STATE OF MICHIGAN

IN THE SUPREME COURT

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

PLAINTIFF-APPELLEE'S RESPONSE TO AMICUS CURIAE BRIEFS

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Plaintiff-appellee submits the following response to arguments made by amici that were not made by the City of Wyoming or raised in the lower courts.

A. The ordinance should not be construed narrowly for the first time on appeal where the record clearly reflects that plaintiff would be subject to penalties under Wyoming's zoning code for his intended medical use of marijuana.

Some of the amici argue that if Wyoming's ordinance were construed very narrowly, Mr. Ter Beek would actually not be prohibited from using medical marijuana in his home and the ordinance would thus not be preempted as applied to him. For example, the amicus briefs of the Michigan Municipal League ("MML Brief") and the Public Corporation Law Section of the State Bar of Michigan ("PCL Brief") both speculate that Wyoming's ordinance, by prohibiting "uses" contrary to federal law, might be construed to prohibit only *principal* uses—that is, "the primary use to which the premises are devoted and the primary purpose for which the premises exist." (See MML Brief at 25-26, 31; PCL Brief at 14-18.) If this construction were adopted, the amici argue, then Mr. Ter Beek can continue to use medical marijuana in his home without being subject to penalty under the Wyoming ordinance.

There are at least two reasons why this set of "narrow construction" arguments should be rejected. First, the record unquestionably reflects that throughout this litigation the City of Wyoming has taken the firm position that its zoning ordinance truly does prohibit Mr. Ter Beek from engaging in his intended "medical use" of marijuana, as that term is defined by the MMMA,[1] in his own home:

- The city manager publicly stated on the city's website: "Although Michigan voters approved the use of medical marijuana in 2008, it remains illegal under

[1] "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).

federal law and, therefore, falls within the proposed zoning ordinance." (Appendix 18b.)

- At paragraph 30 of its answer to plaintiff's amended complaint, Wyoming stated that "the cultivation, possession, distribution and use of medical marihuana is in violation of the zoning code of the City of Wyoming." (Appendix 12b.)

- On pages 8 and 11 of its June 8, 2011 brief in opposition to summary disposition in the circuit court, and again on pages 11 and 14 of its February 27, 2012 brief in the court of appeals, Wyoming stated:

    - "Plaintiff's use of property in a residential zone to cultivate and/or distribute medical marijuana would be in violation of the City's Zoning Code"; and

    - "growing medical marijuana in a residential structure in the City is illegal under federal law and therefore not allowed under the Zoning Code of the City of Wyoming."

- On page 9 of transcript of the June 17, 2011 summary disposition argument in circuit court, Wyoming's city attorney stated that the ordinance was adopted because the city "want[s] to prevent the cultivation of medical marijuana in individual homes."

- On page vii in Wyoming's February 27, 2012 brief in the court of appeals, the City of Wyoming expressly "acknowledged that Plaintiff/Appellant [that is, Mr. Ter Beek] would be in violation of the zoning ordinance if were to grow and/or distribute medical marijuana in his own home."

Thus, in light of the city's clear position that plaintiff would be violating the zoning ordinance by growing medical marijuana in his own home, the court of appeals properly concluded he was entitled to a "declaratory judgment finding defendant's ordinance void and unenforceable *to the extent that it prohibits the medical use of marijuana* in accordance with the MMMA." (Court of Appeals Opinion at 2, Appendix 10a, emphasis added.)

Second, even if amici's "narrow construction" argument had been offered by Wyoming itself, it would not have any merit because it is flatly contradicted by the plain language of the ordinance. It is well known that courts will not adopt a "saving construction" that "tortures the plain language of [an] ordinance." *NAACP v City of Richmond*, 743 F2d 1346, 1358 (CA 9,

1984). In this case, Wyoming's ordinance on its face prohibits all "uses" contrary to federal law, not just "principal uses." (See MML Brief at 24.) "Uses" are defined by the zoning code to include both principal uses *and* accessory uses. (See MML Brief at 25; PCL Brief at 14-15.) Thus, even if plaintiff's intended use of his property to engage in the medical use of marijuana were merely an "accessory use," as suggested by amici (see PCL Brief at 17), it would still violate the zoning ordinance because it would be a "use" of property contrary to federal law. In sum, the court of appeals did not err in finding that "defendant's zoning ordinance, which makes any violation of federal law an unpermitted use of one's property, cause[s] any medical use[1] of marijuana pursuant to the MMMA on any property within the city of Wyoming to be a violation of defendant's zoning ordinance." (Court of Appeals Opinion at 3, Appendix 11a.)

