STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Shapiro, P.J., and Hoekstra and Whitbeck, JJ.

JOHN TER BEEK

Plaintiff-Appellee,

-vs-

CITY OF WYOMING

Defendant-Appellant.
_____/

Supreme Court No. 145816
Court of Appeals No. 306240
Lower Court No. 10-011515-CZ

BRIEF AMICI CURIAE OF THE CATO INSTITUTE, THE DRUG POLICY ALLIANCE, AND LAW ENFORCEMENT AGAINST PROHIBITION

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Dated August 20, 2013

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STATEMENT OF INTEREST OF AMICI CURIAE

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes books and studies, conducts conferences, and files amicus briefs with the courts, including in cases involving the limits of federal power such as *Nat'l Fed Ind Bus v Sebelius*, 132 S Ct 2566 (2012), *Gonzales v Raich*, 545 US 1 (2005), and *United States v Morrison*, 529 US 598 (2000). The present case is of concern to Cato because one of the parties has asserted unconstitutional federal authority to direct state lawmaking powers.

Drug Policy Alliance (DPA) is the nation's leading advocacy organization devoted to advancing those policies and attitudes that best reduce the harms of both drug misuse and drug prohibition, and to promote the sovereignty of individuals over their minds and bodies. DPA envisions a just society in which the use and regulation of drugs are grounded in science, compassion, health and human rights, in which people are no longer punished for what they put into their own bodies but only for crimes committed against others, and in which the fears, prejudices and punitive prohibitions of today are no more. DPA staff attorneys have co-authored various state medical marijuana laws, served as counsel of record for California physicians in Conant v. Walters, 309 F 3d 629 (CA 9, 2002) (upholding first amendment rights of physicians to recommend medical marijuana to their seriously ill patients free from federal government interference), and as amicus counsel for state and national medical and public health groups in various state and federal cases touching upon the medical efficacy of marijuana.

Law Enforcement Against Prohibition (LEAP) is an international nonprofit organization of over 100,000 current and former law enforcement professionals and other

supporters who are speaking out about the failures of our existing drug policies. Those policies have failed, and continue to fail, to effectively address the problems of drug abuse, especially the problems of juvenile drug use, problems of addiction, and problems of crime caused by the existence of a criminal black market in drugs. LEAP envisions a world in which drug policies work for the benefit of society and keep our communities safer. A system of legalization and regulation will end the violence, better protect human rights, safeguard our children, reduce crime and disease, treat drug abusers as patients, reduce addiction, use tax dollars more efficiently, and restore the public's respect and trust in law enforcement.

STATEMENT OF JURISDICTION

Amici curiae accept the statement of jurisdiction presented in Appellee's Brief at 1.

STATEMENT OF QUESTIONS PRESENTED

I. 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 court answers:	Did not address.
Court of Appeals answers:	Yes.
Amici Curiae answer:	Amici curiae do not address this issue. This brief focuses exclusively on the second question raised by City's appeal.

II. IS THE MMMA PREEMPTED BY THE FEDERAL CONTROLLED SUBSTANCES ACT?

Trial court answers:	Yes.
Court of Appeals answers:	No.
Amici Curiae answer:	**No.**

STATEMENT OF FACTS

Amici curiae accept the statement of background and facts presented in Appellee's Brief at 6-9.

SUMMARY OF ARGUMENT

Michigan has joined a growing cadre of states that have sought to remove state-imposed restrictions on the use of marijuana for medical purposes. City of Wyoming now challenges the validity of these laws. It has enacted a zoning ordinance that would regulate medical marijuana out of existence within its boundaries. Now, seeking to protect that ordinance being challenged under the Michigan Medical Marihuana Act (MMMA), City claims that the MMMA itself is preempted because it conflicts with the federal government's outright ban on marijuana.

