 4.
[105] *Id.* at 5-6.

validate its position by holding that the trial court would not be "sanctioning a violation of federal law" if it allowed the probationer to use medical marijuana because the "court's authority to impose probation conditions is limited by statute."[107] In so arguing, the Arizona Supreme Court again leveraged the violation of state law to undermine the lawful condition that federal law not be violated. The Montana Supreme Court made a similar mistake in *Montana v. Nelson*:

> Therefore, while the District Court may require [the defendant] to obey all federal laws as a condition of his deferred sentenced, it must allow an exception with respect to those federal laws which would criminalize the use of medical marijuana in accordance [with] [Montana's] MMA. We accordingly reverse the imposition of Condition No. 9 ["The Defendant shall comply with all city, county, state, federal laws, ordinances, and conduct himself as a good citizen."], *but only insofar as it relates to enforcing the CSA at the expense of the MMA* [. . . .]
>
> While [the defendant] may be generally required to obey federal law, an exception must be made for lawful use of medical marijuana under the MMA."[108]

The italics in the first paragraph create anticipation that the Montana Supreme Court understood the distinction between the illegal condition that the probationer not violate Montana law when the Montana Medical Marijuana Act ("MMMA") states otherwise, and the legal condition that the probationer not violate federal law. However, the Montana Supreme Court's second paragraph, which is included in the opinion's conclusion, does not evidence such understanding. A condition that prohibits a probationer from using medical marijuana consistent with a state medical marijuana act can only be argued to be illegal to the extent it violates a provision of state law. This is

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[106] *Id.* at 6.
[107] *Id.* at 8.
[108] *Montana v. Nelson*, DA 07-0339, 2008 MT 359, at 8, 19-20 (Mont. 2008) (emphasis added).

because a condition that explicitly or implicitly prevents a violation of federal law is not illegal.[109]

The Court finds support for its position in Colorado and Oregon precedent. In the well-reasoned opinion of *Colorado v. Watkins*, the court recognized the tautology that is produced when a probation condition expressly requires adherence to federal law.[110] In *Watkins*, the court recognized that the tautology is further supported by the fact that probationers possess limited constitutional amenities and Colorado's Medical Use of Marijuana Amendment does not provide probationers *carte blanche* to use marijuana.[111] Notably, akin to Pennsylvania's implied condition not to violate the law, Colorado's statutory construct expressly requires that the defendant not commit another crime while on probation.[112]

This Court's rationale is also supported by the court in *Oregon v. Liechti*, which intuitively held that interpreting Oregon's express probation condition that a defendant "violate no law" as only applying to state law "is not only forced, but also hostile to the policy fundamentals of probation."[113] The court opined that probation "is designed to encourage law-abiding conduct of probationers, and, to that end, probationers subject to that general condition are obliged to follow all laws and report any infractions."[114]

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[109] *See, e.g.*, *Oregon v. Bowden*, 425 P.3d 475, 292 Or. App. 815, 816 (Or. Ct. App. 2018) (finding the Oregon medical marijuana statute prevented probation conditions that generally prevented possession of a medical marijuana card, use of illegal substances, and possession of paraphernalia as violations of state law.); *New York v. Stanton*, 2018 NY Slip Op. 28221 (NY Cnty. Ct. July 16, 2018) (holding that medical marijuana could be used by probationers pending a case-by-case review based on the tenets of the New York medical marijuana statute).
[110] *See generally Colorado v. Watkins*, 2012 COA 15, at 18 (Colo. App. Feb. 2, 2012).
[111] *Id.* at 11-13.
[112] *Id.* at 6 (citing Colo. Rev. Stat. § 18-1.3-204(1)).
[113] *Oregon v. Liechti*, 21-03-03751, at *3 (Or. Ct. App. Nov. 16, 2005).
[114] *Id.*

The federal condition here is similarly lawful and reasonable.

V. CONCLUSION

For the reasons articulated above, the Court finds that the federal condition's language that requires compliance with "Federal criminal statutes," which was imposed pursuant to the Pennsylvania Administrative Code by orders of this Court, is a lawful and reasonable condition of probation. This matter will proceed consistent with this Opinion. Any required scheduling will occur by separate court order.

IT IS SO ORDERED this 12th day of September 2019.

cc: The Honorable Nancy L. Butts
The Honorable Joy Reynolds McCoy
The Honorable Eric R. Linhardt
Kenneth Osokow, Esquire
Lycoming County District Attorney's Office
Peter T. Campana, Esquire
Todd J. Leta, Esquire
Campana, Hoffa & Morrone, P.C.
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Gary Weber, Esquire (Lycoming Reporter)
File: 2065-2012
File: 102-2013
File: 1393-2013
File: 1438-2016
File: 1654-2016

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	2:09cr98
	)	**Electronic Filing**
RICHARD MARTIN	)	

MEMORANDUM ORDER

AND NOW, this 24th day of April, 2019, upon due consideration of the Probation Office's Report on Supervision filed on April 11, 2019, indicating defendant has verified that he obtained a medical card for use of marijuana and reporting that defendant has been directed to cease following the prescribed treatment because marijuana remains illegal under federal law, IT IS ORDERED that the court declines to impose a sanction or restrict defendant based on the conduct identified in the report. Defendant has obtained a medical card 1) from a medical practitioner licensed under Pennsylvania law to prescribe the controlled substance 2) for a legitimate medical purpose. Thus, his "use" of marijuana as a form of medical treatment complies with all aspects of Pennsylvania law.

The court declines to prohibit or sanction the reported conduct even though use of marijuana is a technical violation of supervision because possessing it remains a violation of federal law. The federal government has chosen not to interfere with the state providing this form of medical treatment to those who comply with state law and its accompanying regulations. And the medical benefits from the treatment should not be discounted as illicit behavior undertaken for personal thrill and/or the result of dependency behavior. Deference about such assessments should be given to those who are skilled in prescribing the treatment. Accordingly,

the court will not prohibit defendant's use of prescription marijuana provided defendant's use remains in compliance with state law and is not connected to any other unlawful activity or violation of the conditions of supervision.

s/David Stewart Cercone
David Stewart Cercone
Senior United States District Judge

cc: Charles A. Eberle, AUSA
Elisa A. Long, AFPD
Jay Finkelstein, AFPD
Michael Novara, AFPD

Chalene Scott, APO

United States Marshal's Office
United States Probation Office

(*Via CM/ECF Electronic Filing*)

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: October 9, 2019

/s/ Sara J. Rose
Sara J. Rose

CERTIFICATE OF SERVICE

I, Sara Rose, certify that I am on this day of October 9, 2019, serving the foregoing Petitioners' Brief in Support of Application for Special Relief in the Nature of a Preliminary Injunction upon the following counsel for the respondent, who have agreed to accept service by electronic mail, via PACFile and E-mail:

Geri Romanello St. Joseph
Robert J. Krandel
Legal Counsel
Supreme Court of Pennsylvania
Administrative Office of Pennsylvania Courts

Dated: October 9, 2019

/s/ Sara J. Rose
Sara J. Rose