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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.

BRIEF OF PETITIONERS

Extraordinary Jurisdiction Granted for this case which concerns a challenge to a policy (the Policy) prohibiting the use of medical marijuana by individuals under the supervision of the Lebanon County Probation Services.

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I. INTRODUCTION

The Pennsylvania General Assembly enacted the Medical Marijuana Act ("the MMA" or "the Act") to allow individuals with certain serious medical conditions to lawfully use or possess medical marijuana upon certification by a physician and issuance of a valid identification card. In doing so, Pennsylvania joined thirty-two states and the District of Columbia in providing a program for individuals to obtain access to medical marijuana under state law. The Act, which was signed into law by Governor Wolf in 2016, recognizes medical marijuana as a potential therapy that may mitigate suffering in some patients and also enhance their quality of life. In the comprehensive statutory scheme it enacted in the MMA, the General Assembly balanced the need of patients to have access to the latest treatments with the need to promote public safety and to provide a safe and effective method of delivery of medical marijuana to patients.

In accordance with those goals, the Act broadly immunizes patients from being subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, solely for the lawful use of medical marijuana. There is no exclusion from this protection for individuals on probation or other forms of court supervision. The Act's plain language thus prohibits the courts of this Commonwealth from imposing any penalty on individuals who use medical

marijuana in accordance with the law, including individuals subject to court supervision.

Despite these broad protections, the Court of Common Pleas of Lebanon County, Pennsylvania, 52nd Judicial District, adopted a Policy, titled the Medical Marijuana Policy, No. 5.1-2019 & 7.4-2019 ("Policy"), on September 1, 2019, prohibiting "the active use of medical marijuana, regardless of whether the defendant has a medical marijuana card, while the defendant is under supervision by the Lebanon County Probation Services Department." At the time the Policy was adopted, Petitioners were all individuals under supervision by the Lebanon County Probation Services Department ("LCPSD"). Each uses medical marijuana in accordance with the MMA to alleviate serious health conditions. LCPSD probation officers told Petitioners that they would report to the court that Petitioners have violated the terms of their supervision if they continued to use medical marijuana and that the court would revoke their probation and order them incarcerated.

Petitioners thus seek relief from this Court in the form of a declaratory judgment that the Policy violates the MMA and a permanent injunction to enjoin the 52nd Judicial District from enforcing any supervision conditions that require individuals to abstain from the lawful use of medical marijuana under state law.

II. STATEMENT OF JURISDICTION

This Court has elected to exercise its King's Bench Jurisdiction over this matter. Order, 118 MM 2019 (Pa. October 30, 2019).

III. STATEMENT OF THE QUESTIONS INVOLVED

Does the 52nd Judicial District's Policy that bars the use of medical marijuana by anyone under court supervision violate the Medical Marijuana Act, 35 P.S. § 10231.101 *et seq.*, which provides that medical marijuana patients shall not be "subject to arrest, prosecution or penalty in any manner, or denied any right or privilege?"

IV. STATEMENT OF THE CASE[1]

Factual Background

Petitioners Melissa Gass, Ashley Bennett, and Andrew Koch each suffer from serious and debilitating medical conditions that they have been unable to treat with other therapies. In an attempt to manage their disabilities and curb conditions that can be life threatening, each petitioner followed the proper procedures set forth in the MMA to begin using medical marijuana. A doctor has diagnosed them with one of the serious medical conditions for which medical marijuana is approved by the MMA, and based on the doctor's professional opinion and review of past

[1] The facts in this section are taken from the Petition for Review and the Petitioners' Declarations (attached as exhibits to Petitioners' Application for Special Relief), which are incorporated herein by reference.

treatments, has determined that they are likely to receive therapeutic or palliative benefit from the use of medical marijuana. Each petitioner possesses a valid identification card issued by the Department of Public Health that entitles them to use medical marijuana. *See* Declaration of Melissa Gass ("Gass Decl."), ¶¶ 3–6, 11, R. 56–58; Declaration of Ashley Bennett ("Bennett Decl."), ¶¶ 4–6, 11, R. 64–65; Declaration of Andrew Koch ("Koch Decl."), ¶¶ 3, 8, R. 68, 70 (attached as exhibits to Pet'rs Appl. for Special Relief in the Nature of a Prelim. Injunction, Oct. 9, 2019 ("Appl. for Special Relief")).

Each petitioner is also on probation in Lebanon County and is subject to the supervision of the LCPSD. *See* Gass Decl. ¶ 9, R. 57; Bennett Decl. ¶ 10, R. 65; Koch Decl. ¶ 7, R. 69. Although they were successfully using medical marijuana prior to the 52nd Judicial District adopting its Policy barring such use, the Policy turned their lives upside down. The Policy acknowledges that the "use of medical marijuana may have benefits for some medical conditions and under certain circumstances may be helpful," it nonetheless prohibits "offenders under the direct supervision of Lebanon County Probation Services" from using medical marijuana, including oil derived from the marijuana plant, regardless of whether the individual has a medical marijuana card. Exhibit 1 to Petition for Review, R. 36–37. The Policy gave affected individuals 30 days to discontinue use. *Id.* The Policy originally contained no exceptions. Pet. for Review ¶ 65, R. 23.

Petitioner Melissa Gass developed epilepsy following a car accident when she was 10. Gass Decl., ¶ 4, R. 56. The epilepsy causes her to experience life-threatening grand mal seizures: When they occur, she blacks out and falls to the ground. *Id.* These seizures can occur multiple times in a single day. *Id.* Without medical marijuana, the only way to control them is for a family member to inject a prescription drug rectally; otherwise, she risks having multiple seizures in a row. These seizures leave her exhausted and disoriented. *Id.* ¶ 14, R. 58. Ms. Gass also suffers from post-traumatic stress disorder. *Id.* ¶ 6, R. 56. In February 2019, Ms. Gass applied for and received a medical marijuana card. *Id.* ¶ 11, R. 57–58. Since then, she has used a medical marijuana oil that she rubs on her gums when she feels a seizure starting in order to stop the seizure. *Id.* ¶ 12, R. 58. Although she still experiences some seizures, the marijuana oil has greatly reduced the number of seizures she experiences from multiple seizures per day to, at most, a few seizures per month. *Id.* The medical marijuana may not be a cure, but it has transformed her life. *Id.* On September 10, 2019, however, Ms. Gass' probation officer informed her that she could no longer use medical marijuana while on probation due to a new court policy and that if she continued using it, he would report to the court that she had violated the terms of her probation. *Id.* ¶¶ 13, 16, R. 58–59. As a result, Ms. Gass immediately stopped using the medical marijuana oil and suffered twenty seizures over the next two weeks. *Id.* After this Court

ordered enforcement or implementation of the Policy to be stayed, Ms. Gass was able to resume using medical marijuana without fear of having her probation revoked.