City's argument ignores a fundamental constraint on federal Supremacy. Under the anticommandeering rule, Congress cannot force Michigan to ban marijuana for purposes of state law. City's attempt to disguise this command as permissible preemption should be rejected. Congress can only preempt state regulation of private citizens and federal officials. The provisions of the MMMA challenged here do not regulate private citizens or federal officials in any meaningful sense; instead, they repeal state regulations, such as the state's long-standing prohibition on the possession of marijuana. Hence, preempting the MMMA would actually have the perverse and highly unusual consequence of re-instating unwanted state regulations. Properly understood, this is commandeering, not preemption, and it cannot be countenanced.

Because the MMMA does not assist, require, or even pressure anyone to violate the federal Controlled Substances Act (CSA), it does not pose a preemptable conflict with federal law. To be sure, Michigan's refusal to combat medical marijuana may be considered by some a setback for the federal government's long-standing campaign against the drug. But the purpose of the anticommandeering rule is to preserve state autonomy and to prevent Congress from coopting state resources to carry out federal policy.

Congress has other constitutionally permissible means to combat medical marijuana use. It could ramp up enforcement of the federal marijuana ban or attempt to persuade Michigan to voluntarily repeal the MMMA. But it cannot force Michigan to rejoin its campaign, per City's wishes. What is more, Congress has never actually espoused the unconstitutionally coercive tactic City now champions. Congress recognized that states would continue to play an important role in shaping drug policy, and it thus expressly limited the preemptive impact of the CSA. It has subsequently refused to amend the CSA to preempt state legalization of the drug. Likewise, the federal Department of Justice (DOJ), over the course of 17 years and three Presidential Administrations, has never formally claimed that states are preempted from repealing or rethinking their own restrictions on the drug.

I. CONGRESS CANNOT PREEMPT THE MMMA

A. Congress cannot force Michigan to ban medical marijuana.

Congress has banned the possession, cultivation, and distribution of marijuana, recognizing no permissible medical use for the drug. 21 USC 801 *et seq.* In *Gonzales v Raich*, 545 US 1 (2005), the United States Supreme Court affirmed Congress's power to enact a federal ban pursuant to the Commerce Clause. *Id.* at 18 ("Congress can regulate purely intrastate activity that is not itself 'commercial' . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.").

Nonetheless, Congress cannot force states to ban marijuana under their own laws. As the Court explained in *New York v United States*, 505 US 144, 166 (1992), "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *See also Printz v United States*, 521 US 898, 935 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program.").[1] This anticommandeering rule reflects the sound principle that "States are not mere political subdivisions of the United States." *New York, supra*, 505 US at 188.

The anticommandeering rule serves a crucial function in our federal system. It prevents Congress from shifting the onerous financial and political costs of regulations onto the States. *See, e.g.*, Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex L Rev 1, 16 (2004) (explaining that the anti-commandeering rule requires Congress "to internalize the financial and political costs of its actions by prohibiting it from making state institutions enforce federal law").

[1] In *New York*, the Court invoked the anticommandeering rule to invalidate a congressional statute that compelled state legislatures to pass laws providing for the disposal of radioactive waste generated by private firms within their borders. *Supra*, 505 US at 188. In *Printz*, the Court likewise invalidated a congressional statute that compelled state law enforcement agents to conduct criminal background checks on prospective gun buyers. *Supra*, 521 US at 935.

The *Printz* Court explained the dangers posed by such cost-shifting: "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Supra*, 521 US at 930. *See also New York, supra*, 505 US at 169, ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials . . . remain insulated . . . . Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . .").

In the present controversy, the implications of the anticommandeering rule are clear: Michigan may refuse to employ its own coercive powers and resources against residents who possess, cultivate, and distribute marijuana for medical purposes. MCL 333.26427 ("medical use of marihuana is allowed under state law"); MCL 333.26424 ("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 . . ."); MCL 333.26248 (a) (". . . a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana. . . "). Whatever may have motivated Michigan voters to support the MMMA, their decision to refuse to help the federal government wage its campaign against medical marijuana is one they are constitutionally entitled to make.

