

**State of Michigan
In the Supreme Court**

The People of the State of Michigan

Plaintiff-Appellee,

MSC No. 167895

v.

COA No. 366148

Danielle Hess

Montcalm County Circuit Court

Case No. 22-029309-AR

Defendant-Appellant.

**Danielle Hess's
Supplemental Brief**

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Statement of the Questions Presented

First Question

By its plain text, the Michigan Regulation and Taxation of Marihuana Act (MRTMA) protects adults against the revocation of probation for MRTMA-compliant marijuana use. The Act, which makes marijuana legal under state and local law for adults 21 years of age or older, explicitly overrides any conflicting laws, such as MCL 771.3(1)(a). Does a court err when it relies on MCL 771.3(1)(a) to prohibit an individual on probation from engaging in MRTMA-compliant marijuana use?

Ms. Hess answers: Yes.

The Court of Appeals answered: No.

The District Court and Circuit Court did not answer.

Second Question

Although MCL 771.3(3) permits trial courts to set discretionary conditions of probation, the statute makes clear those conditions must be lawful. Against this backdrop, did the trial court err when it imposed discretionary conditions that plainly infringe on the protections afforded to Ms. Hess under MRTMA?

Ms. Hess answers: Yes.

The Court of Appeals answered: No.

The District Court and Circuit Court answered: No.

Third Question

Must Ms. Hess's probation and Holmes Youthful Trainee Act status be reinstated where they were revoked for failure to comply with an unlawful probation condition?

Ms. Hess answers: Yes.

The Court of Appeals answered: No.

The District Court and Circuit Court answered: No.

Introduction

Michigan citizens twice voted to legalize marijuana—in 2008 to permit medical marijuana and in 2018 to permit recreational marijuana. Both times, voters approved provisions protecting adults, *without exception*, against penalty or loss of privilege for lawful marijuana use. Michigan Medical Marihuana Act (MMMA), 2008 IL 1; Michigan Regulation and Taxation of Marihuana Act (MRTMA), 2018 IL 1.

In 2021, the Court of Appeals held that language in the MMMA superseded the probation statute and barred trial courts from penalizing an adult for legally using medical marijuana while on probation. *People v Thue*, 336 Mich App 35 (2021).

Now, in *People v Lopez-Hernandez* and *People v Hess*, the Court of Appeals holds that broader language in MRTMA provides less protection. First, in *Lopez-Hernandez*, the court concluded that a trial judge can prohibit the lawful use of marijuana by a person on probation for marijuana use that violated MRTMA. *People v Lopez-Hernandez*, ___ Mich App ___ ; ___ NW3d ___ (2024) (Docket No. 367731); slip op at 4-5. Next, in *Hess*, the court held that a person who uses recreational marijuana on probation violates federal law, and thus MCL 771.3(1)(a), regardless of whether they complied with MRTMA. *People v Hess*, ___ Mich App ___ ; ___ NW3d ___ (2024) (Docket No. 366148); slip op at 4.

Hess and *Lopez-Hernandez* are wrongly decided. In *Hess*, the Court of Appeals erred when it failed to acknowledge that MRTMA supersedes MCL 771.3(1)(a) to the extent that provision applies to the federal regulation of MRTMA-compliant marijuana use and possession. MRTMA stands as Michigan voters' determination that state-court judges will not enforce federal marijuana regulations against adults sentenced to state-court probation.

In *Lopez-Hernandez*, the Court of Appeals overreached MRTMA’s plain text when it concluded that a violation of Section 4 opens the door to punishing different, MRTMA-compliant marijuana use. When a person is sentenced to probation for conduct that violated MRTMA and that probation is later revoked for different conduct that complied with MRTMA, the MRTMA-compliant conduct is the reason that person has lost the privilege of probation. Nothing in MRTMA’s plain text supports the conclusion that, once a person violates the Act, they forfeit the Act’s protection against penalty or loss of privilege for other lawful conduct. MRTMA protects lawful marijuana possession and use in all circumstances, without exception.

