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IN THE MATTER OF NORHAN MANSOUR, JERSEY CITY POLICE DEPARTMENT	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003876-23 (Consolidated with In the Matter of Omar Polanco, Jersey City Police Department, A-003886-23) ADMINISTRATIVE APPEAL ON APPEAL FROM: NEW JERSEY CIVIL SERVICE COMMISSION DOCKET NO.: CSC Docket No. 2024-484 SAT BELOW: NEW JERSEY CIVIL SERVICE COMMISSION

BRIEF ON BEHALF OF APPELLANT JERSEY CITY POLICE DEPARTMENT

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PRELIMINARY STATEMENT

This present matter is an appeal of the Civil Service Commission's ("the Commission") decision to reinstate police officer Norhan Mansour to her position with Jersey City Police Department ("Jersey City") despite the fact that such reinstatement would require both Mansour and other personnel of Jersey City to violate federal law.

Jersey City police officers are required to carry a firearm on duty and, in some circumstances, while off duty as well. In September 2022, Mansour was randomly selected to submit a urine sample for drug testing, which came back positive for marijuana metabolites; i.e., THC. At the time Mansour submitted her sample for drug testing, regulated marijuana, otherwise known as cannabis, was legal in New Jersey and available for purchase from in-State cannabis dispensaries under the State's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMM Act" or "CREAMMA"), N.J.S.A. 24:6I-31 et seq. State law notwithstanding, the Federal Gun Control Act, 18 U.S.C. 921, et. seq. continues to prohibit users of controlled substances—including marijuana/cannabis—from possessing, carrying, and/or using firearms and ammunition; a condition of police officers' employment. Jersey City removed Mansour from her employment with the City because, as a consequence of her willful actions, she is prohibited from carrying and

possessing a firearm and ammunition under federal law, thus rendering Mansour unable to perform the essential functions of her position.

In issuing its decision to reinstate Mansour, the Commission erred in concluding that the CREAMM Act is not preempted by federal law because "nothing in the CREAMM Act requires anyone to violate federal law." (Aa15). Contrary to the Commission's decision, this is *exactly* what its order of reinstatement does – namely, it requires Jersey City to violate the Gun Control Act by authorizing a known user of a Schedule 1 controlled substance to possess a firearm and ammunition. Even more, the only judicial authority that has examined or addressed this issue, the Florida District Court of Appeals, concluded that a corrections officer who used prescription marijuana could not lawfully possess a firearm, which was an essential function of his job, and therefore must be removed in circumstances identical to the present case. Ortiz v. Dep't of Corrections, 1D22-375, 2023 WL 4101330, at *2 (Fla. Dist. Ct. App. June 21, 2023), reh'g denied (Aug. 2, 2023), review denied sub nom. Ortiz v. Florida Dep't of Corr., SC2023-1040, 2024 WL 277862 (Fla. Jan. 25, 2024). That decision is consistent with the clear ambit of the federal laws at issue in this case.

In short, the Commission's decision to reinstate Mansour is irreconcilable with federal law and would undoubtedly require Jersey City to authorize a known user of a Schedule 1 controlled substance to carry their personally owned

firearm and be issued ammunition in clear violation of the Federal Gun Control Act. Accordingly, this Court should reverse the Commission's decision and Mansour's removal should be upheld.

PROCEDURAL HISTORY

On March 1, 2023, Mansour was issued a Final Notice of Disciplinary Action ("FNDA") that removed her from employment as a police officer at Jersey City. (Aa91-92).

Mansour appealed her removal to the Office of Administrative Law and filed a motion for summary decision on March 26, 2023; Jersey City opposed the motion and filed a cross-motion for summary decision. (Aa1). On June 21, 2023, the Administrative Law Judge ("ALJ") issued an Initial Decision granting Mansour's motion for summary decision, reversing the termination of Mansour, and denying Jersey City's cross-motion for summary decision. (Aa10). On August 2, 2023, the Commission issued a Final Decision that adopted the Initial Decision, reversed the removal of Mansour, and ordered that she be reinstated with back pay and benefits. (Aa14-17). Jersey City filed with the Commission a request for reconsideration and a request to stay Mansour's reinstatement

pending reconsideration and/or appeal, which the Commission denied on July 24, 2024. (Aa18-22). This appeal follows.[1]

STATEMENT OF FACTS

At all relevant times, Mansour was a police officer within Jersey City's Police Department. (Aa1; Aa120-21). Jersey City police officers are required to carry a firearm to perform their job duties while they are on duty. (Aa120). They are also required to carry a firearm while off-duty in Jersey City. (Aa120). The City provides its officers with ammunition multiple times annually, including for mandatory semiannual firearm training. (Aa120). Jersey City police officers are required to utilize ammunition issued by the Department in their firearms while on and off-duty, including when participating in semi-annual firearms training. (Aa120).

In April 2022, the Director of Public Safety and the Deputy Chief of Police issued orders to all police officers putting them on notice that they were prohibited from ingesting cannabis on or off-duty, irrespective of its legalization under State law, due to intervening Federal firearms laws prohibiting (and making illegal) the possession of firearms and ammunition by cannabis users. (Aa167). On September

[1] On January 21, 2025, the Court granted the Civil Service Commission's Motion to Consolidate this case with the related matter involving Officer Omar Polanco, In The Matter of Omar Polanco, Jersey City Police Department (A-3886-23). The Court's Order allowed Jersey City to file separate briefs on the merits.

20, 2022, Mansour was randomly selected and submitted to a random urine sample for drug testing. (Aa170). Mansour's urine sample tested positive for cannabis/marijuana metabolites, otherwise known as THC. (Aa170). On November 23, 2022, the Department's internal affairs unit conducted an interview of Mansour, who admitted that she 1) regularly uses cannabis; 2) ingested cannabis prior to and after her random drug test; and 3) knowingly violated and willfully ignored departmental orders issued on April 20, 2022, which prohibited police officers from using cannabis notwithstanding its legalization under State law, given that Federal law prohibits possession of firearms and ammunition by cannabis users, irrespective of its legality under State law. (Aa171-176).

Following the internal affairs investigation, Mansour was served with a Preliminary Notice of Disciplinary Action ("PNDA") on January 9, 2023, which charged her with insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause by ingesting cannabis prior to and after September 20, 2022, and regularly using cannabis and violating Jersey City drug policy due to the presence of THC in her system. (Aa80-81). Thereafter, she was suspended by the Civil Service regulations, pending a hearing on the charges, which was held on February 7, 2023. (Aa80-81; Aa91-92). Following the hearing, Police Director James Shea issued a decision upholding the charges in the PNDA, and a Final Notice of Disciplinary

Action ("FNDA") was issued (and subsequently amended to address a clerical error) on March 2, 2023, ordering Mansour's removal for, among other reasons, willfully disobeying orders and being "unable to perform an essential function of her position as a police officer – carry and possess a firearm and ammunition – marking her unfit for duty." (Aa94; Aa96).

Mansour appealed her removal to the Office of Administrative Law, and, after both parties filed motions for summary decision, the ALJ issued an Initial Decision on June 21, 2023, reversing her removal. (Aa1-10). The Commission subsequently adopted the ALJ's Initial Decision on August 2, 2023, despite recognizing that "[t]here is an obvious conflict between the [New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMMA")], which legalizes the personal use of marijuana in New Jersey, and federal law, which stills considers marijuana an unlawful controlled substance, and this conflict was recognized by the State of New Jersey Legislature when it enacted the CREAMM Act." (Aa15). Notwithstanding said conflict, the Commission based its Final Decision on the findings that "federal law does not preempt CREAMMA, that Mansour could carry a service weapon without violating federal law, and that the facts of this matter demonstrate that [Jersey City's] termination violated CREAMMA." (Aa16). The Final Decision

ordered that Mansour be reinstated with back pay, benefits, and seniority. (Aa16).

Jersey City filed a request for reconsideration and a request to stay the Final Decision pending reconsideration and appeal, which the Commission denied on July 24, 2024 in its decision labeled "Final Administrative Action of the Commission" ("Final Administrative Action"). (Aa18). In issuing the Final Administrative Action, the Commission ordered Jersey City to reinstate Mansour to her position. (Aa21-22).

STANDARD OF REVIEW

A reviewing "court ordinarily should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). However, where an agency decides an issue of law, its "decision do[es] not carry a presumption of validity and it is for this court to decide whether those decisions are in accord with the law." Parsippany-Troy Hills Educ. Ass'n v. Bd. of Educ., 188 N.J. Super. 161, 165 (App. Div. 1983).

The standard governing agency determinations for summary disposition under N.J.A.C. 1:1-12.5 is "substantially the same as that governing a motion

under Rule 4:46-2 for summary judgment in civil litigation." L.A. v. Bd. of Educ. of City of Trenton, Mercer Cnty., 221 N.J. 192, 203 (2015) (quoting Contini v. Bd. Of Educ. Of Newark, 286 N.J. Super. 106, 121-22 (App. Div. 1995). The Appellate Division "must ascertain 'whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Id. at 204 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)). Because the agency's determination on summary decision is a legal determination, the Appellate Division's review is de novo. L.A. v. Bd. of Educ. of City of Trenton, 221 N.J. at 204.

LEGAL ARGUMENT

I. The Commission's Decision Reinstating Mansour Should Be Reversed Because the Commission Erred in Adopting the Initial Decision's Conclusion that CREAMMA is Not Preempted by Federal Law (Aa14-17; Aa18-22)

"Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that 'interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution' are invalid." Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (quoting Gibbons v. Ogden, 9 Wheat 1, 211 (1824)). State law is preempted by Federal law when: (1) Congress states its intent for preemption through explicit

statutory language; (2) state law "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively[;]" or (3) state and federal laws conflict. See English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990).

Conflict preemption occurs where there is a conflict between a state law and a federal law. Fed. Law Enforcement Ass'n v. Grewal, No. 20-05762, 2022 WL 2236351, *15 (D.N.J. June 21, 2022) (holding that federal law preempted New Jersey state law which required retired law enforcement officers to apply for permits to carry concealed weapons). When there is a conflict, "[c]onflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Farina v. Nokia Inc., 625 F.3d 97, 115 (3d Cir. 2010) (quoting Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) (internal quotation marks omitted)). When confronting arguments that a law stands as an obstacle to Congressional objectives, a court must use its judgment. "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." Grewal, supra at *15. Additionally, "[f]ederal regulations preempt state laws in the same fashion as congressional statutes." Ibid.; see also Fellner v. Tri–Union Seafoods, L.L.C., 539 F.3d 237, 243 (3rd Cir. 2008) (explaining that "[w]here Congress has delegated the

authority to regulate a particular field to an administrative agency, the agency's regulations issued pursuant to that authority have no less preemptive effect than federal statutes, assuming those regulations are a valid exercise of the agency's delegated authority.").

Two principles guide the analysis of whether Federal law preempts State law. "First, the intent of Congress is the 'ultimate touchstone' of preemption analysis." Farina, 625 F.3d at 115 (quoting Medtronic, Inc., v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation marks omitted)). In discerning Congress' intent, a court must "look not only to Congress' express statements, but also to the 'structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" Ibid. (quoting Medtronic, 518 U.S. at 486 (citations and internal quotation marks omitted)).

Second, courts "start[] with the basic assumption that Congress did not intend to displace state law." Farina, 625 F.3d at 115 (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)). The presumption does not apply, however, "where state regulation has traditionally been absent[.]" Ibid.; see also Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001) (rejecting the presumption because "the

relationship between a federal agency and the entity it regulates . . . originates from, is governed by, and terminates according to federal law").

As it relates to the preemption issue raised in this case, the United States Congress enacted legislation decades ago prohibiting certain individuals from possessing or receiving firearms or ammunition and prohibiting any other individual from providing a firearm or ammunition to such an individual based upon such individual's drug use. See 18 U.S.C. 922.

Specifically, under the Federal Gun Control Act of 1968:

> [i]t shall be **unlawful for any person to** sell or otherwise **dispose of any firearm or ammunition to any** person knowing or having reasonable cause to believe that such person, including as a juvenile— . . .
>
> > (3) is an **unlawful user of or addicted to any controlled substance** (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))[.]

18 U.S.C. 922(d) (emphasis added). Additionally,

> [i]t shall be **unlawful for** any person—
>
> > (3) who is **an unlawful user** of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . .
>
> to ship or transport in interstate or foreign commerce, or **possess** in or affecting commerce, **any firearm or ammunition**; or to **receive any firearm or ammunition** which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 922(g) (emphasis added). While the Congressional intent in prohibiting marijuana users from possessing or receiving a firearm or ammunition under 18 U.S.C. 922 should be self-evident, the United States Supreme Court has explicitly recognized that Congress' intent "was to keep firearms out of the hands of presumptively risky people." Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n. 6 (1983).

In February 2021, New Jersey enacted the CREAMM Act, N.J.S.A. 24:6I-31 et seq. to address the legalization of regulated marijuana/cannabis in New Jersey. As it relates to employment, the CREAMM Act provides, in relevant part, that

> [n]o employer shall . . . take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under [the CREAMM Act].

N.J.S.A. 24:6I-52(a)(1). The CREAMM Act was premised on the finding that "States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law; therefore, compliance with this act does not put the State of New Jersey in violation of federal law." N.J.S.A. 24:6I-2. However, the CREAMM Act failed to address the impact of legalizing cannabis on employers who

employ individuals who are required to possess and/or receive firearms in order to fulfill their job duties such as law enforcement officers.

a. The Commission erred in concluding that "nothing in the CREAMM Act requires anyone to violate federal law." (Aa15-16)

In this case, the ALJ (and thus the Commission) recognized that "[t]here is an obvious conflict between the [CREAMM Act] which legalizes the personal use of marijuana in New Jersey, and federal law, which stills considers marijuana an unlawful controlled substance, and this conflict was recognized by the State of New Jersey Legislature when it enacted the CREAMM Act." (AMa15). Both the ALJ and the Commission also recognized that "[c]onflict preemption applies when 'it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."'" (AMa15) (internal citations omitted). Notwithstanding that recognition and the acknowledgment that "police officers are required to possess a firearm and regularly receive ammunition as a condition of their job duties," the ALJ and Commission perplexingly concluded that no preemption existed "because even if marijuana consumption remains unlawful [under] federal law, **nothing in the CREAMM Act requires anyone to violate federal law[**.]" (Ibid. (emphasis added)). This is where the ALJ and the Commission erred, because the decisions implausibly conclude that nothing in CREAMMA

requires anyone to violate federal law. Contrary to the Commission's decision, this is exactly what its order of reinstatement does – it requires Jersey City to violate federal law and authorize a known user of a Schedule I CDS to possess a firearm and ammunition.

