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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.

REPLY BRIEF OF PETITIONERS

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Sara J. Rose (PA ID No. 204936)
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Introduction

The central question in this case is whether state courts have the power to impose conditions that conflict with the laws of this Commonwealth when supervising people on probation, parole, accelerated rehabilitative disposition ("ARD"), or bail. Although Respondent has tried to shift this Court's focus to whether sentencing courts can inquire into the nature of medical marijuana use by probationers, that is not the real issue. The 52nd Judicial District does not simply want the ability to inquire into whether a person under its supervision is using medical marijuana in compliance with state law; it can already do that. Instead, it wants to be able to substitute its judgment for that of the General Assembly and patients' doctors and prohibit medical marijuana patients from using medical marijuana simply because they are on probation or another form of court supervision.

The Medical Marijuana Act ("MMA" or "the Act") sets forth who is eligible to use medical marijuana and contains no exclusions for people under court supervision. The Act provides that medical marijuana patients shall not be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, solely for the lawful use of medical marijuana. The MMA defines a medical marijuana patient as "[a]n individual who: (1) has a serious medical condition; (2) has met the requirements for certification under this act; and (3) is a resident of this

Commonwealth." All three of the petitioners are medical marijuana patients as defined by the MMA. That they are on probation and under the supervision of the 52nd Judicial District does not alter that basic fact. The MMA does not give discretion to trial courts to determine who qualifies as a medical marijuana patient. Rather, the Act's plain language protects medical marijuana patients from being subject to penalty in any manner or denied any right or privilege for using medical marijuana in compliance with state law.

The Policy adopted by the 52nd Judicial District subverts both the letter and intent of the MMA by denying medical marijuana patients the rights and privileges, in the form of probation, parole, ARD, and bail, to which they would otherwise be entitled, and subjecting them to penalty even if they use medical marijuana in compliance with state law. This Court should enjoin the enforcement of the Policy and hold that the MMA prohibits courts in this Commonwealth from enforcing any supervision condition that requires medical marijuana patients to abstain from using medical marijuana in compliance with state law.

A. The MMA Does Not Give the 52nd Judicial District Discretion to Decide Whether a Medical Marijuana Patient Subject to Court Supervision Can Use Medical Marijuana.

The 52nd Judicial District repeatedly asserts that it is entitled to determine whether individuals under its supervision should be allowed to use medical marijuana in compliance with state law. Citing a decision by the U.S. District

Court for the Eastern District of Pennsylvania, it contends that it merely wants to do what the court did in that case: "determine the nature of the defendant's medical need, the validity of the identification card, and that the patient received medical marijuana from an authorized dispensary." Respondent's Br. at 17.[1] If that were all the Judicial District intended to do, there would be no dispute.[2] But the arguments put forth by the Judicial District, along with the Policy itself, reveal that it wants to do more than ensure compliance by those under its supervision; it wants the power to decide who among them is entitled to use medical marijuana. The Judicial District believes it should to be able to substitute its own judgment for the medical judgment of the doctors who have certified that Petitioners and others need to use medical marijuana to treat their serious medical conditions. It is that claim of authority to which Petitioners object and which the MMA prohibits.

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[1] The federal court's decision in *United States v. Jackson*, 388 F. Supp. 3d 505 (E.D. Pa. 2019), is not concerned with any aspect of the MMA. Instead, the decision concerns whether a congressional budget rider that prevents the U.S. Department of Justice from interfering in state marijuana programs prohibits the use of federal funds to prosecute people who use medical marijuana in violation of their supervised release. *Id.* at 507. The *Jackson* court determined that it does, as long as those medical marijuana users are complying with state law. *Id.* Accordingly, the court held that its review was limited to whether the defendant's medical marijuana use complied with state law and scheduled "[a]n evidentiary hearing for the purpose of determining whether defendant was fully compliant with state law governing use of medical marijuana, and thus whether the rider enjoins the use of DOJ funds in a violation of supervised release hearing." *Id.* at 515–16.

[2] *See* Exhibit 2 to Class Action Petition for Review Addressed to the Court's Original Jurisdiction (R. 042) (Sept. 16, 2019, letter from deputy legal director of ACLU of Pennsylvania to the Honorable John C. Tylwalk requesting that Court "allow patients under the supervision of the Lebanon County Court of Common Pleas to use medical marijuana in compliance with state law").

