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.
_____/

Sup. Ct. Case No. 145816

COA Case No. 306240

LC Case No. 10-011515-CZ

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JURISDICTION

This court has jurisdiction under MCR 7.301(A)(2) and 7.302 and MCL 600.215(3). Defendant's application for leave to appeal was granted on April 3, 2013. *Ter Beek v City of Wyoming*, 493 Mich 957; 828 NW2d 381 (2013).

QUESTIONS PRESENTED

I. Is the City of Wyoming's local ordinance preempted by the Michigan Medical Marihuana Act ("MMMA"), MCL 333.26421 *et seq.*, and therefore unenforceable against registered patients who comply with the terms and requirements of the MMMA, where the ordinance makes the medical use of marijuana subject to penalties under state and local law, and the MMMA provides that the medical use of marijuana shall *not* be subject to penalty in any manner?

Trial court's answer:	The trial court agreed with plaintiff that the ordinance and the state law conflict, but did not explicitly hold that the ordinance is preempted.
Court of appeals' answer:	Yes.
Plaintiff-appellee's answer:	Yes.

II. Is the MMMA preempted by the federal Controlled Substances Act ("CSA"), 21 USC 801 *et seq.*, and therefore without effect, where (a) Congress expressed its intent not to preempt states' drug laws, (b) the MMMA does not require anyone to violate federal law and does not interfere with the enforcement of federal law, and (c) states retain sovereignty under the United States Constitution to refrain from using their own law enforcement resources to penalize conduct that happens to be illegal under federal law?

Trial court's answer:	Yes.
Court of appeals' answer:	No.
Plaintiff-appellee's answer:	No.

INTRODUCTION

This is a declaratory judgment action against a Michigan city that adopted a local ordinance banning medical marijuana. In a unanimous decision by Judges Whitbeck, Hoekstra Shapiro, the court of appeals held:

1. The City of Wyoming's ordinance prohibiting the medical use of marijuana is preempted by the Michigan Medical Marihuana Act ("MMMA"), MCL 333.26421 *et seq.*; and

2. The MMMA is not preempted by federal law.

The court of appeals' decision was correct, well-reasoned, and based on clearly established law. The judgment below should therefore be affirmed.

The MMMA, enacted by ballot initiative in 2008, provides that qualifying patients who have been certified by a physician and have registered with the state "shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty" for growing, possessing, or using marijuana under the limits and conditions set forth in the statute. MCL 333.26424(a). Plaintiff John Ter Beek is a registered qualifying patient who wishes to grow and use medical marijuana in his own home, which is located in the city of Wyoming.

In response to the enactment of the MMMA, Wyoming decided to ban medical marijuana within city limits by amending its zoning ordinance to prohibit "uses contrary to federal law, state law, or local ordinance . . . ." If Mr. Ter Beek grows or possesses medical marijuana he will be in violation of the Controlled Substances Act ("CSA"), 21 USC 801 *et seq.*, the federal law prohibiting the cultivation and possession of marijuana. Although by policy and practice the federal government does not generally enforce the CSA against medical marijuana patients, as a matter of law the CSA contains no exception for medical marijuana. As a result, even if plaintiff complies with the MMMA, he will be in violation of Wyoming's new ordinance—for which he

will be subject to fines, costs, injunctions, and other civil penalties. He brought this declaratory judgment action against the city to protect his right not to be subject to penalties under the local ordinance for growing or possessing medical marijuana in accordance with the MMMA.

This case presents a purely legal issue: does a Michigan city have the legal power to override the will of the voters as expressed in Michigan's medical marijuana law? A Michigan statute preempts a local ordinance that directly conflicts with it. Wyoming's ordinance is a complete ban on the medical use of marijuana. It thus directly conflicts with the MMMA because it would subject medical marijuana patients to penalties for conduct that is expressly protected by the MMMA from "penalty in any manner." Therefore, the Wyoming ordinance is preempted by state law and unenforceable against medical marijuana patients who comply with the MMMA.

Wyoming argues that even if there is a conflict between its ordinance and the MMMA, the MMMA *itself* is invalid, and thus without effect, because it is preempted by federal law under the Supremacy Clause of the United States Constitution. This argument is based on a misunderstanding of federal preemption law and, at an even more fundamental level, our federalist system of government. Under the Supremacy Clause and federal preemption law, state laws are invalid to the extent they require the violation of federal law or stand as an obstacle to the enforcement of federal law. However, there is no requirement that state laws prohibit, and subject to state-law penalties, all conduct that happens to be prohibited under federal law and subject to federal penalties. When Congress prohibits certain conduct, the states are not required to march in lockstep with federal law and prohibit exactly the same conduct. To the contrary, as an exercise of their sovereign power within our federalist system, states may simply choose to refrain from penalizing activity that Congress has made illegal.

The MMMA represents Michigan's decision to do exactly that. Most marijuana use remains illegal under Michigan law, but the MMMA exempts the *medical* use of marijuana from all criminal and civil penalties that could previously be imposed by state actors. This exemption is not preempted by federal law because states may always refrain from devoting their own resources to penalizing conduct that happens to violate federal law. Michigan cities, meanwhile, are political subdivisions of the state, and as such have no legal authority to countermand the clearly expressed will of the people to exempt the medical use of marijuana from all criminal and civil penalties. Wyoming's ordinance, which makes plaintiff subject to such penalties, directly conflicts with and is thus preempted by the MMMA. Accordingly, the judgment of the court of appeals should be affirmed.

BACKGROUND AND FACTS

The Michigan Medical Marihuana Act

In 2008, the people of Michigan enacted the MMMA by voter initiative. The MMMA passed with approximately 63% of the vote—including 59% in the city of Wyoming.[1] The voters adopted the following findings:

> (a) Modern medical research . . . has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions.
>
> (b) [A]pproximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana.
>
> (c) Although 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. The laws of [twelve states] do not penalize the medical use and cultivation of marihuana. Michigan joins in this effort for the health and welfare of its citizens. [MCL 333.26422.][2]

The MMMA provides that a person may register with the state as a qualifying medical marijuana patient based on a written certification signed by a physician. MCL 333.26426(a). The written certification must state that the patient has been diagnosed with a debilitating medical condition, identify the condition, and provide a professional opinion the patient is likely

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[1] Election results are publicly available on the website of the Michigan Department of State at http://miboecfr.nicusa.com/cgi-bin/cfr/precinct_srch.cgi.

[2] As of this writing, nineteen states plus the District of Columbia have enacted medical marijuana laws. A summary of eighteen of those laws can be downloaded from the website of the Marijuana Policy Project at http://www.mpp.org/assets/pdfs/library/MMJLawsSummary.pdf. New Hampshire's medical marijuana act, the nineteenth such law, was signed by that state's governor on July 23, 2013. The Illinois legislature passed a bill which will become the twentieth state medical marijuana law on August 5, 2013 unless it is vetoed by the governor.

to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the condition or its symptoms. MCL 333.26423(m).[3] Upon receipt of a valid application including the written certification, the state provides the qualifying patient with a registry identification card. MCL 333.26426(a).

Section 4 of the MMMA cloaks qualifying patients who have been issued a registry identification card with a comprehensive set of legal protections and immunities under state law. Such patients "shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty . . . . for the medical use of marihuana in accordance with this act . . . ." MCL 333.26424(a).[4] "Medical use" is broadly defined by the statute as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(f). In other words, registered patients who comply with the MMMA's conditions and requirements may not be penalized in any manner for using, growing or possessing medical marijuana.

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[3] "Debilitating medical conditions" are cancer, glaucoma, HIV, AIDS, hepatitis C, ALS, Crohn's disease, Alzheimer's disease, nail patella, any chronic or debilitating disease or its treatment that produces one or more symptoms listed by the statute (including severe and chronic pain), and any other state-approved medical condition or its treatment. MCL 333.26423(b).

[4] To be protected from penalty for the medical use of marijuana, registered qualifying patients must possess no more than 2.5 ounces of usable marijuana and no more than 12 marijuana plants in an enclosed, locked facility. MCL 333.26424(a). The MMMA also contains a number of exceptions to the protected medical use of marijuana, such as possession in a school or correctional facility, smoking in a public place, and operating a motor vehicle while under the influence of marijuana. MCL 333.26427(b).

Plaintiff's Medical Use of Marijuana

Plaintiff John Ter Beek is a qualifying patient under the MMMA who has been issued and possesses a registry identification card. (Ter Beek Aff., Appendix 15b-17b.[5]) Mr. Ter Beek's primary care physician provided him with the written certification required by the MMMA. He suffers from severe and chronic pain in his foot, leg, and knees as a result of diabetes, neuropathy, a physical injury, and a hereditary condition called Charcot-Marie-Tooth disease. Marijuana alleviates this pain.

Mr. Ter Beek lives in the city of Wyoming, where he and his wife own a home. He wishes to grow, possess, and use medical marijuana in his home in accordance with the terms, conditions and limitations of the MMMA.