Petitioner Ashley Bennett has been diagnosed with post-traumatic stress disorder, anxiety, and bipolar disorder and experiences chronic pain and nausea resulting from gall bladder surgery and an intestinal blockage. Bennett Decl. ¶¶ 4, 8, R. 61–62. The pain and nausea left her unable to eat regular meals; she lost weight and was constantly tired, unable to lead a normal life. *Id.* ¶¶ 6–7, R. 64–65. After conventional medical treatments failed to improve her condition, Ms. Bennett began using marijuana to alleviate her symptoms. *Id.* ¶¶ 7–9, R. 64–65. She obtained a medical marijuana card in May 2019. *Id.* ¶ 11, R. 65. Ms. Bennett has found that using medical marijuana substantially relieves her adverse symptoms and has allowed her to stop using prescription medications for her mental and physical health conditions. *Id.* ¶ 9, R. 65. In August 2019, Ms. Bennett's probation officer told her she would not be permitted to use medical marijuana while on probation due to the court's new policy and that he would report to the court that she had violated the terms of her probation if she used it. *Id.* ¶ 13, R. 65. As a result, Ms. Bennett stopped using medical marijuana, which has caused her physical and mental health to deteriorate. *Id.* ¶¶ 14–15, R. 65–66. Ms. Bennet lost fifteen pounds, suffered from nausea and exhaustion, and

contemplated resuming risky prescription medication to treat her PTSD despite her concern that the medication could cause her to harm herself—as it did when she used it previously.[2] *Id.* ¶¶ 16–17, R. 66.

Petitioner Andrew Koch experiences constant back and hand pain stemming from a car accident in which the joints in his right hand and several of his vertebrae were crushed. Koch Decl. ¶ 3, R. 68. When Mr. Koch was hospitalized for treatment, he became addicted to opioids. He was eventually able to end the dependency and began using marijuana to help him cope with the constant pain that he still has from the car accident. *Id.* ¶¶ 5–6, R. 68–69. Fearing that he would become addicted to opioids if he began using them again, Mr. Koch obtained a medical marijuana card in October 2018 and used it for nearly a year before the 52nd Judicial District enacted its Policy. *Id.* ¶ 8, R. 69. On September 1, 2019, his probation officer told him he could no longer use medical marijuana due to a new court policy and that he would report to the court that Mr. Koch violated the terms of his probation if he used marijuana. *Id.* ¶ 9, R. 69. As a result, Mr. Koch stopped using medical marijuana. *Id.* After ceasing use of medical marijuana, Mr.

[2] Ms. Bennett resumed using medical marijuana after this Court entered an order staying enforcement or implementation of the Policy. Her situation has dramatically improved, consistent with her use before enactment of the Policy.

Koch experienced pain so severe that he considered obtaining a prescription for opioids despite the risk of addiction.[3] *Id.* ¶ 10, R. 69–70.

Procedural Background

On September 16, 2019, shortly after the 52nd Judicial District adopted its Policy, Counsel for Petitioners sent a letter to The Honorable John C. Tylwalk, the President Judge of the Court of Common Pleas of Lebanon County, describing their concerns with the Policy and asking Judge Tylwalk to rescind it. Exhibit 2 to Petition for Review, R. 39–43. Judge Tylwalk declined the request. Accordingly, counsel filed a Petition for Review on behalf of Petitioners on October 8, 2019, and an Application for Special Relief in the Form of a Preliminary Injunction on October 9, 2019, in Commonwealth Court. Respondent 52nd Judicial District filed an Answer to Petitioners' Application for Special Relief on October 17, 2019. Attached to the Answer was a revised version of the Policy providing 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.

See Revised Policy at 2, Ex. 1-B to Respondent's Answer to Pet'rs Appl. ("Respondent's Answer"), R. 108–09. Also attached to the Answer was a

[3] Mr. Koch resumed using medical marijuana after this Court entered an order staying enforcement or implementation of the Policy and thus did not need to resume use of opioids.

Declaration of Sally Barry, director of probation services for the 52nd Judicial District.[4] Ex. 2 to Respondent's Answer, R. 111–13.

On October 30, 2019, this Court entered an order electing to exercise King's Bench jurisdiction over this matter. Order, 118 MM 2019 (Pa. Oct. 30, 2019). The Court stated that it "finds that this case implicates substantial legal questions concerning matters of public importance, particularly in light of the allegation that other judicial districts have adopted or are considering adopting similar limitations on the use of medical marijuana." *Id.* The Court further ordered that "any enforcement or implementation of the Policy is STAYED pending further order of this Court" and directed the Prothonotary to establish a briefing schedule and list this matter for oral argument.[5] *Id.*

V. SUMMARY OF ARGUMENT

The 52nd Judicial District's Policy[6] bars Petitioners and all others on probation or under other forms of court supervision in Lebanon County from using medical marijuana despite the General Assembly's policy decision in the MMA to

[4] Petitioners do not stipulate to any of the factual averments in Ms. Barry's Declaration. Petitioners do not believe Respondent's factual averments are material to disposition of the legal issue, but if this Court believes otherwise, *i.e.*, that any of Ms. Barry's factual averments are material to the outcome of this case, Petitioners respectfully request that the Court provide the parties with an opportunity to conduct discovery and hold an evidentiary hearing.

