IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

JOHN TERBEEK

Plaintiff-Appellee

Case No. 145816

v.

Court of Appeals No. 306240

Trial Court No. 10-11515CZ

CITY OF WYOMING,

Defendant-Appellant

BRIEF OF AMICUS CURIAE

PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN

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JURISDICTIONAL BASIS

On September 10, 2012, the City of Wyoming, the Appellant herein, timely filed an Application for Leave to Appeal in this Honorable Court. This Court granted leave to appeal on April 3, 2013 and invited interested parties such as the Prosecuting Attorney's Association of Michigan to file a brief amicus curiae.

QUESTION PRESENTED

The United States Supreme Court has held in *Michigan Canners and Freezers Ass'n v Agric Mktg & Barging Bd* where a state law authorizes conduct that the federal law forbids, the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and is therefore preempted. Does Michigan's Medical Marihuana Act stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in its adoption of the Federal Controlled Substance Act?

Amicus curiae answers: "Yes."

INTERESTS OF THE AMICUS CURIAE

The amicus curiae herein is the Prosecuting Attorney's Association of Michigan ("PAAM"). PAAM is an association of the 83 County Prosecutors, the Michigan Attorney General, and the United States Attorneys serving Michigan. Founded in 1928, PAAM is incorporated as a 501.C (3) non-profit corporation. The purpose of PAAM is codified in MCL 49.62, which provides: "[i]t shall be the duty of the prosecuting attorneys' association to keep the prosecuting attorneys of the state informed of all changes in legislation, law, and matters pertaining to their office through the department of attorney general of the state of Michigan, to the end that a uniform system of conduct, duty and procedure be established in each county of the state."

The decision rendered by the Michigan Court of Appeals in *Ter Beek v City of Wyoming,* 297 Mich App 446; 823 NW2d 864 (2012) and the Michigan Medical Marihuana Act in general, undermine the ability of Prosecutors in Michigan to uniformly, fairly and consistently enforce state controlled substance laws.

PAAM asserts that Michigan's Medical Marihuana Act ("MMMA"), which permits and regulates the use of marihuana for medical purposes, is in direct conflict with the Federal Controlled Substance Act ("CSA") and therefore preempted by federal law. Conflicting laws not only create uncertainty in the law, but also undermine the rule of law. As explained further in this brief, the MMMA openly flouts federal law and in turn promotes a casual tolerance for law breaking. As a result, it undermines the very system of laws that protect our liberty.

ARGUMENT

The United States Supreme Court has held in *Michigan Canners and Freezers Ass'n v Agric Mktg & Barging Bd* where a state law authorizes conduct that the federal law forbids, the state law stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress and is therefore, preempted. Michigan's Medical Marihuana Act is preempted because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in its adoption of the Federal Controlled Substance Act.

A. Introduction

Amicus curiae addresses the question posed by the Court in arguing that a positive conflict exists between the MMMA and the CSA because the MMMA and CSA cannot consistently stand together. Specifically, the MMMA authorizes "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer" of marihuana while the CSA prohibits such various activities. In essence, the MMMA is preempted because it stands as an obstacle to the full purposes and objectives of the CSA, which include the elimination of illicit drug abuse and trafficking.

B. Summary of Argument

21 USC § 903 allows states to pass laws on the same subject matter as the CSA unless there is a positive conflict between state and federal law "so that the two cannot consistently stand together." The United States Supreme Court has held in *Michigan Canners and Freezers Ass'n v Agric Mktg & Barging Bd,* 467 US 461; 104 SCt 2518 (1984) that a positive conflict exists when the state law stands as an obstacle to the accomplishment and execution of the full purposes of Congress. More specifically, the *Michigan Canners* Court held that obstacle pre-

emption exists where a state law authorizes conduct that the federal law forbids. The Court of Appeals erred in its failure to examine and apply relevant preemption principles, including those set forth in *Michigan Canners* as well as *Emerald Steel Fabricators v Bureau of Labor and Industries*, 348 Or 159; 230 P3d 518 (2010), an Oregon Supreme Court decision which applied *Michigan Canners* in invalidating an Oregon statute that permited the medical use of marihuana Moreover, a review of the key provisions of the MMMA clearly establishes that the MMMA stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in adopting the CSA.

C. Standard of Review

An issue involving federal preemption of state statutes is reviewed *de novo* as it involves statutory interpretation, which is a question of law. *City of Detroit v Ambassador Bridge Co,* 481 Mich 29, 35; 748 NW2d 221 (2008).

This Court reviews de novo a trial court's grant or denial of a summary disposition motion. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). In deciding a motion for summary disposition under MCR 2.116(C)(10), the Court considers the affidavits, pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists to warrant a trial. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998).

