STATE OF MICHIGAN
APPEAL FROM THE MICHIGAN COURT OF APPEALS
SUPREME COURT

JOHN TER BEEK
Plaintiff-Appellee,

v.

SC: 145816
COA: 306240
Kent CC: 10-011515-CZ

CITY OF WYOMING
Defendant-Appellant.

AMICUS CURIAE BRIEF OF CANNABIS ATTORNEYS OF MID-MICHIGAN

By: Denise Pollicella (P55629)
Cannabis Attorneys of Mid-Michigan
804 E. Grand River Ave.
Howell, MI 48843
(517) 546-1181

Dated: September 24, 2013

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

Statutes

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE

The **Cannabis Attorneys of Mid-Michigan** is a Michigan law firm established in 2007 that specializes in consulting individuals and businesses involved in the medical marihuana community. Cannabis Attorneys of Mid-Michigan also works to improve the Michigan Medical Marihuana act in order to clarify the law for patients, caregivers, law enforcement, and communities. Towards that end, Cannabis Attorneys of Mid-Michigan speaks at seminars, writes articles, and works to create cogent legislation that protects patients and caregivers.

STATEMENT OF JURISDICTION

The Amicus Curiae accept the statement of jurisdiction presented at Appellee's Brief at 1.

STATEMENT OF QUESTIONS PRESENTED

1. IS CITY OF WYOMING'S ZONING ORDINANCE, WHICH PROHIBITS ANY USE THAT IS CONTRARY TO FEDERAL LAW, PREEMPTED BY THE MICHIGAN MEDICAL MARIHUANA ACT (MMMA)?

   Trial courts answered: Did not address.
   Court of Appeals answered: Yes.
   Amicus Curiae answers: Yes.

2. IS THE MMMA PREEMPTED BY THE FEDERAL CONTROLLED SUBSTANCES ACT?
   Trial courts answered: Yes.
   Court of Appeals answered: No.
   Amicus Curiae answers:

STATEMENT OF FACTS

Amicus Curiae accepts the statement of background and facts presented in Appellee's Brief at 6-9.

ARGUMENT

I. THE CITY OF WYOMING'S ORDINANCE IS PREEMPTED BY THE MMMA

STANDARD OF REVIEW

The question of statutory interpretation is a question that a court will review *de novo*. *Mich Coalition for Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 405; 662 NW2d 864 (2003). The applicability of a statute is also a question of law that is reviewed de novo. *Adams Outdoor Adver, Inc v City of Holland*, 463 Mich 675, 681, 625 NW2d 377 (2001).

Argument

a. THE COURT OF APPEALS WAS CORRECT WHEN IT DETERMINED THAT THE CITY'S ORDINANCE IS PREEMPTED BY THE MMMA AS MUNICIPALITIES MUST COMPORT WITH STATE STATUTES

The ordinance at issue is invalid as it conflicts with state law, which is superior to the laws of local governments. Article 7 of the Michigan constitution created municipalities, which includes cities. The Michigan constitution explicitly states that the ordinances of municipalities are subject to the Michigan constitution and state laws. Michigan cons. Art. VII, § 22. Michigan case law has consistently found that a municipality derives its power from the laws of the state in which it is located. *Bivens v City of Grand Rapids*, 443 Mich 391, 397, 505 NW2d 239 (1993); *See also, City of Taylor v Detroit Edison Co*, 475 Mich 109, 115, 715 NW2d 28 (Mich 2006). Thus, an ordinance must be consistent with both the Michigan constitution and state statutes. *Bivens at* 397.

As municipalities derive their power from the state, any ordinances enacted by the city must conform to the laws of the state. *Id.* A municipality, then, has no inherent powers and all of its authority flows from the state. ("[t]he general rule is that these [municipal] corporations

possess and can exercise only such powers as are granted in express words or those necessarily and fairly implied in or incident to powers expressly conferred by the Legislature." *Huron-Clinton Metro Auth v Attorney Gen*, 146 Mich App 79, 82, 379 NW2d 474 (1985)).

