Received 4/22/2024 7:58:16 PM Commonwealth Court of Pennsylvania

Filed 4/22/2024 7:58:00 PM Commonwealth Court of Pennsylvania
283 MD 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Damon Monyer and the Pennsylvania Cannabis Coalition, **Petitioners,** **v.** **23rd Judicial District, Berks County,** **Respondent.**	**No. 283 MD 2023** **Original Jurisdiction**

PETITIONERS' BRIEF IN RESPONSE TO RESPONDENT'S APPLICATION FOR SUMMARY RELIEF

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I. INTRODUCTION

Despite the Judicial District's efforts to complicate this matter, the question before this Court remains straightforward: Does the Judicial District deny medical marijuana patients in Berks County, including Petitioner Damon Monyer, a right or privilege based solely on their lawful use of medical marijuana? The answer to that question is "yes."

As a preliminary matter, the Judicial District's arguments concerning standing are built upon irrelevant considerations—many of which were invoked by the Judicial District only after Petitioners shined a spotlight on its unlawful medical marijuana policy. Contrary to the Judicial District's claim, Petitioners are not asking this Court to order Mr. Monyer's admission into a particular treatment court. Petitioners instead seek an Order from this Court declaring as unlawful the Judicial District's policy restricting treatment court applicants/participants' lawful use of medical marijuana and an injunction against enforcement of that policy. The Judicial District's attempt to challenge standing is a red herring, and as discussed below, is belied by the record and the Judicial District's own statements.

Moreover, not only does the Judicial District misdirect this Court's attention, but it also continues to misstate the holding of *Gass v. 52nd Judicial District*, 232 A.3d 706 (Pa. 2020). The Judicial District has consistently posited its erroneous claim that the *Gass* decision addressed "an administrative policy that banned all

medical marijuana use by probationers across the judicial district . . . ." *Respondent's Brief*, pg. 34. Repeating misinformation does not make it true, and these attempts to *Gass*-light the Court should be summarily dismissed. As is plain from the Pennsylvania Supreme Court's unanimous decision in that case, *Gass* did not deal with a blanket prohibition against medical marijuana use. Instead, the policy at issue mirrored the "medical necessity" language in the Judicial District's own policy. *Gass*, 232 A.3d at 710 n. 4.

As articulated below, the question before this Court is straightforward. Petitioners are entitled to summary declaratory and injunctive relief.

II. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED[1]

1. Do Petitioners Damon Monyer and PCC have standing, where Mr. Monyer is a medical marijuana patient seeking admission to treatment court and PCC's members have suffered financial and professional harm because of the Policy?

2. Does the Judicial District's Policy, which permits its treatment courts to deny admission to treatment court or sanction an individual in treatment court for the lawful use of medical marijuana, violate the immunity provision in the Medical Marijuana Act?

[1] The Judicial District did not set forth any Questions Presented in its Brief, but Petitioners offer these questions to properly frame the issues raised by the Judicial District.

3. Have Petitioners established that they are entitled to a permanent injunction against enforcement of the Judicial District's Policy to avoid injury that cannot be compensated by damages and to prevent the greater injury that will result if the requested relief is not granted?

Suggested answer to all: Yes.

III. COUNTER-STATEMENT OF THE STATEMENT OF MATERIAL FACTS

Petitioners incorporate the Statement of Uncontested Facts set forth in their Brief in Support of their Application for Summary Relief and their Answer to Respondent's Application for Summary Relief.

Petitioner Damon Monyer is an Air Force veteran and medical marijuana patient whose application to Veterans Treatment Court was denied in May 3, 2023. Pet. Answer to Resp. App. ¶¶ 8, 72. He filed this case on June 21, 2023, claiming that his application was denied due to his lawful medical marijuana use in violation of Pennsylvania's Medical Marijuana Act, 35 P.S. § 10231.101 *et seq*. *Id.* ¶ 1. Mr. Monyer sought an injunction barring the 23rd Judicial District from enforcing its prohibition on medical marijuana use by treatment court participants against him. *Id.* At the time he filed the case, Mr. Monyer intended to submit another Veterans Treatment Court application in accordance with the suggestion by Assistant District Attorney Kenneth Kelecic, a member of the Veterans Treatment Court team, that Mr. Monyer reapply to Veterans Treatment Court. Pet. Answer to Resp.

App. ¶¶ 73-74. That application was denied on August 28, 2023. *Id.* ¶ 77. Mr. Monyer thereafter applied for admission to Mental Health Treatment Court based on the recommendation of another Veterans Treatment Court team member, Gelu Negrea. *Id.* ¶ 78, Pet. App. ¶ 126-27. On February 2, 2024, while his application to Mental Health Treatment Court was pending, Mr. Monyer filed an Amended Application for Special Relief in the Nature of a Preliminary Injunction. Pet. Answer to Resp. App. ¶ 6. Although Mr. Monyer is "statutorily eligible" and "still a good candidate" for treatment court, his application was denied on February 6, 2024, based on the judge's incorrect belief that he "is ineligible to participate … due to the firearms offense." *Id.* ¶ 80. Mr. Monyer will submit a new treatment court application if the Court enjoins the Judicial District's policy. Pet. App. ¶ 133.

Petitioner Pennsylvania Cannabis Coalition ("PCC") is a trade association representing Pennsylvania medical marijuana permit holders and industry partners. Pet. Answer to Resp. App. ¶ 9. Among its members are three of the four licensed medical marijuana dispensaries in Berks County. *Id.* ¶ 10. Medical marijuana patients participating in the Judicial District's treatment courts have stopped purchasing and using medical marijuana in order to be admitted to treatment court or to avoid sanctions for lawful medical marijuana use. Pet. App. ¶ 140. The Judicial District has stipulated that multiple individuals have asked to use medical marijuana and had their requests denied. Pet. App. ¶ 73.

