THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 574 MD 2019

MELISSA GASS, ASHLEY BENNETT, and ANDREW KOCH,

Petitioners,

v.

52nd JUDICIAL DISTRICT, LEBANON COUNTY,

Respondent.

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

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

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

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 of 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. Its intent is to balance 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 form of court supervision. The Act's plain language thus prohibits the courts of this Commonwealth, including the 52nd Judicial District, from imposing any penalty on individuals authorized to use medical marijuana under the law, including individuals subject to court supervision.

The 52nd Judicial District, however, 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." Petitioners are all individuals under supervision by the Lebanon County Probation Services Department ("LCPSD") who use medical marijuana in accordance with the MMA to alleviate serious health conditions. Petitioners have been told by their probation officers that LCPSD will report to the court that they have violated the terms of

their supervision if they continue to use medical marijuana and that the court will revoke their probation and order them incarcerated.

Petitioners thus seek relief from this Court in the form of a declaratory judgment that the Medical Marijuana Act bars the 52nd Judicial District from enforcing any supervision conditions that require individuals to abstain from the lawful use of medical marijuana under state law. Petitioners also ask this Court to preliminarily enjoin the 52nd Judicial District, including the Court of Common Pleas and the LCPSD, from taking any adverse action, including the denial or revocation of probation, against individuals solely for using medical marijuana in accordance with state law.

II. FACTS

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.

Petitioners Melissa Gass, Ashley Bennett, and Andrew Koch are qualified medical marijuana patients under the MMA. Each petitioner has received a certification from an approved practitioner that he or she suffers from one of the serious medical conditions specified by the Act and possesses a valid identification card issued by the Department of Public Health. *See* Declaration of Melissa Gass ("Gass Decl."), ¶¶ 3-6, 11; Declaration of Ashley Bennett ("Bennett Decl."), ¶¶ 4-

6, 11; Declaration of Andrew Koch ("Koch Decl."), ¶¶3, 8. Each petitioner is also on probation and is subject to the supervision of the LCPSD. *See* Gass Decl. ¶ 9; Bennett Decl. ¶ 10; Koch Decl. ¶ 7. The Policy adopted by the 52nd Judicial District adversely affects the petitioners. Petition for Review ¶¶ 64-66. Although 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. The Policy provided affected individuals 30 days to discontinue use. *Id.* There are no exceptions to the Policy. Petition for Review ¶ 65.

Petitioner Melissa Gass developed epilepsy following a car accident when she was 10. Gass Decl., ¶ 4. The epilepsy causes her to experience life-threatening grand mal seizures. *Id.* These seizures can occur multiple times in a single day. *Id.* Ms. Gass also suffers from post-traumatic stress disorder. *Id.* ¶ 6. In February 2019, Ms. Gass applied for and received a medical marijuana card. *Id.* ¶ 11. 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. 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.* ¶ 12. 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. As a result, Ms. Gass immediately stopped using the medical marijuana oil and suffered twenty seizures over the next two weeks. *Id.* Ms. Gass has since resumed using medical marijuana oil, risking revocation of her probation. *Id.*¶ 18.

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. After conventional medical treatments failed to improve her condition, Ms. Bennett began using marijuana to alleviate her symptoms. *Id.* ¶¶ 7-9. She obtained a medical marijuana card in May 2019. *Id.* ¶ 11. Ms. Bennet has found substantial relief from her symptoms from using medical marijuana and no longer uses prescription medications for her mental and physical health conditions. *Id.* ¶ 9. 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. As a result, Ms. Bennet stopped using medical

marijuana, which has caused her physical and mental health to deteriorate. *Id.* ¶¶ 14-15. Since ceasing medical marijuana, Ms. Bennet has lost fifteen pounds, has suffered from nausea and exhaustion, and is contemplating resuming medication for her PTSD despite her concern that the medication will cause her to harm herself—as it did when she used it previously. *Id.* ¶¶ 16-17.

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. He began using marijuana to control his pain because he feared becoming addicted to opioids. *Id.* ¶¶ 5-6. Mr. Koch obtained a medical marijuana card in October 2018. *Id.* ¶ 8. 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. As a result, Mr. Koch stopped using medical marijuana. *Id.* Since then, Mr. Koch has experienced pain so severe that he has considered obtaining a prescription for opioids despite the risk of addiction. *Id.* ¶ 10.

III. ARGUMENT

Pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), this Court may order special relief, including a preliminary or special injunction "in the interest of justice and consistent with the usages and principles of law." The

purpose of a preliminary injunction is to "put and keep matters in the position in which they were before the improper conduct of the defendant commenced." *Hill v. Dep't of Corr.*, 992 A.2d 933, 936 (Pa. Commw. Ct. 2010) (quoting *Little Britain Twp. Appeal*, 651 A.2d 606, 611 (Pa. Commw. Ct. 1994).[1] A preliminary injunction is warranted if: (1) it is necessary to prevent immediate and irreparable harm; (2) petitioners are likely to prevail on the merits; (3) greater injury would result from refusing the injunction than from granting it, and granting it will not substantially harm other interested parties; (4) the injunction will not adversely affect the public interest; (5) the injunction will properly restore the parties to their status immediately prior to the issuance of the order; and (6) the injunction is reasonably suited to abate the offending activity. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). Petitioners satisfy each of these elements.

A. A Preliminary Injunction Is Necessary to Prevent Immediate and Irreparable Harm to Petitioners' Health.

Petitioners suffer from serious medical conditions that are alleviated by the use of medical marijuana. If the Policy is not enjoined, petitioners will be forced to choose between ceasing the use of medication that the legislature has said may

[1] The standard for obtaining a preliminary injunction under Rule 1532(a) is the same as that for a grant of a preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. *See Shenango Valley Ostepathic Hosp. v. Dep't of Health*, 451 A.2d 434, 441 (Pa. 1982).

mitigate suffering and enhance the quality of life for people with serious medical conditions or violating their terms of supervision, which could lead to arrest, detention, and even revocation of their probation. Either choice will result in immediate and irreparable harm to petitioners. *See Fischer v. Dep't of Pub. Welfare*, 439 A.2d 1172, 1174 (Pa. 1982) (acknowledging that denial of a medically necessary procedure was sufficient to show irreparable harm); *Chruby v. Dep't of Corr.*, 4 A.3d 764, 770 (Pa. Commw. Ct. 2010) (affirming *ex parte* preliminary injunction by trial court, which found denial of prisoner's medical need for dialysis constituted immediate and irreparable injury). *Am. Booksellers Ass'n, Inc. v. Rendell*, 481 A.2d 919, 928 (Pa. Super. Ct. 1984) (book distributors who either had to refrain from exercising their First Amendment rights or face arrest and prosecution under pornography statute demonstrated irreparable injury); *Cedarbrook Realty, Inc. v. Nahill*, 387 A.2d 127, 129 (Pa. Commw. Ct. 1978) (noting that individual's incarceration would constitute irreparable injury).

B. Petitioners Are Likely to Prevail on the Merits of Their Claim that the 52nd Judicial District Lacks Authority to Prohibit Medical Marijuana Use as a Condition of Court Supervision Because It Is Contrary to State Law.

To warrant relief, the party seeking an injunction is not required to "establish his or her claim absolutely," but need only show that "substantial legal questions must be resolved to determine the rights of the respective parties." *Fischer*, 439 A.2d at 1174; *see also, e.g.*, *Ambrogi v. Reber*, 932 A.2d 969, 976 (Pa. Super Ct.

2007) ("[T]he party seeking an injunction is not required to prove that he will prevail on his theory of liability, but only that there are substantial legal questions that the trial court must resolve to determine the rights of the parties.").

In this case, petitioners ask this Court to determine whether the MMA prohibits courts from imposing terms of supervision that subject medical marijuana patients to threat of arrest, detention, and denial or revocation of probation. This is an issue of first impression in this Court and affects not just petitioners and others similarly situated in Lebanon County, but also medical marijuana patients under court supervision in many other counties in Pennsylvania.[2] Issues of first impression have consistently been found to qualify as substantial legal questions. *See, e.g.*, *Fischer*, 439 A.2d at 1175 (question of whether Act 239, which prevented expenditure of public funds on performance of abortion, violated federal and state constitutions was "without question" substantive legal question); *Walter v. Stacy*, 837 A.2d 1205, 1209 (Pa. Super. Ct. 2003) (finding substantial legal questions existed where litigant attempted to hold wife of murderer liable for his conduct under a theory of negligence); *Chmura v. Deegan*, 581 A.2d 592, 593 (Pa. Super. Ct. 1990) (finding substantial legal questions existed when it was unresolved whether computer designs were protected as trade secrets); *T.W.*

[2] At the time of this filing, counsel for petitioners are aware of at least seven counties that prohibit individuals under court supervision from using medical marijuana: Elk, Forest, Indiana, Lebanon, Lycoming, Northampton, Northumberland, and Potter Counties.

Philips Gas & Oil Co. v. Peoples Natural Gas Co., 492 A.2d 776, 781 (Pa. Commw. Ct. 1985) (finding questions of service territory rights to be substantial).

In addition to raising a substantial legal question, petitioners are likely to succeed on the merits of their claims. The 52nd Judicial District exceeded its authority under state law when it adopted a policy barring all qualified patients from using medical marijuana while subject to the supervision of the LCPSD. 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. 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). The MMA's intent is clear and unambiguous, so this Court need not "look beyond the

statutory language to ascertain its meaning." *Mohamed v. Dep't of Transp.*, 40 A.3d 1186, 1193 (Pa. 2012).

A core component of the MMA is its broad protection for patients from any form of punishment, or the denial of rights or privileges, stemming from their use of medical marijuana. 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 penalty. *Id*. In addition, a medical marijuana patient cannot be denied *any* right or privilege for using medical marijuana pursuant to the MMA.[3]

Although the MMA does not directly address individuals on probation, the absence of an explicit exception to the general standards means that state and local governments in Pennsylvania cannot punish or deny any right or privilege to medical marijuana patients simply because they are on probation or otherwise

[3] 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).

under court supervision.[4] The language of the MMA suggests that the General Assembly intended that individuals under court supervision be permitted to use medical marijuana. In the portion of the MMA that addresses the use of medical marijuana in certain locations, it explicitly prohibits such use in any correctional institution, including one "which houses inmates serving a portion of their sentences on parole." 35 P.S. § 10231.1309(2). If the General Assembly intended to prohibit all parolees from using medical marijuana, there would be no need for a separate exception to prohibit its use by patients in facilities that serve parolees, as those individuals would be barred from using medical marijuana regardless of their location.

The fact that the MMA excludes certain individuals from the law's protections demonstrates that the General Assembly intended the MMA to include all those not explicitly excluded, a conclusion reached by a federal court in Pennsylvania. *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

[4] 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.

applies to any other.") (internal citation omitted). 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). Nothing in the law addresses whether individuals under court supervision are eligible to use medical marijuana, so it follows that the General Assembly did not intend to prohibit these individuals from using medical marijuana. When the Supreme Court of Arizona addressed the same issue under that state's nearly identical law, it easily concluded that its medical marijuana law "does not exclude probationers." *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 139 (Ariz. 2015).[5]

[5] 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. 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.

As a result, the Supreme Court of Arizona held 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—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." *Hoggatt*, 347 P.3d 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 Arizona Supreme Court's conclusion 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*.

The Montana Supreme Court similarly held that Montana's medical marijuana law protects the right of 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, like the Arizona and Montana statutes, 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.3d 380, 381 (Pa. Super. Ct. 1973) (en banc) (describing the "privilege of probation").[6] If

[6] 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, sec. 14).

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.[7]

2. The Policy Prohibiting Qualified Patients from Using Medical Marijuana Violates the MMA.

Pennsylvania trial courts do not have discretion to impose any probation conditions they choose. Rather, they are limited by statute to a list of thirteen specific conditions and 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 P.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"). None of the specific

[7] 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 as well as the instant case. 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 as a condition of probation that defendants not commit another offense and noted that the Colorado law *does not contain language protecting medical marijuana patients from the denial of any right or privilege*. *Id.* at 505-06. 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 P.S. § 9754.

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.[8] Accordingly, the only possible statutory authorization for the Policy is in Section 9754(c)(13), which allows courts to impose conditions that are "reasonably related to the rehabilitation of the defendant." For that provision to apply, however, 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 § 9754 if they are not reasonably related to rehabilitating the offender from the offense for which he was convicted).

As an initial matter, there is no connection between 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

[8] 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 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 held that sentencing courts could not impose probation conditions that barred 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.

offense. It is also 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":

> A probation condition, even if it is not a violation of the criminal law, must be reasonably related to the crime of which the defendant was convicted or to future criminality. However, it ordinarily cannot be said that the treatment of an illness by lawful means is so related.

California v. Tilehkooh, 7 Cal. Rptr. 3d 226, 234 (Cal. Ct. App. 2003) (quotation omitted) (reversing probationer's violation for using medical marijuana because condition prohibiting use of medical marijuana was unlawful). Indeed, a federal court in Pennsylvania refused to prohibit or sanction a medical marijuana patient who used marijuana in violation of the terms of his supervised release because "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." *See United States v. Martin*, No. 2:09-cr-98 (W.D. Pa. April 24, 2019), slip. op. at 1 (Mem. Order).

The MMA recognizes that marijuana has medical benefits for individuals with certain serious medical conditions. Prohibiting individuals on probation from using medical marijuana is thus unlike a prohibition on other legal acts, such as the use of alcohol, because of the legislature's recognition that it is medically

necessary for some people. *Tilehkooh*, 7 Cal. Rptr. 3d at 237 (Morrison J., concurring). As the Montana Supreme Court explained, "[w]hen a qualifying patient uses medical marijuana in accordance with the MMA, 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.

What is more, the Pennsylvania Supreme 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 under § 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 Court cited the Statutory Construction Act in explaining how to resolve a clash between a general statutory provision and a special one:

> When a dispute implicates a general statutory provision and a special one, we note that the Statutory Construction Act directs that "the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail."

Id. at 743-44 (quoting 1 P.S. § 1933). The MMA was enacted after § 9754(c)(13), and as explained above, the legislature did not carve out an exception from its protections for individuals on probation or subject to court supervision. Revoking

a defendant's probation for using medical marijuana would thus be contrary to the MMA. And hence, the Statutory Construction Act directs that the MMA must prevail. Sentencing courts do not have authority to direct that a probation officer detain a medical marijuana patient for using marijuana consistent with the MMA. Nor do they have the power to revoke a medical marijuana patient's probation for using the drug. For that reason alone, the Policy should be enjoined.

By prohibiting people subject to court supervision from using medical marijuana, the 52nd Judicial District has illegally 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 the Court." *Nelson*, 195 P.3d at 833. As the Montana Supreme Court recognized, when determining whether a court may prohibit individuals on probation from using medical marijuana, the Court's "concern is solely with the plain language of the MMA and the sentencing authority" of the trial court. *Id*. Both principles of statutory construction and Section 9754(c)(13)'s requirement that probation conditions be reasonably related to the rehabilitation of the defendant constrain the 52nd Judicial District's authority to impose a condition of supervision that 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.

3. The Common Pleas Court Has No Authority 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 the prohibition on medical marijuana use by individuals subject to court supervision, that position flies in the face of Pennsylvania Supreme Court precedent, which 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," the Pennsylvania Supreme 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.* 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. 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.

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

i. 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.").

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

There is 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.[9] Congress' decision to bar the Department of Justice from using funds to interfere with state-level medical cannabis programs[10] 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 …

[9] 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. *Raich*, however, 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.

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

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. 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.[11] As the Montana court explained, 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

[11] 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 (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 (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").

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.

b. 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).

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.2d 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)). As a result of that appropriations rider, federal courts have 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 has concluded that "the rider applies to violations of supervised release." *Jackson*, 388 F. Supp. 3d at 512. According to the court, "[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." *Id.* at 513 (quoting *United States v. Samp*, No. 16-cr-20263, 2017 WL 1164453, at *2 (E.D. Mich. Mar. 29, 2017)). If federal courts cannot condition defendants' supervised release on abstaining from medical marijuana, there is no conceivable justification for state courts to prohibit qualified patients from using medical marijuana under the premise of following federal law. 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.

For all of the foregoing reasons, the 52nd Judicial District exceeded its authority by imposing a blanket condition prohibiting individuals subject to LCPSD supervision from using medical marijuana in a manner consistent with state law. This Court should enjoin the 52nd Judicial District and LCPSD from enforcing the Policy.

C. Greater Injury Would Result from Refusing to Enjoin the 52nd Judicial District's Enforcement of Its Illegal Policy than Granting the Requested Injunction.

Any potential injury to the 52nd Judicial District that might result from an injunction of its Policy, which would likely be largely symbolic, pales in comparison to the real injuries to petitioners' health and liberty if the policy is not enjoined. The 52nd Judicial District's interests in fashioning probation conditions is limited by statute, and that statute provides no authority for requiring compliance with federal law, much less a federal law that Congress has refused to appropriate funds to enforce and to which Pennsylvania and most other states have carved out exceptions for medical marijuana patients. The only possible interest that could support the District's Policy is its interest in rehabilitation, but for the reasons explained above, that interest is not furthered by the Policy. On the other hand, the

Policy is causing and will continue to cause severe harm to individuals who use marijuana to alleviate their serious medical conditions.

Absent an injunction, as detailed above, each of the petitioners and others in the class they seek to represent have suffered and will continue to suffer very real harms because of the Policy. Those under court supervision face an untenable choice: continue to abstain from the lawful use of medical marijuana, and suffer serious health consequences, or resume using medical marijuana and risk receiving a probation violation, having their probation revoked, and incarceration. Each of these outcomes constitutes an irreparable injury, and petitioners are already suffering serious physical and mental health injuries because they have discontinued medical marijuana use pursuant to the Policy.

On the other hand, with an injunction, the risk of any injury to the 52nd Judicial District is largely theoretical. The District wants individuals subject to its supervision to comply with federal law, but it remains completely unclear what harm, if any, the District was suffering prior to its adoption of the policy or what harm it might suffer if the policy is enjoined. Additionally, the General Assembly legalized the use of medical marijuana, and in doing so, explicitly chose to provide blanket immunization to patients from "arrest, prosecution or penalty in any manner, or [denial of] any right or privilege . . . solely for lawful use of medical marijuana." 35 P.S. § 10231.2103(a). The Policy is a direct violation of Section

10231.2103(a). To refuse an injunction here "would sanction the [Respondent]'s continued statutory violations" of the MMA, and be injurious to medical marijuana users under court supervision. *See Firearms Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1181 (Pa. Commw. Ct. 2016) (quoting *Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa. Commw. Ct. 2013)). The balance of the injuries thus overwhelmingly favors granting petitioners' injunction.

D. Enjoining the Policy Will Promote the Public's Interest by Ensuring that the Intent of the Legislature Is Followed.

Allowing the status quo to remain in place until a determination of the merits is made will not harm the 52nd Judicial District or the general public, but would prevent continued harm to the petitioners. *See City of Philadelphia v. Commonwealth*, 837 A.2d 591, 604 (Pa. Commw. Ct. 2003) (granting preliminary injunctive relief and noting that "the public interest lies in favor of maintaining the status quo" pending determination of the merits in the case). Furthermore, enjoining the Policy will promote the public interest. It will improve public health by allowing qualified patients to use medical marijuana to treat their serious medical conditions and reduce the number of people dependent on opioids. It will also ensure that the clear intent of the Pennsylvania General Assembly—to legalize marijuana for medicinal purposes and to immunize from legal consequence those who are participating in the medical marijuana program—is followed, thus vindicating the public interest.

Legislative power has been vested by the Commonwealth in the General Assembly under Article II, Section 1 of the Pennsylvania Constitution. Pa. Const., Art. 2, Sec. 1. The Medical Marijuana Act was passed in 2016 with the intent to "[p]rovide a program of access to medical marijuana which balances the needs of patients to have access to the latest treatments with the need to promote safety." 35 P.S. § 10231.102(3)(i). When legislating, the General Assembly may choose to give local governmental entities flexibility to enact local regulation. *See City of Philadelphia v. Clement & Muller, Inc.*, 715 A.2d 397, 398 (Pa. 1998) ("[T]he General Assembly may choose to leave a subject open to control by local governmental bodies . . . or local ordinances may be prohibited entirely."). In the Medical Marijuana Act, the General Assembly provided broad protections to patients, thereby depriving local governments of authority to arrest, prosecute, penalize, or deny any right of privilege to patients solely for the lawful use of medical marijuana. *See* 35 P.S. § 10231.2103(a). When a statute "proclaims a course of regulation and control which brooks no municipal intervention," local ordinances and policies to the contrary "die away as if they did not exist." *Dep't of Licenses & Inspections, Bd. of License & Inspection Review v. Weber*, 147 A.2d 326, 327 (Pa. 1959).

"[T]he public is best served by . . . respecting the power conferred by the electorate on the General Assembly." *Costa v. Cortes*, 143 A.3d 430, 442 (Pa.

Commw. Ct. 2016). Enjoining a local policy that contradicts the clear terms of legislative enactment does not jeopardize the public interest, but rather ensures that the public interest is properly respected.

E. The Injunction Will Restore the Parties to Their Status Prior to the Issuance of the Court of Common Pleas' Policy.

Petitioners' requested injunction "will properly restore the parties to their status as it existed prior to the alleged wrongful conduct." *Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28, 43 (Pa. Commw. Ct. 2009). "The status quo to be maintained is the last actual and lawful uncontested status, which preceded the pending controversy." *Id.*

The requested injunction seeks only to return to the status quo for individuals under court supervision before the Policy was announced on September 1, 2019. Prior to that date, petitioners were able to treat their physical and mental health disabilities through the lawful use of medical marijuana without risking potential probation violations, revocations, and incarcerations. None of the petitioners' probation officers raised any objections to their using medical marijuana prior to the new Policy. Enjoining the Policy will allow these individuals to access much-needed medication once again. Prior to the implementation of the Policy, petitioners were openly using medical marijuana while on probation, were forthcoming with their probation officers about their use, and provided them with copies of their medical marijuana cards. Maintaining the

status quo will not impose any hardship on the 52nd Judicial District, as it suffered no hardship when a subset of individuals under court supervision previously used medical marijuana. Thus, by enjoining the Policy, the requested injunction will properly restore the parties to the "last actual and lawful uncontested status." *Snyder*, 977 A.2d at 43.

F. Enjoining the 52nd Judicial District from Enforcing the Policy Is Reasonably Suited to the Petitioners' Interest in Being Allowed to Use Medical Marijuana in Accordance with State Law.

The requested injunctive relief is reasonably suited to abate the offending activity at issue: the continued operation of the Policy and the resulting physical and mental harm to petitioners and others. *See Snyder*, 977 A.2d at 48–49 (granting preliminary injunction noting that the injunction was a reasonable way to preventing the possibility of future harm). Enjoining the Policy will protect Petitioners and others from continued harm by allowing them to resume using medical marijuana without fear of receiving a probation violation, or worse, having their probation revoked and being incarcerated. It is "reasonably tailored" to abate the offending conduct of the 52nd Judicial District because it imposes no affirmative obligations on that entity and simply allows Petitioners to resume engaging in lawful behavior. *See SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 509 (Pa. 2014) (finding injunctive relief reasonably tailored where it instructed the Commonwealth to stop reducing the number state health centers,

cease reducing public health services, and affirmatively restore public health services). Petitioners have been lawfully using medical marijuana in accordance with the provisions of the MMA, having been certified by an authorized physician to do so.

An order enjoining enforcement of the Policy is the only way to prevent further, irreparable injury to petitioners, who only seek to continue their lawful use of medical marijuana while under court supervision without fear of arrest, detention, or revocation of their probation.

IV. CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that this Court preliminarily enjoin the 52nd Judicial District, including the Court of Common Pleas and the Lebanon County Probation Services Department, from enforcing the Medical Marijuana Policy against individuals subject to the supervision of the LCPSD who use medical marijuana in accordance with the Pennsylvania Medical Marijuana Act.

Dated: October 9, 2019

Respectfully submitted,

/s/ Sara J. Rose

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Callaghan v. Darlington Fabrics Corp.

Superior Court of Rhode Island, Providence

May 23, 2017, Filed

C.A. No. PC-2014-5680

Reporter
2017 R.I. Super. LEXIS 88 *

CHRISTINE CALLAGHAN, Plaintiff, v. DARLINGTON FABRICS CORPORATION and THE MOORE COMPANY, Defendants.

Core Terms

private right of action, the Hawkins-Slater Act, medical marijuana, cardholder, disability, general assembly, hire, preemption, rights, marijuana, workplace, cases, statutes, medical use of marijuana, cause of action, state law, drug test, provides, card, qualified individual, debilitating, accommodate, user, employment discrimination, medical condition, of the Hawkins-Slater Act, provisions, patient, reasonable accommodation, summary judgment motion

Counsel: **[*1]** For Plaintiff: Carly Beauvais Iafrate, Esq.

For Defendant: Timothy C. Cavazza, Esq.; Meghan E. Siket, Esq.

Judges: LICHT, J.

Opinion by: LICHT

Opinion

DECISION

"I get high with a little help from my friends"

—The Beatles, 1967

LICHT, J. Over fifty years ago, pop culture addressed the use of marijuana in our society. Within the past decade, the General Assembly legalized the use of medical marijuana, and it became lawful to sell Rocky Mountain High cannabis in Colorado. Last fall, the voters of our neighbor, Massachusetts, authorized the legal possession and sale of marijuana. Today, the debate rages in Rhode Island political circles over legalizing the recreational use of "pot." Until recently, Rhode Island courts have dealt with the subject solely from the perspective of the criminal law. However, our civil jurisprudence will undoubtedly face an onslaught of litigation concerning the lawful use of marijuana. A colleague recently analyzed the zoning law of a town to determine if growing marijuana is agriculture. *Carlson v. Zoning Bd. of Review of South Kingstown, No. WC-2014-0557, 2016 R.I. Super. LEXIS 134, 2016 WL 7035233 (R.I. Super. Nov. 25, 2016)*. We read of towns enacting zoning ordinances outlawing the cultivation of medical marijuana, which ordinances will most certainly be challenged. **[*2]** See, e.g., *Ter Beek v. City of Wyoming, 495 Mich. 1, 846 N.W.2d 531 (Mich. 2014)*.

While the legal use of marijuana, whether medicinal or recreational, makes for interesting political and philosophical discourse from law review articles to the dinner table, a Superior Court justice cannot participate in that debate. Consequently, this Court's challenge is limited to discerning the intent of the General Assembly in enacting the *Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act* (the Hawkins-Slater Act), *G.L. 1956 §§ 21-28.6-1 et seq.* To adequately perform its task, this Court must wade into the weeds of the law of private rights of action, federal preemption, and statutory interpretation. Hopefully, it will not write out of key or analyze out of tune.