That is, the City cannot comply with both CREAMMA and the Federal Gun Control Act. Mansour is a regular user of marijuana and police officers are required to possess firearms and receive ammunition to fulfill their duties. In failing to remove Mansour, a user of a Schedule I substance, not only would the City have been complicit in allowing Mansour to violate federal law by returning to work in a position where she is required to possess a firearm and ammunition, but the City would also have been required to illegally issue ammunition for said illegal firearm in order for her to perform the necessary duties of a police officer. In other words, by failing to remove Mansour, Jersey City would be employing a "user of a substance," in contravention of 18 U.S.C. 922(g), and would be required to issue ammunition for her firearm in contravention of 18 U.S.C. 922(d), thereby subjecting it to penalties and prosecution by the Federal Government under 18 U.S.C. 924. Importantly, 18 U.S.C. 924 states "[w]hoever knowingly violates subsection (d) or (g) of section 922 shall be fined under this title, imprisoned for not more than 15 years, or both." 18 U.S.C. 922(g), (d); 18 U.S.C. 924.

Notwithstanding changes in State law, marijuana/cannabis was *and remains* a Schedule I substance under the Controlled Substances Act, and the prohibition on marijuana users possessing or receiving firearms or ammunition under Federal law is clear. Such prohibition on marijuana users possessing or receiving firearms or ammunition under Federal law has been emphasized by the U.S. Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), which has advised that under the Federal firearms laws, "**any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition** [. . .] **and you may not transfer firearms or ammunition to them.**" See (Aa360) (emphasis added); see also (Aa64) (consisting of ATF's Firearms Transaction Record, Form 4473, which explains that "[t]he use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside" and that "a person who answers 'yes' to any of the questions 21.b. through 21.k. [regarding drug use] is prohibited from receiving or possessing a firearm.").

Moreover, as recently as May 30, 2023, in response to Minnesota's legalization of recreational cannabis, the ATF issued clarification "for gun

owners and potential gun owners who may be considering using marijuana given [the state's] recent ease on marijuana restrictions, drawing attention to the distinction between state and federal law." See (Aa361). In no uncertain terms, the ATF emphasized that "the Federal Gun Control Act of 1968 prohibits any person who is an unlawful user of or addicted to any controlled substance as defined by the Controlled Substances Act of 1970 from shipping, transporting, receiving, or possessing firearms or ammunition." Ibid. Thus, "**regardless of the recent changes in [State] law related to the legalization of marijuana**, an individual who is a current user of marijuana is still federally defined as an "unlawful user" of a controlled substance and therefore is prohibited from shipping, transporting, receiving, or possessing firearms or ammunition." Ibid. (emphasis added).

Even more, the only judicial authority that has examined or addressed this issue, the Florida District Court of Appeals, concluded that a corrections officer who used prescription marijuana could not lawfully possess a firearm, which was an essential function of his job, and therefore must be removed in circumstances identical to the present case. Ortiz v. Dep't of Corrections, 1D22-375, 2023 WL 4101330, at *2 (Fla. Dist. Ct. App. June 21, 2023), reh'g denied (Aug. 2, 2023), review denied sub nom. Ortiz v. Florida Dep't of Corr., SC2023-1040, 2024 WL 277862 (Fla. Jan. 25, 2024). Despite the relevancy of such

decision, the Commission failed to even address the Ortiz case in issuing its Final Decision. While the Commission did ultimately address Ortiz in its Final Administrative Action on Jersey City's request for reconsideration, its cursory rejection of Ortiz failed to offer any reason to distinguish the analysis and conclusion reached by the multiple appellate level judges on the same issues presented here.[2]

Simply stated, the ALJ's Initial Decision and the Commission's Final Decision wholly fail to explain or analyze how Jersey City can comply simultaneously with the Federal Gun Control Act and CREAMMA. Because Mansour and Jersey City cannot comply with both laws simultaneously, and because federal law is paramount as it relates to firearms, this Court must reverse the Commission's Final Decision reinstating Mansour.

b. The Commission's Final Agency Action also erred in concluding that CREAMMA avoids preemption because of 18 U.S.C. 925(a)(1)'s Exemption to certain provisions of The Gun Control Act. (Aa20-21)

The Commission further erred in its unilateral conclusion, contained within the Final Administrative Action on Jersey City's Motion for Reconsideration, that CREAMMA avoids preemption because of the exceptions

[2] The Commission dismissively rejected Ortiz by writing, "Ortiz is a Florida District Court decision . . . [and] this case does not serve as a mandatory precedent in this matter." (Aa20).

contained in 18 U.S.C. 925(a)(1) (Aa20-21). Such a conclusion is factually and legally meritless.

18 U.S.C. § 925(a)(1) provides, in relevant part, that certain provisions of the Gun Control Act applicable to this matter:

> shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued **for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof**.

(emphasis added); see also 27 C.F.R. § 478.141(a).

But neither Federal law nor any State law requires that law enforcement agencies issue their officers their firearms. Instead, the rules implementing this statute merely provide that

> [l]aw enforcement officers purchasing firearms for official use **who provide the licensee with a certification on agency letterhead**, signed by a person in authority within the agency (other than the officer purchasing the firearm), stating that the officer will use the firearm in official duties and that a records check reveals that the purchasing officer has no convictions for misdemeanor crimes of domestic violence are not required to complete Form 4473 or Form 5300.35.

27 C.F.R. § 478.134(a) (emphasis added). In this case, there is no assertion that the Jersey City Police Department provided Mansour, or any other officer, with the duty firearm that they must possess or a certification on police agency

letterhead, as would be required to exempt the individual from the Gun Control Act's prohibitions on drug use and firearm/ammunition possession. Jersey City does not and has not provided its officers with such certification or issued officers with their service firearms. Instead, such officers are required to purchase and possess a firearm subject to the requirements of the Gun Control Act. That is why Mansour never presented such argument. Furthermore, the exception only exempts the requirement to complete the ATF form to purchase a firearm; it does not authorize a law enforcement officer to use a Schedule I CDS and carry a firearm and ammunition.

The Commission's conclusion that CREAMMA avoids preemption because of such exceptions would also lead to absurd results that could not have been Congress' intent in passing the Gun Control Act or the Federal government's intent in enacting 27 C.F.R. § 478.134(a). Namely, the Commission's decision would mean that chief law enforcement officers are vested with the sole discretion to allow their friends or relatives who are police officers to use Schedule 1 controlled substances while possessing a firearm, including while on duty, so long as they provide a letter stating that the officer will use the firearm in official duties or where their department issues the firearms directly. Such an absurd result could not have been Congress' intent in passing the Gun Control Act or the Federal government's intent in enacting 27 C.F.R. § 478.134(a). With respect to the statutory text, which dates to 1968, there

were no decriminalized narcotics at that time, nor was decriminalization conceivable. It was not until many decades after the Gun Control Act's passage that New Jersey acted to legalize cannabis and to require employers such as Jersey City to employ individuals they know to be regular users of a controlled substance in positions requiring them to possess firearms. Additionally, there is nothing to suggest that when Congress enacted the Gun Control Act in 1968, it intended to allow municipal police departments and police officers to ignore the prohibitions of the statute that prohibits users of Schedule 1 controlled substances from possessing a firearm or that the State of New Jersey could exempt its police officers from compliance with Federal law. Accordingly, the Commission's application of 18 U.S.C. § 925(a)(1) as a basis for finding that federal law does not preempt CREAMMA is flawed.

In conclusion, the Commission's Final Decision reinstating Mansour is irreconcilable with federal law. Mansour and Jersey City cannot comply with both laws simultaneously, and because federal law preempts CREAMMA to the extent it conflicts with federal law, the Commission did not violate CREAMMA in rightfully removing Mansour from her employment with the City due to her failure to perform the essential functions of her position. Therefore, the Commission's decision should be reversed.

CONCLUSION

For all of the foregoing reasons, this Court must reverse the Civil Service Commission's Final Decision reinstating Mansour as a police officer, as the Commission erred in determining that federal law does not preempt CREAMMA and further erred in concluding that nothing in CREAMMA would require Jersey City to violate federal law.

Respectfully submitted,

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BRIEF ON BEHALF OF APPELLANT JERSEY CITY POLICE DEPARTMENT

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PRELIMINARY STATEMENT

This present matter is an appeal of the Civil Service Commission's ("the Commission") decision to reinstate police officer Omar Polanco ("Polanco") to his position with Jersey City Police Department ("Jersey City") despite the fact that such reinstatement would require both Polanco and other personnel of Jersey City to violate federal law.

Jersey City police officers are required to carry a firearm on duty and, in some circumstances, while off duty as well. In September 2022, Polanco was randomly selected to submit a urine sample for drug testing, which came back positive for marijuana metabolites; i.e., THC. At the time Polanco submitted his sample for drug testing, regulated marijuana, otherwise known as cannabis, was legal in New Jersey and available for purchase from in-State cannabis dispensaries under the State's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMM Act" or "CREAMMA"), N.J.S.A. 24:6I-31 et seq. State law notwithstanding, the Federal Gun Control Act, 18 U.S.C. 921, et. seq. continues to prohibit users of controlled substances—including marijuana/cannabis—from possessing, carrying, and/or using firearms and ammunition; a condition of police officers' employment. Jersey City removed Polanco from his employment with the City because, as a consequence of his willful actions, he is prohibited from carrying and possessing

a firearm and ammunition under federal law, thus rendering Polanco unable to perform the essential functions of his position.

In issuing its decision to reinstate Polanco, the Commission erred in concluding that the CREAMM Act is not preempted by federal law because "nothing in the CREAMM Act requires anyone to violate federal law." (Aa15). Contrary to the Commission's decision, this is *exactly* what its order of reinstatement does – namely, it requires Jersey City to violate the Gun Control Act by authorizing a known user of a Schedule 1 controlled substance to possess a firearm and ammunition. Even more, the only judicial authority that has examined or addressed this issue, the Florida District Court of Appeals, concluded that a corrections officer who used prescription marijuana could not lawfully possess a firearm, which was an essential function of his job, and therefore must be removed in circumstances identical to the present case. Ortiz v. Dep't of Corrections, 1D22-375, 2023 WL 4101330, at *2 (Fla. Dist. Ct. App. June 21, 2023), reh'g denied (Aug. 2, 2023), review denied sub nom. Ortiz v. Florida Dep't of Corr., SC2023-1040, 2024 WL 277862 (Fla. Jan. 25, 2024). That decision is consistent with the clear ambit of the federal laws at issue in this case.

In short, the Commission's decision to reinstate Polanco is irreconcilable with federal law and would undoubtedly require Jersey City to authorize a known user of a Schedule 1 controlled substance to carry their personally owned

firearm and be issued ammunition in clear violation of the Federal Gun Control Act. Accordingly, this Court should reverse the Commission's decision and Polanco's removal should be upheld.

PROCEDURAL HISTORY

On March 1, 2023, Polanco was issued a Final Notice of Disciplinary Action ("FNDA") that removed him from employment as a police officer at Jersey City. (Aa246).

Polanco appealed his removal to the Office of Administrative Law and filed a motion for summary decision on July 5, 2023; Jersey City opposed the motion and filed a cross-motion for summary decision. (Aa188). On August 18, 2023, the Administrative Law Judge ("ALJ") issued an Initial Decision granting Polanco's motion for summary decision, reversing the termination of Polanco, and denying Jersey City's cross-motion for summary decision. (Aa194). On September 20, 2023, the Commission issued a Final Decision that adopted the Initial Decision, reversed the removal of Polanco, and ordered that he be reinstated with back pay and benefits. (Aa198-199). Jersey City filed with the Commission a request for reconsideration and a request to stay Polanco's

reinstatement pending reconsideration and/or appeal, which the Commission denied on July 24, 2024. (Aa201; Aa204). This appeal follows.[1]

STATEMENT OF FACTS

At all relevant times, Polanco was a police officer within Jersey City's Police Department. (Aa189; Aa294-95). Jersey City police officers are required to carry a firearm to perform their job duties while they are on duty. (Aa294). They are also required to carry a firearm while off-duty in Jersey City. (Aa294). The City provides its officers with ammunition multiple times annually, including for mandatory semiannual firearm training. (Aa294). Jersey City police officers are required to utilize ammunition issued by the Department in their firearms while on and off-duty, including when participating in semi-annual firearms training. (Aa294).

In April 2022, the Director of Public Safety and the Deputy Chief of Police issued orders to all police officers putting them on notice that they were prohibited from ingesting cannabis on or off-duty, irrespective of its legalization under State law, due to intervening Federal firearms laws prohibiting (and making illegal) the possession of firearms and ammunition by cannabis users. (Aa295; Aa341). On

[1] On January 21, 2025, the Court granted the Civil Service Commission's Motion to Consolidate this case with the related matter involving Officer Norhan Mansour, In The Matter of Norhan Mansour, Jersey City Police Department (A-3876-23). The Court's Order allowed Jersey City to file separate briefs on the merits.

September 20, 2022, Polanco was randomly selected and submitted to a random urine sample for drug testing. (Aa344). Polanco's urine sample tested positive for cannabis/marijuana metabolites, otherwise known as THC. (Aa344). On November 23, 2022, the Department's internal affairs unit conducted an interview of Polanco, who admitted that he 1) regularly uses cannabis; 2) ingested cannabis prior to and after his random drug test; and 3) knowingly violated and willfully ignored departmental orders issued on April 20, 2022, which prohibited police officers from using cannabis notwithstanding its legalization under State law, given that Federal law prohibits possession of firearms and ammunition by cannabis users, irrespective of its legality under State law. (Aa345-49).