The Wyoming Ordinance

Following the enactment of the MMMA, the City of Wyoming adopted Ordinance No. 11-10. (1st Am. Compl. and Answer ¶ 27, Appendix 6b and 12b.) That ordinance amended the zoning chapter of the Wyoming City Code to add the following provision:

> **Sec. 90-66. USES PROHIBITED BY LAW.** Uses not expressly permitted under this Ordinance are prohibited in all districts. Uses that are contrary to federal law, state law or local ordinance are prohibited. (*Id.* ¶ 28, Appendix 6b and 12b.)

Violations of the zoning chapter are punishable by fines, damages, costs, and other civil penalties. (*Id.* ¶ 30, Appendix 6b and 12b, and MCR 2.111(E)(1); Wyoming City Code § 1-27, Appendix 19b-20b.)

Although the new ordinance does not specifically mention medical marijuana, its purpose and effect is to prohibit the medical use of marijuana by incorporating all of federal law into the city code. (1st Am. Compl. and Answer ¶ 30, Appendix 6b and 12b, and MCR 2.111(E)(1).)

[5] Appendix page numbers ending with the letter "a" refer to the Appellant's Appendix; page numbers ending with the letter "b" refer to the Appellee's Appendix.

Wyoming's city manager, Curtis Holt, candidly admitted as much in a statement on the city's website: "Although Michigan voters approved the use of medical marijuana in 2008, it remains illegal under federal law and, therefore, falls within the proposed zoning ordinance." (Ex. to Mot. for Sum. Disp., Appendix 18b.) Indeed, the City of Wyoming "[a]dmits that the cultivation, possession, distribution and use of medical marihuana is in violation of the zoning code of the City of Wyoming." (Answer to 1st Am. Compl. ¶ 30, Appendix 12b.)

Procedural History

Plaintiff filed this action in circuit court seeking a declaratory judgment that the Wyoming ordinance is preempted by the MMMA and therefore unenforceable against him for the medical use of marijuana in compliance with the MMMA. MCR 2.605. Plaintiff moved for summary disposition, which Wyoming opposed. Although the circuit court denied relief on grounds that medical marijuana is prohibited by federal law, the court of appeals reversed and held that a declaratory judgment should issue. *Ter Beek v City of Wyoming*, 297 Mich App 446; 823 NW2d 864 (2012). Specifically, the court of appeals, in a unanimous decision, held that Wyoming's ordinance is preempted by the MMMA, and that the MMMA is not preempted by federal law. *Id.* This court granted the city's application for leave to appeal. *Ter Beek v City of Wyoming*, 493 Mich 957; 828 NW2d 381 (2013).

SUMMARY OF ARGUMENT

This case presents two different questions of preemption, the first under state preemption law and the second under federal preemption law.

Summary of State Preemption Analysis

The first question, whether Wyoming's ordinance is invalid as a matter of state law, is relatively straightforward. Cities are creatures of state law, and a city ordinance is preempted to the extent it conflicts with a Michigan statute. Where an ordinance permits what a statute prohibits, or vice-versa, there is a direct conflict between the two and the ordinance must fall.

In this case, it is undisputed that Wyoming's ordinance prohibits plaintiff from growing medical marijuana in his own home. Indeed, the city has stated that even the possession or use of medical marijuana would violate its zoning ordinance. (Answer to 1st Am. Compl. ¶ 30, Appendix 12b.) Yet the MMMA expressly provides that medical marijuana patients shall not be subject to any penalty for possessing, using, and cultivating medical marijuana under the conditions and restrictions delineated by that statute. Thus, there is a direct conflict between the MMMA and the Wyoming ordinance, because under the ordinance plaintiff is subject to penalties for the medical use of marijuana—penalties expressly prohibited by the MMMA.

When a state law expressly exempts certain conduct or persons from a general prohibition or a penalty, as the MMMA does here, cities may not disregard that exemption. Wyoming's ordinance is therefore preempted by the MMMA and cannot be enforced against plaintiff for his medical use of marijuana.

Summary of Federal Preemption Analysis

To the extent a state law is preempted by federal law, it is "without effect" and cannot displace a local ordinance. Wyoming therefore raises *federal preemption* as an affirmative defense, arguing that its local ordinance is valid because the MMMA is not.

The court of appeals correctly held that the MMMA is not preempted by federal law. The MMMA does not require anyone to violate federal law, nor does it create an obstacle to the enforcement of federal law. As a matter of state sovereignty, Michigan has no obligation to devote its own laws or resources to punishing people for engaging in conduct that happens to violate federal law. Because the MMMA represents Michigan's decision to exempt the medical use of marijuana from penalties under state law, the MMMA is not preempted.

Congressional Intent. Federal preemption analysis begins with an examination of congressional intent, and there is a strong presumption against preemption. Preemption is found only where Congress has clearly and unequivocally indicated an intent to displace state law. In this case, the CSA's antipreemption clause evinces Congress's intent *not* to preempt state drug laws unless there is a "positive conflict" between the CSA and the state law such that they cannot stand together. Congress thus did not intend to "occupy the field" of all drug regulation; only state laws that actually conflict with the CSA are preempted.

Impossibility Conflict. The CSA and the MMMA set different standards of conduct under federal and state law, but they do not conflict. Courts have recognized two types of conflict for federal preemption purposes: impossibility conflict and obstacle conflict. Impossibility conflict exists when it is physically impossible to comply with both federal and state law. That is definitely not the case here. The MMMA does not require anyone to violate

CSA, and the CSA does not require anyone to violate the MMMA; thus, it is possible to comply with both laws. Therefore, the MMMA is not preempted under the impossibility rule.

Obstacle Conflict. A second type of conflict exists when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. State laws that obstruct the enforcement of federal law or impair rights created by federal law are preempted under this rule. But state laws that merely do not punish conduct that happens to violate federal law are not. Obstacle preemption does not stand for the broad proposition that federal law preempts state law whenever state lawmakers choose not to penalize an activity that can be penalized under federal law. Because the MMMA does not stand in the way of federal law, it is not preempted.

State Sovereignty. In fact, the preemptive reach of all federal prohibitions is necessarily limited by the sovereignty retained by the states in our federalist system of government. The United States Supreme Court has recognized that even in areas where Congress has the authority to pass federal laws prohibiting or requiring certain acts, the "anti-commandeering" principle of the Tenth Amendment prohibits Congress from compelling the states to use their own laws and officials to enforce federal law or implement federal policy objectives. Simply put, Congress can prohibit drug use, but it cannot force the states to prohibit anything. Accordingly, even if Congress wanted to preempt a state law that exempts some marijuana users from penalties under state and local laws, it could not.

ARGUMENT

I. The local ordinance banning medical marijuana conflicts with the MMMA and is therefore preempted by state law.

Standard of Review and Issue Preservation

Whether a state statute preempts a local ordinance is a question of statutory interpretation and therefore a question of law that is reviewed de novo. *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 602; 673 NW2d 111 (2003). Plaintiff preserved the state law preemption issue on pages 7-10 of his motion for summary disposition and pages 11-15 of his brief on appeal.

Analysis

It could not be clearer that the voters of Michigan intended to protect registered qualifying patients from penalty of any kind under state and local law for the medical use of marijuana. Section 4 of the MMMA provides that qualifying patients and primary caregivers who have been issued and possess a registry identification card "shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty . . . . for the medical use[6] of marihuana in accordance with this act . . . ." MCL 333.26424(a). Nevertheless, Wyoming has defied the MMMA by adopting an ordinance that diametrically conflicts with it. Ordinance No. 11-10 outlaws medical use of marijuana anywhere within the city of Wyoming. (Answer to 1st Am. Compl. ¶ 30, Appendix 12b.) The ordinance is consequently invalid under straightforward principles of state preemption law.

[6] "Medical use" is defined by the MMMA to include the possession, cultivation and manufacture of marijuana for medical purposes. MCL 333.26423(f).

A. The ordinance is preempted because it makes plaintiff subject to penalties for the medical use of marijuana and the MMMA expressly provides that patients shall *not* be subject to penalties for the medical use of marijuana.

Under Michigan's constitutional and statutory structure, the City of Wyoming's power to legislate is delegated by and subject to controlling state law. Michigan's Constitution provides: "Each . . . city . . . shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and law.*" Const 1963, art 7, §22 (emphasis added). "While prescribing broad powers, this provision specifically provides that ordinances are subject to the laws of this state, i.e., statutes." *AFSCME v City of Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003). Similarly, the Michigan Home Rule Cities Act authorizes a city to enact ordinances "through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns *subject to the constitution and general laws of this state.*" MCL 117.4j(3) (emphasis added). Under this constitutional and statutory structure, local legislation is subordinate to state law. See *AFSCME*, *supra*, at 410-11. Wyoming's ordinance, then, is subordinate to the MMMA.

State law preempts a local ordinance where there is a direct conflict between the two: "A municipality is precluded from enacting an ordinance if . . . the ordinance is in direct conflict with the state statutory scheme." *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977). "A direct conflict exists . . . when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id.* at 322 n 4. That is exactly the case here. Wyoming's ordinance permits local authorities to do precisely what Section 4 of the MMMA prohibits: impose civil penalties on registered qualifying patients for their medical use of marijuana. Put another way, the ordinance prohibits *all* marijuana use, whereas the MMMA

exempts its *medical* use from penalty. The MMMA preempts the ordinance because the ordinance directly conflicts with the statute.