Plaintiff Christine Callaghan (Plaintiff) has brought this action against Defendants Darlington Fabrics Corporation (Darlington) and the Moore Company (together, Defendants), alleging employment discrimination with respect to hiring for an internship position because she held a medical marijuana card. Defendants have moved for summary judgment on all three counts under *Superior Court Rules of Civil Procedure 56*; Plaintiff has filed a cross-motion for summary judgment on Counts I and III, and otherwise opposes Defendants' motion on Count II. For the reasons stated below, **[*3]** the Court grants Plaintiff's

cross-motion and denies the Defendants' motion.

I

Facts and Travel

Most of the facts in this case are undisputed. In June 2014, Plaintiff, then a Master's student studying textiles at the University of Rhode Island, sought an internship as a requirement of her program. Compl. ¶¶ 7, 11-12. Her professor referred her to Darlington, a division of the Moore Company. Compl. ¶¶ 4, 13. Plaintiff met with Darlington Human Resources Coordinator Karen McGrath on June 30, 2014. Defs.' Mem. 3. At this meeting, Plaintiff signed Darlington's Fitness for Duty Statement, acknowledging she would have to take a drug test prior to being hired. Id. at 3-4. During this meeting, Plaintiff also disclosed that she held a medical marijuana card, authorized by the Hawkins-Slater Act. Id. at 4. The interview concluded shortly thereafter.

On the morning of July 2, 2014, Ms. McGrath and a colleague, Ms. Linda Ann Morales, had a conference call with Plaintiff. Id. Ms. McGrath asked Plaintiff if she was currently using medical marijuana, to which Plaintiff responded affirmatively. Id. Plaintiff also indicated that as a result, she would test positive on her pre-employment drug screening. Id. Ms. McGrath responded **[*4]** by informing Plaintiff that a positive test would "prevent the Company from hiring her." Id. Plaintiff informed Ms. McGrath that she was allergic to many other painkillers and that she would neither use marijuana in or bring it to the workplace. Defs.' Answers to Interrog. 3.

That afternoon, Ms. McGrath and Ms. Morales called Plaintiff to inform her that Darlington was "unable to hire her." Defs.' Mem. 5. According to Darlington,

> "Because Ms. Callaghan put the Corporation on notice that she was currently using marijuana, would not stop using marijuana while employed by the Company, and could not pass the required pre-employment drug test, and thus could not comply with the Corporation's drug-free workplace policy, the Corporation did not hire her." Defs.' Answers to Interrog. 7.

Plaintiff filed a three-count complaint on November 12, 2014. Count I seeks a declaration that the "failure to hire a prospective employee based on his or her status as a medical marijuana card holder and user is a violation of the" Hawkins-Slater Act. Compl. ¶ 29. Counts II and III seek damages: Count II alleges Defendants' conduct violated the *Rhode Island Civil Rights Act (RICRA), G.L. 1956 §§ 42-112-1 et seq.*; Count III alleges violations **[*5]** of the Hawkins-Slater Act due to employment discrimination.

II

Standard of Review

"Summary judgment is 'a drastic remedy,' and a motion for summary judgment should be dealt with cautiously." *Estate of Giuliano v. Giuliano, 949 A.2d 386, 390 (R.I. 2008)* (citation omitted). On a motion for summary judgment, the movant must "establish that there exists no genuine dispute with respect to the material facts of the case." *Id. at 391*. This Court can grant summary judgment only if it concludes, "after viewing the evidence in the light most favorable to the nonmoving party, that there is no genuine issue of material fact to be decided and that the moving party is entitled to judgment as a matter of law." *Lacey v. Reitsma, 899 A.2d 455, 457 (R.I. 2006)*.

III

Analysis

Because Count I, the declaratory judgment request, and Count III, the Hawkins-Slater Act claim, both deal with the Hawkins-Slater Act, the Court will address those first. The Court deals with Count III initially as the reasoning therein informs the analysis of Count I. After those counts, the Court will move to Count II, the RICRA claim.

A

Count III: Employment Discrimination under the Hawkins-Slater Act

First, the Court must determine whether the Hawkins-Slater Act provides a private right of action through which Plaintiff can seek relief. *Section 21-28.6-4(d)*[1] of

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[1] P.L. 2016, ch. 142, art. 14, § 1, shifted the sections of the

the Hawkins-Slater **[*6]** Act provides: "No school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder." Plaintiff contends that she was not hired because she was a cardholder, and she contends that this prohibition against discriminatory hiring practices should apply to her. Despite this direct prohibition, the statute fails to provide an express private right of action. Thus the first of many questions this Court must tackle is whether the General Assembly intended *§ 21-28.6-4(d)* to be enforceable or not. To do so, the Court must turn to statutory interpretation, as the intent of the Legislature is not obvious. "'In matters of statutory interpretation [the Court's] ultimate goal is to give effect to the purpose of the act as intended by the Legislature.'" *Whittemore v. Thompson, 139 A.3d 530, 540 (R.I. 2016)* (quoting *GSM Indus., Inc. v, Grinnell Fire Prot. Sys. Co., Inc., 47 A.3d 264, 268 (R.I. 2012)*). To discern that purpose, however, the Court must resolve several conflicting jurisprudential principles.

1

Contradictory Canons

On the one hand, "[i]t is well settled in this jurisdiction that when the language of a statute is unambiguous and expresses a clear and sensible meaning, this Court must interpret the statute literally and must give the words of the statute their **[*7]** plain and obvious meaning." *Bandoni v. State, 715 A.2d 580, 584 (R.I. 1998)*. "When a statute 'does not plainly provide for a private cause of action [for damages], such a right cannot be inferred.'" *Stebbins v. Wells, 818 A.2d 711, 716 (R.I. 2003)*; but see *Bandoni, 715 A.2d at 585* (denying a private right of action "where our Legislature has neither by express terms nor by implication provided" for one). Our Supreme Court has routinely refused to imply a private right of action. E.g., *Great Am. E & S Ins. Co. v. End Zone Pub & Grill of Narragansett, Inc., 45 A.3d 571, 575 (R.I. 2012)* (no private right of action under *§ 27-9.1-4, the Unfair Claims Settlement Practices Act*); *Tarzia v. State, 44 A.3d 1245, 1258 (R.I. 2012)* (no private right of action under *G.L. 1956 § 12-1-12(a)*, a records sealing statute); *Heritage Healthcare Servs., Inc. v. Marques, 14 A.3d 932, 939 (R.I. 2011)* (no private right of action under P.L. 2003, ch. 410, § 3, involving a workers' compensation fund); *Stebbins, 818 A.2d at 716* (no private right of action under *G.L. 1956 § 5-20.8-5*, requiring real estate agents to provide buyers with disclosure statements); *Cummings v. Shorey, 761 A.2d 680, 685 (R.I. 2000)* (no private right of action under *G.L. 1956 §§ 44-5-11(b)* and *44-5-22* for missed tax certification deadlines); *Bandoni, 715 A.2d at 584* (no private right of action under *§§ 12-28-3 to 12-28-5.1*, the Victim's *Bill of Rights*); *Pontbriand v. Sundlun, 699 A.2d 856, 868 (R.I. 1997)* (no private right of action under *G.L. 1956 § 19-14-2*, regarding those allowed to inspect financial records); *Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)* (no private right of action under *G.L. 1956 § 37-13-14*, requiring governmental entities to demand bonds from contractors they employ); *In re John, 605 A.2d 486, 488 (R.I. 1992)* (no private right of action under *G.L. 1956 § 15-7-7(a)(1)*, regarding termination of parental rights); *Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 57 (R.I. 1980)* (no private right of action under **[*8]** *§ 2-1-22, the Freshwater Wetlands Act*).

Since the Hawkins-Slater Act does not contain an express private right of action, at first glance it appears that the aforementioned cases would militate against implying a private right of action under the Hawkins-Slater Act. However, there is another principle which cuts strongly the other way: that the Court "will not ascribe to the General Assembly an intent to enact legislation which is devoid of any purpose, inefficacious, or nugatory." *Kingsley v. Miller, 120 R.I. 372, 376, 388 A.2d 357, 360 (1978)*. This canon of interpretation has long been recognized in Rhode Island. See *Mowry v. Staples, 1 R.I. 10, 16 (1835)*; see also *Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987)*; *State v. Gonsalves, 476 A.2d 108, 111 (R.I. 1984)*; *Carrillo v. Rohrer, 448 A.2d 1282, 1285 (R.I. 1982)*; *Town of Scituate v. O'Rourke, 103 R.I. 499, 509, 239 A.2d 176, 182 (1968)*; *Long v. Fugere, 56 R.I. 137, 142, 184 A. 316 (1936)*. In each of the private cause of action cases listed earlier, refusing to recognize a private right of action did not result in the statute being inefficacious.

To see whether these two tenets can comfortably coexist here, it is instructive to examine these prior cases that have declined to recognize a private right of action by implication. The cases can generally be placed in one of four categories: those (1) imposing civil penalties, (2) authorizing government enforcement, (3) directing government action, or (4) stating policy considerations. The Court examines each in turn.

Hawkins-Slater Act. In 2012, at the time of the incident at issue, this provision was at *§ 21-28.6-4(c)*. Additionally, P.L. 2014, ch. 515, § 2 amended this subsection in ways not germane to this case. The Court will refer to this provision as *§ 21-28.6-4(d)* throughout this decision.

In Tarzia, the plaintiff sued the state for, **[*9]** inter alia, violations of § 12-1-12(a), "which governs the destruction or sealing of records of people who have been acquitted or otherwise exonerated." Tarzia, 44 A.3d at 1254. The plaintiff "argue[d] that although the only remedy explicitly included in the sealing statute [was] a monetary fine, there exist[ed] other causes of action available to him." Id. at 1257. The Court held that "the Legislature specifically limited the remedy for the violation of the statute to a monetary fine demonstrat[ing] 'that the [L]egislature provided precisely the redress it considered appropriate.'" Id. (quoting Sterling Suffolk Racecourse Ltd. P'ship v. Burrillville Racing Ass'n, Inc., 989 F.2d 1266, 1270 (1st Cir. 1993)). Thus, in Tarzia, there was clearly nothing nugatory about § 12-1-12(a)—the statute made a particular action subject to a civil penalty, enforceable by the designated government agency.

Several of the other listed cases stem from similar circumstances. In Stebbins, a "buyer attempted to allege a private cause of action for damages against defendants for their asserted violations of [Chapter 20.8 of Title 5's] disclosure provisions." Stebbins, 818 A.2d at 715. However, the court held that the $100 civil penalty was the "particular enforcement provision" the Legislature had contemplated. Id. at 716. In Pontbriand, the statute in question had "three express remedies for its enforcement," **[*10]** including a $1000 civil fine and, potentially, dismissal from state employment. Pontbriand, 699 A.2d at 868. Finally, in Great American, a violation of the unfair insurance claim practice the statute prohibited was punishable by a substantial fine, see G.L. 1956 § 27-9.1-6, determined by the director of business regulation. Great Am. E & S Ins. Co., 45 A.3d at 575.[2] Thus, these statutes were not superfluous by virtue of their express enforcement mechanisms—just not the private one the plaintiffs in each case desired.

Similar to instances where the statute provided for a civil fine are cases where the statute enables or empowers a government agency to take some action. In In re John, for instance, at issue was § 15-7-7, which provided that, if certain facts were found, a "court shall, upon a petition duly filed after notice to the parent and hearing thereon, terminate any and all legal rights of the parent to the child." A woman sought to use this statute to terminate her former husband's parental rights. In re John, 605 A.2d at 487. However, the Court held that "[t]he state needs a method to terminate the parental rights of unfit or unable parents," and that "[t]ermination of parental rights in these instances achieves the purpose of § 15-7-7, which is to allow the state to make the children available **[*11]** for adoption." Id. Likewise, in Waterman Lake, a citizens' group attempted to privately enforce the Fresh Water Wetlands Act. Waterman Lake, 420 A.2d at 55. However, the Court "conclude[d] that all enforcement powers [were] vested in the director," who had "broad powers to remedy any violation of the wetlands act." Id. at 57. Therefore, the statutes at issue had purpose and effect. Like those cases where the statute at issue provided for a civil fine, these statutes enable the government to take action. Thus, in all of these cases, there was no concern that the statutory language would be meaningless were no private right of action implied—the statute allowed the government to take action instead.

Other cases are linked by a different thread. In these instances, the statute at issue is directed at the government, not a private actor, and instructs it to take or not take some action. For instance, in Cummings, the statute in question provided that town tax assessors must certify revaluations, and must do so by a particular date. Cummings, 761 A.2d at 685. The plaintiff there availed herself of the two-step appeals process provided for by § 44-5-26, claiming that because the certification was not done pursuant to the statute, she was entitled to a full refund **[*12]** of her property tax payment. Id. at 682. However, the Court held that "the Legislature did not provide a remedy to taxpayers in plaintiff's position." Id. at 685. While it was clear that there was a "remedy available for relief from an alleged illegal assessment of taxes," it was of no benefit to plaintiff. Id. The Court found the certifications there "directory, not mandatory." Id. at 686; see also id. at 687 (Flanders, J., concurring) ("[F]or the reasons given by the Court, I do not believe that the challenged revaluation and tax assessment certifications were illegal . . . ."). Unlike a mandatory statute, "[t]he violation of a directory statute is attended with no consequences, since there is a permissive element." 1A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 25:3, at 583 (7th ed. 2009). Thus, as a directory statute, the legislature meant it only as "a guide for the conduct of orderly business and procedure," id., and so failure to comport with it did "not eviscerate the goals, requirements, and mandates" of the statutory scheme, West v. McDonald, 18 A.3d 526, 535 (R.I. 2011).

In a somewhat similar way, the statutes in Bandoni,

[2] Furthermore, the act under examination in Great American explicitly stated that it created no private right of action. Great Am. E & S Ins. Co., 45 A.3d at 575.

implementing the Victim's *Bill of Rights*, and Accent Store Design, requiring payment bonds on public works projects, were **[*13]** held to imply no private right of action. The Supreme Court did not address the argument in either case that failure to recognize a private right of action would render the respective statutes nugatory. However, in both instances, the statute at issue provided instructions to government officials in how they were to carry out their duties. For instance, in Bandoni, the Victim's *Bill of Rights* provided victims the ability to be informed of the right to restitution, to have the right to address the court upon plea negotiation and at pretrial conferences, and that civil judgments shall be automatically entered when restitution is ordered. *Bandoni, 715 A.2d at 584*. While the Supreme Court held there was no implied private right of action for violation of those rights, the lack of the private right of action did not render those provisions illusory. Instead, they were directions to the coordinate branches of government on how to operate. Cf. *Town of Tiverton v. Fraternal Order of Police, Lodge No. 23, 118 R.I. 160, 164, 372 A.2d 1273, 1275 (1977)* ("[W]e recognize the general distinction between statutes aimed at public officers and those directed towards private individuals."). In much the same way, the Rhode Island public works bonding statute instructs the executive branch and municipalities to obtain bonds on public works projects. **[*14]** *Sec. 37-13-14*. Thus, the statute, which was at issue in Accent Store Design, was another directing the effective and efficient flow of government.

Finally, there is one last context where the Supreme Court has declined to recognize a private right of action: when dealing with prefatory or policy language. See *73 Am. Jur. 2d Statutes § 101* (2012) ("While a declaration of policy or a preamble may be used as a tool of statutory construction, it may not be used to create an ambiguity in an otherwise unambiguous statute."). Thus, in Heritage Healthcare, the Court found that the phrase "lowest possible price" in an insurance charter was "prefatory in nature and [did] not create any substantive private right." *Heritage Healthcare, 14 A.3d at 938*. According to the Court, the words were "a statement of policy," used "to clarify other substantive provisions" of the statute. *Id. at 939*. Thus, the phrase "lowest possible price" was not useless—it was there to provide context and clarity for the remainder of the statute.

Thus, when the Supreme Court has declined to recognize an implied private right of action in the past, the statute being examined was not inefficacious, and therefore there was no conflict between the presumption against implied private rights of action and the presumption **[*15]** against nugatory enactments. The question remains, then, as to how *§ 21-28.6-4(d)* fares under such an analysis.

As an initial matter, while the Hawkins-Slater Act does provide for civil enforcement of some of its provisions, see, e.g., *§ 21-28.6-7(c)*, there are no listed penalties for violations of *§ 21-28.6-4(d)*. Similarly, while the Department of Health is empowered to issue identification cards, see *§ 21-28.6-6*, and while the Departments of Health and Business Regulation are authorized to regulate compassion centers, see *§ 21-28.6-12*, no state department is given authority to administer *§ 21-28.6-4(d)*. No portion of the Hawkins-Slater Act authorizes, for instance, any department to intervene on behalf of a tenant who was refused a lease, a student who was declined enrollment, or an employee who was denied employment.

Furthermore, while many of the other provisions in *§ 21-28.6-4* are directed at public officials or the manner in which government operates, *§ 21-28.6-4(d)* in particular is not. For instance, *§ 21-28.6-4(a)* provides that qualifying cardholders "shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, **[*16]** for the medical use of marijuana." This subsection of the statute, much as in the vein of the one in Bandoni, is directed at the coordinate branches of government and dictating how they should treat cardholders. Similarly, *§ 21-28.6-4(k)* states that "[a]ny interest in, or right to, property that is possessed, owned, or used in connection with the medical use of marijuana, or acts incidental to such use, shall not be forfeited."

In fact, all of the subsections in *§ 21-28.6-4* are directed at modifying or changing the official status of marijuana and cardholders with respect to various government programs and obligations—all except one, that is. *Section 21-28.6-4(d)* is not directed at government behavior. It does not focus on the rights and responsibilities of state and local government vis-à-vis the individual. Instead, it is concerned with schools, employers, and landlords, a target far broader than the government. Thus, the logic that saved the statutes in Bandoni and Accent Store Design from meaninglessness cannot do likewise for *§ 21-28.6-4(d)*.

If *§ 21-28.6-4(d)* is not part of some overarching

regulatory scheme, and if it is not a declaration of procedure or instructions to other government officials, might it be simply a statement of policy, as in Heritage **[*17]** Healthcare? It is unlikely. The statutory language at issue in Heritage Healthcare was, in its context, clearly a "statement of policy." *Heritage Healthcare, 14 A.3d at 939*. The public law subsections at issue began with the phrases "[t]he purpose of the fund" and "[t]he general assembly declares that." P.L. 2003, ch. 410, § 3(a), (f). The language used there explicitly denotes a "declaration of policy." See id. (quoting *Ill. Indep. Tel. Ass'n v. Ill. Commerce Comm'n, 183 Ill. App. 3d 220, 539 N.E.2d 717, 726, 132 Ill. Dec. 154 (Ill. Ct. App. 1989)*). Contrariwise, the language of *§ 21-28.6-4(d)* is a directive, not a policy statement. Additionally, it is in *§ 21-28.6-4*, titled "Protections for the medical use of marijuana," and is surrounded by other sections that provide for specific directives, not mere policy gestures. To read *§ 21-28.6-4(d)* as a general policy statement would ignore its position in the text and the forceful language it employs.

None of our Supreme Court's aforementioned precedents, which denied implied private right of action but found other ways to make a statute efficacious, can breathe life into *§ 21-28.6-4(d)*. Thus, without a private right of action, *§ 21-28.6-4(d)* would be meaningless. The Court is hesitant, then, to apply one presumption—that against implied rights of action—that would directly collide with another—that against nugatory enactments.

Another presumption that often appears in cases **[*18]** dealing with implied private rights of action is that "a statute that establishes rights not recognized by law is subject to strict construction." *Accent Store Design, 674 A.2d at 1226*; see also *Bandoni, 715 A.2d at 584*; *In re John, 605 A.2d at 488*. To that end, Defendants contend that the Hawkins-Slater Act "abrogates an employer's common law right to employ individuals 'at will'" and therefore should be construed strictly. Defs.' Mem. 21. This argument, however, must be juxtaposed with *§ 21-28.6-13*, which states in full: "This chapter shall be liberally construed so as to effectuate the purposes thereof." This language is unambiguous, direct, and to the point. Regardless of whether *§ 21- 28.6-4(d)* is in derogation of the common law, the judiciary has been explicitly instructed to interpret it liberally, thereby disturbing any case law to the contrary. *O'Connell v. Walmsley, 156 A.3d 422, 477 n.4, 2017 R.I. LEXIS 38 (R.I. 2017)* (observing that even if a statute "operates in derogation of the common law, [the Court's] task of strict statutory construction must give way to the clear intent of the General Assembly").

Sometimes our Supreme Court has ruminated over implied private rights of action articulating the principle that "[t]he General Assembly could easily have exercised its power to create a cause of action, . . . but it chose not to do so." *Accent Store Design, 674 A.2d at 1226*; see also **[*19]** *Bandoni, 715 A.2d at 584-85*; *In re John, 605 A.2d at 488*. While such a notion presents a powerful argument, it is also "presumed that the General Assembly knows the 'state of existing relevant law when it enacts or amends a statute.'" *Ret. Bd. of Emps.' Ret. Sys. of R.I. v. DiPrete, 845 A.2d 270, 287 (R.I. 2004)* (quoting *Smith v. Ret. Bd. of the Emps.' Ret. Sys. of R.I., 656 A.2d 186, 189 (R.I. 1995)*); see also *Horn v. Southern Union Co., 927 A.2d 292, 296 (R.I. 2007)* (applying this presumption in the employment discrimination context).

It is precisely in the civil rights context where courts have been most open to implying private rights of action—including *Title VI of the Civil Rights Act of 1964* and *Title IX of the Education Amendments of 1972* (Title IX). See *Cannon v. Univ. of Chicago, 441 U.S. 677, 696, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979)*; see also *45B Am. Jur. 2d Job Discrimination § 1843* (2012) ("[A] cause of action may be implied where a statute defines an unfair employment practice but does not provide an express method of redress."). Given this principle, it is more understandable why the General Assembly may not have explicitly provided a private right of action. The state of the law naturally includes an awareness of "judicial interpretation." *First Fed. Sav. & Loan Ass'n of Providence v. Langton, 105 R.I. 236, 245, 251 A.2d 170, 176 (1969)*; see also Horn (Suttell, J., dissenting) at 300 (observing RICRA drafters "'must have been aware of the precedents interpreting the federal statute'" (quoting *Rathbun v. Autozone, Inc., 361 F.3d 62, 67 (1st Cir. 2004)*)). Thus, it is reasonable to conclude that the General Assembly, when passing *§ 21-28.6-4(d)*, understood that private rights of action are more commonly implied in the employment discrimination context.

Ultimately, then, the presumptions that have guided previous **[*20]** analyses of whether to recognize a private right of action all are undercut when applied to *§ 21-28.6-4(d)*. The reflexive reaction against implied private rights of action butts up against the presumption that the Legislature would not enact a nugatory statute. The assumption that the Legislature would simply add a private right of action if that was their intent is weakened by the subject matter of the statute itself. And the rule construing statutes in derogation of the common law narrowly is explicitly countermanded by the liberal

construction mandate of § 21-28.6-13.

2

Giving Effect

Having survived the gauntlet of presumptions with only one clear directive—to read the Hawkins-Slater Act liberally—the Court, then must "interpret the statute [the General Assembly] has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval, 532 U.S. 275, 286, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)*.

This Court "begin[s] with the language of the statute itself." *Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 16, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979)* [hereinafter TAMA]. As the Court has mentioned, *§ 21-28.6-4(d)* provided: "No school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder." There is another portion of the Hawkins-Slater Act, however, **[*21]** that is also relevant to this inquiry. *Section 21-28.6-7(b)(2)* states that ***"[n]othing in this chapter shall be construed to require . . . [a]n employer to accommodate the medical use of marijuana in any workplace***." (Emphasis added.) This intriguing provision is the only other portion of the Hawkins-Slater Act that references employers.

"It is a well-settled principle of statutory interpretation that an isolated part of a particular statute cannot be viewed in a vacuum; rather, each word and phrase must be considered in the context of the entire statutory provision." *Power Test Realty Co. Ltd. P'ship v. Coit, 134 A.3d 1213, 1221 (R.I. 2016)*. "It is also a canon of statutory construction that the Legislature is presumed to have intended each word or provision of a statute to express a significant meaning, and the court will give effect to every word, clause, or sentence, whenever possible." *State v. Bryant, 670 A.2d 776, 779 (R.I. 1996)*. This Court finds it crucial that the statute does not say that nothing within the chapter would require an employer to accommodate the medical use of marijuana entirely. Instead, it cabins that proscription to use "in any workplace." *Sec. 21-28.6-7(b)(2).* The natural conclusion is that the General Assembly contemplated that the statute would, in some way, require employers to accommodate the medical use **[*22]** of marijuana outside the workplace. This provision undermines Defendants' contention that its actions did not violate the Hawkins-Slater Act because its refusal to hire Plaintiff was based not on her cardholder status, but her use of marijuana outside the workplace that prevented her from passing a drug test.

Plaintiff urges this Court to apply the factors the United States Supreme Court analyzed in Cannon. Pl.'s Mem. 18-21. There, the Supreme Court analyzed *§ 901(a) of Title IX*, which stated, in pertinent part, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Cannon, 441 U.S. at 681, 682*. The Court proceeded to analyze the statute under the four-factor test laid out in *Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)*. As the United States Supreme Court has subsequently made clear, the factors in Cort were not meant to supplant the intent of the Legislature. *TAMA, 444 U.S. at 23*. However, "the first three factors discussed in Cort—the language and focus of the statute, its legislative history, and its purpose—are ones traditionally relied upon in determining legislative intent." *Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979)*. This Court's current **[*23]** mission is to determine legislative intent, and so comparison with Cannon, while not dispositive, could be fruitful.

The language of *§ 21-28.6-4(d)* is quite similar to the "'rights-creating' language so critical to the [United States Supreme] Court's analysis in Cannon." *Alexander, 532 U.S. at 279*. The structure is the same: "*§ 601* decrees that '[n]o person . . . shall . . . be subjected to discrimination,'" id. (quoting *42 U.S.C. § 2000d*), while *§ 21-28.6-4(d)* decrees that "no . . . employer . . . may[3] refuse to . . .employ . . . a person solely for his or her status as a cardholder." The General Assembly drafted *§ 21-28.6-4(d)* "with an unmistakable focus on the benefited class." *Cannon, 441 U.S. at 691*. "[T]he right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action." *Id. at 690 n.13*. Looked through this lens,

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[3] While the distinction between "may" and "shall" is sometimes consequential, see Singer & Singer, supra, § 25:4, the Court is not concerned with the difference here. This section is prohibitory, and so employers are prohibited from discrimination. Cf. *Cabana v. Littler, 612 A.2d 678, 683 (R.I. 1992)* ("Negative words in a grant of power should never be construed as directory . . . .").

implication of a private right of action appears appropriate.

