

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 against 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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**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 to¹:

- 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

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 use²:

- 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 cannabinoids³ 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

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); cannabidivarin (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 dispensary 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 substance⁴ 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.

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



Eastern Region Office
PO Box 60173
Philadelphia, PA 19102
215-592-1513 T
215-592-1343 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717-238-2258 T
717-236-6895 F

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); *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.”). 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.

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