The Policy adopted by the 52nd Judicial District explicitly prohibits people under court supervision from using medical marijuana. Although the Judicial District later—in response to the threat of this lawsuit[3]—added an exception to the Policy allowing individuals under court supervision to petition the court "to determine whether they should be excused from its application to them," that exception requires individuals to do far more than provide evidence of MMA compliance, such as producing a medical marijuana identification card or receipts for the purchase of medical marijuana: it imposes a burden on medical marijuana patients "to establish to the Court *the medical necessity* of their ongoing use of medical marijuana." R. 109 (emphasis added).

That the Judicial District intends to require individuals to show more than mere compliance with the MMA is apparent from the arguments set forth in its brief. The Judicial District criticizes Petitioners' failure to avail themselves of the Policy's exception, but neglects to mention that the exception did not exist until October 7, 2019, the day before the Petition was filed, and that neither Petitioners nor their counsel was made aware of it until October 17, 2019, when the Answer was filed. Because Petitioners did not withdraw their Petition and seek an

[3] The revised Policy is dated October 7, 2019—one day before the Petition for Review was filed—and neither Petitioners nor their counsel were informed that the Policy had been revised until the 52nd Judicial District filed its Answer to Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction on October 17, 2019.

exception, the Judicial District avers "there is no way of knowing if the Judicial District would have considered the information in Petitioners' affidavits, balanced their criminal history, and concluded that they should all have been excused from the Policy's restriction against medical marijuana." Respondent's Br. at 37. The Judicial District further claims that "[t]his Court has no way of knowing how the Judicial District, after a 'full and fair hearing,' would have considered the benefits of their medical marijuana use in relation to their underlying criminal acts and personal histories." *Id.* at 38.[4] These statements reveal that the 52nd Judicial District does not simply want to ensure that medical marijuana patients under its supervision use medical marijuana in compliance with state law; it wants to be able "balance medical marijuana use with the needs of reforming the probationer." *Id.* at 44. That necessarily involves discretion to decide who is allowed to use medical marijuana, regardless of their eligibility under the MMA or compliance with its terms. But the legislature has already made that decision. The MMA sets out who is eligible to use medical marijuana and protects them from being subject to

[4] Petitioners note that nowhere in the MMA did the General Assembly choose to limit patients' access to medical marijuana because of their criminal history. The General Assembly does require potential caregivers under the Act to undergo a criminal history record check, but does wholly not preclude individuals with a criminal history from serving as caregivers. 35 P.S. § 10231.502(b). Even those with drug convictions may serve as a caregiver after five years. *Id.* The fact that the General Assembly chose not to require a criminal background check for patients shows that criminal history has no bearing on becoming a patient under the MMA.

penalty in any manner or denied any right or privilege if they use medical marijuana in compliance with the Act. *See* 35 P.S. §§ 10231.103, 10231.2103.

If there is any question remaining that the Judicial District's true aim is to prohibit people from using medical marijuana—as opposed to ensuring their compliance with the MMA—the Court need only look to the language of the exception itself. To be excused from the Policy, individuals must "establish to the Court the medical necessity of their ongoing use of medical marijuana." R. 109. In the legal context, "necessity" is a defense that "can be asserted only by an actor who is confronted with such a crisis as a personal danger (to oneself or others), a crisis which does not permit a selection from among several solutions, some of which do not involve criminal acts." *Commonwealth v. Capitolo*, 498 A.2d 806, 808 (Pa. 1985). Demanding that individuals establish "medical necessity" would thus require proof that medical marijuana is the *only possible treatment* available to prevent serious harm. Not only is it unlikely that anyone on probation in Lebanon County could satisfy the Judicial District's demand, but requiring such proof subverts the intent of the MMA. The MMA's purpose was not to make medical marijuana a treatment of last resort; the General Assembly expressly intended to "[p]rovide a program of access to medical marijuana which balances the need of patients to have access to the latest treatments with the need to promote patient safety." 35 P.S. § 10231.102.

If the Judicial District's goal were to ensure that people under its supervision use medical marijuana in compliance with the MMA, then its Policy should say that. That it does not, along with the Judicial District's repeated assertions about the need to "balance" medical need with criminal history, evinces its true aim—to use its authority to revoke or deny probation, parole, ARD, or bail to prevent people from using medical marijuana. The prospect that medical marijuana patients would be subject to that kind of threat is exactly what the MMA's patient protections were designed to guard against.