The Court is mindful of the general—and rightful—reluctance of courts to imply private rights of action. However, the Court also believes that there is only one sensible interpretation of § 21-28.6-4(d). The Hawkins-Slater Act must have an implied private right of action. Without one, § 21-28.6-4(d) would be meaningless. The Act provides no "particular remedy or remedies" **[*24]** such that the "court must be chary of reading others into" the statute. *TAMA, 444 U.S. at 20*. The statute is not "'phrased as a directive to . . . agencies engaged in the disbursement of public funds.'" *Alexander, 532 U.S. at 286* (quoting *Univs. Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 772, 101 S. Ct. 1451, 67 L. Ed. 2d 662 (1981)*). And other provisions of the Hawkins-Slater Act reinforce the notion that the General Assembly expected § 21-28.6-4(d) to be enforced. Given the above, and the context of the provision—an anti-discrimination statute—this Court finds that there is an implied private right of action for violations of § 21-28.6-4(d).

3

Scope of *§ 21-28.6-4(d)*

Having determined there is an implied private right of action, the Court is faced with yet another question. *Section 21-28.6-4(d)* prohibits employers from refusing to employ "a person solely for his or her status as a cardholder." Defendants persistently argue that they did not refuse to hire Plaintiff because of her status as a cardholder, but because of her inability to "pass a mandatory pre-employment drug screen." Defs.' Mem. 25-26. At oral arguments for both their *Super. R. Civ. P. 12(b)(6)* motion to dismiss and *Super. R. Civ. P. 56* motion for summary judgment, Defendants continually made the incredulous argument that the General Assembly was making a distinction between cardholders and users of medical marijuana. Defendants would have the Court believe that a **[*25]** patient cardholder might never use medical marijuana.[4]

Again, Defendants' argument requires the Court to delve into the statutory language. While Defendants would again have the Court interpret the Hawkins-Slater Act narrowly because it "is in derogation of an employer's common law right to employ individuals 'at will,'" *id. at 25*, the Court will not do so. As explained above, the General Assembly explicitly instructed the courts to construe the Hawkins-Slater Act broadly. *Sec. 21-28.6-13*. The Court initially notes that despite Defendants' insistence that the protections only apply to cardholders and not the medical use of marijuana, § 21-28.6-4(d) falls within subsection four, titled "[p]rotections for the medical use of marijuana." Admittedly, "headings and notes are not binding, may not be used to create an ambiguity, and do not control an act's meaning by injecting a legislative intent or purpose not otherwise expressed in the law's body." Singer & Singer, supra, § 47:14. However, such a meaning is expressed in the body.

Also relevant is *Section 21-28.6-4(a)*, which provides that "[a] qualifying patient cardholder who has in his or her possession a registry identification card shall not be . . . denied any right or privilege . . . for the medical use of marijuana." Employment **[*26]** is neither a right nor a privilege in the legal sense. However, the protection provided by § 21-28.6-4(d) is. Thus, reading the two statutes together, this Court gleans that the Hawkins-Slater Act provides that employers cannot refuse to employ a person for his or her status as a cardholder, and that that right may not be denied for the medical use of marijuana. The statutory scheme is premised on the idea that "State law should make a distinction between the medical and nonmedical use of marijuana." *Sec. 21-28.6-2(5)*. If the Court were to interpret § 21-28.6-4(d) as narrowly as Defendants propose, Plaintiff and other medical marijuana users would be lumped together with nonmedical users of marijuana. The protections that § 21-28.6-4(d) affords would be illusory—every medical marijuana patient could be screened out by a facially-neutral drug test. In fact, this practice would place a patient who, by virtue of his or her condition, has to use medical marijuana once or twice a week in a worse position than a recreational user. The recreational user could cease smoking long enough to pass the drug test and get hired, and subsequently not be subject to future drug tests, allowing him or her to smoke recreationally to his or her heart's content. **[*27]** The medical user, however, would not be able to cease for long enough to pass the drug test, even though his or her use is necessary to "treat[] or alleviat[e] pain, nausea, and other symptoms associated with certain debilitating medical conditions." *Sec. 21-28.6-2(1)*.

[4] The Court recognizes that caregivers and cultivators are also cardholders and that they might not use medical marijuana. However, the instant matter involves a patient cardholder. Regardless, this distinction made by Defendants is discussed below.

Defendants argue that there are other non-patient individuals who hold cards. They aver that since *§ 21-28.6-4(d)*'s protections extend to people who do not use medical marijuana, the Court should not read the section so broadly. This argument is not convincing. First, it is absurd to think that the General Assembly wished to extend less protection to those suffering with debilitating medical conditions and who are the focus of the Hawkins-Slater Act. Second, this argument ignores the legislative history. When the Hawkins-Slater Act was initially passed, the statute did not use the term "cardholder"—instead, it specifically called out registered qualifying patients and registered primary caregivers separately. P.L. 2005, ch. 442, § 1 (then codified at § 21-28.6-4(b)). The General Assembly changed the term to cardholder, broadening the protections, but still encompassing the original scope of registered qualifying patients. See P.L. 2009, ch. 16, § 1.

Defendants finally **[*28]** contend that the Hawkins-Slater Act does not, and should not be interpreted to, require employers to accommodate medical marijuana use. Defendants emphasize that their manufacturing facility has dangerous equipment and couch their concern as one of workplace safety. They suggest that if this Court were to rule in favor of Plaintiff, an employer would have to accommodate "an employee who shows up to work in the morning under the influence after spending the entire night—or possibly the entire weekend—ingesting medical marijuana, simply because they used the drug outside the physical workplace." Defs.' Mem. 32. This argument utterly ignores the plain words of the General Assembly, which has explicitly contemplated this scenario. The Hawkins-Slater Act shall not permit "[a]ny person to undertake any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice." *Sec. 21-28.6-7(a)(1)*. If an employee came to work under the influence, and unable to perform his or her duties in a competent manner, the employer would thus not have to tolerate such behavior.

Regardless, this Court agrees that Defendants are not required to make any accommodations for Plaintiff as they **[*29]** are defined in the employment discrimination context. They do not need to make existing facilities readily accessible. *Sec. 42-87-1.1(4)(i)*. They do not need to restructure jobs, modify work schedules, reassign to a vacant position, or acquire or modify devices or examinations. *Sec. 42-87-1.1(4)(ii)*. They do not even need to alter their existing drug and alcohol policy, which prohibits "the illegal use, sale or possession of drugs or alcohol on company property." While that policy provides that "all new applicants who are being considered for employment will be tested for drug or chemical use," it does not state that a positive result of such test will be cause for withdrawal of the job offer.[5] Ex. 1 to Defs.' Ex. C.

4

Application to the Instant Case

Ultimately, having found that the Hawkins-Slater Act can theoretically support Plaintiff's action, the final question is whether the facts entitle Plaintiff to summary judgment. Unlike the questions of statutory interpretation the Court has faced thus far, the facts at issue in this case are relatively straightforward. Plaintiff was denied the opportunity to apply for a job with Defendants because she believed she could not pass the pre-employment drug test. Plaintiff did inform **[*30]** Defendants that she was a medical marijuana cardholder and that she would obey state law and not bring marijuana into the workplace. Defendants do not contest that they denied her employment based on the fact that she could not pass the drug screening. Therefore, Defendants have violated the Hawkins-Slater Act. As a result, the Court grants Plaintiff's motion for summary judgment and correspondingly denies Defendants' motion.

B

Count I: Declaratory Judgment

Plaintiff also asks for a declaratory judgment that "failure to hire a prospective employee based on his or her status as a medical marijuana card holder and user is a violation of the Act." Compl. ¶ 29. Defendants argue that it is inappropriate to use the Declaratory Judgment Act to circumvent the lack of a private right of action, pointing to *Pontbriand, 699 A.2d at 868*.

As in any case that comes before this Court, "the party seeking declaratory relief must present the court with an actual controversy." *Providence Teachers Union v.*

[5] The Fitness for Duty Statement signed by Plaintiff also does not state the penalty for failing the drug test. Ex. 2 to Defs.' Ex. C.

Napolitano, 690 A.2d 855, 856 (R.I. 1997). Even in declaratory judgment actions, "trial justices may not dispense with the traditional rules prohibiting them from rendering advisory opinions." Id. Thus, to the extent that Plaintiff seeks a generalized construction of the statute, see Defs.' Mem. 37, **[*31]** removed from the facts in this particular case, the Court cannot render such an opinion. To do so would be to "'sit like a kadi under a tree dispensing justice.'" Sullivan v. Chafee, 703 A.2d 748, 753 (R.I. 1997) (quoting Terminiello v. City of Chicago, 337 U.S. 1, 11, 69 S. Ct. 894, 93 L. Ed. 1131 (1949) (Frankfurter, J., dissenting)).

The Court, in accordance with its liberal pleading rules, will read Count I to request a declaration specific to Plaintiff and to the facts in the case at hand. Given that Count I is a declaration under the Hawkins-Slater Act, however, all the discussions in Part A, supra, apply here—it is an application of the same law to the same facts. Therefore, for the same reasons articulated in Part A3, the Court grants Plaintiff's motion for summary judgment and denies Defendants' motion with respect to Count I as well.

C

Count II: RICRA

1

Disability

Count II alleges unlawful discrimination under RICRA, which prohibits, inter alia, discrimination based on disability in the making and enforcement of contracts. Sec. 42-112-1(a). RICRA is expansive, and "provides broad protection against all forms of discrimination in all phases of employment." Ward v. City of Pawtucket Police Dep't, 639 A.2d 1379, 1381 (R.I. 1994). Here, there is no question a private right of action exists. Sec. 42-112-2. While Defendants move for summary judgment on Count II, Plaintiff does not. Defendants have an array of arguments against **[*32]** the applicability of RICRA to Plaintiff's claim, which the Court will consider in turn.

First, Defendants contend that "[a]ctive drug use is not a disability under the RICRA." Defs.' Mem. 7. For purposes of RICRA, "[t]he term 'disability' has the same meaning as that term is defined in § 42-87-1." Sec. 42-112-1(d). Defendants would limit RICRA's disability coverage to anyone who is protected by the federal Americans with Disabilities Act (ADA). Defs.' Mem. 7. RICRA's definition of disability is broader than that, however. While including those covered by the ADA, § 42-87-1(1)(iv), Chapter 87 also defines disability as "[a] physical or mental impairment that substantially limits one or more . . . major life activities," if there is a "record of such impairment." Sec. 42-87-1(1)(i)-(ii). Plaintiff is a medical marijuana cardholder. In order to qualify for such a card, Plaintiff must have a "debilitating medical condition." Sec. 21-28.6-3(10) (2013).[6]

A "debilitating medical condition" under the Hawkins-Slater Act must necessarily "substantially limit[] one or more . . . major life activities" under § 42-87-1. The examples of conditions which automatically qualify as debilitating medical conditions are severe: cancer, glaucoma, HIV/AIDS, and Hepatitis C. Sec. 21-28.6-3(3)(i) (2013).[7] All of these diseases **[*33]** impair "the operation of a major bodily function," such as the immune system, normal cell growth, or the like. See § 42-87-1(5). Further, all of the symptoms which would qualify a cardholder are also severe: "wasting syndrome; severe, debilitating, chronic pain; severe nausea; seizures; . . . or severe and persistent muscle spasms." Sec. 21-28.6-3(3)(ii) (2013).[8] Again, these would all naturally substantially limit a major life activity. Even just a plain reading of the terms, without reference to the definitions, makes it clear—"debilitating medical condition" connotes disability on its own. See Merriam-Webster's Collegiate Dictionary 296 (Frederick C. Mish et al. eds., 10th ed. 2001) (equating debilitate with weaken or enfeeble).

Thus, Plaintiff is disabled under the terms of RICRA. Her status as a medical marijuana cardholder signaled that to Defendants—she could not have obtained such a card without a debilitating medical condition that would cause her to be disabled.

2

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[6] This section is now at § 21-28.6-3(18).

[7] This section is now at § 21-28.6-3(5)(i). Post-traumatic stress disorder has since been added to this list.

[8] This section is now at § 21-28.6-3(5)(ii).

Illegal Drug Use

However, the Court's dalliance with the *RICRPDA* is not over. Defendants point to *§ 42-87-1(6)*, which defines a "qualified individual." Defendants embrace sub-*subsection (v)*, which states that "[a] qualified individual with a disability shall not include any **[*34]** . . . applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." Plaintiff's drug use is legal under Rhode Island law, but illegal under federal law. The Court, however, does not have to determine to which body of law the General Assembly was referring. Assuming arguendo that Plaintiff is engaged in illegal drug use, this provision is not applicable to RICRA. While the term "qualified individual" is used throughout Chapter 42-87, those words do not appear anywhere within *§ 42-112-1*. None of the definitions incorporated in *§ 42-112-1(d)* reference qualified individuals. Had the Legislature wanted to incorporate the restrictions of that language into *§ 42-112-1*, they could have easily done so. In fact, the General Assembly incorporated a limited set of terms from *§§ 42-87-1* and *42-87-1.1*; however, they did not include "qualified individual." *Sec. 42-112-1(d)*.[9] "[I]t is not within the province of this court to insert in a statute words or language that does not appear therein except in those cases where it is plainly evident from the statute itself that the legislature intended that the statute contain such provisions." *New England Die Co. v. Gen. Prods. Co., 92 R.I. 292, 298, 168 A.2d 150, 154 (1961)*. Furthermore, per the maxim expressio unius est exclusion alterius, the **[*35]** Court infers that in explicitly including certain definitions from Chapter 42-87, the General Assembly intended to exclude all others. See *Gorman v. Gorman, 883 A.2d 732, 738 n.9 (R.I. 2005)*.

3

Basis for Termination

Having determined that marijuana users are not precluded from making a claim under RICRA, and that Plaintiff had a disability, the Court is now faced with Defendants' next contention: that Defendants' decision not to hire Plaintiff was based solely on her use of marijuana, not her underlying disability. This distinction breaks down upon further examination. Defendants essentially ask this Court to completely separate the medical condition from the treatment, which would circumvent the broad intent of RICRA. However, the only reason a given patient cardholder uses marijuana is to treat his or her disability. This policy prevents the hiring of individuals suffering disabilities best treated by medical marijuana.

Defendants, nevertheless, assert that Plaintiff never informed them of her underlying condition. Thus, contend Defendants, Darlington "was not aware of her migraine condition when it decided not to hire her." Defs.' Mem. 11. While Plaintiff is uncertain as to whether she informed Defendants of her condition, there is **[*36]** no dispute that Defendants knew she possessed a medical marijuana card and was thus disabled. It is irrelevant that Defendants did not know her precise disability. It is sufficient to show that Defendants discriminated against a class of disabled people—namely, those people with disabilities best treated by medical marijuana.

This framing of the disability also disposes of Defendants' next contention—that RICRA does not allow for a "mixed motives" analysis of discrimination, but instead requires "but-for" causation. Here, but for Plaintiff's disability—which her physician has determined should be treated by medical marijuana—Plaintiff seemingly would have been hired for the internship position. The Court need not address whether a mixed-motives analysis is required, as there is but-for causation.[10]

4

Disparate Impact

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[9] The Court also observes that the same analysis applies to *RIFEPA*. See *§ 28-5-6(5)* (importing the definition of disability, but not qualified individual).

[10] The Court notes that the case Defendants cite in support of the argument that a mixed-motives analysis should not be conducted under RICRA does not sweep as broadly as they imply. *Dwyer v. Sperian Eye & Face Protection, Inc., Civil No. 10-cv-255-JD, 2012 U.S. Dist. LEXIS 1036, 2012 WL 16463, at *5 (D.R.I. Jan. 3, 2012)* ("Dwyer does not show that this is a mixed motive case . . . . Even if mixed motive were an issue in this case, however, Dwyer makes no developed argument that the Rhode Island Supreme Court would analyze mixed-motive age discrimination claims . . . . In the absence of a developed argument, the court will not consider Dwyer's theory.").

Next, Defendants contend that their enforcement of a neutral Alcohol and Drug Policy "cannot be the basis of a disparate treatment discrimination claim."[11] Defs.' Mem. 14. Under a Title VII analysis, there are two types of federal employment discrimination cases: disparate-treatment and disparate-impact. *Casey, 861 A.2d at 1036* (citing *Newport Shipyard, Inc. v. R.I. Comm'n for Human Rights, 484 A.2d 893, 898 (R.I. 1984)*). Assuming, without **[*37]** deciding, that Defendants are correct in that the facts here do not support a disparate-treatment case, such reasoning only eliminates the first theory of discrimination. Instead, while Defendants may have a facially-neutral policy, RICRA is concerned with "the consequences of employment practices, not simply the motivation." *Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)*. A disparate-impact claim "does not require discriminatory intent." *Lewis v. City of Chicago, Ill., 560 U.S. 205, 215, 130 S. Ct. 2191, 176 L. Ed. 2d 967 (2010)*. Thus, the argument that Defendants had no discriminatory intent does not foreclose Plaintiff's RICRA claim under a Title VII analysis.

Even so, Defendants pose the question: does RICRA prevent disability-based discrimination when the reasonable accommodation involves use of medical marijuana?[12] As discussed earlier, unlike RICRPDA, RICRA's scope is not limited to "qualified individuals," which exempts from its scope those engaged in the illegal use of drugs. RICRA does look to *§ 42-87-1.1* to define a "reasonable accommodation." *Sec. 42-112-1(d)*. Given that "qualified individual" is neither included in *§ 42-112-1(d)*, nor in the definition of "reasonable accommodation" in *§ 42-87-1.1(4)*, this Court will not judicially insert the term into the statute. In fact, the definition of reasonable accommodation refers not to qualified individuals, but to the **[*38]** broader superset of all "individuals with disabilities." *Sec. 42-87-1.1(4)(i)-(iv)*.

The Court, also, has difficulty imagining what reasonable accommodation is required. The term encompasses either a modification of facilities, equipment, work schedule or conditions, or the like. *Sec. 42-87-1.1(4)*. While the definition also uses the term "policies," the Court believes that refers to workplace policies and not hiring policies. However, as previously discussed, the written drug screening policy does not state the consequence of failing the drug test. Thus, changing the unwritten practice not to automatically disqualify a cardholder who tests positive for marijuana would be deemed a reasonable accommodation. RICRA, therefore, poses no obstacle. The duties that RICRA imposes for employers to institute reasonable accommodations, if any, are thus not limited by the restrictions in *§ 42-87-1(6)(v)*.

Thus, with respect to Count II, the Court finds that RICRA can support a cause of action under the facts alleged here, and that Plaintiff has properly stated a claim.

D

Federal Preemption

The final arrow in Defendants' quiver is federal preemption. Defendants argue that even if the Hawkins-Slater Act or RICRA entitles Plaintiff to relief, such an action **[*39]** cannot be maintained due to preemption by the federal *Controlled Substances Act (CSA), 21 U.S.C. §§ 801 et seq.* It is without question that federal law can preempt state law. The crucial inquiry is whether or not it, in fact, does in this case. The Court notes that only *§ 21-28.6-4(d)* is at issue in this analysis; "if this section were declared invalid, it does not follow that the remainder must fall because this section is not indispensable to the other parts of the act." *Chartier Real Estate Co. v. Chafee, 101 R.I. 544, 556, 225 A.2d 766, 773 (1967)*. Indeed, the General Assembly has provided for the severability of the statute. *Sec. 21-28.6-10*.

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[11] The Court pauses to note the slightly unusual nature of Count II, in that it is a RICRA action for employment discrimination brought without an accompanying RIFEPA claim. The Rhode Island Supreme Court, when analyzing RICRA alongside RIFEPA, has looked "to the federal interpretations of *Title VII of the Civil Rights Act of 1964*." *Casey v. Town of Portsmouth, 861 A.2d 1032, 1036 (R.I. 2004)*. Thus, despite the fact that there "is a significant functional distinction between the two statutory means of redress provided under" RIFEPA and RICRA, *Horn, 927 A.2d at 301* (Suttell, J., dissenting), when analyzing theories of discrimination, the Court applies a Title VII analysis.

[12] Defendants contend that Plaintiff failed to plead a cause of action for failure to accommodate. First, such a cause of action would more appropriately be brought in a RIFEPA action. See *G.L. 1956 § 28-5-7*. Regardless, since Plaintiff "pled a number of facts relevant" to a failure to accommodate, "[t]his was sufficient to preserve the argument." *Reeves ex rel. Reeves v. Jewel Food Stores, Inc., 759 F.3d 698, 701 (7th Cir. 2014)*.

"The *Supremacy Clause of the United States Constitution, Article VI, clause 2*, preempts or invalidates state law that interferes or conflicts with any federal law." *Verizon New England Inc. v. R.I. Pub. Utils. Comm'n, 822 A.2d 187, 192 (R.I. 2003)*. In general, there are three types of preemption: express preemption, field preemption, and conflict preemption. Id. The CSA describes how it should be interpreted with regard to state law:

> "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that **[*40]** State law so that the two cannot consistently stand together." *21 U.S.C. § 903*.

How *§ 903* fits into the standard tripartite delineation of preemption is, on a plain reading, unclear; it is an express clause, but speaks of fields and conflicts as well. See *People v. Crouse, 388 P.3d 39, 44, 2017 CO 5 (Colo. 2017)* (Gabriel, J., dissenting). The United States Supreme Court, however, has distinguished a similar provision "indicating that a provision of state law would only be invalidated upon a 'direct and positive conflict' with [federal law]" from an "express pre-emption provision." *Wyeth v. Levine, 555 U.S. 555, 567, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)*. Such a distinction indicates this is not a traditional express preemption clause. Additionally, Congress did not choose to completely occupy the field—it instead chose to only preempt state laws that could not consistently stand with the CSA. Thus, field preemption is not implicated. See *Verizon New England, 822 A.2d at 193* ("'In *§ 251* Congress specifically refused to preclude state regulations . . . that provide access to networks, are consistent with *§ 251*, and do not 'substantially prevent implementation of the requirements of this section and the purposes of this part.' As a result, there is no field preemption.'" (quoting *47 U.S.C. § 251(d)(3)(C)*)).

The Court is left to analyze conflict preemption, which comports nicely with the language of *§ 903*. Conflict **[*41]** preemption requires there to be a "positive conflict" between state and federal law such that they "cannot consistently stand together." The question is, then, does the protection Rhode Island affords employees come into such a positive conflict? One way for conflict preemption to arise would be if it were impossible for an employer to comply with both the CSA and the Hawkins-Slater Act or RICRA. Id. (Conflict preemption exists when "'compliance with both federal and state regulations is a physical impossibility . . . .'" (quoting *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)*)). There is no physical impossibility here. As detailed above, the Hawkins-Slater Act does not require "[a]n employer to accommodate the medical use of marijuana in any workplace." *Sec. 21-28.6-7(b)(2)*. Marijuana need not enter the employer's premises. Indeed, this is all that is required to maintain a drug-free workplace. See *41 U.S.C. § 8101(a)(5)* (defining "drug-free workplace" as "a site of an entity . . . at which employees of the entity are prohibited from engaging" in federally-prohibited uses of controlled substances). What an employee does on his or her off time does not impose any responsibility on the employer.

The other instance in which conflict preemption can arise is when a state law **[*42]** "creates an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth, 555 U.S. at 563-64* (quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*). It is important to remember that there is a presumption against preemption, however, in cases involving powers traditionally delegated to the states. *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)* ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). Employment law and anti-discrimination law are examples of two such delegated powers. See *Gary v. Air Group, Inc., 397 F.3d 183, 190 (3d Cir. 2005)* (observing that preemption is disfavored "in the employment law context which falls 'squarely within the traditional police powers of the states'" (quoting *Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1259 (11th Cir. 2003)* (citation omitted))); *Kroske v. U.S. Bank Corp., 432 F.3d 976, 981 (9th Cir. 2005)* (describing "the State's historic police powers to prohibit discrimination on specified grounds").

Ultimately, this Court finds the purpose of the CSA—the "illegal importation, manufacture, distribution, and possession and improper use of controlled substances"—to be quite distant from the realm of employment and anti-discrimination law. *21 U.S.C. § 801(2)*. The CSA is concerned with stopping the illegal trafficking and use of controlled substances. To read the CSA as preempting **[*43]** either the Hawkins-Slater Act

or RICRA would imply that anyone who employs someone that violates federal law is thereby frustrating the purpose of that law. The connection must, at some point, be deemed too attenuated. Cf. *Wyeth, 555 U.S. at 583* (Thomas, J., dissenting) ("Because implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution, I concur only in the judgment."). It may be that Congress does wish to preempt laws such as the Hawkins-Slater Act or RICRA with respect to employment discrimination, but if they do so, they have not expressed that intent in the CSA.[13]

One last consideration reassures the Court in finding that the CSA does not preempt Rhode Island law in this narrow question. "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, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)* (quoting *Silkwood v. Kerr—McGee Corp., 464 U.S. 238, 256, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984)*). Congress is definitely aware of the existence of various states' medical marijuana schemes. Indeed, over the past several years, Congress has passed an amendment to various **[*44]** omnibus spending bills preventing the funds appropriated therein to the Department of Justice to be used to prevent any of a number of listed states, including Rhode Island, "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537. It would be easy to overstate the importance of this enactment. It has not repealed or modified the CSA itself. It was not contemporaneous with the passage of the CSA. However, it is a direct and unambiguous indication that Congress has decided to tolerate the tension, at least for now, between the federal and state regimes. See *Bonito Boats, 489 U.S. at 166-67*. Congress seems to want, as Justice Brandeis said, the States to be the laboratories of democracy with respect to medical marijuana. See 161 Cong. Rec. H3746 (daily ed. June 2, 2015) (statement of Rep. Cohen).

IV

Conclusion

The Court finds that there is an implied cause of action under the Hawkins-Slater Act, and further finds that there is no genuine issue of material fact with respect to the counts regarding that effect. Thus, the Court grants Plaintiff's Motion for Summary Judgment on Counts I and III. Correspondingly, **[*45]** Defendants' motion, regarding Counts I and III, is denied. Furthermore, for the reasons stated above, Defendants' Motion for Summary Judgment is also denied for Count II. Counsel shall enter an appropriate order for entry.

End of Document

[13] Again, the Court is focused solely on *§ 21-28.6-4(d)* within the Hawkins-Slater Act. Whether the CSA might preempt other parts of the Act is not before the Court.

Chance v. Kraft Heinz Foods Co.