This Court must overturn *Hess* and *Lopez-Hernandez*.

Statement of Facts and Proceedings

Danielle Hess admitted to taking clothes from Meijer without paying and pleaded guilty to one charge of Retail Fraud 3rd Degree, a 93-day misdemeanor. 33a-34a, 41a. The district court sentenced Ms. Hess to 12 months' probation under the Holmes Youthful Trainee Act, MCL 762.11. 7a, 41a.

Although no evidence suggests marijuana had anything to do with this retail fraud, the district court imposed special probation conditions that prevented Ms. Hess from using or possessing marijuana:

***Shall not use or possess any alcohol, marijuana, illegal controlled substances or drug paraphernalia or be in the presence of alcohol, marijuana or controlled substances.**

***Shall submit to testing of breath, blood, urine or saliva for alcohol, marijuana or controlled substances upon the request of probation and/or police agency and pay any costs incurred.**

***Shall submit to a search of her person, home or vehicle for alcohol, marijuana or other illegal controlled substances.**

8a (emphasis added), 41a.

While on probation, Ms. Hess tested positive for marijuana and was summoned to court for her first violation. 9a. At the hearing, she admitted the violation and was sentenced to another 30 hours of community service as well as a 6-month extension of probation. 48a-49a.

Ms. Hess was summoned to court for a second probation violation when she again tested positive for marijuana. 10a. This time, Ms. Hess moved to dismiss the violation and to amend her probation conditions by deleting the condition that prohibited marijuana use, arguing that

the condition was unenforceable under the Michigan Regulation and Taxation of Marihuana Act (MRTMA). 11a-21a.

The district court held a hearing on the contested violation. After learning Ms. Hess tested positive for THC and did not possess a medical marijuana card, the court found Ms. Hess had used recreational marijuana. 62a, 66a-67a. The district court concluded *People v Thue* permitted courts to regulate recreational marijuana on probation and cited a court's general authority under MCL 771.3 to impose conditions on a person sentenced to probation. 77a-78a. The court denied Ms. Hess's motion to amend the terms of her probation and dismiss the violation. *Id.*

The court entered an order unsatisfactorily discharging Ms. Hess from probation and revoking her Holmes Youthful Trainee Act (HYTA) status. The court sentenced her to serve 10 days in jail. 22a-24a, 81a.

Appellate Proceedings

Ms. Hess timely filed a claim of appeal to the circuit court, which stayed the jail sentence pending appeal. 26a-27a.

The circuit court heard argument on the appeal. In an oral ruling, the court acknowledged that MRTMA "is very broad as it relates to its language" but concluded that its protections did not apply to people on probation because they are "in a different class as it relates to individuals who are otherwise law-abiding citizens." 95a. The circuit court, like the district court, interpreted the "decision and the dicta" in *People v Thue* as authorizing the regulation of recreational marijuana on probation. 96a-97a.

The circuit court entered an order affirming the revocation of Ms. Hess’s probation and HYTA status and the denial of her motion to modify her probation conditions. The court continued the stay of Ms. Hess’s jail sentence pending further appellate proceedings. 28a.

The Court of Appeals granted leave to appeal. *People v Hess*, unpublished order of the Court of Appeals, entered November 11, 2023.

Following supplemental briefing and oral argument, the Court of Appeals affirmed the district court’s finding that Ms. Hess violated her conditions of probation and the subsequent revocation of her probation and HYTA status. *People v Hess*, ___ Mich App ___; ___ NW3d ___ (2024) (Docket No. 366148). Rather than rely on the district court’s discretionary marijuana conditions, the Court of Appeals concluded that Ms. Hess violated the probation statute’s provision that she “obey all state, federal, and local laws.” *Id.* at ___; slip op at 6. Because federal law proscribes marijuana, the panel reasoned, Ms. Hess violated federal law and her conditions of probation. *Id.*

Ms. Hess applied for leave to appeal before this Court, which granted leave and ordered the parties brief the following questions:

- (1) Whether MCL 771.3(1)(a), which makes it a mandatory condition of probation that “the probationer shall not violate any criminal law of . . . the United States,” requires trial courts to bar probationers from engaging in marijuana use that is otherwise permitted by the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq.*, and
- (2) If not, whether and under what circumstances a trial court may prohibit MRTMA-compliant marijuana use as a discretionary condition of probation under MCL 771.3(3).