Michigan case law is replete with instances of local ordinances being struck down as preempted by state law. One such case is particularly instructive. In *Builders Ass'n v City of Detroit*, 295 Mich 272; 294 NW 677 (1940),[7] this court invalidated a city ordinance that prohibited *all* real estate transactions on Sundays because it conflicted with the statewide Sunday closing law's specific exemption for those who observe the Sabbath on Saturday. The lesson from *Builders Association* is clear: where the local ordinance fails to make an exemption that the state law requires, the state law prevails and the local ordinance must fall. Wyoming's ordinance in this case prohibits marijuana with no exemption for medical use, an exemption the MMMA requires by its very terms. The MMMA therefore preempts the ordinance.

A more recent example is *City of Monroe v Jones*, 259 Mich App 443; 674 NW2d 703 (2004). In that case, the court of appeals held that the city could not enforce its one-hour parking ordinance against a disabled person because it was preempted by a state statute that exempted disabled persons from parking violations: "A municipality's power to adopt an ordinance regarding municipal concerns is subject to the constitution and law. A state law preempts a municipal ordinance if the ordinance directly conflicts with the state statute." *Id.* at 450 (citations and internal quotation marks omitted). The same principle applies here; the MMMA preempts the Wyoming ordinance.

By enacting the MMMA, the voters expressed their intent that Michigan join the other states that "do not penalize the medical use and cultivation of marihuana." MCL 333.26422(c).

[7] The case is recognized as foundational in Michigan state preemption law. See *People v Llewellyn*, *supra*, 401 Mich at 322 n 4 (citing *Builders Ass'n*).

Wyoming may not override the MMMA by enacting an ordinance that prohibits the very activity the MMMA protects from penalty. The ordinance is therefore preempted.

B. Wyoming cannot completely ban medical marijuana just by labeling its ordinance a "zoning regulation."

Wyoming argues that its ordinance is not preempted because it is a "zoning regulation" authorized by the Michigan Zoning Enabling Act ("MZEA"), MCL 125.3201 *et seq.* (Appellant's Brief at 5.) That argument is meritless for several reasons.

First, a zoning ordinance is subordinate to state law just like any other ordinance. *Dingeman Advertising, Inc v Saginaw Township*, 92 Mich App 735; 285 NW2d 440 (1979), helps illustrate why Wyoming's ordinance is preempted by the MMMA. In that case, the plaintiff was given a state permit to construct outdoor advertising billboards in accordance with the terms and conditions of the state Highway Advertising Act, but a local township's zoning ordinance prohibited all billboard advertising. The township claimed that it had authority under the Township Rural Zoning Act to adopt its ordinance, but the court disagreed. Although the zoning act provided the township with a *general* grant of authority to enact zoning ordinances, the highway advertising act contained more *specific* provisions related to billboard advertising. Because "[i]t is generally the case that specific statutory provisions control over more general statutory provisions," the court reasoned, "implementing the more specific requires that activities under the general enactment be constrained." *Id.* at 739. The township's zoning ordinance was therefore preempted by the state's highway advertising statute. *Id.* at 737-38.

Applying the same reasoning to this case, Wyoming's zoning ordinance is preempted by the MMMA. Although the MZEA provides local units of government with a *general* grant of authority to enact zoning ordinances, the MMMA contains a *specific* provision protecting the medical use of marijuana from penalty in any manner. Where one statute (such as the MZEA)

provides localities with a general grant of lawmaking authority and another statute (here, the MMMA) contains more specific limitations, the more specific statute prevails and preempts the local law. The MMMA unambiguously states that registered qualified patients shall not be subject to *any* penalty for the medical use of marijuana. Accordingly, the City of Wyoming may no more prohibit the medical use of marijuana through a zoning ordinance than through any other ordinance authorized by a general enabling statute.[8]

Second, the MMMA itself explains how courts should treat other Michigan statutes of general applicability that might otherwise be used to prohibit the medical use of marijuana: "All other acts and parts of acts inconsistent with this act *do not apply to the medical use of marihuana* as provided for by this act." MCL 333.26427(e) (emphasis added). Consequently, the numerous provisions of the state's Public Health Code that generally prohibit the possession and manufacture of marijuana, see MCL 333.7401 *et seq.*, do not apply to the medical use of marijuana when undertaken in accordance with the MMMA. By the same token, the MZEA's general grant of zoning authority does not extend to zoning ordinances that would prohibit the medical use of marijuana. Therefore, just as the MMMA limits the power of law enforcement authorities to make arrests and initiate prosecutions that would otherwise be authorized by the Public Health Code, it likewise limits the power of cities and townships to prohibit the medical use of marijuana through a zoning ordinance that would otherwise be authorized by the MZEA.

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[8] The court applied the same reasoning in *City of Monroe v Jones*, *supra*, where a city's parking ordinance was held to be preempted by a state law immunizing disabled drivers from parking violations. Although the city argued that it had general authority under the Home Rule Cities Act and the Motor Vehicle Code to enact parking ordinances, the court concluded that such "authority is not absolute and unfettered and must give way to a . . . specific statute regarding disabled persons and parking." *Id.*, 259 Mich App at 451. Applying the same reasoning in this case, Wyoming's zoning authority is likewise not absolute and unfettered; it must give way to a specific statute regarding the medical use of marijuana.

This court's recent decision in *People v Koon*, 494 Mich 1; __ NW2d __ (2013), is almost directly on point. In that case, the state tried to prosecute a registered medical marijuana patient for violating the Motor Vehicle Code, MCL 257.625(8), which prohibits driving with *any* amount of marijuana in one's system. The MMMA, by contrast, protects registered patients from penalty in any manner for the medical use of marijuana (which is defined to include the "internal possession" of marijuana) unless the patient is driving "under the influence" of marijuana. *Koon, supra* at 2. Thus, in the case of a patient who drives with some marijuana in his or her system but is not "under the influence" of marijuana, there is an apparent conflict between the Motor Vehicle Code and the MMMA. *Id.* at 3. Such conflicts, this court held, are resolved in favor of the MMMA: "When the MMMA conflicts with another statute, the MMMA provides that '[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana . . . .'" *Id.* (quoting MCL 333.26427(e)). Accordingly, the MMMA supersedes MCL 257.625(8), which cannot be enforced against medical marijuana patients who are driving with some marijuana in their system but are not "under the influence" of marijuana and are otherwise complying with the MMMA. *Id.*

The reasoning of *Koon* is controlling here. To whatever extent the MZEA might otherwise allow Wyoming to prohibit the cultivation or possession or marijuana through a zoning ordinance, the MMMA is inconsistent with—and thus supersedes—the MZEA as applied to an ordinance that would prohibit registered patients from growing or possessing marijuana for medical use in accordance with the MMMA. Wyoming thus cannot rely on its zoning authority, any more than the state can rely on the Motor Vehicle Code, to penalize conduct that is protected under the MMMA.

Furthermore, Wyoming's ordinance is far from a typical "zoning" measure. "A zoning ordinance is defined as an ordinance which regulates the use of land and buildings according to districts, areas, or locations." *Square Lake Hills Condominium Ass'n v Bloomfield Twp*, 437 Mich 310, 323; 471 NW2d 321 (1991). Although Wyoming's zoning ordinances generally function in this manner, Ordinance No. 10-11 does nothing to specify specific areas, types of property, or characteristics of buildings where medical use of marijuana may occur. (See Court of Appeals Opinion n 4, Appendix 13a.) It broadly declares unlawful *any* use of *any* property that violates any federal law. (See *id.* at 11a; Answer to 1st Am. Compl. ¶ 30, Appendix 12b.) The ordinance's purpose and effect is to ban the medical use of marijuana *throughout* the city of Wyoming. (See Appellant's Brief at 8.) It is not, in any meaningful sense, a simple "zoning regulation"; it is outright prohibition.[9] Regardless of how Wyoming's ban is labeled, it is difficult to imagine a more direct conflict between a local ordinance and a state law.

Finally, although Wyoming understandably cites the California case of *City of Riverside v Inland Empire Patients Health & Wellness Center, Inc*, 56 Cal 4th 729; 156 Cal Rptr 3d 409; 300 P3d 494 (2013), where local zoning restrictions were upheld, that case is easily distinguished. California's medical marijuana law exempts patients and collectives only from

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[9] Wyoming argues that its ban on medical marijuana is permissible because plaintiff has not established a "demonstrated need" under the MZEA's exclusionary zoning provision, MCL 125.3207. (Appellant's Brief at 9.) This argument should be deemed waived because it was raised for the first time before this court. In any event, it is meritless because it conflates two separate issues: preemption and exclusionary zoning. Wyoming's ordinance is preempted because the MMMA explicitly provides that the medical use of marijuana shall not be subject to penalty in any manner. Furthermore, because the MMMA states that "[a]ll other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act," MCL 333.26427(e), the "demonstrated need" requirement of MCL 125.3207 does not apply to the medical use of marijuana. See *Koon, supra*, 494 Mich at 3. Requiring certified, registered medical marijuana patients to prove a "demonstrated need" to possess or cultivate a limited amount of marijuana in their own homes and for their own use is clearly inconsistent with the MMMA, which was crafted to allow the very activity that Wyoming seeks to prohibit.

