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THE SUPREME COURT OF PENNSYLVNIA
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 AMICI CURIAE SOCIETY OF CANNABIS CLINICIANS, ASSOCIATION OF CANNABIS SPECIALISTS, DRUG POLICY ALLIANCE, AND AMERICANS FOR SAFE ACCESS FOUNDATION

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The following *amici curiae* submit this brief pursuant to Pennsylvania Rule of Appellate Procedure 531 in support of Petitioners' request to enjoin the medical marijuana policy for individuals on probation or parole under supervision in the 52nd Judicial District, Lebanon County, Pennsylvania.

Society of Cannabis Clinicians: The Society of Cannabis Clinicians ("SCC") is a nonprofit educational and scientific society of physicians and other health care professionals dedicated to advancing research and disseminating information regarding medicinal cannabis. SCC's primary goals are to expand public knowledge on the medical uses of cannabis; facilitate best practice standards for cannabis consultations; and study, discuss and make recommendations relating to research, practice and policy in the medical use of cannabis. From its founding twenty years ago, SCC has been on the forefront of setting professional standards in cannabis medicine. It was the first to develop and propose cannabis practice guidelines, and, since then, SCC has worked to develop a standardized health history questionnaire for all cannabis clinicians to collect the medically-relevant data. It continues to publish practice standards for cannabis approvals outlining how clinical encounters should occur; the need for supportive evidence of practice with continued medical education; and appropriate clinical decision making, documentation, informed consent, disclosure of competing interests and patient

education and follow-up. SCC members have monitored cannabis use by hundreds of thousands of patients of all ages, and for a range of symptoms and disease processes, such as cancer, depression, chronic pain, migraine headaches and Crohn's Disease.

Association of Cannabis Specialists: The Association of Cannabis Specialists ("ACS") is a nonprofit organization that imposes the highest standards in the practice of cannabis medicine on its members. ACS requires clinical best practices to safeguard patient care, including through connections with other stakeholders in the medicinal cannabis community. ACS provides evidence and experience-based education for patients, cannabis clinicians, referring clinicians, and lawmakers to help them understand cannabis medicine and make informed decisions. They strive to implement best practices in the laws and regulations at the federal, state and international levels.

Drug Policy Alliance: The Drug Policy Alliance ("the Alliance") is the nation's leading advocacy organization devoted to advancing policies that best reduce the harms of both drug misuse and drug prohibition. The Alliance develops just policy proposals on the use and regulation of drugs which are grounded in science, compassion, health and human rights. Several states relied on Alliance staff attorneys in drafting medical marijuana laws across the country. Alliance attorneys have also served as counsel in various state and federal cases touching

upon the medical efficacy of cannabis. These matters include representing California physicians in *Conant v. Walter*, 309 F.3d 629 (9th Cir. 2002) (which upheld the First Amendment rights of physicians to recommend medical marijuana to seriously-ill patients), and serving as *amicus* counsel for state and national medical and public health groups.

Americans for Safe Access Foundation: The mission of The Americans for Safe Access Foundation ("ASA") is to ensure safe and legal access to cannabis for therapeutic use and research. ASA is a member-based organization of over 100,000 patients, medical professionals, scientists, and concerned citizens across all 50 states promoting safe and legal access to cannabis for therapeutic use and research ASA creates policies that improve access to medical cannabis for patients and researchers through legislation, education, litigation, research, grassroots empowerment, advocacy and services for patients, governments, medical professionals, and medical cannabis providers.

INTRODUCTION

The *amici* submitting this brief are concerned by the 52nd Judicial District's ("the District") probation supervision policy prohibiting medical marijuana use which is otherwise permitted by Pennsylvania law. *See* 52nd Judicial District of Lebanon County, The Medical Marijuana Policy, No. 5.1-2019 & 7.24-2019 (hereinafter "the Policy"). The Policy removes medical decisions about medical

treatment options from the hands of medical professionals: doctors and the Pennsylvania Department of Health ("the Department").

The elected officials comprising the General Assembly used their institutional authority to review scientific evidence on the benefits of marijuana as a means of medical treatment. 35 P.S. § 10231.102(1). Relying on this research, the General Assembly authorized the use of medical marijuana in Pennsylvania through the Medical Marijuana Act ("MMA" or "the Act") and entrusted the Department to implement the Act through regulations. 35 P.S. § 10231.301(b). This judgment applies to anyone in the commonwealth who could be assisted medically by marijuana treatment. All persons within the commonwealth are eligible for certification to use medical marijuana under the act, and no certified patient may be penalized for such use. 35 P.S. § 10231.2103(a).

The District's Policy overrides the governing standards applying to all citizens, made by the state's elected officials, allowing the Department and licensed practitioners to determine whether marijuana is an appropriate medical course of treatment for patients. The Policy, in contrast to the Act enacted by the general assembly, is not supported by scientific evidence and contradicts the research and opinions of medical experts, presented by *amici* in this brief.

In protecting all persons, including probationers, from penalty or punishment under the MMA, the general assembly recognized a critical truth: that when

Petitioners and other similarly-situated persons enter the doctor's office they are patients first, not probationers.

Each Petitioner was certified as a medical marijuana patient by a Department-approved physician in compliance with the MMA. *See* Declarations of Petitioners, pp. 3, 10, and 14. As a result, each Petitioner is authorized under Pennsylvania law to pursue the course of medical marijuana treatments as approved by their physicians. 35 P.S. § 10231.301. Despite the Petitioners' compliance with Pennsylvania law, the LCPSD informed each of the Petitioners that they would violate their court-ordered supervision if they follow the course of medical marijuana treatment approved by their physicians. *See* Brief of Petitioners in Support of Application for Special Relief in the Nature of a Preliminary Injunction (hereinafter "Petitioners' Brief"), pp. 2-3.