J.S. stopped purchasing medical marijuana from PCC member dispensaries to enter DUI Treatment Court and comply with the Policy, and her probation officer admitted that she stopped such use "in order to get admitted into DUI treatment court." Pet. App. ¶ 145; Pet. Answer to Resp. App. ¶ 96(a).

G.S. stopped purchasing medical marijuana from PCC member dispensaries upon entering DUI Treatment Court for several months after being told by treatment court staff that it was not permitted under the Policy. Pet. App. ¶ 145; Pet. Answer to Resp. App. ¶ 96(b). G.S. later resumed using medical marijuana and was jailed for that use, again causing G.S. to stop purchasing medical marijuana from PCC member dispensaries because of the Policy. Pet. Answer to Resp. App. ¶ 96(b); *see* Ex. 15, *Commonwealth v. G.S.*, CP-06-CR-2852-2021, Notes of Testimony (March 16, 2023).

R.P. was told by the Mental Health Court that he would not be allowed to use medical marijuana in the program, and he stopped purchasing medical marijuana from PCC member dispensaries for several months to comply with that instruction. Policy. Pet. App. ¶ 145; Pet. Answer to Resp. App. ¶ 96(c). His probation officer and the treatment court notes confirm that he was not using medical marijuana during that time. Pet. Answer to Resp. App. ¶ 96(c).

P.M. stopped purchasing medical marijuana from PCC member dispensaries to comply with the Policy in DUI Treatment Court because the court denied his

request to use medical marijuana, even after submitting a doctor's letter. Pet. App. ¶ 73; Pet. Answer to Resp. App. ¶ 96(c).

Each of these individuals would have purchased medical marijuana from PCC member dispensaries if, pursuant to the Policy, the Judicial District's treatment courts permitted them to use medical marijuana. Pet. App. ¶ 145; Pet. Answer ¶ 96(a)-(d). PCC's members have lost revenue and have been unable to provide care to patients who have stopped using medical marijuana in order to comply with the Judicial District's policy. Pet. App. ¶¶ 141-145.

IV. SUMMARY OF ARGUMENT

The Judicial District is not entitled to summary judgment on Petitioners' claim that the Judicial District's Policy ("Policy") violates the Medical Marijuana Act ("MMA"). Instead of defending the Policy as consistent with the MMA's immunity provision, as interpreted by the Supreme Court in *Gass*, the Judicial District improperly relies on the deposition testimony of its own witnesses, advances an absurd interpretation of its own Policy that is not supported by the evidence, and suggests that its concerns regarding medical marijuana use by treatment court participants should outweigh the MMA's unambiguous language and the intent of the General Assembly. The undisputed facts support summary judgment for Petitioners and denial of summary judgment for the Judicial District.

The Court should declare the Judicial District's Policy invalid under the MMA and enjoin its enforcement.

A. Petitioners have standing because they have been aggrieved by the Judicial District's Policy.

A party has standing if they are "aggrieved," demonstrated by establishing three factors: (1) substantial, (2) direct, and (3) immediate interest in the outcome of the litigation. *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 309 A.3d 808, 832 (Pa. 2024). "A party's interest is substantial when it surpasses the interest of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection with the alleged harm; finally, a party's interest is immediate when the causal connection with the alleged harm is neither remote nor speculative." *Commonwealth, Office of the Governor v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014). The Judicial District's argument that Petitioners lack standing conflates the concepts of standing and mootness and fails to account for the well-recognized doctrine of associational standing. For the reasons that follow, Petitioners have standing to seek both injunctive and declaratory relief.

1. Petitioner Damon Monyer has standing because the Policy is a barrier to his admission to the Judicial District's treatment court programs.

Mr. Monyer satisfies standing requirements. First, Mr. Monyer has a substantial interest in this litigation as a medical marijuana patient who is

statutorily eligible for admission to the Judicial District's treatment court programs. *See Allegheny Reprod. Health*, 309 A.3d 808, at 838. Second, Mr. Monyer's interest is direct because a declaration that the Policy is invalid and an injunction barring its enforcement would remove the Policy as a barrier to Mr. Monyer's entry into a treatment court program when he files a new treatment court application. *Id.* (explaining that interest is "direct" for standing when declaration invalidating law would obviate injury). And third, Mr. Monyer's interest is immediate because he presently seeks entry into treatment court and is subject to the Policy. *See id.* (explaining that interest in litigation seeking declaration of invalidity is "immediate" when party is currently subject to the challenged regulation).

The Judicial District's argument that Mr. Monyer lacks standing because he does not have a pending application for admission to treatment court fails to recognize that Mr. Monyer is statutorily eligible for treatment court, and under the Judicial District's own rules, he can reapply for admission to treatment court. Pet. App. ¶¶ 43, 133. Although Mr. Monyer has previously applied to treatment court and been denied, his standing to make a facial challenge to the Policy is no different from individuals who file pre-enforcement challenges to other unlawful policies or statutes. Any factual development that would result from him submitting another application would not alter the resolution of legal issues in this

case. *See Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467 (Pa. 2021) (firearm owners' interest in pre-enforcement challenge to firearms ordinance was immediate because "[a]dditional factual development that would result from awaiting an actual [criminal prosecution] is not likely to shed more light upon the constitutional question of law presented") (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 925 (Pa. 2013)); *see also Robinson Twp.*, 83 A.3d at 925 (physician had standing for pre-enforcement challenge to statute impacting patients).

The Judicial District also contends that Mr. Monyer lacks standing because the Mental Health Court deemed him "ineligible to participate in Mental Health Treatment Court due to the firearms offense." Resp. Br. at 18-19. Viewed in its best light, the Judicial District's argument is about mootness, not standing. *See, e.g.*, *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (describing mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)" (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1384 (1973)). Mr. Monyer's claim is not moot because there is no bar to him re-applying for admission to treatment court. Whether or not the Mental Health Court has authority to deem him ineligible for treatment court is a disputed issue of fact, Pet.