Issue Preservation

Ms. Hess preserved her claim that MRTMA supersedes MCL 771.3 by contesting her probation violation in April 2022 and moving to modify her probation conditions. Const 1963, art 1, § 20; MCR 6.445(H)(1); see *People v Kaczmarek*, 464 Mich 478, 482-483, 485 (2001) (holding, after the 1994 constitutional amendment, a person receives an appeal of right after contesting their probation violation).

At that time, Ms. Hess also preserved her claim that the district court's special probation conditions regarding recreational marijuana were unlawful. *People v Ford*, 410 Mich 902 (1981) (reversing probation revocation, noting “[d]efendant shall receive a new probation revocation hearing at which the circuit court judge shall decide whether the original conditions of probation were lawful”); *People v McNeil*, 104 Mich App 24, 26 (1981) (“While this issue [that defendant’s probation conditions were impermissibly vague] arises from defendant’s original plea and sentence and thus might be considered improperly raised on appeal, it will be considered here because it relates to whether defendant’s probation was lawfully terminated.”).

Standard of Review

This Court reviews questions of statutory interpretation de novo. *People v Kolanek*, 491 Mich 382, 393 (2012).

Because MRTMA was enacted by a voter initiative, the “interpretation is ultimately drawn from the plain language of the statute, which provides ‘the most reliable evidence’ of the electors’ intent.” *People v Hartwick*, 498 Mich 192, 210 (2015).

In this context, a court must “place ‘special emphasis on the duty of judicial restraint’ ” when interpreting an initiative passed by the voters. *Id.*, quoting *Schmidt v Dept of Ed*, 441 Mich 236, 241-242 (1992). A court can “make no judgment as to the wisdom” of a voter initiative and may “not attempt to limit or extend the statute’s words.” *Hartwick*, 498 Mich at 210.

When, as here, “the statutory language is clear and unambiguous, the inquiry stops.” *People v Latz*, 318 Mich App 380, 383 (2016), quoting *Braska v Challenge Mfg Co*, 307 Mich App 340, 352 (2014).

Arguments

I. **Because MCL 771.3 is superseded by MRTMA, the probation statute does not require or authorize trial courts to prohibit MRTMA-compliant use or possession of marijuana by adults on probation.**

MRTMA provides that the lawful use or possession of recreational marijuana is not a basis for “penalty in any manner” nor is it “grounds to deny any other right or privilege.” MCL 333.27955(1). This unmistakable protection applies here: Probation and HYTA are privileges, and their revocation is a penalty.

Until MRTMA was enacted, MCL 771.3(1)(a) prohibited the possession or use of marijuana by a person on probation. The statute requires a sentence of probation include the condition that “the probationer shall not violate any criminal law of this state, the United States, or another state” MCL 771.3(1)(a). Because the possession or use of recreational marijuana violated Michigan law and federal law, recreational marijuana was prohibited on probation.

The passage of MRTMA in 2018 created an irreconcilable conflict with the probation statute by banning what MCL 771.3 authorized: a probation condition prohibiting the recreational use of marijuana. Because MRTMA supersedes the probation statute, this Court should hold that trial courts are no longer authorized to prohibit the MRTMA-compliant use of marijuana by probationers.

A. MRTMA and the probation statute irreconcilably conflict.

When two statutes regulate the same subject matter, this Court must first determine if they conflict or if the statutes can be harmonized. *People v Mazur*, 497 Mich 302, 313-314 (2015). If they can be harmonized

the statutes are read *in pari materia*; if they conflict, this Court must determine whether the Legislature intended one statute to supersede the other. *Id.* at 314-315.