"state criminal sanctions" under specified, enumerated sections and provisions of the state's Health and Safety Code. *Id.* at 738, 744-45, 748, 753, 761; see Cal Health & Safety Code 11362.775. By contrast, in Michigan the MMMA does not narrowly enumerate specified statutes in the Public Health Code from which medical marijuana patients are exempt; it broadly declares that they shall not be subject to penalty *in any manner* for the medical use of marijuana, and that any other law inconsistent with the MMMA *does not apply* to the medical use of marijuana. MCL 333.26424(a), 333.26427(e). Thus, unlike the medical marijuana law at issue in *City of Riverside*, the MMMA's plain language immunizes qualifying patients from penalties to which they would otherwise be subject under a local ordinance.

In sum, Wyoming's ordinance is not insulated from review merely because it is described by defendant as a "zoning regulation." Like any other ordinance, a zoning regulation is subject to state law and is preempted if it conflicts with state law. In this case, there is a clear conflict between Wyoming's complete ban on the medical use of marijuana and the protections of the MMMA. Accordingly, there should be no question that Wyoming's ordinance is preempted.

C. The court should reject Wyoming's remaining arguments regarding state preemption.

Wyoming offers a hodgepodge of other arguments and assertions as to why its ordinance is not preempted. As explained below, they are meritless.

No "Absolute Right" to Grow or Possess Marijuana. Wyoming cites numerous Michigan cases for the proposition that the MMMA did not establish any "absolute right to grow, use or possess marijuana." (Appellant's Brief at 2.) Of course that is true, but it is irrelevant here. Plaintiff does not assert an "absolute right" to use marijuana. Rather, as a registered qualifying patient, he has a right not to be subject to penalties for the medical use of marijuana that is undertaken in compliance with the terms and requirements of the MMMA. MCL 333.26424(a).

Plaintiff does not assert any unfettered right to use marijuana; he seeks a declaratory judgment that the city's ordinance—as applied to him and his medical use of marijuana in accordance with the MMMA—is unenforceable because it is preempted by the MMMA. (See 1st Am. Compl. ¶ 36, Appendix 7b.)

Other Forms of Local Regulation. Wyoming incorrectly construes the court of appeals' decision as completely eliminating the ability of a municipality to regulate the cultivation and distribution of marijuana within its borders. (Appellant's Brief at 3.) That is clearly not what the court of appeals held, nor is such a holding necessary to provide plaintiff with the relief he seeks in this case. First, the city is free to enforce its ordinance against property owners who are *not* protected by Section 4 of the MMMA—for example, patients or caregivers with more than the maximum allowable number of plants; patients or caregivers who run illegal dispensaries; or individuals who are not even registered as qualifying patients or caregivers. See, e.g., *State v McQueen*, 493 Mich 135; 828 NW2d 644 (2013); *State v Bylsma*, 493 Mich 17; 825 NW2d 543 (2012). Second, this case does not require the court to decide the extent to which some other local ordinance may reasonably *regulate* the medical use of marijuana. (See Court of Appeals Opinion, Appendix 13a.) The ordinance at issue here is preempted because it completely *prohibits* the medical use of marijuana.[10]

[10] In this regard, it is unnecessary for the court to decide whether the MMMA completely "occupies the field" of medical marijuana regulation. As stated in Wyoming's brief, a local ordinance is preempted if (1) it is in "direct conflict" with state law ***or*** (2) the state law "occupies the field" of regulation. (Appellant's Brief at 3-4, citing *People v Llewellyn*, *supra*, 401 Mich at 322.) In some future case involving an ordinance that merely regulates the safety of conditions for growing or storing medical marijuana, this court may be called upon to decide whether the MMMA fully occupies the field and thereby preempts all local regulation of medical marijuana. In this case, the court need only hold that Wyoming's total city-wide prohibition of medical marijuana is preempted because it is in direct conflict with the MMMA.

Injunction Not a "Penalty." Wyoming also argues that its ordinance could be enforced through an injunction and this would not be a "penalty" prohibited by the MMMA. (Appellant's Brief at 11.) The court of appeals wisely rejected this sophistry. The MMMA broadly prohibits Wyoming from making the medical use of marijuana "*subject to* arrest, prosecution, or *penalty in any manner*, . . . including *but not limited to* civil penalty . . . ." MCL 333.26424(a) (emphasis added). An injunction, which is a court order backed up by the threat of serious criminal or civil penalty, is not materially different from a misdemeanor or felony statute: the penalty comes after you violate it. Thus, a patient who is enjoined from the medical use of marijuana is "subject to . . . penalty" for the medical use of marijuana. If the MMMA prohibits cities from making medical marijuana patients subject to arrests, prosecutions, and fines but not injunctions (which, when violated, would themselves result in arrests, prosecutions, and fines), the MMMA's protections would amount to little.[11]

Strangely, Wyoming cites this court's decision in *State v McQueen*, *supra*, for the proposition that its ordinance can be enforced through an injunction. *McQueen* stated just the opposite: an injunction for marijuana-related nuisance activity is lawful only insofar as the activity is *not* protected by the MMMA. *Id.*, 493 Mich at 148. *McQueen* therefore completely undermines the city's argument that injunctions can be used to enforce its ordinance against patients and caregivers who are complying with the MMMA.

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[11] "[B]ecause the MMMA was the result of a voter initiative," this court "must give the words of the MMMA their ordinary and plain meaning as would have been understood by the electorate." *People v Kolanek*, 491 Mich 382, 397; 817 NW2d 528 (2012). "Initiative provisions are liberally construed to effectuate their purposes and facilitate rather than hamper the exercise of reserved rights by the people," and "a reasonable construction must be given in light of the purpose of the statute." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461-62; 540 NW2d 693 (1995). The preamble to the MMMA states as one of its purposes "to provide protections for the medical use of marihuana." 2008 IL 1, pmbl. Section 4 of the law lays out those protections in the most expansive language conceivable. MCL 333.26424.

Standing. Finally, without developing an argument or citing a single case, Wyoming's brief vaguely alludes to plaintiff's standing being "questionable." (Appellant's Brief at 12.) This assertion should be disregarded for purposes of this appeal. As this court has repeatedly held, "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quoting *Mitcham v Detroit*, 355 Mich 183, 203; 94 NW2d 388 (1959)); see also *Goolsby v City of Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Furthermore, MCR 7.302(H)(4)(a) limits the issues to those raised in the application for leave to appeal, and Wyoming did not challenge plaintiff's standing in its application. In fact, at oral argument before the court of appeals, Wyoming conceded that plaintiff has standing. (Court of Appeals Opinion n 2, Appendix 10a.)

In any event, plaintiff does have standing because he is a registered qualifying patient who wishes to engage in the medical use of marijuana but will be "subject to . . . penalty" under Wyoming's ordinance for doing so. He therefore has a "substantial interest[] that will be detrimentally affected in a manner different from the citizenry at large," *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372; 792 NW2d 686 (2010), and a declaratory judgment will "guide or direct future conduct" "in order to preserve legal rights" "before actual injuries or losses have occurred," *UAW v Cent Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). Declaratory relief is appropriate. MCR 2.605.

II. The MMMA is not preempted by federal law because there is no conflict between the MMMA and the CSA.

Standard of Review and Issue Preservation

Whether federal law preempts state law is a legal question dependent on statutory interpretation that is reviewed de novo. *People v Kanaan*, 278 Mich App 594, 601; 751 NW2d 57 (2008); *Konynenbelt v Flagstar Bank*, 242 Mich App 21, 27; 617 NW2d 706 (2000). Plaintiff preserved the federal law preemption issue on pages 10-16 of his motion for summary disposition and pages 15-35 of his brief on appeal.

Analysis

Wyoming argues that even if there is a conflict between its ordinance and the MMMA, the ordinance survives because the MMMA is itself preempted by federal law. In other words, the city raises federal preemption as an affirmative defense, arguing that its local ordinance is valid because the MMMA is not. (See Answer to 1st Am. Compl., Affirmative Defenses ¶¶ 2-3, Appendix 13b; Court of Appeals Opinion, Appendix 13a.) It is true that if the MMMA were preempted by federal law, the MMMA would be "without effect" and the local ordinance would stand. See *Maryland v Louisiana*, 451 US 725, 746; 101 S Ct 2114; 68 L Ed 2d 576 (1981).[12] But, as the court of appeals correctly held, the MMMA is not preempted. State law is not invalid just because an activity that is illegal under federal law is not subject to penalties under state law.

[12] Federal preemption is grounded in the Supremacy Clause of the United States Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." US Const, art IV, cl 2.

A. Congressional intent is dispositive, and there is a strong presumption against federal preemption of state laws.

"Congressional intent is the cornerstone of preemption analysis." *Westlake Transp, Inc v Public Serv Comm'n*, 255 Mich App 589, 595; 662 NW2d 784 (2003). The Supremacy Clause does not mean that federal law automatically displaces state law whenever federal and state law say something different about the same subject. Rather, courts must closely examine the relevant federal statute to determine whether and to what extent Congress actually intended to preempt state law. See *Wyeth v Levine*, 555 US 555, 565; 129 S Ct 1187; 173 L Ed 2d 51 (2009); *Medtronic, Inc v Lohr*, 518 US 470, 485-86; 116 S Ct 2240; 135 L Ed 2d 700 (1996). Unless Congress intends that federal and state laws addressing the same subject cannot stand side by side, the state law survives.