Superior Court of Delaware, Kent

October 24, 2018, Submitted; December 17, 2018, Decided

C.A. No. K18C-01-056 NEP

Reporter
2018 Del. Super. LEXIS 1773 *; 2018 WL 6655670

JEREMIAH CHANCE, Plaintiff, v. KRAFT HEINZ FOODS COMPANY, Defendant.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Disposition: Upon Defendant's Motion to Dismiss DENIED in Part, GRANTED in Part.

Core Terms

private right of action, medical marijuana, alleges, anti-discrimination, termination, disability, original complaint, regulation, marijuana, public policy, drug test, cardholder, preempted, patient, motion to dismiss, violations, argues, provisions, employees, rails, plaintiff's claim, retaliation, state law, reporting, disability discrimination claim, railroad tie, relates back, debilitating, discharged, preemption

Case Summary

Overview

HOLDINGS: [1]-The court held that the language of Delaware's Medical Marijuana Act (DMMA), Del. Code Ann. tit. 16, § 4905A(a)(3), was held to create an implied private right of action as absent a finding of an implied private right of action, § 4905A would be devoid of any purpose within the broader context of the statute; [2]-As such, the court denied defendant's motion to dismiss plaintiff's claim alleging discrimination under the DMMA following his termination when, as a medical marijuana cardholder, he was fired after failing a drug test; [3]-The court also held that the employer's motion to dismiss was denied as to plaintiff's claim under the Delaware's Whistleblowers' Protection Act, Del. Code Ann. tit. 19, § 1701 et seq., because discovery was necessary.

Outcome
Defendant's motion to dismiss denied, in part.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss, the moving party bears the burden of demonstrating that under no set of facts which could be proven in support of its complaint would the plaintiff be entitled to relief. Upon this Court's review of a motion to dismiss, (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

R.I. Patient Advocacy Coalition Found. (RIPAC) v. Town of Smithfield

Superior Court of Rhode Island, Providence

September 27, 2017, Filed

C.A. No. PC-2017-2989

Reporter
2017 R . I . Super. LEXIS 150 *

RHODE ISLAND PATIENT ADVOCACY COALITION FOUNDATION (RIPAC) d/b/a RIPAC; JANE DOE, ***I***; JANE DOE, II, Plaintiffs, v. TOWN OF SMITHFIELD, Defendant.

Core Terms

Ordinance, medical marijuana, the Hawkins-Slater Act, cultivation, marijuana, Zoning, general assembly, regulation, cardholders, ***patient***, zoning ordinance, plants, municipal, preliminary injunction, injunctive relief, preemption, status quo, preempted, police power, state law, compassion, injunction, merits, agriculture, cooperative, protections, caregiver, Enabling, licensed, centers

Counsel: [*1] For Plaintiff: John D. Meara, Esq., Carl A. Chiulli, Esq., Matthew ***R***. Plain, Esq.

For Defendant: Edmund L. Alves, Esq., Marc Desisto, Esq.

Judges: LICHT, J.

Opinion by: LICHT

Opinion

DECISION

LICHT, J. Before the Court is Plaintiffs' request to enjoin the Defendant Town of Smithfield from enforcing an amendment to its zoning ordinance concerning medical marijuana. Jurisdiction is pursuant to *G.L. 1956 § 8-2-13*.

I

Facts and Travel

On April 18, 2017, the Town of Smithfield (the Town) unanimously adopted an ordinance (the Ordinance) amending the Town's zoning ordinance. The Ordinance's stated purpose is "to regulate the cultivation and distribution of medical marijuana." Zoning Ordinance Amendment § 1(B). The Ordinance is relatively comprehensive, addressing ***patient*** cultivation, caregiver cultivation, cooperative cultivation, and compassion centers. Broadly speaking, the Ordinance restricts who can grow marijuana, where and how it can be grown, and creates a licensing procedure for potential growers.

Individual pseudonymous plaintiffs Jane Doe ***I*** and II (together, the Does) are residents of Smithfield and medical marijuana ***patient*** cardholders licensed under The *Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act (the Hawkins-Slater Act), G.L. 1956 §§ 21-28.6-1 et seq.* Doe Affs. ¶¶ 1, 3. They are **[*2]** also members of organizational plaintiff ***Rhode Island Patient Advocacy Coalition*** (RIPAC). Compl. ¶ 33. RIPAC and the Does (together, Plaintiffs) challenge the Ordinance and seek both declaratory and injunctive relief from this Court, claiming the Ordinance tramples upon the protections and rights afforded the Does by the Hawkins-Slater Act. The Town responds by claiming that the Plaintiffs lack standing, and even if their standing is established, that Plaintiffs have not met the burden of showing they are entitled to a preliminary injunction.

II

Standard of Review

This Court can only issue a preliminary injunction when

the moving party

> "(1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." *Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (**R.I.** 1999)*

"The issuance and measure of injunctive relief rest in the sound discretion of the trial justice." *Cullen v. Tarini, 15 A.3d 968, 981 (**R.I.** 2011)*.

III

Analysis

A

Threshold Issues

The Town has raised several issues that could preclude Plaintiffs from filing **[*3]** this suit in the first place. As a result, the Court must first determine whether Plaintiffs are stymied by a lack of a private right of action or by lack of standing.[1]

1

Private Right of Action

The Town argues that the Does are barred from bringing this suit because they already have a remedy—if cited under the Ordinance, the Does "may demand an evidentiary hearing, pursuant to . . . *§ 21-28.6-8(b)* and gain a dismissal of the charge . . ." Def.'s Mem. 8. According to the Town, "[s]ince Plaintiffs have a remedy, the Court may not imply a further remedy not set forth in the [Hawkins-Slater] Act." Id. However, the Plaintiffs have not brought their Complaint under the Hawkins-Slater Act—they have brought it under the *Uniform Declaratory Judgments Act (UDJA), G.L. 1956 §§ 9-30-1 et seq.*[2] The UDJA vests the Superior Court with the authority to "determine[] any question of construction or validity" of a municipal ordinance for any person "whose rights, status, or other legal relations are affected . . ." *Sec. 9-30-2*; see also *Canario v. Culhane, 752 A.2d 476, 479 (**R.I.** 2000)*.

2

Standing

"It is well established in this state that a necessary predicate to a court's exercise of its jurisdiction under the [UDJA] is an actual justiciable controversy." *Sullivan v. Chafee, 703 A.2d 748, 751 (**R.I.** 1997)*. "For a claim to be justiciable, two elemental **[*4]** components must be present: (1) a plaintiff with the requisite standing and (2) 'some legal hypothesis which will entitle the plaintiff to real and articulable relief.'" *N & M Props., LLC v. Town of West Warwick ex rel. Moore, 964 A.2d 1141, 1145 (**R.I.** 2009)* (quoting *Bowen v. Mollis, 945 A.2d 314, 317 (**R.I.** 2008))*. "The requisite standing to prosecute a claim for relief exists when the plaintiff has alleged that 'the challenged action has caused him injury in fact, economic or otherwise[.]'" *Bowen, 945 A.2d at 317* (quoting ***R.I.** Ophthalmological Soc'y v. Cannon, 113 **R.I.** 16, 22, 317 A.2d 124, 128 (1974))*. "An injury in fact is 'an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Warwick Sewer Auth. v. Carlone, 45 A.3d 493, 499 (**R.I.** 2012)* (quoting *N & M Props., 964 A.2d at 1145*).

The Town alleges that the Plaintiffs' injuries are "purely

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[1] There is also one evidentiary issue outstanding: at oral argument, Plaintiffs attempted to introduce documentary evidence regarding police enforcement of marijuana laws. The Town objected to this evidence and has submitted a memorandum in support of its objection to which Plaintiffs have replied. Even though the rules of evidence do not apply on a motion for preliminary injunction, ***R.I.** **R**.* Evid. 101(B), and the Court can rely on affidavits, the Court has not considered this evidence. The Court will not rule on the objection at this time, as it is not necessary for the resolution of the instant motion.

[2] While the Court is only considering the request for a preliminary injunction at this time, the basis for the request for injunctive relief is the UDJA action, as "[a]n injunction is a remedy, not a cause of action." *Long v. Dell, Inc., 93 A.3d 988, 1004 (**R.I.** 2014)*.

conjectural." Def.'s Mem. 4. The Town frames the Plaintiffs' potential injuries as ones of inconvenience and contends that the "Plaintiffs continue to have the ability to access medicinal marijuana in neighboring cities and towns and continue to have the ability to possess the same amount of usable marijuana contemplated under the state *Medical Marijuana Act*." Id. at 5. While such a characterization may reflect part of the Plaintiffs' Complaint, their concerns go deeper than that. The Does indicate that "[t]he Ordinance requires the exposure of [their] confidential and protected **[*5]** health care information to Smithfield authorities." Doe Affs. ¶ 9. Under the Hawkins-Slater Act, the list of persons to whom the Department of Health has issued registration cards "shall be confidential . . . and not subject to disclosure." *Sec. 21-28.6-6(i)(3)*. The Town has no way of accessing this information, as it is even insulated from public records requests. Id.; see also Smithfield Town Council Mins. 3, Apr. 18, 2017. The Plaintiffs face a pressing dilemma—register with the Town and lose their state-guaranteed privacy, or risk fines for the possibility of staying anonymous. This imminent invasion of privacy presents a concrete and particularized injury, leading this Court to ***find*** that the Does have standing to challenge the Ordinance.[3]

For an organization such as RIPAC, the "standing requirement is satisfied 'when [the organization's] members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit.'" *In re Town of New Shoreham Project, 19 A.3d 1226, 1227 (**R.I.** 2011)* (mem.) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*). Given that the Does are members of RIPAC and have standing in their own right, the first **[*6]** prong is satisfied. The continued vitality and protection of the medical marijuana program is germane to RIPAC's stated purpose of "educat[ing] ***Rhode Island***'s medical marijuana ***patients***, caregivers, doctors and others . . . and to educate the public about the medical attributes of the use of the cannabis plant and the legal status of use of the cannabis plant." Compl. ¶ 30. Finally, the nature of the claim—the legal protections of medical marijuana ***patients***—"does not make the individual participation of each injured party indispensable to proper resolution of the cause . . ." *Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. Thus, RIPAC also has standing to bring the claim.[4]

B

Injunctive Relief

This Court must now determine whether the Plaintiffs have shown the four requisite elements for granting injunctive relief: (1) a reasonable likelihood of success on the merits, (2) irreparable harm in the absence of the injunction, (3) equity weighs in the Plaintiffs' favor, and (4) issuance of a preliminary injunction will preserve the status quo. See *Iggy's Doughboys, Inc., 729 A.2d at 705*. Before beginning this analysis, this Court observes that "[a] plaintiff is generally entitled to injunctive relief when a municipality seeks to enforce an invalid ordinance." *Women & Infants Hosp. v. City of Providence, 527 A.2d 651, 654 (**R.I.** 1987)*.

1

Likelihood of [*7] Success

In order to obtain injunctive relief, "[t]he moving party must . . . show that it has a reasonable likelihood of succeeding on the merits of its claim at trial." *Fund for*

[3] The Court notes that the Does have not explicitly stated that they grow or plan to grow marijuana. (An affidavit was submitted with Plaintiffs' Supplemental Memorandum of Law filed post-argument wherein the affiant states that he/she was growing twelve mature and twelve immature medical marijuana plants. There is no indication that the affiant is one of the Plaintiffs, and the affidavit was not considered. See footnote 1, supra.) Therefore, the Court does not base its standing analysis on those grounds. The Court, however, observes that marijuana cultivation remains illegal under federal law and could understand why a litigant might not want to expose themselves to prosecution. Were the Does to be growing marijuana, it could provide independent grounds for standing. See *St. George Greek Orthodox Cathedral of W. Mass., Inc. v. Fire Dep't of Springfield, 462 Mass. 120, 967 N.E.2d 127, 131 (Mass. 2012)* ("By maintaining its existing system, the church continues to violate the ordinance; in theory, the city could issue an enforceable violation notice at any time . . . .").

[4] Given that the Plaintiffs have established their own standing, "they may present the broader claims of the public at large." ***R.I.** Ophthalmological Soc'y, 113 **R.I.** at 27, 317 A.2d at 130*.

Cmty. Progress v. United Way of Se. New England, 695 A.2d 517, 521 (**R.I.** 1997). This is not "a certainty of success," but only "a prima facie case." Id. "Prima facie evidence is that amount of evidence that, if unrebutted, is sufficient to satisfy the burden of proof on a particular issue." Paramount Office Supply Co. v. D.A. MacIsaac, Inc., 524 A.2d 1099, 1101 (**R.I.** 1987).

State Preemption

Plaintiffs have alleged that the Ordinance is preempted by the Hawkins-Slater Act. Indeed, the Ordinance purports to limit ***patient*** cardholder cultivation possession to two mature plants, Ordinance § 1(D)(5), while the Hawkins-Slater Act permits ***patient*** cardholders up to twelve, § 21-28.6-4(a). Additionally, the Ordinance bans all caregiver and cooperative cultivation, Ordinance § 1(E)-(F), which is permitted by the Hawkins-Slater Act, § 21-28.6-4(e), -14(a). "[A]s a general rule, a state law of general character and statewide application is paramount to any local or municipal ordinance inconsistent therewith." Mongony v. Bevilacqua, 432 A.2d 661, 664 (**R.I.** 1981). This "conflicts with a state statute on the same subject," making a prima facie case for direct preemption. Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1261 (**R.I.** 1999).

Furthermore, the Hawkins-Slater Act provides a "comprehensive regulatory structure" for the medical use and supply of **[*8]** medical marijuana. Sec. 21-28.6-2(8). "[E]very marijuana plant, either mature or seedling, grown by a registered ***patient*** or primary caregiver, must be accompanied by a physical medical marijuana tag purchased through the department of business regulation and issued by the department of health . . . ." Sec. 21-28.6-15(a). Not one but two state departments are involved in the administration of the medical marijuana program. The Department of Business Regulation alone has issued 107 pages of regulations about the program. The General Assembly has instituted an oversight committee to evaluate the compassion center program. Sec. 21-28.6-12(j). There are nineteen subsections detailing protections for the medical use of marijuana. Sec. 21-28.6-4. This level of attention and detail makes clear that "the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject." Town of Warren, 740 A.2d at 1261. Thus, the Ordinance "will be declared invalid if it disrupts the state's overall scheme of regulation . . ." Town of E. Greenwich v. O'Neil, 617 A.2d 104, 109 (**R.I.** 1992).

Portions of the Ordinance dealing with the requirements of the building in which the marijuana will be grown, such as § 1(D)(4), may also be preempted by other state statutes. See, e.g., G.L. 1956 § 23-27.3-100.1.7 ("[T]he local cities and towns shall be prohibited from **[*9]** enacting any local building codes and ordinances in the future."); § 23-27.3-101.3 ("When the provisions in this code specified for structural strength, adequate egress facilities, sanitary conditions, equipment, light and ventilation, and fire safety conflict with the local zoning ordinances, [the State Building Code] shall control the erection or alteration of buildings."); § 23-28.1-2(b)(3) (providing that municipal fire safety ordinances "shall be effective only upon the approval by rule of the fire safety code board of appeal and review"). While the Ordinance purports to deal with fire safety issues concerning the electrical apparatus used to grow marijuana, see, e.g., Ordinance § 1(D)(3)(c), (4)(c), there is no evidence that the Town obtained any such approval.

The Town's Zoning Authority

The Attorney General[5] astutely observes that in various places, the Hawkins-Slater Act and its corresponding regulations gives deference to municipalities and their zoning laws, indicating that the General Assembly did not intend to occupy the entire field. This may be true to some extent, but this argument cuts both ways. The instances where the legislature has built in such deference is limited to compassion centers, licensed cultivators, and **[*10]** cooperative cultivators, all of who operate on a larger scale than the individual. See § 21-28.6-14(a)(7) (providing that cooperative cultivations must display documentation that the location and cultivation comply with applicable municipal housing and zoning codes); § 21-28.6-16(i) (providing that licensed cultivators, who sell medical marijuana to compassion centers, must abide by all zoning ordinances); 230 ***R.I.***C.***R***. 80-5-1 1.1(C)(1) (limiting the Department of Business Regulation's role in the medical marijuana

[5] Both sides in this case have challenged a law's constitutionality—the Town, as will be seen infra, challenges the constitutionality of the Hawkins-Slater Act, and the Plaintiffs, by virtue of preemption, challenge the Ordinance. In accordance with § 9-30-11, the parties served the Attorney General with a copy of the proceedings. The Attorney General has only to date elected to file, as amicus, a memorandum arguing that there is no conflict between the Ordinance and the Hawkins-Slater Act.

program to "compassion centers, licensed cultivators, and cooperative cultivations"); see also Att'y Gen.'s Mem. 5 ("Indeed, the Medical Marijuana Act recognizes the right of local cities and towns to regulate compassion centers, cooperative cultivations and licenses [sic] cultivators."). Thus, while the General Assembly may have specifically carved out space for towns to regulate medical marijuana cultivation, it has only been in the context of larger-scale operations, not individual ones.[6]

Furthermore, this Court questions whether it is within the power of municipalities to regulate an individual's small-scale cultivation of medical marijuana for personal use under its zoning authority.[7] The Town **[*11]** claims authority to regulate medical marijuana growth under G.L. 1956 § 45-24-37(g), which states, in part, that "plant agriculture is a permitted use within all zoning districts of a municipality, including all industrial and commercial zoning districts, except where prohibited for public health or safety reasons . . ." Interestingly, the Town pointed to no other instances where its zoning ordinance regulated agriculture in a residential zone. At oral argument, Plaintiffs contested that the growing of medical marijuana constituted plant agriculture. The Town cites to two Superior Court decisions in support of its contention that marijuana cultivation constitutes agriculture under § 45-24-37(g). However, these two cases do not quite stand for such a proposition.[8] One, Carlson v. Zoning Bd. of Review of S. Kingstown, No. WC-2014-0557, 2016 ***R.I.*** Super. LEXIS 134, 2016 WL 7035233, at *5 (***R.I.*** Super. Nov. 25, 2016), simply ***found*** that the plaintiff's medical marijuana cultivation did not constitute "agricultural products manufacturing." The second ***found*** that "growing medical marijuana was a horticulture exercise," but also held that it was not a "traditional agricultural land use." Baird Props., LLC v. Town of Coventry, No. KC-2015-0313, 2015 ***R.I.*** Super. LEXIS 111, 2015 WL 5177710, at *8-9 (***R.I.*** Super. Aug. 31, 2015).

However, "a zoning restriction imposed for considerations or **[*12]** purposes not embodied in an enabling act will be held invalid, not as exceeding the scope of the police power per se, but as an ultra vires act beyond the statutory authority delegated." Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 2:15 (4th ed. 2016).

> "[C]ases where zoning ordinances and decisions thereunder may be held ultra vires include situations where regulation: (1) involves the details or the manner of on-site use, such as heating systems or laundry facilities, etc., which do not directly involve the use of land or impose externalities on nearby land; . . . or (6) restricts the use of land to deal with some community problem, such as an economic boycott, demonstrations, or school desegregation, etc., that is only tangentially related, if at all, to the use of land at a particular location or the pattern of land use within the community." Id. at § 2:10.

The regulation of personal medical marijuana cultivation may be outside the scope of the authority granted to municipalities under the Zoning Enabling Act. The Zoning Enabling Act allows municipalities to enact a zoning ordinance, which is defined as "[a]n ordinance . . . that establish[es] regulations and standards **[*13]** relating to the nature and extent of uses of land and structures[.]" Sec. 45-24-31(72). A use is "[t]he purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." Sec. 45-24-31(65). The word "use" "traditionally has been understood to refer to the type of activity that is allowed at a particular site, such as residential, educational, religious, industrial, retail or mining." Lord Family Windsor, LLC v. Planning & Zoning Comm'n of Windsor, 288 Conn. 730, 954 A.2d 831, 836-37 (Conn. 2008). There are "de minimis uses of private property which are neither regulated nor contemplated by the zoning regulations." In re Scheiber, 168 Vt. 534, 724 A.2d 475, 478 (Vt. 1998); see also City of New Orleans v. Estrade, 200 LA. 552, 555, 8 So. 2d 536 (La. 1942) ("But, surely, it could not be seriously contended that it is a violation of the zoning ordinance for one to erect a shuffle-board or a badminton court in his own yard for the use and enjoyment of himself, his family

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[6] Even if this Court were inclined to agree that the state has not fully occupied the field, this argument fails to address the direct preemption discussed supra.

[7] These arguments were not fully briefed. However, "the office of a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy . . ." Coolbeth v. Berberian, 112 ***R.I.*** 558, 564, 313 A.2d 656, 659 (1974). This Court will give the parties full opportunity to brief the matter before final adjudication. Here, though, this Court "limit[s] [its] inquiry to whether the plaintiffs have shown at least a reasonable probability, rather than a certainty, of ultimate success on a final hearing." Id. at 566, 313 A.2d at 660.

[8] Furthermore, while persuasive, they are not binding on this Court.

and friends, or that it is illegal for children to engage in their various games and amusements in the yards of their homes."). It is entirely possible that the personal cultivation of medical marijuana is not a "use" that can be regulated under the Zoning Enabling Act.

Both parties presented the Court with the minutes from the Town Council meeting at which the Ordinance was enacted. Neither in these minutes nor in **[*14]** the Ordinance itself did the Town Council make any legislative findings. While not required to do so, the Town Council by that mechanism might have justified some of the limitations being placed on cardholders. Moreover, at the hearing, the Town offered no evidence to support its contention that two plants is sufficient for cardholders' needs, notwithstanding the fact that the General Assembly ***found*** twelve plants to be the appropriate number of plants to allow an individual cardholder to grow.

The Court is ever mindful that the Hawkins-Slater Act was enacted because the General Assembly ***found*** that it was in the interest of the health of certain Rhode Islanders to allow them to use and grow marijuana for medicinal purposes. The Court gleans from the minutes of the Town Council meeting that the police chief and others believed, for some reason, that two plants was sufficient for a cardholder's needs, and feared the excess could be sold illegally or make cardholder growers subject to potential robbery. Again, there is no evidence in this record or known to the Court that supports a claim that two plants is sufficient for a ***patient***'s use. Given that the Hawkins-Slater Act was drafted to **[*15]** protect the health of those with debilitating medical conditions, the Court hopes that the Town was acting on more than a hunch when it decided to alter the protections granted to cardholders by the General Assembly. Moreover, there is no precedent of which the Court is aware that says zoning ordinances are to be drafted as crime prevention tools. That would be an unusual stretch of "the police power." If that were the case, a municipality could use its zoning ordinance to eliminate banks as they are susceptible to robbery or prohibit pharmacies from dispensing opioids because of the health threat they pose.

Ultimately, there is a likelihood that the Plaintiffs can establish that the Town exceeded its zoning authority in enacting the Ordinance.

Federal Preemption

The Town's final argument with respect to the Plaintiffs' likelihood of success on the merits is that the Hawkins-Slater Act itself is preempted by federal law, specifically the *Controlled Substances Act (CSA), 21 U.S.C. §§ 801 et seq.* However, if the Ordinance is beyond the scope of the Zoning Enabling Act, it is immaterial whether the Hawkins-Slater Act is valid. If the Town acted ultra vires when enacting the Ordinance, the Ordinance is unenforceable **[*16]** and a nullity. See *Hardy v. Zoning Bd. of Review of Coventry, 113 **R.I.** 375, 377, 321 A.2d 289, 290-91 (1974)* ("[A]ny attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is ultra vires of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void."); see also *Women & Infants Hosp., 527 A.2d at 653*.

The Court does not rely on the foregoing, however, to conclude that the Hawkins-Slater Act is not preempted by the CSA. Of course, "[t]he *Supremacy Clause of the United States Constitution, Article VI, clause 2*, preempts or invalidates state law that interferes or conflicts with any federal law." *Verizon New England Inc. v. **R.I.** Pub. Utils. Comm'n, 822 A.2d 187, 192 (**R.I.** 2003)*. But what constitutes a conflict has confounded courts. The CSA helpfully describes how it should be interpreted with regard to state law:

> "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." *21 U.S.C. § 903*.

Congress has not chosen to completely occupy the field, instead only choosing to preempt laws that are in "positive conflict" **[*17]** with the CSA "so that the two cannot consistently stand together." Id.

As this Court recently observed in *Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 **R.I.** Super. LEXIS 88, 2017 WL 2321181, at *14 (**R.I.** Super. May 23, 2017)*, this clause fits nicely within the doctrine of "conflict preemption." Conflict preemption comes in two forms. The first arises "where compliance with both federal and state regulations is a physical impossibility . . ." *Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)*.

The second occurs "where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)* (quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*).

The Supreme Court of Michigan recently dealt with conflict preemption in extremely similar circumstances in *Ter Beek v. City of Wyoming, 495 Mich. 1, 846 N.W.2d 531 (Mich. 2014)*. In Ter Beek, the city of Wyoming penalized, inter alia, growing medical marijuana under their zoning ordinance. This ordinance conflicted with a Michigan statute that provided a regulatory scheme for medical marijuana. The city argued the CSA preempted the Michigan statute. The Supreme Court of Michigan first determined that there was no impossibility preemption because "it does not require that the City violate" the CSA. *Ter Beek, 846 A.2d at 538*. Such a conclusion is eminently logical and applicable to **[*18]** the case at bar. Nothing in the Hawkins-Slater Act requires the Town—or anyone—to "manufacture, distribute, or dispense, or possess" marijuana or to otherwise violate the CSA. *21 U.S.C. § 841(a)(1)*.

Finally, this Court concludes that the Hawkins-Slater Act does not stand as an obstacle to the purposes and objectives of the CSA. The key to understanding why lies in a simple proposition: "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." *New York v. United States, 505 U.S. 144, 166, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992)*. But while the "several states must be considered as sovereign and independent," *McCulloch v. Maryland, 17 U.S. 316, 342, 4 L. Ed. 579 (1819)*, "[***i***]t is well established that cities and towns have no power to enact legislation except in reliance upon those powers delegated to them from time to time by the General Assembly." *Vukic v. Brunelle, 609 A.2d 938, 941 (**R.I.** 1992)*; see also ***R.I.** Const. art. XIII, § 4* ("The general assembly shall have the power to act in relation to the property, affairs and government of any city or town by general laws . . . ."). The Hawkins-Slater Act provides that a "qualifying ***patient*** cardholder who has in his or her possession a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or **[*19]** denied any right or privilege . . . . for the medical use of marijuana[.]" *Sec. 21-28.6-4(a)*; see also § 21-28.6-4(b), *(e)*, *(j)* & *(m)* (providing the same or similar protections for authorized purchasers, primary caregiver cardholders, and practitioners); *§§ 21-28.6-12(h)*, *-16(m)* (providing the same or similar protections for compassion centers and registered cultivators).