Petitioners rightfully argue that this Policy violates the rights of individuals under court supervision who require marijuana for medical treatment, and, alarmingly, the Policy imperils their health and lives by prohibiting those treatments. This *amicus* brief addresses both issues, but focuses on the health and policy implications of the District's decision to forbid the use of medical marijuana which is medically necessary, physician directed, and compliant with existing Pennsylvania law.

This brief aims to share the knowledge and concerns of the *amici*, by presenting the court with expert research supporting the judgment of the General Assembly and practitioners that, contrary to the concerns of the District, marijuana is a safe, effective, and—for some patients— necessary medical treatment option. The effect of the District's Policy is to impose on Petitioners a punishment that the General Assembly explicitly sought to preclude, and, as a result, the *amici* support the Petitioners in asking this Court to permanently enjoin its implementation.

BACKGROUND

I. The Pennsylvania Medical Marijuana Act: Background and Operation

The MMA was passed with broad bipartisan support, in the House by a vote of 149 to 46 and the Senate by a vote of 42 to 7.[1] The Act was signed into law by Governor Tom Wolf and took effect May 17, 2016.[2]

The MMA establishes a framework for the legalization of medical marijuana in the Commonwealth for certain conditions. The expressed legislative intent of the Act is to:

> (i) Provide a program of access to medical marijuana which balances the need of patients to have access to the latest

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[1] Thomas G. Wilkinson, Jr., Pennsylvania's New Medical Marijuana Law: The Legal Roadmap for a Growing Industry, PENNSYLVANIA BAR ASS'N QUARTERLY, 147, 148 (Oct. 2016), file:///C:/Users/rkelly/Downloads/PABAR%20Wikinson%20Oct%202016_RevCWEB%20(1).PDF (hereinafter, "Wilkinson, Legal Roadmap").

[2] *Id.*

treatments with the need to promote patient safety.

(ii) Promote a safe and effective method of delivery of medical marijuana to patients.

(iii) Promote high quality research into the effectiveness and utility of medical marijuana.

35 P.S. §10231.102 (emphasis added).

Under the MMA, patients with the following medical conditions are eligible to seek approval for lawful medical marijuana treatment supervised by a physician:

(1) Cancer.
(2) Positive status for human immunodeficiency virus or acquired immune deficiency syndrome. ["HIV/AIDS"]
(3) Amyotrophic lateral sclerosis. ["ALS" or "Lou Gehrig's Disease"]
(4) Parkinson's disease.
(5) Multiple sclerosis ["MS"]
(6) Damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity.
(7) Epilepsy.
(8) Inflammatory bowel disease ["IBS"]
(9) Neuropathies.
(10) Huntington's disease.
(11) Crohn's disease.
(12) Post-traumatic stress disorder ["PTSD"].
(13) Intractable seizures.
(14) Glaucoma.
(15) Sickle cell anemia.
(16) Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective.
(17) Autism.
(18) Neurodegenerative diseases
(19) Terminal Illness
(20) Dyskinetic and spastic movement disorders

(21) Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions
(22) Tourette Syndrome
(23) Anxiety Disorders[3]

The MMA and MMA regulations established "rigorous certification standards" for both doctors and patients.[4] Only Department-approved physicians may certify a patient for medical marijuana. 35 P.S. § 10231.401. To gain Department approval, an interested physician must pass the Department's rigorous review process. § 10231.401(a)(1). The Department reviews the status of the physician's medical license and disciplinary history. § 10231.401(a)(2). The physician must be deemed qualified to treat one of the MMA's enumerated conditions. § 10231.401(a)(2). Then, even after the physician is approved by the Department, they must maintain accurate records of patient prescription information and be subject to an annual review of their license and disciplinary history. § 10231.401(b)(2). While there are over two hundred individuals with

[3] *See* 28 Pa. Code § 1141.21; *Getting Medical Marijuana*, COMMONWEALTH OF PENNSYLVANIA, https://www.pa.gov/guides/pennsylvania-medical-marijuana-program/ (last visited Jan. 8, 2020).

[4] Wilkinson, Legal Roadmap at 150.

active medical physician and surgeon licenses practicing in Lebanon County, only seven are MMA-certified.[5]

A patient afflicted with one of the aforementioned twenty-three conditions must seek a certification recommending medical marijuana treatment from one of these Department-approved practitioners. Before the patient is approved, they must send his or her physician's certification for marijuana treatment to the Department (along with other required materials) for further review.[6] Then, if the Department issues a medical marijuana card to the patient, they may purchase marijuana from a state-regulated dispensary.[7] Approved dispensaries are subject to rigorous certification standards.[8]

Chapter 20 of the MMA, entitled "Academic Clinical Research Centers," permits medical schools qualifying as Academic Clinical Research Centers ("ACRCs") to form research partnerships with Clinical Registrants ("CRs"). 35 P.S. §§ 10231.2001-10231.2003.[9] A CR is an entity that:

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[5] *Department of Health Medical Marijuana Approved Practitioners*, PENNSYLVANIA DEPARTMENT OF HEALTH OFFICE OF MEDICAL MARIJUANA, (Dec. 18, 2019), https://www.health.pa.gov/topics/Documents/Programs/Medical%20Marijuana/DOH%20Approved%20Practitioners.pdf

[6] Wilkinson, Legal Roadmap at 148.

[7] *Id.* at 151.