D. Discussion

1. The Federal Controlled Substance Act

Congress enacted the CSA for the intended purpose of strengthening rather than weakening existing drug laws. *United States v Moore*, 423 US 122, 133; 96 SCt 335 (1975). The CSA was designed by Congress to "conquer drug abuse and to control the legitimate and

illegitimate traffic in controlled substances." *Gonzales v Oregon,* 546 US 243, 269; 126 SCt 904 (2006) (internal citations omitted), see also 21 USC § 801.

In order to carry out this intended purpose, Congress made it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance "except as authorized by [21 USC § 801-904]." 21 USC § 841(a)(1). The CSA also makes it unlawful to possess any controlled substance except as authorized by the CSA. 21 USC § 844(a). Persons who violate the CSA are subject to criminal and civil penalties, and ongoing violations may be enjoined. 21 USC §§ 841-863, 882(a)

The restrictions that the CSA places on the manufacture, distribution, and possession of a controlled substance depend upon the schedule in which the drug has been placed. 21 USC §§ 821-829. Marihuana is a classified as a "Schedule I" controlled substance, which means that its use, manufacturing, and distribution are strictly prohibited. 21 USC § 841. The CSA makes it is a twenty year felony to manufacture, cultivate or distribute marihuana. 21 USC §841. It is also a crime to knowingly rent any place for the purpose of manufacturing, distributing or using marihuana. 21 USC § 856. Government approved research is the only exception to the CSA's strict prohibitions. 21 USC § 823(f).

Recent federal decisions make it abundantly clear that the CSA does not permit nor recognize medical marihuana. For example in *United States v Oakland Cannabis Buyers' Cooperative*, 532 US 483; 121 SCt 1711 (2001) respondents operated a medical marihuana dispensary in the City of Oakland. The United States sued the cooperative in Federal District Court seeking to enjoin the cooperative from distributing and manufacturing marihuana. *Id at* 487. After the District Court granted a preliminary injunction, the cooperative violated the injunction by distributing marihuana to numerous persons. *Id at* 488. The United States

responded by initiating contempt proceedings. *Id.* In defense, the cooperative argued that distribution was medically necessary. *Id.* The District Court rejected this argument, found the cooperative in contempt, and modified the injunction to authorize the United States Marshall to seize the cooperative's premises. *Id.* On appeal, the Ninth Circuit Court of Appeals reversed and remanded, holding that the medical necessity defense "was a legally cognizable defense." *Id.* The Supreme Court, however, rejected the cooperative's medical necessity defense. The Court held that a medical necessity is not a defense to manufacturing and distributing marihuana. *Id at* 491. The Court stated that "a medical necessity exception for marijuana is at odds with the terms of the Controlled Substance Act. The statute...does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable." *Id.*

Four years later, the Supreme Court upheld the validity of the CSA after being challenged by cultivators of medical marihuana in *Gonzales v Raich.* 545 US 1; 125 SCt 2195 (2005) In *Raich,* the respondents were California residents who suffered from a variety of serious illnesses, and sought to treat their illness through the medical use of marihuana pursuant to the terms of California's Compassionate Use Act. *Id at* 6-7. Respondents were being treated by a physician who concluded that marihuana was the only effective treatment for respondents' conditions. With their physician's approval, Respondent Monson cultivated her own marihuana, while Respondent Raich relied on two caregivers for cultivation. *Id at* Page 7. On August 15, 2002, local and Federal law enforcement came to respondents' home. The Federal agents seized and destroyed respondents' cannabis plants. *Id.* Respondents thereafter brought an action against the United States Attorney General and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the Federal Controlled Substance Act. *Id.* The respondents raised several arguments in support, including that enforcing the CSA against them would violate

the Commerce Clause. Specifically, respondents argued that "the CSA's categorical prohibition of the manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." *Id.*

On appeal, the Supreme Court rejected this argument. The Court held that Congress has the ability to regulate marihuana under the CSA pursuant to the Constitution's Commerce Clause, even if the cultivation of marihuana is for legitimate medical use, and involves a purely local activity. *Id at* 17-18 Relying on *Wickard v Filburn*, 317 US 111; 63 SCt 82 (1942), a case involving the Agricultural Adjustment Act of 1938, which was designed to control the volume of wheat moving in interstate commerce, the *Raich* Court stated:

> The similarities between this case and Wickard are striking. Like the farmer in Wickard, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal interstate market. Just as the Agricultural Adjustment Act was designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequently control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions. *Id at* 18-19.