B. Preempting the MMMA is tantamount to forcing Michigan to ban marijuana.

City tries to evade the strictures of the anticommandeering rule by re-casting Congress's purported desire to block the MMMA as "preemption" rather than commandeering. (Appellant's Brief at 12, "[T]he Michigan Medical Marijuana Act is preempted by the federal Controlled Substances Act . . ."). It is, of course, true that Congress may preempt state *regulation* of private citizens and federal agents. *E.g., New York, supra*, 505 US at 188 ("The Constitution enables the Federal Government to pre-empt state *regulation* contrary to federal interests . . .") (emphasis added). But the provisions of the MMMA challenged here do not *regulate* private citizens or federal agents. Rather, the MMMA actually eliminates certain state-imposed restrictions on private citizens, such as the state's prohibition on the possession of the drug found in MCL 333.7403. Preempting the MMMA would thus actually serve to *re-instate* earlier adopted state regulations. Properly understood, this is commandeering, not preemption, and it cannot be countenanced. *Cf. Nat'l Fed Ind Bus v Sebelius*, 132 S Ct 2566, 2604 (2012) (Roberts, CJ) (rejecting federal government's characterization of Medicaid expansion as permissible encouragement and instead labeling it impermissible coercion).

The true nature of City's argument becomes apparent once we examine the ramifications of its claims that Congress has preempted the MMMA. Long before the MMMA was enacted, Michigan passed laws prohibiting the possession, cultivation, and distribution of marijuana. MCL 333.7401(1), for example, stipulates that ". . . a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . .", a term that includes marijuana,[2] and MCL 333.7403 (a) stipulates that a "person shall not knowingly or intentionally possess. . ." the drug. Violations of these provisions are treated as

[2] MCL 333.7214(e) (defining marijuana as a schedule 2 controlled substance").

criminal offenses carrying substantial prison terms and fines.[3] This prohibition remains in effect for most Michigan residents.

The MMMA simply carves out an exception to the state's marijuana ban. Namely, it seeks to block the application of MCL 333.7401 & 333.7403 to certain persons who use marijuana for medical purposes and their designated caregivers.[4] For some such persons, it provides immunity from arrest and prosecution by state authorities. MCL 333.26424 ("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 others, it provides an affirmative defense to state drug charges. MCL 333.26428 (a) ("[A] patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana. . . "). But in either case, the MMMA does no more than to eliminate state-imposed restrictions that would otherwise apply under MCL 333.7401 & 333.7403, and related provisions.

If this Court were to hold that Congress has preempted the changes wrought by the MMMA, medical marijuana would be re-criminalized under state law. It would be as though the MMMA had never been passed. As Law Professor Robert Mikos has explained,

> "If preempted, state medical marijuana laws would be null and void. They would remain on the books, but they would be unenforceable . . . [M]edical users and their suppliers

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[3] Marijuana trafficking offenses are classified as felonies, punishable by up to 15 years imprisonment and fines up to $10,000,000, MCL 333.7401(2)(d), and marijuana possession offenses are treated as misdemeanors, punishable by up to one year imprisonment and fines up to $1,000, MCL 333.7403(d).

[4] The Michigan Supreme Court has interpreted the scope of the protections afforded by the MMMA. *See, e.g., People v. McQueen*, 493 Mich. 135, 828 N.W.2d 644 (2013) (rejecting claim that qualified patients may transfer marijuana to other patients, or that dispensaries may assist them in so doing).

would be subject to the same state legal sanctions as recreational users, leaving them vulnerable to harassment by state agents even if federal agents chose not to enforce the CSA."

See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand L Rev 1421, 1440 (2009) (citations omitted). And these effects would be felt not only in the City of Wyoming, but throughout the State of Michigan.