Answer to Resp. App. ¶ 77, as well as law,[2] so it cannot serve as the basis for granting the Judicial District summary judgment on that issue. *See Flagg v. Int'l Union, Sec., Police, Fire Prof'l of Am., Local 506*, 146 A.3d 300, 305 (Pa. Commw. Ct. 2016). Moreover, the Judicial District has not claimed that the firearms charge makes Mr. Monyer ineligible for Veterans Treatment Court, and the Veterans Treatment Court never denied his application on that basis. Resp. App. ¶¶ 72, 77; *see also* Resp. Br. at 19 ("Moreover, even if [Mr. Monyer] were to reapply to *Mental Health Court*, changing or invalidating the Judicial District's policy will not change that Monyer's charges involve a firearm, which renders him ineligible according to Judge Geishauser.") (emphasis added)). The Judicial District's claim that Mr. Monyer "was not an appropriate candidate for Veterans Court due to his mental health diagnoses," Resp. Br. at 18, is not supported by the record. *See* Pet. Answer ¶ 61.

[2] The statute that governs admission to treatment courts, which is a form of "intermediate punishment," defines an "eligible offender" as *inter alia*, excluding a person with a "present or past pattern of violent behavior." 42 Pa.C.S. § 9802. The legislature alone determines eligibility criteria. *See Commonwealth v. Sarapa*, 13 A.3d 961, 968 (Pa. Super. Ct. 2011) ("trial court committed an error of law" in applying policy deeming all DUI offenders ineligible for the intermediate punishment program because "a local policy cannot supersede a legislative dictate"); *Commonwealth v. Jurczak*, 86 A.3d 265, 271 (Pa. Super. Ct. 2014) (unlawful to add additional eligibility requirements because "every county is nevertheless restricted by the eligibility requirements of the Sentencing Code").

Even if Mr. Monyer's claim were moot, his individual circumstances are not material to the question before the Court, which is whether the Policy violates the MMA by placing the burden on patients to prove "medical necessity." And this Court can still render a decision in this case and enjoin the Policy because, as explained below, PCC also has standing to seek declaratory and injunctive relief.

In addition, this case is not moot because the conduct complained of is capable of repetition, yet evading review, and the case involves questions of public importance. *See Saucon Valley Sch. Dist. v. Robert O.*, 785 A.2d 1069 (Pa. Commw. Ct. 2001). The conduct complained of—the Judicial District's application of the Policy to require medical marijuana patients to establish "medical necessity" in order to use medical marijuana in treatment court programs—is capable of repetition, yet evading review because the conduct is too short in duration to permit full litigation, and capable of repetition because every medical marijuana patient seeking access to treatment courts will be subject to the Policy. *See id.* And the Supreme Court has held that judicial districts adopting policies limiting the use of medical marijuana "implicates substantial legal questions concerning matters of public importance." *Gass v. 52nd Judicial Dist.*, 223 A.3d 212, 213 (Pa. 2019) (invoking King's Bench jurisdiction).

2. Petitioner Pennsylvania Cannabis Coalition ("PCC") has standing because the Policy harms its members.

PCC's membership includes three of the four medical marijuana dispensaries in Berks County, each of which has a substantial, direct, and immediate interest in the outcome of this litigation. Resp. App. ¶¶ 9-10. PCC, therefore, has standing. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 922 (Pa. 2013) ("Under Pennsylvania law, an association has standing as representative of its members to bring a cause of action even in the absence of injury to itself, if the association alleges that at least one of its members is suffering immediate or threatened injury as a result of the action challenged.").

The Judicial District's Policy harms PCC members in at least two ways—lost income due to reduced patronage and interference with PCC members' professional relationships with medical marijuana patients. Pet. App. ¶¶ 140-145. The Judicial District does not challenge PCC members' "substantial" interest in this litigation as a result of those harms. *See* Respondent's Br. at 20-21; *see also Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975) (plurality opinion) (explaining that pecuniary harm is a "substantial" interest, and "there is no minimum threshold on its magnitude"); *Allegheny Reprod. Health*, 309 A.3d at 835, 837-838 (reviewing cases that "highlighted the professional harms faced by the plaintiff, then found that the plaintiff's interests were adequately substantial, immediate and direct to confer standing," and holding

that medical institutions that provided abortion services had substantial interest in litigation challenging restrictions on Medical Assistance coverage of abortions).

Instead, the Judicial District's argument seems to be that PCC members' interest is not "direct" or "immediate" because PCC itself "has not suffered harm for engaging in protected activity under the MMA." Resp. Br. at 20. But the law does not require PCC to show that the Judicial District's Policy infringes upon PCC's or its member dispensaries' *own* rights protected by the MMA. A party whose interest is substantial, immediate, and direct has standing, whether or not "the core legal rights being vindicated by the lawsuit belong[] to other persons." *Allegheny Reprod. Health*, 309 A.3d at 835; *see also id.* at 832 ("Pennsylvania's standing doctrine is judicially created in contrast to federal standing requirements, which derive from Article III of the United States Constitution. . . . Generally speaking, in our Commonwealth, standing is granted more liberally than in federal courts.").

The harms to PCC members as set forth in the Petitioners' Application and the Counter-Statement of Uncontested Facts set forth in this Brief, in the form of lost income and interference with their professional relationships with patients, are directly related to the Judicial District's violation of the MMA. *See* Pet. App. ¶ 145; Pet. Answer to Resp. App. ¶ 96. Multiple medical marijuana patients have stopped using that treatment and stopped purchasing it from PCC member

dispensaries because of the Policy. PCC's interest in this litigation is direct because "a declaration that the [Policy] is invalid would obviate either injury alleged." *Wm. Penn Parking*, 346 A.2d at 289; *see also Allegheny Reprod. Health*, 309 A.3d at 838. PCC's interest in this litigation is immediate because the Judicial District's Policy presently causes reduced patronage and interference with PCC members' professional relationships with patients. *See Wm. Penn Parking*, 346 A.2d at 289-91; *Hosp. & Healthsystem Ass'n of Pa. v. Dep't of Pub. Welfare*, 888 A.2d 601, 608 (Pa. 2005) (holding hospitals' interest in litigation challenging statute is "neither remote nor abstract" where challenged language "presently and directly changes the way in which they may receive payment for emergency services"). The fact that these harms are caused by the Judicial District's violation of *patients'* rights protected by the MMA is irrelevant. *See Allegheny Reprod. Health*, 309 A.3d at 831-842.