[5] Petitioners understand the Court's Order to act as a preliminary injunction and, thus, submit this brief on the merits for declaratory relief and a permanent injunction. If the Court would like Petitioners to address the application of the preliminary injunction factors, Petitioners respectfully request leave to amend their brief accordingly.

make medical marijuana use legal in Pennsylvania for individuals with certain serious medical conditions. Unless it is permanently enjoined, the Policy will put Petitioners between the Scylla and Charybdis of abstaining from a drug that is essential to their health or going to jail for violating the terms of their probation.

The Policy conflicts with Pennsylvania law. The MMA has a broad immunity clause that explicitly protects all medical marijuana patients from arrest, punishment, or denial of any privilege (such as probation). Yet the Policy ignores this plain language and amounts to a rewrite and circumvention of the General Assembly's statutory scheme, constituting an impermissible judicial usurpation of the legislative function. When confronted with the same statutory immunity clause, the highest courts in Arizona and Montana have concluded that probationers are entitled to use medical marijuana. Moreover, in imposing a blanket condition that has no relationship to the rehabilitation of Petitioners, the Policy constitutes an impermissible probation condition under Pennsylvania law that would make it *harder* for individuals with serious medical conditions to be rehabilitated.

The 52nd Judicial District's rationales—that medical marijuana has not been approved as a medication by the FDA and is illegal under federal law—provide no basis for upholding the Policy, as federal law has no bearing on its validity. The Commonwealth has sovereign authority to allow its residents to use marijuana to

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[6] All references to the Policy hereafter refer to the revised version of the policy that is attached as Exhibit 1-B to Respondent's Answer. R. 108–09.

treat certain serious medical conditions without fear of arrest, prosecution, or the denial of any right or benefit *by the state*. That medical marijuana remains illegal under federal law neither compels nor authorizes the courts of this Commonwealth to ignore the will of the state legislature in favor of enforcing federal law.

VI. ARGUMENT

A. The 52nd Judicial District Lacks Authority to Prohibit Medical Marijuana Use as a Condition of Court Supervision Because It Is Contrary to State Law.

The 52nd Judicial District exceeded its authority under state law when it adopted the Policy barring all qualified patients from using medical marijuana while subject to court supervision. Whether it is styled as a prohibition on medical marijuana use or a requirement to comply with federal law, the Policy undermines the MMA's broad protections for medical marijuana patients and thwarts the will of the General Assembly. It constitutes an illegal sentence and should be enjoined.

1. The Plain Language of the MMA Protects Medical Marijuana Patients Who Are Subject to Court Supervision from "Arrest, Prosecution or Penalty in Any Manner" and from Being "Denied Any Right or Privilege."

The 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. Nothing in the MMA, either explicitly or implicitly, excludes from its protections individuals who are under court supervision. If the General

Assembly intended to prohibit individuals on probation or parole from using medical marijuana, it would have simply said so. Likewise, if the General Assembly intended to give sentencing courts discretion to prohibit individuals under the courts' supervision from using medical marijuana, it could have excluded such individuals from the Act's broad protections. That it did not do so demonstrates the General Assembly's intent to protect access to medical marijuana for residents of this Commonwealth, regardless of whether they are on probation or parole.

Under Pennsylvania's Statutory Construction Act, a court is to ascertain the General Assembly's intent and give it effect. 1 Pa.C.S. § 1921(a). In discerning that intent, the Statutory Construction Act mandates that first resort is to the words of the statute itself. If the language of the statute is clear and unambiguous, that language is the paramount indicator of legislative intent and a court is not to look beyond it to ascertain a statute's meaning. 1 Pa.C.S. § 1921(b); *see also Mohamed v. Dep't of Transp.*, 40 A.3d 1186, 1193 (Pa. 2012). As a general rule, the words and phrases in statutes are to be construed according to the rules of grammar and "according to their common and approved usage[.]" 1 Pa.C.S. § 1903(a). When interpreting the MMA, and the provisions contained therein, this Court must construe the statute "liberally" to ensure that the MMA's objectives are achieved in a way that promotes justice. 1 Pa.C.S. § 1928(c). Further and significantly, this

Court has instructed that it is a court's function to construe and apply statutory provisions; it is not the court's function, under the guise of statutory construction, to recraft or supplement the statutes the legislature has enacted. *See Burke v. Independence Blue Cross*, 103 A.3d 1267, 1274 (Pa. 2014).

The statutory language in the MMA is clear and unambiguous. A core component of the MMA is its broad protection for "patients"[7] from any form of punishment, or the denial of rights or privileges, stemming from their use of medical marijuana. 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). This provision prohibits *any* arrest, prosecution, or other

[7] The MMA broadly defines a "patient" under the MMA as 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 this Commonwealth. *See* 35 P.S. § 10231.103. It is undisputed that each of the Petitioners is a "patient" within the meaning of the MMA.

penalty. *Id*. In addition, a medical marijuana patient cannot be denied *any* right or privilege for using medical marijuana pursuant to the MMA.[8]

Nothing in the MMA excludes individuals on probation, parole, or otherwise under court supervision from these protections. That the legislature would have excluded these individuals if it had intended to is evident from the categories of people it did exclude from the Act's protections. For example, the MMA prohibits any individual who has been "convicted of any criminal offense related to the sale or possession of illegal drugs, narcotics or controlled substances" from working with a medical marijuana organization (although the person could nevertheless still be a "patient" and use medical marijuana). 35 P.S. § 10231.614. Similarly, it prohibits a person who has "been convicted of a criminal offense that occurred within the past five years relating to the sale or possession of drugs, narcotics or controlled substances" from serving as a "caregiver" as defined by the MMA. 35 P.S. § 10231.502(b). And in Section 10231.1309, the portion of the MMA which sets forth "Other Restrictions," the General Assembly addressed the use of medical marijuana in certain locations, and explicitly prohibited such use in any correctional institution, including one "which houses inmates serving a portion of

[8] The MMA even extends protections to patients so that they are not fired from their jobs for using medical marijuana outside of work, and the MMA ensures that the use of medical marijuana does not affect custody proceedings. 35 P.S. §§ 10231.2103(b–c).

their sentences on parole." 35 P.S. § 10231.1309(2).[9] Pursuant to the canon of statutory interpretation known as *expressio unius est exclusio alterius*—the mention of a specific matter in a general statute implies the exclusion of others not mentioned—that means that the legislature did not *also* intend to exclude other categories of individuals, such as probationers, from its immunity provision. *See, e.g.*, *Cali v. City of Philadelphia*, 177 A.2d 824, 832 (Pa. 1962); *City of Allentown v. Local 302, Int'l Ass'n of Fire Fighters*, 512 A.2d 1175 (Pa. 1986) (stating that presence of explicit exception in statutory scheme weighs against reading in implicit exceptions).