[8] *Id.* (marijuana must be tracked from "seed-to-sale" by growers.).

[9] An ACRC is an "[a]n accredited medical school within this Commonwealth that operates or partners with an acute care hospital licensed within this Commonwealth." 35 P.S. § 10231.2001.

1) Holds a permit as both a grower/processor and a dispensary; and

2) Has a contractual relationship with an ACRC under which the [ACRC] or its affiliate provides advice to the entity, regarding, among other areas, patient health and safety, medical applications and dispensing and management of controlled substances.

35 P.S. § 10231.2001. The Department is authorized to register up to eight CRs, each of which may provide medical marijuana at not more than six separate dispensary locations. § 10231.2002. Once approved, the CR is permitted to dispense medical marijuana to its ACRC partner for the purpose of conducting research studies, and indeed, the enabling Regulations require an active, Department-approved research study to deem any CR dispensary location operational or renew a permit. 28 Pa. Code § 1210.31(c).

II. The Petitioners are Department-Approved Medical Marijuana Patients Under the MMA

As the Court well knows from Petitioners' brief, the medical histories presented by the Petitioners in their briefing demonstrate the severe health burdens imposed upon them by the Policy. *See* Supreme Court Brief of Petitioners, pp. 6-11. Petitioner Ashley Gass immediately stopped her lawful medical marijuana treatment after being threatened to do so by her parole officer and she subsequently suffered twenty seizures over a two week period. *Id.* at 9.

After being instructed by her probation officer to stop using medical marijuana or face consequences for violating her parole, Petitioner Ashley Bennett

stopped her lawful medical marijuana treatment. *Id.* at 9. Since then, Ms. Bennett has suffered nausea and exhaustion leading to weight loss, and has seen a recurrence of her mental health challenges. *Id.* at 9-10. She is concerned returning to prescription drug use will once again cause her to harm herself. *Id.* at 10.

Petitioner Andrew Koch was told by his probation officer to cease his lawful use of medical marijuana or be reported to the court for violating his probation. *Id.* Now, Mr. Koch's severe pain – previously relieved by marijuana—has returned. *Id.* Absent the lawful course of medical marijuana treatments prescribed by his physician, Mr. Koch is faced with a decision: remain in debilitating pain or resume the use of opioids which are lawful but extremely risky for an opioid addict in remission. *Id.* at 11.

ARGUMENT

Like all Pennsylvania counties, Lebanon is precluded by Pennsylvania law from imposing any penalty on individuals authorized to use medical marijuana under the broad and unambiguous language of the MMA. The Act clearly states that patients may not be subject to "penalty in any manner" or denied any right or privilege for their lawful use of medical marijuana. 35 P.S. § 10231.2103(a).

The General Assembly expressly granted the Department – not any county or judicial agency – exclusive authority to implement, oversee, and administer the MMA and MMP in the Commonwealth. § 10231.1107. Only the legislature can

modify or amend that statutory grant of power to an administrative agency. *See Quest Diagnostics Venture, LLC v. Commonwealth*, 119 A.3d 406, 413 (Pa. Commw. Ct. 2015) ("[l]egislative regulations are binding on reviewing courts as part of a statute, as long as they are (1) within the granted power, (2) adopted in compliance with proper procedures and (3) reasonable").

Accordingly, local officials are not permitted to adopt rules or ordinances that modify or amend the Department's authority under the MMA. This is true even if the local officials assert some facially admirable purpose or defensible public policy goal. But the 52nd Judicial District's supervision policy purports to do exactly that by overriding the MMA to prohibit medical marijuana use by certain patients otherwise qualified under the law.

The District's amendment of the Policy permitting patients to petition the court to request permission to use medical marijuana does not cure the Policy's violation of the MMA. This amendment requires patients under court supervision to "bear the burden of establishing to the Court the medical necessity of their ongoing use of medical marijuana." As Petitioners note in their brief, this attempt to rewrite the MMA and impose onerous, vague requirements on patients to prove their need for a medication they have already been lawfully approved to receive is contrary to state law.

As a result, the Policy unlawfully imposes the threat of punishment, including the potential revocation of probation or parole, on Department-approved patients.

III. The 52nd Judicial District's Policy is Contrary to State Law.

Pennsylvania enacted the MMA in 2016 after determining medical marijuana is a "potential therapy that may mitigate suffering" in patients and "enhance quality of life." 35 P.S. § 10231.102(1). To protect the interests of such patients, the MMA broadly prohibits any form of punishment for the lawful use of medical marijuana. § 10231.2103(a). As a result, the MMA unambiguously dictates patients may not 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 immunity from penalty extends to individuals subject to supervision by the LCPSD. There is no provision in the MMA or other state law exempting *any* state, county, municipal, judicial, or other local agency or entity from following its requirements. *Id.* To the contrary, the legislature by necessity *included* parolees and probationers within the definition of a lawful medical marijuana patient when it chose to *exclude* certain other classes of persons

under the Act. § 10231.103.[10] The MMA only prohibits use or possession of medical marijuana "in a State or county correctional facility," including one "which houses inmates serving a portion of their sentences on parole." § 10231.1309(2). This would be redundant if the MMA's protections did not already to extend to all parolees. *See Commonwealth v. Dickson*, 918 A.2d 95, 106 (Pa. 2007) (rejecting commonwealth's interpretation of statute because it would render other terms within the statute "redundant").