One power granted to municipalities is the power to zone areas for specific use. This power to zone is quite expansive, but it is not unlimited and must be exercised fairly. ("A zoning ordinance shall be made with reasonable consideration of the character of each district, its peculiar suitability for particular uses, the conservation of property values and natural resources, and the general and appropriate trend and character of land, building, and population development." MCL 125.3203(1)); *see also Kyser v Kasson Township*, 486 Mich 514, 786 NW2d 543 (2010)). Such exercise of this power is subject to a two prong analysis:

> In determining the validity of an exercise of police power, a two-pronged analysis is applied: (1) whether the object of the ordinance is one for which police power may be properly invoked, and, if so, (2) whether there is a reasonable and substantial relationship between the exercise of the police power invoked and the object to be attained. [*People v Yeo*, 103 Mich App 418, 421, 302 NW2d 883 (1981)]; [*Van Slooten v Larsen*, 86 Mich App 437, 445, 272 NW2d 675 (1978), *aff'd*, 410 Mich 21, 299 NW2d 704 (1980)].

People v McKendrick, 188 Mich App 128, 137, 468 NW2d 903 (1991).

The question in this controversy is whether such an ordinance is reasonable under the circumstances. "The generally accepted rule is that a presumption prevails in favor of the reasonableness and validity in all particulars of a municipal ordinance unless the contrary is shown by competent evidence, or appears on the face of the enactment." *Brown v Shelby Township*, 360 Mich 299, 309, 103 NW2d 612 (1960). The party challenging the ordinance must show that it is arbitrary and unreasonable. *Michigan Towing Ass'n, Inc v Detroit*, 370 Mich 440, 455, 122 NW2d 709 (1963); *see also Austin v Older*, 283 Mich 667, 674, 278 NW 727, 730 (1938). The ordinance at issue is arbitrary

and overbroad because it not only seeks to punish those granted protections under state law, but seeks to ban conduct that is otherwise protected and tacitly sanctioned by the state through the Michigan Medical Marihuana Program.

The power granted to municipalities under the Michigan Zoning Enabling Act are no greater than any other power given to a municipality. *See* Dingeman Advertising, Inc v Saginaw Township, 92 Mich App 735; 285 NW2d 440 (1979). As such, municipalities cannot use this power to circumvent state statutes. The city of Wyoming cannot use its zoning power to override the provisions and protections of the MMMA. The zoning power is not a power that would allow municipalities to deem its own powers as supreme over the state's. Such action would run contrary to Michigan's constitutional grant of power to municipalities.

As a city has no inherent powers of its own and if the state has not delegated powers in a specific area to the city, the city must yield to the state. *Id.* If a city's ordinances conflict with the laws of the state, the state law preempts the ordinance. Michigan courts have stated that "[i]n general, the powers that cities possess fall into three categories: those granted in express words; those necessarily or fairly implied in or incident to the powers expressly granted; and those essential to the accomplishment of the declared objects and purposes of the municipal corporation." *Inch Memorials v Pontiac*, 93 Mich App 532, 535, 286 NW2d 903 (1979).

The city of Wyoming's ordinance works to overturn a valid voter initiative. The ordinance is a blanket statement prohibiting all uses not allowed under federal law. This ordinance, then, works to invalidate any state law that conflicts federal law, regardless of the validity of the state statute. The city oversteps its powers granted under the Michigan constitution by disregarding state law in favor of federal law.