The Court in *Allegheny Reproductive Health* summarized several Supreme Court cases where "the putative plaintiffs actually relied on the rights of their clients" to establish standing, and held that abortion providers had standing to challenge a statute even though it primarily impacted patients. *Allegheny Reprod. Health*, 309 A.3d at 840. For example, the Court has held that parking garage operators have standing to challenge a tax imposed on their patrons because the tax would harm the garage operators either "due to a reduced patronage of their

facilities," or due to the garage operators absorbing the cost of the tax. *Wm. Penn Parking*, 346 A.2d at 287-91. And it has held that health care providers have standing to challenge laws that interfere with their provision of care, even if the rights being vindicated belong to patients. *Robinson Twp.*, 83 A.3d at 923-24 (physician had standing to challenge an oil and gas drilling statute that interfered with his ability to provide medical care to patients who were impacted by oil and gas drilling); *Allegheny Reprod. Health*, 309 A.3d at 831-842 (abortion providers had standing to challenge Pennsylvania Medical Assistance program's exclusion of some abortions from coverage).

Likewise, PCC has standing because its members have a substantial, direct, and immediate interest in the litigation. The Judicial District's Policy prohibits medical marijuana use unless the treatment court grants an exemption for "medical necessity." As Respondent states, "the judge [] decides whether the individual is allowed to use [medical marijuana] in treatment court." Respondent's App. ¶ 48. In other words, the Policy gives judges authority that they do not have under the law to deny patients the privilege of treatment court participation or subject them to penalties based solely on lawful medical marijuana use. *See Gass*, 232 A.3d at 714. When a judge conditions entry into treatment court on a medical marijuana patient stopping lawful use of medical marijuana, it directly interferes with PCC members' professional relationships with their clients, similar to the challenged tax in

William Penn Parking, and the challenged restrictions impacting provision of healthcare in *Robinson Township* and *Allegheny County Reproductive Health*. And like the parking garage operators in *William Penn Parking*, PCC members face reduced patronage as a result of the Judicial District's Policy.

The Judicial District in a footnote claims that PCC "has not produced competent evidence that its members lost revenue." Resp. Br. at 20 n.1. This is factually incorrect. The Judicial District has admitted that it does not "have any reason to dispute that the Cannabis Coalition loses money if individuals are not allowed to use medical marijuana while they are in treatment court." Exhibit 51, March 13, 2024 Telephone Conference Transcript at 8:17-20. The Judicial District has also stipulated that several individuals who asked to use medical marijuana had those requests denied. Pet. App. ¶ 73. In addition, Petitioners have provided evidence of multiple patients who ceased purchasing medical marijuana from PCC member dispensaries due to the Policy. *See* Pet. App. ¶ 145; Pet. Answer to Resp. App. ¶ 96.

In any event, PCC is not required to prove specific examples of patients discontinuing medical marijuana use as a result of the Judicial District's Policy to establish standing, because the Policy "tend[s] to prohibit or burden transactions between the plaintiff and those subject to the regulation." *Wm. Penn Parking*, 346 A.2d at 289; *see also Robinson Twp.*, 83 A.3d at 923-25 (holding that physician

had standing to challenge statute that impacted his ability to provide medical care to his patients, even though statute had not yet resulted in specific instance of interference with physician's provision of medical care); *Hosp. & Healthsystem Ass'n*, 888 A.2d at 607-08 (holding that hospital trade association and hospitals had standing to challenge statute that changed how health care providers were paid for emergency services, despite absence of allegations that "any of their members were harmed as a result" of the challenged statute, or that any provider "was paid pursuant to the disputed provision").

The direct result of the Policy is that PCC's members have suffered and continue to suffer professional and financial harm because some of their patients are not permitted to use medical marijuana. This harm is substantial, direct, and immediate, and it gives PCC standing to challenge the Policy.

3. Petitioner Pennsylvania Cannabis Coalition is not challenging a criminal prosecution.

The Judicial District argues that PCC lacks standing because third parties may not challenge criminal sentences imposed against others. Resp. Br. at 21-28. The Judicial District's argument is based on the fundamentally flawed premise that PCC is challenging a criminal sentence. Even a cursory review of the cases cited by the Judicial District reveals that they are inapposite. The cited cases involve efforts by nonparties to alter criminal sentences or compel prosecution when a

district attorney declines prosecution.[3] *See* Respondent's Br. at 21-28. Those circumstances are not remotely analogous to the circumstances of this case and should not dictate this Court's analysis.

Petitioners Monyer and PCC in this case do not challenge a criminal sentence. To the contrary, they are challenging the legality of the Judicial District's Policy, which allows its treatment courts to restrict participants' lawful use of medical marijuana and that has the effect of directly harming PCC's members. For this basic reason, the Judicial District's argument should be disregarded.

B. The Judicial District's "Medical Necessity" Policy suffers from the same flaws as the policy struck down in *Gass*.

1. The Judicial District's Policy is facially invalid.

The Judicial District's Policy states:

> Medical Marijuana use will be addressed on a case-by-case basis. Consideration for use should be accompanied by a letter addressed to the Court from a treating physician that details, [sic] diagnosis and medical necessity for use.