The Court should reject an interpretation ignoring any part of the MMA or rendering any part of the MMA superfluous. *See, e.g., Bayview Loan Servicing, LLC v. Lindsay*, 185 A.3d 307, 313 (Pa. 2018) (court must read and give effect to the entire statute; no provision may be deemed superfluous). There would be no need to enact a specific provision excepting the use of medical marijuana by patients in facilities that serve parolees from the protections of the MMA unless all parolees are, as a class, protected from penalty for medical marijuana use under the law. *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

[10] *See* 35 P.S. § 10231.510 (excluding workers handling certain chemicals, high-voltage equipment, miners, and other public safety employees from MMA's protections).

concludes that the Act applies to those individuals just as it applies to any other person.").

Courts in other states with nearly identical medical marijuana acts have reached the same conclusion.[11] Notably, the Arizona Supreme Court analyzed this issue under a nearly-identical statute, the Arizona Medical Marijuana Act ("AMMA"). The court held that while incarcerated persons are explicitly excluded from the AMMA's protections for medical marijuana patients, there exists no such exclusion for patients on probation, as in Pennsylvania's MMA as well. *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 139 (Ariz. 2015). Thus, the court held revoking probation for medical marijuana use was illegal. *Id.* Pennsylvania legislators modeled much of the MMA on Arizona's AMMA.

The District's Policy is also inconsistent with current federal law and drug policy enforcement efforts. In December 2014, Congress adopted the Rohrabacher Amendment, preventing the Department of Justice ("DOJ") from using funds appropriated by Congress to thwart states' implementation of "laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[12] Federal

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[11] *See Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 139 (Ariz. 2015) (concluding probationers are not excluded from medical marijuana law); *see also State v. Nelson*, 195 P.3d 826, 833 (Mont. 2008).

[12] *See* Karen Rubin and Renee Zaystev, *Lawyers Can Represent Cannabis Clients and Still Comply With State Rules, NY Ethics Opinion Says*, Thompson Hine LLP (Dec. 13, 2019), https://www.thelawforlawyerstoday.com/.

courts have held employees at companies in the marijuana business are entitled to protection under federal employment laws.[13]

The MMA expressly prohibits penalizing patients for using medical marijuana while under the supervision of LCPSD. The District's Policy violates this prohibition and thwarts the will and legislative authority of the General Assembly, unlawfully superseding the MMA's broad protections for medical marijuana patients. Accordingly, any punishment imposed under the Policy is an illegal sentence and its enforcement should be permanently enjoined.

IV. Ample Evidence Supports the Benefits of Cannabis in Treating the Enumerated Health Conditions in the Medical Marijuana Act.

By implicitly overruling the legislature's judgment on this issue, the Policy rejects growing scientific and medical evidence supporting the benefits of medical marijuana (commonly referred to as "cannabis" in the scientific community). As the General Assembly explained, "scientific evidence suggests that cannabis is one potential therapy that may mitigate suffering in some patients and also enhance quality of life." 35 P.S. § 10231.102(1).

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[13] *See Kenney v. Helix TCS, Inc.*, 939 F.3d 1106, 1113 (10th Cir. 2019); *see also Hager v. M&K Constr.*, No. A-0102-18T3, 2020 N.J. Super. LEXIS 4 at *29-30 (N.J. Super. Ct. Jan. 13, 2020); *see also* Vin Gurrieri, *Federal Wage Law Covers Cannabis Workers, 10th Cir. Says*, LAW360, https://www.law360.com/articles/1201280/federal-wage-law-covers-cannabis-workers-10th-circ-says.

Yet the District does not address the serious, consequential, and demonstrable harm caused *by penalizing* patients. Rather, it expresses concern for the potential harm caused by *not penalizing* patients under the Office's supervision. While the risks associated with *not penalizing* all patients are pondered by the District vaguely and theoretically, the real life risks of *penalizing* these patients are very real and have already come to pass. For example, Petitioner Melissa Gass suffered six to seven seizures a day after adhering to the threats of her probation officer and discontinuing her cannabis treatment. *See* Supreme Court Brief of Petitioners, p. 9.

Ms. Gass is not an isolated patient who happens to benefit from cannabis use. To the contrary, the District's reasoning is rejected and rebutted by extensive medical research and literature in the field. The District has explained that it considered a "review of research and acknowledgment that the Food and Drug Administration ("FDA") does not recognize medicinal cannabis as a treatment for medical conditions."[14] *See* 52nd Judicial District Answer to Petitioners'

[14] The FDA's assessment of the medical value of cannabis has no bearing on the probation department's lack of authority to prevent implementation of the MMA for a certain class of individuals. Regardless, the District's assertion that the FDA "does not recognize medicinal cannabis as a treatment for medical conditions" is misleading. Nearly thirty years ago, the FDA approved Marinol, a drug containing a synthetic form of the cannabis ingredient tetrahydrocannabinol ("THC"). Janet Joy and Alison Mack, *Marijuana as Medicine? The Science Beyond the Controversy*, 144 Nat'l Academy of Sciences (2000). The FDA recently approved Epidiolex, containing cannabis chemicals, used for the treatment of patients with Dravet's syndrome. *FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy*, UNITED STATES FOOD & DRUG

Application for Special Relief in the Nature of a Preliminary Injunction (hereinafter "Answer"), p. 2. The District has not disclosed any actual research results, likely because the common misperception that cannabis is not a valid medical treatment option – even amongst well-meaning public officials – has been debunked by various clinical studies and trials.

The medical research demonstrates cannabis alleviates symptoms for patients suffering from a wide-range of serious conditions including many enumerated in the MMA, such as cancer, epilepsy, AIDS, and glaucoma.[15] For many patients, cannabis is the only safe and effective form of treatment or pain management.[16] Clinical trial testing and research shows cannabis's potential to help patients manage pain and harmful side-effects associated with various serious medical conditions. For the many Pennsylvanians suffering from at least one of the qualifying conditions under the MMA, cannabis may offer valuable relief.[17] For example, while 400,000 Pennsylvanians have Alzheimer's disease and 110,000

ADMINISTRATION (June 25, 2018), https://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms.