The Michigan Zoning Enabling Act allows municipalities to regulate the use of land , not to regulate the conduct of citizens of the state. Allowing a city to criminalize personal conduct through land use regulation -- conduct that is otherwise protected by state statute – would open the floodgates for the state's nearly 2,000 municipalities to criminalize any behavior deemed unpalatable to their respective small group of local officials. The precedent set by a finding in favor of the City in this matter would be nothing short of devastating to the structure of the state, and would, for all practical purposes, nullify the MCLA. A citizen of Michigan, in driving from Iron River to Monroe, could unwittingly violate numerous local ordinances simply by crossing municipal boundaries. The precedent and authority at issue here goes far beyond the current, albeit polarizing, topic of medical marihuana.

b. THE CITY OF WYOMING'S ORDINANCE IS PREEMPTED BY THE MMMA AS THERE IS DIRECT CONFLICT PREEMPTION

A city's ordinance can be preempted by state statute either by express, implied, or conflict preemption[1]. Express preemption is where a state statute explicitly indicates that the state statute will preempt the ordinance. *Noey v Saginaw*, 271 Mich 595, 261 NW 88 (1935).

---

[1] Michigan courts have "set forth guidelines for determining whether a statute has preempted municipal ordinances by *completely occupying the field* of regulation:

First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted. [*Noey v Saginaw*, 271 Mich 595, 261 NW 88 (1935)].

Second, pre-emption of a field of regulation may be implied upon an examination of legislative history. [*Walsh*].

Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. [*Grand Haven v Grocer's Co-op Dairy Co*, 330 Mich 694, 702, 48 NW2d 362 (1951)]; [*In re Lane*, 372 P2d 897 (1962)]; [*County Council for Montgomery County v Montgomery Ass'n*, 333 A2d 596 (1975)]. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.

Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Rental Prop Owners Ass'n v City of Grand Rapids*, 455 Mich 246, 257, 566 NW2d 514 (1997).

Implied preemption is when the language of the state statute makes it clear that the ordinance is completely regulating a particular area to the extent that local governments would be unable to regulate it at all. *Grand Haven v Grocer's Co-op Dairy Co*, 330 Mich 694, 702, 48 NW2d 362 (1951).

When state statutes and ordinances completely conflict with one another so that it would be impossible to enforce both laws, this is known as conflict preemption. *McNeil v Charlevoix County*, 275 Mich App 686, 697, 741 NW2d 27 (2007). Conflict preemption can also occur when implementation of the ordinance would frustrate the purpose of the state statute. ("A state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field." *USA Cash #1, Inc v City of Saginaw*, 285 Mich App 262, 267; 776 NW2d 346 (2009)).

"A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." *People v Llewellyn*, 401 Mich 314, 322. 257 NW2d 902 (1977), *cert denied,* 435 US 1008 (1978).

A direct conflict exists between a local regulation and state statute when the local regulation prohibits what the statute permits. *Id.* "For purposes of preemption, a direct conflict exists between a local regulation and a state statute when the local regulation permits what the statute prohibits or prohibits what the statute permits." *McNeil, supra,* citing [*People v Llewellyn*, 401 Mich 314, 322 n4, 257 NW2d 902 (1977)]. An ordinance is not automatically invalidated if there if a conflict, but "[it] depends upon whether the State has occupied the whole field of

prohibitory legislation. ... If such is the case, it is held that a conflict exists." *National Amusement Co v Johnson*, 270 Mich 613, 616, 259 NW 342 (1935). The court in National Amusement explained that the ordinance and statute "must contain either express or implied conditions which are inconsistent and irreconcilable with each other." *Id.*

Many factors are considered when a municipal ordinance and a state statute occupy the same regulatory field. An ordinance may occupy the same field as the statute, and may expand upon the provisions of the state statute, as needed. ("the nature of the regulated subject matter calls for regulation adapted to local conditions," so long as the ordinances do "not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld." *Llewellyn,* 401 Mich at 324–325). Michigan case law, however, does not allow ordinances to outmaneuver state statutes in order to work the statute out of existence in a municipality.