This is precisely the conclusion that a federal court sitting in Pennsylvania recently reached. *See United States v. Jackson*, 388 F. Supp. 3d 505, 513 (E.D. Pa. 2019) ("The Medical Marijuana Act carves out some exceptions, such as prohibiting the use of medical marijuana in prisons, but it contains no exception for individuals on probation or parole or under supervision. Without any such provision, the Court concludes that the Act applies to those individuals just as it applies to any other.") (internal citation omitted). It is also the conclusion reached by appellate courts in other states that have analogous immunity provisions in their own medical marijuana laws. The legislature had the benefit of these decisions when it wrote the MMA. If it had intended for Pennsylvania courts to reach a

[9] Notably, of course, this does not bar parolees from using marijuana outside of such housing.

different conclusion on the issue of whether the MMA precludes sentencing courts from requiring individuals under court supervision to abstain from using medical marijuana, it would have said so.

The Supreme Court of Arizona held in 2015 that its state's substantially comparable medical marijuana law—which protects medical marijuana patients "from being 'subject to arrest, prosecution or penalty, or denial of any right or privilege' as long as their use or possession complies with the terms" of the state medical marijuana law—did not exclude probationers. *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 139 (Ariz. 2015).[10] The Arizona law barred courts from imposing probation conditions that would prohibit "a qualified patient from using medical marijuana pursuant to the Act, as such an action would constitute a denial of a privilege." *Id.* at 139. The court also held that revoking probation for such use would "constitute a punishment" in violation of the medical marijuana statute. *Id.* The court's conclusion that the defendant was unlawfully denied such use as a condition of his probation was grounded in language identical to Pennsylvania's MMA—the statute's "sweeping grant of immunity against 'penalty in any manner, or denial of any right or privilege.'" *Id.*

[10] The Arizona Supreme Court held that the Arizona law protects individuals' access to medical marijuana if it could alleviate severe or chronic pain or debilitating medical conditions even if the individual has been convicted of a drug offense. *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 139 (Ariz. 2015). The MMA is the same. It does not exclude individuals convicted of drug offenses from using medical marijuana if they have a certification from a doctor that they have a medical condition covered by the law. There is thus no basis under the MMA to prohibit individuals from using medical marijuana even if they have been convicted of drug offenses.

Likewise, the Montana Supreme Court held in 2008 that Montana's medical marijuana law entitles medical marijuana patients subject to court supervision to use marijuana. *State v. Nelson*, 195 P.3d 826, 833 (Mont. 2008). In *Nelson*, the Montana Supreme Court held a probation condition unlawful because it prohibited a medical marijuana patient—who had been convicted of criminal possession and manufacture of dangerous drugs—from using marijuana in any form other than pills. *Id.* at 832–33. Reciting the language of the law—"the MMA states unequivocally that a qualified patient in the Program 'may not be arrested, prosecuted, or penalized in any manner *or be denied any right or privilege*, including but not limited to civil penalty or disciplinary action by a professional licensing board or the department of labor and industry, *for the medical use of marijuana*'"—the court held that "[t]he MMA simply does not give sentencing judges the authority to limit the privilege of medical use of marijuana while under state supervision." *Id.* at 833 (emphasis added by court).

Like the probation conditions at issue in *Hoggatt* and *Nelson*, the 52nd Judicial District's Policy prohibiting medical marijuana patients from using marijuana while under supervision by the LCPSD is in direct conflict with the MMA's protections, which explicitly shield patients from "arrest, prosecution or penalty in any manner" as well as the denial of "any right or privilege" for using marijuana in accordance with state law. 35 P.S. § 10231.2103(a). Detaining an

individual for using or possessing medical marijuana or revoking that person's probation would undeniably constitute an "arrest" or denial of a "privilege." *See Commonwealth v. Newman*, 310 A.2d 380, 381 (Pa. Super. Ct. 1973) (en banc) (describing the "privilege of probation").[11] If the 52nd Judicial District or the LCPSD takes action to give the Policy effect—by detaining medical marijuana patients or revoking their probation—they will be acting contrary to the intent and plain language of the MMA.[12]

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[11] The court's Policy also reaches individuals who are subject to the terms and conditions of bail. Denying or revoking bail because an individual lawfully used medical marijuana under the MMA would constitute the denial of a right under the MMA, as the Pennsylvania Constitution creates a broad and fundamental right to pretrial release for those who are eligible. *See Commonwealth v. Bonaparte*, 530 A.2d 1351, 1353 (Pa. Super. 1987) ("Prior to conviction, in a non-capital case in Pennsylvania, an accused has a constitutional right to bail which is conditioned only upon the giving of adequate assurances that he or she will appear for trial.") (citing Pa. Const., Art. 1, § 14).

[12] A recent decision by the Lycoming County Court of Common Pleas denying a defendant's motion to modify the conditions of his probation to allow him to use medical marijuana consistent with state law failed to address the broad immunity provided to patients by the MMA. *See Commonwealth v. Wood*, No. CR-2065-2012 (Lycoming Co. Ct. C.P. Sept. 12, 2019) (slip op.) (en banc). In addition to ignoring the plain language of the statute, the Lycoming court relied on cases from other states that were clearly distinguishable from the case before it. The court approvingly cited *People v. Watkins*, 282 P.3d 500 (Colo. App. 2012), for the proposition that it could require individuals on probation to follow federal law. *Id.* at 26. In that case, however, the court explicitly relied on a Colorado statute that required courts to impose a condition of probation that defendants not commit another offense and distinguished the Colorado statute from the Montana medical marijuana law, noting that the Montana law "contained language … significantly broader than that in Colorado's Amendment." *Watkins*, 282 P.3d at 505–06 (noting that under Montana law, "a qualified patient 'may not be … denied any right or privilege'"). The Lycoming court also cited *Oregon v. Liechti*, 123 P.3d 350, 351 (Or. Ct. App. 2005), which held that a trial court could require a defendant to "obey all laws, municipal, county, state and federal," including the federal Controlled Substances Act, while on probation because such a condition was expressly authorized by state statute. *Id.* at 351–52. The Pennsylvania statute governing probation does not include such a condition. *See* 42 Pa.C.S. §§ 9754 and 9763(b).