Several well-recognized rules of statutory construction govern the federal preemption analysis, in this case as in all others. First, "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). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did *not* intend to displace state law." *Maryland, supra*, 451 US at 746 (emphasis added). This "assumption that the historic police powers of the States are not to be superseded unless that was the clear and manifest purpose of Congress . . . provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Riegel v Medtronic*, 552 US 312, 334; 128 S Ct 999; 169 L Ed 2d 892 (2008) (internal quotation marks and alterations omitted).

Second, the presumption against federal preemption is "heightened" where Congress is legislating in a field traditionally occupied by the states. *Id.*; see also *Lohr, supra*, 518 US at

485. The "heightened" presumption applies here, as areas of traditional state regulation include public health, safety, medicine, and narcotics. *Riegel, supra*, at 334; *Gonzales v Oregon*, 546 US 243, 270; 126 S Ct 904; 163 L Ed 2d 748 (2006); *Lohr, supra*, at 475; *Hillsborough County v Automated Med Labs, Inc*, 471 US 707, 716; 105 S Ct 2371; 85 L Ed 2d 714 (1985); *Reina v United States*, 364 US 507, 512; 81 S Ct 260; 5 L Ed 2d 249 (1960). By contrast, the presumption against federal preemption is less robust in areas of unique federal concern such as foreign trade or federal agencies and officials. See *Buckman Co v Plaintiffs' Legal Cmte*, 531 US 341, 347-48; 121 S Ct 1012; 148 L Ed 2d 854 (2001); *Crosby v Nat'l Foreign Trade Council*, 530 US 363; 120 S Ct 2288; 147 L Ed 2d 352 (2000).

Third, if the federal statute at issue contains a clause expressly addressing preemption, that clause "necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce v Whiting*, __ US __; 131 S Ct 1968, 1977; 179 L Ed 2d 1031 (2011) (internal quotation marks omitted). Then, that preemption clause itself must be interpreted narrowly and with a presumption against preemption. *Lohr, supra*, 518 US at 485; *Thomas v United Parcel Service*, 241 Mich App 171, 174; 614 NW2d 707 (2000). "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, supra*, 552 US at 335. "The case for federal pre-emption is 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 stand by both concepts and to tolerate whatever tension there is between them." *Wyeth, supra*, 555 US at 575 (brackets and internal quotation marks omitted).

B. The CSA's antipreemption clause expresses Congress's intent not to preempt state medical marijuana laws except in cases of "positive conflict."

In this case, the federal CSA contains explicit language that contemplates dual and co-existent federal and state systems for regulating the possession and cultivation of marijuana and other drugs. Section 903 of the CSA states:

> 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.]

This sentence, which has been described as a "nonpreemption clause," *Gonzales v Oregon*, *supra*, 546 US at 289 (Scalia, J., dissenting), and an "antipreemption provision," *United States v $79,123.49 in US Cash & Currency*, 830 F2d 94, 98 (CA 7, 1987); *Hartford v Tucker*, 225 Conn 211, 215; 621 A2d 1339 (1993), "explicitly contemplates a role for the States in regulating controlled substances." *Gonzales v Oregon, supra*, at 251. "This express statement by Congress that the federal drug law does not generally preempt state law gives the usual assumption against preemption additional force." *Nat'l Pharmacies, Inc v De Melecio*, 51 F Supp 2d 45, 54 (D PR, 1999).

Congress has thus expressly disclaimed any intent to "occupy the field" of regulating controlled substances such as marijuana, leaving it to the states to enact their own drug laws to be enforced alongside federal enforcement of the CSA. In fact, most law enforcement related to illicit drug use takes place on the state level, not under federal law. Some states' drug laws largely mirror the CSA, some regulate controlled substances more strictly than the CSA, and some less. With the exception of state laws that "positively conflict" with the CSA "so that the two cannot consistently stand together," 21 USC 903, no such law is preempted.

C. There is no "positive conflict" between the CSA and the MMMA such that the two cannot consistently stand together.

Federal and state laws do not "positively conflict" merely because a federal law prohibits certain conduct and a state law does not. In California, which for over 15 years has had a medical marijuana law passed by initiative, the courts have repeatedly rejected municipalities' attempts to circumvent that law by claiming it is preempted by the CSA. See *Qualified Patients Ass'n v City of Anaheim*, 187 Cal App 4th 734, 756-63; 115 Cal Rptr 3d 89 (2010); *County of San Diego v San Diego NORML*, 165 Cal App 4th 798, 818-28; 81 Cal Rptr 3d 461 (2008); *City of Garden Grove v Superior Court*, 157 Cal App 4th 355, 380-86; 68 Cal Rptr 3d 656 (2007). Similarly, in Oregon, where medical marijuana patients are entitled to gun licenses issued under state law, the state's highest court has rejected county officials' arguments that the state law is preempted by the federal Gun Control Act. See *Willis v Winters*, 350 Or 299, 307-14; 253 P3d 1058 (2011). These courts all recognized that where a federal law prohibits an activity and a state law does not prohibit it, there is no conflict between them. This case is no different.

Federal preemption doctrine recognizes two types of conflict between state and federal law: impossibility conflict and obstacle conflict. *Hillsborough County, supra*, 471 US at 713. The court of appeals correctly held that the CSA and the MMMA do not conflict under either of these rules.

i. The CSA does not preempt the MMMA under the "impossibility conflict" rule because it is possible to comply with both laws.

Under the impossibility rule, "state and federal law conflict where it is impossible . . . to comply with both state and federal requirements." *PLIVA, Inc v Mensing*, __ US __; 131 S Ct 2567, 2577; 180 L Ed 2d 580 (2011). Such a conflict arises only where a state law actually *requires* someone to violate a federal law, or vice-versa, and "[t]he existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice v Norman*

Williams Co, 458 US 654, 659; 102 S Ct 3294; 73 L Ed 2d 1042 (1982). Thus, "[i]mpossibility pre-emption is a demanding defense." *Wyeth*, *supra*, 555 US at 573.

The MMMA does not conflict with the CSA under the impossibility rule because it is possible to comply with both laws. The CSA prohibits the possession and cultivation of marijuana, and the MMMA prohibits state and local officials from penalizing its medical use. But the MMMA does not require anyone to possess or distribute marijuana, and the CSA does not require state or local officials to enforce federal law or punish people for engaging in activity that violates federal law. Thus, the City of Wyoming and its officials can comply with the CSA by not growing or possessing medical marijuana themselves, and they can comply simultaneously with the MMMA by not adopting or enforcing local ordinances that subject medical marijuana patients and caregivers to penalties for growing or possessing medical marijuana. Likewise, although it is possible for plaintiff to violate the CSA while complying with the MMMA, it is also possible for plaintiff to comply with both the MMMA and CSA simultaneously. In short, neither law requires conduct the other law forbids, and neither forbids conduct the other requires.[13]

Courts outside of Michigan have swiftly rejected municipalities' federal preemption claims under the impossibility rule. As explained in *Qualified Patients*, *supra*, 187 Cal App 4th

[13] Although may be "impossible" to actually use marijuana and comply with federal law at the same time, that is not the correct test for preemption under the impossibility doctrine. The relevant question is whether it is possible *in the abstract* to comply with both laws simultaneously, not whether the parties before the court actually intend to comply with both laws simultaneously. "The Supreme Court has made clear that even if one sovereign's law purports to give people a right to engage in conduct that the other sovereign's law purports to prohibit, the 'physical impossibility' test is not satisfied; a person could comply with both state and federal law simply by refraining from the conduct." Nelson, *Preemption*, 86 Va L R 225, 228 n 15 (2000). Thus, the impossibility test is "vanishingly narrow." *Id.* at 228.

at 759 (rejecting the City of Anaheim's claim that California's two medical marijuana statutes are preempted by federal law):

> A claim of positive conflict might gain more traction if the state required, instead of merely exempting from state criminal prosecution, individuals to possess, cultivate, transport, possess for sale, or sell medical marijuana in a manner that violated federal law. But because neither the [Compassionate Use Act] or the [Medical Marijuana Program Act] require such conduct, there is no "positive conflict" with federal law, as contemplated for preemption under the CSA. In short, nothing in either state enactment purports to make it impossible to comply simultaneously with both federal and state law. [Citation omitted.]

In sum, "there is no conflict based on the fact that Congress has chosen to prohibit the possession of medical marijuana, while [Michigan] has chosen not to." *City of Garden Grove*, *supra*, 157 Cal App 4th at 385 (also holding that California's medical marijuana law is not preempted).

ii. The CSA does not preempt the MMMA under the "obstacle conflict" rule because the MMMA does not stand in the way of federal law.

Under the obstacle theory, even where state and federal laws do not conflict under the "impossibility" test, state laws are preempted to the extent they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County*, *supra*, 471 US at 713. As with the impossibility rule, the court of appeals correctly ruled that the MMMA is not preempted under the obstacle conflict doctrine.