Following the internal affairs investigation, Polanco was served with a Preliminary Notice of Disciplinary Action ("PNDA") on January 9, 2023, which charged him with insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause by ingesting cannabis prior to and after September 20, 2022, and regularly using cannabis and violating Jersey City drug policy due to the presence of THC in his system. (Aa236-37). Thereafter, he was suspended by the Civil Service regulations, pending a hearing on the charges, which was held on February 7, 2023. (Aa244). Following the hearing, Police Director James Shea issued a decision upholding the charges in the PNDA, and a Final Notice of Disciplinary Action

("FNDA") was issued by Jersey City on March 2, 2023, ordering Polanco's removal from his employment for *inter alia*, willfully disobeying orders and the inability to "perform an essential function of his position as a policy officer carry and possess a fire arm and ammunition-making him unfit for duty." (Aa252).

Polanco appealed his removal to the Office of Administrative Law, and, after both parties filed motions for summary decision, the ALJ issued an Initial Decision on August 18, 2023, reversing his removal. (Aa188-96). The Commission subsequently adopted the ALJ's Initial Decision on September 20, 2023, noting that the ALJ relied in part on the Commission's decision in In The Matter of Norhan Mansour (CSC, decided August 2, 2023) (Aa198-200). In that matter, which has been consolidated with this case and is essentially factually identical to this matter, the Commission recognized that "[t]here is an obvious conflict between the [New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMMA")], which legalizes the personal use of marijuana in New Jersey, and federal law, which stills considers marijuana an unlawful controlled substance, and this conflict was recognized by the State of New Jersey Legislature when it enacted the CREAMM Act." (Aa15). Notwithstanding said conflict, the Commission based its Final Decision in this matter on the findings that "federal law does not preempt CREAMMA" and "that Polanco could carry a service weapon without

violating federal law" (Aa198-99). The Final Decision ordered that Polanco be reinstated with back pay, benefits, and seniority. (Aa199-200).

Jersey City filed a request for reconsideration and a request to stay the Final Decision pending reconsideration and appeal, which the Commission denied on July 24, 2024, in its decision labeled "Final Administrative Action of the Commission" ("Final Administrative Action"). (Aa201-204). In issuing the Final Administrative Action, the Commission ordered Jersey City to reinstate Polanco to his position. (Aa21-22).

STANDARD OF REVIEW

A reviewing "court ordinarily should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). However, where an agency decides an issue of law, its "decision do[es] not carry a presumption of validity and it is for this court to decide whether those decisions are in accord with the law." Parsippany-Troy Hills Educ. Ass'n v. Bd. of Educ., 188 N.J. Super. 161, 165 (App. Div. 1983).

The standard governing agency determinations for summary disposition under N.J.A.C. 1:1-12.5 is "substantially the same as that governing a motion under Rule 4:46-2 for summary judgment in civil litigation." L.A. v. Bd. of Educ. of City of Trenton, Mercer Cnty., 221 N.J. 192, 203 (2015) (quoting Contini v. Bd. Of Educ. Of Newark, 286 N.J. Super. 106, 121-22 (App. Div. 1995). The Appellate Division "must ascertain 'whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Id. at 204 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)). Because the agency's determination on summary decision is a legal determination, the Appellate Division's review is de novo. L.A. v. Bd. of Educ. of City of Trenton, 221 N.J. at 204.

LEGAL ARGUMENT

I. The Commission's Decision Reinstating Polanco Should Be Reversed Because the Commission Erred in Adopting the Initial Decision's Conclusion that CREAMMA is Not Preempted by Federal Law (Aa198-200; Aa200-204)

"Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that 'interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution' are invalid." Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604

(1991) (quoting Gibbons v. Ogden, 9 Wheat 1, 211 (1824)). State law is preempted by Federal law when: (1) Congress states its intent for preemption through explicit statutory language; (2) state law "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively[;]" or (3) state and federal laws conflict. See English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990).

Conflict preemption occurs where there is a conflict between a state law and a federal law. Fed. Law Enforcement Ass'n v. Grewal, No. 20-05762, 2022 WL 2236351, *15 (D.N.J. June 21, 2022) (holding that federal law preempted New Jersey state law which required retired law enforcement officers to apply for permits to carry concealed weapons). When there is a conflict, "[c]onflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Farina v. Nokia Inc., 625 F.3d 97, 115 (3d Cir. 2010) (quoting Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) (internal quotation marks omitted)). When confronting arguments that a law stands as an obstacle to Congressional objectives, a court must use its judgment. "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." Grewal, supra at *15. Additionally, "[f]ederal regulations preempt state laws in the same fashion as

congressional statutes." Ibid.; see also Fellner v. Tri–Union Seafoods, L.L.C., 539 F.3d 237, 243 (3rd Cir. 2008) (explaining that "[w]here Congress has delegated the authority to regulate a particular field to an administrative agency, the agency's regulations issued pursuant to that authority have no less preemptive effect than federal statutes, assuming those regulations are a valid exercise of the agency's delegated authority.").

Two principles guide the analysis of whether Federal law preempts State law. "First, the intent of Congress is the 'ultimate touchstone' of preemption analysis." Farina, 625 F.3d at 115 (quoting Medtronic, Inc., v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation marks omitted)). In discerning Congress' intent, a court must "look not only to Congress' express statements, but also to the 'structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" Ibid. (quoting Medtronic, 518 U.S. at 486 (citations and internal quotation marks omitted)).

Second, courts "start[] with the basic assumption that Congress did not intend to displace state law." Farina, 625 F.3d at 115 (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)). The presumption does not apply, however, "where state regulation has traditionally been absent[.]" Ibid.; see also Buckman Co. v. Plaintiffs'

Legal Comm., 531 U.S. 341, 347 (2001) (rejecting the presumption because "the relationship between a federal agency and the entity it regulates . . . originates from, is governed by, and terminates according to federal law").

As it relates to the preemption issue raised in this case, the United States Congress enacted legislation decades ago prohibiting certain individuals from possessing or receiving firearms or ammunition and prohibiting any other individual from providing a firearm or ammunition to such an individual based upon such individual's drug use. See 18 U.S.C. 922.

Specifically, under the Federal Gun Control Act of 1968:

> [i]t shall be **unlawful for any person to** sell or otherwise **dispose of any firearm or ammunition to any** person knowing or having reasonable cause to believe that such person, including as a juvenile— . . .
>
> > (3) is an **unlawful user of or addicted to any controlled substance** (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))[.]

18 U.S.C. 922(d) (emphasis added). Additionally,

> [i]t shall be **unlawful for** any person—
>
> > (3) who is **an unlawful user** of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . .
>
> to ship or transport in interstate or foreign commerce, or **possess** in or affecting commerce, **any firearm or ammunition**; or to **receive any firearm or ammunition**

> which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 922(g) (emphasis added). While the Congressional intent in prohibiting marijuana users from possessing or receiving a firearm or ammunition under 18 U.S.C. 922 should be self-evident, the United States Supreme Court has explicitly recognized that Congress' intent "was to keep firearms out of the hands of presumptively risky people." Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n. 6 (1983).

In February 2021, New Jersey enacted the CREAMM Act, N.J.S.A. 24:6I-31 et seq. to address the legalization of regulated marijuana/cannabis in New Jersey. As it relates to employment, the CREAMM Act provides, in relevant part, that

> [n]o employer shall . . . take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under [the CREAMM Act].

N.J.S.A. 24:6I-52(a)(1). The CREAMM Act was premised on the finding that "States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law; therefore, compliance with this act does not put the State of New Jersey in violation of federal law." N.J.S.A. 24:6I-2. However, the CREAMM Act failed to address the impact of legalizing cannabis on employers who

employ individuals who are required to possess and/or receive firearms in order to fulfill their job duties such as law enforcement officers.

a. The Commission erred in concluding that "nothing in the CREAMM Act requires anyone to violate federal law." (Aa198-99)

The Commission has recognized that "[t]here is an obvious conflict between the [CREAMM Act] which legalizes the personal use of marijuana in New Jersey, and federal law, which stills considers marijuana an unlawful controlled substance, and this conflict was recognized by the State of New Jersey Legislature when it enacted the CREAMM Act." (Aa15). The Commission has also recognized that "[c]onflict preemption applies when 'it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."'" (Aa15) (internal citations omitted). Despite these recognitions and the acknowledgment that police officers are required to possess a firearm, the Commission concluded that "**federal law does not preempt CREAMMA**" and "**that Polanco could carry a service weapon without violating federal law.**" (Aa198-99) (Ibid. (emphasis added)). This is where the ALJ and the Commission erred, because the decisions implausibly conclude that nothing in CREAMMA requires anyone to violate federal law. Contrary to the Commission's decision, this is exactly what its order of reinstatement does – it requires Jersey City to violate

federal law and authorize a known user of a Schedule I CDS to possess a firearm and ammunition.

That is, the City cannot comply with both CREAMMA and the Federal Gun Control Act. Polanco is a regular user of marijuana, and police officers are required to possess firearms and receive ammunition to fulfill their duties. In failing to remove Polanco, a user of a Schedule I substance, not only would the City have been complicit in allowing Polanco to violate federal law by returning to work in a position where he is required to possess a firearm and ammunition, but the City would also have been required to illegally issue ammunition for said illegal firearm in order for him to perform the necessary duties of a police officer. In other words, by failing to remove Polanco, Jersey City would be employing a "user of a substance," in contravention of 18 U.S.C. 922(g), and would be required to issue ammunition for his firearm in contravention of 18 U.S.C. 922(d), thereby subjecting it to penalties and prosecution by the Federal Government under 18 U.S.C. 924. Importantly, 18 U.S.C. 924 states "[w]hoever knowingly violates subsection (d) or (g) of section 922 shall be fined under this title, imprisoned for not more than 15 years, or both." 18 U.S.C. 922(g), (d); 18 U.S.C. 924.

Notwithstanding changes in State law, marijuana/cannabis was *and remains* a Schedule I substance under the Controlled Substances Act, and the prohibition on marijuana users possessing or receiving firearms or ammunition under Federal law

is clear. Such prohibition on marijuana users possessing or receiving firearms or ammunition under Federal law has been emphasized by the U.S. Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), which has advised that under the Federal firearms laws, "**any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition** [. . .] **and you may not transfer firearms or ammunition to them.**" See (Aa360) (emphasis added); see also (Aa364) (consisting of ATF's Firearms Transaction Record, Form 4473 which, explains that "[t]he use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside" and that "a person who answers 'yes' to any of the questions 21.b. through 21.k. [regarding drug use] is prohibited from receiving or possessing a firearm.").

Moreover, as recently as May 30, 2023, in response to Minnesota's legalization of recreational cannabis, the ATF issued clarification "for gun owners and potential gun owners who may be considering using marijuana given [the state's] recent ease on marijuana restrictions, drawing attention to the distinction between state and federal law." See (Aa361). In no uncertain terms,

the ATF emphasized that "the Federal Gun Control Act of 1968 prohibits any person who is an unlawful user of or addicted to any controlled substance as defined by the Controlled Substances Act of 1970 from shipping, transporting, receiving, or possessing firearms or ammunition." Ibid. Thus, "**regardless of the recent changes in [State] law related to the legalization of marijuana**, an individual who is a current user of marijuana is still federally defined as an 'unlawful user' of a controlled substance and therefore is prohibited from shipping, transporting, receiving, or possessing firearms or ammunition." Ibid. (emphasis added).

Even more, the only judicial authority that has examined or addressed this issue, the Florida District Court of Appeals, concluded that a corrections officer who used prescription marijuana could not lawfully possess a firearm, which was an essential function of his job, and therefore must be removed in circumstances identical to the present case. Ortiz v. Dep't of Corrections, 1D22-375, 2023 WL 4101330, at *2 (Fla. Dist. Ct. App. June 21, 2023), reh'g denied (Aug. 2, 2023), review denied sub nom. Ortiz v. Florida Dep't of Corr., SC2023-1040, 2024 WL 277862 (Fla. Jan. 25, 2024). Despite the relevancy of such decision, the Commission failed to even address the Ortiz case in issuing its Final Decision. While the Commission did ultimately address Ortiz in its Final Administrative Action on Jersey City's request for reconsideration, its cursory

rejection of Ortiz failed to offer any reason to distinguish the analysis and conclusion reached by the multiple appellate level judges on the same issues presented here.[2]

Simply stated, the ALJ's Initial Decision and the Commission's Final Decision wholly fail to explain or analyze how Jersey City can comply simultaneously with the Federal Gun Control Act and CREAMMA. Because Polanco and Jersey City cannot comply with both laws simultaneously, and because federal law is paramount as it relates to firearms, this Court must reverse the Commission's Final Decision reinstating Polanco.

b. The Commission's Final Agency Action also erred in concluding that CREAMMA avoids preemption because of 18 U.S.C. 925(a)(1)'s Exemption to certain provisions of The Gun Control Act. (Aa203)

The Commission further erred in its unilateral conclusion, contained within the Final Administrative Action on Jersey City's Motion for Reconsideration, that CREAMMA avoids preemption because of the exceptions contained in 18 U.S.C. 925(a)(1). (Aa203). Such a conclusion is factually and legally meritless.

[2] The Commission dismissively rejected Ortiz by writing, "Ortiz is a Florida District Court decision . . . [and] this case does not serve as a mandatory precedent in this matter." (Aa203).

18 U.S.C. § 925(a)(1) provides, in relevant part, that certain provisions of the Gun Control Act applicable to this matter:

> shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued **for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof**.

(emphasis added); see also 27 C.F.R. § 478.141(a).

But neither Federal law nor any State law requires that law enforcement agencies issue their officers their firearms. Instead, the rules implementing this statute merely provide that

> [l]aw enforcement officers purchasing firearms for official use **who provide the licensee with a certification on agency letterhead**, signed by a person in authority within the agency (other than the officer purchasing the firearm), stating that the officer will use the firearm in official duties and that a records check reveals that the purchasing officer has no convictions for misdemeanor crimes of domestic violence are not required to complete Form 4473 or Form 5300.35.

27 C.F.R. § 478.134(a) (emphasis added). In this case, there is no assertion that the Jersey City Police Department provided Polanco, or any other officer, with the duty firearm that they must possess or a certification on police agency letterhead, as would be required to exempt the individual from the Gun Control Act's prohibitions on drug use and firearm/ammunition possession. Jersey City does not and has not provided its officers with such certification or issued

officers with their service firearms. Instead, such officers are required to purchase and possess a firearm subject to the requirements of the Gun Control Act. That is why Polanco never presented such argument. Furthermore, the exception only exempts the requirement to complete the ATF form to purchase a firearm; it does not authorize a law enforcement officer to use a Schedule I CDS and carry a firearm and ammunition.