The court in *Rental Prop Owner's Ass'n,* 455 Mich 246 (1997) explained the interplay between local ordinances and state statutes:

> In both [*Detroit v Qualls*, 434 Mich 340, 362, 454 NW2d 374 (1990)] and [*Miller v Fabius Township Bd*, 366 Mich 250, 256–257, 114 NW2d 205 (1962)], we quoted the following passage approvingly from 56 Am Jur 2d, Municipal Corporations, § 374, pp 408–409:
>
> It has been held that in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test *is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits.* Accordingly, it has often been held that a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required, or authorize what the legislature has expressly forbidden.
>
> ***
>
> The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the

> requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. *The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.* Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.

Rental Prop Owner's Ass'n, 455 Mich 246, 261–262 (1997).

Therefore, in the present controversy, as it is clear that as the ordinance is attempting to prohibit what the state statute permits, the ordinance is preempted. The MMMA clearly provides that qualifying patients who comply with the MMMA are afforded protections under Michigan law. ("A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner… for the medical use of marihuana in accordance with this act" MCL 333.26424(4)(a)). The ordinance, however, works to prohibit the medical use of marihuana despite the state statute to the contrary. Michigan case law is clear that an ordinance is preempted where it seeks to prohibit what a state statute permits.

It is clear that the intent of the voters of Michigan agree that qualified patients should not be punished for use of medical marihuana provided certain requirements have been met. As the law shields such citizens, it would be abhorrent to the law and authority of the state to allow municipalities to effectively disallow the use of medicinal marihuana. Permitting such action would effectively allow over 2,000 municipalities to implement incongruous rules and

regulations regarding medical marihuana. The state would be left with a patchwork of ordinances incomprehensible to an ordinary citizen and adverse to the Michigan constitution's intent.

More disturbing is that this precedent would not be limited to medical marihuana, allowing municipalities to contravene state law in an area and on any topic they choose, potentially undermining all manner of personal conduct and freedoms. If the City of Wyoming prevails, municipalities conceivably would be able to regulate or legalize anything not prohibited by federal law. Municipalities would be able to argue that they could zone for activities despite contrary state law so long as the federal laws do not prohibit such conduct. The municipalities do not have such power under the Michigan constitution and finding for the City would run afoul of its provisions.

c. CITIZENS IN COMPLIANCE WITH THE MMMA ARE PROTECTED FROM CIVIL PENALTIES

The city cannot validly enforce its ordinance because it runs afoul of the specific protections of the MMMA. Michigan courts have found that "[t]he purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be an 'effort for the health and welfare of [Michigan] citizens.'" *People v Kolanek*, 491 Mich 382, 393–394, 817 NW2d 528 (2012). In furthering that purpose, the MMMA states that "A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner… for the medical use of marihuana in accordance with this act" MCL 333.26424(4)(a). Therefore, qualifying patients are not subject to a civil penalty if they are compliant with the requirements set forth under the MMMA.

The city of Wyoming's ordinance provides that: "Uses not expressly permitted under this article are prohibited in all districts. Uses that are contrary to federal law, state law or local ordinance are prohibited." Wyoming Ordinance, § 90-66. Federal law essentially prohibits the use of medical marihuana, even for medicinal purposes, under 21 USC 812(c)(10). Therefore, the use of marihuana, even for valid, medical purposes, is prohibited in the city of Wyoming, completely contrary to the provisions of the MMMA.

Violations of Wyoming's city code, including zoning violations, are punishable by "civil sanctions, including, without limitation, fines, damages, expenses and costs," Wyoming Ordinance, 1-27(a), and zoning violations are further subject to injunctive relief pursuant to Michigan's zoning enabling act. MCL 125.3407.

The city of Wyoming's ordinance violates the very letter of the MMMA as it imposes civil penalties on those who use, cultivate, or possess medical marihuana. Allowing the city of Wyoming to penalize residents for lawfully using marihuana would not only run afoul of the MMMA, but would give carte blanche for municipalities to ban any state statute that it finds to be undesirable. Municipalities must not be allowed to overturn the will of the people of the state of Michigan.