The State of ***Rhode Island*** has granted certain individuals immunity from state prosecution under the Hawkins-Slater Act. The Hawkins-Slater Act does not (and could not) deny the federal government the ability to enforce the CSA, and does not (and could not) immunize medical marijuana users from prosecution. Accord *Ter Beek, 846 N.W.2d at 540* ("Granting Ter Beek his requested relief does not limit his potential exposure to federal enforcement of the CSA against him, but only recognizes that he is immune under state law for MMMA-compliant conduct, as provided in *§ 4(a)*."). Medical marijuana is a matter of statewide concern, and the Hawkins-Slater Act was enacted under the state's police power out of concern for the health of certain of its residents. See *§ 21-28.6-2(6)*. Thus, while cities and towns have the "right of self government in all local matters," ***R.I.** Const. art. XIII, § 1*, this "in no way affect[s] the sovereignty of the state with regard **[*20]** to the exercise of the police power . . ." *Lynch v. King, 120 **R.I.** 868, 876, 391 A.2d 117, 122 (1978)*; see also *State v. Krzak, 97 **R.I.** 156, 161, 196 A.2d 417, 421 (1964)* ("[T]he sovereignty of the state in the matter of elections and education was not surrendered to those cities and towns which adopted a home rule charter. Neither was the sovereignty of the state with relation to the exercise of the police power transferred to such cities and towns.") (citations omitted).

The General Assembly, in exercising its police power, has withdrawn the power from the cities and towns to punish the medical use of marijuana under its own ordinances. The CSA is still in effect in Smithfield, as it is throughout ***Rhode Island***. Nothing prevents the federal government from enforcing the CSA. ***Rhode Island*** has, simply, elected not to independently prohibit the conduct proscribed under the CSA. Even if the CSA did contain direction to the states to adopt certain laws, it would be moot, as "Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States, 521 U.S. 898, 925, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)*. Thus, this Court concludes that the CSA does not preempt the Hawkins-Slater Act. Because the Plaintiffs have made a prima facie case that the Town has failed to rebut, this Court also concludes that Plaintiffs **[*21]** have a likelihood of success on the merits.

Other Provisions

The Plaintiffs have challenged other provisions of the Ordinance. Since this matter is before the Court on preliminary injunction, it is not the final adjudication of this matter, and these arguments will be considered when the case is considered on preliminary or permanent injunction.

2

Irreparable Harm

"The purpose of an injunction is to prevent imminent, irreparable injury." *Ward v. City of Pawtucket Police Dep't, 639 A.2d 1379, 1382 (**R.I.** 1994)*. As this Court has detailed supra, one harm the Plaintiffs have highlighted is the potential invasion of their privacy—if the Plaintiffs want to comply with the Ordinance, they must reveal what is, under the Hawkins-Slater Act, confidential information. Whether the right is given by statute or by the Constitution, "the right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief." *Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981)*; see also *Oil, Chem. & Atomic Workers Int'l Union, Local 2-286 v. Amoco Oil Co. (Salt Lake City Refinery), 885 F.2d 697, 707 (10th Cir. 1989)* (***finding*** the invasion of privacy and potential stigmatization and humiliation of a drug-testing program, despite "assurances of confidentiality," to constitute an irreparable injury). Hence, the Court ***finds*** that the unwarranted disclosure of Plaintiffs' **[*22]** status as medical marijuana cardholders constitutes irreparable harm.

Plaintiffs also contend that the Ordinance hinders "their ability to access medication prescribed to them by their doctor"—namely, medical marijuana. Pls.' Mem. 24. The Town observes that "there are certainly alternative sources of medical marijuana available to the individual Plaintiffs outside of the Town." Def.'s Mem. 11. Apparently, the Town feels there is no harm in ***patient*** cardholders with "[a] chronic or debilitating disease or medical condition," such as "severe, debilitating, chronic pain," "seizures," or "severe and persistent muscle spasms," having to drive out of town to obtain medication. *Sec. 21-28.6-3(5)(ii)*. However, the General Assembly concluded otherwise and permitted these ***patients*** the right to grow their medication in their own homes.

3

Balance of the Equities and Status Quo

Testing the balance of the equities involves "examining the hardship to the moving party if the injunction is denied, the hardship to the opposing party if the injunction is granted and the public interest in denying or granting the requested relief." *Fund for Cmty. Progress, 695 A.2d at 521*. The hardships to the Does include revealing their medical status prematurely and increased difficulty **[*23]** or inability to either grow or obtain their medicine. The General Assembly has ***found*** that "[m]odern medical research has discovered beneficial uses for marijuana in treating or alleviating pain, nausea, and other symptoms associated with certain debilitating medical conditions . . ." *Sec. 21-28.6-2(1)*. Thus, "pursuant to its police power to enact legislation for the protection of the health of its citizens," the General Assembly enacted the Hawkins-Slater Act. *Sec. 21-28.6-2(6)*. The State has implemented a regulatory scheme in the interests of "public safety, public welfare, and the integrity of the medical marijuana program . . ." *Sec. 21-28.6-2(7)*. Town interference in this system, designed to be "transparent, safe, and responsive to the needs of ***patients***," could impair the public interest as laid out by the General Assembly. *Sec. 21-28.6-2(8)*. Thus, considering the burdens on the parties and the impact to the public interest, this Court ***finds*** the balance of the equities lies with the Plaintiffs.

Any concerns raised before the Town Council can be addressed through enforcement of other laws and the exemptions in the Hawkins-Slater Act. See *§ 21-28.6-4(p)* (providing that "[a] qualifying ***patient*** or primary caregiver cardholder may give marijuana to another . . . provided **[*24]** that no consideration is paid for the marijuana"); *§ 21-28.6-7(a)(2)(vi)* (providing that the Hawkins-Slater Act does not permit smoking of marijuana "[w]here exposure to the marijuana smoke significantly adversely affects the health, safety, or welfare of children"). The General Assembly has endowed the Plaintiffs with certain rights relative to their health care, and the Town has put forward no evidence of any of its interests; thus, it is more equitable to deny the preliminary relief.

The status quo analysis is straightforward. The Ordinance disturbed the legislative regime set up by the

Hawkins-Slater Act. The Town argues that "preventing enforcement of this measure would remove necessary public safeguards which have been in place since April 18, 2017 . . ." Def.'s Mem. 13. Yet, the Town has not pointed to any effort to charge anyone for violating the Ordinance. Moreover, "a restraining order is meant to preserve or restore the status quo and . . . this status quo is the last peaceable status prior to the controversy." *E.M.B. Assocs. v. Sugarman, 118 **R.I.** 105, 108, 372 A.2d 508, 509 (1977)*. Granting the restraining order would indeed maintain the status quo.

IV

Conclusion

The Court ***finds*** that the Plaintiffs have standing to pursue their declaratory judgment action and their **[*25]** request for injunctive relief. The Court also ***finds*** that the Plaintiffs have a reasonable likelihood of success on the merits, will suffer irreparable harm without the requested relief, have the balance of the equities, and that issuance of the injunction will preserve the status quo. Therefore, the Court grants the Plaintiffs' motion for a preliminary injunction. Counsel will prepare the appropriate order for entry.

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HN2 **Federal Common Law, Preemption**

A federal statute may preempt a state law in several ways, including where state law is an obstacle to the objectives of the United States Congress (obstacle preemption) or where simultaneous compliance with both federal and state law is impossible (impossibility preemption). These two concepts are often referenced collectively as conflict preemption.

Business & Corporate Compliance > ... > Disability Discrimination > Scope & Definitions > Discriminatory Conduct

Labor & Employment Law > Discrimination > Actionable Discrimination

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

Business & Corporate Compliance > ... > Medical Treatment > Healthcare Law > Medical Treatment

HN3 **Scope & Definitions, Discriminatory Conduct**

The Court finds that conflict preemption does not apply because the anti-discrimination provisions of the Delaware's Medical Marijuana Act (DMMA), Del. Code Ann. tit. 16, § 4901A et seq., does not pose an obstacle to the objectives of the United States Congress nor do they render compliance with both federal and state law impossible. The DMMA does not require employers to participate in an illegal activity (the unauthorized manufacture, dissemination, dispensing or possession of controlled substances) but instead merely prohibits them from discriminating based upon medical marijuana use.

Governments > Legislation > Statutory Remedies & Rights

HN4 **Legislation, Statutory Remedies & Rights**

A private right of action may be implied if there is strong evidence that the legislature intended to create it. Delaware courts traditionally apply a three-factor implied private right of action analysis as first articulated by the U.S. Supreme Court in Cort v. Ash. This test analyzes (1) whether the plaintiff is a member of a class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent to grant or deny a private right of action; and (3) whether recognition of an implied private right of action would advance the statute's purpose. This Court has held that "statutory intent is determinative in a private right of action analysis.

Business & Corporate Compliance > ... > Disability Discrimination > Scope & Definitions > Discriminatory Conduct

Labor & Employment Law > Discrimination > Actionable Discrimination

Business & Corporate Compliance > ... > Medical Treatment > Healthcare Law > Medical Treatment

Labor & Employment Law > ... > Disability Discrimination > Employment Practices > Medical Inquiries

HN5 **Scope & Definitions, Discriminatory Conduct**

Delaware's Medical Marijuana Act (DMMA), Del. Code Ann. tit. 16, § 4905A, prohibits an employer from discriminating against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon either of the following: a. the person's status as a cardholder; or b. a registered qualifying patient's positive drug test.

Business & Corporate Compliance > ... > Disability Discrimination > Scope & Definitions > Discriminatory Conduct

Labor & Employment Law > Discrimination > Actionable Discrimination

Labor & Employment Law > ... > Disability Discrimination > Employment Practices > Medical Inquiries

Business & Corporate Compliance > ... > Medical Treatment > Healthcare Law > Medical Treatment

HN6 **Scope & Definitions, Discriminatory**

Conduct

Delaware's Medical Marijuana Act (DMMA), Del. Code Ann. tit. 16, § 4901A(g), provides that state law should make a distinction between the medical and nonmedical uses of marijuana. Hence, the purpose of this chapter is to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties. The Court may reasonably infer that the purpose of the statute is to protect medical marijuana patients from discrimination based upon their status, and from being penalized based upon that discrimination, as with termination from employment.

Governments > Legislation > Interpretation

Governments > State & Territorial
Governments > Legislatures

HN7[] **Legislation, Interpretation**

The Court's duty in interpreting a statute is to find legislative intent and to give effect to it. The Court is required, under settled rules of construction, to read the statute as a whole and to harmonize its parts. If a literal interpretation leaves a result inconsistent with the general statutory intention, the literal interpretation must give way to the general intent.

Business & Corporate Compliance > ... > Disability Discrimination > Scope &
Definitions > Discriminatory Conduct

Labor & Employment
Law > Discrimination > Actionable Discrimination

Business & Corporate Compliance > ... > Medical Treatment > Healthcare Law > Medical Treatment

Labor & Employment Law > ... > Disability Discrimination > Employment Practices > Medical Inquiries

HN8[] **Scope & Definitions, Discriminatory Conduct**

The purpose of Delaware's Medical Marijuana Act (DMMA), Del. Code Ann. tit. 16, § 4901A, is to protect individuals with debilitating medical conditions from arrest or prosecution, and from criminal or other penalties. The purpose of Section 4905A is to prohibit employment-related discrimination based upon either status as a medical marijuana cardholder or a qualifying patient's positive drug test. It is a well-settled principle of statutory interpretation that an isolated portion of a statute should not be construed in a vacuum: rather, every word must be given meaning and must be considered in the context of the entire statute.

Business & Corporate Compliance > ... > Disability Discrimination > Scope &
Definitions > Discriminatory Conduct

Labor & Employment
Law > Discrimination > Actionable Discrimination

Labor & Employment Law > ... > Disability Discrimination > Employment Practices > Medical Inquiries

Business & Corporate Compliance > ... > Medical Treatment > Healthcare Law > Medical Treatment

HN9[] **Scope & Definitions, Discriminatory Conduct**

In the Delaware's Medical Marijuana Act (DMMA), Del. Code Ann. tit. 16, § 4901A et seq., no agency or commission has been tasked with enforcement of the anti-discrimination provision. Under Delaware's Medical Marijuana Act (DMMA), Del. Code Ann. tit. 16, § 4905A(a)(3), no remedy other than a private right of action is available to cardholders and qualifying marijuana patients terminated or discharged from employment for failing drug tests. The fact that an antidiscrimination provision was included in the DMMA demonstrates legislative intent to remedy the problem of discrimination based upon one's cardholder status. Therefore, this Court finds that the language of Section 4905A(a)(3) creates an implied private right of action. Absent a finding of an implied private right of action, Section 4905A would be devoid of any purpose within the broader context of the statute.

Governments > Legislation > Statutory Remedies & Rights

Labor & Employment
Law > Discrimination > Actionable Discrimination

HN10 **Legislation, Statutory Remedies & Rights**

A cause of action may be implied where a statute defines an unfair employment practice but does not provide an express method of redress.

Business & Corporate Compliance > ... > Disability Discrimination > Scope & Definitions > Discriminatory Conduct

Governments > Legislation > Statutory Remedies & Rights

Business & Corporate Compliance > ... > Medical Treatment > Healthcare Law > Medical Treatment

HN11 **Scope & Definitions, Discriminatory Conduct**

The Delaware's Medical Marijuana Act (DMMA), Del. Code Ann. tit. 16, § 4901A, clarifies the DMMA's purpose of protecting individuals with debilitating medical conditions from arrest or prosecution and from criminal or other penalties. However, there is no remedy in the DMMA's anti-discrimination provision for damages caused by the prohibited discrimination. Although a criminal sanction against the employer might deter future violations, it would provide little by way of remedy to an employee who was discharged. In fact, without an implied private right of action, a plaintiff would have no other recourse. In short, while the fact that the Delaware General Assembly authorized a private right of action in Del. Code Ann. tit. 16, § 4924A may serve as some evidence that a private right of action was not intended in Del. Code Ann. tit. 16, § 4905A(a)(3), the Court finds that the other arguments supporting the provision of an implied private right of action by the General Assembly outweigh such evidence. Statutes prohibiting discrimination are generally deemed remedial, and Delaware law is clear that remedial statues are granted a liberal construction.

Business & Corporate Compliance > ... > Disability Discrimination > Scope & Definitions > Discriminatory Conduct

Labor & Employment Law > Discrimination > Actionable Discrimination

Civil Rights Law > Protection of Rights > Procedural Matters > Statute of Limitations

HN12 **Scope & Definitions, Discriminatory Conduct**

The Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12117(a) and 42 U.S.C.S. § 2000e-5(f)(1), require ADA claims to be brought within 90 days of receiving the Equal Employment Opportunity Commission's (EEOC's) right-to-sue notice. Del. Code Ann. tit. 19, § 714(b) requires Delaware's Persons with Disabilities Employment Protections Act, Del. Code Ann. tit. 19, § 720 et seq., claims to be filed within 90 days of receiving either the EEOC or Delaware Department of Labor Office of Anti-Discrimination's right-to-sue notice, whichever is later. A claim filed even one day beyond this ninety-day window is untimely and may be dismissed.

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

HN13 **Pro Se Litigants, Pleading Standards**

Cognizant of the difficulties faced by pro se plaintiffs, the Court holds a pro se plaintiff's complaint to a less demanding standard of review. However, there is no different set of rules for pro se plaintiffs, and the Court's leniency cannot go so far as to affect the substantive rights of the parties.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN14 **Amendment of Pleadings, Relation Back**

An amendment of a pleading relates back to the date of the original pleading when the claim asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. In order for an amendment to relate back, there must be fair notice of the general fact situation out of which the claim or defense arose. Relation back is improper when the new claim(s) present a new and independent theory of liability based upon independent facts that were not set forth in the original complaint.

Civil Procedure > ... > Defenses, Demurrers &

Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN15 **Motions to Dismiss, Failure to State Claim**

Although the Court must accept all well-pleaded allegations as true for purposes of a Del. Super. Ct. R. Civ. P. 12(b)(6) motion to dismiss, the Court will ignore conclusory allegations that lack specific supporting factual allegations.

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Scope & Definitions

HN16 **Whistleblower Protection Act, Scope & Definitions**

The Delaware's Whistleblowers' Protection Act (DWPA), Del. Code Ann. tit. 19, § 1701 et seq., acts to protect employees who report violations of the law for the benefit of the public, as well as to provide a check on persons in positions of authority, by ensuring that they do not take retaliatory action against subordinates who disclose misconduct. The DWPA prohibits an employer from discharging or otherwise discriminating against an employee for reporting a violation to the employer or to the employee's supervisor, which he/she knows or reasonably believes has occurred or is about to occur. A violation is an act or omission by an employer that is materially inconsistent with, and a serious deviation from, standards implemented pursuant to a law, rule, or regulation promulgated under the laws of Delaware.

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Evidence

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Scope & Definitions

HN17 **Whistleblower Protection Act, Evidence**

The elements for a prima facie case of a violation of the Delaware's Whistleblowers' Protection Act (DWPA), Del. Code Ann. tit. 19, § 1701 et seq., are as follows: (1) the employee engaged in a protected whistleblowing activity; (2) the accused official knew of the protected activity; (3) the employee suffered an adverse employment action; and (4) there is a causal connection between the whistleblowing activity and the adverse action.

Labor & Employment Law > Wrongful Termination > Public Policy

HN18 **Wrongful Termination, Public Policy**

In general, an at-will employee may be discharged by his/her employer at any time without cause. However, the Delaware Supreme Court has implemented certain protections for at-will employees through recognition of a limited covenant of good faith and fair dealing implicit in every employment contract. These protections have been delineated in four categories by the Delaware Supreme Court in E.I. DuPont de Nemours and Co. v. Pressman, one of which is where the termination violated public policy. In Pressman, the Delaware Supreme Court held that a plaintiff must satisfy a two-part test in order to establish a breach of the covenant of good faith and fair dealing under the public policy category: (i) the employee must assert a public interest recognized by some legislative, administrative or judicial authority and (ii) the employee must occupy a position with responsibility for advancing or sustaining that particular interest. Various other jurisdictions have also recognized wrongful discharge as a separate claim where the reason for discharge violates public policy.

Business & Corporate Compliance > ... > Labor & Employment Law > Occupational Safety & Health > Duties & Rights

Business & Corporate Compliance > ... > Labor & Employment Law > Occupational Safety & Health > OSHA Violations & Penalties

HN19 **Occupational Safety & Health, Duties & Rights**

Section 11(c)(1), 29 U.S.C.S. § 660(c), provides that no

person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act.

Counsel: **[*1]** Patrick C. Gallagher, Esquire, Jacobs & Crumplar, P. A., Wilmington, Delaware, Attorney for the Plaintiff.

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Thomas R. Chiavetta, Esquire (pro hac vice), Jones Day, Washington, D.C.; and Benjamin M. Gavel, Esquire (pro hac vice), Jones Day, Cleveland, Ohio, Of Counsel for the Defendant.

Judges: Noel Eason Primos, Judge.

Opinion by: Noel Eason Primos

Opinion

OPINION AND ORDER

Primos, J.

Before the Court is the motion to dismiss of Defendant Kraft Heinz Foods Company (hereinafter "Kraft Heinz") and the response of Plaintiff Jeremiah Chance (hereinafter "Plaintiff). Plaintiff filed his initial complaint *pro se* on January 30,2018, regarding his termination of employment from Kraft Heinz. Plaintiff alleged in his original Complaint that he was terminated after testing positive for marijuana in violation of *Delaware's Medical Marijuana Act ("DMMA")*,[1] and in retaliation for his complaints under the federal *Occupational Safety and Health Act ("OSHA")*.[2] Plaintiff subsequently obtained counsel and filed an Amended Complaint on March 26, 2018, which asserted four Counts arising from his **[*2]** termination: (I) violation of the DMMA; (II) violations of the *Americans with Disabilities Act ("ADA")*,[3] and the *Delaware's Persons with Disabilities Employment Protections Act ("DEPA")*;[4] (III) violation of *Delaware's Whistleblowers' Protection Act ("DWPA")*;[5] and (IV) common law wrongful termination. Kraft Heinz's motion requests dismissal of all Counts asserted in the Amended Complaint. For the reasons set forth below, Defendant Kraft Heinz's motion is **DENIED** in part and **GRANTED** in part.

I. Factual Background and Procedural History

The facts recited are as alleged in Plaintiffs' Amended Complaint.[6] Plaintiff was employed by Kraft Heinz at its facility in Dover, Delaware, from May 2009 to August 2016. This facility contains railroad tracks on its premises. Plaintiff started out as a warehouse employee and was eventually promoted to Yard Equipment Operator. In his Amended Complaint, Plaintiff alleges that he suffers from a number of medical ailments of which Kraft Heinz was aware, including various back problems. Plaintiff obtained a medical marijuana card in 2016 for these medical issues and took leave on several occasions through the *Family and Medical Leave Act ("FMLA")* and by utilizing **[*3]** short-term disability benefits.

On August 9, 2016, Plaintiff submitted an incident report to Kraft Heinz management regarding unsafe conditions of the railroad ties in the railroad yard. The following day, Plaintiff showed Paul Diebel, a maintenance supervisor employed by Kraft Heinz, and two bulk operators the unsafe conditions of the railroad ties as well as other defects. Plaintiff also met with Michael Doughty, the Warehouse Supervisor, and voiced his concern that the unsafe conditions of the railroad tracks violated the United Facilities Criteria (the "UFC"). Doughty responded that Kraft Heinz was not obligated to comply with the UFC. Plaintiff had relied upon the UFC, however, because he had previously requested from Kraft Heinz the standards that applied to the rails but had never been provided them.

Later that day, Plaintiff was operating a "shuttle wagon" on the railroad tracks when it derailed. This prompted Kraft Heinz management to request that Plaintiff undergo a drug test. The test was inconclusive, and

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[1] *16 Del. C. §4901A et seq.*

[2] *29 U.S.C. § 651 et seq.*

[3] *42 U.S.C. §§ 12101 et seq.*

[4] *19 Del. C. §720 et seq.*

[5] *19 Del. C. § 1701 et seq.*

[6] *Savor, Inc. v. FMR Corp., 812 A.2d 894, 896-97 (Del. 2002)* (on a motion to dismiss "all well-pleaded factual allegations are accepted as true").

Kraft Heinz requested that he submit to another test. On August 12, 2016, Plaintiff underwent a second drug test, and on August 16, 2016 a Medical Review Officer ("MRO") **[*4]** informed Plaintiff that he had tested positive for marijuana. Plaintiff informed the MRO that he possessed a medical marijuana card and provided it to the MRO. On August 25 or 26, 2016, Kraft Heinz terminated Plaintiff for failing the drug test.

Plaintiff subsequently filed a Charge for Discrimination with the Delaware Department of Labor Office of Anti-Discrimination ("DDOL") on October 27, 2016, which was "dual filed" with the Federal Equal Employment Opportunity Commission ("EEOC"). The DDOL issued a right-to-sue letter on September 29, 2017, and the EEOC issued Plaintiff a right-to-sue letter on November 1, 2017. Plaintiff filed his original Complaint within the requisite 90 days on January 30, 2018, and subsequently filed an Amended Complaint on March 26, 2018.

II. Standard of Review

HN1[] On a motion to dismiss, the moving party bears the burden of demonstrating that "under no set of facts which could be proven in support of its [complaint] would the [plaintiff] be entitled to relief."[7] Upon this Court's review of a motion to dismiss, "(i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the **[*5]** claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[8]

III. Discussion

A. Count I: Plaintiff's Claims Under the DMMA.

Kraft Heinz argues that federal law preempts the DMMA to the extent that it authorizes the use of marijuana and requires employers to accommodate that use. Kraft Heinz cites to the Supremacy Clause[9] and a handful of cases in other jurisdictions for the proposition that the Controlled Substances Act ("CSA"),[10] under a conflict preemption analysis,[11] preempts the DMMA and state medical marijuana laws. Plaintiff, in response, argues that this analysis is overbroad and that the CSA does not preempt the specific employment discrimination provisions within the DMMA.

At issue before this Court are two main inquiries: (1) whether the DMMA, and specifically its anti-discrimination provision, is in conflict with the CSA and is thus preempted; and (2) whether a private right of action to enforce its non-discrimination provision is implied in the DMMA.[12] Both of these queries appear to be issues of first impression **[*6]** in Delaware.

1. Whether the DMMA is Preempted by the CSA.

In considering whether the anti-discrimination provision of the DMMA is not preempted by the CSA, this Court finds persuasive the decision of the United States District Court for the District of Connecticut in *Noffsinger v. SSC Niantic Operating Co., LLC*,[13] and that of the Rhode Island Superior Court in *Callaghan v. Darlington Fabrics Corp.*[14] This Court further finds that the case

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[7] *Daisy Constr. Co. v. W.B. Venables & Sons, Inc., 2000 Del. Super. LEXIS 9, 2000 WL 145818, at *1 (Del. Super. Jan. 14, 2000)*.

[8] *Savor, 812 A.2d at 896-97*.

[9] U.S. Const. art. VI.

[10] *21 U.S.C. § 801 et seq.*

[11] *HN2*[] A federal statute may preempt a state law in several ways, including where state law is an obstacle to the objectives of Congress ("obstacle preemption") or where simultaneous compliance with both federal and state law is impossible ("impossibility preemption"). *Noffsinger v. SSC Niantic Operating Co., LLC, 273 F. Supp. 3d 326, 333 (D. Conn. 2017)*. These two concepts are often referenced collectively as "conflict preemption." *Callaghan v. Darlington Fabrics Corp., 2017 R.I. Super. LEXIS 88, at * 40-42 (R.I. Super. May 23, 2017)*.

[12] The DMMA does not expressly permit individuals to sue for violations of the non-discrimination provision. Thus, this Court must analyze whether a private right of action is implied within the statute.

[13] *273 F. Supp. 3d 326 (D. Conn. 2017)*.

[14] *2017 R.I. Super. LEXIS 88 (R.I. Super. May 23, 2017)*. Unlike most other states that have enacted medical marijuana laws, Delaware is one of only nine states (including Connecticut and Rhode Island) that explicitly bars employers

law cited by Kraft Heinz is distinguishable from the case at hand.