Under anti-commandeering principles, Congress plainly could not have forced Michigan to ban marijuana in the first instance. It follows that Congress cannot force the people of Michigan to keep a ban they no longer want. The Constitution makes no distinction between a state's initial refusal to ban marijuana and a state's subsequent decision to repeal a ban already adopted: both choices are sacrosanct. *See Conant v Walters*, 309 F 3d 629, 645 (CTA 9, 2002) (Kozinski, J, concurring) ("[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated."); Mikos, *On the Limits of Supremacy*, *supra*, at 1448-49 (explaining that distinguishing between blocking the repeal of a ban and compelling passage of the ban in the first instance would create an "arbitrary loophole" in the anticommandeering rule). States are obliged neither to follow Congress's lead when it regulates private activity nor to obtain Congress's consent to *stop* regulating it.

Contrary to Appellant's assertion, the Supreme Court has never held that the "Federal Controlled Substances Act preempts state Medical Marihuana statutes" (Appellant's Brief at 15) in the sense it now claims. *See* Mikos, *On the Limits of Supremacy*, *supra*, at 1442 ("The Supreme Court has never squarely addressed the preemption issue, despite many claims to the

contrary. . ."). Instead, the Supreme Court has merely held that measures legalizing marijuana for purposes of state law do not likewise constrain federal officials who are enforcing *federal* law. In *Gonzales v Raich,* the Court simply refused to enjoin the federal Drug Enforcement Administration (DEA) from enforcing the federal CSA against two medical marijuana users. *Supra,* 545 US at 7 (noting that action was filed against "the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act"). And in *United States v Oakland Cannabis Buyers' Coop*, 532 US 483 (2001), the Supreme Court barred a medical marijuana cooperative from asserting a medical necessity defense in a civil suit brought by federal officials and governed by federal law. *Id.* at 487 (noting the federal government had only asserted that "'whether or not the Cooperative's activities are legal under California law, they violate federal law'"). Similarly, in *United States v Hicks*, 722 F Supp 2d 829 (ED Mich, 2010), the federal district court found that a defendant convicted of federal drug crimes had violated the express terms of his federal supervised release program by possessing marijuana. 722 F Supp 2d at 833 ("[T]he MMMA has no effect on federal law, and the possession of marijuana remains illegal under federal law, even if it is possessed for medicinal purposes in accordance with state law."). Importantly, none of these cases held that *state* (or local) officials can ignore state laws that instruct them not to arrest, prosecute, or punish certain persons who use marijuana for medical purposes.[5]

[5] A pair of pre-Civil War Supreme Court cases helps to illustrate the difference between a state's permissible refusal to help enforce federal law and its impermissible interference with federal (or private) efforts to enforce federal law. The cases involved Personal Liberty Laws passed by northern states prior to the Civil War. To a large extent, these Personal Liberty Laws simply forbade state agents from taking any part in the recapture of fugitive slaves (e.g., by jailing them). In *Prigg v Pennsylvania*, 41 US 539 (1842), the Court approved of such laws on the theory that the States could not be forced to assist federal (or private) agents in rounding up

In all of the other cases relied on by City, preemption has been used in a similar fashion to block state interference with the activities of private citizens. For example, in *Crosby v Nat'l Foreign Trade Council*, the Supreme Court held that Congress had preempted a state law that penalized private firms doing business in Burma. 530 US 363, 367 (2000). The state law barred state and local government from buying goods or services from such firms. Congress had sought to apply some economic pressure against Burma, but the Court found that the state law went too far because it "*penalizes* some private action that the federal Act (as administered by the President) may allow." *Id.* at 376 (emphasis added). In *Geier v American Honda Motor Co, Inc*, the Court held that federal safety regulations preempted District of Columbia tort law. 529 US 861 (2000). The DC tort law *required* manufacturers to install airbags on all models, an imposition the Court found conflicted with federal regulations that had "deliberately provided manufacturers with a range of choices among different passive restraint devices" in order to encourage technological development of such devices. *Id.* at 875. And in *Michigan Canners & Freezers Assn. v. Agricultural Marketing & Bargaining Board*, the Court found that Congress had preempted Michigan's Agricultural Marketing and Bargaining Act. 467 US 461 (1984). The Michigan law forced some agricultural producers to pay service fees to producer associations and to sell commodities on terms negotiated by these associations, "regardless of whether they had chosen to become members" of the associations. *Id.* at 467-68. In so doing, the Michigan law