Most recently, the United States Court of Appeals for the D.C. Circuit rejected an attempt to reclassify marijuana to a less restrictive schedule in the case *Americans for Safe Access v Drug Enforcement Admin*, 706 F3d 438 (DC Cir 2013) The Court upheld a decision by the Drug Enforcement Administration that marihuana has no currently accepted medical use based on the lack of adequate and well controlled studies proving efficacy." *Id at* 441. The DEA's decision was itself based on binding scientific and medical evaluation conducted by the U.S. Department of Health and Human Services. That agency had concluded that research on the medical use of

marijuana ha[d] not progressed to the point that marijuana [could] be considered to have a currently accepted medical use or a currently accepted medical use with severe restrictions." *Id.*

2. The Supremacy Clause and Federal Preemption Principles

Under the Supremacy Clause of the United States Constitution, US Const Art VI Cl 2, the laws of the United States are the supreme law of the land, regardless of anything in the constitution or laws of any state to the contrary. As the Supreme Court noted in *Gibbons v Ogden*:

> [S]uch acts of the State Legislatures as do not transcend their powers, but...interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution,...in every such case, the act of Congress...is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. 22 US (9 Wheat.) 1,211 (1824)

"It is a familiar and well-established principle that the Supremacy Clause...invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Cnty v Automated Med Laboratories, Inc*, 471 US 707, 712; 105 SCt 2371 (1985). In determining whether preemption exists "[t]he purpose of Congress may indicate preemptive intent through a statute's express language or through its structure and purpose." *Altria Group, Inc v Good*, 555 US 70; 129 SCt 538 (2008). In the absence of express preemption, Congressional intent can be inferred where "it is impossible for a private party to comply with both state and federal requirements,...or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v Nat'l Foreign Trade Council*, 530 US 363, 372-73; 120 SCt 2288 (2000).

3. The MMMA is preempted by Federal Law

The CSA preemption statute is found in 21 USC §903 which states in relevant part that states are permitted to pass laws on the same subject matter as the CSA unless there is a positive conflict between state and federal law "so that the two cannot consistently stand together."

"Michigan adheres to the rule that a state court is bound by the authoritative holdings of federal courts upon federal questions including interpretations of federal statutes." *Yellow Freight System Inc v Michigan*, 464 Mich 21, 29 n 10; 627 NW2d 236 (2001), *rev'd on other grounds* 537 US 36; 123 SCt 371 (2002). Although there are no federal decisions that have reviewed §903 in the context of a preemption challenge of state medical marihuana laws, a U.S. Supreme Court case during the era of prohibition aids in the interpretation of §903. In *United States v Lanza*, 260 US 377, 378-379; 43 SCt 141 (1922) the Court reviewed the propriety of prohibition-related liquor charges brought against Defendants by both the federal government and the state of Washington. With respect to prohibition, the Eighteenth Amendment specifically established concurrent jurisdiction. Yet, according to the *Lanza* Court, the existence of concurrent power "does not enable Congress or the several states to defeat or thwart the prohibition, but only enforce it by appropriate means." *Id at* 380. The *Lanza* Court further stated that "each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. *Id at* 382.[1]

[1] Other jurisdictions have interpreted §903 in a manner as argued by Amicus curiae. *People v Sheppard*, 432 NYS2d 467, 468(1980) ("Although the Drug Enforcement Administration is a federal agency, concurrent jurisdiction with the state is intended under 21 USCA section 903." and *Hartford v Tucker*, 621 A2d 1339, 1341 (Conn 1993) ("The anti-preemption provision of the

The best aid in interpreting §903 is found *Michigan Canners and Freezers Ass'n Inc* cited *supra*. The question presented in this case was whether certain provisions of Michigan's Agricultural Marketing and Bargaining Act ("Michigan's Act") were pre-empted by the federal Agricultural Fair Practices Act of 1967. ("AFPA") *Id at* 463. Both Michigan's law and the federal law were designed to facilitate collective action among agricultural producers. *Id at* 466. The federal law forbids producers associations to "coerce any producer in the exercise of his right to join and belong to or to refrain joining or belonging to an association of producers." *Id at* 465. The federal law also forbids processors and producers associations from "coerce[ing] or intimidate[ing] any producer to enter into, maintain, breach, cancel or terminate a membership agreement or marketing contract with an association of producers..." *Id.*

The Michigan law, on the other hand established "a state-administered system by which producers' associations are organized and certified as exclusive bargaining agents for all producers of a particular commodity." *Id.* The Michigan Act further provided that "all producers...regardless of whether they have chosen to become members of the association, must pay a service fee to the association and must abide by the terms of the contracts the association negotiates with processors." *Id at* 467-468.

The Plaintiff in this case brought a suit against the Michigan Agricultural Cooperative Marketing Association, Inc., a producers association accredited under the Michigan law. Plaintiff sought a declaratory judgment that the Michigan statutes requiring service fees and mandatory adherence to an association-negotiated contract are preempted by the AFPA. *Id.* On appeal, the

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Controlled Substance Act, evidences the fact that Congress specifically considered the issue of concurrent state proceedings and decided to allow them.")