The Commission's conclusion that CREAMMA avoids preemption because of such exceptions would also lead to absurd results that could not have been Congress' intent in passing the Gun Control Act or the Federal government's intent in enacting 27 C.F.R. § 478.134(a). Namely, the Commission's decision would mean that chief law enforcement officers are vested with the sole discretion to allow their friends or relatives who are police officers to use Schedule 1 controlled substances while possessing a firearm, including while on duty, so long as they provide a letter stating that the officer will use the firearm in official duties or where their department issues the firearms directly. Such an absurd result could not have been Congress' intent in passing the Gun Control Act or the Federal government's intent in enacting 27 C.F.R. § 478.134(a). With respect to the statutory text, which dates to 1968, there were no decriminalized narcotics at that time, nor was decriminalization conceivable. It was not until many decades after the Gun Control Act's passage that New Jersey acted to legalize cannabis and to require employers such as Jersey City

to employ individuals they know to be regular users of a controlled substance in positions requiring them to possess firearms. Additionally, there is nothing to suggest that when Congress enacted the Gun Control Act in 1968, it intended to allow municipal police departments and police officers to ignore the prohibitions of the statute that prohibits users of Schedule 1 controlled substances from possessing a firearm or that the State of New Jersey could exempt its police officers from compliance with Federal law. Accordingly, the Commission's application of 18 U.S.C. § 925(a)(1) as a basis for finding that federal law does not preempt CREAMMA is flawed.

In conclusion, the Commission's Final Decision reinstating Polanco is irreconcilable with federal law. Polanco and Jersey City cannot comply with both laws simultaneously, and because federal law preempts CREAMMA to the extent it conflicts with federal law, the Commission did not violate CREAMMA in rightfully removing Polanco from his employment with the City due to his failure to perform the essential functions of his position. Therefore, the Commission's decision should be reversed.

CONCLUSION

For all of the foregoing reasons, this Court must reverse the Civil Service Commission's Final Decision reinstating Polanco as a police officer, as the Commission erred in determining that federal law does not preempt CREAMMA

and further erred in concluding that nothing in CREAMMA would require Jersey City to violate federal law.

Respectfully submitted,

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IN THE MATTER OF NORHAN MANSOUR, and IN THE MATTER OF OMAR POLANCO.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003876-23 DOCKET NO: CSC 2024-484 **CONSOLIDATED WITH** APPELLATE DIVISION DOCKET NO.: A-003886-23 DOCKET NO.: CSC 2024-814 ON APPEAL FROM: NEW JERSEY CIVIL SERVICE COMMISSION

RESPONDENTS NORHAN MANSOUR AND OMAR POLANCO'S BRIEF IN OPPOSITION TO APPEAL

Michael P. Rubas, Esq.
On Brief

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PRELIMINARY STATEMENT

On November 3, 2020, the citizens of New Jersey by an overwhelming majority of sixty-seven percent voted to amend the New Jersey State Constitution to legalize regulated cannabis with Governor Murphy subsequently signing into law the comprehensive enabling legislation known as the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, N.J.S.A. 24:6I-31 *et seq*. (the "CREAMM Act"). The CREAMM Act set forth new employment protections for job applicants and employees which prohibited subjecting employees to an adverse employment action simply because a blood or urine test signaled positive for regulated cannabis. Considering this new state constitutional right afforded to all citizens, on April 13, 2022, New Jersey Attorney General Matthew J. Platkin issued a Memorandum advising all law enforcement chief executives that the "CREAMMA further provides that law enforcement agencies may not take any adverse action against any officers because they do or do not use cannabis off-duty."

Instead of seeking prompt judicial intervention, Jersey City Mayor Steven Fulop publicly announced that the appellant Jersey City Police Department ("Appellant") would purposefully violate the law and defy the Attorney General to terminate police officers who lawfully used regulated cannabis off-duty. Appellant later carried out on its threat, terminating respondents Jersey City Police Officers

Norhan Mansour ("Mansour") and Omar Polanco ("Polanco") (collectively, the "Respondents") despite that their off-duty use of regulated cannabis complied state law and the Attorney General's Memorandum.

The appeal in this matter is wholly without merit because the Appellant cannot establish that the Civil Service Commission acted contrary to the law or acted in an arbitrary, capricious, or unreasonable manner. Instead, the Civil Service Commission correctly held that the CREAMM Act was not federally preempted as it relates to the off-duty use of regulated cannabis by New Jersey law enforcement officers.

The Federal Gun Control Act expressly exempts from its proscriptions firearms and ammunition issued for the use of political subdivisions of the State such as the City of Jersey City. As such, Respondents' acquisition, possession, and use of firearms and ammunition in her capacity as a municipal police officer is completely lawful and fails within the exemption outlined in 18 U.S.C. § 925(a)(1) as well as in federal regulations 27 C.F.R. § 478.141(a) and 27 C.F.R. § 478.134(a).

Moreover, New Jersey police officers are not even required by law to obtain a permit to carry their duty weapons, whether on or off duty. Specifically, under N.J.S.A. 2C:39-(7)(a), municipal police officers like Respondents are exempt from the requirement to have a firearm permit to carry a firearm on or off-duty in any place in this State, provided they have had firearms training in the Police Academy

and qualify each year pursuant to N.J.S.A. 2C:39-6(j).

This Court can also take judicial notice of the fact that every other single police department in the State of New Jersey is abiding by the employment protections contained in the CREAMM Act and following the orders of the New Jersey Attorney General who declared that "CREAMMA further provides that law enforcement agencies may not take any adverse action against any officers because they do or do not use cannabis off-duty."

From the beginning, Appellant has been a scofflaw, unlawfully terminating law enforcement officers who followed the law and openly defying multiple, lawful reinstatement orders of the Civil Service Commission. For these reasons, Appellant's appeal should be denied.

PROCEDURAL HISTORY

A. Jersey City Police Officer Norhan Mansour.

On March 2, 2023, Mansour was unlawfully terminated from Appellant's employ for her lawful use of regulated cannabis. (Aa096).[1] Mansour filed her Law Enforcement Removal Appeal and then filed a Motion for Summary Decision to reverse her unlawful termination. (Aa001). On June 21, 2023, the Honorable Kimberly Moss, A.L.J., granted Mansour's Motion for Summary Decision, reversed her unlawful removal, and immediately reinstated her employment as a police

[1] "AA" refers to Appellant's Appendix.

officer. (Aa001-013).

On August 2, 2023, the New Jersey Civil Service Commission issued its Decision to accept and adopt the Findings of Facts and Conclusions contained in the Initial Decision of the Honorable Kimberly Moss, A.L.J, and ordered Mansour's immediate reinstatement with back pay, benefits, and reasonable counsel fees. (Aa014-017). Appellant filed a motion for reconsideration or, in the alternative, to stay pending appeal of the August 2, 2023 Order of the Civil Service Commission. (Aa018-022). In response, Mansour filed a request pursuant to N.J.A.C. 4A:10-2.1(a)(1) and (2) for the issuance of an Order of Compliance and the assessment of substantial fines because Appellant refused to comply with the Order of the Civil Service Commission and reinstate her employment. (Id.)

On July 24, 2024, the Civil Service Commission denied Appellant's motion for reconsideration and stay and granted Mansour's request for an Order of Compliance. (Aa018-022). Appellant was, once again, ordered to immediately reinstate Mansour with back pay, benefits, seniority, and reasonable counsel fees. (Id.).

B. Jersey City Police Officer Omar Polanco.

On March 2, 2023, Polanco was unlawfully terminated from Appellant's employ for his lawful use of regulated cannabis. (Aa252). Polanco filed his Law Enforcement Removal Appeal and then filed a Motion for Summary Decision to

reverse his unlawful termination. (Aa188). On August 18, 2023, the Honorable Joann Lasala Candido, A.L.J., granted Polanco's Motion for Summary Decision, reversed his unlawful removal, and immediately reinstated his employment as a police officer. (Aa188-197).

On September 20, 2023, the New Jersey Civil Service Commission issued its Decision to accept and adopt the Findings of Facts and Conclusions contained in the Initial Decision of the Honorable Joann Lasala Candido, A.L.J, and ordered Polanco's immediate reinstatement with back pay, benefits, and reasonable counsel fees. (Aa198-200). Appellant filed a motion for reconsideration or, in the alternative, to stay pending appeal of the September 20, 2023 Order of the Civil Service Commission. (Aa201-205). In response, Polanco filed a request pursuant to N.J.A.C. 4A:10-2.1(a)(1) and (2) for the issuance of an Order of Compliance and the assessment of substantial fines because Appellant refused to comply with the Order of the Civil Service Commission and reinstate his employment. (Id.)

On July 24, 2024, the Civil Service Commission denied Appellant's motion for reconsideration and stay and granted Polanco's request for an Order of Compliance. (Aa201-205). Appellant was ordered, once again, to immediately reinstate Polanco with back pay, benefits, seniority, and reasonable counsel fees. (Id.).

COUNTER-STATEMENT OF FACTS

A. The CREAMM Act.

On February 22, 2021, Governor Murphy signed into law the enabling legislation known as the CREAMM Act. See generally N.J.S.A. 24:6I-31 *et seq.* The CREAMM Act set forth new employment protections for job applicants and employees, namely, employees cannot be subject to an adverse employment action simply because a blood or urine test signaled positive for marijuana use. See id. The CREAMM Act defines an "adverse employment action" as "refusing to hire or employ an individual, barring or discharging an individual from employment, requiring an individual to retire from employment, or discriminating against an individual in compensation or in any terms, conditions, or privileges of employment." N.J.S.A. 24:6I-3.

The CREAMM Act provides, in pertinent part, that "an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under P.L.2021, c.16 (C.24:6I-31 *et al.*)" N.J.S.A. 24:6I-52(a)(1). The CREAMM Act, which was signed into law on February 22, 2021, specifically provided that the section "shall take effect immediately, but shall only become operative upon adoption of the commission's initial rules and regulations pursuant to subparagraph (a) of paragraph (1) of subsection d. of section 6 of P.L.2021, c.16

(C.24:6I-34)." N.J.S.A. 24:6I-31 *et seq.*

On August 19, 2021, the Cannabis Regulatory Commission published its first set of rules and regulations, titled the "Personal Use Cannabis Rules," governing recreational cannabis under CREAMM Act. See generally N.J.A.C. 17:30. The adoption of these rules made the CREAMM Act and its employee protections operative. Legal sales of regulated cannabis in New Jersey started on April 21, 2022. A week before the start of legal sales, Attorney General Matthew J. Platkin reaffirmed these absolute employment protections and issued a Memorandum on April 13, 2022 advising all law enforcement chief executives that the "CREAMMA further provides that law enforcement agencies may not take any adverse action against any officers because they do or do not use cannabis off-duty." (Aa223).

B. Unlawful Termination of Officer Norhan Mansour.

Mansour is a municipal police officer employed by Appellant and its police officers are required to carry a firearm while on duty. (Aa001; Aa043). In April 2022, Appellant's Police Director and Deputy Chief issued an order in violation of state law and the Attorney General's memorandum, stating that officers were prohibited from using cannabis on or off-duty because it was allegedly unlawful under federal law for cannabis users to possess, carry or use firearms. (Aa001-002). On September 20, 2022, Mansour was randomly selected and submitted to a random urine sample for drug testing. (Aa002).

On January 9, 2023, Mansour was served a Preliminary Notice of Disciplinary Action which charged her with insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause by ingesting cannabis prior to and after September 20, 2022, regularly using cannabis off-duty, and violating JCPD drug policy due to the presence of cannabinoid metabolites, specifically THC in her system. (Aa080-081). An Amended Final Notice of Disciplinary Action was issued on March 2, 2023, sustaining the charges and effectuating Mansour's removal. (Aa091-092). There were no allegations of on-duty cannabis use or impairment by Mansour, nor did the Appellant allege that the Mansour used unregulated cannabis. (Aa081; Aa088; Aa 091-092). In fact, Mansour told Internal Affairs that she relied on the Attorney General's Memorandum and the CREAMM Act in using regulated cannabis off-duty. (Aa176).

C. The Unlawful Termination of Officer Omar Polanco.

Polanco is a municipal police officer employed by Appellant and its police officers are required to carry a firearm while on duty. (Aa237; Aa256). In April 2022, Appellant's Police Director and Deputy Chief issued an order in violation of state law and the Attorney General's memorandum, stating that officers were prohibited from using cannabis on or off-duty because it was allegedly unlawful under federal law for cannabis users to possess, carry or use firearms. (Aa218). On

September 20, 2022, Polanco was randomly selected and submitted to a random urine sample for drug testing. (Aa252).

On January 9, 2023, Polanco was served a Preliminary Notice of Disciplinary Action which charged him with insubordination, inability to perform duties, conduct unbecoming a public employee, neglect of duty and other sufficient cause by ingesting cannabis prior to and after September 20, 2022, regularly using cannabis off-duty, and violating JCPD drug policy due to the presence of cannabinoid metabolites, specifically THC in his system. (Aa236-237). An Amended Final Notice of Disciplinary Action was issued on March 2, 2023, sustaining the charges and effectuating Polanco's removal. (Aa252). There were no allegations of on-duty cannabis use or impairment by Polanco, nor did the Appellant allege that the Polanco used unregulated cannabis. (Aa252; Aa257). In fact, Polanco told Internal Affairs that he relied on the Attorney General's Memorandum and the CREAMM Act in using regulated cannabis off-duty. (Aa349).

STANDARD OF REVIEW

An appellate court has "a limited role" in the review of administrative agency decisions, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980) and may only reverse an order of the Civil Service Commission when it is firmly established that the decision is arbitrary, capricious, or unreasonable or it lacks fair support in the record. See id. In determining if an agency's decision is arbitrary, capricious, or unreasonable, the Appellate Division will consider: (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. In re Carter, 191 N.J. 474, 482-83 (2007) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)). Courts "may not substitute [its] own judgment for the agency's even though [it] might have reached a different result." Id.