Resp. App. ¶ 18. The Pennsylvania Supreme Court ruled unanimously in *Gass v. 52nd Judicial District* that the MMA's immunity provision prohibits courts from requiring medical marijuana patients on probation to demonstrate a "medical

[3] To the extent the Judicial District relies on federal cases, "the unique third-party standing test from federal jurisprudence" does not apply to Pennsylvania standing analysis. *Allegheny Reprod. Health*, 309 A.3d at 842.

necessity" to use medical marijuana. 232 A.3d 706, 715 (Pa. 2020). The principal issue in this case is whether that prohibition applies equally to the Judicial District's treatment courts.

The Judicial District unsuccessfully attempts to dodge the issue, claiming *Gass* is "irrelevant" because the Policy is not a "blanket ban" like the one the Supreme Court struck down. Resp. Br. 34-36. But the policy analyzed by the Court in *Gass* is nearly identical to the Policy at issue here: Both policies ban lawful medical marijuana use unless the patient establishes to the court's satisfaction that medical marijuana is a "medical necessity" to treat their serious medical condition.

Like the policy in *Gass*, the Judicial District's Policy presumptively bans medical marijuana for treatment court participants, listing medical marijuana as a prohibited substance. Pet. App. ¶ 56. The Policy allows use only with prior court approval and places the burden on the patient to establish "medical necessity." Pet. App. ¶ 72.

2. The Policy requires treatment court applicants to establish "medical necessity."

The Judicial District asserts the word "should" in the Policy is read in a narrow, literal sense to mean a letter establishing medical necessity is not a strict requirement. But that reading is contradicted by the Judicial District's own witnesses, who have confirmed that the Judicial District requires patients to provide a letter from their treating physician establishing medical necessity before being

admitted to treatment court or to be allowed to use medical marijuana in treatment court without risk of sanctions.

Jessica Bodor, the assistant chief for the Judicial District since 2014 and the Treatment Court Coordinator, supervises treatment court probation officers and was the primary drafter of the current treatment court manual. Resp. App. ¶¶ 13-16. According to Ms. Bodor, a patient's medical marijuana card is not sufficient to allow a patient to use medical marijuana in treatment court, Ex. 8, Bodor Dep., 123:19-124:3. There is a "different procedure for entering into treatment court when you have a medical marijuana card." *See* Ex. 52, *Commonwealth v. W.P., CP-06-CR-2664-2022*, Notes of Testimony (October 20, 2023) at 8-9.

That procedure requires medical marijuana patients applying to treatment court to submit a letter from an "actual doctor who can give that diagnosis." *Id.*; Resp. App. ¶ 48; Pet. App. ¶ 63. The letter must describe "whatever diagnosis the physician is treating them for and that [medical marijuana] is the ***only*** thing that will treat whatever condition they are using it for." *See* Pet. App. ¶¶ 63-64; Ex. 8, Bodor Dep., 113:15-23; 120:16-19 (emphasis added). The treating physician must be an "established physician that they've been working with," Ex. 8 Bodor Dep., 123:5-10, "[b]ecause they can then state what medications [the patient has] tried, what therapies they've tried, anything that they have done, you know, outside of medical marijuana to treat whatever condition they have," *id.* at 124:9-16. It is then up to the

treatment court judice to decide "whether the individual is allowed to use [medical marijuana] in treatment court." Resp. App. ¶ 48.

At least two patients—Mr. Monyer and W.P.—were denied admission to treatment court because they continued to lawfully use medical marijuana without providing a letter from their treating physician that met the treatment court's requirements. Pet. App. ¶ 108; Pet. Answer to Resp. App. ¶ 47.

Other patients have been sanctioned for lawfully using medical marijuana while participating in treatment court.[4] Prior to July 31, 2023, four treatment court participants had been sanctioned for lawfully using medical marijuana, including three who submitted letters from medical providers in support of their requests to use medical marijuana. Pet. App. ¶¶ 72, 87. Treatment court sanctions include being terminated from the treatment court program or incarcerated. Pet. App. ¶ 48. One of these patients, G.S., stopped using medical marijuana upon entering treatment court because DUI Treatment Court staff said it was not permitted. Pet. Answer to Resp. App. ¶ 96. Once G.S. learned they could seek an exemption to the Policy's medical marijuana ban, they submitted a letter from their medical provider detailing their

[4] Patients have stopped using medical marijuana for the purpose of being admitted to treatment court, typically because they were unaware of the exemption at the time they applied, they were unable to obtain a letter from their medical provider, or their requests to use medical marijuana were denied by the court. Pet. App. ¶ 81; Pet. Answer to Resp. App. ¶ 96.

diagnosis and stating the medical provider's "professional opinion that the patient may benefit from Medical Marijuana use." Ex. 30. The treatment court judge nonetheless terminated G.S. from treatment court—and ordered G.S. to be taken into custody—for continuing to use medical marijuana without providing "the medical necessity and reference document that we need to authorize the use of the medical marijuana." Ex. 15, *Commonwealth v. G.S.*, CP-06-CR-2852-2021, Notes of Testimony at 2:11-16; 4:20-23; Ex. 38, G.S. Decl. ¶¶ 43-45.

The Judicial District ties itself into knots trying to distinguish its Policy from the one the Supreme Court unanimously struck down in *Gass*. It disingenuously argues that the Policy does not require patients to submit doctors' letters attesting to medical necessity despite overwhelming evidence to the contrary, including witness testimony and its stipulation that, between February 2022 and March 27, 2024, the Judicial District approved only five of twelve requests for lawful use of medical marijuana in treatment court. Pet. App. ¶ 73.[5]

The undisputed facts demonstrate that the Judicial District penalizes patients who lawfully use medical marijuana by denying them admission to treatment court or subjecting them to sanctions, unless they establish "medical necessity" to the treatment court's satisfaction. This approach improperly puts the burden on the

[5] All twelve requests were accompanied by at least one letter from a medical provider addressed to the court. Pet. App. ¶ 73.

patient and "dilute[es] the immunity afforded" by the MMA. *Gass*, 232 A.3d at 715 ("[J]udges and/or probation officers should have some substantial reason to believe that a particular use is unlawful under the Act before hauling a probationer into court."). For these reasons, the Policy should be enjoined.