[15] *Medical Marijuana*, THE DRUG POLICY ALLIANCE, http://www.drugpolicy.org/issues/medical-marijuana (last visited Dec. 18, 2019).

[16] *Id.*

[17] *See Washington v. Barr*, 925 F.3d 109, 120 (2d Cir. 2019) (recognizing potential "transformative effects" of medical cannabis).

have epilepsy, only 220,000 Pennsylvanians hold medicinal marijuana cards. A close examination of these and other covered conditions demonstrates the medical value of cannabis recognized by the General Assembly, but ignored by the District.

a. Medical Cannabis is an Effective Treatment Method for Patients Suffering from Epilepsy and Seizures.

Cannabis is a promising treatment course for seizure patients with little other prescription medication options. A component of cannabis, cannabidiol ("CBD"), is an effective adjunctive treatment for rare pediatric seizures and shows promise as an adjunctive more broadly for seizure control.[18] One such disorder is Dravet's syndrome, "a complex childhood epilepsy disorder associated with drug-resistant seizures and a high mortality rate."[19] Patients with Dravet's syndrome face "limited" treatment options, and a high risk of death from various complications including "SUDEP (Sudden Unexpected Death in Epilepsy), prolonged seizures,

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[18] R. Mechoulam, *Toward Drugs Derived from Cannabis*, 65 The Science of Nature 174-179 (1978), https://theroc.us/researchlibrary/Toward%20Drugs%20Derived%20from%20Cannabis.pdf; E.A. Carlini, Jomar M. Cunha, Aparecido E. Pereira, et al., *Chronic Administration of Cannabidiol to Healthy Volunteers and Epileptic Patients*, 21 Pharmacology 175-185 (1980), https://pdfs.semanticscholar.org/2775/1edbac24dd0134645a08e101457202816fc2.pdf?_ga=2.79475415.231897877.1577977606-1842353204.1577977606.

[19] J. Helen Cross and Orrin Devinsky, *Trial of Cannibidiol for Drug-Resistant Seizures in the Dravet Syndrome*, THE NEW ENGLAND JOURNAL OF MEDICINE (May 25, 2017), https://www.nejm.org/doi/10.1056/NEJMoa1611618?url_ver=Z39.88-2003&rfr_id=ori%3Arid%3Acrossref.org&rfr_dat=cr_pub%3Dwww.ncbi.nlm.nih.gov (hereinafter, "Cross and Devinsky").

seizure-related accidents such as drowning, and infections."[20] A multinational study of children and young adults with Dravet's syndrome measured the effectiveness of CBD on treating patients with Dravet's syndrome. The study found the "median frequency of convulsive seizures per month decreased from 12.4 to 5.9 with CBD."[21] Overall condition improved in 62 percent of patients and 5 percent of patients became entirely seizure-free.[22]

Similarly, Lennox-Gastaut syndrome is a "severe form of epileptic encephalopathy" that is "frequently resistant to available medications."[23] A study supplied by GW Pharmaceuticals measured the effectiveness of CBD in treating patients with the drug-resistant disorder in the United States, Netherlands, and Poland. The study found patients given the cannabis-derived chemical experienced a 43.9 percent reduction in monthly seizure frequency.[24] A similar study of CBD's

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[20] *What Is Dravet Syndrome?*, DRAVET SYNDROME FOUNDATION, https://www.dravetfoundation.org/what-is-dravet-syndrome/ (last visited Dec. 18, 2019).

[21] Cross and Devinsky.

[22] *Id.*

[23] Selim R. Benbadis, et al., *Cannabidiol in patients with seizures associated with Lennox-Gastaut syndrome (GWPCARE4)*, THE LANCET (Jan. 24, 2018), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)30136-3/fulltext.

[24] *Id.*

effect on treating patients with Lennox-Gastaut syndrome found patients experienced a 41.9 percent reduction in seizure frequency.[25]

b. Medical Cannabis is an Effective Treatment Method for Certain Patients Suffering From Cancer, Multiple Sclerosis, PTSD, and Other Disorders

A report from The National Academies of Sciences, Engineering, and Medicine determined there is "conclusive or substantial evidence" that cannabis is effective for the treatment of "chronic pain in adults," "chemotherapy-induced nausea and vomiting," and "multiple sclerosis spasticity symptoms."[26] The report also determined there is "moderate evidence" that cannabis is effective treatment for "sleep disturbance... associated with obstructive sleep apnea syndrome, fibromyalgia, chronic pain, and multiple sclerosis."[27] Similarly, patient trials and

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[25] Orrin Devinsky and Anup D. Patel, *Effect of Cannabidiol on Drop Seizures in the Lennox-Gastaut Syndrome*, THE NEW ENGLAND JOURNAL OF MEDICINE (May 17, 2018), https://www.nejm.org/doi/10.1056/NEJMoa1714631?url_ver=Z39.88-2003&rfr_id=ori:rid:crossref.org&rfr_dat=cr_pub%3dwww.ncbi.nlm.nih.gov.

[26] NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS, at 119 (Washington, DC: The National Academics Press 2017); *see also* Michelle S. Arbus, et al., *Benefit of Tetrahydrocannabinol versus Cannabidiol for Common Palliative Care Symptoms*, 22 JOURNAL OF PALLATIVE MEDICINE, 1180, 1180 (2019) (noting "growing evidence to support the benefits for medical cannabis for a variety of symptoms" and that "[r]ecent reviews and meta-analyses have pointed to benefits for pain, nausea, anorexia, spasticity, and several other symptoms").