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or handling fugitive slaves. *Id.* at 615–16 (Story, J.) ("[The Fugitive Slave Clause] does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted [sic] to them by the constitution."). At the same time, however, the Court indicated that the states could not obstruct federal (or private) efforts to round up fugitive slaves. *Id.* at 618–19. Hence, in *Ableman v Booth*, 62 US 506 (1858), the Supreme Court invalidated a very different type of State law—a state court writ ordering federal officials to release a prisoner they were holding under the Fugitive Slave Act, on the grounds that states had no authority over federal officials.

plainly conflicted with a federal law that sought to shield the very same producers from "coercion by associations." *Id.* at 464. Though the Court described the state law as having "authorize[d] producers' associations to engage in conduct that the federal Act forbids," *id.* at 478, it is quite clear in context that the Court did not use the term "authorize" in the sense City now suggests, i.e., as mere tolerance of private activity. This is because the state had not merely tolerated private coercion of producers, it had actually participated in such coercion.[6] *Id.* at 477-78 ("The Michigan Act . . . empowers producers' associations to do precisely what the federal Act forbids them to do. . . . [A]n accredited association operating under the Michigan Act may coerce a producer to 'enter into [or] maintain . . . a marketing contract with an association of producers. . . —a clear violation of [7 USC] § 2303(c)", which prohibits associations from coercing producers to "enter into . . a membership agreement or marketing contract"); *id.* at 478 ("[T]he Michigan Act . . . binds [a producer] to the association's marketing contracts, forces him to pay fees to the association, and precludes him from marketing his goods himself.").[7] Other

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[6] The City's argument demonstrates the danger of relying too much on semantics. "Whether a state law speaks in terms of authorization or legalization is wholly immaterial, so long as the effect is merely to lift state-imposed sanctions. For example, a state might adopt a marijuana law that provides 'Person A is authorize to use marijuana' or it might instead adopt a law that provides 'It is legal for Person A to use marijuana.' Despite the variance in language, both laws have the same practical effect; they bar state officials punishing Person A for using marijuana." Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J Health Care Law & Policy 5, 28 (2013).

[7] The Oregon Supreme Court cited *Michigan Canners* repeatedly in *Emerald Steele Fabricators, Inc v Bureau of Labor & Industries,* 348 Or 159; 230 P 3d 518 (2010). *Emerald Steele* held that Oregon law was preempted by the CSA to the extent it sought to shield medical marijuana users from private employment discrimination. City now asks this Court to follow *Emerald Steele* and invalidate entirely unrelated provisions of the MMMA. (Appellant Brief at 17.) But for the reasons just explained, *Emerald Steele* provides no support for City's preemption claim here. Like the *Michigan Canners* Court before it, the *Emerald Steele* Court was addressing the validity of a State *regulation*, namely, a law that barred private firms from discriminating against persons who used marijuana for medical purposes. *Emerald Steele*, *supra*, 348 Or at 186, 230 P 3d at 533-34. Whatever the merits of its decision, the Oregon Supreme Court did not address the more relevant portion of Oregon's medical marijuana law, ORS 475.309, which

prominent preemption cases follow the same pattern: they involve Congress blocking state interference with the activities of private individuals. *E.g.*, *Arizona v United States*, 132 S Ct 2492 (2012) (holding preempted state regulations of immigrants). Indeed, "the [United States Supreme] Court has never held that Congress could block states from merely allowing some private behavior to occur, even if that behavior is forbidden by Congress. To be sure, the Court has found myriad state laws preempted, but only when the states have punished or subsidized (broadly defined) behavior Congress sought to foster or deter . . . " Mikos, *On the Limits of Supremacy*, *supra*, at 1449 (citations omitted).