B. The MMA Protects Medical Marijuana Patients from Penalty in Any Manner or the Denial of Any Privilege for Using Medical Marijuana.

The MMA is intended to protect medical marijuana patients from facing adverse consequences that are based solely on their MMA-compliant use of medical marijuana. In the section titled "Protections for Patients and Caregivers," the MMA provides that no patient "shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by a Commonwealth licensing board or commission, solely for lawful use of medical marijuana 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). It also protects medical marijuana patients from adverse

employment consequences[5] and prohibits courts from making custody decisions based solely on medical marijuana use.[6]

The Judicial District's argument that the Policy does not violate the "Protections for Patients and Caregivers" section of the Act because it "is not restricting marijuana ***solely*** because [probationers] are' patients,'" Respondent's Br. at 12, misapprehends the Act's language. The Act protects patients from being subject to penalty in any manner or denied any right or privilege solely for the use of medical marijuana. The privilege at issue here is probation and the penalty at issue is probation revocation. The Judicial District's Policy prohibits individuals under court supervision from using medical marijuana. If a probationer uses medical marijuana and is not granted an exception from the Policy, the court will revoke their probation. The Policy thus subjects medical marijuana patients to a

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[5] The 52nd Judicial District claims, incorrectly, that employers can deny medical marijuana patients employment. Respondent's Br. at 25. Although the MMA prohibits individuals from engaging in certain dangerous work activities while under the influence of marijuana, 35 P.S. § 10231.510(4), and allows employers to discipline employees for working under the influence of marijuana if it negatively affects their performance, 35 P.S. § 10231.2103(b)(2), the MMA specifically prohibits employers from retaliating against medical marijuana patients. 35 P.S. § 10231.2103(b)(1) ("No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana."); *see also Whitmire v. Wal-Mart Stores Inc.*, 359 F. Supp. 3d 761, 779 n.11 (D. Ariz. 2019) (describing Pennsylvania as being one of nine states with medical marijuana laws containing "explicit anti-discrimination protections from adverse employment actions").

[6] 35 P.S. § 10231.2103(c) ("The fact that an individual is certified to use medical marijuana and acting in accordance with this act shall not by itself be considered by a court in a custody proceeding.").

penalty—the revocation of their probation—solely for the use of medical marijuana.[7]

It is no different than if this Court adopted a Rule of Professional Conduct stating that members of the bar of the Pennsylvania Supreme Court must abstain from medical marijuana use and initiated disciplinary action against lawyers who used medical marijuana. The lawyers' use would not be subject to scrutiny solely because they were medical marijuana patients. It would be scrutinized because they are medical marijuana patients *and* members of the bar of this Court. But the fact that they are members of the bar of this Court does not mean they could be subject to disciplinary action. In fact, under the plain language of the MMA, they could not. The Act protects medical marijuana patients from disciplinary action by a Commonwealth licensing board just as it protects medical marijuana patients from having their probation revoked. Neither can be subject to penalty, denied a right or privilege, or be disciplined by the state solely for lawful use of medical marijuana.

[7] Conditioning bail, ARD, probation, or parole on abstaining from medical marijuana use would constitute the denial of a right or privilege under the MMA. *See, e.g.*, *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 139 (Ariz. 2015) ("if the state extends a plea offer that includes probation, it cannot condition the plea on acceptance of a probationary term that would prohibit a qualified patient from using medical marijuana pursuant to the Act, as such an action would constitute the denial of a privilege").

Petitioners' interpretation of the statute's plain language—that it protects medical marijuana patients from having their probation revoked if they use medical marijuana—is consistent with the Arizona Supreme Court's interpretation of the Arizona Medical Marijuana Act ("AMMA"), which contains patient protections that are nearly identical to the MMA. *See Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 139 (Ariz. 2015). The Judicial District, however, seizes on two minor differences between the statutes' language in an attempt to argue that the MMA's patient protections are not as extensive as the AMMA's. Neither of these distinctions is material.