The CSA regulates the possession and use of certain drugs, including marijuana, and states that it is "...unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA."[15] The CSA classifies marijuana as a Schedule I substance and does not currently allow any exceptions for medical use.[16] The DMMA, in contrast, expressly authorizes the distribution, possession, and use of marijuana for medical purposes.[17] Moreover, as mentioned *supra*, and unlike most other state medical marijuana statutes, the DMMA explicitly prohibits employers from disciplining employees who use marijuana for medical reasons, and who fail drug tests because of it: **[*7]**

> [A]n employer may not discriminate against a person in hiring, termination, or any term or condition of employment...if the discrimination is based upon either of the following: a. The person's status as a cardholder; or b. A registered qualifying patient's positive drug test for marijuana...unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.[18]

At first glance, it appears that the two statutes are at odds. However, to find preemption in this case would represent an overbroad approach to that issue.[19] While the CSA classifies marijuana as a Schedule I substance and does not currently make exceptions for medical use, it does not make it illegal to employ someone who uses marijuana, nor does it purport to regulate employment matters within this context. In fact, the CSA itself explicitly confirms Congress's intent that the statute not preempt a state law "unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."[20]

Therefore,*HN3*[↑] the Court finds that conflict preemption does not apply because the anti-discrimination **[*8]** provisions of the DMMA do not pose an obstacle to the objectives of Congress nor do they render compliance with both federal and state law impossible. The DMMA does not require employers to participate in an illegal activity (the unauthorized manufacture, dissemination, dispensing or possession of controlled substances) but instead merely prohibits them from discriminating based upon medical marijuana use.

Kraft Heinz cites to a number of cases in its opening and reply memoranda for the proposition that the CSA preempts anti-discrimination provisions of the state medical marijuana law and that employers are not required to accommodate employees' state-licensed marijuana use by continuing to employ them after learning of the use via employee disclosure or a failed drug test.[21] Indeed, very few medical marijuana statutes prohibit the discipline or discharge of an employee who uses medical marijuana outside of work and later tests positive on a drug test. Rather, most such statutes lack any clear statutory protections for medical marijuana users' employment, which has led to the dismissal of multiple claims of employees who were discharged based upon their medical marijuana use, even absent **[*9]** evidence that their use affected their work

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from firing or refusing to hire an employee who uses medical marijuana in compliance with the requirements of state law. The other states besides the three previously mentioned are Arizona, Illinois, Maine, Nevada, New York, and Minnesota. *See* Noffsinger, 273 F. Supp. 3d at 331.

[15] Gonzales v. Raich, 545 U.S. 1, 13, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).

[16] 21 U.S.C. § 812.

[17] 16 Del. C. §4903A.

[18] 16 Del. C. § 4905A(a)(3).

[19] *See* Noffsinger, 273 F. Supp. 3d at 334 (argument that Connecticut medical marijuana statute stands as obstacle to CSA is overbroad because it ignores specific provision at issue, *i.e.*, anti-discrimination provision). This Court must focus upon the DMMA's specific anti-employment discrimination provision rather than the statute as a whole. In preemption cases, "state law is displaced only to the extent that it actually conflicts with federal law [and] a ... court should not extend its invalidation of a statute further than necessary to dispose of the case before it." Noffsinger, 273 F. Supp. 3d at 334 (quoting Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476, 116 S. Ct. 1063, 134 L. Ed. 2d 115 (1996)).

[20] 21 U.S.C. § 903. *See also* Callaghan, 2017 R.I. Super. LEXIS 88, at *43-44 (R.I. Super. May 23, 2017) (Congress is aware of state medical marijuana statutes and "has decided to tolerate the tension.. .between the federal and state regimes.").

[21] *See, e.g.*, Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 348 Ore. 159, 230 P.3d 518 (Or. 2010); Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225 (D.N.M. 2016).

performance.[22] However, this Court finds the cases cited by Kraft Heinz distinguishable from this case because the statutory provisions at issue in those cases are not analogous to the anti-discrimination provision of the DMMA.[23]

2. Whether a Private Right of Action is Implied in the DMMA.

HN4[↑] A private right of action may be implied if there is "strong evidence that the legislature intended to create it."[24] Delaware courts traditionally apply a three-factor implied private right of action analysis as first articulated by the U.S. Supreme Court in *Cort v. Ash*.[25] This test analyzes "(1) whether the plaintiff is a member of a class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent to grant or deny a private right of action; and (3) whether recognition of an implied private right of action would advance the statute's purpose."[26] This Court has held that "statutory intent is determinative in a private right of action analysis."[27]

With regard to the first and third prongs of *Cort*, this Court finds that these factors weigh in favor of Plaintiff. *HN5*[↑] Section 4905A prohibits **[*10]** an employer from discriminating "against a person in hiring, termination, or any term or condition of employment, or otherwise penalizi[ng] a person, if the discrimination is based upon either of the following: a. [t]he person's status as a cardholder; or b. [a] registered qualifying patient's positive drug test...."[28] In this case, Plaintiff, as a medical marijuana cardholder, was terminated after failing a drug test. Clearly, Plaintiff falls within the class of persons for whose especial benefit the statute was enacted, as Section 4905A(a)(3) seeks to prohibit discrimination against medical marijuana patients.

The third *Cort* prong examines whether recognition of an implied private right of action would advance the statute's purpose. *HN6*[↑] Section 4901A(g) provides that "[s]tate law should make a distinction between the medical and nonmedical uses of marijuana. Hence, the purpose of this chapter is to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal *and other penalties*,...."[29] (emphasis added). The Court may reasonably infer that the purpose of the statute is to protect medical marijuana patients from discrimination based upon their status, **[*11]** and from being penalized based upon that discrimination, as with termination from employment. Thus, Plaintiff has met the third prong.

The second *Cort* factor looks to whether there is any indication of legislative intent to grant or deny a private right of action. In this case, the analysis is complicated by the fact that there is no explicit statutory directive. Kraft Heinz fastens upon this point and asserts four main arguments in opposition to finding an implied private right of action: (1) had the legislature wanted to create a private right of action, it could have done so

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[22] *See, e.g.*, Ross v. RagingWire Telecommunications, Inc., 42 Cal. 4th 920, 70 Cal. Rptr. 3d 382, 174 P.3d 200, 208 (Cal. 2008); Emerald Steel, 230 P.3d at 535; Roe v. Teletech Customer Care Mgmt., LLC, 171 Wn.2d 736, 257 P.3d 586, 591-93 (Wash. 2011).

[23] Notably, as *Noffsinger* notes, the Oregon Supreme Court's decision in *Emerald Steel*, which Kraft Heinz cites repeatedly, is distinguishable, as both the statute at issue in that case, and the question addressed, are at odds with the question presented here, *i.e.*, whether a medical marijuana employment anti-discrimination provision is preempted by the CSA. Noffsinger, 273 F. Supp. 3d at 334. Oregon's medical marijuana statute does not contain a specific provision barring employment discrimination and, thus, the Oregon Supreme Court's analysis focused on a broader issue regarding whether the CSA preempted a provision of the Oregon statute that authorized the use of medical marijuana.

[24] Ray's Plumbing & Heating Serv., Inc. v. Stover Homes, L.L.C., 2011 Del. Super. LEXIS 345, 2011 WL 3329384, at *4 (Del. Super. July 26, 2011).

[25] Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975).

[26] Ray's Plumbing, 2011 Del. Super. LEXIS 345, 2011 WL 3329384, at *2 (quoting O'Neill v. Town of Middletown, 2006 Del. Ch. LEXIS 10, 2006 WL 205071, at *16 (Del. Ch. Jan. 18, 2006)).

[27] Id. at *4.

[28] 16 Del. C. § 4905A(a)(3).

[29] 16 Del. C. § 4901A(g).

expressly; (2) the DMMA expressly creates a private right of action to enforce some of its provisions, but not its anti-discrimination provision; (3) the DMMA should not be construed liberally; and (4) the legislative history contains no indication of an intent to create an implied private right of action. Most, if not all, of these arguments were scrutinized and dismissed in the Callaghan case, which, as this Court has already noted, is germane to this discussion. This Court, likewise, does not find these arguments convincing.

First, by way of context, it is important to remember that HN7[] the Court's duty in interpreting **[*12]** a statute is to find legislative intent and to give effect to it.[30] The Court is required, under settled rules of construction, to read the statute as a whole and to harmonize its parts.[31] "If a literal interpretation leaves a result inconsistent with the general statutory intention, the literal interpretation must give way to the general intent."[32]

Here, HN8[] the purpose of Section 4901A is to protect individuals with debilitating medical conditions from arrest or prosecution, and from criminal or other penalties. The purpose of Section 4905A is to prohibit employment-related discrimination based upon either status as a medical marijuana cardholder or a qualifying patient's positive drug test. It is a well-settled principle of statutory interpretation that an isolated portion of a statute should not be construed in a vacuum: rather, every word must be given meaning and must be considered in the context of the entire statute.[33]

HN9[] In the DMMA, no agency or commission has been tasked with enforcement of the anti-discrimination provision. Under Section 4905A(a)(3), no remedy other than a private right of action is available to cardholders and qualifying marijuana patients terminated or discharged from employment for failing drug tests. **[*13]** The fact that an antidiscrimination provision was included in the DMMA demonstrates legislative intent to remedy the problem of discrimination based upon one's cardholder status. Therefore, this Court finds that the language of Section 4905A(a)(3) creates an implied private right of action. Absent a finding of an implied private right of action, Section 4905A would be devoid of any purpose within the broader context of the statute.[34]

In *Callaghan*, the Superior Court of Rhode Island examined the *Cort* factors with regard to finding an implied private right of action under the anti-discrimination provisions of the Rhode Island Medical Marijuana Act.[35] Rhode Island's statute provides that "no...employer...may refuse to...employ...a person solely for his or her status as a cardholder."[36] The court deemed this "rights-creating language" and held that because there were no particular remedies established, the "only...sensible interpretation" of the anti-discrimination provisions of the Rhode Island statute was that there must be "an implied private right of action. Without one, [the provision]...would be meaningless."[37]

With regard to Kraft Heinz's first point that the legislature could have expressly created a private right **[*14]** of action if it had wanted to, the Court does not find this argument persuasive. While it is certainly true that the General Assembly has provided express private remedies in other employment statutes, the General Assembly is also presumed to know how the statute would be interpreted or construed by the courts. The court in *Callaghan* rejected a similar argument, stating that the Rhode Island General Assembly is presumed to possess knowledge regarding "the 'state of existing relevant law when it enacts or amends a statute.'"[38] Thus, the absence of an express right of action cannot be assumed to preclude an implied private right of action.[39] Here, there is no indication of legislative intent to deny a private cause of action, and the Court finds,

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[30] Murphy v. Bd. Of Pension Trustees, 442 A.2d 950, 951 (Del. Super. 1982).

[31] *Id.*

[32] Georgeopoulos v. State Farm Mut. Auto. Ins. Co., 1990 Del. Super. LEXIS 223, 1990 WL 91085, at *2 (Del. Super. June 19, 1990) (citing Nationwide Mutual Insurance Co. v. Krongold, 318 A.2d 606, 609 (Del. Super. 1974)).

[33] Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem. Hosp., Inc., 36 A.3d 336, 344 (Del. 2012).

[34] *See* Noffsinger, 273 F.Supp.3d at 340 (holding that "without a private cause of action, [the statute in question] would have no practical effect, because the law does not provide for any other enforcement mechanism.").

[35] 2017 R.I. Super. LEXIS 88 (R.I. Super. May 23, 2017).

[36] R.I. Gen. Laws § 21-28.6-4(d).

[37] Callaghan, 2017 R.I. Super. LEXIS 88 at *23.

[38] Id. 18-19.

[39] *Id.*

as in *Callaghan*, that the Delaware General Assembly knew that the right could be implied. Moreover, this also answers Kraft Heinz's fourth argument: the absence of any legislative history on this issue does not prove that the General Assembly wished to preclude a private right of action.

Kraft Heinz's second argument for not finding an implied private right of action is that the DMMA expressly creates a private right of action to enforce some **[*15]** of its provisions, such as *Section 4924A*, which authorizes "any citizen" to sue in state court if the Delaware Department of Labor does not comply with its statutory mandate to adopt regulations to implement the DMMA. Because there is no such language in the DMMA's anti-discrimination provision, Kraft Heinz asserts that the legislature did not intend for a private right of action for that provision. This argument, likewise, lacks merit.

HN10[] "[A] cause of action may be implied where a statute defines an unfair employment practice but does not provide an express method of redress."[40] In another employment case, *Heller v. Dover Warehouse Market, Inc.*,[41] this Court found that an implied private right of action exists under a Delaware law prohibiting employers from requiring submission to polygraph testing. In that case, the plaintiff was an employee accused of theft.[42] Her employer forced her to take a polygraph test despite the statute's prohibition that "[n]o person... shall require... that any employee... take... a polygraph...as a condition of...continuation of employment."[43] This Court, in analyzing the statute, found that the provision of a criminal penalty in the statute did not exclude the possibility of **[*16]** a civil remedy.[44] The statute was found to have a dual purpose — assuring that employees are not subjected to polygraph testing, and penalizing employers that require such testing.[45] The court concluded that the General Assembly must have intended a private right of action to accomplish that dual purpose, given that "[r]edress for damages is not assured unless a private right of action is implied under the statute."[46]

Similarly, in *Callaway v. N.B. Downing Co.*,[47] this Court found an implied private right of action when examining the state's minimum wage law. That statute made it illegal to pay less than the minimum wage and set criminal penalties for violations, but did not include any provisions regarding civil remedies.[48] The Court found that one of the primary purposes of the statute was to provide employees the right to a minimum wage, and therefore that the General Assembly would have intended an implied right of action because the General Assembly would not have established a right "without a corresponding remedy."[49]

HN11[] *Section 4901A* clarifies the DMMA's purpose of protecting individuals with debilitating medical conditions from arrest or prosecution and from criminal or other penalties. However, just as **[*17]** in *Heller* and *Callaway*, there is no remedy in the DMMA's anti-discrimination provision for damages caused by the prohibited discrimination. Although a criminal sanction against the employer might deter future violations, it would provide little by way of remedy to an employee who was discharged. In fact, without an implied private right of action, Plaintiff, like the employees in *Heller* and *Callaway*, would have no other recourse.

In short, while the fact that the General Assembly authorized a private right of action in *Section 4924A* may serve as some evidence that a private right of action was not intended in *Section 4905A(a)(3)*, the Court finds that the other arguments supporting the provision of an implied private right of action by the General Assembly outweigh such evidence.

The Court also finds Kraft Heinz's third argument unconvincing. The fact that the DMMA does not state that it is to be construed liberally does not establish that this is so. Statutes prohibiting discrimination are generally deemed remedial, and Delaware law is clear that remedial statues are granted a liberal

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[40] *Callaghan, 2017 R.I. Super. LEXIS 88 at *19* (quoting *45B Am. Jur. 2d Job Discrimination § 1843* (2012)).

[41] *515 A.2d 178 (Del. Super. 1986)*.

[42] *Id. 180*.

[43] *19 Del. C. § 704*.

[44] *Heller, 515 A.2d at 180*.

[45] *Id. 180-81*.

[46] *Id. at 181*.

[47] *53 Del. 493, 172 A.2d 260, 3 Storey 493 (Del. Super. 1961)*.

[48] *29 Del. C. § 6913* (1953).

[49] *172 A.2d at 262-63*.

construction.[50]

Upon a careful review of the briefings and case law provided by counsel, the Court finds the case at hand distinguishable **[*18]** from Kraft Heinz's cited case law, notably *Ray's Plumbing*. In *Ray's Plumbing*, this Court found that the plaintiff, as a subcontractor, had access to alternative civil remedies such as breach of trust, breach of contract, and fraud.[51] In this case, by contract — as in *Heller* and *Callaway* — a private right of action is the only means of effectuating the statute's remedial purpose.

B. Count II: Plaintiff's Claims Under the ADA and the DEPA.

Kraft Heinz next moves to dismiss Plaintiff's claims of violations of the ADA and the DEPA as untimely. Federal and Delaware law requires that a plaintiff file a disability discrimination claim within 90 days of receiving right-to-sue notices from the agencies responsible for investigating a discrimination charge (in this case both the EEOC and DDOL).[52] Failure to abide by this time frame will bar a claim.[53]

In this case, Plaintiff filed his initial complaint *pro se* within the 90-day time period. However, the initial complaint alleged violations of the DMMA as well as retaliation under OSHA, and did not include disability discrimination claims under the ADA or the DEPA. These claims were not brought before the Court until Plaintiff subsequently **[*19]** obtained counsel and filed an Amended Complaint on March 26, 2018.

HN13[↑] Cognizant of the difficulties faced by *pro se* plaintiffs, this Court holds a *pro se* plaintiff's complaint to a less demanding standard of review.[54] However, "there is no different set of rules for *pro se* plaintiffs,"[55] and the Court's leniency cannot go so far as to affect the substantive rights of the parties.[56] Thus, the question before the Court is whether the Amended Complaint's assertion of violations of the ADA and the DEPA raises a new theory of liability that was not set forth in the original complaint, or whether this theory arises out of the same transaction or occurrence so as to relate back to the original complaint, which was timely filed.

HN14[↑] "An amendment of a pleading relates back to the date of the original pleading when...the claim...asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading."[57] In order for an amendment to relate back, there must be "fair notice of the general fact situation out of which the claim or defense arose."[58] Relation back is improper when the new claim(s) present a new and independent theory **[*20]** of liability based upon independent facts

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[50] *See* *Gomez-Perez v. Potter, 553 U.S. 474, 481, 128 S. Ct. 1931, 170 L. Ed. 2d 887 (2008)* (referring to anti-discrimination statutes as "remedial"); *Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247, 1256 (Del. 2011)* (under Delaware law, remedial statutes to be construed liberally).

[51] *2011 Del. Super. LEXIS 345, 2011 WL 3329384 at *4*. *See also* *Mann v. Oppenheimer & Co., 517 A.2d 1056 (Del. 1986)* (in addition to fact that General Assembly did not expressly authorize private right of action, other relevant factors, such as whether plaintiffs were members of a class for whose benefit the statute was created, argued against finding a private right of action).

[52] ***HN12***[↑] *See* *42 U.S.C. § 12117(a)* *and* *42 U.S.C. § 2000e-5(f)(1)* (requiring ADA claims to be brought within 90 days of receiving the EEOC's right-to-sue notice); *19 Del. C. § 714(b)* (requiring DEPA claims to be filed within 90 days of receiving either the EEOC or DDOL's right-to-sue notice, whichever is later).

[53] *See* *Figueroa v. Buccaneer Hotel Inc., 188 F. 3d 172, 176, 41 V.I. 502 (3d Cir. 1999)* ("[A] claim filed even one day beyond this ninety-day window is untimely and may be dismissed....").

[54] *Anderson v. Tingle, 2011 Del. Super. LEXIS 362, 2011 WL 3654531, at *2 (Del. Super. Aug. 15, 2011)*.

[55] *Draper v. Med. Ctr. of Del, 767 A.2d 796, 799 (Del. 2001)*.

[56] *Anderson, 2011 Del. Super. LEXIS 362, 2011 WL 3654531, at *2*. To the extent Plaintiff argues for a more lenient standard of review with regard to alleging his disability discrimination claims, the Court is not convinced and finds that his status as a *pro se* litigant does not excuse his failure to bring the disability discrimination claims in the original complaint, particularly when it appears that Plaintiff knew how to assert such claims to the EEOC. *Cf.* *Thompson v. Brandywine School Dist., 478 F. App'x 718, 720 (3d Cir. 2012)* (claim of discrimination based upon race did not relate back to earlier complaint of discrimination based on nationality and religion).

[57] *Sup. Ct. Civ. R. 15(c)(2)*.

[58] *Mullen v. Alarmguard of Delmarva, Inc., 625 A.2d 258, 264 (Del. 1993)*.

that were not set forth in the original complaint.[59]

Here, the Court finds that Plaintiff's disability discrimination claims do not relate back to his initial complaint. The Court also finds that Plaintiff's original complaint failed to plead sufficient facts so as to put Kraft Heinz on notice of the general fact situation out of which the disability discrimination claims arose.

Plaintiff argues that his original complaint pled facts adequately alleging disability discrimination. Plaintiff's original complaint alleges that Kraft Heinz violated the DMMA and retaliated against Plaintiff for reporting safety issues. Subsection B of the original complaint states that "[w]hile filling out the paperwork for the drug test, Plaintiff inquired about how to fill out the paperwork considering his medical marijuana prescription." The original complaint also alleges that Plaintiff needed to take multiple drug tests. Thus, Kraft Heinz knew that Plaintiff possessed a medical marijuana card, which Plaintiff argues is sufficient to establish a nexus between the allegations in the original complaint and those of the Amended Complaint.

Plaintiff argues that **[*21]** in order to be a cardholder under the DMMA, an individual must be deemed a "qualifying patient," which means that he or she must have "been diagnosed by a physician as having a debilitating medical condition."[60] Plaintiff alleges that because Kraft Heinz knew that he possessed a medical marijuana card, it was aware that Plaintiff had been diagnosed with a "debilitating disease" by a physician. Additionally, Plaintiff alleges that Kraft Heinz knew that he had used significant portions of his FMLA and short-term disability benefits over the years. Thus, Plaintiff's primary argument for why relation back is proper in this case is that he was a cardholder under the DMMA and, consequently, that Kraft Heinz knew or should have known that he was a person "disabled" for purposes of the ADA and the DEPA. This argument is tenuous and lacks merit for several reasons.

As a preliminary matter, the Court notes that Plaintiff has cited to no legal authority for the proposition that status as a Delaware medical marijuana cardholder equates to possessing a "disability" within the confines of the ADA or the DEPA. The Court notes that the ADA defines an individual with a disability as a person "who has **[*22]** a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment."[61] Notably, the DMMA does not include a definition of "disability". Rather, Plaintiff attempts to analogize to a "disability" by referencing the definition for a "debilitating medical condition," which includes "[a] chronic or debilitating disease or medical condition...."[62] These two definitions, while similar, are not identical. Moreover, while it is certainly possible that an individual with a disability under the ADA may also be a "qualifying patient" under the DMMA, the Court will not simply infer this correlation or assume that someone is an individual with a disability under the ADA or DEPA merely because that individual holds a medical marijuana card.

Additionally, even assuming arguendo that Plaintiff's status as a "qualifying patient" under the DMMA necessarily classified him as an individual with a "disability" under the ADA and the DEPA, there is nothing in Plaintiff's original complaint to indicate that Kraft Heinz terminated Plaintiff's employment due to his "disability". Thus, Kraft Heinz cannot be found **[*23]** to have been on notice regarding potential disability discrimination claims. Rather, the original complaint alleges that Kraft Heinz terminated Plaintiff because he failed a drug test for medical marijuana use, and that it retaliated against Plaintiff for reporting safety issues. The Amended Complaint, conversely, alleges that Plaintiff suffers from hand, wrist, and back problems that render him "disabled" and that Kraft Heinz terminated his employment based on his "disability" in violation of the ADA and the DEPA.

HN15[] Although the Court must accept all "well-pleaded" allegations as true for purposes of a *Rule 12(b)(6)* motion to dismiss, the Court will "ignore conclusory allegations that lack specific supporting factual allegations."[63] In this case, even reviewing Plaintiff's *pro se* complaint under the "less stringent

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[59] *Moore ex rel. Moore v. Emeigh, 935 A.2d 256, at *2, 2007 Del. LEXIS 429 at *6 (Del. 2007)* (TABLE); *see also Thompson, 478 F. App'x at 720* (race discrimination claims did not relate back to earlier discrimination claims filed within 90-day period).

[60] *16 Del. C. §§ 4902A(1)* & *(13)*.

[61] *42 U.S.C. § 12102(2)*. The definition of "person with a disability" in the DEPA is nearly identical. *19 Del. C. § 722 (4)*.

[62] *16 Del. C. §§ 4902A(3)(b)*.

[63] *Ramunno v. Cowley, 705 A.2d 1029, 1034 (Del. 1998)* (citation omitted).

standard," it nonetheless lacks well-pleaded allegations that would provide a sufficient legal or factual basis on which Plaintiff may recover from Kraft Heinz for disability discrimination. In making this determination, the Court relies upon the analysis laid out by the Delaware Supreme Court in *Moore v. Emeigh*.[64] In that case, the Supreme Court affirmed the trial court's discretionary decision **[*24]** that a claim of negligence against the defendant for failing to inspect constituted a new claim that did not relate back to a claim of vicarious negligence pled in the original complaint.[65] In so holding, the Supreme Court found that the new claim was not based upon facts contained in the original complaint.[66] Here, as in *Moore*, the Court finds that the new claims of disability discrimination are not based upon facts contained in the original complaint, which alleges only discrimination for medical marijuana use and retaliation under OSHA, and Count II is therefore dismissed.

C. Count III: Plaintiff's Claims Under the DWPA.

Kraft Heinz next asserts that Plaintiff did not engage in "protected conduct" under the DWPA, as the Amended Complaint fails to allege any specific violations of law, and fails to allege that Plaintiff reported any such violations to management. For the reasons outlined below, Plaintiff's claim of a violation of the DWPA will survive Kraft Heinz's 12(b)(6) motion to dismiss; however, should Plaintiff be unable to discover evidence to support his allegation, this claim is subject to resolution in Kraft Heinz's favor at the summary judgment phase.

HN16[] The DWPA acts to protect **[*25]** "employees who report violations of the law for the benefit of the public," as well as to "provide[ ] a check on persons in positions of authority, by ensuring that they do not take retaliatory action against subordinates who disclose misconduct."[67] The DWPA prohibits an employer from discharging or otherwise discriminating against an employee for reporting a "violation" to the employer or to the employee's supervisor, which he/she "knows or reasonably believes has occurred or is about to occur."[68] A "violation" is "an act or omission by an employer...that is...[m]aterially inconsistent with, and a serious deviation from, standards implemented pursuant to a law, rule, or regulation promulgated under the laws of this State...."[69]

HN17[] The elements for a *prima facie* case of a violation of the DWPA are as follows: (1) the employee engaged in a protected whistleblowing activity; (2) the accused official knew of the protected activity; (3) the employee suffered an adverse employment action; and (4) there is a causal connection between the whistleblowing activity and the adverse action.[70]

Kraft Heinz argues that Plaintiff's DWPA count must be dismissed, as Plaintiff fails to plead facts showing which law, **[*26]** rule or regulation he believed had been violated in connection with the unsafe conditions of the railroad ties, and that whether Plaintiff *reasonably believed* the conduct was violative is irrelevant.[71] Additionally, Kraft Heinz argues that even if Plaintiff had identified some specific law, rule, or regulation that was violated, Plaintiff did not allege ever reporting it to management.

Plaintiff, in response, argues that an actual "violation" need not be alleged in order to seek relief under the statute. Rather, pursuant to *Kelsall v. Bayhealth, Inc.*,[72] there need not be an actual violation pled, as long as the reporting employee "reasonably believes" a violation

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[64] ***935 A.2d 256, 2007 Del. LEXIS 429 (Del. 2007)*** (TABLE).