A clear principle emerges from these cases: courts must draw a line between state regulation and state de-regulation (or non-regulation). Per the Supremacy Clause, states need Congress's acquiescence to *regulate* private conduct that Congress also regulates; but under the anticommandeering rule, they can always refuse to regulate that conduct. Mikos, *Preemption Under the Controlled Substances Act*, *supra*, at 15 ("[A]lthough Congress has the power to preempt state laws that *regulate* marijuana, it has no authority to preempt state laws that merely legalize the drug."). The provisions of the MMMA challenged here clearly fall on the de-regulation side of the line.[8] They simply allow certain people to use marijuana free of State interference, no more, no less.

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provides that "a person engaged in or assisting in the medical use of marijuana is excepted from the criminal laws of the state for possession, delivery or production of marijuana. . ." That provision, like all other State laws eliminating State imposed restrictions on medical marijuana, remains in effect to this day.

[8] Professor Mikos explains more fully the distinction between preemptable regulation and un-preemptable legalization in the present context:

> "[R]egulation entails state interference with marijuana-related activities (possession, distribution, etc.). Examples include prohibitions against selling marijuana to minors, requirements that marijuana vendors obtain special business licenses, and bans on employment discrimination against medical marijuana users. . . . [R]egulations such as

C. Congress may not force Michigan to ban marijuana just because it disagrees with the State's stance on the drug's medicinal value or the utility of prohibiting it.

Michigan and the Federal Government disagree about marijuana's medicinal value. The state believes marijuana has some "beneficial uses", MCL 333.26422, whereas the Federal Government insists it has none, 21 USC 812(b)(1) (specifying that Schedule I controlled substances have "no currently accepted medical use"). The two sovereigns also disagree about whether their respective government resources should be used to quash these contested uses of the drug. City mischaracterizes this disagreement of opinion as a "direct conflict" (Appellant's Brief at 12), claiming, without explanation, that it is "not possible to comply with both the Michigan Medical Marihuana Act and the Federal Control Substances Act." (Appellant's Brief at 13.) In particular, City appears to argue that state officials somehow violate the CSA when they "ignore" the federal marijuana ban:

> "There is no question that there is a direct conflict between the federal CSA and the state MMMA. The MMMA allows numerous actions which are specifically prohibited by the CSA. Specifically, as interpreted by Plaintiff, the MMMA allows the cultivation and distribution of marijuana . . . Although appellee argues that the two laws can co-exist, the only way that can be done is for the State of Michigan, the City of Wyoming and every other municipal government to ignore the provisions of the CSA. Appellee's entire

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> these either restrict or promote marijuana-related activities. Legalization, by contrast, entails a laissez-faire approach in which the state allows some marijuana-related activity to occur free of state regulation. Examples include repeal of state criminal bans against the possession of marijuana for medical purposes and repeal of sanctions against physicians who recommend the drug to patients. When a state legalizes marijuana, it simply chooses to leave marijuana-related activities to the vagaries of private market forces and federal regulation."

Mikos, *Preemption Under the Controlled Substances Act*, *supra*, at 15-16 (citations omitted).

argument hinges on the claim that the City can simply choose to ignore the federal statute."

(Appellant's Brief at 12-13).

City's argument that the MMMA poses a direct conflict with the CSA necessarily misinterprets both the substance of the CSA and the implications of the anticommandeering rule. The MMMA arguably does require state officials to "ignore" the CSA, at least in the sense that it instructs them not to use the state's own legal apparatus to arrest, prosecute, or punish private citizens who possess medical marijuana, even though such persons are plainly violating federal law. But in so doing the MMMA does not require those officials to violate federal law, because the CSA does not—and could not—obligate state officials to help enforce federal law.