The Policy is a court-made exclusion that prevents individuals who are otherwise eligible under the MMA from securing its benefits and should therefore be enjoined.

2. The Policy Is Not a Valid Probation Condition Because Prohibiting Individuals with Serious Medical Conditions from Using Medical Marijuana Violates the MMA and Is Not Reasonably Related to the Goals of Rehabilitation.

Pennsylvania trial courts do not have discretion to impose any probation conditions they choose. Rather, a probation condition must either fall under one of the thirteen specific conditions set out by statute or fall under one wider "catchall" condition, which allows courts to require defendants "[t]o satisfy any other conditions related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience." 42 Pa.C.S. § 9754(c); *see Commonwealth v. Rivera*, 95 A.3d 913, 915 (Pa. Super. Ct. 2014) (if "no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction"). Even if the condition is reasonably related to the defendant's rehabilitation, it must be consistent with other state laws.

None of the specific conditions listed in the statute authorize courts to prohibit individuals from using medical marijuana or any other drug. Nor does the statute authorize courts to require that individuals comply with federal law.[13] The

[13] Pennsylvania's lack of any authorized or mandated probation conditions requiring individuals to comply with federal law distinguishes this case from the decision by the Colorado Court of

only possible statutory authorization for the Policy is in Section 9754(c)(13),[14] which allows courts to impose conditions that are "reasonably related to the rehabilitation of the defendant." For that provision to apply, however, the condition must not conflict with another state law and there must be a nexus between the condition imposed and the crime for which the defendant was convicted. *Commonwealth v. Hall*, 80 A.3d 1204, 1216 (Pa. 2013) (conditions that might be sound "as a theoretical matter" will still fail to meet the purposes of Section 9754 if they are not reasonably related to rehabilitating the offender from the offense for which he was convicted).

As an initial matter, the condition barring probationers from using medical marijuana conflicts with the broad protections the MMA provides for patients. This Court has held that trial courts cannot impose probation conditions pursuant to Section 9754(c)(13) if they violate other statutory provisions. *Commonwealth v. Wilson*, 67 A.3d 736, 743 (Pa. 2011) (sentencing court did not have discretion

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Appeals holding that a state statute requiring that all probation sentences explicitly include a condition that probationers not commit offenses during the probation period included federal offenses and therefore deprived the trial court of authority to allow defendants to use medical marijuana while on probation due to its illicit status under federal law. *Watkins*, 282 P.3d at 505–06. The *Watkins* court expressly noted that neither Montana nor California, whose courts have held that sentencing courts cannot impose probation conditions barring individuals from using medical marijuana consistent with their states' laws, had "a statutory requirement that all probation sentences include a condition that the defendant 'not commit another offense during the period for which the sentence remains subject to revocation.'" *Id.* at 506.

[14] During the pendency of this action, the legislature amended Title 42 such that the probation conditions previously in Section 9754 are now in Section 9763. This statutory change has no impact. Because the cases discussing these issues all cite to Section 9754, this brief will do the same for the sake of simplicity.

under Section 9754(c)(13) to require defendant to submit to warrantless, suspicionless searches when another statute required probation officers to have reasonable suspicion to conduct a search). The condition that probationers abstain from using medical marijuana is thus an illegal sentence.

The amendment of the Policy to allow affected individuals to petition the court for permission to use medical marijuana does not resolve the conflict with the MMA. The MMA sets forth a comprehensive statutory framework for approving individuals' applications to use medical marijuana. The process requires individuals to submit a certification from a physician who is registered with the Department of Health stating that the individual has a serious medical condition and that the individual is likely to receive therapeutic or palliative benefit from the use of medical marijuana. 35 P.S. § 10231.403. Upon approval of that certification, the Department of Health will issue an identification card authorizing the patient to obtain and use medical marijuana as authorized by the MMA. The Act does not authorize any person or entity to require additional proof of medical necessity.

The 52nd Judicial District's requirement that individuals under court supervision "bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana" thus constitutes a judicially created procedure that is not authorized by the MMA. This Court has recognized that "it is

not the province of the judiciary to augment the legislative scheme," s*ee Discovery Charter Sch. v. Sch. Dist. of Philadelphia*, 166 A.3d 304, 318–19 (Pa. 2017), and that the judicial rewriting of a statute would violate the separation of powers doctrine. *Id.* (citing *Pap's A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), *rev'd on other grounds*, 529 U.S. 277 (2000)); *see also In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 721 (Pa. 2018) (in reviewing constitutionality of procedures under Investigating Grand Jury Act, court "may not usurp the province of the legislature by rewriting the Act to add hearing and evidentiary requirements that grand juries, supervising judges, and parties must follow which do not comport with the Act itself, as that is not our proper role under our constitutionally established tripartite form of governance"). When, as in this case, "the proposed judicially-created procedure is inconsistent with the plain terms of the underlying statute," adhering to these principles is especially important. *Discovery Charter*, 166 A.3d at 319. The 52nd Judicial District has imposed requirements neither authorized nor contemplated by the MMA that otherwise eligible patients must meet through before they can use medical marijuana. Allowing courts to create additional hoops that patients must jump through to avail themselves of the benefits of the MMA would usurp the will of the legislature and open the door to additional judicially created prerequisites to patients' eligibility under the Act.

The Policy's exemption procedure not only imposes a requirement that is absent from the MMA, but it is also far too vague to give individuals notice of what evidence they must provide to the court. The MMA sets forth a process that individuals must follow to obtain a medical marijuana card and be allowed to purchase and possess medical marijuana, which includes obtaining a certification from a physician. It is not clear what other evidence a patient will be able to marshal to establish "medical necessity" besides the certification they received from their doctor to obtain their medical marijuana card. Nor is it clear what criteria the Lebanon County Court of Common Pleas will use to determine whether "medical necessity" exists in an individual case. Judges are not doctors and allowing them to make decisions about whether medical marijuana is a "medical necessity" not only usurps the role of the legislature but also that of the patient's physician.