LEGAL ARGUMENT

THERE IS NO FEDERAL PREEMPTION & APPELLANT HAS FAILED TO ESTABLISH THAT THE CIVIL SERVICE COMMISSION'S ORDERS WERE CONTRARY TO LAW OR WERE ARBITRARY,CAPRICIOUS OR UNREASONABLE.

The elements of federal preemption were recently described in detail by the New Jersey Supreme Court in another cannabis related case in Hager v. M&K Construction, 246 N.J. 1, 26-45 (2021). Under the Supremacy Clause of the United States Constitution, federal law may preempt state law in several circumstances, see generally English v. Gen. Elec. Co., 496 U.S. 72, 78 (1990), which are known as "express preemption" and "implied preemption." Hager, 246 N.J. at 28.

Express preemption "is found when Congress explicitly preempts state law." Matter of Altice USA, Inc., 253 N.J. 406, 417 (2023). If the text of a preemption clause could have more than one plausible reading, "courts ordinarily 'accept the reading that disfavors preemption.'" Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008) (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005)).

"In the alternative, there are two forms of implied preemption: field and conflict." Hager, 246 N.J. at 28. "'Field preemption applies "where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" Id. (quoting In re Reglan Litig., 226 N.J. 315, 328 (2016) (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S.

88, 98 (1992)).

Conflict preemption is when either: (1) "'compliance with both federal and state regulations is a physical impossibility'" or (2) state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Altice, 253 N.J. at 417 (quoting Reglan, 226 N.J. at 329 (citations omitted)). Conflict preemption "requires an actual - rather than hypothetical or speculative - conflict between federal and state law." Hager, 246 N.J. at 29. "'[P]re-emption is not to be lightly presumed.'" Id. (quoting Franklin Tower One, LLC v. N.M., 157 N.J. 602, 615 (1999)). Preemption claims are "'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 . . . tolerate whatever tension there [is] between them.'" Hager, 246 N.J. at 30 (quoting Wyeth v. Levine, 555 U.S. 575 (2009).

In the instant matter, there is no conflict preemption between the Federal Gun Control Act and CREAMM Act for two primary reasons. The first reason is that 18 U.S.C. § 925(a)(1) clearly provides that guns and ammunition "issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof[]" are not subject to the criminal provisions of the Federal Gun Control Act. Thus, there is no threat of criminal liability for Appellant and its employees, and no conflict preemption.

Second, pursuant to 27 C.F.R. § 478.134(a), municipal police officers who purchase their own weapons for their employment are not required to complete a Federal Firearms Transaction Record or Federal Report of Firearms Transactions. Because of this, there is a pathway for New Jersey police officers to obtain and possess (and for police departments to effectively supply) firearms without running afoul of the Federal Gun Control Act. Thus, New Jersey state law does not stand as an obstacle to the federal law's full purposes and objectives. Once again, there is no conflict preemption.

A. There Is No Federal Preemption Because the Law Enforcement Exception Contained in 18 U.S.C. § 925(a)(1) Exempts the Jersey City Police Department from the Prohibitions of the Federal Gun Control Act.

Appellant generally asserts if it provided police officers who use regulated cannabis off-duty weapons and ammunition, it would be in violation of federal law. That is untrue because the Appellant is not subject to the prohibitions of the Federal Gun Control Act. This is an important fact that is fatal to Appellant's case. Specifically, 18 U.S.C. § 925(a)(1) provides that:

> The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), **shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.**

Id. (Emphasis added). Considering the above, Appellant's claim that it is in violation 18 U.S.C. §922(d)(3) or 18 U.S.C. § 922(g)(3) if it provides firearms or ammunitions to municipal police officers who use regulated cannabis off-duty is untrue because firearms and ammunition provided by the Appellant are exempt. There is absolutely no federal preemption.

Indeed, the applicability of Section 925(a)(1) is illustrated in the case of Hyland v. Fukuda, 580 F.2d 977 (9th Cir. 1978). In that matter, Mr. Hyland applied to be an Adult Corrections Officer in the Hawaii prison system, stating on his application that he had been previously convicted of armed robbery and served a three-year prison term. See id., at 978. Mr. Hyland's application was accepted but concerning his right to be employed and to carry a firearm, the State suspended his eligibility for employment pending the opinion of its Attorney General. See id. In upholding the district court on this issue, the Court of Appeals for the Ninth Circuit found that "because of Hyland's prior armed robbery conviction, he falls squarely within the prohibition of section 922(h)(1). The district judge concluded, however, that "18 U.S.C. § 925(a)(1) would except Hyland from section 922(h)(1)'s proscription." Id., at 979. The Appeals Court further found that that "[i]t is undisputed that any firearm Hyland might be permitted to carry in the position he seeks would be owned by, and used exclusively for, the state. We agree with the district judge that the plain terms of section 925(a)(1) remove firearms owned by the

state and used exclusively for its purposes from the limitations of section 922." Id.

Likewise, in the instant case, Appellant argues that it and its employees would be in violation of the Federal Gun Control Act and subject to arrest if it provided its municipal police officers with ammunition or firearms given the knowledge that such officers are users of regulated cannabis off-duty. However, Section 925(a)(1) plainly and unambiguously states that firearms and ammunition issued by the political subdivision of the State, such as Appellant, and used exclusively for its purposes are exempt from the limitations of Section 922. Because of this, there is no federal law violation, no risk of arrest or prosecution, and no conflict preemption.

B. Federal Regulations Do Not Require the Appellant to Violate the Federal Gun Control Act, Nor Do They Impose an Obstacle to Its Purposes.

Regulatory authorities similarly confirm there is no conflict between the CREAMM Act and the Federal Gun Control Act. For example, 27 C.F.R. § 478.141(a) provides that the statute's implementing regulation's prohibitions, including on receipt or possession of firearms or ammunition by an unlawful user of controlled substances, likewise "shall not apply with respect to ... any firearm or ammunition … issued for the use of ... any State or ... political subdivision thereof." Id. In addition, 27 C.F.R. § 478.134(a) provides that "[l]aw enforcement officers purchasing firearms for official use who provide the licensee with a certification on agency letterhead, signed by a person in authority within the agency (other than the

officer purchasing the firearm), stating that the officer will use the firearm in official duties … are not required to complete Form 4473" - the form that otherwise requires a purchaser to indicate whether they are an unlawful user of controlled substances. See id.; see also ATF Form 4473 (rev. Aug. 2023) (Aa363-369).

These authorities underscore that there is no conflict between the Federal Gun Control Act and Section 52(a)(1) of the CREAMM Act as it relates to regulated cannabis. Federal regulations confirm that when a law enforcement officer purchases their "firearm[] for official use," they need not fill out the form that otherwise requires a purchaser to indicate whether they are an unlawful user of controlled substances. Rather, all they need to do is present "certification on agency letterhead, signed by a person in authority within the agency" that the firearm is being obtained for use "in official duties" and that the officer does not have a disqualifying domestic violence conviction. See, e.g., 27 C.F.R. § 478.134; ATF, Federal Firearms Regulations Reference Guide 68 (2014) (https://www.atf.gov/firearms/docs/guide/federal-firearms-regulations-reference-guide-2014-edition-atf-p-53004/download) (last visited May 21, 2025) (noting that dealers may sell firearms and ammunition to law enforcement without requiring completion of Form 4473 if the officer provides a signed statement from an authorized official of the agency stating that the item is for official use); see also ATF Form 4473, supra.

Indeed, the reference in these regulations to domestic violence convictions is particularly telling, given that domestic violence convictions are the one disqualifying attribute about the possessor that Congress expressly singled out as still applying, even where a firearm or ammunition is "issued for the use of" a local government. See 18 U.S.C. § 925(a)(1). In other words, the expert federal agency charged with administering the Federal Gun Control Act, the ATF, makes it clear that police officers may purchase their own service weapons for public use, and that, when they do, they fall within Section 925(a)(1)'s governmental use exception the same as they would if a police department issued the firearms directly.

In its appeal brief, Appellant argues that because it makes their municipal police officers purchase their own service weapons, but it does not provide those officers with an agency certification letter, conflict preemption must exist. This flawed argument does not support or advance its preemption theory, because conflict preemption exists only where state and federal law are so "diametrically opposed" that they "frustrate each others' goals," Elassaad v. Indep. Air, Inc., 613 F.3d 119, 132 (3d Cir. 2010), either where compliance with both "is impossible," or where the state law "stands as an obstacle to" the federal law's "full purposes and objectives…" Klotz v. Celentano Stadtmauer & Walentowicz LLP, 991 F.3d 458, 463 (3d Cir. 2021) (citations omitted).

In other words, conflict preemption must stem from the state and federal statutes themselves, not from a party's own choices. For good reason: the alternative would allow parties such as the Appellant here, to manufacture preemption simply by deciding to throw a wrench into an otherwise harmonious regime. This commonsense rule forecloses Appellant's arguments because they do not dispute that they choose to make their officers purchase their own service firearms and that they choose to withhold agency certification letter.

In short, where federal law provides for two pathways for Appellant's officers to be lawfully armed in their governmental capacities by either providing its municipal police officers with weapons or providing its municipal police officer with an agency certification stating that the weapons being purchased are for official use, see 18 U.S.C. § 925(a)(1); 27 C.F.R. §§ 478.134(a) and 141(a), Appellant cannot claim preemption simply because they have elected not to follow either path.

Accordingly, there is no conflict preemption and the Civil Service Commission's July 24, 2024 Orders should be affirmed.

CONCLUSION

For reasons stated above, respondents Norhan Mansour and Omar Polanco respectfully request the Court to deny Appellant's appeal and affirm the Civil Service Commission's July 24, 2024 Orders.

Respectfully submitted,

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Norhan Mansour and Omar Polanco

Dated: May 21, 2025

IN THE MATTER OF NORHAN MANSOUR, JERSEY CITY POLICE DEPARTMENT IN THE MATTER OF OMAR POLANCO, JERSEY CITY POLICE DEPARTMENT	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003886-23T2 (Consolidated with Appellate Division Docket No. A-003876-23) CIVIL ACTION ON APPEAL FROM: A Final Agency Decision of the New Jersey Civil Service Commission State of New Jersey Office of Administrative Law OAL Docket No. CSR-03569-23 OAL Docket No. CSR-03570-23 Sat Below: Hon. Kimberly A. Moss, A.L.J. Hon. Joann Lasala Candido, A.L.A.J.

BRIEF ON BEHALF OF RESPONDENT CIVIL SERVICE COMMISSION

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PRELIMINARY STATEMENT

In 2021, after voters passed a referendum to amend our State Constitution to permit the use of regulated cannabis, the Legislature passed the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMMA"), N.J.S.A. 24:6I-31 to -56. While CREAMMA allows employers to take adverse employment action against employees who are impaired or intoxicated by cannabis while on the job, it protects employees from adverse employment actions based solely on the presence of cannabis in the employee's system. See N.J.S.A. 24:6I-52(a)(1) ("Section 52(a)(1)"). CREAMMA thus respects both an employee's right to use regulated cannabis while off-duty and the public's interest in drug-free workplaces.

Here, Jersey City Police Officers Norhan Mansour and Omar Polanco were terminated from their employment with the Jersey City Police Department solely because they tested positive for cannabis. The Officers both challenged their terminations before the Civil Service Commission as violating Section 52(a)(1)'s prohibition against terminating employees solely based on the presence of cannabis in the employee's system. The Commission ordered the Officers to be reinstated, and the Department appealed to this court. The Department asks this court to reverse the Commission's decision and hold that the Gun Control Act of 1968, 18 U.S.C. §§ 921-934, preempts Section 52(a)(1)

of CREAMMA under an impossibility-preemption theory because the federal law makes it unlawful to provide firearms and ammunition to users of controlled substances. As a result, the Department argues, complying with Section 52(a)(1)'s prohibition on terminating officers for off-duty cannabis use requires the Department to provide firearms and ammunition to the Officers in violation of the Gun Control Act, 18 U.S.C. § 922. The Department is mistaken.

The Gun Control Act does not preempt CREAMMA because there is no conflict between them and it is not impossible for the Department to comply with both statutes. Although 18 U.S.C. § 922 makes it unlawful to provide firearms and ammunition to users of controlled substances as a general matter, Congress in a different section of the Act lifted nearly all of those restrictions (including restrictions regarding users of controlled substances) where the firearm or ammunition has been "issued for the use of … any State … or political subdivision thereof." 18 U.S.C. § 925(a)(1). The Department concedes (as it must) that Jersey City is a political subdivision of New Jersey, and as a result, that firearms and ammunition "issued for [its] use" fall within that exception. Because of that exception, the Department is wholly capable of complying with both CREAMMA's Section 52(a)(1) and the Gun Control Act, and nothing about its compliance would stand as an obstacle to the Gun Control Act's purposes. There is thus no conflict, and no preemption. This court should affirm.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. New Jersey Legalizes Regulated Cannabis Use Through CREAMMA.

On February 22, 2021, after New Jersey voters passed a referendum amending the State Constitution to legalize regulated cannabis use by adults, the New Jersey Legislature enacted CREAMMA, N.J.S.A. 24:6I-31 to -56, to implement a regulated cannabis market. CREAMMA prohibits employers from taking "any adverse action" against employees "solely due to the presence of cannabinoid metabolites in the employee's bodily fluid." Id. 24:6I-52(a)(1). In other words, an employee may not be fired simply because they used cannabis while off-duty and then tested positive for cannabis at a later date. Ibid. However, CREAMMA does not shield employees from adverse action for being impaired while on the job. So

> an employer may require an employee to undergo a drug test upon reasonable suspicion of an employee's usage of a cannabis item while engaged in the performance of the employee's work responsibilities, or upon finding any observable signs of intoxication related to usage of a cannabis item, or following a work-related accident subject to investigation by the employer."
>
> [Ibid.]

[1] These related sections are combined for the court's convenience.

These provisions balance an employee's right to regulated use of cannabis while off duty and the broader societal interests in ensuring that employees are not under the influence while performing their work-related duties. See ibid.

These employee protections became operative on August 19, 2021, upon adoption by the Cannabis Regulatory Commission's Personal Use Cannabis Rules. See P.L. 2021, c.16, § 87(a)(2); N.J.A.C. 17:30-1.1 to -20.10.