First, the CSA does not purport to require state officials to help enforce the statute. For example, the CSA does not require anyone to report or take action against known violations of the law. *United States v Santana*, 898 F 2d 821, 824 (CA 1, 1990) ("Defendant may not be convicted of aiding and abetting the possession of cocaine . . . merely on proof that he was a knowing spectator [to a drug transaction]."). Instead, the CSA imposes only negative duties, i.e., duties to refrain from engaging in certain types of activities proscribed by the statute, such as the cultivation and distribution of marijuana. 21 USC 841. Indeed, City's argument here is strikingly odd because it seemingly requires state officials to do more to enforce federal law than even their federal counterparts are required to do. After all, federal officials themselves commonly "ignore" violations of federal law. *See* James M. Cole, Deputy United States Attorney General, *Memorandum to United States Attorneys*, June 29, 2011, *available at* http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf (advising that it is "likely not an efficient use of federal resources to focus enforcement efforts on

individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen").

Second, even if it wanted to, Congress could not impose the sort of affirmative duty City envisions here without running afoul of the anticommandeering rule. *Printz*, *supra*, 521 US at 933 (holding that duty imposed upon state law enforcement agents to conduct criminal background checks on prospective gun purchasers is unconstitutional). Thus, contrary to City's claim, states in fact "can simply choose to ignore" federal law in the limited fashion of the MMMA.[9]

D. Congress may not force Michigan to ban medical marijuana in order to advance federal policy objectives.

In the alternative, City suggests that the MMMA is preempted because it poses an obstacle to congressional objectives. (Appellant's Brief at 14, "MMMA clearly undermines the purposes of the Federal Controlled Substances Act.") But it is difficult to imagine how the MMMA creates an "obstacle," and City fails to elaborate upon its claim. The MMMA does not interfere with the enforcement of federal law by federal officials. MCL 333.26422 (c) (acknowledging that federal law still "prohibits any use of marihuana except under very limited circumstances"). It does not compel, subsidize, or otherwise assist Michigan residents to grow, possess, or distribute medical marijuana. Instead, the MMMA puts the burden upon Congress to achieve its own objectives. And requiring Congress to assume the full fiscal and political burden of its regulatory endeavors is the core purpose of the anticommandeering rule. *See supra*, pp. 3-4.

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[9] Likewise, because of its passive nature, the MMMA does not require any private citizens to violate the CSA. "A citizen can obey a state law allowing or even authorizing the possession, distribution, or cultivation of marijuana and the CSA's express ban on these same activities by not engaging in them." Mikos, *Preemption Under the Controlled Substances Act*, *supra*, at 28. After all, the state is not imposing a marijuana mandate on its residents.

Like most states, Michigan has long assumed most of the burden of enforcing marijuana prohibition. As the MMMA notes, for example, states have historically made 99% of all marijuana related arrests. MCL 333.26422 (b). Michigan continues to invest heavily in combatting recreational marijuana, but it now refuses to employ limited state resources against a segment of the population that uses marijuana only for medical purposes. The federal government has disclaimed any serious interest in arresting, prosecuting, or punishing such persons,[10] but if it so desired it would have to do so entirely on its own. Of course, quashing marijuana use among qualified patients would be no easy task for federal law enforcement agents acting alone. As of September 2012, more than 124,000 Michigan residents had successfully registered to use medical marijuana. *See* Michigan Dep't of Community Health, *FY 2012 Medical Marihuana Annual Report Statistics*, http://www.michigan.gov/documents/lara/FY_2012_Medical_Marihuana_Annual_Report_Statistics_409663_7.pdf. But Michigan has no constitutional obligation to divert its own resources to help Congress achieve its objectives. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York*, *supra*, 505 US at 178.