But even if this Court determines that the Policy does not conflict with the MMA, the condition barring medical marijuana use would nonetheless constitute an illegal sentence under Section 9754(c)(13) because it is not reasonably related to the goals of rehabilitation. There is no connection between the condition imposed by the Policy and the offenses committed by those subject to it, as it is a blanket condition that prohibits *all* individuals on probation from using medical

marijuana, regardless of their offense.[15] The revision to the Policy allowing individuals to petition the Court for an opportunity to "establish[] the medical necessity of their ongoing use of medical marijuana," Ex. 1-B to Respondent's Answer, R. 109, does not obviate the need for individual determinations at the time of sentencing.

According to the Policy, the no-medical-marijuana condition is premised on a concern about individuals "who are involved in substance abuse and issues surrounding addiction which may have played a part in the defendant's criminal violations of law." *Id.*, R. 108. Leaving aside the fact that the Policy applies to *everyone* on court supervision and not just defendants "involved with substance abuse," the condition requiring individuals to abstain from medical marijuana would fail the reasonable relationship test even if it were applied only to defendants "involved with substance abuse." People with a history of substance use disorders are not disqualified from being certified as medical marijuana patients under the MMA. In fact, opioid use disorder is one of the serious medical conditions for which medical marijuana is permitted under the Act.[16] And

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[15] Although the Policy expresses concern that "[i]ndividuals . . . 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," the Policy applies to "all offenders under the direct supervision of Lebanon County Probation Services." Ex. 1-B to Respondent's Answer, R. 108.

[16] 28 Pa. Code § 1141.21.

individuals with a history of illicit marijuana use may have been self-medicating prior to the availability of medical marijuana in 2018, so prohibiting them from using medical marijuana would not aid their rehabilitation.[17]

Indeed, it is difficult to comprehend how prohibiting an individual with a serious medical condition from using a medication that the legislature has deemed appropriate to treat that condition could possibly be "reasonably related to the rehabilitation of the defendant." *California v. Tilehkooh*, 7 Cal. Rptr. 3d 226, 234 (Cal. Ct. App. 2003) (holding that state medical marijuana law provided defense to probation revocation based on marijuana possession or use). In *Tilehkooh*, a California appellate court analyzed whether barring probationers' use of medical marijuana was reasonably related to a rehabilitative purpose, as required by state law, and concluded that "[a] rehabilitative purpose is not served when the probation condition proscribes the lawful use of marijuana for medical purposes . . . any more than it is served by the lawful use of a prescription drug." *Id.*[18]

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[17] *See, e.g.*, Daniel P. Alford et al., *Primary Care Patients with Drug Use Report Chronic Pain and Self-Medicate with Alcohol and Other Drugs*, 31 J. Gen. Internal Med. 486, 488 (2016) (43% of surveyed individuals who illicitly used marijuana reported using marijuana to self-medicate for chronic pain); Nicholas Litzeris et al., *Medicinal Cannabis in Australia, 2016: The Cannabis as Medicine Survey*, 209 Med. J. Australia 211, 214 (2018) (Australians who self-medicate with illicit marijuana for "diverse range of health conditions, especially pain, mental health, sleep, and neurological conditions" expressed strong preferences for legal medical cannabis).

[18] The court reached the issue in *Tilehkooh* of whether a probation condition banning medical marijuana use was reasonably related to the goals of rehabilitation because the statute at issue did not provide medical marijuana patients the same broad immunity from the denial of any right or privilege as the MMA, but it did provide such immunity to doctors: "no physician in this state

For similar reasons, a federal court in Pennsylvania refused to sanction a medical marijuana patient who used marijuana in violation of the terms of his supervised release. *See United States v. Martin*, No. 2:09-cr-98 (W.D. Pa. April 24, 2019), slip. op. at 1 (Mem. Order). The court explained that "the medical benefits from [medical marijuana] should not be discounted as illicit behavior undertaken for personal thrill and/or the result of dependency. Deference about such assessments should be given to those who are skilled in prescribing the treatment." *Id.*

The MMA recognizes that marijuana has medical benefits for individuals with certain serious medical conditions. Prohibiting individuals on probation from using medical marijuana is different than restricting probationers from engaging in other legal acts, such as the use of alcohol, because the legislature has recognized that it is medically necessary for some people. *See Tilehkooh*, 7 Cal. Rptr. 3d at 237 (Morrison J., concurring) (explaining that medical marijuana law's "immunity from criminal sanction takes the possession of marijuana and puts it in a special category apart from other legal acts, such as the use of alcohol, that can properly be made a condition of probation"). As the Montana Supreme Court explained, "[w]hen a qualifying patient uses medical marijuana in accordance with the MMA,

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shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes." 7 Cal. Rptr. 3d at 228 n.3.

he is receiving lawful medical treatment. In this context, medical marijuana is most properly viewed as a prescription drug." *Nelson*, 195 P.3d at 832.

It is impossible to conceive that a state trial court would prohibit someone on probation from using insulin to treat their diabetes or insist that a cancer patient follow a course of treatment that is contrary to her doctor's advice. But that is equivalent to what the 52nd Judicial District has done here. In its briefing at the preliminary injunction stage, the 52nd Judicial District pointed to the Superior Court's decision in *Commonwealth v. Homoki*, 621 A.2d 136 (Pa. Super. Ct. 1993) as authorizing probation conditions that prohibit a supervisee from using certain prescription medication. That interpretation not only reads too much into that decision, but it is also irrelevant here. In *Homoki*, the sentencing court imposed a specific condition on an individual petitioner, which prohibited him from starting any new prescription medications *that he was not currently prescribed* in light of his history of prescription medicine abuse. *Id.* at 138. The Superior Court explicitly noted that the issue of whether the sentencing court exceeded its discretion in imposing the condition was not yet ripe, as the probationer was unable to demonstrate any harm because he was not in need of any of the prohibited medications. *Id.* at 140. Here, the issue certainly is ripe, as Petitioners have demonstrated that they will suffer irreparable harm if they are forced to choose between using medical marijuana to treat their serious medical conditions

and risking revocation of their probation. Moreover, there was no equivalent of the MMA at issue in *Homoki*—no statute explicitly authorized that defendant to use a specific drug to treat a serious illness, and no statute provided immunity for doing so. The situation here is far different.[19]