B. Amici defend the Wyoming ordinance using principles of "field" preemption, but the correct framework in this case is that of "conflict" preemption.

Once it is clear that the Wyoming ordinance prohibits plaintiff's intended medical use of marijuana, the question is whether the ordinance is void insofar as it is preempted by the MMMA. In arguing that the MMMA does not preempt Wyoming's ordinance, some of the amici conflate two distinct preemption concepts: *field* preemption and *conflict* preemption. The Michigan Municipal League, for example, argues: "Preemption . . . is not a half-a-loaf proposition. Either a municipality is preempted from regulating within the field occupied by the State or it is not." (MML Brief at 19.) This assertion reflects the fears of Wyoming and other amici that if the ordinance in this case is held to be preempted, then *all* local ordinances pertaining to medical marijuana, no matter what they say, will henceforth be preempted.

In truth, that is not how preemption works. This Court has repeatedly held that there are two different situations in which a state statute would preempt a local ordinance:

> A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, ***or***

> 2) if the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation.
>
> [*Addison Twp v Gout*, 435 Mich 809, 814-15; 460 NW2d 215 (1990) (quoting *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977)) (emphasis added).]

When the state statutory scheme "occupies the field" of regulation, then no local regulation pertaining to that subject is permissible. But even when the state law does not occupy the field, and thus local regulation is generally allowed, an ordinance that directly conflicts with the statute is preempted.

In this case, it is unnecessary to decide whether the MMMA *occupies the field* of medical marijuana regulation, to the complete exclusion of all local zoning ordinances on that subject. As explained in plaintiff's principal brief, the ordinance at issue, as applied to him, is preempted because it *directly conflicts* with the MMMA. See *AFSCME v. City of Detroit*, 468 Mich 388, 411; 662 NW2d 695 (2003) (basing its preemption holding on conflict preemption rather than field preemption). The ordinance prohibits the medical use of marijuana and makes plaintiff subject to penalties for such medical use. Thus, there is a direct conflict between the ordinance and the MMMA, and it is the ordinance which must give way. Whether localities may adopt their own medical marijuana zoning regulations that do *not* directly conflict with the MMMA is a "field preemption" question that should be left for another day.

C. The recent U.S. Supreme Court decisions cited by amici do not undermine the court of appeals' holding that the MMMA is not preempted by federal law.

As support for Wyoming's federal preemption argument, amici offer several recent U.S. Supreme Court decisions in which state laws were found to be preempted by federal law. The PCL Brief, for example, cites *Mutual Pharmaceutical Co v Bartlett*, __ US __; 133 S Ct 2466; 186 L Ed 2d 607 (2013), and *Hillman v Maretta*, __ US __; 133 S Ct 1943; 186 L Ed 2d 43

(2013), two decisions that were rendered after the City of Wyoming filed its brief. (See PCL Brief at 25-31.) As explained below, these decisions do not change the outcome of this case.

Mutual Pharmaceutical

In *Mutual Pharmaceutical*, it was held that a state law on labeling drugs was preempted when the state and federal laws on drug labeling had two different sets of requirements for the same drug that could not both be followed by a single drug manufacturer. As the PCL Brief notes, the Court rejected the argument that the conflict between the laws could be avoided if the drug manufacturer simply stopped selling the drug in question. The Court held that because a drug manufacturer who freely chose to sell that drug was required by the state law to act in a way that would violate the federal law, the state law was preempted.

This case is plainly distinguishable. In *Mutual Pharmaceutical*, the party that was raising the federal preemption defense—the party that did not want to comply with state law—was the drug manufacturer that would have been forced by state law to violate federal law. In this case, the party that is raising the federal preemption defense is the City of Wyoming. The MMMA only requires Wyoming to refrain from penalizing medical marijuana patients—a requirement that does *not* force Wyoming to violate any federal law. Unlike the drug manufacturer in *Mutual Pharmaceutical*, the City of Wyoming is under absolutely no state-law obligation to do anything that the federal law prohibits.

The situation would be different, of course, if the MMMA required city officials to distribute medical marijuana to patients or caregivers. In such a case the officials would be similarly situated to the drug manufacturers in *Mutual Pharmaceutical*. Such officials would be forced to choose between violating the MMMA and violating the CSA. And courts would

rightly reject the argument, as the Supreme Court did in *Mutual Pharmaceutical*, that the officials could avoid the conflict by quitting their jobs. But that is not what is happening here.