MRTMA and MCL 771.3 conflict and cannot be harmonized. Each statute authorizes diametrically opposed penalties and privileges for marijuana users.

Begin with MRTMA. MRTMA unambiguously prohibits the denial of a privilege or the imposition of a penalty because a person lawfully used recreational marijuana. Section 5 of MRTMA provides:

(1) Notwithstanding any other law or provision of this act, and except as otherwise provided in section 4 of this act, the following acts by a person 21 years of age or older are not unlawful, are not grounds for seizing or forfeiting property, are not grounds for arrest, prosecution, or penalty in any manner, are not grounds for search and inspection, and are not grounds to deny any other right or privilege:

(a) Except as permitted by subdivision (b),¹ possessing, using or consuming, internally possessing, purchasing, transporting, or processing 2.5 ounces or less of marihuana, except that not more than 15 grams of marihuana may be in the form of marihuana concentrate.

MCL 333.27955.

Section 4 of MRTMA sets forth what conduct is *not* lawful. Examples include the use of marijuana by “any person under the age of 21,” consuming marijuana in public, or operating a vehicle under the influence of marijuana. MCL 333.27954. Section 4 enacts no regulation

¹ MCL 333.27955(1)(b) regulates the possession of marijuana and marijuana plants in a person’s home.

or restriction targeting an adult on probation differently than any other adult over the age of 21.

By its plain text, MRTMA protects probationers against the revocation of probation for MRTMA-compliant marijuana use. Such use cannot support a “penalty in any manner” or the “den[ial] [of] any other right or privilege.” MCL 333.27955(1).

Yet probation is a privilege, and its revocation is a penalty. *People v Thue*, 336 Mich App 35, 47-48 (2021); *People v Terminelli*, 68 Mich App 635, 637 (1976). The protection afforded by HYTA also is a privilege. *People v Roberson*, 22 Mich App 664, 668-669 (1970); see *People v Dipiazza*, 286 Mich App 137, 150 (2009) (youth suffered “losses of rights or privileges” when dissemination of SORA registration thwarted non-public status of HYTA disposition). The revocation of HYTA is a penalty and the denial of a privilege because the revocation results in the youth’s conviction of the underlying offense and that conviction becomes open to public inspection. MCL 762.14; *Dipiazza*, 286 Mich App at 141-142.

The class of people entitled to MRTMA’s protections also is unambiguous: MRTMA protects all “acts by a person 21 years of age or older” unless they are specifically enumerated in Section 4. The use of marijuana on probation is not a prohibited act enumerated in Section 4.

MRTMA defines the class of people who are *not* protected by the Act: “any person under the age of 21.” MCL 333.27954(1)(c). Probationers who are 21 years or older are not a separate unprotected class under MRTMA, and MRTMA does not authorize the imposition of additional restrictions on adult probationers.

Nothing in MRTMA’s text permits a court to apply the Act’s protections differently to probationers than to other adults. And,

because Section 4 does not prohibit the use or possession of marijuana by an adult on probation, that conduct is protected against the denial of a privilege (e.g., revocation of probation or HYTA) and the imposition of penalty (e.g., jail or prison). MCL 333.27955(1).

Turn to the probation statute. The plain text of MCL 771.3 sets forth several avenues for a trial judge to regulate the use of recreational marijuana. First, the statute provides:

During the term of his or her probation, the probationer shall not violate any criminal law of this state, the United States, or another statute or any ordinance of any municipality in this state or another state.

MCL 771.3(1)(a). Since 2018, a person who uses or possesses marijuana in compliance with MRTMA does not violate a criminal law of this state. But any person who uses or possesses medical *or* recreational marijuana violates federal law. The federal Controlled Substances Act (CSA) categorizes marijuana as a Schedule I controlled substance, 21 USC 812 (Schedule I)(c)(10), and possession of a controlled substance is a federal crime. 21 USC 844.²

The probation statute also authorizes a trial judge to impose special conditions “as the circumstances of the case require or warrant or as in its judgment are proper.” MCL 771.3(3). In this case, the trial judge relied on this provision to impose special conditions that barred Ms.