[27] *Id.*

studies confirm that cannabis is an effective treatment method for reducing chemotherapy-induced nausea and vomiting experienced by cancer patients.[28]

Some patients with MS rely on the benefits of cannabis treatment. MS patients commonly suffer from spasticity, which "refers to feelings of stiffness and a wide range of involuntarily muscle spasms" such as "sustained muscle contractions or sudden movements."[29] Spasticity may cause pain and tightness around the joints, as well as in the lower back.[30] There is "substantial evidence" that cannabis is an "effective treatment for improving patient-reported multiple sclerosis spasticity symptoms."[31]

Cannabis also offers promising treatment benefits for military veterans suffering from PTSD and chronic pain.[32] A study conducted on Canadian male military personnel afflicted with PTSD showed cannabis improved "general well-

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[28] *Id.* at 92.

[29] *Spasticity*, NATIONAL MULTIPLE SCLEROSIS SOCIETY, https://www.nationalmssociety.org/Symptoms-Diagnosis/MS-Symptoms/Spasticity (last visited Dec. 19, 2019).

[30] *Id.*

[31] NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS, at 98-99 (Washington, DC: The National Academies Press 2017).

[32] *Id.* at 116; S. 445, 116th Cong. § 2 (2019).

being" and "global clinical state" in patients.[33] Patients also experienced a decrease in nightmares while using cannabis.[34] Nearly 20 percent of United States veterans returning from Iraq and Afghanistan suffer from PTSD, and 60 percent suffer from chronic pain.[35] For these veterans, cannabis "may serve as a less harmful alternative to opioids."[36] Such principles may be extended to other patients – Petitioner Ashley Bennett suffers from PTSD as a result of childhood trauma.

c. Medical Cannabis Offers a Safer Alternative to Prescription Opioids in this Current Addiction Crisis

The military research on cannabis safety is critical to Pennsylvania, one of many states where the national opioid epidemic is serious and widespread. Federal government studies show that in 2017, 57.7 opioid prescriptions were written for every 100 Pennsylvanians, and one in four of these patients develop an opioid addiction – including patients such as Petitioner Andrew Koch, who became addicted to opioids while in the hospital following a car accident.[37] Put differently,

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[33] NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS, at 116 (Washington, DC: The National Academies Press? 2017).
[34] *Id.*

[35] S. 445, 116th Cong. § 2 (2019).

[36] *Id.*

[37] *Pennsylvania Opioid Summary*, NATIONAL INSTITUTE ON DRUG ABUSE (May 2019), https://www.drugabuse.gov/opioid-summaries-by-state/pennsylvania-opioid-summary; *Prescription Opioids*, CENTERS FOR DISEASE CONTROL AND PREVENTION,

opioid prescriptions still lead to 14 addictions for every 100 Pennsylvanians. Even those who do not develop addictions from opioid use still face grave dangers from accidental misuse and fluctuating tolerance to the painkillers.[38]

Approximately 800 Pennsylvanians die from opioid overdoses each month, and Pennsylvanians make approximately 20,000 Emergency Room visits annually for opioid overdoses.[39] A study through the National Institute of Health showed that 66 percent of all drug deaths in the United States are opioid-related.[40] As such, "physicians are considering tapering the opioid regimens for many of their chronic pain patients, using a patient-centered approach."[41] On average, the states

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https://www.cdc.gov/drugoverdose/opioids/prescribed.html (last visited Dec. 23, 2019); *see also* Declarations of Petitioners at 13.

[38] Marie McCullough, *Cancer Patients Shunning Opioids*, PHILADELPHIA INQUIRER, Dec. 23, 2019, at A2.

[39] *Pennsylvania Quick Stats*, OPENDATAPA, https://data.pa.gov/stories/s/9q45-nckt/

[40] Tamara M. Haegerich, et al., *Quantifying the Epidemic of Prescription Opioid Overdose Deaths*, 108(4) Am. J. Public Health 500, 500 (Apr. 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5844400/.

[41] Kevin Rod, *A Pilot Study of a Medical Cannabis - Opioid Reduction Program*, AMERICAN JOURNAL OF PSYCHIATRY AND NEUROSCIENCE (Sept. 20, 2019), file:///C:/Users/rkelly/Downloads/10.11648.j.ajpn.20190703.14.pdf. Vol. 7, No. 3, 2019, pp. 74-77; *see also* Andrew Davis, et al., *Reduction of Benzodiazepine Use in Patients Prescribed Medical Cannabis*, 4 CANNABIS AND CANNABINOID RESEARCH, 214, 214 (2019) (finding medical marijuana treatment allowed patients to discontinue use of benzodiapzepines, "a class of medication with sedative properties, commonly used for anxiety and other neurological conditions" that "are associated with several well-known adverse effects"); Melissa M. Goggin, et al., *Reduced Urinary Opioid Levels from Pain Management Patients Associated with Marijuana Use*, 9(5) PAIN MANAGEMENT, 441–447 (Sept. 9, 2019) (research study finding "[f]or each of the opioids investigated …, marijuana use was associated

where medicinal cannabis is legal have an annual opioid overdose mortality rate 24.8 percent lower than states where medicinal cannabis is prohibited.[42] The MMA should similarly help Pennsylvania counteract the opioid crisis.