B. The Gun Control Act of 1968.

In general, the Gun Control Act prohibits providing firearms or ammunition to various groups of unlawful possessors. See 18 U.S.C. § 922(d), (g). Those groups include people convicted of felonies, id. § 922(d)(1), (g)(1); people convicted of misdemeanor domestic-violence offenses, id. § 922(d)(9), (g)(9); and, particularly relevant here, people who unlawfully use or are "addicted to any controlled substance," as defined by federal law, id. § 922(d)(3), (g)(3). For this third group, the Act makes it illegal to transfer a firearm or ammunition to someone with "reasonable cause to believe" they are "an unlawful user of or addicted to any controlled substance," id. § 922(d)(3), and correspondingly makes it illegal for anyone who is themselves "an unlawful user of or addicted to any controlled substance" to possess a firearm or ammunition, id. § 922(g)(3).

Importantly, the Gun Control Act distinguishes between guns issued for private use and guns issued for government use: it lifts most of the Act's provisions (subject to certain exceptions, which are inapplicable here) when a firearm or ammunition is "issued for the use of" a government entity.

Specifically, the section provides:

> The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.
>
> [Id. § 925(a)(1).]

So, while Section 922 imposes restrictions on firearms and ammunitions generally, Section 925(a)(1) in turn removes virtually all of those restrictions (including where a possessor/recipient is an illegal user of controlled substances) where the firearms or ammunition are "issued for the use of" a State or one of its municipalities. Ibid. That exception—which is part of a statute that has been amended multiple times since its first enactment in 1968, most recently in 2018, see John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, § 809(e)(3), 132 Stat. 1636, 1842 (2018)—has been cited through the years by numerous courts alike. See, e.g., Clifton v. U.S. Dep't of Justice, 615 F. Supp. 3d 1185, 1190 (E.D. Cal. 2022); Keyes v.

Sessions, 282 F. Supp. 3d 858, 866 (M.D. Pa. 2017); United States v. Mastro, 570 F. Supp. 1388, 1391-92 (E.D. Pa. 1983).

C. The Instant Case.

In April 2022, Appellant, the Jersey City Police Department, issued an order stating that officers were prohibited from using cannabis while on or off duty. (Aa2, 189). On September 20, 2022, the Jersey City Police Department selected Respondents Officer Norhan Mansour and Officer Omar Polanco for random drug testing. (Aa2, 189).[2] Both Mansour and Polanco tested positive for cannabinoids and accordingly were served with preliminary notices of disciplinary action, charging them with violating the Department drug policy, insubordination, inability to perform duties, neglect of duty, and conduct unbecoming an officer and a public employee. (Aa37, 221). Following their departmental hearings, Mansour and Polanco received Amended Final Notices of Disciplinary Action on March 2, 2023, terminating them from their employment with the Department. (Aa96, 252). It is undisputed that neither matter involves any allegations of on-duty intoxication or impairment, or use of unregulated cannabis. (Aa2, 189).

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[2] "Aa" refers to Appellant's Appendix.
"AMb" refers to Appellant's Brief relating to A-3876-23 (Mansour).
"APb" refers to Appellant's Brief relating to A-3886-23 (Polanco).
"Rb" refers to Respondent's Brief.

Mansour and Polanco both appealed their removal to the Civil Service Commission, and the Commission transmitted both matters to the Office of Administrative Law. (Aa18, 201). On Motions for Summary Decision, both Mansour and Polanco argued that their termination violated CREAMMA's prohibition against employers taking adverse employment actions against employees based on off-duty cannabis use. (Aa30-32, 208-16). The Department opposed Summary Decision and filed cross motions arguing that CREAMMA is preempted by the Gun Control Act of 1968, 18 U.S.C. §§ 921-934 (the "Gun Control Act"). (Aa5-6, 192-93). Specifically, the Department argued that 18 U.S.C. § 922(d) and (g) prohibit the receipt and possession of a firearm or ammunition by users of marijuana and that the classification of marijuana as a Schedule I controlled dangerous substance under 21 U.S.C. § 812 is in direct conflict with CREAMMA's prohibition against adverse employment actions involving police officers who test positive for marijuana. Ibid.

On June 21, 2023, Administrative Law Judge ("ALJ") Kimberly Moss issued an Initial Decision in Mansour's appeal, rejecting the Department's preemption arguments, finding that Mansour's removal violated CREAMMA, and ordering Mansour's termination be reversed. (Aa5-11). On August 9, 2023, Administrative Law Assignment Judge Joann Lasala Candido issued an Initial Decision in Polanco's appeal, adopting ALJ Moss's reasoning and analysis in

Mansour and ordering Polanco's termination be reversed. (Aa193-94). Thereafter, the Commission issued Decisions adopting the Findings of Fact and Conclusions of Law in both appeals and ordering that Mansour and Polanco to be reinstated with mitigated back pay, benefits and seniority, and attorney's fees. (Aa14-17, 198-200).

After the decisions were issued, the Department filed with the Commission petitions for reconsideration and requests for a stay of the Final Agency Decisions issued in both matters. (Aa18-22, 201-05). In its request for a stay, the Department argued that the Commission failed to address the Florida District Court decision, Ortiz v. Department of Corrections, 368 So. 3d 33 (Fla. Dist. Ct. App. 2023), and erroneously concluded that there was no conflict between CREAMMA and federal law. (Aa20, 202).

On July 24, 2024, the Commission issued Final Administrative Decisions rejecting the Department's arguments on reconsideration in both the Mansour and Polanco matters. (Aa18-22, 201-05). The Commission rejected the Department's preemption claim, reasoning that Ortiz did not address New Jersey law and held no precedential value. (Aa20-21, 203). The Commission further reasoned that Mansour and Polanco could carry service weapons without violating federal law, noting that Section 925(a)(1) of the Gun Control Act exempts firearms or ammunition "issued for the use of … any State or …

political subdivision thereof," and reasoning that courts have consistently interpreted this provision as applying to firearms or ammunition used by local police departments. Ibid. Accordingly, the Commission reasoned that because the officers' use of firearms and ammunition in their capacities as police officers fit squarely within this exemption, no conflict existed between CREAMMA and the Gun Control Act. Ibid.

On August 9, 2024, the Department filed a Notice of Appeal in both matters. On August 30, 2024, this court denied the Department's Motions for a stay of the Commission's decisions to reinstate Mansour and Polanco. On January 21, 2025, this court granted the Commission's request to consolidate the appeals.

ARGUMENT

POINT I

SECTION 52(a)(1) OF CREAMMA IS NOT PREEMPTED BY THE GUN CONTROL ACT.

An agency's summary decision is a legal decision subject to de novo review. L.A. v. Bd. of Educ. of Trenton, 221 N.J. 192, 204 (2015). The standard for granting summary decision is "substantially the same as that governing a motion under Rule 4:46-2 for summary judgment in civil litigation." Id. at 203-04 (quoting Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996)). Thus, the court must determine

whether the record contains any "genuine issue as to any material fact challenged and that the moving party is entitled to a judgment … as a matter of law." Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 228 (App. Div. 2009) (quoting Rule 4:46-2(c)).

There are no material facts in dispute in this appeal. The Department does not dispute that terminating Mansour and Polanco after the effective date of CREAMMA based solely on the presence of cannabinoids runs afoul of the Act nor does the Department allege any on-duty or unregulated marijuana use. (Aa2, 96, 189-90, 252). Rather, the Department's sole argument is that the Gun Control Act, 18 U.S.C. § 922, preempts Section 52(a)(1) of CREAMMA because the two conflict. (Amb8-21; Apb8-21).

Federal law can preempt state law in three ways: (1) "when Congress explicitly preempts state law"; (2) "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and (3) "when state law actually conflicts with federal law." In re Altice USA, Inc., 253 N.J. 406, 416 (2023) (citations omitted). The Department relies solely on a theory of conflict preemption, (Amb8-20; Apb9-20), but no such conflict exists.

A. The Department Cannot Overcome The Strong Presumption Against Preemption.

As our Supreme Court has explained, "the preemption analysis begins with the 'assumption that the historic police powers of the State [are] not to be superseded by a federal act unless that was the clear and manifest purpose of Congress.'" In re Altice USA, Inc., 253 N.J. at 416 (cleaned up) (quoting Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008)). Thus, a preemption claim must overcome "a strong presumption against preemption in areas of the law that States have traditionally occupied." Klotz v. Celentano Stadtmauer & Walentowicz LLP, 991 F.3d 458, 463 (3d Cir. 2021) (quoting Kansas v. Garcia, 140 S. Ct. 791, 804 (2020)); see also Bruesewitz v. Wyeth, 561 F.3d 233, 240 (3d Cir. 2009) (noting courts "have a duty to accept the reading [of federal law] that disfavors preemption"). "Consistent with the nature of federalism, … 'pre-emption is not to be lightly presumed.'" Ridgefield Park v. N.Y. Susquehanna & W. Ry. Corp., 163 N.J. 446, 453 (2000) (quoting Franklin Tower One v. N.M., 157 N.J. 602, 615 (1999)). This is because "the historic police powers of the State [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Ibid.

The presumption against preemption applies here because Section 52(a)(1) "protects workers," and thus falls "within New Jersey's police power," even when those protections operate in the context of a separately regulated

federal industry. See Bedoya v. Am. Eagle Express, Inc., 914 F.3d 812, 818 (3d Cir. 2019); see also Lupian v. Joseph Cory Holdings LLC, 905 F.3d 127, 131 (3d Cir. 2018) (noting "[a]reas of traditional state regulation or police power include regulation of 'the employment relationship to protect workers in the State" (citation omitted)). The Department must therefore show "clear and manifest evidence" to overcome the presumption against preemption. See Summit Plaza Assocs. v. Kolta, 462 N.J. Super. 401, 410 (App. Div. 2020) (quoting Pa. Med. Soc'y v. Marconis, 942 F.2d 842, 853 (3d Cir. 1991)). But, as discussed below, the Department cannot meet that burden.[3]

B. The Gun Control Act Does Not Conflict-Preempt Section 52(a)(1) Of CREAMMA.

Even without applying the presumption against preemption, however, the Gun Control Act does not conflict with, and therefore does not preempt, Section 52(a)(1) of CREAMMA. Conflict preemption only "applies where compliance with both federal and state regulations is a physical impossibility … or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In re Altice USA, Inc., 253 N.J. at 417

[3] Although our Supreme Court has acknowledged some uncertainty over whether the presumption against preemption applies in express preemption cases, see In re Altice USA, Inc., 253 N.J. at 416 n.1, it is well settled that the presumption applies in conflict preemption cases, Klotz, 991 F.3d at 463. In any event, as explained infra Section I.B, there is no preemption here even absent the presumption.

(citations omitted). Further, "[c]onflict preemption requires an actual—rather than hypothetical or speculative—conflict between federal and state law." Hager v. M&K Const., 246 N.J. 1, 29 (2021). Whether conflict preemption applies "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000). "The primary source of Congress's intent is the language of the preemptive statute and the statutory framework surrounding it." Ridgefield Park, 163 N.J. at 453-54 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 484-85 (1996)). Here, the Department asserts only impossibility preemption—that compliance with both federal and state law is a physical impossibility because complying with Section 52(a)(1) of CREAMMA necessarily requires violating Sections 922(d)(3) and (g)(3) of the Gun Control Act by requiring that it authorize a user of a Schedule I controlled substance to possess a firearm and ammunition. (AMb13-14; APb13-14). But no conflict preemption exists under either an impossibility or obstacle preemption theory.

1. It Is Not Impossible For The Department To Comply With Both CREAMMA And The Gun Control Act.

The text and structure of the Gun Control Act reveal no grounds for impossibility preemption at all, let alone clear and manifest preemption. The Department's counterarguments are meritless.

i. The Gun Control Act's Governmental-Use Exemption Is Fatal To Any Impossibility Conflict-Preemption Claim.

Because the Gun Control Act expressly exempts from all relevant provisions those firearms and ammunition used by state or local law enforcement agencies, the Department's employment of individuals who engage in off-duty cannabis use does not violate the Gun Control Act's prohibition on the transfer of firearms and ammunition to controlled substance users. The Gun Control Act generally prohibits the transfer of firearms and ammunition to any person whom the transferor has "reasonable cause to believe" is "an unlawful user of or addicted to any controlled substance," as defined in the Controlled Substances Act. 18 U.S.C. § 922(d)(3). It also prohibits anyone who is an "unlawful user of or addicted to any controlled substance" from possessing a firearm. Id. § 922(g)(3).

But Section 925(a)(1) exempts firearms "issued for the use of" a municipal agency from nearly all the Gun Control Act prohibitions, including Sections 922(d)(3) and (g)(3) at issue here. That exemption provides:

> The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of … any State or any department, agency, or political subdivision thereof.
>
> [18 U.S.C. § 925(a)(1) (emphasis added).]

So, while Section 922 limits the possession and provision of firearms and ammunition generally, Section 925(a)(1) excludes from those general restrictions firearms and ammunition used by political subdivisions of a State, such as Jersey City's Police Department.

Section 925(a)(1) expresses Congress's clear intent to exempt state and local law enforcement officers from the restrictions in Sections 922(d)(3) and 922(g)(3). Indeed, courts interpreting this exemption—which has remained a part of the Gun Control Act through multiple amendments since the Gun Control Act was enacted in 1968—consistently hold that "the plain terms of section 925(a)(1)" expressly exclude firearms for the use of the State and its subdivisions from the limitations of Section 922. See Hyland v. Fukuda, 580 F.2d 977, 979 (9th Cir. 1978); see also, e.g., Clifton v. U.S. Dep't of Justice, 615 F. Supp. 3d 1185, 1190 (E.D. Cal. 2022) (acknowledging that Section 925(a)(1) provides an exception "to this firearms ban under federal law for state actors acting in their official capacity"); Keyes v. Sessions, 282 F. Supp. 3d 858, 866 (M.D. Pa. 2017) (noting that Section 925(a)(1) allowed plaintiff to "possess and operate numerous firearms in the course of his position as Master Trooper" for the Pennsylvania State Police, but not "in his personal capacity under federal law"); United States v. Mastro, 570 F. Supp. 1388, 1391-92 (E.D. Pa. 1983) (explaining that Section 925(a)(1) and ATF guidance establish that certain

"sales of firearms to individual police officers are exempt from the requirements of the Act" where the firearm is "used for the official business of the agency" and "the individual officer submit a signed certification from the authorized official for the agency for which he works stating that the firearm is to be used in the officer's official duties"); Fezzey v. Dodge, 653 P.2d 1359, 1364 (Wash. App. Ct. 1982) (interpreting Section 925(a)(1) to apply to a person's "use of a weapon while performing his duties as a custodial officer … on behalf of the County, a political subdivision of the state").