² There is no federal exception for medical marijuana, even though 21 USC 844 provides an exception for controlled substances obtained pursuant to a valid prescription. Schedule I controlled substances have “no currently accepted medical use in treatment in the United States.” 21 USC 812(a)(1)(B). It “is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception.” *United States v Oakland Cannabis Buyers’ Co-op*, 532 US 483, 494 (2001).

Hess from using or possessing marijuana, required she submit to testing for marijuana, and mandated she consent to searches of her person, home, and vehicle for marijuana. 8a.

If a trial court finds that a person has committed “repeated technical violations” of probation or “new criminal behavior,” the court may revoke probation and impose jail or prison. MCL 771.4(2). Technical violations are any probation violation, except for the violation of a no-contact order, commission of a new crime, or consumption of alcohol by a person on probation for a felony conviction for operating a vehicle while intoxicated/impaired. MCL 771.4b(9)(b). Technical violations include missing or failing drug tests. *Id.* For a misdemeanor probationer, like Ms. Hess, a first technical violation can be punished with up to 5 days in jail even if probation is not revoked. MCL 771.3b(1)(a)(i). A person on felony probation may be punished with up to 15 days’ jail for their first technical violation. MCL 771.3b(1)(b)(i).

Thus, the probation statute authorizes the revocation of probation (a privilege) and the imposition of jail or prison (a penalty) if a court finds a person on probation violated MCL 771.3(1)(a) by possessing marijuana in violation of federal law. And if a court imposes special conditions, as it did here, the probation statute authorizes jail (a penalty) the first time a person fails or misses a drug test or refuses to consent to a search for marijuana. If the person violates those special conditions more than once, the probation statute authorizes the court to revoke probation (a privilege) and impose jail or prison (a penalty).

The result: MRTMA and MCL 771.3 irreconcilably conflict. See *Ter Beek v City of Wyoming*, 495 Mich 1, 20 (2014) (“[T]he Ordinance directly conflicts with the MMMA by permitting what the MMMA expressly prohibits . . .”).

These statutes have “two diametrically opposed purposes.” *Mazur*, 497 Mich at 314. MRTMA’s “intent is to prevent arrest and penalty for personal possession . . . of marihuana by adults 21 years of age or older,” MCL 333.27952, and it prohibits “arrest, prosecution, or penalty in any manner, . . . search or inspection,” and denial of “any other right or privilege” for MRTMA-compliant behavior, MCL 333.27955(1). The probation statute, by contrast, authorizes courts to impose penalties and revoke the privilege of probation for the use or possession of marijuana that violates federal law (even if MRTMA-compliant) and for failure to comply with any special marijuana condition a court imposes.

Because the statutes conflict and MRTMA specifically supersedes all conflicting laws, the probation statute must yield.

B. MRTMA supersedes the probation statute.

“When two statutes seemingly conflict, the controlling question is how the Legislature intended for those statutes to interact.” *Milne v Robinson*, 513 Mich 1, 12 (2024). The body enacting a statute “is held to be aware of the existence of the law in effect at the time of its enactments,” and typically “a subsequently enacted specific statute is regarded as an exception to a prior general one.” *Malcolm v City of East Detroit*, 437 Mich 132, 139 (1991).

Those canons apply here, where voters expressly announced their intent to overturn any conflicting law and occupy the regulation of recreational marijuana with MRTMA. MRTMA supersedes MCL 771.3 regarding the regulation of recreational marijuana on probation.

First, voters ensured that MRTMA would have the broadest possible effect by adopting a provision in Section 4 that specifically supersedes all contrary statutes:

All laws inconsistent with this act do not apply to conduct that is permitted by this act.

MCL 333.27954(5). MRTMA’s plain text acknowledges that conflicting statutes like MCL 771.3 existed at the time of its passage and explicitly overrides them.