Hillman

In *Hillman*, the Supreme Court unanimously reaffirmed a long-standing rule that where a federal statute gives federal employees the right to designate who should receive their federal life insurance benefits at the time of their death, the federal law preempts any state law that would divert the federal insurance proceeds to another person not designated by the federal employee. *Hillman* is cited by the PCL Brief in an attempt to persuade this Court that because Congress has "clear and substantial federal interests" in drug control, just like it has "clear and substantial federal interests" in giving federal employees the right to designate the beneficiaries of their insurance policies, the MMMA is preempted.

There are several reasons why *Hillman* does not lead to the conclusion that the MMMA is preempted in this case. First, Congress always has a "uniquely federal interest" in federal employees and federal programs. See *Boyle v United Technologies Corp*, 487 US 500, 504-06; 108 S Ct 2510; 101 L Ed 2d 442 (1998). Thus, the federal life insurance program at issue in *Hillman* gave Congress a special interest in establishing the rights of the insured because the insured were federal employees whose life insurance policies were funded by a federal program. The City of Wyoming, by contrast, is not a federal agency, and it is not charged under the CSA with enforcing federal drug laws. Meanwhile, the MMMA does nothing to prevent federal officials from enforcing the CSA. Thus, in the circumstances presented by this case—whether plaintiff is exempt from *state and local* penalties for the medical use of marijuana—the MMMA implicates no "uniquely federal interest."

Second, the state law in *Hillman* positively interfered with the rights of federal employees to designate their beneficiaries—rights that had been specifically established by Congress in the federal act. *Hillman* is thus like *Michigan Canners* (see Plaintiff-Appellee Brief at 40-41) in that the state statute interfered with the individual rights and interests established by the federal statute. In this case, by contrast, the CSA does not vest anyone with rights that the MMMA obstructs. The CSA authorizes *federal* officials to effect arrests and prosecutions for drug abuse, and federal officials remain free to enforce the CSA in Michigan, should they choose to do so, as though the MMMA had never been enacted. And any drug-enforcement authority Wyoming had prior to the MMMA's enactment was conferred on it by Michigan state law, not the CSA.

Summary

If the federal preemption decisions cited by amici are applied to this case in the way amici suggest, federal preemption doctrine would completely topple some of the most fundamental principles of our federalist system: "the power to define conduct as a state criminal offense lies with the individual states, not with the federal government," *People v Couch*, 436 Mich 414, 416; 461 NW2d 683 (1990), and the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," *Printz v United States*, 521 US 898, 935; 117 S Ct 2365; 138 L Ed 2d 914 (1997). As previously explained (see Plaintiff-Appellee's Brief at 34-39),[2] the Supremacy Clause does not amount to a requirement that states enforce federal drug laws or write their own drug laws to be coextensive with federal law. The City of Wyoming, as a municipality, is a creature of state law; it may exercise authority only as conferred by state law. *City of Taylor v Detroit Edison Co*, 475 Mich

[2] See also Amici Curiae Brief of the Cato Institute et al.

109, 115; 715 NW2d 28 (2006). Accordingly, just as Congress may not force the states and their political subdivisions to use their own laws and resources to punish drug use, municipalities may not "stand in for the federal government" and insist on implementing federal policy when the state has denied them the power to do so. *Qualified Patients Ass'n v City of Anaheim*, 187 Cal App 4th 734, 761; 115 Cal Rptr 3d 89 (2010).

No U.S. Supreme Court decision cited by amici—and, in fact, no reported decision in any jurisdiction—has ever held that a state law is preempted just because it exempts from state and local penalties private conduct that happens to be illegal under federal law. Yet Wyoming and several amici are asking this Court to announce a drastic holding that would be unprecedented in any of the 20 states with medical marijuana laws just like Michigan's: "void the MMMA in its entirety." (PCL Brief at 44.)

D. The confidentiality requirement in Section 6 of the MMMA does not render the MMMA preempted in a declaratory judgment action involving a city's obligation to comply with Section 4.

This is a case about whether the City of Wyoming must comply with Section 4 of the MMMA, MCL 333.26244, which provides that registered patients "shall not be subject to . . . penalty in any manner" for their medical use of marijuana. The PCL Brief, however, focuses on a completely separate section of the MMMA in its discussion of federal preemption. The PCL Brief argues that the MMMA is preempted because *Section 6* of the MMMA, MCL 333.26426, prohibits disclosure of confidential patient information, information that the brief says is "critical" to federal law enforcement. (PCL Brief at 38.)