While Section 925(a)(1) applies to nearly all of the Gun Control Act's provisions, its carve-outs also make plain that Congress knew how to limit an exception when it needed to—and declined to do so for Section 922(g)(3) at issue here. See Ingram v. Experian Info. Sols., Inc., 83 F.4th 231, 241 (3d Cir. 2023) ("Courts generally presume 'that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.'" (quoting Intel Corp. Inv. Pol'y Comm. v. Sulyma, 140 S. Ct. 768, 777 (2020))). Section 925(a)(1) expressly provides that the governmental-use exemption applies to "[t]he provisions of this chapter, except for sections 922(d)(9) and (g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply." 18 U.S.C. § 925(a)(1) (emphasis added). Sections 922(d)(9) and (g)(9) prohibit the sale,

transportation, or possession of firearms and ammunition by a person that "has been convicted … of a misdemeanor crime of domestic violence." Id. §§ 922(d)(9), (g)(9). And Section 922(p) prohibits firearms designed to avoid detection via x-ray or metal detectors. Id. § 922(p). Thus, the general prohibitions in Section 922 still apply to individuals with misdemeanor domestic violence convictions and firearms designed to avoid detection via x-ray or metal detectors—even when those firearms and ammunition would be used by an officer as part of their official duties in a law enforcement agency. Id. § 925(a)(1). That Congress chose to carve out individuals with misdemeanor domestic violence convictions and guns designed to avoid detection—but not users of controlled substances—shows "that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." Ingram, 83 F.4th at 241 (quoting United States v. Johnson, 529 U.S. 53, 58 (2000)).

Thus, the plain text and structure of Section 925(a)(1) demonstrate that it is not impossible for the Department to simultaneously comply with CREAMMA's prohibition against terminating employees based solely on testing positive for marijuana and with the Gun Control Act. As numerous courts have consistently recognized, Section 925(a)(1) exempts from the Act's general prohibitions firearms and ammunition used by law enforcement agencies in political subdivisions. See, e.g., United States v. Gonzalez, 528 F.3d 1207,

1214 (9th Cir. 2008) (noting "Section 925(a)(1) allows … armed forces members and law enforcement[] relief from" the prohibitions in Section 922); Hyland, 580 F.2d at 979 (applying governmental-use exception to state corrections officers); Keyes, 282 F. Supp. 3d at 866 (noting dichotomy created by Sections 922 and 925 where a law enforcement officer "may possess and operate numerous firearms" in their capacity as a law enforcement officer "but may not possess or use a firearm in [their] personal capacity under federal law"). The Department's impossibility preemption claim fails on this basis alone.

ii. None Of The Department's Counterarguments Establish That It Cannot Comply With CREAMMA And The Gun Control Act.

The Department's various arguments for why it cannot comply with both CREAMMA and the Gun Control Act do not support conflict preemption.

To start, the Department contends that complying with CREAMMA and failing to remove Mansour and Polanco based on their off-duty cannabis use would require it to violate the Gun Control Act because the Department would be issuing ammunition to a "controlled substance" user for his firearm in contravention of Section 922(d)(3) and would be employing a "controlled substance" user who possesses a firearm or ammunition in contravention of Section 922(g)(3). (AMb14; APb14). And, the Department argues, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") has stated in guidance

that marijuana users are banned from possessing a firearm under the Gun Control Act. (AMb15-16; APb14-16). Those arguments ignore the plain language of Section 925(a)(1), which makes clear that all relevant provisions of the Gun Control Act do not "apply with respect to" the "possession" of "any firearm or ammunition" that is "sold" or "issued for the use of" a "political subdivision." 18 U.S.C. § 925(a)(1). As explained above, courts consistently hold that this provision applies to firearms and ammunition used by local law enforcement agencies, like the Jersey City Police Department. See Gonzalez, 528 F.3d at 1214; Hyland, 580 F.2d at 979; Keyes, 282 F. Supp. 3d at 866.

ATF's general statements also do not concern or address the exemption for law enforcement agencies from most of the Gun Control Act's prohibitions, (contra AMb15-16; APb14-16), and therefore do not establish a conflict here. Indeed, while Form 4473—the form used by licensed firearms dealers to document the sale and transfer of firearms to individuals—contains language mirroring the general prohibitions on the transfer of firearms and ammunition in Section 922, the regulations underlying this form outline the exemption for firearms issued for government use. For instance, 27 C.F.R. § 478.141(a) expressly provides that the Act's prohibitions on receiving and possessing firearms and ammunition "shall not apply with respect to: (a) … possession … of any firearm or ammunition … issued for the use of … any State or …

political subdivision thereof." And 27 C.F.R. § 478.134(a) provides that, where police departments do not provide officers with service weapons directly, those officers "purchasing firearms for official use" with "a certification on agency letterhead" need not complete Form 4473—which otherwise requires a purchaser of firearms to state whether they are a controlled substance user. (See Aa363-69). Accordingly, the general statements on which the Department relies and Form 4473 itself do not apply to firearms and ammunition used by local police departments and therefore do not establish a conflict.

The Department disputes the applicability of the Section 925(a)(1) exemption and its corresponding regulations by arguing that the Department does not provide its officers with firearms and instead its officers "are required to purchase and possess a firearm subject to the requirements of the Gun Control Act," (AMb18-19; APb18-19), but this argument is misguided. As ATF Guidance demonstrates, the exemption in Section 925(a)(1) applies regardless of whether the Department itself provides the firearms or whether the officers purchase their own in connection with their role as police officers. ATF Guidance provides that "[l]aw enforcement officers purchasing firearms for official use … are not required to complete a[n] ATF Form 4473 … or undergo a background check." See, e.g., ATF, May a licensee sell firearms to law enforcement agencies and individual officers? (Apr. 12, 2022),

http://tinyurl.com/y59z36wk. And, as noted, ATF regulations likewise make clear that "[l]aw enforcement officers purchasing firearms for official use who provide the licensee with a certification on agency letterhead, signed by a person in authority within the agency … are not required to complete Form 4473." 27 C.F.R. § 478.134(a). Thus, even law enforcement officers who purchase their own service weapons are exempt from all relevant provisions of the Gun Control Act under the exemption in Section 925(a)(1) because their "possession" of a "firearm or ammunition" is one that is "sold" or "issued for the use of … any State" or its "political subdivision." 18 U.S.C. § 925(a)(1) (emphases added).

The Department also fails to diminish the import of this clear rule by claiming the Department "has not provided its officers with" the certification required by 27 C.F.R. § 478.134(a) "or issued officers with their service firearms," and instead, "officers are required to purchase and possess a firearm subject to the requirements of the Gun Control Act," (AMb18-19; APB18-19). But for one, if the Department plays no role in how its officers obtain their firearms, (AMb18-19; APB18-19), then it cannot be in violation of Section 922(d)(3) because it has not "dispose[d] of any firearm … to any person" that it has "reasonable cause to believe … is an unlawful user of" a "controlled substance" in violation of Section 922(d)(3). 18 U.S.C. § 922(d)(3). In any event, Section 925(a)(1) does not distinguish between firearms and ammunition

provided by the Department and those acquired by police officers for their use as law enforcement officers. Rather, Section 925(a)(1) broadly excludes from the prohibitions of Section 922 "possession … of any firearm or ammunition … sold … or issued for the use of … any State … or political subdivision thereof." (emphases added). Any firearms or ammunition for use here would be sold or issued to the individual solely for the benefit of the Department, which is a subdivision of the State. (See AMb2-3, 14; APb2-3, 14). And as for Section 922(g)(3), even if the governmental-use exemption did not apply and the officers were violating that provision by "possessing" a "firearm or ammunition" as a "controlled substance" user, that does not cause the Department to violate that provision because it is not a violation of the Section 922(g)(3) to employ such a controlled substance user. Thus, under either scenario, possession of a firearm by Mansour and Polanco for governmental use does not violate federal law.[4]

Furthermore, even if the Department's decision to require officers to obtain their own service weapons without issuing them a certification under 27 C.F.R. § 478.134(a) did somehow cause the Department to violate the Gun Control Act, that violation would stem from an unnecessary choice by the

[4] Although it claims that officers must obtain their own service weapons, the Department concedes that it does provide its officers ammunition "multiple times annually." (AMb4; APb4). But that provision of ammunition falls squarely within Section 925(a)(1)'s exemption for ammunition … issued for the use of … any State … or political subdivision thereof." 18 U.S.C. § 925(a)(1).

Department itself—not the impossibility of complying with the Gun Control Act. Put another way, the Department may not manufacture conflict preemption through its choice to require officers to obtain their own service weapons and to simultaneously withhold the certification required under 27 C.F.R. § 478.134(a). See Hager, 246 N.J. at 29 (requiring "an actual—rather than hypothetical or speculative—conflict between state and federal law"). Rather, an impossibility theory of conflict preemption exists when "it is impossible for [an entity] to comply with both state and federal requirements." See id. (emphasis added). But federal law allows the Department's officers to be lawfully armed in their governmental capacities through the Department providing its officers service weapons, see 18 U.S.C. § 925(a)(1); 27 C.F.R. § 478.141(a), or providing its officers with the certification required under 27 C.F.R. § 478.134(a). The Department's choice not to follow either path therefore does not establish that it was impossible for the Department to comply with the Gun Control Act and therefore cannot create a conflict where none exists.[5] See In re Reglan Litig.,

[5] To the extent the Department is implying that any alleged violation of Section 922(g)(3) by the officers would be imputed to it for purposes of preemption, the Department lacks standing to raise such a claim. See, e.g., In re D'Aconti, 316 N.J. Super. 1, 12-13 (App. Div. 1998) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). If the officers purchased their own service weapons from third-party sellers, then it would be the officers—and not the Department—violating Section 922(g)(3). Thus, even if the governmental-use exception did not apply, the Department cannot show any injury in fact, let alone injury

226 N.J. 315, 336 (2016) (holding defendants' choice not to conform their generic drug labels to brand-name drug labels as required by the FDCA did not establish that it was "impossible to comply with both federal and state law").

The Department's suggestion that the Commission's decision here would vest police chiefs "with the sole discretion to allow their friends or relatives who are police officers to use Schedule 1 controlled substances while possessing a firearm, including while on duty," (AMb19), also represents a misunderstanding of both the employee protections in Section 52(a)(1) of CREAMMA and the governmental-use exception in Section 925(a)(1). Nothing in Section 52(a)(1) of CREAMMA prevents the City from disciplining officers whom the Department reasonably suspects of being impaired on the job. Rather, Section 52(a)(1) expressly permits employers to drug test employees "upon reasonable suspicion" of employees' on-duty use, "or upon finding any observable signs of intoxication," "or following a work-related accident subject to investigation." Moreover, the governmental-use exemption in Section 925(a)(1) does not "allow" officers to use cannabis—it simply allows officers who use cannabis to possess firearms and ammunition "issued for" governmental use. 18 U.S.C.

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traceable to CREAMMA. See ibid.; see also State v. Erhman, 469 N.J. Super. 1, 31-32 (App. Div. 2021) (declining to address claims by an individual relating to a conviction of an LLC).

§ 925(a)(1). Neither CREAMMA nor the governmental-use exemption authorizes on-duty intoxication.

Finally, the Department's continued reliance on Ortiz v. Department of Corrections, 368 So.3d 33 (Fla. Dist. Ct. App. 2023), is misplaced. (AMb16-17; APb16-17). In Ortiz, a Florida corrections officer challenged his termination after he tested positive for marijuana, arguing that he had a constitutional right to use medicinal marijuana when he was not working. 368 So.3d at 34. The court upheld the officer's termination, reasoning that under Florida law, all correctional officers must "possess good moral character," meaning "a correctional officer cannot engage in any activity that could give rise to a felony conviction even if he is never charged with the offense." Ibid. (citing Fla. Admin. Code R. 11B-27.0011(4)(a)). And "[b]ecause marijuana may not be validly prescribed under federal law, mere possession of marijuana is a felony under federal law." Id. at 35. The court held that the officer was "violating his requirement to maintain good moral character, which is required to keep his correctional officer certification," and so his termination was lawful. Ibid.

Ortiz has no bearing on this case. The correctional officer's termination was upheld because his off-duty marijuana use violated Florida law's requirement that officers maintain good moral character. Although the court mentioned the Gun Control Act's prohibition on possession of a firearm by

control substance users, no party raised any preemption claim nor was the exemption under Section 925(a)(1) addressed. Moreover, the lawfulness of the officer's termination did not hinge on the application of the Gun Control Act and instead was justified solely under Florida law. Accordingly, Ortiz is neither relevant to nor supportive of the Department's preemption claim here. None of the Department's counterarguments establish that it is impossible for it to comply with both CREAMMA and the Gun Control Act to establish a conflict preemption claim.

2. Section 52(a)(1) Of CREAMMA Presents No Obstacle To The Gun Control Act's Objectives.

Although the Department does not raise obstacle preemption, that claim would likewise fail. Obstacle preemption requires a showing that, "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, 530 U.S. at 372-73 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Whether such an obstacle exists "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." Id.

The plain language of the Gun Control Act as a whole, including the governmental-use exception, evinces a clear intent: Congress intended to prohibit users of controlled substances from possessing or receiving firearms,

18 U.S.C. § 922, but to lift most of the Act's prohibitions—including the prohibitions in Sections 922(d)(3) and (g)(3)—for police officers and other government agents who receive and possess weapons to engage in their government duties, id. § 925(a)(1). CREAMMA's prohibition on terminating police officers—who fall squarely within the exemption under Section 925(a)(1)—solely based on their off-duty cannabis use in no way frustrates this purpose.

* * *

Because the Department has failed to establish any actual conflict between the Gun Control Act and CREAMMA, the Commission's final agency decisions should be affirmed.