Although the obstacle doctrine is somewhat broader than the impossibility rule, it does not stand for the nearly boundless proposition that federal law preempts state law whenever state lawmakers disagree with federal lawmakers or state law does not mirror federal law. Obstacle preemption applies only if, "under the circumstances of a particular case," "the purpose of the [federal] act *cannot* otherwise be accomplished—if its operation within its chosen field else *must* be frustrated and its provisions *refused* their natural effect." *Crosby*, *supra*, 530 US at 373

(emphases added; internal quotation marks omitted). The United States Supreme Court has recently warned that

> preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law. Our precedents establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act. [*Chamber of Commerce v Whiting*, *supra*, 131 S Ct at 1985 (citations and quotation marks omitted).]

That "high threshold" is not met here. The CSA, it is true, prohibits the possession and cultivation of marijuana regardless of whether it is used for medical purposes. But the fact that the CSA includes no exemption for medical use does not mean that its purpose "cannot otherwise be accomplished" and its operation "must be frustrated and its provisions refused their natural effect" whenever a state's drug law does contain such an exemption. *Crosby*, *supra*, 530 US at 373 (internal quotation marks omitted). There is no reason to conclude that Congress, in prohibiting *all* marijuana use as a matter of federal law, thereby intended to prevent states from limiting penalties *at the state and local level* to a smaller subset of marijuana use. Such a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" cannot serve as the basis for setting aside a duly enacted state law. *Chamber of Commerce v Whiting*, *supra*, at 1985 (internal quotation marks omitted).

The MMMA would be preempted if it actually stood in the way of federal law enforcement activity, but it does nothing of the kind. Although the MMMA protects medical marijuana patients and caregivers from penalties under color of *state* law for the medical use of marijuana, it has never been seriously suggested that the MMMA is intended to prohibit federal officials from enforcing the CSA, even against medical marijuana patients and caregivers. See MCL 333.26422(c) (acknowledging that federal law prohibits any use of marijuana, recognizing

that states are not required to penalize conduct that is prohibited by federal law, and declaring that Michigan intends to join those states that do not penalize the medical use of marijuana); *United States v Hicks*, 722 F Supp 2d 829, 833 (ED Mich, 2010) ("It is indisputable that state medical-marijuana laws do not, and cannot, supercede federal laws that criminalize the possession of marijuana. . . . And if federal law and precedent were not clear enough, the MMMA specifically acknowledges that it does not supercede or alter federal law. . . . Thus, the MMMA has no effect on federal law . . . .").[14] The MMMA prevents state and local officials from penalizing some conduct that happens to violate the CSA, but it does not allow them to stand in the way of federal officials who wish to enforce the CSA. Federal officials remain able to prosecute all CSA violations in Michigan just as they can in any other state, and the MMMA does nothing to impede or frustrate those prosecutions. Similarly, "under circumstances of [this] particular case," *Crosby*, *supra*, 530 US at 373 (internal quotation marks omitted), the relief plaintiff seeks would affect the City of Wyoming's ability to penalize some conduct that violates federal law, but it would not create an obstacle to the federal government's ability to penalize plaintiff for violating the CSA should it choose to do so. Thus, it cannot be said that as a result of the MMMA "the purpose of the [federal] act cannot otherwise be accomplished" or its "operation . . . frustrated." *Id.* (internal quotation marks omitted).

Of course, those who voted against the MMMA might prefer, as a matter of public policy, that federal law enforcement efforts be assisted, bolstered and complemented by state

[14] See also *Gonzales v Raich*, 545 US 1; 125 S Ct 2195; 162 L Ed 2d 1 (2005) (holding that the Commerce Clause empowers Congress to prohibit the possession and cultivation of medical marijuana in California under federal law, notwithstanding the California statute exempting qualifying patients and caregivers from criminal penalties); *United States v Cannabis Cultivators Club*, 5 F Supp 2d 1086, 1100 (ND Cal, 1998) ("[W]hether defendants' conduct falls within the scope of [California's medical marijuana law] is immaterial. Defendants do not argue, as they cannot, that simply because state law does not prohibit their conduct federal law may not do so.").

drug laws that mirror the CSA in all respects. The CSA recognizes no medical purpose defense, and consequently it might be said that a state's decision to refrain from penalizing the possession and cultivation of marijuana when it is used for medical purposes does not *actively support* the full purposes and objectives of Congress. Such a decision, however, is not equivalent to standing as an *obstacle* to their accomplishment. The MMMA simply requires state and local officials to *refrain from penalizing* some private conduct that violates federal law. There is a critical difference between a state's inaction, which is all the MMMA requires, and a state's active obstruction of federal law, which would be preempted under the obstacle conflict doctrine. In our nation's so-called "War on Drugs," states are not permitted to fight on the other side. But if they simply choose not to show up to a few of the battles, they are not traitors to the cause.

The court of appeals' conclusion that the MMMA is not preempted on obstacle conflict grounds is in line with the decisions of other states' courts on this issue. As the California courts have concluded in rejecting municipalities' obstacle preemption claims, "a state statutory scheme that limits state prosecution for medical marijuana possession but does not limit enforcement of the federal drug laws . . . does not implicate federal supremacy concerns." *City of Garden Grove*, *supra*, 157 Cal App 4th at 385. Or, as the Oregon Supreme Court has said in rejecting a similar obstacle preemption claim related to medical marijuana, "The state's decision not to use its [laws] as a means of enforcing federal law does not pose an obstacle to enforcement of [federal] law." *Willis v Winters*, *supra*, 350 Or at 314. This court should reach the same conclusion.

The Supremacy Clause of the United States Constitution has never been interpreted to mean that a state law is preempted by federal law, and is thus without effect, merely because the state's lawmakers choose not to punish under state law some conduct that violates federal law.

To the contrary, not only has the United States Supreme Court warned that "preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," *Chamber of Commerce v Whiting*, *supra*, 131 S Ct at 1985 (internal quotation marks omitted), it has also said that "[t]he case for federal pre-emption is 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 stand by both concepts and to tolerate whatever tension there is between them," *Wyeth v Levine*, *supra*, 555 US at 575 (brackets and internal quotation marks omitted). Applying the obstacle preemption doctrine and 21 USC 903 in accordance with those principles, the MMMA is not preempted by federal law.

D. Under the Tenth Amendment's anti-commandeering principle, Michigan's decision to refrain from penalizing the medical use of marijuana cannot be preempted by federal law.

There is yet another reason the MMMA is not preempted. Although Congress has the power to prohibit the possession and manufacture of marijuana, it does not have the power to force states to enact the same prohibition. Where, as here, the relevant state law represents no more than a statewide policy of *not* using state and local resources to penalize conduct that happens to violate federal law, Congress simply lacks the power to preempt the state statute.[15]

Under the anti-commandeering doctrine, rooted in the federalism principles of the Tenth Amendment, each state has the sovereign power to refrain from using its own laws and law enforcement system to implement the federal government's policy objectives: "Even where

[15] Because federal preemption is primarily a question of statutory interpretation and congressional intent, the court should construe 21 USC 903 and the CSA's preemptive reach with a presumption that Congress did not intend to preempt state laws that it does not have the power to preempt. The canon of constitutional avoidance is applicable where, as here, one party's reading of a federal statute "invokes the outer limits of Congress' power" and "alters the federal-state framework." *Solid Waste Agency of N Cook County v US Army Corps of Engineers*, 531 US 159, 172-73; 121 S Ct 675; 148 L Ed 2d 576 (2001). Additionally, "[w]here the text of a preemption clause is open to more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Riegel*, *supra*, 552 US at 335.

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) (quoting *New York v United States*, 505 US 144; 112 S Ct 2408; 120 L Ed 2d 120 (1992)); see also *Reno v Condon*, 528 US 141, 149-51; 120 S Ct 666; 145 L Ed 2d 587 (2000) (further explaining the anti-commandeering doctrine).[16] In other words, Congress is empowered by the Commerce Clause to prohibit the possession and cultivation of marijuana, see *Gonzales v Raich*, 545 US 1; 125 S Ct 2195; 162 L Ed 2d 1 (2005), but under the Tenth Amendment the states are not required to prohibit under their own drug laws the same wide range of activity that the CSA proscribes. States may not "stand as an obstacle" to federal law enforcement, but they also need not actively assist federal law enforcement efforts, and they need not implement their own policies that mirror or support those of the federal government.

A ruling that the CSA preempts the MMMA would turn this fundamental principle of federalism upside down. Wyoming's obstacle preemption argument is based on the flawed premise that because medical marijuana is illegal under federal law, Congress has the power to prohibit Michigan from making a statewide decision, binding on state and local officials, to refrain from subjecting the medical use of marijuana to penalties under state and local law. Such a broad-brush approach to obstacle preemption is untenable, and its implications are staggering. If a state's decision *not* to prohibit activity that happens to violate federal law were deemed an "obstacle" to the accomplishment of Congress's purpose and objective to stamp out such

[16] This court recognized this limitation on federal power, albeit in a somewhat different context, in *People v Couch*, 436 Mich 414, 416; 461 NW2d 683 (1990): "Clearly, the power to define conduct as a state criminal offense lies with the individual states, not with the federal government . . . ."

activity, then every criminal statute passed by Congress would effectively amount to a requirement that fifty state legislatures prohibit precisely the same conduct.