[65] *Id. at *2*.

[66] *Id.*

[67] *Smith v. Delaware State University, 47 A.3d 472, 476 (Del. 2012)*.

[68] *19 Del. C. § 1703(1)* and *(4)*.

[69] *19 Del. C. § 1702(6)*.

[70] *Addision v. East Side Charter School of Wilmington, Inc., 2014 Del. Super. LEXIS 471, 2014 WL 4724895, at *3 (Del. Super. Sept. 19, 2014)*.

[71] *See Hanzer v. Nat'l Mentor Healthcare, LLC, 2014 U.S. Dist. LEXIS 49441, 2014 WL 1390889, at *6 (D. Del. 2014)* (denying DWPA claim as the plaintiff "failed to point to any statute, rule or regulation" that the employer's conduct violated. "Whether [plaintiff] believed such conduct was violative is irrelevant to the analysis as the statute requires the violation to be based on a rule, regulation or law."); *see also Smith, 47 A.3d at 476* ("The [DWPA] protect[s] employees who report violations of law....").

[72] *2015 Del. Super. LEXIS 1045, 2015 WL 9312477 (Del. Super. Dec. 18, 2015)*.

has occurred or is about to occur.[73] Additionally, according to Plaintiff, the Amended Complaint alleges that he did report the illegal conditions to management on several occasions via multiple verbal complaints and his incident report, as well as showing one of his supervisors the defects in the rails.

The Court will address Kraft Heinz's latter argument first regarding Plaintiff's alleged failure to report a "violation" to management, and may easily dispose of this argument. In the Amended Complaint, Plaintiff pled **[*27]** that he made Kraft Heinz management aware of the lack of safety of the rails on multiple occasions and informed management that he believed the rails were in violation of the law. This may be evidenced by the fact that Plaintiff submitted an incident report to Kraft Heinz management[74] regarding the unsafe conditions of the railroad ties because he believed that the ties did not comply with the UFC standards. Additionally, Plaintiff alleges that he had asked for the guidelines or rules that applied to the rails but was never provided them.

Turning to Kraft Heinz's first argument, the primary inquiry for this Court is whether a plaintiff must identify some applicable law, rule, or regulation allegedly violated, or whether a "reasonable belief of a law's being violated or about to be violated is sufficient. Plaintiff does not dispute that his Amended Complaint does not identify any concrete "violation" of the law within the meaning of the DWPA.[75] Rather, Plaintiff argues that there "does not have to be an actual violation, as long as the reporting employee 'reasonably believes' a violation has occurred or is about to occur."[76] Plaintiff cites to this court's opinion in *Kelsall* for this proposition. **[*28]** However, *Kelsall* simply held that a plaintiff's claim could survive a motion to dismiss if the plaintiff was alleged to have "reasonably believed" that a violation had occurred.[77] *Kelsall* did not address whether liability could ultimately be based upon conduct that did not constitute a violation.

The Court finds the United States District Court for the District of Delaware's decision in *Hanzer v. National Mentor Healthcare, LLC*,[78] instructive on this issue. In *Hanzer*, the DWPA was interpreted to require an employee to report a violation of law. The court held that *Hanzer's* DWPA claim could not survive summary judgment because she could not identify a law, rule or regulation that was or that would have been violated, and that the statute "requires the violation to be based on a rule, regulation or law."[79] While the DWPA allows for the possibility that the reporting employee may be uncertain, at the time he or she reports the conduct, of the specific law, rule, or regulation that has been violated, or even that there is a law, rule, or regulation applicable to the reported conduct, DWPA liability cannot be based upon reported conduct that does not ultimately turn out to be a violation, and **[*29]** to the extent that *Kelsall* can be construed as holding otherwise, this Court declines to follow it.

Therefore, the Court finds that dismissal at this early stage would be inappropriate when Plaintiff has alleged that the condition of the rails violates the UFC standards and when Plaintiff has not had the opportunity to conduct discovery or support his allegation as to whether the condition of the rail ties did, in fact, constitute a "violation" under state or federal law. Plaintiff's allegations must be accepted as true until such time as the factual record is more developed.[80] While the Court finds *Hanzer* persuasive, *Hanzer* involved a plaintiff's failure to identify a statute, rule, or regulation *at the summary judgment stage*. Here, Plaintiff should be allowed to move to discovery and gather facts to support his claim, particularly insofar as Plaintiff has alleged that he asked for the guidelines or rules that apply to the rails and was not provided them. However, should Plaintiff be unable to discover evidence to support his allegation that the condition of the rails constituted a "violation" — that is, an actual deviation from a specific law, rule or regulation — this

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[73] *Id. at *2* (citing *19 Del. C. § 1703(4)*).

[74] Plaintiff pleads that he submitted an incident report to Kraft Heinz management; that he showed maintenance supervisor Paul Diebel the defects in the rails; and that he subsequently met with Michael Doughty, the warehouse supervisor, to again voice his concerns about the railroad ties.

[75] Plaintiff has alleged that the condition of the rails violates the UFC standards as well as other laws, rules, or regulations; however, Plaintiff does not specifically state what other laws or regulations he is referencing.

[76] *See* *19 Del. C. § 1703(3)*.

[77] *Id. at *2*.

[78] *2014 U.S. Dist. LEXIS 49441, 2014 WL 1390889 (D. Del. 2014)*.

[79] *Id. at *5-6*.

[80] *Ferguson v. Wesley Coll., Inc., 2000 Del. Super. LEXIS 146, 2000 WL 706833, at *2 (Del. Super. Mar. 23, 2000)*.

claim is **[*30]** subject to resolution in Kraft Heinz's favor at the summary judgment phase.

D. Count IV: Plaintiff's Claims for Common Law Wrongful Discharge

Lastly, Kraft Heinz moves to dismiss Plaintiff's claim for wrongful termination on the basis that the DMMA and OSHA do not provide any public policy grounds for relief. Kraft Heinz asserts that the DMMA is preempted by the CSA and that OSHA has its own remedial scheme. In response, Plaintiff argues that Delaware law recognizes an implied covenant of good faith and fair dealing that allows him to recover under both statutes.

HN18[] In general, an at-will employee may be discharged by his/her employer at any time without cause. However, the Delaware Supreme Court has implemented certain protections for at-will employees through recognition of a limited covenant of good faith and fair dealing implicit in every employment contract.[81] These protections have been delineated in four categories by the Delaware Supreme Court in *E.I. DuPont de Nemours and Co. v. Pressman*, one of which is where the termination violated public policy.[82] In *Pressman*, the Delaware Supreme Court held that a plaintiff must satisfy a two-part test in order to establish a breach of the covenant **[*31]** of good faith and fair dealing under the public policy category: "(i) the employee must assert a public interest recognized by some legislative, administrative or judicial authority and (ii) the employee must occupy a position with responsibility for advancing or sustaining that particular interest."[83]

Looking first to Plaintiff's public policy wrongful termination claim under the DMMA, this Court does not find Plaintiff's argument persuasive that as a medical marijuana cardholder he is innately tasked with "responsibility for advancing or sustaining that particular interest." Plaintiff has asserted that the DMMA's antidiscrimination provisions establish a public interest in protecting medical marijuana patients from discrimination by employers. Moreover, Plaintiff alleges that as a medical marijuana patient, the DMMA's anti-discrimination provisions provide him with the ability to combat the discrimination himself. In support of this argument, Plaintiff cites to the Delaware Supreme Court's decision in *Schuster v. Derocili*,[84] where the Court held that an employee could maintain a claim for wrongful termination based upon a public policy against sexual harassment.[85]

In order to determine whether Plaintiff occupies a position with responsibility for advancing a public interest, the Court must look to the nature of Plaintiff's job functions. Here, Plaintiff worked as a warehouse employee and then as Yard Equipment Operator. While Plaintiff has certainly alleged public safety responsibilities, the Court does not find that he has adequately pled whether or how he was responsible for ensuring Kraft Heinz's compliance with the DMMA.

The Court finds the *Schuster* decision distinguishable. There, the plaintiff apparently did not occupy a job position that required her to oversee the implementation of, or be involved in the enforcement of, laws prohibiting the sexual harassment that she allegedly experienced. Nonetheless, the Delaware Supreme Court found that as a purported victim of sexual harassment in the workplace, she occupied a position with responsibility for advancing or sustaining the interest of preventing sexual harassment in the workplace.[86] However, in reaching this conclusion, the Court was careful to note the "unique procedural and factual scenario" of the case.[87] The Court further observed that the Court's holding that a claim for breach **[*33]** of the implied

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[81] *Merrill v. Crothall-American, Inc., 606 A.2d 96, 101 (Del. 1992)*. Various other jurisdictions have also recognized wrongful discharge as a separate claim where the reason for discharge violates public policy. For example, the Supreme Court of New Jersey held that a claim for wrongful discharge will lie where the employer violates a "clear mandate of public policy" and directed courts to examine "legislation, administrative rules, regulations or decisions, and judicial decisions" as potential sources of public policy. *Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505, 512 (N.J. 1980)*.

[82] *E.I. DuPont de Nemours and Co. v. Pressman, 679 A.2d 436 (Del. 1996)*.

[83] *Id. at 441-42*; *see also* *Lord v. Souder, 748 A.2d 393, 401 (Del. 2000)*; *Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578, 587-88 (Del. Ch. 1994)*.

[84] *775 A.2d 1029 (Del. 2001)*, *superseded by* ***[*32]*** *statute*, *19 Del. C. § 712(b)*.

[85] *Id. at 1039-40*.

[86] *775 A.2d at 1039*.

[87] *Id. at 1034*.

covenant arising from a termination allegedly resulting from a refusal to condone sexual advances "flow[ed] directly from Delaware's clear and firmly rooted public policy to deter, prevent and punish sexual harassment in the workplace" and that recognizing such a unique common law cause of action "provides employees with an important weapon to advance Delaware's policy to assure civilized conduct in the workplace."[88] Finally, the Court noted that sexual harassment is a "systemic social problem" and therefore that "[p]reventing it is of immense social value" and thereby promotes Delaware's public policy. By contrast, this Court does not find that the public policy against discrimination toward medical marijuana cardholders is so "firmly rooted," and addresses such a "systemic social problem," that allowing a purported victim of such discrimination to pursue a common law wrongful termination claim based upon it would be appropriate.[89] Thus, this claim is dismissed.

With regard to Plaintiff's wrongful termination claim under OSHA, the Court finds that Plaintiff satisfies the two-part test as laid out in *Pressman*. OSHA prohibits an employer from discharging **[*34]** or discriminating against any employee who exercises "any right afforded by" that law. ***HN19***[↑] *Section 11(c)(1)* provides that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act...."[90]

In this case, Kraft Heinz argues that OSHA cannot support Plaintiff's wrongful discharge claim because the law has its own enforcement mechanisms for remedying retaliation.[91] Kraft Heinz cites to a number of cases outside this jurisdiction, as well as to the Delaware Superior Court's decision in *Nelson v. JAED Corp., Inc.*, for the proposition that "[w]here a statutory framework is already in place to address wrongful conduct, [Delaware courts are] reluctant to expand the public policy exception to the employment at will doctrine."[92] However, Delaware case law, particularly with regard to OSHA, is not well-developed in this area, and this Court has not found any binding authority stating that OSHA does not provide any public policy grounds for relief.[93] Indeed, the plaintiff in *Nelson* alleged that his termination was in violation of the public policy behind the *Delaware Wage and Collection Payment Act*. **[*35]** [94] This is wholly different from alleging a violation of public policy under OSHA.

In *Nelson*, the Court stated "[t]here is no provision in the Wage Act authorizing a private right of action for statutory penalties. Nor are there any Delaware cases awarding civil penalties to an employee or suggesting that such an award is feasible under the Wage Act."[95] This Court is not persuaded, however, that similar concerns preclude a claim for breach of the covenant of good faith and fair dealing related to OSHA, as long as the requirements recognized by the *Pressman* court are met.[96]

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[88] *Id. at 1036, 1039*.

[89] The Court finds the analysis in *Noffsinger* pertinent to this point. In *Noffsinger*, the United States District Court for the District of Connecticut held that *Connecticut's Palliative Use of Marijuana Act (PUMA)*, which, as mentioned *supra*, is similar to the DMMA in its anti-discrimination provision, is not preempted by the CSA and does contain an implied private right of action. However, the court dismissed the plaintiff's public policy claim, stating that "if a statute already provides a private right of action intended to vindicate the relevant public policy, the [public policy] claim will fail." *Id. at 341* (quoting *Groth v. Grove Hill Med. Or., P.C., 2015 U.S. Dist. LEXIS 92106, 2015 WL 4393020, at *9 (D. Conn. 2015)*). Here, this Court has already found that a private right of action exists under the DMMA.

[90] *29 U.S.C. § 660(c)*.

[91] *Id.* In particular, Kraft Heinz asserts that an individual who believes that his or her employer has disciplined him or her in retaliation for reporting a safety concern may file a complaint with OSHA. *See 29 U.S.C. § 660(c)(2)*.

[92] *Nelson v. JAED Corp., 2013 Del. Super. LEXIS 78, 2013 WL 1092200, at *8 (Del. Super. Jan. 23, 2013)*.

[93] The closest authority the Court could find on point is *Paolella v. Browning-Ferris, Inc., 973 F.Supp. 508 (E.D. P. A. 1997)*, *aff'd*, *158 F.3d 183 (3d Cir. 1998)*, discussed in more detail below. In that case, the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit both applied Delaware law in holding that whistleblowing employees were entitled to protection under the public policy exception to the employment-at-will doctrine. Admittedly, this case is not binding on the Court and is merely persuasive authority.

[94] *Id. at *8*; *19 Del. C. §§ 1112(b)* and *1113*.

[95] *Nelson, 2013 Del. Super. LEXIS 78, 2013 WL 1092200, at *8*.

[96] Like the *Nelson* Court, this Court in *Ayres v. Jacobs &*

In holding that Plaintiff's claim for wrongful termination under OSHA may survive Kraft Heinz's motion to dismiss, the Court finds persuasive the decisions of the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit in *Paolella v. Browning-Ferris, Inc.*,[97] as well as the Supreme Court of Connecticut's decision in *Sheets v. Teddy's Frosted Foods, Inc.*[98]

In *Paolella*, the United States District Court for the Eastern District of Pennsylvania examined Delaware law to determine **[*36]** whether whistleblowing employees were entitled to protection under the public policy exception. In that case, a former employee brought a wrongful discharge claim against his employer under Delaware law, alleging that he has been terminated for complaining about illegal billing practices. The District Court, based upon the analysis laid out in *Pressman*, held that Delaware courts would extend the protection of the public policy exception to an employee who "blew the whistle" on the employer's illegal conduct.[99] The United States Court of Appeals for the Third Circuit, in applying Delaware law and upholding the District Court's findings, held that a wrongful discharge action under the public policy exception may be maintained in Delaware and that the employee in that case could meet the two *Pressman* factors. The Court of Appeals went on to hold that (1) the employee's complaints, namely that his employer's billing scheme was illegally designed to defraud customers, asserted a public interested recognized by some legislative, administrative, or judicial authority; and (2) as a sales manager who was responsible for negotiating service contracts, billing customers, and handling customer complaints, **[*37]** the employee had responsibility for the employer's billing practices.[100]

Similarly, in *Sheetz*, the Supreme Court of Connecticut examined "whether to permit a cause of action for wrongful discharge where the discharge contravenes a clear mandate of public policy."[101] The plaintiff in that case, a Quality Control Director and Operations Manager at a frozen food products company, had alleged that he was discharged because of his conduct in notifying his employer about repeated violations of the Connecticut Uniform Food, Drug, and Cosmetic Act, specifically deviations from the employer's own standards, as well as pointing out false labels. This Act, which prohibits the sale of mislabeled food, contains criminal penalties and sanctions, but makes no mention of any private right of action.[102] The court, in permitting a cause of action for wrongful discharge, found that the plaintiff's unique position within the organization may have exposed him to criminal prosecution under the Act and that the Act was intended to "safeguard the public health and promote the public welfare."[103] Thus, it may be inferred that the plaintiff in that case, like Plaintiff here, must have asserted a public interest and occupied **[*38]** a position with responsibility for that interest.[104]

Plaintiff has asserted in his Amended Complaint that he started out at Kraft Heinz as a warehouse employee and was eventually promoted to Yard Equipment Operator. Moreover, Plaintiff has pled that as Yard Equipment Operator, he is a safety representative and must ensure

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Crumplar, P.A., held that "it would be counter-productive to recognize a broader common law exception to the at-will doctrine when there exist elaborate statutory schemes at both the federal and state levels that address this same public policy concern." *1996 Del. Super. LEXIS 565, 1996 WL 769331, at *12 (Del. Super. Dec. 31, 1996)*. However, the issue in *Ayres* was that of racial discrimination. Thus, the Court found that "[s]ince both the federal and state governments have enacted statutory procedures for dealing with the type of racial discrimination alleged by Ayres, it seems neither desirable nor wise to upset the balance deliberately created by the federal and state anti-discrimination statutes as they have been construed." *Id.* The Court finds this case wholly inapplicable to the case at hand.

[97] *973 F.Supp. 508 (E.D. P.A. 1997)*, *aff'd by* *158 F.3d 183 (3d Cir. 1998)*.

[98] *179 Conn. 471, 427 A.2d 385 (Conn. 1980)*.

[99] *Paolella, 973 F.Supp. at 512*.

[100] *Paolella, 158 F.3d at 191-92*.

[101] *Sheetz, 427 A.2d at 386*.

[102] *Id. at 388*.

[103] *Id.*

[104] *Cf. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (Pa. 1974)*. In *Geary*, a salesman at a steel company, believing the sale of a product to be unsafe, protested its sale to his immediate supervisors and to senior corporate officers. The salesman was ultimately fired for not following orders. The Pennsylvania Supreme Court refused to afford the salesman any relief under a wrongful discharge theory, holding that the plaintiff's duties as an employee did not extend to matters of product safety and, thus, no clear public policy concern was implicated in his discharge.

that everything operates safely and smoothly. Because of Plaintiff's unique position at Kraft Heinz and because Plaintiff has adequately asserted that he was concerned about the safety of the railroad ties and other aspects of the railroad tracks, the Court finds that Plaintiff may make out a colorable claim under *Pressman*. At this stage, on Kraft Heinz's Motion to Dismiss, the allegations of retaliation in the Amended Complaint must be recognized as leaving open the possibility that Plaintiff could present evidence sufficient to prove a breach of the covenant of good faith and fair dealing, based upon the fact that he submitted an incident report and alleged unsafe conditions of the railroad ties to management. Since there are facts sufficient to raise the possibility that Plaintiff might prevail, he is entitled to survive a motion to dismiss and offer evidence **[*39]** in support of such claims.[105]

WHEREFORE, for the foregoing reasons, Defendant Kraft Heinz's Motion to Dismiss is **DENIED** in part and **GRANTED** in part as follows:

Defendant's Motion is **DENIED** as to Count I of the Amended Complaint;

Defendant's Motion is **GRANTED** as to Count II of the Amended Complaint;

Defendant's Motion is **DENIED** as to Count III of the Amended Complaint;

Defendant's Motion is **GRANTED** as to Plaintiff's common law wrongful termination claim based upon his status as a medical marijuana cardholder as set forth in Count IV of the Amended Complaint; and

Defendant's Motion is **DENIED** as to Plaintiff's common law wrongful termination claim based upon retaliation for Plaintiff's complaints of safety concerns pursuant to OSHA as set forth in Count IV of the Amended Complaint.

IT IS SO ORDERED.

/s/ Noel Eason Primos

Judge

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[105] *See* *In Re: Burlington Coat Factory, S.E.C. Litigation, 114 F.3d 1410, 1420 (3d Cir. 1997)*.

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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

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

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PER CURIAM

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

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

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

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

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

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

I. BACKGROUND

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

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

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

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

II. QUESTION PRESENTED

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

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

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

[6] Defendant's Motion, Exhibit A.

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

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

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

III. THE PARTIES' CONTENTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

authority.[33]

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

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

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

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

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

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

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

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

IV. DISCUSSION[50]

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

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

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

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

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

[52] 21 U.S. Code § 903 ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Legal Impossibility under Conflict Preemption

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

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

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

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

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

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

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

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

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

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

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

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

2. Legal Obstacle under Conflict Preemption

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

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

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

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

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

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

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

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

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

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

[81] 21 U.S.C. § 801.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The federal condition here is similarly lawful and reasonable.

V. CONCLUSION

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

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

cc: The Honorable Nancy L. Butts
The Honorable Joy Reynolds McCoy
The Honorable Eric R. Linhardt
Kenneth Osokow, Esquire
Lycoming County District Attorney's Office
Peter T. Campana, Esquire
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File: 2065-2012
File: 102-2013
File: 1393-2013
File: 1438-2016
File: 1654-2016

R.I. Patient Advocacy Coalition Found. (RIPAC) v. Town of Smithfield

Superior Court of Rhode Island, Providence

September 27, 2017, Filed

C.A. No. PC-2017-2989

Reporter
2017 R . I . Super. LEXIS 150 *

RHODE ISLAND PATIENT ADVOCACY COALITION FOUNDATION (RIPAC) d/b/a RIPAC; JANE DOE, ***I***; JANE DOE, II, Plaintiffs, v. TOWN OF SMITHFIELD, Defendant.

Core Terms

Ordinance, medical marijuana, the Hawkins-Slater Act, cultivation, marijuana, Zoning, general assembly, regulation, cardholders, ***patient***, zoning ordinance, plants, municipal, preliminary injunction, injunctive relief, preemption, status quo, preempted, police power, state law, compassion, injunction, merits, agriculture, cooperative, protections, caregiver, Enabling, licensed, centers

Counsel: [*1] For Plaintiff: John D. Meara, Esq., Carl A. Chiulli, Esq., Matthew ***R***. Plain, Esq.

For Defendant: Edmund L. Alves, Esq., Marc Desisto, Esq.

Judges: LICHT, J.

Opinion by: LICHT

Opinion

DECISION

LICHT, J. Before the Court is Plaintiffs' request to enjoin the Defendant Town of Smithfield from enforcing an amendment to its zoning ordinance concerning medical marijuana. Jurisdiction is pursuant to *G.L. 1956 § 8-2-13*.

I

Facts and Travel

On April 18, 2017, the Town of Smithfield (the Town) unanimously adopted an ordinance (the Ordinance) amending the Town's zoning ordinance. The Ordinance's stated purpose is "to regulate the cultivation and distribution of medical marijuana." Zoning Ordinance Amendment § 1(B). The Ordinance is relatively comprehensive, addressing ***patient*** cultivation, caregiver cultivation, cooperative cultivation, and compassion centers. Broadly speaking, the Ordinance restricts who can grow marijuana, where and how it can be grown, and creates a licensing procedure for potential growers.

Individual pseudonymous plaintiffs Jane Doe ***I*** and II (together, the Does) are residents of Smithfield and medical marijuana ***patient*** cardholders licensed under The *Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act (the Hawkins-Slater Act), G.L. 1956 §§ 21-28.6-1 et seq.* Doe Affs. ¶¶ 1, 3. They are **[*2]** also members of organizational plaintiff ***Rhode Island Patient Advocacy Coalition*** (RIPAC). Compl. ¶ 33. RIPAC and the Does (together, Plaintiffs) challenge the Ordinance and seek both declaratory and injunctive relief from this Court, claiming the Ordinance tramples upon the protections and rights afforded the Does by the Hawkins-Slater Act. The Town responds by claiming that the Plaintiffs lack standing, and even if their standing is established, that Plaintiffs have not met the burden of showing they are entitled to a preliminary injunction.

II

Standard of Review

This Court can only issue a preliminary injunction when

the moving party

> "(1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." *Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (**R.I.** 1999)*

"The issuance and measure of injunctive relief rest in the sound discretion of the trial justice." *Cullen v. Tarini, 15 A.3d 968, 981 (**R.I.** 2011)*.

III

Analysis

A

Threshold Issues

The Town has raised several issues that could preclude Plaintiffs from filing **[*3]** this suit in the first place. As a result, the Court must first determine whether Plaintiffs are stymied by a lack of a private right of action or by lack of standing.[1]

1

Private Right of Action

The Town argues that the Does are barred from bringing this suit because they already have a remedy—if cited under the Ordinance, the Does "may demand an evidentiary hearing, pursuant to . . . *§ 21-28.6-8(b)* and gain a dismissal of the charge . . ." Def.'s Mem. 8. According to the Town, "[s]ince Plaintiffs have a remedy, the Court may not imply a further remedy not set forth in the [Hawkins-Slater] Act." Id. However, the Plaintiffs have not brought their Complaint under the Hawkins-Slater Act—they have brought it under the *Uniform Declaratory Judgments Act (UDJA), G.L. 1956 §§ 9-30-1 et seq.*[2] The UDJA vests the Superior Court with the authority to "determine[] any question of construction or validity" of a municipal ordinance for any person "whose rights, status, or other legal relations are affected . . ." *Sec. 9-30-2*; see also *Canario v. Culhane, 752 A.2d 476, 479 (**R.I.** 2000)*.

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Standing

"It is well established in this state that a necessary predicate to a court's exercise of its jurisdiction under the [UDJA] is an actual justiciable controversy." *Sullivan v. Chafee, 703 A.2d 748, 751 (**R.I.** 1997)*. "For a claim to be justiciable, two elemental **[*4]** components must be present: (1) a plaintiff with the requisite standing and (2) 'some legal hypothesis which will entitle the plaintiff to real and articulable relief.'" *N & M Props., LLC v. Town of West Warwick ex rel. Moore, 964 A.2d 1141, 1145 (**R.I.** 2009)* (quoting *Bowen v. Mollis, 945 A.2d 314, 317 (**R.I.** 2008))*. "The requisite standing to prosecute a claim for relief exists when the plaintiff has alleged that 'the challenged action has caused him injury in fact, economic or otherwise[.]'" *Bowen, 945 A.2d at 317* (quoting ***R.I.** Ophthalmological Soc'y v. Cannon, 113 **R.I.** 16, 22, 317 A.2d 124, 128 (1974))*. "An injury in fact is 'an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Warwick Sewer Auth. v. Carlone, 45 A.3d 493, 499 (**R.I.** 2012)* (quoting *N & M Props., 964 A.2d at 1145*).

The Town alleges that the Plaintiffs' injuries are "purely

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[1] There is also one evidentiary issue outstanding: at oral argument, Plaintiffs attempted to introduce documentary evidence regarding police enforcement of marijuana laws. The Town objected to this evidence and has submitted a memorandum in support of its objection to which Plaintiffs have replied. Even though the rules of evidence do not apply on a motion for preliminary injunction, ***R.I.** **R**.* Evid. 101(B), and the Court can rely on affidavits, the Court has not considered this evidence. The Court will not rule on the objection at this time, as it is not necessary for the resolution of the instant motion.