CONCLUSION

The Commission's final agency decisions should be affirmed.

Respectfully submitted,
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IN THE MATTER OF NORHAN MANSOUR, JERSEY CITY POLICE DEPARTMENT IN THE MATTER OF OMAR POLANCO, JERSEY CITY POLICE DEPARTMENT	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003876-23 (Consolidated with In the Matter of Omar Polanco, Jersey City Police Department, A-003886-23) ADMINISTRATIVE APPEAL ON APPEAL FROM: NEW JERSEY CIVIL SERVICE COMMISSION DOCKET NO.: CSC Docket No. 2024-484 SAT BELOW: NEW JERSEY CIVIL SERVICE COMMISSION

REPLY BRIEF OF APPELLANT JERSEY CITY POLICE DEPARTMENT

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PRELIMINARY STATEMENT

Respondents Norhan Mansour, Omar Polanco, and the Civil Service Commission (collectively referred to herein as "Respondents") assert that the Federal Gun Control Act of 1968 does not preempt CREAMMA, relying exclusively on the application of the exemption under 18 U.S.C. 925(a)(1) – a position that is both legally untenable and factually unsupported. This is not a case involving firearms owned by the state and used exclusively for its purposes. Jersey City did not provide Mansour or Polanco with the duty firearm that they must possess. Nor is there any record evidence suggesting that Mansour or Polanco were provided with a certification on police agency letterhead that would be required to exempt them from the Gun Control Act pursuant to 27 C.F.R. § 478.134(a).

Instead, Mansour and Polanco were required to purchase and possess a firearm subject to the requirements of the Gun Control Act, requirements that they cannot satisfy because they are users of a Schedule I substance. Jersey City cannot comply with both CREAMMA and the Gun Control Act because the City would be forced to be complicit in allowing Mansour and Polanco to violate federal law by returning to work in a position where they are required to possess their personally owned and illegal duty firearm, and because the City would be required to violate federal law by issuing ammunition for said illegal firearm in order for them to perform the necessary duties of a police officer.

The Gun Control Act conflicts with CREAMMA because Jersey City cannot comply with both statutes, and CREAMMA obstructs Congress's express purpose in enacting the Gun Control Act to keep firearms out of the hands of presumptively risky people, which includes marijuana users such as Mansour and Polanco. Because federal law preempts CREAMMA to the extent it conflicts with federal law, the City did not violate CREAMMA by removing Mansour and Polanco from their employment due to their inability to perform the essential functions of their position pursuant to the Gun Control Act. Therefore, the Commission's decisions reinstating Mansour and Polanco should be reversed.

LEGAL ARGUMENT

I. The Federal Gun Control Act Preempts CREAMMA Because Jersey City Cannot Comply With Both CREAMMA and The Federal Gun Control Act

Conflict preemption occurs where there is a conflict between a state law and a federal law. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000). When there is a conflict, "[c]onflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Farina v. Nokia Inc., 625 F.3d 97, 115 (3d Cir. 2010) (quoting Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) (internal quotation marks omitted)); see also Crosby, 530 U.S. at

372 (preemption will be found "where it is impossible for a private party to comply with both state and federal law"); Fed. Law Enforcement Ass'n v. Grewal, No. 20-05762, 2022 WL 2236351, *15 (D.N.J. June 21, 2022) (holding that federal law preempted New Jersey state law which required retired law enforcement officers to apply for permits to carry concealed weapons because New Jersey law "frustrate[d] 'the full purposes and objectives of Congress'" in passing the federal legislation).

Here, Jersey City cannot comply with both the Federal Gun Control Act and CREAMMA. Under 18 U.S.C. 922(d) of the Gun Control Act:

> [i]t shall be **unlawful for any person to** sell or otherwise **dispose of any firearm or ammunition to any** person knowing or having reasonable cause to believe that such person, including as a juvenile— . . .
>
> > (3) is an **unlawful user of or addicted to any controlled substance** (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))[.]

(emphasis added). Additionally, under 18 U.S.C. 922(g):

> [i]t shall be **unlawful for** any person—
>
> > (3) who is **an unlawful user** of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . .
>
> to ship or transport in interstate or foreign commerce, or **possess** in or affecting commerce, **any firearm or ammunition**; or to **receive any firearm or ammunition** which has been shipped or transported in interstate or foreign commerce.

(emphasis added). Respondents concede that marijuana/cannabis was *and remains* a Schedule I substances under the Controlled Substances Act. As set forth above in 18 U.S.C. 922(d), (g), the prohibition on marijuana users possessing or receiving firearms or ammunition under Federal law is clear, and there is no dispute that such prohibition furthers the express Congressional intent of 18 U.S.C. 922 to "keep firearms out of the hands of presumptively risky people." Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n. 6 (1983).

While CREAMMA provides that "an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under [CREMMA]," CREAMMA fails to address the impact of legalizing cannabis on employers who employ individuals who are required to possess and/or receive firearms in order to fulfill their job duties. That is, here, Mansour and Polanco are required to possess firearms and receive ammunition to fulfill their duties as police officers. However, since they are unlawful users of a controlled substance, they are prohibited from receiving or possessing firearms or ammunition – which is an essential function of their position as police officers.

By failing to remove Mansour and Polanco, undisputed users of a controlled substance in disregard of federal law, not only would the City have been complicit in allowing them to violate federal law by returning to work in a position where they

are required to possess their personally owned duty firearm and receive ammunition in violation federal law, but the City would also have been required to provide them with ammunition necessary to perform their jobs while utilizing firearms that they cannot legally possess. In other words, by failing to remove Mansour and Polanco, Jersey City would be employing "user[s] of a substance" who must possess their personally owned firearm and receive ammunition in direct contravention of 18 U.S.C. 922(g), and Jersey City would be required to issue ammunition for their personally owned and illegal duty firearm in violation of 18 U.S.C. 922(d), thereby subjecting the City to penalties and prosecution by the Federal Government under 18 U.S.C. 924. Stated simply, Jersey City cannot comply with both CREAMMA and the Gun Control Act. Accordingly, CREAMMA conflicts with the Gun Control Act.

Furthermore, as it relates to the enforcement of the Gun Control Act's prohibition against unlawful use of marijuana in light of recent changes in state laws protecting marijuana use, such as CREAMMA, the U.S. Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") has made clear as recent as May 30, 2023, that "**regardless of the recent changes in [State] law related to the legalization of marijuana, an individual who is a current user of marijuana is still federally defined as an "unlawful user" of a controlled substance and therefore is prohibited from shipping, transporting, receiving, or possessing firearms or ammunition.**" (Aa361) (emphasis added); see also

(Aa360) (similarly stating "any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition [. . .] and you may not transfer firearms or ammunition to them"); (Aa64) (consisting of ATF's Firearms Transaction Record, Form 4473, which explains that "[t]he use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside" and that "a person who answers 'yes' to any of the questions 21.b. through 21.k. [regarding drug use] is prohibited from receiving or possessing a firearm").

Based on the recent guidance from the ATF, there should be no question that the Gun Control Act preempts state laws protecting marijuana use when such state laws conflict with or serve as a substantial obstacle to Congress's prohibition on unlawful users of a controlled substance from receiving or possessing firearms or ammunition. Furthermore, CREAMMA (specifically N.J.S.A. 24:6I-52(a)(1)'s prohibition on adverse employment action by a municipal police department against a police officer who is an unlawful user of any controlled substance simultaneously required to possess and/or receive a firearm or ammunition as part of his or her job duties) serves as a substantial obstacle to Congress' intent of keeping firearms out

of the hands of presumptively risky persons who choose to use controlled substances.

Since there is an obvious conflict[1] between CREAMMA and the Gun Control Act due to Jersey City's inability to comply with both statutes, CREAMMA is preempted by the Gun Control Act. Therefore, the Commission's decisions reinstating Mansour and Polanco should be reversed because they were based on the erroneous finding that "nothing in CREAMMA requires anyone to violate federal law" and that federal law does not preempt CREAMMA. (Aa15).

II. Section 925(a)(1)'s Exemption Does Not Apply In This Matter And The Federal Gun Control Act Preempts CREAMMA.

Knowing that CREAMMA clearly conflicts with U.S.C. 922(d) and (g), Respondents rely entirely on the asserted application of the exemption under 18 U.S.C. 925(a)(1) in their Oppositions to support their position that the Gun Control Act does not preempt CREAMMA.[2] However, Respondents' reliance on this Section

[1] Administrative Law Judge Kimberly Moss explicitly recognized in her Initial Decision for the Mansour matter that there "is an obvious conflict between the CREAMM Act, which legalizes the personal use of marijuana an unlawful controlled substance, and federal law[.]" See (Aa15). However, she and the Commission erred in concluding that, despite this obvious conflict, "nothing in the CREAMM Act requires anyone to violate federal law[.]" Ibid.

[2] Despite this heavy reliance on 18 U.S.C. 925(a)(1) by Respondents, it is notable that neither the Initial or Final Agency Decisions for both the Mansour and Polanco matters cited 18 U.S.C. 925(a)(1) as a justification for finding that CREAMMA is not preempted by the Gun Control Act.

925(a)'s exemption is misplaced as the application of such exemption is legally flawed and based on factual assertions not supported by the record evidence.

A. Section 925(a)(1)'s Exemption To Certain Provisions Of The Gun Control Act Is Inapplicable Because Jersey City Police Officers Are Not Issued Their Standard Duty Firearm For The Use Of The City And Instead Must Privately Purchase A Firearm Subject To Federal Licensing.

18 U.S.C. 925(a)(1) provides in relevant part that certain provisions of the Gun Control Act applicable to this matter:

> shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued **for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof**.

(emphasis added); see also 27 C.F.R. § 478.141(a).

But neither Federal law nor any State law requires that law enforcement agencies issue their officers with their firearms. The rules implementing this statute provide that

> [l]aw enforcement officers purchasing firearms for official use **who provide the licensee with a certification on agency letterhead**, signed by a person in authority within the agency (other than the officer purchasing the firearm), stating that the officer will use the firearm in official duties and that a records check reveals that the purchasing officer has no convictions for misdemeanor crimes of domestic violence are not required to complete Form 4473 or Form 5300.35.

27 C.F.R. § 478.134(a) (emphasis added). There are **no facts** in the record suggesting that the Jersey City Police Department provided Mansour or Polanco, or any other police officer, with the duty firearm that they must possess. There are also **no facts** in the record suggesting that the City ever provided any of its officers with a certification on police agency letterhead for the purchase of their duty firearm *as would be required* to exempt Mansour and Polanco from the Gun Control Act.

To the contrary, Jersey City does not and has not provided its officers with such a certification or issued service firearms to its officers. Instead, such officers are required to personally purchase and possess a firearm subject to the requirements of the Gun Control Act. Notably, neither Mansour and Polanco argued that 18 U.S.C. 925(a)(1)'s exemption applied in their discipline appeals, presumably because they knew such exemption did not apply as they were required to personally purchase their duty firearm and were not provided with a certification for the purchase of their firearm.

Importantly, this is not a case involving "**firearms owned by the state, and used exclusively for, the state**" as suggested by Respondents in their Oppositions. See Mansour and Polanco Opposition at 14-15 (quoting Hyland v. Fukuda, F.2d 977, 979 (9th Cir. 1978)); see also Civil Service Commission's Opposition at 15, 18, 19 (citing Hyland). Instead, this case involves Mansour's and Polanco's personally owned firearms that may be used for their own purposes, *without* any record

evidence demonstrating that such firearms were purchased or are possessed with the certification required to exempt Mansour and Polanco from the Gun Control Act's requirements. Such a distinction is legally significant. See e.g., United States v. Kozerski, 518 F. Supp. 1082, 1086, n.13 (D.N.H. 1981), aff'd, 740 F.2d 952 (1st Cir. 1984) (declining to apply U.S.C. 925(a)(1)'s exemption for a police officer's violation of federal firearms laws on the basis that the record evidence demonstrated that **unlike in Hyland**, Kozerski purchased his own firearm and, since officers owned their own weapons, their duty firearms could be used for private purposes such as target practice; further stating that **"[t]his marked distinction from the factual situation in Hyland v. Fukuda is sufficient to make that decision inapplicable"**). None of the cases cited by Respondents hold that 925(a)(1)'s exemption hold that such exemption would apply for a police officer's *personally owned* firearm that were purchased or possessed *without the certification* needed to exempt such officers from the Gun Control Act. In fact, the only authority that appears to address this precise issue found that 925(a)(1)'s exemption did not apply. Kozerski, 518 F. Supp. 1082.

Therefore, there is no basis to conclude that 925(a)(1)'s exemption would apply in this case because there is no record evidence suggesting that Mansour or Polanco's duty firearms were owned by the City and used exclusively for the state, or that such firearms were legally purchased with a certificate pursuant to 27 C.F.R.

§ 478.134(a). There is no such record evidence because the firearms at issue were and are not owned by the City. The firearms were and are not possessed with the certificate pursuant to 27 C.F.R. § 478.134(a). That is why Respondents did not make such an argument in their motions for summary decision. (See Aa1-13; Aa188-197.) Instead, this assertion was raised for the first time by the Commission nearly a year after the records closed; it did so not even in its Final Decision, but instead in response to Jersey City's motions for reconsideration without any factual basis or opportunity for Jersey City to address the unsupported factual premise. (See Aa20.)

Should Jersey City be required to reinstate Mansour and Polanco, the City will essentially be mandated to employ persons it knows to violate Federal law by being regular users of a controlled substance despite serving in positions which require them to possess the firearm that they illegally purchased, privately own, and must receive ammunition for. The City would also be mandated to provide ammunition to Mansour and Polanco for their illegal firearm in contravention of 18 U.S.C. 922(d). Consequently, the Commission's Final Decisions reinstating Mansour and Polanco are irreconcilable with federal law because the City (and Mansour and Polanco) cannot comply with both laws simultaneously.

CONCLUSION

Therefore, for the reasons set forth herein, the City submits that this Court should reverse the Civil Service Commission's Final Decisions reinstating Mansour and Polanco as police officers, as the Commission erred in determining that federal law does not preempt CREAMMA and further erred in concluding that nothing in CREAMMA would require Jersey City to violate federal law.

Respectfully submitted,

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