The first difference the Judicial District points to is utterly meaningless in determining whether the MMA protects medical marijuana patients from threats to revoke their probation for MMA-compliant medical marijuana use. The Judicial District argues that the reference in the AMMA to "disciplinary action by a court" in its patient-protection language, Ariz. Rev. Stat. Ann. § 36-2811(B) (protecting patients from, inter alia, "denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau"), is an important distinction from the MMA's language, which protects patients from, inter alia, being "denied any right or privilege, including civil penalty or disciplinary action by a Commonwealth licensing board or commission." 35 P.S. § 10231.2103(a). Not only is it obvious that the reference to

"disciplinary action by a court" is intended to apply to disciplinary action against members of the bar of a court given that it directly precedes "or occupational or professional licensing board or bureau," but the Arizona Supreme Court did not rely on that language in its decision. The court's holding that "any probation term that threatens to revoke probation for medical marijuana use that complies with the terms of AMMA is unenforceable and illegal under AMMA," was grounded in the law's "sweeping grant of immunity against 'penalty in *any* manner, or denial of *any* right or privilege.'" *Reed-Kaliher*, 347 P.3d at 139-40 (quoting Ariz. Rev. Stat. § 36-2811(B) (emphasis added by court)). With the exception of the words "denial of any," which are replaced by the words "denied any" in the MMA, the language relied on by the Arizona Supreme Court is identical to the language Petitioners rely on here.

The second difference the 52nd Judicial District focuses on is the motivation for the adverse action. The Judicial District contends that the AMMA is distinguishable from the MMA because the AMMA "does not contain Pennsylvania's 'but for' language." Respondent's Br. at 13. Leaving aside the fact that the MMA does not use the phrase "but for" and instead provides 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. § 10231.2013(a) (emphasis added), the AMMA contains essentially the same

provision. It states that a "registered qualifying patient . . . is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege . . . ***[f]or*** the registered qualifying patient's medical use of marijuana pursuant to this chapter." Ariz. Rev. Stat. § 36-2811(B) (emphasis added). Both provisions are designed to establish a nexus between the protected conduct—medical marijuana use—and actions that would deter a person from engaging in that protected conduct. The Judicial District provides no explanation as to how the addition of the word "solely" would alter the Arizona Supreme Court's conclusion in *Reed-Kaliher*.[8] That is because it makes no difference. The intent of both laws is to protect medical marijuana patients from adverse actions that they would not face except for their use of medical marijuana in compliance with state law.

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[8] The Judicial District also notes that the provision of the medical marijuana law that the Montana Supreme Court relied on in *State v. Nelson*, 195 P.3d 826 (Mont. 2008), does not contain the "solely for" phrase and instead provides that "A qualifying patient . . . may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege . . . ***for*** the medical use of marijuana." *Id.* at 828 (emphasis added) (quoting Mont. Code Ann. § 50-46-201(1) (repealed 2011)). Again, the Judicial District does not explain how or why the word "solely" would have altered the court's holding that the state medical marijuana law "simply does not give sentencing judges the authority to limit the privilege of medical use of marijuana while under state supervision." *Id.* at 833. The Judicial District also claims, incorrectly, that "[t]he Montana Supreme Court was mostly concerned with the concept of an outright ban against the use of medical marijuana." Respondent's Br. at 24–25. In fact, the sentencing court in *Nelson* allowed the probationer to use medical marijuana in pill form but denied his request to smoke marijuana. *Id.* at 829. The Montana Supreme Court held that "[i]n limiting Nelson to the ingestion of marijuana in pill form, and requiring him to have a physician's prescription to do so, the District Court ignored the clear intent of the voters of Montana that a qualifying patient with a valid registry identification card be lawfully entitled to grow and consume marijuana in legal amounts." *Id.* at 832.

That is why the Arizona Supreme Court held that the "AMMA bars courts from imposing a probation condition prohibiting the use of medical marijuana pursuant to AMMA," *Reed-Kaliher*, 347 P.3d at 142. Because "[p]robation is a privilege," conditioning a plea offer "on acceptance of a probationary term that would prohibit a qualified patient from using medical marijuana pursuant to the Act . . . would constitute the denial of a privilege." *Id.* at 139. And because "[r]evocation of probation is a penalty," imposing such a condition or penalizing a probationer "by revoking probation for such AMMA-compliant use . . . would constitute a punishment." *Id.* Either way, such conditions conflict with the immunity accorded to medical marijuana patients and are thus unenforceable and illegal. *Id.* at 140.

The Judicial District's attempt to distinguish the MMA from the nearly identical statute at issue in *Reed-Kaliher* relies on a contrived interpretation of the law that is divorced from the plain meaning of its language. The Judicial District has provided no credible justification for departing from the normal rules of statutory construction, and the MMA should be interpreted in accordance with its plain language to protect patients' access to medical marijuana.