3. The Policy denies patients the benefits of treatment court and subjects them to penalties *solely for* lawful medical marijuana use.

The Judicial District's contention that "there is no genuine [issue] of material fact that Petitioners cannot show that they were denied privileges solely for protected activity under the MMA," Resp. Br. at 39, is both immaterial and incorrect. The reason for the denial of Mr. Monyer's Veterans Treatment Court application is immaterial to the question before the Court, which is whether the Policy itself subjects patients to penalty or denies them a privilege solely for the lawful use of medical marijuana. Regardless, the record demonstrates that Mr. Monyer's medical marijuana use was the Veterans Treatment Court's sole reason for denying his application.[6] Pet. Answer to Resp. App. ¶¶ 72, 77.

[6] The only reasons the Judicial District provides for denying Mr. Monyer admission to Veterans Treatment Court in its Statement of Undisputed Facts are "failure to comply with pretrial services" and "not meeting appropriate requirements needed to enter Treatment Court." Resp. App. ¶¶ 72, 77.

a. The Policy Targets Lawful Medical Marijuana Use.

A plain reading of the Policy demonstrates that medical marijuana patients will be subject to penalty solely for using medical marijuana if they do so without prior approval from the treatment court. Pet. App. ¶ 59; Ex. 1, Berks County Treatment Court Policy and Procedure Manual (March 2023) at 10, Appendix ("Treatment Court participants using such medications absent permission from the Treatment Court Judge are subject to termination from the program"). And the undisputed facts show that patients have been denied admission to treatment court solely for using medical marijuana without the court's permission. Pet. App. ¶ 72. Like the policy in *Gass*, the Judicial District's Policy puts patients at risk of being denied admission to treatment court or penalized solely for lawfully using medical marijuana, notwithstanding the fact that they are also under court supervision. *Gass*, 232 A.3d at 713 (rejecting argument that "integral involvement of court supervision means that any punishment or denial of the privilege of probation occurring under the Policy is not 'solely for' a petitioner's medical marijuana use").

The MMA's immunity provision provides that no medical marijuana patient "shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege … ***solely for*** lawful use of medical marijuana.'" 35 P.S. § 10231.2103(a) (emphasis added). In an attempt to obfuscate the issue before the

Court, the Judicial District suggests there is a dispute between the parties over the meaning of "solely for."[7] But the Policy violates the MMA even under the "but for" definition put forth by the Judicial District. When the Judicial District sanctions a patient or denies them admission to treatment court because they are lawfully using medical marijuana, the patient's lawful medical marijuana use is the "but for" cause of the adverse action. *See, e.g.*, *Whitner v. Von Hintz*, 263 A.2d 889, 894 (Pa. 1970) (explaining that under Pennsylvania tort law, the "but for formulation . . . says that there is liability if the harmful result would not have come about but for the negligent conduct'").

To be sure, there may be reasons other than lawful medical marijuana use that a patient is denied admission to treatment court. For example, the patient may have been terminated from treatment court previously for a non-medical marijuana related violation. Or the patient may have a prior statutorily excludable offense. But when a patient like W.P. would be admitted to treatment court but for his lawful medical marijuana use, *see* Pet. App. ¶ 89, then the denial is ***solely for***

[7] The cases the Judicial District cites are inapposite because neither addressed the MMA's immunity provision protecting patients from government sanction. *See Harrisburg Area Cmty. Coll. v. Pa. Hum. Rel. Comm'n.*, 245 A.3d 283 (Pa. Commw. Ct. 2020) (analyzing whether college's discrimination against student who used medical marijuana violated PHRA); *Reynolds v. Willert Mfg. Co., LLC*, 567 F.Supp.3d 553 (E.D. Pa. 2021) (analyzing whether employer violated MMA's protections for employees from discrimination "solely on the basis of such employee's status as an individual who is certified to use medical marijuana").

lawful medical marijuana use. Likewise, when a patient in treatment court is sanctioned for a positive THC test, the patient is being penalized ***solely for*** using medical marijuana.

b. Mr. Monyer's Veterans Treatment Court Applications Were Denied Solely for His Lawful Medical Marijuana Use.

Whether or not Mr. Monyer's prior treatment court applications were denied solely for his medical marijuana use is not material to whether the Policy violates the MMA. If the Court enjoins the Judicial District from enforcing the Policy, then Mr. Monyer will submit a new treatment court application. Pet. App. ¶ 133. He seeks only prospective relief.

To the extent that the Court believes the reasons for the denial of Mr. Monyer's prior applications to Veterans Treatment Court are relevant, the record does not support the Judicial District's argument that Mr. Monyer's May 2023 application was denied for any reason *other* than his lawful medical marijuana use. The Judicial District has provided no evidence other than the self-serving statements of its own witnesses that Mr. Monyer's May 2023 Veterans Treatment Court application was denied for failing to comply with a treatment plan. Resp. App. ¶¶ 56-57, 64. The only evidence the Judicial District relies on derives from the deposition testimony of its treatment court team members. The *Nanty-Glo* rule prohibits a party moving for summary judgment from resting "solely upon its own testimonial affidavits or depositions, or those of its witnesses, to establish the non-

existence of genuine issue of material fact." *Wells Fargo Bank, N.A. v. Premier Hotels Grp., LLC*, 177 A.3d 248, 250 (Pa. Super. Ct. 2017) (citation omitted); *see also O'Rourke v. Pa. Dep't of Corr.*, 730 A.2d 1039, 1041 (Pa. Commw. Ct. 1999) (moving party cannot rely "exclusively on oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact"). Accordingly, the Judicial District has provided no factual support for its claim that Mr. Monyer's Veterans Treatment Court applications were denied for reasons other than his lawful medical marijuana use.