CONCLUSION

The city of Wyoming's ordinance must fail for a number of reasons. The city of Wyoming derives its power from the Michigan constitution and Michigan statutes. As the MMMA is a valid, Michigan statute, the city must comply with the law and cannot seek to prohibit what the statute allows. The ordinance is preempted by the MMMA as there is conflict preemption. A medical marihuana patient or caregiver would be unable to comply with the

MMMA and the city of Wyoming's ordinance. Such individuals would be forced to be subject to unlawful fines or unable to use their medication. Lastly, the ordinance is subjecting individuals to penalties, from which the MMMA expressly shields them. The ordinance in question is plainly violative of Michigan law and cannot be upheld.

II. THE MMMA IS NOT PREEMPTED BY THE FEDERAL CONTROLLED SUBSTANCES ACT

STANDARD OF REVIEW

A court reviews questions of whether federal law preempts state law *de novo*. *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010).

a. CONGRESS CANNOT REQUIRE THE STATE OF MICHIGAN TO ENFORCE FEDERAL LAW UNDER THE ANTI-COMMANDEERING RULE

Congress has the power to enact laws that prohibit the use of certain substances, including medicinal marihuana. The Supreme Court has found that this power stems from the Commerce Clause. Gonzales v Raich, 545 US 1 (2005). The Court in *Gonzalez* reasoned that some intrastate activity in the aggregate will have an effect on interstate commerce and thus, such activity can be regulated by Congress. *Id.* Under this authority, Congress has enacted the Controlled Substances Act, which classifies marihuana as a Schedule I drug. 21 USC 801. According to the Drug Enforcement Agency's website, Schedule I drugs "have no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse." *Controlled Substances Schedules,* (Sept 10, 2013, 11:23 A.M.), http://www.deadiversion.usdoj.gov/schedules/#define.

Despite Congress's expansive powers, the Supreme Court of the United States has found that the federal government cannot require a state government to enforce federal regulations. *New York v United States,* 505 US 144 (1992). Thus, even where the authority exists to enact such laws, the federal government has no power to require the states to enforce it. *Id.* ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts . . . ." *Printz v United States*, 521 US 898, 924; 117 S Ct 2365; 138 L Ed 2d 914 (1997)).

The Court in *New York V United States* found that the Tenth Amendment to the United States Constitution prohibits the federal government from "commandeering" states' officials. *New York v United States*, 505 US 144 (1992). The Court clearly stated that the federal government "may not compel the States to enact or administer a federal regulatory program." *Id.* at 188. This important doctrine of anti-commandeering prevents the federal government from interfering with the sovereignty of the states.

This respect for states' rights from commandeering was continued in *Printz v United States*, 521 US 898 (1997), in which the Court found that the federal government could not require states to perform background checks on those who wished to purchase handguns. The purpose of the Tenth Amendment is to preserve state autonomy and resources. Requiring states to enforce federal provisions would contradict the aims of the Constitution and the goals of our Federalist government.

The Supreme Court has found that the power of the states to enforce its own laws and oversee its own people is of great importance to our system of governance. "The independent power of the States also serves as a check on the power of the Federal Government: 'By denying any one government complete jurisdiction over all the concerns of public life, federalism protects

the liberty of the individual from arbitrary power.'" *National Fed'n of Indep Bus v Sebelius*, ___ US ___, 132 S Ct 2566 (2012) *citing Bond v United States*, ___ US ___, 131 S Ct 2355, 2364 (2011).

The dual system of government prevents one government from tyrannical control of the people and their rights. Not only are the rights of the individuals protected by the dual system, but also the powers and authority of the separate governments are protected. The state is protected from the federal government's oppression and vice versa.

The language of the MMMA clearly acknowledges that "[a]lthough federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law." MCL 333.26422(c). Nothing in the language of the MMMA indicates that the state will attempt to prevent the federal government from enforcing the Controlled Substances Act.