C. This Court Should Exercise Its King's Bench Authority to Rule that the MMA Prohibits Sentencing Courts from Requiring Medical Marijuana Patients to Abstain from Using Medical Marijuana as a Condition of Court Supervision.

Suffused throughout the Judicial District's brief is the notion that the Petitioners should have followed the Policy and sought an exception to it rather than attacking it in this Court. Notwithstanding the fact that no process for seeking an exception appeared to exist at the time the Petition was filed, the Judicial District puts forth no persuasive reason why this Court should require Petitioners to go through the process of "petition[ing] the Court for a full and fair hearing" where they "will bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana." R. 108–09.

Petitioners filed this case in the Commonwealth Court, which has original jurisdiction over all civil actions or proceedings against the Commonwealth government. 42 Pa.C.S. § 761. Although this Court held that the Commonwealth Court had jurisdiction over Petitioners' claims, it nonetheless elected to exercise its King's Bench jurisdiction over this matter. *Gass v. 52nd Judicial District*, No. 118 MM 2019 (Pa. October 30, 2019) (Order). In doing so, this Court recognized 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.* at 3. There is currently at least one appeal pending in Superior

Court involving the same issue as this case.[9] If the Court does not decide these substantial legal questions now, it will face them eventually. In the meantime, whether or not medical marijuana patients under court supervision will be able to use a medical treatment recommended by their doctor will depend on the county where they live. Those who live in counties that prohibit people under court supervision from using medical marijuana will not be able to take advantage of the MMA's benefits and will continue to be harmed.

Much of the Judicial District's concern regarding the ripeness of this case appears to stem from the lack of a factual record, but Petitioners submit that the only issue this Court need decide is a legal one—whether the MMA prohibits sentencing judges from conditioning the privilege of probation on abstaining from medical marijuana use. If it does, as Petitioners assert, then no development of the factual record will change the outcome. If it does not, then the Petitioners will be required to seek an exception to the Policy and appeal any denial. But there is no reason to require Petitioners to do so in the first instance for the Court to decide this legal question.

The Judicial District repeatedly claims that there is no way to know how it would enforce the Policy because Petitioners chose not to avail themselves of it.

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[9] *Commonwealth v. Wood*, 250 MDA 2020 and 251 MDA 2020. The Superior Court granted Petitions for Permission to Appeal on February 13, 2020.

E.g., Respondent's Br. at 37. But that is precisely the problem with the Policy and why this Court should render a decision in this case. If, as the Judicial District claims, it would merely require Petitioners to provide the information that the U.S. District Court for the Eastern District of Pennsylvania requested in *Jackson*, then it should set that out in the Policy. The fact that it has not, and repeatedly refers to the need for courts to balance criminal history with "medical necessity" in deciding whether a person on probation should be allowed to use medical marijuana, irrespective of their eligibility to do so under the MMA, reveals that it does not intend to apply the Policy in that manner, and this Court should not assume that it will do so.

The MMA and its implementing regulations set out the requirements an individual must meet to be able to use medical marijuana, including receiving a certification from an approved physician that the individual suffers from a serious medical condition that could be alleviated by medical marijuana. 35 P.S. § 10231.103. Allowing sentencing courts to overrule a doctor's recommendation in favor of their own determination of whether medical marijuana is a "medical necessity" for a particular defendant would violate the MMA's patient protections and would allow sentencing courts to ignore a physician's recommendations in favor of their own opinions as to whether a medical treatment is indicated. Thus, the only appropriate inquiry for a sentencing court is whether an individual meets

the definition of "patient" under state law, and if so, whether their use of medical marijuana complies with the Act. If these two criteria are satisfied, then there is nothing else for the court to consider. Threatening to revoke the probation of medical marijuana patients who use medical marijuana in compliance with the MMA is inconsistent with the Act's broad protections for patients and thus violates both the letter and the spirit of the law.

Conclusion

For all the foregoing reasons, 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 52nd Judicial District who use medical marijuana in compliance with the MMA.

Dated: May 1, 2020

Respectfully submitted,

s/ Sara J. Rose

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CERTIFICATE PURSUANT TO RULE 2135

I hereby certify that this brief contains fewer than 7,000 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this brief.

Dated: May 1, 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: May 1, 2020 */s/ Sara J. Rose*

CERTIFICATE OF SERVICE

I certify that on this day of May 1, 2020, the foregoing Petitioners' Brief was served upon the following counsel via PACFile:

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