That is clearly not the law. The obstacle conflict rule is not so broad as to give preemptive effect to each one of the "countless federal criminal provisions [prohibiting] conduct that happens not to be forbidden under state law." *Gonzales v Oregon, supra*, 546 US at 290 (Scalia, J., dissenting). If it were, innumerable state laws would be preempted. For example, some states do not penalize under their own laws the sale of a handgun to a person under the age of 21, even though federal law forbids such a sale. Compare Idaho Code 18-3302A (state restriction on gun sales applies only to purchasers under 18 years old) and Tex Penal Code 46.06(a)(2) (same) with 18 USC 922(b)(1) (federal restriction on gun sales applies to purchasers under 21, unless the gun is a shotgun or rifle). Similarly, some states do not have laws that prohibit enticing 16- and 17-year-olds to engage in illicit sexual activity, even though federal law prohibits it. Compare Conn Gen Stat 53a-90a(a) (state law criminalizing enticement of a minor younger than 16) and Wis Stat 948.075 (similar state law) with 18 USC 2422(b) (federal law criminalizing enticement of a minor younger than 18). And in addition to medical marijuana laws, some state laws decriminalize the possession of controlled substances under other narrowly defined circumstances. See, e.g., NM Stat 30-31-27.1 (exempting from state criminal prosecution the possession of a controlled substance by an individual who needs medical assistance due to a drug overdose or who seeks medical assistance for a person experiencing an overdose). It would be absurd to suggest that all of these state laws are preempted by their federal counterparts, and thus "without effect," simply because federal law prohibits conduct that state law does not prohibit. Yet in arguing that the MMMA is preempted by the CSA, that is exactly what Wyoming would have this court hold.

In medical marijuana cases similar to this one, other states' courts have recognized that the preemptive reach of federal law is necessarily limited by the anti-commandeering principle inherent in the Tenth Amendment and our federalist system of government. In each case, the courts have rejected municipal officials' attempts to evade state law based on a federal preemption defense.

Qualified Patients Ass'n v City of Anaheim, *supra*, is directly on point. In that case, the plaintiffs sought a declaratory judgment that a California city's local ordinance criminalizing medical marijuana was preempted by that state's medical marijuana law, and the defendant city sought to justify its ordinance on grounds that the state law was preempted by the federal CSA. The court rejected the city's federal preemption defense, citing the Tenth Amendment's anti-commandeering doctrine:

> Preemption theory . . . is not a license to commandeer state or local resources to achieve federal objectives. . . . That patients may be more likely to violate federal law if the additional deterrent of state liability is removed may worry the federal government, but the proper response . . . is to ratchet up the federal regulatory regime, not to commandeer that of the state. . . .
>
> Just as the federal government may not commandeer state officials for federal purposes, a city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana. . . .
>
> The city may not justify its ordinance solely under federal law, nor in doing so invoke federal preemption of state law that may invalidate the city's ordinance. [*Qualified Patients*, *supra*, 187 Cal App 4th at 761-63 (citations and quotation marks omitted).]

The reasoning of *Qualified Patients* applies here with equal force.

Another example is the Oregon Supreme Court decision in *Willis v Winters, supra.*[17] In that case, medical marijuana patients who were legally entitled to gun licenses under Oregon state law brought a lawsuit challenging county sheriffs' refusal to issue the licenses. The sheriffs argued that because the *federal* Gun Control Act prohibits people who use marijuana from possessing firearms, the state's gun licensing statute was preempted by federal law. The Oregon Supreme Court rejected the sheriffs' federal preemption defense and directed them to issue the gun licenses as required by state law. Again, the anti-commandeering rule was paramount:

> It is well established that the federal government lacks constitutional authority to commandeer the policy-making or enforcement apparatus of the states by requiring them to enact or enforce a federal regulatory program. Although the United States Constitution establishes the supremacy of the federal government in most respects, it reserves to the states certain powers that are at the core of state sovereignty. One expression of that reservation of powers is the notion that Congress lacks authority to require the states to govern according to Congress's instructions.
>
> It follows from that "anti-commandeering" principle that Congress lacks authority to require the states to use their gun licensing mechanisms to advance a particular federal purpose. The state's decision not to use its gun licensing mechanism as a means of enforcing federal law does not pose an obstacle to the enforcement of that law. Federal officials can effectively enforce the federal prohibition on gun possession by marijuana users by arresting and turning over for prosecution those who violate it. [*Id.*, 350 Or at 313-14 (citations, quotation marks, and footnote omitted).]

This case is no different. As recognized by the California and Oregon courts in *Qualified Patients* and *Willis*, federal laws do not—and cannot—preempt state laws that merely reflect a

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[17] In addition to *Qualified Patients* and *Willis v Winters*, discussed in the text above, see *San Diego NORML, supra*, 165 Cal App 4th at 827-28 (invoking the Tenth Amendment's anti-commandeering principle in rejecting California counties' claim that the state medical marijuana law was preempted by the CSA), and *Conant v Walters*, 309 F3d 629, 646 (CA 9, 2002) (Kozinski, J., concurring) ("If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal.").

state's policy of not penalizing conduct that federal law happens to prohibit. If an Oregon state law can validly require that state's county sheriffs to issue state gun licenses to people whose possession of a gun would violate federal law, then surely the MMMA can validly require the City of Wyoming not to make plaintiff subject to penalties for his medical use of marijuana. Nothing in the CSA requires—or even could require—Michigan to allow its own state and local officials to penalize the medical use of marijuana. Consequently, the MMMA's requirement that such activity not be subject to criminal and civil penalties is not preempted by federal law.

E. Wyoming misconstrues the authorities it cites in support of its federal preemption argument.

As explained below, the cases Wyoming cites do not demonstrate that the MMMA is preempted by federal law.

Federal marijuana cases. Contrary to Wyoming's assertion, the federal drug cases it cites do not hold that the CSA preempts state medical marijuana laws. (See Appellant's Brief at 15-17, citing *Gonzales v Raich*, 545 US 1; 125 S Ct 2195; 162 L Ed 2d 1 (2005); *United States v Oakland Cannabis Buyers Cooperative*, 532 US 483; 121 S Ct 1711; 149 L Ed 2d 722 (2001); and *United States v Hicks*, 722 F Supp 2d 829 (ED Mich, 2010).) In the present case, the question before this court is whether a state law can validly prohibit *state and local* officials from penalizing the medical use of marijuana under *state and local* laws and ordinances. The issue in each of the cases cited above was fundamentally different: could the state laws prevent *federal* officials from enforcing *federal* law? In *Raich*, the Supreme Court held that the federal government had the authority, under the Commerce Clause, to prohibit and prosecute under federal law the local cultivation and use of marijuana even where such activity did not violate state law. Similarly, in *Oakland Cannabis*, the Supreme Court held that in a federal prosecution under the CSA, there was no medical defense under federal law even where a medical defense

would be allowed in a similar prosecution under state law. And in *Hicks*, the federal court held that the federal defendant's compliance with the MMMA would not excuse his violation of the conditions of his federal supervised release. In other words, state medical marijuana laws cannot be used to inhibit the federal government's enforcement of federal law. But none of these cases stands for the proposition that federal law *preempts* those state laws (and thus renders them "without effect") just because they exempt from state and local penalties some activity that remains illegal under federal law. They recognize, as does plaintiff, that Congress may sometimes prohibit conduct under federal law that is not penalized by states and localities under state and local law.

Michigan Canners. Nor does *Michigan Canners & Freezers Ass'n v Agricultural Marketing & Bargaining Board*, 467 US 461; 104 S Ct 2518; 81 L Ed 2d 399 (1984), quoted at length in Wyoming's brief (see Appellant's Brief at 17-18), stand for the broad proposition that a state law is preempted whenever it would allow individuals to engage in conduct that a federal law happens to prohibit. In that case, the federal law at issue gave farmers the right to join associations that could market agricultural products under a single contract, and it also gave all farmers the right to *refrain* from joining such associations and marketing their goods under association contracts. But under the state law, if more than 50% of the farmers that sold a particular good formed an association, the association could *require* the remaining unassociated farmers to pay an association fee and market their goods under the terms of the contract negotiated by the association. The state law was held to be preempted because it empowered the associations "to interfere in a [farmer's] decision to become or remain affiliated with an association . . . by coercing [them] to belong to, or participate in a marketing contract with, the association." *Id.* at 471. The provisions of the state law thus conflicted with those of the federal

law, which specifically gave farmers the right *not* to join associations and market their goods in an "agency shop" arrangement.

The MMMA is unlike the state law in *Michigan Canners* because it does not trample on any person's rights or interests as established by a federal law. The MMMA simply announces a statewide policy of not penalizing some private conduct that violates federal law. There is a critical difference between a state's inaction, which is all the MMMA requires, and a state's active obstruction of federal law, which is what was held to be preempted in *Michigan Canners*.[18]

Emerald Steel. That leaves the one state-court medical marijuana preemption case Wyoming cites, *Emerald Steel Fabricators, Inc v Bureau of Labor & Industries*, 348 Or 159; 230 P3d 518 (2010). There, the Supreme Court of Oregon did hold that one provision of that state's medical marijuana law is preempted by the CSA. *Emerald Steel* is an outlier, as most courts have rejected federal preemption claims in medical marijuana cases. See *Qualified Patients*, *supra*, 187 Cal App 4th at 756-63; *San Diego NORML*, *supra*, 165 Cal App 4th at 818-28; *City*

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[18] Wyoming suggests that by adhering to the MMMA, it would be forced to "ignore" federal law. (Appellant's Brief at 18.) The complaint is misplaced because federal law does not (and under the Tenth Amendment, cannot) require state and local officials to enforce the CSA. Nor can federal law require state and local officials to use their own laws and ordinances to penalize conduct that happens to violate the CSA. The MMMA requires Wyoming to refrain from subjecting plaintiff to any penalty for his medical use of marijuana. MCL 333.26424(a). Wyoming would not be violating (or even "ignoring") federal law by complying with this statutory requirement.