Michigan courts have clearly stated that "the MMMA specifically acknowledges that it does not supercede [sic] or alter federal law." *United States v Hicks*, 722 F Supp 2d 829, 833 (ED Mich, 2010). The MMMA merely states that individuals may cultivate, possess, or use medical marihuana for certain medical conditions and not face prosecution or have a valid defense under Michigan law. MCL 333.26427 ("medical use of marihuana is allowed under state law"). The law also recognizes the power of the federal government to enforce its own laws, but also notes that the federal government seldom chooses to exercise this power. The MMMA clearly states

> Data from the Federal Bureau of Investigation Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law.

MCL **333.26422(b).**

There is nothing in the MMMA that seeks to undermine the powers of the federal government to enforce its own laws and nothing to indicate that Michigan will interfere with the exercise of such powers. But, despite the presence of such powers, Michigan cannot be forced to enforce federal regulations. Thus, under the doctrine of anti-commandeering, it is well within the rights of the state of Michigan to allow medicinal marihuana and refuse to enforce federal laws that run contrary to Michigan laws.

b. THE CONTROLLED SUBSTANCES ACT DOES NOT CONFLICT WITH THE MMMA

Where there is conflict between state and federal law, there is a potential for preemption. The Constitution expressly states that the federal laws are the supreme law of the land, this is known as the Supremacy Clause. Constitution Art. VI. cl. 2. This, however, does not mean that when the state law and federal law occupy the same regulatory field that the state law is automatically disregarded.

A state law can be preempted by federal law in one of three ways either express, implied, or conflict preemption[2]. Express preemption is where a federal statute explicitly indicates that the federal law will preempt the state law. Implied preemption is when the language of the federal law makes it clear that the federal law is completely regulating a particular area to the extent that state and local governments would be unable to regulate it at all. When federal and state law

[2] From the language of the Controlled Substances Act, it is clear that field and express preemption are not applicable in the present controversy. The Controlled Substances Act explicitly provides that it will not control against contrary law unless there is an express conflict. (No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together. [21 USC 903.]) Therefore, conflict preemption is the sole issue.

completely conflict with one another so that it would be impossible to enforce both laws, this is known as conflict preemption. Conflict preemption can also occur when implementation of the state law would frustrate the purpose of the federal law. However, even where any of these preemption doctrines apply, does not necessarily mean that the state law is automatically disregarded.

Preemption is not automatically presumed where state and federal law govern the same field. "Congress is strongly presumed not to have preempted state law, so preemption will only be found where Congress has clearly and unequivocally indicated an intent to do so." *Patrick v Shaw,* 275 Mich App 201, 208; 739 NW2d 365 (2007). "Where the text of a preemption clause is open to more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Riegel v Medtronic,* 552 US 312, 334; 128 S Ct 999; 169 **L** Ed 2d 892 (2008).

Where there is a conflict in the reading of the two laws, it must be more than an apparent conflict, the courts must find that the two laws would be impossible to enforce at the same time. An express conflict must be one that is actual and real and "[t]he existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." Rice v Norman 28 Williams Co, 458 US 654, 659; 102 S Ct 3294; 73 L Ed 2d 1042 (1982).

The Controlled Substances Act does not preempt the MMMA because the two laws can be enforced and has been enforced without conflict between one another. As stated above, conflict preemption requires that it would be impossible to enforce both laws. Congress anticipated a dual enforcement system and it has operated well during the last few years. The text of the Controlled Substances Act plainly anticipates an intersection between federal and state law. The language indicates dual systems with differing laws and only where a clear conflict

exists, will the Controlled Substances Act preempt state law[3].