There is absolutely no reason why an argument about Section 6 of the MMMA should be considered by this Court in this case. The City of Wyoming has never argued that the confidentiality requirements of Section 6 are in conflict with federal law, so the argument is waived. Furthermore, the confidential information protected in Section 6 is maintained by *state*

officials in the Department of Licensing and Regulatory Affairs, not by cities or local officials, so the City of Wyoming is the wrong party to raise the issue in any case. Moreover, the relief sought by plaintiff in this case has nothing to do with the protections of Section 6: the Wyoming ordinance he challenges does not threaten to disclose confidential information; and plaintiff seeks only a declaration that the ordinance is unenforceable to the extent it would make him subject to *penalties* in violation of *Section 4* of the MMMA. The court of appeals framed the issue correctly:

> *Under these circumstances*, the question presented . . . is whether the possibility of plaintiff being subject to the civil sanctions of the Wyoming zoning ordinance if found in violation of the city ordinance for engaging in activity otherwise permitted by the MMMA *constitutes a "penalty in any manner" prohibited by MCL 333.26424(a)*.
>
> [Court of Appeals Opinion at 4, Appendix 12a, emphasis added.]

Courts have been clear that federal preemption analysis, particularly "obstacle conflict" preemption, must focus on the circumstances of the case at hand, not the hypothetical possibility of a conflict involving a different set of facts. For example, in *Crosby v National Foreign Trade Council*, 530 US 363, 373; 120 S Ct 2288; 147 L Ed 2d 352 (2000), the Court said:

> We will find preemption where it is impossible for a private party to comply with both state and federal law, and where, *under the circumstances of a particular case*, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [Citation and quotation marks omitted; emphasis added.]

Because the circumstances of this case involve whether plaintiff is to be subject to penalties prohibited by Section 4, the question of whether Section 6 is preempted is not before the Court. The Wyoming ordinance at issue does not threaten to disclose any confidential information, so Section 6 has no application here. Put another way, Wyoming does not have standing to challenge Section 6 of the MMMA as a defense to plaintiff's claim that its ordinance is

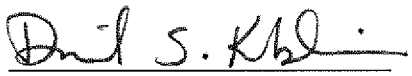
preempted by Section 4. See *County of San Diego v San Diego NORML*, 165 Cal App 4th 798, 813-18; 81 Cal Rptr 3d 461 (2008) (holding that counties lacked standing to raise a federal preemption challenge to those provisions of a medical marijuana law that did not apply to the facts of the particular case before the court). And because Wyoming has no basis to challenge Section 6, amici cannot do so either.[3]

As to the merits of the argument that the patient confidentiality provision of the MMMA is preempted by federal law, the PCL Brief argues that the MMMA is preempted because it requires officials to "aid and abet" the violation of the CSA by not disclosing confidential patient information. The PCL Brief cites no authority for this assertion, and there is abundant authority to the contrary. See *City of Garden Grove v Superior Court*, 157 Cal App 4th 355, 368; 68 Cal Rptr 3d 656 (2007) (rejecting city's argument that California's medical marijuana law is preempted because it requires city officers to "aid and abet" the violation of federal law); *Conant v Walters*, 309 F3d 629, 635-36 (CA 9, 2002) (holding that doctors do not "aid and abet" a violation of the CSA by recommending medical marijuana to patients). An aider and abettor must have "participated in the venture as something he wished to bring about and sought to make succeed." *United States v Graham*, 622 F3d 445, 450 (CA 6, 2010). Specific intent is an element of the offense, and the defendant must share in the criminal intent of the principal. *United States v. Brown*, 151 F3d 476, 486 (CA 6, 1998); *United States v Hill*, 55 F3d 1197, 1201 (CA 6, 1995). Under the MMMA, state and local officials do not participate in an illegal

[3] It is also worth noting that Section 6, like every section of the MMMA, contains an express severability clause. MCL 333.264230. Thus, even if Section 6's confidentiality provisions were found to be preempted and unenforceable in a case where that part of the MMMA were at issue, Wyoming would still be required to comply with Section 4's mandate that its ordinances not make patients and caregivers subject to penalties for their medical use of marijuana. The severability clause is yet another reason why the PCL Brief's Section 6 argument is of no use to Wyoming's claim that it is not obligated to comply with Section 4.

venture, let alone possess the required *mens rea* for criminal liability under the CSA, merely by maintaining the confidentiality of patient information pursuant to Section 6.

Respectfully submitted,



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