Next, in Section 5, voters confirmed that MRTMA overrides any existing statute that regulated the possession of recreational marijuana. Put another way, MRTMA governs “[n]otwithstanding any other law.” MCL 333.27955(1) (emphasis added).

Then, by prohibiting “search or inspection” based on the possession of marijuana, Section 5 eliminated the types of special probation conditions requiring drug tests and searches adopted by the trial judge in Ms. Hess’s case. *Id.* Voters enacted a text plainly protecting users against more than just criminal *conviction* for possessing marijuana—its expansive protection of “any other right or privilege” signaled an end to the myriad ways marijuana had been used for decades to open the door to collateral punishment and the denial of privilege.

In fact, in the statute’s statement of purpose, voters expressly announced that they intended an expansive reading of MRTMA’s protections:

The purpose of this act is to make marihuana legal under state and local law for adults 21 years of age or older, to make industrial hemp legal under state and local law, and to control the commercial production and distribution of marihuana under a system that licenses, regulates, and taxes the businesses involved. **The intent is to prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older**; remove the commercial production and distribution of marihuana from the illicit market; prevent revenue generated from commerce in

marihuana from going to criminal enterprises or gangs; prevent the distribution of marihuana to persons under 21 years of age; prevent the diversion of marihuana to illicit markets; ensure the safety of marihuana and marihuana-infused products; and ensure security of marihuana establishments. **To the fullest extent possible, this act shall be interpreted in accordance with the purpose and intent set forth in this section.**

MCL 333.27952 (emphasis added).

MRTMA’s intent to supersede all conflicting laws has been recognized by this Court and the Court of Appeals. *People v Armstrong*, ___ Mich ___ ; ___ NW3d ___ (2025) (Docket No. 165233); slip op at 1-2, 13 (MRTMA superseded holding in *People v Kazmierczak*); *People v Kejbou*, 348 Mich App 467, 478 (2023), lv den *People v Kejbou*, 513 Mich 1062 (2024) (MRTMA superseded Article 7 of the Public Health Code).

Thus, MCL 771.3 is superseded to the extent it conflicts with MRTMA. MRTMA supersedes a trial court’s authority under MCL 771.3(3) to impose special conditions of probation concerning the otherwise-lawful use or possession of recreational marijuana. And MRTMA supersedes MCL 771.3(1)(a)’s provision that a person who violates federal law by using or possessing marijuana also violates their state-court probation.

C. The Controlled Substances Act does not preempt MRTMA.

The fact that MCL 771.3(1)(a) prohibits violations of federal law on probation does not change the probation statute’s relationship to MRTMA under this analysis. Unless a federal law preempts state law, it is up to the State and its citizens to determine whether to enforce federal laws and which federal laws to enforce. US Const, art VI, cl. 2; US Const, Am X; *Printz v United States*, 521 US 898, 925 (1997); *New*

York v United States, 505 US 144, 180 (1992) (“[T]he Framers did *not* intend that Congress should exercise [the Commerce Clause] through the mechanism of mandating state regulation.”).

Under the Supremacy Clause, federal law preempts state laws that “interfere with, or are contrary to, federal law.” *Hillsborough Co v. Automated Med Labs, Inc*, 471 US 707, 712 (1985), quoting *Gibbons v Ogden*, 22 US 1, 211 (1824); US Const, art VI, cl. 2. Congress may preempt state law “by so stating in express terms” or by enacting a federal scheme “sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.” *Hillsborough Co*, 471 US at 713. Alternatively, “state law is nullified to the extent that it actually conflicts with federal law,” meaning that “compliance with both federal and state regulations is a physical impossibility” or that state law is an obstacle “to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (cleaned up).

The federal law at issue here is the Controlled Substances Act (CSA), which prohibits the personal use or possession of marijuana. 21 USC 844; 21 USC 812 (Schedule 1)(c)(10). Because the CSA expressly provides that “[n]o provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which this provision operates,” the only remaining question is whether MRTMA positively conflicts with the CSA. 21 USC 903; *Ter Beek*, 495 Mich at 11.