Michigan has recognized in the text of the MMMA that very few marihuana arrests take place under federal law. This distinctly shows that there are no practical and logistical issues with the application of the MMMA and the Controlled Substances Act. Therefore, any conflicts are plainly hypothetical or potential. As there are no practical conflicts between the two laws, the Controlled Substances Act does not preempt the MMMA. The history of enforcement has shown that it would not be impossible to implement both schemes.

c. THE FEDERAL GOVERNMENT RECOGNIZES STATES' AUTONOMY IN REGARDS TO MEDICAL MARIHUANA LAWS

As the federal government has full authority to enact laws prohibiting marihuana, it has a proportionate right to enforce such laws. It is important to reiterate that the federal government alone is required to enforce federal laws. The federal government, however, has recognized the sovereignty of the states. It has repeatedly noted states' rights to enact laws permitting medicinal marihuana despite federal prohibition of the use of marihuana.

The Department of Justice issued a memorandum on October 9, 2009, which address the issue of the conflict between federal law and state laws that allow the use of medical marihuana. The memorandum, known as the Ogden memo, notes that although marihuana is illegal under federal law, those who use marihuana for a valid medical purpose will not be the focus of federal resources. Ogden at 2-3.

On August 29, 2013, the Department of Justice issued another memorandum, known as the "Cole memo," which addressed the interplay between federal law and laws of states that legalized recreational use of marijuana. The Cole memo, similar to the Ogden memo, essentially

[3] "unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." (21 USC 903.)

states that the federal government will not interfere with the recreational marihuana so long as the state adequately enforces its laws. Cole at 2. The memo states that the federal government has very little interest in prosecuting individuals who possess small amounts of marihuana. *Id.* Such use and possession is typically left to the laws and enforcement of state and local officials. *Id.*

It is clear that the federal government recognizes the validity of the laws allowing the use of medical marihuana. It is also clear that the federal government does not find that the federal law preempts states' medical marihuana laws. The Ogden memorandum makes it quite clear that the state medical marihuana laws and the federal laws can coexist. As stated above, the text of the MMMA Therefore, as the federal government recognizes the fact that there is no conflict preemption, it is clear that the city of Wyoming should not be permitted to find such a conflict, either.

CONCLUSION

The Controlled Substances Act does not preempt the MMMA. Under the doctrine of anti-commandeering, the federal government cannot require the individual states to enforce any federal laws. The federal law does not preempt the Michigan law because both schemes can be and have been implemented without any real, practical issues. The Department of Justice has recognized that the sovereignty of the states in enacting medical marihuana laws and has chosen to allow states to continue in their own schemes so long as federal interests are protected. Therefore, there is little to suggest that there are conflicts between the enforcement of the Controlled Substances Act and the MMMA and the MMMA is not preempted.

CONCLUSION AND RELIEF REQUESTED

The city of Wyoming has no rights under the Michigan Constitution and Michigan laws to ignore the MMMA. As the city of Wyoming derives its authority from Michigan laws, it cannot act in contradiction to the source of its power. To allow a municipality to do so would be to create thousands of disparate ordinances and regulations for any given law. The practical effects of a ruling to the contrary would be grave and would essentially strip the Michigan legislature of its constitutional powers.

The Controlled Substances Act does not work in a way to preempt the MMMA. The text of the Controlled Substances Act anticipates different enforcement mechanisms and only preempts where state law clearly conflicts with it. It is clear from the history of the enforcement of both these laws that there is no real conflict and any are hypothetical. In addition, the federal government has recognized that it will allow states to enforce even recreational marihuana using each states' own regulatory scheme.

Therefore, the Amicus respectfully request that this court determine that: 1) the city of Wyoming's ordinance is preempted by the MMMA, and 2) the federal Controlled Substances Act does not preempt the MMMA.

Respectfully submitted,

Denise A. Pollicella, Esq., PLLC
Cannabis Attorneys of Michigan

Denise Pollicella (P55629)
804 E. Grand River Ave.
Howell, MI 48843
(517) 546-1181
dp@smallbusinesslegal.net