E. Congress has other, proper means by which to vindicate its interests.

Importantly, a ruling upholding the MMMA against City's preemption challenge would not prevent Congress from vindicating its interests. Rather, it would force Congress to use constitutionally *proper* means to combat what it—but not the state—deems a drug problem. For example, Congress could employ more federal law enforcement resources to crack down on the

[10] *See* Cole, *Memorandum to United States Attorneys*, *supra* (advising federal prosecutors that it is "likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen").

medical marijuana market. It could even try to persuade the state to change its policy, by offering grants contingent on re-criminalizing medical marijuana under State law. *New York*, *supra*, 505 US at 171–73 (distinguishing permissible conditional spending from impermissible commandeering). As long as Congress's offer is not coercive, it would be acting within its constitutional authority. *Nat'l Fed Ind Bus*, *supra*, 132 S Ct at 2602.

It is striking how little evidence there is that Congress sought to employ the coercive tactic now suggested by the City of Wyoming. The express preemption clause of the CSA, 21 USC 903, itself proclaims an interest only in preempting "positive conflicts" with federal law, a choice of terminology that seems plainly directed at certain types of state *regulation* of as opposed to state *non-interference* with drug related activity. *See* Mikos, *Preemption Under the Controlled Substances Act*, *supra*, at 15-17 (demonstrating that courts need to interpret Congress's preemptive language narrowly in order to avoid a "commandeering trap").

Congress itself has arguably recognized the limited preemptive impact of the CSA as currently written. In 2000, for example, federal lawmakers attempted to amend the CSA's preemption clause to accomplish what City now seeks. The amended language of the CSA would have preempted "any and all laws of the States . . . insofar as they may now or hereafter effectively permit or purport to authorize the use, growing, manufacture, distribution, or importation . . . of marijuana." H.R. 4802, 106th Cong. (2d Sess. 2000). But the legislation was not adopted.

It is also revealing that the federal Department of Justice (DOJ) has never formally espoused the preemption argument the City is now advocating. As discussed above, the DOJ has successfully debunked claims that state medical marijuana laws could preclude enforcement of its own prohibition on the drug. But since California passed the first medical marijuana law in

1996—and through three different Presidential Administrations—the DOJ has never filed its own suit, or intervened in another, to claim that a state is preempted from removing its own criminal prohibitions on medical marijuana. Not once. This is in stark contrast to the DOJ's aggressive stance on preemption in other policy domains.[11] The DOJ has had ample time and opportunity to challenge state medical marijuana laws over the past seventeen years. At this point, twenty states have passed laws curbing state-imposed restrictions on medical marijuana, and all of those laws remain in effect.

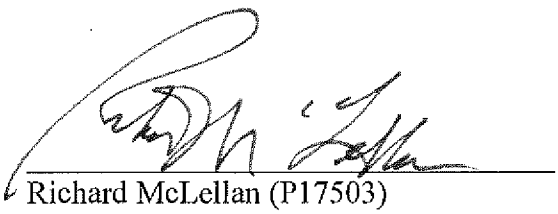
In sum, City has erred in suggesting that Congress sought to preempt the MMMA and similar laws—a move that would be plainly unconstitutional. Congress's express language belies any such intention, and the DOJ's forbearance from asserting preemption against these laws only reinforces that view.

[11] *E.g.*, *United States v. Arizona*, 703 F Supp 2d 980, 985-86 (D Ariz, 2010) (noting that DOJ filed civil suit to block Arizona's immigration regulations barely two months after those regulations were enacted), *affirmed in part, reversed in part, and remanded by Arizona v. United States*, 132 S Ct 2492 (2012).

CONCLUSION AND RELIEF REQUESTED

Amici curiae respectfully request this Court to reject the federal preemption challenge to the MMMA and affirm the judgment of the Court of Appeals on this matter.

Respectfully submitted,



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Dated: August 20, 2013