By prohibiting people subject to court supervision from using medical marijuana, the 52nd Judicial District has substituted its judgment for that of the General Assembly and patients' doctors. "[W]hether or not medical marijuana is ultimately a good idea is not the issue" before this Court. *Nelson*, 195 P.3d at 833. The legislature has already made the decision to allow people to use medical marijuana for a delineated list of serious medical conditions upon a doctor's certification. Instead, the Court's "concern is solely with the plain language of the MMA and the sentencing authority" of the trial court. *Id.*

Section 9754(c)(13) prohibits the 52nd Judicial District from barring probationers from using medical marijuana because that condition conflicts with the MMA and has no relationship to the rehabilitation of the defendant. The Policy prohibiting individuals subject to the supervision of the LCPSD from using medical marijuana constitutes an illegal condition of probation and should be enjoined.

[19] The *Homoki* decision is, of course, not binding on this Court.

B. The 52nd Judicial District Has No Legal Basis to Require That Medical Marijuana Patients Comply with the Federal Controlled Substances Act.

Although the 52nd Judicial District suggests in its Policy that federal law compels its prohibition on medical marijuana for individuals under court supervision, that position is not only wrong legally, but if upheld would undermine the Commonwealth's sovereignty. This Court's precedent jealously protects the rights afforded to Pennsylvania residents by state law from federal encroachment: "The predominant theory underlying our federalist system has always been to secure the rights of the people, striking a proper balance between state and federal governments to promote 'double security,' for individual freedom, while allowing local policies that are sensitive to the varying needs of a heterogeneous union." *Miller v. Se. Pa. Transp. Auth.*, 103 A.3d 1225, 1236 (Pa. 2014). Because its "powers are derived from the citizens of Pennsylvania," this Court will not "lightly set aside their existing rights or remedies in deference to uncertain federal law." *Id.* The Court must be "certain of federal congressional intent before allowing federal law to divest Pennsylvanians of the rights and remedies afforded under the laws of this Commonwealth." *Id.* Accordingly, unless "'Congress intended to preempt state law, there is a presumption against preemption,' as we also require a clear manifestation of congressional intent to preempt." *Id.* (quoting *Dooner v. DiDonato*, 971 A.2d 1187, 1194 (Pa. 2009)). Indeed, the Court has said that "even

where federal law contains an express preemption clause, our duty is to further inquire as to the scope and substance of any displacement of our state laws." *Id.*

In this case, there is no need for the Court to "further inquire" as to the scope and substance of the federal Controlled Substances Act (CSA), as it does not preempt the MMA under any of the three forms of preemption: field, express, or conflict. The absence of any preemption is further evidenced by Congress's refusal to appropriate any funds to block or interfere with state medical marijuana programs and federal judges who have declined to sanction individuals for using medical marijuana while on probation. Because there is no preemption, Pennsylvania is free to allow the use of marijuana for medical purposes and determine how best to effectuate that objective.

1. The Controlled Substances Act does not preempt the MMA.

a. *The CSA does not occupy the entire field of the regulation of marijuana use, nor is there an express preemption of such laws.*

Field preemption exists when Congress has precluded states from "regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Field preemption does not exist in this instance, as the United States Supreme Court has already determined that the "CSA explicitly contemplates a role for the States in regulating controlled substances." *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006). When it enacted the CSA,

Congress explicitly disavowed a desire to occupy the field with regard to marijuana activity within states:

> 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 . . . 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 . . . and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Per Congress's instruction, the CSA is not intended to and does not occupy the field of regulating controlled substances such as marijuana.

For the same reasons, Congress has also *not* expressly preempted state laws through the CSA. Instead, the CSA only prevails in narrow circumstances where there is a "conflict" between the CSA and a state law, and the "two cannot consistently stand together." *Id.*; *see Hoggatt*, 347 P.3d at 141 ("Congress itself has specified that the CSA does not expressly preempt state drug laws or exclusively govern the field.").

b. There is no conflict between the Controlled Substances Act and the MMA.

There is also no conflict between the CSA and MMA that would cause the MMA to be preempted by federal law because 1) compliance with both federal and state regulations is not a physical impossibility and 2) the challenged state law does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 399.

First, individuals can comply with both laws by choosing not to use medical marijuana. Second, Pennsylvania's decision to allow medical marijuana use by qualified patients does not prevent the federal government from prosecuting medical marijuana users who are otherwise compliant with state law.[20] Congress' decision to bar the Department of Justice from using funds to interfere with state-level medical cannabis programs[21] further supports the conclusion that there is no conflict. "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)). Congress's explicit restriction on the use of funds to prevent states, including Pennsylvania, "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana … is a direct and unambiguous indication that Congress has decided to tolerate the tension, at least for now, between the federal and state regimes." *Callaghan v.*

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[20] In *Gonzales v. Raich*, 545 U.S. 1, 15 (2005), the United States Supreme Court ruled that the CSA is a constitutional exercise of Congress's power under the Commerce Clause, even with respect to marijuana created and consumed within a single state. While *Raich* authorizes the *federal government* to arrest and prosecute medical marijuana users, it does not address and has no bearing on the question of whether a state may immunize medical marijuana users from prosecution by the *state government*.

[21] *See* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019).

Darlington Fabrics Corp., No. PC-2014-5680, 2017 R.I. Super. LEXIS 88, at *44, 2017 WL 2321181, at *15 (R.I. Super. Ct. May 23, 2017).

The Supreme Courts of Montana and Arizona have expressly held that allowing medical marijuana patients on state or county probation to use marijuana poses no conflict with federal law.[22] Montana's medical marijuana law "does not in any way prohibit the federal government from enforcing the CSA against medical marijuana users . . . if it chooses to do so; however a state court may not, under these circumstances, use violation of the federal law as a justification for revocation of a deferred sentence." *Nelson*, 195 P.3d at 834. And the Arizona Supreme Court held that allowing medical marijuana patients on probation to use marijuana created 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." *Hoggatt*, 347 P.3d at 141.