Put another way, when a sovereign state's laws place clear limits on the powers of state and local officials, those officials are not "ignoring" federal law just because the powers of federal officials are not similarly constrained. For example, imagine if *Michigan's* attorney general wanted to execute someone for conduct that constitutes a capital offense under federal law; he could not reasonably argue that the Michigan Constitution's prohibition on the death penalty, see Const 1963, art 4, §46, is "preempted" by the Federal Death Penalty Act, 18 USC 3591 *et seq*. There is no question that the Federal Death Penalty Act can be (and is) enforced by federal prosecutors in Michigan. Yet no one thinks that *state* prosecutors are "ignoring" federal law by not seeking capital sentences. They are following state law, as they are bound to do.

of Garden Grove, *supra*, 157 Cal App 4th at 380-86; *Willis*, *supra*, 350 Or at 307-14. The key to understanding *Emerald Steel* is that only one subsection of the Oregon law was held to be preempted, while the remainder of the statute was left intact. And when one closely examines which part of the law was held invalid and which parts survived, it is clear that *Emerald Steel* does not support Wyoming's federal preemption argument.

In *Emerald Steel*, a medical marijuana patient brought a claim for disability discrimination under a state law that subjects an employer to liability for failing to accommodate an employee's use of any drug that is "authorized . . . under . . . state . . . law." *Id.*, 348 Or at 170. The court first determined, as a matter of statutory interpretation, that one subsection of Oregon's medical marijuana law did "authorize" the use of medical marijuana under state law, thereby seemingly bringing medical marijuana use within the scope of the state statute prohibiting disability discrimination. *Id.* at 171. Then, citing *Michigan Canners* for the broad proposition that whenever a state law "authorizes . . . conduct that [a] federal Act forbids, it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the Oregon court held that the provision of the state medical marijuana law that "authorized" the use of medical marijuana was preempted by the federal CSA and was therefore "without effect." *Id.* at 177-78 (quoting *Michigan Canners, supra,* 467 US at 478 (internal quotation marks omitted)). Under the plain language of the state's disability discrimination law, the employee could not prevail in a civil suit against his employer unless the drug he was fired for using was "authorized." See *id.* at 171 & n 11, 180, 185. The court therefore rejected the employee's disability claim because, under the court's interpretation of *Michigan Canners*, Oregon could not validly "authorize" the violation of a federal law. *Id.* at 186.

There is much to criticize in the reasoning employed by the *Emerald Steel* majority, and this court—which is of course not bound by *Emerald Steel*—may well find the dissenting opinion in that case more persuasive. See *id.* at 190-206 (Walters, J., dissenting).[19] The *Emerald Steel* majority construed the CSA as having the broadest possible preemptive reach notwithstanding rules of statutory interpretation and considerations of federalism that require courts to tolerate some differences, and even some tension, between federal and state law. Notably, *Emerald Steel* was decided before the United States Supreme Court emphasized in *Chamber of Commerce v Whiting* that "preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" and that "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Whiting*, *supra*, 131 S Ct at 1985. In fact, only a year after deciding *Emerald Steel*, the Oregon Supreme Court itself published a unanimous opinion about medical marijuana with a warning that "*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted." *Willis v Winters*, *supra*, 350 Or at 309 n 6. Thus, much of *Emerald Steel*'s reasoning has been undermined or weakened not only by the dissenting opinion in that case but also by subsequent decisions of the same court and the United States Supreme Court.

Ultimately, however, it is unnecessary for this court to take a definitive position on whether *Emerald Steel* was correctly decided. Even assuming it was, the MMMA is not preempted in this case.

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[19] For example, the dissenting opinion explained that *Michigan Canners*, *supra*, does not stand for the broad proposition that a state law is preempted whenever it allows conduct that federal law forbids. Rather, the state law was preempted in *Michigan Canners* because it impaired the exercise of powers or rights created by federal law. *Emerald Steel*, *supra*, 348 Or at 199 (Walters, J., dissenting).

Throughout *Emerald Steel*, the court repeatedly stated that Oregon's medical marijuana statute provides two completely separate and distinct benefits to medical marijuana patients: (1) it *authorizes* them to use medical marijuana; and (2) it *exempts* them from criminal prosecution. *Emerald Steel*, *supra*, 348 Or at 161, 162, 171 & n 11, 172 n 12, 179-80, 185 n 21, 190. In drawing this bright line between provisions of state law that explicitly "authorize" illegal conduct and those that merely exempt such conduct from state-law penalties, the court took pains to emphasize that the subsection of the Oregon law that exempted medical marijuana use from prosecution was *not* preempted. See *id.* at 172 n 12, 185 n 21 & 190. "Congress lacks authority to require states to criminalize conduct that the states choose to leave unregulated, no matter how explicitly Congress directs the states to do so," the court explained, citing the anti-commandeering cases discussed above. *Id.* at 180 (citing *Printz*, *supra*, 521 US at 935, and *New York v United States*, *supra*, 505 US at 161-66); see also *id.* at 186. Therefore, even though the *Emerald Steel* court held that the CSA preempted the one subsection of the state law that explicitly "authorized" medical marijuana use, it emphasized that the provisions of the law exempting medical marijuana from state-law penalties remained intact.

In this case, because the provision of the MMMA that is relevant to plaintiff's claim is one of exemption, not authorization, it is not preempted even under the *Emerald Steel* line of reasoning. Plaintiff seeks a declaratory judgment that Wyoming's ordinance, as applied to him, runs afoul of section 4 of the MMMA: "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, or denied any right or privilege, including but not limited to civil penalty . . . for the medical use of marihuana in accordance with this act . . . ." MCL 333.26424(a). (See 1st Am. Compl. ¶ 23, Appendix 5b.) Section 4 does not affirmatively authorize plaintiff to use medical marijuana; it

prohibits the City of Wyoming from subjecting plaintiff to any penalty for doing so. In other words, the MMMA exempts medical marijuana patients from penalty, which, as stated above and in *Emerald Steel*, is not and cannot be preempted. See *Emerald Steel*, *supra*, 348 Or at 180, 186.

The medical marijuana patient in *Emerald Steel* was uniquely situated in that he could not state a claim against his employer under the plain language of his state's disability discrimination statute unless the drug he used was actually "authorized" under state law.[20] See *Emerald Steel*, *supra*, 348 Or at 171 & n 11, 180, 185. Therefore, the provisions of the Oregon medical marijuana law *exempting* him from penalties were of no use to him in that particular case. Here, the opposite is true. The City of Wyoming's ordinance is preempted by the MMMA because the MMMA exempts medical marijuana patients from penalties. Such an exemption is not and cannot be preempted by the CSA or any other federal law.

[20] The Oregon court was also careful to note that its decision was based as much on the language of the state's disability discrimination statute as the medical marijuana law. If the disability discrimination statute were rewritten to provide a cause of action to medical marijuana patients directly, rather than only to persons whose use of a drug was "authorized," obstacle preemption would not come into play. See *Emerald Steel*, *supra*, 348 Or at 171 & n 11, 172 n 12. Here, unlike in *Emerald Steel*, plaintiff's claim for relief does not hinge on language in some other statute that requires his conduct to be "authorized"; it is based directly on the section of the MMMA providing that such conduct "shall not be subject to . . . penalty in any manner." MCL 333.26424(a).

CONCLUSION AND RELIEF REQUESTED

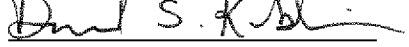
In Michigan, a local government does not have the inherent authority to disregard a state law simply because it wishes to prohibit or penalize an activity that happens to violate a federal law. Cities are creatures of state law, and as such they are powerless to enact ordinances that are contrary to state law. Congress, moreover, cannot force Michigan or its localities to penalize conduct that violates a federal law. In other words, the final decision whether the medical use of marijuana is to be subject to penalties by local officials under local law rests with the people of the State of Michigan. They made that decision at a general election on November 4, 2008.

If the City of Wyoming or its officials are dissatisfied with those election results, they are free to advocate that the MMMA be repealed by the Legislature or by the voters on a statewide ballot. They are even free to ask the federal government, which is not bound by the MMMA, to enforce the CSA against medical marijuana patients and caregivers. What they are not free to do is flout state law by making the medical use of marijuana subject to penalties under a local ordinance when the MMMA itself prohibits such penalties throughout the state.

For these reasons, the court of appeals correctly held that: (1) Wyoming's ordinance prohibiting the medical use of marijuana is preempted by the MMMA; and (2) the MMMA is not preempted by federal law. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Dated: July 31, 2013



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