On the other hand, Petitioners have provided evidence from a member of the Judicial District's treatment court team contradicting its claim that Mr. Monyer's first application was denied for failure to comply with his treatment plan. All of the Judicial District's witnesses claim that information regarding Mr. Monyer's alleged noncompliance with the treatment plan came from Mr. Negrea. Pet. App. ¶¶ 110-116. But Mr. Negrea never created a treatment plan for Mr. Monyer and had no recollection of conveying any information to anyone in the Judicial District regarding Mr. Negrea's expectations as to whether Mr. Monyer would comply with a treatment plan. Pet. App. ¶¶ 117-125.

Prior to the May 2023 application denial, none of the Judicial District's witnesses raised concerns that Mr. Monyer's mental health diagnosis would impact his ability to successfully complete Veterans Treatment Court. Although Mr.

Negrea believed he shared his concerns about Mr. Monyer's mental health diagnosis with the Veterans Treatment Court team, nothing in the record indicates that those concerns factored into the decision to deny Mr. Monyer's May 2023 application. Pet. App. ¶ 127. And ADA Kelecic's suggestion that Mr. Monyer ***reapply*** for Veterans Treatment Court, rather than Mental Health Court, Resp. App. ¶ 73, reveals that the treatment court team did not have concerns about Mr. Monyer's ability to complete Veterans Treatment Court.

With respect to Mr. Monyer's second Veterans Treatment Court application, the Judicial District has provided no evidence that it was denied due to Mr. Monyer's mental health diagnosis. Instead, the Judicial District points solely to the court's vaguely worded order, which makes no reference to any concerns about Mr. Monyer's mental health, stating only that his application was denied "due to [Monyer] not meeting appropriate requirements needed to enter Treatment Court." Resp. App. ¶ 77. Given the lack of evidence of any other basis for the denial, a reasonable jury could find that Mr. Monyer's application was denied solely for lawfully using medical marijuana without complying with the Judicial District's illegal requirement that he demonstrate medical necessity by submitting a letter from his treating physician.

The Judicial District also fails to provide any evidence in support of its argument that it denied Mr. Monyer's applications due to concerns about the VA's

medical marijuana policies. Its clam that "the V.A., a federal agency, does not allow medical marijuana use" is simply untrue. Resp. Br. At 40. While federal law prohibits VA medical providers from *recommending* the use of medical marijuana or assisting veterans to obtain medical marijuana, the VA has made clear that veteran participation in state marijuana programs does not affect eligibility for VA care and services. Pet. App. ¶¶ 129-130. Indeed, Mr. Negrea, who works for the VA and is part of the treatment court team, called Ms. Bodor's concern that the VA would not prescribe medication to a veteran who uses medical marijuana "crazy." Ex. 47 Negrea Dep., 103:8-14. Mr. Kelecic's alleged "concern that Monyer would be subject to additional charges if he were caught with medical marijuana on VA property," Resp. Br. at 40, is both irrational and speculative. Prohibiting veterans from using medical marijuana in treatment court due to concerns about violating federal law echoes the argument—rejected by *Gass*—that individuals under court supervision must comply with all state *and* federal laws. *Gass*, 232 A.3d at 714 ("[T]he District cannot require state-level adherence to the federal prohibition, where the General Assembly has specifically undertaken to legalize the use of medical marijuana for enumerated therapeutic purposes.").

Finally, the Judicial District has provided no evidence to support its argument that Mr. Monyer is ineligible for Mental Health Court due to his nonviolent firearms offense. That is merely a *post hoc* rationale that was never

raised during consideration of his two prior treatment court applications even though the purported policy on which the Judicial District relies was in effect before those applications were denied. Pet. Answer to Resp. App. ¶ 80. Moreover, ADA Kelecic—the treatment court team member charged with determining whether Mr. Monyer is "statutorily eligible for the program" based on whether he has "a prior conviction or their current charge doesn't exclude them," Ex. 7, Kelecic Dep., 42:11-16—concluded Mr. Monyer is "statutorily eligible" because "his prior record is I believe nonexistent. *Id. at* 70:22-23. The current charge that he was being charged with was being in possession of a firearm at that point was not a problem, that wasn't going to make him statutorily ineligible." *Id*. at 70:22-71:2. As Mr. Monyer has no criminal record and no pattern of violent behavior, Mr. Keleicic's opinion has not changed: "My position on Mr. Monyer in regards to statutory eligibility would not change. I think he's still statutorily eligible." *Id*. at 140:18-20. If this Court enjoins the Policy, Mr. Monyer will submit a new treatment court application. If it is denied due to the firearms charge, then he can challenge the denial on that basis.

C. This Court should enjoin the Judicial District from enforcing the Policy against Mr. Monyer and other medical marijuana patients.

1. This Court has authority to enjoin the Policy.

The Judicial District's claim that this Court lacks authority to enjoin the Policy is foreclosed by the Supreme Court's decision in *Gass*. As explained above,

the Judicial District's Policy is indistinguishable from the policy at issue in *Gass*. It is an administrative policy created at the district level that restricts the lawful use of medical marijuana by Mr. Monyer and other treatment court applicants and participants.

The Judicial District's argument that Petitioners are challenging "a specific ruling by a treatment court judge acting in a judicial capacity," Resp. Br. at 30, wholly misstates the posture of this case. Petitioners are not challenging the decisions of the treatment court judges denying Mr. Monyer admission. Rather, they are challenging the Policy's presumptive ban on lawful medical marijuana use by patients in treatment court unless they receive an exemption. Mr. Monyer's present posture is as a patient who is statutorily eligible for treatment court and planning to apply for admission (again). He is not asking this Court to order the Judicial District to admit him to treatment court.[8] Instead, he is asking that the Policy not be enforced against him in the event he re-applies.