[22] Other courts have also held that that there is no conflict between the CSA and state medical marijuana laws. *See, e.g., Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 539 (Mich. 2014) (finding no indication that CSA's "purpose or objective was to require states to enforce its prohibitions"); *Chance v. Kraft Heinz Foods Co.*, No. K18C-01-056 NEP, 2018 Del. Super. LEXIS 1773, at *8, 2018 WL 6655670, at *3 (Del. Super. Ct. Dec. 17, 2018) (CSA does not preempt anti-discrimination provisions of the state medical marijuana law); *R.I. Patient Advocacy Coal. Found. (RIPAC) v. Town of Smithfield*, No. PC-2017-2989, 2017 R.I. Super. LEXIS 150, at *18, 2017 WL 4419055, at *7 (R.I. Super. Ct. Sep. 27, 2017) (concluding that state medical marijuana law "does not stand as an obstacle to the purposes and objectives of the CSA"); *City of Palm Springs v. Luna Crest, Inc.*, 200 Cal. Rptr. 3d 128, 131–33 (Cal. Ct. App. 2016) (affirming trial court's determination that federal law does not preempt city's regulation of medical marijuana); *Commonwealth v. Wood*, No. CR-2065-2012 (Lycoming Co. Ct. C.P. Sept. 12, 2019) ("no sound argument exists that the MMA stands as an obstacle to the Department of Justice pursuing legal action for violations of the USCSA").

2. Federal law does not give Pennsylvania courts authority to order that individuals subject to court supervision refrain from exercising their right under state law to use medical marijuana.

Because the MMA is not preempted by federal law, Pennsylvania is free to create a regulatory system under which marijuana can be grown, processed, sold, possessed, and used for medical purposes without fear of arrest, prosecution or penalty or denial of any right or privilege by the Commonwealth or any of its political subdivisions. This is a valid exercise of Pennsylvania's legislative power, as "the States have broad authority to enact legislation for the public good—what we have often called a 'police power.'" *Bond v. United States*, 572 U.S. 844, 854 (2014). And the federal government has no authority to compel the Commonwealth or its courts to require its residents to comply with federal law:

> Congress cannot compel the States to enact or enforce a federal regulatory program . . . . The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' 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.

Printz v. United States, 521 U.S. 898, 935 (1997); *see New York v. United States*, 505 U.S. 144, 166 (1992) ("even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts"); *Galarza v.*

Szalczyk, 745 F.3d 634, 644 (3d Cir. 2014) (interpreting federal statute to compel county to detain prisoners for federal government is contrary to the Federal Constitution and Supreme Court anti-commandeering precedents). Nor, of course, does the CSA either implicitly or explicitly seek to compel such enforcement by state officials.

Other states' courts have reached the same conclusion when considering the legality of their analogous medical marijuana statutes. The Supreme Courts of Arizona and Montana have not only rejected the argument that federal law required their states' courts to prohibit individuals on probation from using medical marijuana, but have held that sentencing courts *cannot* require individuals to comply with federal laws that restrict the rights granted to them by their respective states. As the Montana Supreme Court explained, "while the District Court may require [probationer] to obey all federal laws as a condition of his deferred sentence, it must allow an exception with respect to those federal laws which would criminalize the use of medical marijuana in accordance [with] the MMA." *Nelson*, 195 P.3d at 834; *see Hoggatt*, 347 P.3d at 141 ("while the court can impose a condition that probationers not violate federal laws generally, it must not include terms requiring compliance with federal laws that prohibit marijuana use pursuant to" state statute).

Even the federal government has shown more deference to Pennsylvania's sovereign authority to allow its residents to use medical marijuana than the 52nd Judicial District has displayed. In every appropriations bill since 2014, Congress has included a rider in its allocation of funds to the Department of Justice, providing that "[n]one of the funds made available under this Act to the Department of Justice may be used, with respect to [Pennsylvania and 49 other U.S. states and jurisdictions], to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Jackson*, 388 F. Supp. 3d 505, 509 (E.D. Pa. 2019) (quoting Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019)).

Based on that appropriations rider, the U.S. Court of Appeals for the Ninth Circuit held that "*at a minimum*, [the rider] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws." *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016). And the U.S. District Court for the Eastern District of Pennsylvania concluded that "the rider applies to violations of supervised release" because "[r]evoking a defendant's supervised release for his state law-compliant medical marijuana use would 'accomplish[] materially the same effect' as directly prosecuting him for his marijuana use and would prevent Pennsylvania from 'giving practical effect' to its

law." *Jackson*, 388 F. Supp. 3d at 512–13 (quoting in part *United States v. Samp*, No. 16-cr-20263, 2017 U.S. Dist. LEXIS 46291, at *4, 2017 WL 1164453, at *2 (E.D. Mich. Mar. 29, 2017)). If federal courts do not consider themselves constrained by federal law to sanction defendants who use medical marijuana, then the argument by state courts that they are so obligated is groundless. The 52nd Judicial District's interest in ensuring that the individuals it supervises obey federal law is surely no greater than that of Congress itself.

VII. CONCLUSION

For all of the foregoing reasons, the 52nd Judicial District exceeded its authority by imposing a condition prohibiting individuals subject to LCPSD supervision from using medical marijuana in a manner consistent with state law. Petitioners respectfully request that this Court enter a declaratory judgment that the Policy violates the MMA and enjoin the 52nd Judicial District, including the Court of Common Pleas and the Lebanon County Probation Services Department, from enforcing the Policy against individuals subject to the supervision of the LCPSD who use medical marijuana in accordance with the Pennsylvania Medical Marijuana Act.

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Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 2135

I hereby certify that this brief contains fewer than 14,000 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this brief.

Dated: January 29, 2020 */s/ Sara J. Rose*

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: January 29, 2020 */s/ Sara J. Rose*

CERTIFICATE OF SERVICE

I certify that on this day of January 29, 2020, the foregoing Petitioners' Brief was served upon the following counsel for the respondent via PACFile:

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