[2] While the Court is only considering the request for a preliminary injunction at this time, the basis for the request for injunctive relief is the UDJA action, as "[a]n injunction is a remedy, not a cause of action." *Long v. Dell, Inc., 93 A.3d 988, 1004 (**R.I.** 2014)*.

conjectural." Def.'s Mem. 4. The Town frames the Plaintiffs' potential injuries as ones of inconvenience and contends that the "Plaintiffs continue to have the ability to access medicinal marijuana in neighboring cities and towns and continue to have the ability to possess the same amount of usable marijuana contemplated under the state *Medical Marijuana Act*." Id. at 5. While such a characterization may reflect part of the Plaintiffs' Complaint, their concerns go deeper than that. The Does indicate that "[t]he Ordinance requires the exposure of [their] confidential and protected **[*5]** health care information to Smithfield authorities." Doe Affs. ¶ 9. Under the Hawkins-Slater Act, the list of persons to whom the Department of Health has issued registration cards "shall be confidential . . . and not subject to disclosure." *Sec. 21-28.6-6(i)(3)*. The Town has no way of accessing this information, as it is even insulated from public records requests. Id.; see also Smithfield Town Council Mins. 3, Apr. 18, 2017. The Plaintiffs face a pressing dilemma—register with the Town and lose their state-guaranteed privacy, or risk fines for the possibility of staying anonymous. This imminent invasion of privacy presents a concrete and particularized injury, leading this Court to ***find*** that the Does have standing to challenge the Ordinance.[3]

For an organization such as RIPAC, the "standing requirement is satisfied 'when [the organization's] members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit.'" *In re Town of New Shoreham Project, 19 A.3d 1226, 1227 (**R.I.** 2011)* (mem.) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*). Given that the Does are members of RIPAC and have standing in their own right, the first **[*6]** prong is satisfied. The continued vitality and protection of the medical marijuana program is germane to RIPAC's stated purpose of "educat[ing] ***Rhode Island***'s medical marijuana ***patients***, caregivers, doctors and others . . . and to educate the public about the medical attributes of the use of the cannabis plant and the legal status of use of the cannabis plant." Compl. ¶ 30. Finally, the nature of the claim—the legal protections of medical marijuana ***patients***—"does not make the individual participation of each injured party indispensable to proper resolution of the cause . . ." *Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. Thus, RIPAC also has standing to bring the claim.[4]

B

Injunctive Relief

This Court must now determine whether the Plaintiffs have shown the four requisite elements for granting injunctive relief: (1) a reasonable likelihood of success on the merits, (2) irreparable harm in the absence of the injunction, (3) equity weighs in the Plaintiffs' favor, and (4) issuance of a preliminary injunction will preserve the status quo. See *Iggy's Doughboys, Inc., 729 A.2d at 705*. Before beginning this analysis, this Court observes that "[a] plaintiff is generally entitled to injunctive relief when a municipality seeks to enforce an invalid ordinance." *Women & Infants Hosp. v. City of Providence, 527 A.2d 651, 654 (**R.I.** 1987)*.

1

Likelihood of [*7] Success

In order to obtain injunctive relief, "[t]he moving party must . . . show that it has a reasonable likelihood of succeeding on the merits of its claim at trial." *Fund for*

[3] The Court notes that the Does have not explicitly stated that they grow or plan to grow marijuana. (An affidavit was submitted with Plaintiffs' Supplemental Memorandum of Law filed post-argument wherein the affiant states that he/she was growing twelve mature and twelve immature medical marijuana plants. There is no indication that the affiant is one of the Plaintiffs, and the affidavit was not considered. See footnote 1, supra.) Therefore, the Court does not base its standing analysis on those grounds. The Court, however, observes that marijuana cultivation remains illegal under federal law and could understand why a litigant might not want to expose themselves to prosecution. Were the Does to be growing marijuana, it could provide independent grounds for standing. See *St. George Greek Orthodox Cathedral of W. Mass., Inc. v. Fire Dep't of Springfield, 462 Mass. 120, 967 N.E.2d 127, 131 (Mass. 2012)* ("By maintaining its existing system, the church continues to violate the ordinance; in theory, the city could issue an enforceable violation notice at any time . . . .").

[4] Given that the Plaintiffs have established their own standing, "they may present the broader claims of the public at large." ***R.I.** Ophthalmological Soc'y, 113 **R.I.** at 27, 317 A.2d at 130*.

Cmty. Progress v. United Way of Se. New England, 695 A.2d 517, 521 (**R.I.** 1997). This is not "a certainty of success," but only "a prima facie case." Id. "Prima facie evidence is that amount of evidence that, if unrebutted, is sufficient to satisfy the burden of proof on a particular issue." Paramount Office Supply Co. v. D.A. MacIsaac, Inc., 524 A.2d 1099, 1101 (**R.I.** 1987).

State Preemption

Plaintiffs have alleged that the Ordinance is preempted by the Hawkins-Slater Act. Indeed, the Ordinance purports to limit ***patient*** cardholder cultivation possession to two mature plants, Ordinance § 1(D)(5), while the Hawkins-Slater Act permits ***patient*** cardholders up to twelve, § 21-28.6-4(a). Additionally, the Ordinance bans all caregiver and cooperative cultivation, Ordinance § 1(E)-(F), which is permitted by the Hawkins-Slater Act, § 21-28.6-4(e), -14(a). "[A]s a general rule, a state law of general character and statewide application is paramount to any local or municipal ordinance inconsistent therewith." Mongony v. Bevilacqua, 432 A.2d 661, 664 (**R.I.** 1981). This "conflicts with a state statute on the same subject," making a prima facie case for direct preemption. Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1261 (**R.I.** 1999).

Furthermore, the Hawkins-Slater Act provides a "comprehensive regulatory structure" for the medical use and supply of **[*8]** medical marijuana. Sec. 21-28.6-2(8). "[E]very marijuana plant, either mature or seedling, grown by a registered ***patient*** or primary caregiver, must be accompanied by a physical medical marijuana tag purchased through the department of business regulation and issued by the department of health . . . ." Sec. 21-28.6-15(a). Not one but two state departments are involved in the administration of the medical marijuana program. The Department of Business Regulation alone has issued 107 pages of regulations about the program. The General Assembly has instituted an oversight committee to evaluate the compassion center program. Sec. 21-28.6-12(j). There are nineteen subsections detailing protections for the medical use of marijuana. Sec. 21-28.6-4. This level of attention and detail makes clear that "the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject." Town of Warren, 740 A.2d at 1261. Thus, the Ordinance "will be declared invalid if it disrupts the state's overall scheme of regulation . . ." Town of E. Greenwich v. O'Neil, 617 A.2d 104, 109 (**R.I.** 1992).

Portions of the Ordinance dealing with the requirements of the building in which the marijuana will be grown, such as § 1(D)(4), may also be preempted by other state statutes. See, e.g., G.L. 1956 § 23-27.3-100.1.7 ("[T]he local cities and towns shall be prohibited from **[*9]** enacting any local building codes and ordinances in the future."); § 23-27.3-101.3 ("When the provisions in this code specified for structural strength, adequate egress facilities, sanitary conditions, equipment, light and ventilation, and fire safety conflict with the local zoning ordinances, [the State Building Code] shall control the erection or alteration of buildings."); § 23-28.1-2(b)(3) (providing that municipal fire safety ordinances "shall be effective only upon the approval by rule of the fire safety code board of appeal and review"). While the Ordinance purports to deal with fire safety issues concerning the electrical apparatus used to grow marijuana, see, e.g., Ordinance § 1(D)(3)(c), (4)(c), there is no evidence that the Town obtained any such approval.

The Town's Zoning Authority

The Attorney General[5] astutely observes that in various places, the Hawkins-Slater Act and its corresponding regulations gives deference to municipalities and their zoning laws, indicating that the General Assembly did not intend to occupy the entire field. This may be true to some extent, but this argument cuts both ways. The instances where the legislature has built in such deference is limited to compassion centers, licensed cultivators, and **[*10]** cooperative cultivators, all of who operate on a larger scale than the individual. See § 21-28.6-14(a)(7) (providing that cooperative cultivations must display documentation that the location and cultivation comply with applicable municipal housing and zoning codes); § 21-28.6-16(i) (providing that licensed cultivators, who sell medical marijuana to compassion centers, must abide by all zoning ordinances); 230 ***R.I.***C.***R***. 80-5-1 1.1(C)(1) (limiting the Department of Business Regulation's role in the medical marijuana

[5] Both sides in this case have challenged a law's constitutionality—the Town, as will be seen infra, challenges the constitutionality of the Hawkins-Slater Act, and the Plaintiffs, by virtue of preemption, challenge the Ordinance. In accordance with § 9-30-11, the parties served the Attorney General with a copy of the proceedings. The Attorney General has only to date elected to file, as amicus, a memorandum arguing that there is no conflict between the Ordinance and the Hawkins-Slater Act.

program to "compassion centers, licensed cultivators, and cooperative cultivations"); see also Att'y Gen.'s Mem. 5 ("Indeed, the Medical Marijuana Act recognizes the right of local cities and towns to regulate compassion centers, cooperative cultivations and licenses [sic] cultivators."). Thus, while the General Assembly may have specifically carved out space for towns to regulate medical marijuana cultivation, it has only been in the context of larger-scale operations, not individual ones.[6]

Furthermore, this Court questions whether it is within the power of municipalities to regulate an individual's small-scale cultivation of medical marijuana for personal use under its zoning authority.[7] The Town **[*11]** claims authority to regulate medical marijuana growth under G.L. 1956 § 45-24-37(g), which states, in part, that "plant agriculture is a permitted use within all zoning districts of a municipality, including all industrial and commercial zoning districts, except where prohibited for public health or safety reasons . . ." Interestingly, the Town pointed to no other instances where its zoning ordinance regulated agriculture in a residential zone. At oral argument, Plaintiffs contested that the growing of medical marijuana constituted plant agriculture. The Town cites to two Superior Court decisions in support of its contention that marijuana cultivation constitutes agriculture under § 45-24-37(g). However, these two cases do not quite stand for such a proposition.[8] One, Carlson v. Zoning Bd. of Review of S. Kingstown, No. WC-2014-0557, 2016 ***R.I.*** Super. LEXIS 134, 2016 WL 7035233, at *5 (***R.I.*** Super. Nov. 25, 2016), simply ***found*** that the plaintiff's medical marijuana cultivation did not constitute "agricultural products manufacturing." The second ***found*** that "growing medical marijuana was a horticulture exercise," but also held that it was not a "traditional agricultural land use." Baird Props., LLC v. Town of Coventry, No. KC-2015-0313, 2015 ***R.I.*** Super. LEXIS 111, 2015 WL 5177710, at *8-9 (***R.I.*** Super. Aug. 31, 2015).

However, "a zoning restriction imposed for considerations or **[*12]** purposes not embodied in an enabling act will be held invalid, not as exceeding the scope of the police power per se, but as an ultra vires act beyond the statutory authority delegated." Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 2:15 (4th ed. 2016).

> "[C]ases where zoning ordinances and decisions thereunder may be held ultra vires include situations where regulation: (1) involves the details or the manner of on-site use, such as heating systems or laundry facilities, etc., which do not directly involve the use of land or impose externalities on nearby land; . . . or (6) restricts the use of land to deal with some community problem, such as an economic boycott, demonstrations, or school desegregation, etc., that is only tangentially related, if at all, to the use of land at a particular location or the pattern of land use within the community." Id. at § 2:10.

The regulation of personal medical marijuana cultivation may be outside the scope of the authority granted to municipalities under the Zoning Enabling Act. The Zoning Enabling Act allows municipalities to enact a zoning ordinance, which is defined as "[a]n ordinance . . . that establish[es] regulations and standards **[*13]** relating to the nature and extent of uses of land and structures[.]" Sec. 45-24-31(72). A use is "[t]he purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." Sec. 45-24-31(65). The word "use" "traditionally has been understood to refer to the type of activity that is allowed at a particular site, such as residential, educational, religious, industrial, retail or mining." Lord Family Windsor, LLC v. Planning & Zoning Comm'n of Windsor, 288 Conn. 730, 954 A.2d 831, 836-37 (Conn. 2008). There are "de minimis uses of private property which are neither regulated nor contemplated by the zoning regulations." In re Scheiber, 168 Vt. 534, 724 A.2d 475, 478 (Vt. 1998); see also City of New Orleans v. Estrade, 200 LA. 552, 555, 8 So. 2d 536 (La. 1942) ("But, surely, it could not be seriously contended that it is a violation of the zoning ordinance for one to erect a shuffle-board or a badminton court in his own yard for the use and enjoyment of himself, his family

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[6] Even if this Court were inclined to agree that the state has not fully occupied the field, this argument fails to address the direct preemption discussed supra.

[7] These arguments were not fully briefed. However, "the office of a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy . . ." Coolbeth v. Berberian, 112 ***R.I.*** 558, 564, 313 A.2d 656, 659 (1974). This Court will give the parties full opportunity to brief the matter before final adjudication. Here, though, this Court "limit[s] [its] inquiry to whether the plaintiffs have shown at least a reasonable probability, rather than a certainty, of ultimate success on a final hearing." Id. at 566, 313 A.2d at 660.

[8] Furthermore, while persuasive, they are not binding on this Court.

and friends, or that it is illegal for children to engage in their various games and amusements in the yards of their homes."). It is entirely possible that the personal cultivation of medical marijuana is not a "use" that can be regulated under the Zoning Enabling Act.

Both parties presented the Court with the minutes from the Town Council meeting at which the Ordinance was enacted. Neither in these minutes nor in **[*14]** the Ordinance itself did the Town Council make any legislative findings. While not required to do so, the Town Council by that mechanism might have justified some of the limitations being placed on cardholders. Moreover, at the hearing, the Town offered no evidence to support its contention that two plants is sufficient for cardholders' needs, notwithstanding the fact that the General Assembly ***found*** twelve plants to be the appropriate number of plants to allow an individual cardholder to grow.

The Court is ever mindful that the Hawkins-Slater Act was enacted because the General Assembly ***found*** that it was in the interest of the health of certain Rhode Islanders to allow them to use and grow marijuana for medicinal purposes. The Court gleans from the minutes of the Town Council meeting that the police chief and others believed, for some reason, that two plants was sufficient for a cardholder's needs, and feared the excess could be sold illegally or make cardholder growers subject to potential robbery. Again, there is no evidence in this record or known to the Court that supports a claim that two plants is sufficient for a ***patient***'s use. Given that the Hawkins-Slater Act was drafted to **[*15]** protect the health of those with debilitating medical conditions, the Court hopes that the Town was acting on more than a hunch when it decided to alter the protections granted to cardholders by the General Assembly. Moreover, there is no precedent of which the Court is aware that says zoning ordinances are to be drafted as crime prevention tools. That would be an unusual stretch of "the police power." If that were the case, a municipality could use its zoning ordinance to eliminate banks as they are susceptible to robbery or prohibit pharmacies from dispensing opioids because of the health threat they pose.

Ultimately, there is a likelihood that the Plaintiffs can establish that the Town exceeded its zoning authority in enacting the Ordinance.

Federal Preemption

The Town's final argument with respect to the Plaintiffs' likelihood of success on the merits is that the Hawkins-Slater Act itself is preempted by federal law, specifically the *Controlled Substances Act (CSA), 21 U.S.C. §§ 801 et seq.* However, if the Ordinance is beyond the scope of the Zoning Enabling Act, it is immaterial whether the Hawkins-Slater Act is valid. If the Town acted ultra vires when enacting the Ordinance, the Ordinance is unenforceable **[*16]** and a nullity. See *Hardy v. Zoning Bd. of Review of Coventry, 113 **R.I.** 375, 377, 321 A.2d 289, 290-91 (1974)* ("[A]ny attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is ultra vires of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void."); see also *Women & Infants Hosp., 527 A.2d at 653*.

The Court does not rely on the foregoing, however, to conclude that the Hawkins-Slater Act is not preempted by the CSA. Of course, "[t]he *Supremacy Clause of the United States Constitution, Article VI, clause 2*, preempts or invalidates state law that interferes or conflicts with any federal law." *Verizon New England Inc. v. **R.I.** Pub. Utils. Comm'n, 822 A.2d 187, 192 (**R.I.** 2003)*. But what constitutes a conflict has confounded courts. The CSA helpfully describes how it should be interpreted with regard to state law:

> "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." *21 U.S.C. § 903*.

Congress has not chosen to completely occupy the field, instead only choosing to preempt laws that are in "positive conflict" **[*17]** with the CSA "so that the two cannot consistently stand together." Id.

As this Court recently observed in *Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 **R.I.** Super. LEXIS 88, 2017 WL 2321181, at *14 (**R.I.** Super. May 23, 2017)*, this clause fits nicely within the doctrine of "conflict preemption." Conflict preemption comes in two forms. The first arises "where compliance with both federal and state regulations is a physical impossibility . . ." *Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)*.

The second occurs "where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)* (quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*).

The Supreme Court of Michigan recently dealt with conflict preemption in extremely similar circumstances in *Ter Beek v. City of Wyoming, 495 Mich. 1, 846 N.W.2d 531 (Mich. 2014)*. In Ter Beek, the city of Wyoming penalized, inter alia, growing medical marijuana under their zoning ordinance. This ordinance conflicted with a Michigan statute that provided a regulatory scheme for medical marijuana. The city argued the CSA preempted the Michigan statute. The Supreme Court of Michigan first determined that there was no impossibility preemption because "it does not require that the City violate" the CSA. *Ter Beek, 846 A.2d at 538*. Such a conclusion is eminently logical and applicable to **[*18]** the case at bar. Nothing in the Hawkins-Slater Act requires the Town—or anyone—to "manufacture, distribute, or dispense, or possess" marijuana or to otherwise violate the CSA. *21 U.S.C. § 841(a)(1)*.

Finally, this Court concludes that the Hawkins-Slater Act does not stand as an obstacle to the purposes and objectives of the CSA. The key to understanding why lies in a simple proposition: "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." *New York v. United States, 505 U.S. 144, 166, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992)*. But while the "several states must be considered as sovereign and independent," *McCulloch v. Maryland, 17 U.S. 316, 342, 4 L. Ed. 579 (1819)*, "[***i***]t is well established that cities and towns have no power to enact legislation except in reliance upon those powers delegated to them from time to time by the General Assembly." *Vukic v. Brunelle, 609 A.2d 938, 941 (**R.I.** 1992)*; see also ***R.I.** Const. art. XIII, § 4* ("The general assembly shall have the power to act in relation to the property, affairs and government of any city or town by general laws . . . ."). The Hawkins-Slater Act provides that a "qualifying ***patient*** cardholder who has in his or her possession a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or **[*19]** denied any right or privilege . . . . for the medical use of marijuana[.]" *Sec. 21-28.6-4(a)*; see also § 21-28.6-4(b), *(e)*, *(j)* & *(m)* (providing the same or similar protections for authorized purchasers, primary caregiver cardholders, and practitioners); *§§ 21-28.6-12(h)*, *-16(m)* (providing the same or similar protections for compassion centers and registered cultivators).

The State of ***Rhode Island*** has granted certain individuals immunity from state prosecution under the Hawkins-Slater Act. The Hawkins-Slater Act does not (and could not) deny the federal government the ability to enforce the CSA, and does not (and could not) immunize medical marijuana users from prosecution. Accord *Ter Beek, 846 N.W.2d at 540* ("Granting Ter Beek his requested relief does not limit his potential exposure to federal enforcement of the CSA against him, but only recognizes that he is immune under state law for MMMA-compliant conduct, as provided in *§ 4(a)*."). Medical marijuana is a matter of statewide concern, and the Hawkins-Slater Act was enacted under the state's police power out of concern for the health of certain of its residents. See *§ 21-28.6-2(6)*. Thus, while cities and towns have the "right of self government in all local matters," ***R.I.** Const. art. XIII, § 1*, this "in no way affect[s] the sovereignty of the state with regard **[*20]** to the exercise of the police power . . ." *Lynch v. King, 120 **R.I.** 868, 876, 391 A.2d 117, 122 (1978)*; see also *State v. Krzak, 97 **R.I.** 156, 161, 196 A.2d 417, 421 (1964)* ("[T]he sovereignty of the state in the matter of elections and education was not surrendered to those cities and towns which adopted a home rule charter. Neither was the sovereignty of the state with relation to the exercise of the police power transferred to such cities and towns.") (citations omitted).

The General Assembly, in exercising its police power, has withdrawn the power from the cities and towns to punish the medical use of marijuana under its own ordinances. The CSA is still in effect in Smithfield, as it is throughout ***Rhode Island***. Nothing prevents the federal government from enforcing the CSA. ***Rhode Island*** has, simply, elected not to independently prohibit the conduct proscribed under the CSA. Even if the CSA did contain direction to the states to adopt certain laws, it would be moot, as "Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States, 521 U.S. 898, 925, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)*. Thus, this Court concludes that the CSA does not preempt the Hawkins-Slater Act. Because the Plaintiffs have made a prima facie case that the Town has failed to rebut, this Court also concludes that Plaintiffs **[*21]** have a likelihood of success on the merits.

Other Provisions

The Plaintiffs have challenged other provisions of the Ordinance. Since this matter is before the Court on preliminary injunction, it is not the final adjudication of this matter, and these arguments will be considered when the case is considered on preliminary or permanent injunction.

2

Irreparable Harm

"The purpose of an injunction is to prevent imminent, irreparable injury." *Ward v. City of Pawtucket Police Dep't, 639 A.2d 1379, 1382 (**R.I.** 1994)*. As this Court has detailed supra, one harm the Plaintiffs have highlighted is the potential invasion of their privacy—if the Plaintiffs want to comply with the Ordinance, they must reveal what is, under the Hawkins-Slater Act, confidential information. Whether the right is given by statute or by the Constitution, "the right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief." *Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981)*; see also *Oil, Chem. & Atomic Workers Int'l Union, Local 2-286 v. Amoco Oil Co. (Salt Lake City Refinery), 885 F.2d 697, 707 (10th Cir. 1989)* (***finding*** the invasion of privacy and potential stigmatization and humiliation of a drug-testing program, despite "assurances of confidentiality," to constitute an irreparable injury). Hence, the Court ***finds*** that the unwarranted disclosure of Plaintiffs' **[*22]** status as medical marijuana cardholders constitutes irreparable harm.

Plaintiffs also contend that the Ordinance hinders "their ability to access medication prescribed to them by their doctor"—namely, medical marijuana. Pls.' Mem. 24. The Town observes that "there are certainly alternative sources of medical marijuana available to the individual Plaintiffs outside of the Town." Def.'s Mem. 11. Apparently, the Town feels there is no harm in ***patient*** cardholders with "[a] chronic or debilitating disease or medical condition," such as "severe, debilitating, chronic pain," "seizures," or "severe and persistent muscle spasms," having to drive out of town to obtain medication. *Sec. 21-28.6-3(5)(ii)*. However, the General Assembly concluded otherwise and permitted these ***patients*** the right to grow their medication in their own homes.

3

Balance of the Equities and Status Quo

Testing the balance of the equities involves "examining the hardship to the moving party if the injunction is denied, the hardship to the opposing party if the injunction is granted and the public interest in denying or granting the requested relief." *Fund for Cmty. Progress, 695 A.2d at 521*. The hardships to the Does include revealing their medical status prematurely and increased difficulty **[*23]** or inability to either grow or obtain their medicine. The General Assembly has ***found*** that "[m]odern medical research has discovered beneficial uses for marijuana in treating or alleviating pain, nausea, and other symptoms associated with certain debilitating medical conditions . . ." *Sec. 21-28.6-2(1)*. Thus, "pursuant to its police power to enact legislation for the protection of the health of its citizens," the General Assembly enacted the Hawkins-Slater Act. *Sec. 21-28.6-2(6)*. The State has implemented a regulatory scheme in the interests of "public safety, public welfare, and the integrity of the medical marijuana program . . ." *Sec. 21-28.6-2(7)*. Town interference in this system, designed to be "transparent, safe, and responsive to the needs of ***patients***," could impair the public interest as laid out by the General Assembly. *Sec. 21-28.6-2(8)*. Thus, considering the burdens on the parties and the impact to the public interest, this Court ***finds*** the balance of the equities lies with the Plaintiffs.

Any concerns raised before the Town Council can be addressed through enforcement of other laws and the exemptions in the Hawkins-Slater Act. See *§ 21-28.6-4(p)* (providing that "[a] qualifying ***patient*** or primary caregiver cardholder may give marijuana to another . . . provided **[*24]** that no consideration is paid for the marijuana"); *§ 21-28.6-7(a)(2)(vi)* (providing that the Hawkins-Slater Act does not permit smoking of marijuana "[w]here exposure to the marijuana smoke significantly adversely affects the health, safety, or welfare of children"). The General Assembly has endowed the Plaintiffs with certain rights relative to their health care, and the Town has put forward no evidence of any of its interests; thus, it is more equitable to deny the preliminary relief.

The status quo analysis is straightforward. The Ordinance disturbed the legislative regime set up by the

Hawkins-Slater Act. The Town argues that "preventing enforcement of this measure would remove necessary public safeguards which have been in place since April 18, 2017 . . ." Def.'s Mem. 13. Yet, the Town has not pointed to any effort to charge anyone for violating the Ordinance. Moreover, "a restraining order is meant to preserve or restore the status quo and . . . this status quo is the last peaceable status prior to the controversy." *E.M.B. Assocs. v. Sugarman, 118 **R.I.** 105, 108, 372 A.2d 508, 509 (1977)*. Granting the restraining order would indeed maintain the status quo.

IV

Conclusion

The Court ***finds*** that the Plaintiffs have standing to pursue their declaratory judgment action and their **[*25]** request for injunctive relief. The Court also ***finds*** that the Plaintiffs have a reasonable likelihood of success on the merits, will suffer irreparable harm without the requested relief, have the balance of the equities, and that issuance of the injunction will preserve the status quo. Therefore, the Court grants the Plaintiffs' motion for a preliminary injunction. Counsel will prepare the appropriate order for entry.

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

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

MEMORANDUM ORDER

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

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

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

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

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

Chalene Scott, APO

United States Marshal's Office
United States Probation Office

(*Via CM/ECF Electronic Filing*)

CERTIFICATE OF COMPLIANCE

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

Dated: October 9, 2019

/s/ Sara J. Rose
Sara J. Rose

CERTIFICATE OF SERVICE

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

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

Dated: October 9, 2019

/s/ Sara J. Rose
Sara J. Rose