The Supreme Court did not require the three petitioners in *Gass*—all serving sentences of probation—to wait until they were sanctioned for using medical

[8] The Judicial District appears to believe that Petitioners are asking this Court to order the Judicial District to admit Mr. Monyer to treatment court. Petitioners are not requesting such relief, as it would be a mandatory injunction barred by sovereign immunity. *See Philadelphia Life Ins. Co. v. Commonwealth*, 190 A.2d 111, 114 (Pa. 1963).

marijuana and then appeal the imposition of sanctions to Superior Court to receive relief. *See Gass*, 223 A.3d at 213. Instead, it ruled that this Court had jurisdiction to address those claims and the legality of that judicial district's policy, before invoking its King's Bench jurisdiction because of the importance of the issue.[9] There is no reason why Mr. Monyer or any other treatment court applicant or participant should be required to do that here. This Court has authority to enter an injunction prohibiting enforcement of the Policy.

2. Injunctive relief is necessary to uphold the General Assembly's express intent to provide patients access to medical marijuana.

"[I]t is free from doubt that the medical marijuana system the General Assembly created for the well-being and safety of patients . . . was intended for them to have access to the latest medical treatments." *Fegley v. Firestone Tire and Rubber*, 291 A.3d 940, 952 (Pa. Commw. Ct. 2023) (*en banc*). Interpreting the MMA as the Judicial District urges—to allow judges to presumptively ban medical marijuana use by treatment court participants with exemptions meted out on a

[9] While the injunction against the policy in *Gass* was issued by the Supreme Court, the Court previously explained that original jurisdiction rests with this Court. *Gass v. 52nd Judicial District, Lebanon County*, 223 A.3d 212, 212-13 (Pa. 2019) (explaining that this Court had jurisdiction, but accepting the case pursuant to King's Bench authority due to the importance of the issue and granting a preliminary injunction); *McFalls v. 38th Jud. Dist.*, No. 4 M.D. 2021, 2021 WL 3700604, at *5-7 (Pa. Commw. Ct. Aug. 6, 2021) (rejecting preliminary objections based on jurisdiction) (unpublished).

"case-by-case" basis—would "undermine the General Assembly's express intent to provide Commonwealth citizens who are patients '*access to medical marijuana* which balances the need of patients to have access to the latest treatments with the need to promote patient safety[.]'" *Id.* (quoting 35 P.S. § 10231.102(3)(i)) (emphasis added by Commonwealth Court).

The Court must presume that the General Assembly was aware of the existence and mission of the Commonwealth's problem-solving courts when it enacted the immunity provision. *See Fegley*, 291 A.3d at 951. If the General Assembly wanted to exclude treatment court participants from the protections of the MMA, it could have done so. *See Gass*, 232 A.3d at 713 ("had the General Assembly intended broader limitations, it would have been a straightforward matter for it to have said this"). That it did not demonstrates its intention for treatment court participants to receive the full protections of the Act. *See Fegley*, 291 A.3d at 952 (interpreting Workers' Compensation Act to require employer to reimburse employee for out-of-pocket costs for medical marijuana because General Assembly "explicitly intended Commonwealth residents suffering from intractable pain to have the benefit of [medical marijuana], and at the same time chose not to limit claimants from receiving their statutory rights").

Although the Judicial District contends that treatment court judges need discretion to decide on a case-by-case basis which participants should be allowed

to use medical marijuana, that argument is foreclosed by *Gass*'s holding that "to the degree that [criminal offenders] satisfy the Act's threshold requirements and obtain medical marijuana cards, each is entitled to the immunity afforded under Section 2103(a)." *Gass*, 232 A.3d at 713. The Judicial District's concerns that medical marijuana use by treatment court participants may cause difficulties with supervision and treatment must be resolved by legislative, not judicial, adjustment. *Id.* at 714-15.

Even if, in this Court's view, an injunction against the Judicial District's Policy would cause greater injury, that consideration is irrelevant: "'[W]hether or not medical marijuana is ultimately a good idea is not the issue' before the courts. Rather, in Pennsylvania, as elsewhere, the political branch has decided to permit patients—including probationers—to use medical marijuana for specified, serious medical conditions, upon a physician's certification." *Id.* at 715 (quoting *Nelson*, 195 P.3d at 833). Here, as in *Gass*, the Policy "fails to afford sufficient recognition to the status" of a treatment court applicant/participant "holding a valid medical marijuana card as a patient, entitled to immunity from punishment, or the denial of any privilege, solely for lawful use." *Id.* For this reason, the Policy should be enjoined.

3. PCC cannot be compensated with money damages.

The Judicial District argues that this Court cannot enter a permanent injunction on behalf of PCC because its members' lost revenue due to the Policy can be compensated by monetary damages. Resp. Br. at 41. As an initial matter, money damages are unavailable because of sovereign immunity. The General Assembly has waived the Commonwealth's sovereign immunity to money damages in only certain specified instances, none of which apply here. *See* 42 Pa.C.S. § 8522; *McFalls*, 2021 WL 3700604 at *10 (explaining that, in an action against a judicial district, under Pennsylvania law, sovereign immunity applies to claims for monetary damages); *Ward v. Potteiger*, 142 A.3d 139, 144 n.8 (Pa. Commw. Ct. 2016) (Sovereign Immunity Act applies to "officers or agencies of the unified judicial system").

In addition, money damages would not address the professional harm to PCC's members, who are denied the ability to fulfill their professional missions to provide safe and effective treatment to medical marijuana patients. *See* Pet. App. ¶¶ 137-140 (quoting the mission statements on the webpages of PCC members Trulieve and Sunnyside Medical Cannabis Dispensary). In any event, the Judicial District does not advance this argument with respect to Mr. Monyer.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court deny Respondent's Application for Summary Relief and enter summary relief in Petitioners' favor, permanently enjoin the Judicial District from enforcing its Policy on the use of medical marijuana in treatment courts, and declare that the Policy is unlawful.

Dated: April 22, 2024

Respectfully submitted,

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CERTIFICATES 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.

I hereby certify, pursuant to Pa.R.A.P. 2135, that this brief does not exceed 14,000 words.

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