This Court has already held that “there is no indication that the CSA’s purpose or objective was to require states to enforce its prohibitions” and, indeed, “Congress lacks the constitutional authority to impose such an obligation.” *Ter Beek*, 495 Mich at 539. In conducting

a similar Supremacy Clause analysis between the CSA and the MMMA, *Ter Beek* found that “it is not impossible to comply with both the CSA’s federal prohibition of marijuana and [MMMA] § 4(a)’s limited state-law immunity for certain medical marijuana use, and § 4(a) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA.” *Id.* at 19.

The same is true of the CSA and MRTMA. The CSA criminalizes marijuana at the federal level; MRTMA legalizes marijuana at the state level but does not require anyone to possess marijuana and does not prohibit punishment under federal law. Cf. *Ter Beek*, 495 Mich at 12; *Felder v Casey*, 487 US 131, 138 (1988) (finding preemption where a state law “*requirement*” prevented the execution of a federal law) (emphasis added). MRTMA bestows *state-law* immunity on individuals who possess or use recreational marijuana in compliance with Michigan law. MRTMA does not frustrate the CSA’s purpose or operation: MRTMA “does not purport to alter the CSA’s federal criminalization of marijuana, or to interfere with or undermine federal enforcement of that prohibition.” *Ter Beek*, 495 Mich at 16.

MRTMA provides that a state-court judge may not revoke state-court probation because of the probationer’s state-legal use of marijuana. This is a policy decision by the voters of Michigan—otherwise permitting state courts to revoke probation because a person’s state-legal use of marijuana violates federal law creates a loophole that contradicts the will of the voters. In fact, given the federal government’s longstanding policy of leaving prosecution of personal marijuana use to the states,³ the Court of Appeals opinion in this case has the perverse result of

³ James Cole, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement*, August 29, 2013, at 2; 99a-100a.

making Michigan state courts the primary enforcers of the federal marijuana prohibition despite Michigan voters' passage of two laws instructing state courts *not* to penalize marijuana use.

Like the local ordinance at issue in *Ter Beek* banning violations of “federal law,” the probation statute’s requirement that probationers follow all laws of “the United States” is superseded by MRTMA to the extent it applies to the MRTMA-compliant use of marijuana. See *Ter Beek*, 495 Mich at 20.

Any other outcome directly contradicts MRTMA’s stated purpose to prevent penalty for state-legal marijuana use and the voters’ directive that, “[t]o the fullest extent possible, this act shall be interpreted in accordance with the purpose and intent set forth in this section.” MCL 333.27952; cf. *Commonwealth v Craan*, 469 Mass 24, 33 (2014) (voter initiative legalizing marijuana “must be read as curtailing [state] police authority to enforce the” CSA; “any contrary interpretation would clearly contravene the people’s intent, to which we must give effect”).

* * *

Taken together, MRTMA is not preempted by the CSA, and MRTMA supersedes the probation statute. As such, trial courts are not authorized to prohibit the MRTMA-compliant use of marijuana by probationers. This Court should so hold.

II. MRTMA bars discretionary probation conditions that prohibit lawful, MRTMA-compliant use of recreational marijuana on probation, without exception.

To be sure, judges are typically afforded wide discretion in fashioning conditions of probation. But the conditions must be lawful. See *People v Higgins*, 22 Mich App 479, 482 (1970) (reversing trial court order wherein probation condition was “not a lawful provision” (internal quotation marks omitted)). Indeed, when authorizing judges to impose special conditions, the probation statute makes clear “the court may impose . . . *lawful* conditions.” MCL 771.3(3) (emphasis added). When a condition is unlawful, a higher court may “disturb the sentencing judge’s determination.” *People v Pettit*, 88 Mich App 203, 205 (1979).