A study reported in the Journal of Clinical Oncology provided thirty patients with stage IV cancer with three months of medical marijuana treatment.[43] The results showed cannabis's potential to both improve pain management in advanced cancer patients and to lower opioid requirements. Patients treated with cannabis under the study "achieved a reduction in opioid use and improved pain control." Another study examined the effectiveness of cannabis in treating six hundred patients. After six months, 55 percent of patients reduced their opioid use by an average of 30 percent, while 26 percent of patients stopped using opioids entirely.[44]

Medicinal cannabis is not just a safe alternative to opioids for many patients – it is an effective one. A study consisting of 28 random trials, 27 of which were

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with statistically significant lower urinary opiate levels than in samples without indicators of marijuana use").

[42] S. 445, 116th Cong. § 2 (2019).

[43] Tom Arneson, et al., *A Randomized Trial of Medical Cannabis (MC) in Patients With Advanced Cancer (AC) to Assess Impact on Opioid Use and Cancer-Related Symptoms*, JOURNAL OF CLINICAL ONCOLOGY (Nov. 25, 2019), https://ascopubs.org/doi/10.1200/JCO.2019.37.31_suppl.109.

[44] Kevin Rod, *A Pilot Study of a Medical Cannabis - Opioid Reduction Program*, AMERICAN JOURNAL OF PSYCHIATRY AND NEUROSCIENCE (Sept. 20, 2019), https://ascopubs.org/doi/10.1200/JCO.2019.37.31_suppl.109.

controlled, in 2,454 patients suffering from chronic, intractable pain found that cannabis "increase[d] the odds for improvement of pain by approximately 40 percent versus the control condition."[45] According to the National Academies of Sciences, Engineering, and Medicine, based on analysis of five separate studies, "[t]here is substantial evidence" that cannabis "is an effective treatment for chronic pain in adults."[46]

The foregoing is only a partial survey of pertinent medicinal cannabis literature, but the research all points in the same direction. Cannabis is as safe and effective – and often safer and more effective – than current medical treatments for the qualifying conditions of the MMA. The Generally Assembly agrees. 35 P.S. § 10231.102(1) ("medical marijuana is one potential therapy that may mitigate suffering in some patients and also enhance quality of life"). The District rightfully seeks to ensure public safety, but it cannot simply ignore the content of the medical literature, the General Assembly's statement of purpose and policy recognizing the medical value of cannabis, or the legislative requirements and prohibition on punishments already designed to balance patient needs with patient and public safety.

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[45] NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS, at 88 (Washington, DC: The National Academics Press 2017).

[46] *Id.*

V. In Light of the Ample Research Presented, the District's Policy Justifications are Unpersuasive

Lebanon County is not permitted to unilaterally adopt a policy contravening the MMA. Even if there were some legal basis for superseding state law, the policy justifications put forth by the District are not persuasive and would not warrant a departure from the Commonwealth's public policy favoring access.

The General Assembly adopted the MMA to, *inter alia*, "[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(3)(i). Contravening that policy, the 52nd Judicial District adopted overbroad rules prohibiting those under the supervision of its Probation Services Office from using medical marijuana.[47] There is no mention of patient needs in the Policy. Instead, the District reportedly "promulgated the Policy after the LSPCD began to experience a disruption in probation services and persistent difficulty in supervising probationers and parolees who use medical marijuana." (Answer, p. 2). The District characterizes the Policy as "a careful balance between safety concerns for the community and the fact that providers of substance abuse treatment will not treat anyone with a medical marijuana card due to the risk of relapse." (Answer, p. 14).

[47] The Medical Marijuana Policy, No. 5.1-2019 & 7.24-2019.

Safety and relapse are worthwhile goals in theory, but they are not magic words under which policies may be adopted in contravention of state law. The "safety concerns for the community" remain vague and unsupported even at this late stage, and the Policy is overbroad in its application to *all* supervisees. *Id.* Indeed, the District concedes that some supervisees have complied fully with the law, and instead falls back on the contention that "*some* individuals under court supervision with medical marijuana prescriptions are unable to identify the health condition that led to the medical marijuana prescription." *Id.* (emphasis added and brackets omitted).

While the District's Answer justified its Policy due to unspecified problems with "some individuals," it failed to offer specific examples for the Court to evaluate the seriousness of the purported problem. (Answer, p. 4.). Instead, it appears the District avoided any analysis or examination of individual patient needs or safety by pronouncing that <u>all</u> patients under court supervision must face a violation hearing, regardless of their circumstances or responsible use.[48]

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[48] There are ample alternative solutions to addressing individual patient management and accommodations, as many Pennsylvania employers have shown after Pennsylvania courts have recognized a private right of action for patients to sue employers under the MMA for failing to conform to the Act's mandate. *E.g.*, *Palmiter v. Commonwealth* Health Systems, No. 19-CV-1315 at 2-3 (C.C.P. Lacka. Co. Nov. 22, 2019); *see also* 35 P.S. § 10231.2103(b) (prohibiting certain adverse employment actions based on medical marijuana status). Subsequently, employers have developed accommodation processes ensuring current and prospective employees are not penalized for lawful medical marijuana use-- so long as such use does not "impact their ability to safely and effectively perform their jobs." Judy Greenwald, *Medical Marijuana Trend Means Growing Discrimination Exposures*, BUSINESS INSURANCE (Dec. 10,

The District further rationalizes the Policy by expressing a concern that some medical marijuana users were placed under court supervision for the illegal use of marijuana. Specifically, in its Answer – but not the Policy itself – the District justified the Policy because "a significant amount of individuals under supervision, who possess a medical marijuana card...have a history of marijuana abuse and/or their underlying charges are related to the unlawful possession of marijuana." *Id.* This logic is flawed. If such a person is now a lawfully-certified medical marijuana patient, it is possible, if not probable, that the earlier marijuana use prior to the MMA's passage was for self-medication purposes. This is the predicament Petitioners Ashley Bennett and Andrew Koch faced, when they turned to marijuana for self-medication purposes after traditional treatments failed them, only to later be arrested for marijuana possession. (Declarations of Petitioners, at 10 and 14).

Moreover, under the authority granted by the General Assembly, it is the Department's prerogative to decide to what extent a medical marijuana patient's drug use or criminal history factors into their decision to issue an identification card. The state judicial districts cannot override that authority. Similarly, the District has offered no justification for departing from the clear position of the

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2019), https://www.businessinsurance.com/article/20191210/NEWS06/912332111/Medical-marijuana-trend-means-growing-discrimination-exposures.

Pennsylvania Board of Probation and Parole ("Board").[49] The Board, in a memo to all state parole supervision staff instructed, "[i]f the parolee has a prescription for medical marijuana, we would treat it exactly as we would treat any other prescription."[50]

The District's policy tends to undermine the effective operation of parole and probation systems throughout the Commonwealth. The Parole Board is tasked with ensuring parolees and parole candidates are "accurately and consistently evaluated for their readiness to parole to enhance public safety."[51] The District's across the board policy mandating that patients stop using an effective medication for their physical and mental health conditions impedes the Parole Board's mission of enhancing public safety.

In sum, the purported justifications behind the 52nd Judicial District's Policy are unsupported and unwarranted, and serve as further support for Petitioners' request to enjoin its enforcement.

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[49] Pennsylvania Board of Probation and Parole: Agency Open Records Office Statement (Oct. 24, 2019) (https://tribwpmt.files.wordpress.com/2019/10/pa-board-of-probation-1.pdf)

[50] *Id.* Other jurisdictions, such as New York City, where recreational marijuana use remains illicit, have nevertheless banned marijuana testing of persons on probation. Colorado has also prevented courts from prohibiting "the possession or use of medical marijuana" as a condition of probation. C.R.S. § 18-1.3-204(2)(a)(VIII).

[51] *Making Parole Decisions*, THE PENNSYLVANIA BOARD OF PROBATION AND PAROLE, https://www.pbpp.pa.gov/About%20PBPP/Pages/default.aspx (last visited Dec. 26, 2019).

VI. The Policy Unnecessarily Impedes Critical Chapter 20 Research

Among other goals, the MMA legalized the controlled distribution and use of medical marijuana to allow medical and policy experts to study medical marijuana to determine the effectiveness of the current law. 35 P.S. § 10231.2000(b). As a result, the District's policy prohibiting medical marijuana use by parolees and others not only denies qualified patients the medicine they need, it interferes with potentially ground-breaking, peer-reviewed medical research by recognized and approved institutions supported and enabled by bi-partisan legislation in this Commonwealth.

Three ACRCs are currently affiliated with provisionally permitted Clinical Registrants: the Drexel University College of Medicine, Penn State College of Medicine, and Sidney Kimmel Medical College at Thomas Jefferson University.[52] The MMA established a statewide system for furthering medical marijuana research by these entities, but the system will not work if the research programs cannot be filled with qualified patients who meet the study criteria *and* remain available for the duration of the study. Many individuals under court supervision with qualifying medical conditions could be excluded despite qualifying for (and benefitting from)[53] these research studies, particularly those studies focusing on

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[52] *See Clinical Research (Chapter 20)*, Pennsylvania Department of Health, https://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/Research.aspx (last visited January 6, 2020).

[53] Qualified patients who participate in the research studies receive their medication at no cost.

opioid use disorder, PTSD and epilepsy like Petitioners here. 35 P.S. § 10231.2002.

The ACRCs and affiliated Clinical Registrants should not potentially risk study disruption or incompletion due to withdrawal of research study participants impacted by the Policy or similar exclusions adopted in other judicial districts. The result may well be an exclusion of all parolees from participating in all research studies – a harsh result inconsistent with the salutary purposes of Chapter 20. Indeed, the District's Policy would effectively preclude the ACRCs and CRs from studying the impact of medical marijuana laws on patients like two of the Petitioners whose pre-MMA self-medication played a role in their incarceration.

CONCLUSION

Amici ask the Court to return discretion as to a patient's suitability to medical marijuana treatment to the medical professionals, as the General Assembly intended when it enacted the MMA. The 52nd Judicial District's restrictive Policy concerning registered medical marijuana patients who are on probation or parole must be brought into compliance with the statutory framework established by the Pennsylvania legislature in the MMA through Act 16, and with the regulations promulgated thereunder by the Department of Health. The health and treatment regimen of patients qualified under the Act for access to medical marijuana due to an approved medical condition as certified by a registered physician should not be

compromised by a local court rule. There are no special extenuating circumstances warranting a departure from that view. Accordingly, the 52nd Judicial District's Policy denying medical marijuana to qualified patients on parole violates clear state law and must be vacated.

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CERTIFICATE OF COMPLIANCE WITH PENNSYLVNIA RULE OF APPELLATE PROCEDURE 2135(a)(1)

This brief complies with the word count limits of Pa. R. App. P. 2135(a)(1) because, according to the word processing software used to prepare this brief, it contains less than 7,000 words.

Dated: January 28, 2020

By: */s/ Thomas G. Wilkinson*

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 28, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January 2020, the foregoing Brief of Amici Curiae in Support of Petitioners was served via the PACFile and via electronic mail upon the following counsel of record noted below in a manner that satisfies the requirements of Pa. R. App. P. 121:

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