Lawfulness, then, must be the touchstone when reviewing discretionary probation conditions. Against this rubric, there are no circumstances under which a trial court may prohibit an adult’s MRTMA-compliant marijuana possession or use, because any such condition is unlawful under MRTMA’s plain text. See Part I.

The Court of Appeals in both *Hess* and *Lopez-Hernandez* avoided this inescapable conclusion by adopting a puzzling and unexplained reading of MRTMA. It distinguished MRTMA-compliant marijuana use from MMMA-compliant marijuana use. In *Thue*, the court held MMMA-compliant marijuana use cannot form the basis of a probation violation. 336 Mich App at 48. And, as the court acknowledged, “the language of the MMMA that this Court relied on in *Thue* is mirrored in the MRTMA.” *Hess*, ___ Mich at ___; slip op at 4. Rather than “extend *Thue* to this case,” the circuit court parsed “the dicta of *Thue*” to infer that “MRTMA does not automatically preclude a condition of probation that prohibits the use or possession of marijuana.” *Id.* at ___; slip op at 5.

But the court never explained how it reached this conclusion nor why MRTMA would provide less protection for probationers than the MMMA. Ironically, the opposite is true: MRTMA is *more* protective of citizens' rights than the MMMA.

Compare the Acts' immunity clauses. The MMMA protects a qualifying patient against "arrest, prosecution, or penalty in any manner, or den[ial of] any right or privilege." MCL 333.26424(a). MRTMA goes further—MRTMA supplemented those protections and provides that compliant acts "are **not unlawful**, are **not an offense**, are **not grounds for seizing or forfeiting property**, are not grounds for arrest, prosecution, or penalty in any manner, are **not grounds for search or inspection**, and are not grounds to deny any other right or privilege." MCL 333.27955(1) (emphasis added).

MRTMA's statement of purpose is also more protective. The MMMA's statement of intent describes the benefits of medical marijuana and "joins in" the nationwide effort to decriminalize its use. MCL 333.26422. It provides no guidance or explanation of how the MMMA should be interpreted. *Id.*

By contrast, MRTMA declares that its "intent is to prevent arrest and penalty for personal possession and cultivation of marihuana" by adults and directs courts to interpret the act in accordance with that purpose "to the fullest extent possible." MCL 333.27952.

Plainly, MRTMA disavows the notion that recreational marijuana is somehow less acceptable and less protected than medical marijuana. For decades, recreational marijuana has been an excuse for stops, searches, and testing—and thus the gateway to other, unrelated convictions and lost privileges. MRTMA changed that.

MRTMA effected a sea change in Michigan’s treatment of marijuana, which the Court of Appeals’ opinion rolls back. It must be reversed.

III. Ms. Hess’s probation and HYTA were revoked for failure to comply with unlawful probation conditions. Her probation and HYTA must be reinstated.

Revocation of probation may not be based on failure to comply with an unlawful condition. *Ford*, 410 Mich at 902; *People v Heil*, 79 Mich App 739, 749 (1977). Because the probation conditions prohibiting Ms. Hess from possessing or using marijuana violate MRTMA, they are unenforceable. *Thue*, 336 Mich App at 47.

The only probation violation that Ms. Hess is alleged to have committed is that she “used marijuana as evidenced by test on 4/7/22.” 10a. Although the Court of Appeals reformulated Ms. Hess’s violation as failure “to obey all state, federal, and local laws,” the underlying allegation remains the same. *Hess*, ___ Mich at ___; slip op at 6. The recreational use of marijuana is the only probation violation the district court found based on the testimony presented at the violation hearing. 66a-67a, 78a-79a.

The revocation of Ms. Hess’s probation and HYTA status was based on the violation of an unlawful condition of probation. Her probation and HYTA must be reinstated, and the conditions violating MRTMA must be deleted.

Conclusion and Relief Requested

For the reasons stated above, Danielle Hess respectfully requests that this Honorable Court reverse and vacate the district court's order finding that Ms. Hess violated probation and remand the case for reinstatement of probation and HYTA.

Respectfully submitted,

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