U.S. Supreme Court agreed with Plaintiff and held that the Michigan act is preempted by the AFPA based on obstacle preemption grounds. *Id at* 478. The Court stated that "[the AFPA] explicitly makes unlawful the coercion of a producer 'in the exercise of his right...to refrain from joining...an association of producers' and the coercion of a producer to 'enter into...a membership agreement or marketing contract with an association of producers.'" *Id at* 471 (internal citations omitted.) However, the Michigan Act "empowers producers' associations to do precisely what the federal act forbids them to do. Once an association reaches a certain size and receives accreditation, it is authorized to bind nonmembers without their consent, to marketing contracts." *Id at* 478. The Court concluded that "because the Michigan Act authorizes producers' associations to engage in conduct that the federal act forbids, it 'stands as an obstacle to the full purposes and objectives of Congress.'" *Id. (internal citations omitted)*

Recently, the Oregon Supreme Court applied the holding of *Michigan Canners* to invalidate an Oregon statute that authorized the use of medical marihuana in the case *Emerald Steel Fabricators, Inc v Bureau of Labor and Industries*, 348 Or 159; 230 P3d 518 (2010).

In *Emerald Steel Fabricators*, an employee at Emerald Steel Fabricators obtained a registry identification card pursuant to Oregon's medical marihuana law, ORS 475.306[2]. This state law allowed a person to use marihuana to mitigate the symptom or effects of a debilitating medical condition. *Id at* 161. While working for employer steel company, the employee used medical marihuana three times per day as treatment for anxiety. *Id at* 162 Knowing that he would have to pass a drug test as a condition of employment, the employee informed his

[2] ORS 475.306(1) provides "A person who possesses a registry identification card issued pursuant to ORS 475.309 may engage in, and a designated primary caregiver of such person may assist in, the medical use of marijuana only as justified to mitigate the symptoms or effects of the person's debilitating medical condition." As argued *infra*, this statute is similar to §4 of the MMMA, MCL 333.26424.

employer that he used marihuana to treat his medical problem. *Id at* 162-163. The steel company then terminated the employee's employment. *Id.*

Two months later, the employee filed a complaint with Oregon's Bureau of Labor and Industries ("BOLI"), claiming that his employer had engaged in discrimination because of a disability, and had also failed to provide reasonable accommodation for his disability. *Id.* BOLI filed a complaint against Emerald Steel, alleging that the steel company had unlawfully terminated employee because of his disability. *Id.* An administrative law judge issued an order in which the judge found that the employee was disabled as defined by Oregon law, but employer had not discharged employee because of his disability. *Id at 164.* On appeal, Emerald Steel argued that because ORS 475.306 affirmatively authorizes the use of medical marihuana, federal law preempts this statute. *Id at* 172.

The Oregon Supreme Court agreed with Emerald Steel's argument. The Court first examined 21 USC § 903,. The Oregon Supreme Court, citing to *Michigan Canners*, then found a positive conflict between Oregon's law and federal law. The Court determined that ORS 475.306 was preempted by the CSA, and held:

> The preemption issue in this case is similar to the issue in *Michigan Canners*...In this case, ORS 475.306(1) affirmatively authorizes the use of medical marihuana. The Controlled Substances Act, however, prohibits the use of marihuana without regard to whether it is used for medicinal purposes. As the Supreme Court has recognized, by classifying marihuana as a Schedule I drug, Congress has expressed its judgment that marihuana has no recognized medical use. *See Raich,* 545 U.S. at 14. Congress did not intend to enact a limited prohibition on the use of marihuana- *i.e.,* to prohibit the use of marihuana unless states chose to authorize its use for medical purposes. *Cf. Barnett Bank,* 517 U.S. at 31-35 (reaching a similar conclusion regarding the scope of the national bank act). Rather, Congress imposed a blanket federal prohibition on the use of marihuana without regard to state permission to use marihuana for medical purposes. *Oakland Cannabis Buyers' Cooperative,* 532 U.S. at 494 & n 7.
>
> Affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act. *Michigan Canners,* 467 U.S. at 478. *Id at* 177-178

Applying the holding of *Michigan Canners* to the case at bar, this Court should conclude that the MMMA stands as an obstacle to the full purposes and objectives of Congress. Like the Michigan law at issue in *Michigan Canners*, and the statute at issue in *Emerald Steel Fabricators,* the MMMA authorizes conduct that is prohibited by federal law.

§ 7 of the MMMA, MCL 333.26427, provides that "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act." *see also People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 ("The purpose of the MMMA is to allow a limited class of individuals the medical use of [marihuana]") The MMMA broadly defines medical use to include "acquisition, possession, internal delivery, transfer, or transportation of marihuana..." MCL 333.26423(e). These are all activities strictly prohibited by the CSA. *see* 21 USC §§ 841-863, 882(a) discussed *supra*. The MMMA also protects qualifying patients and caregivers from arrest, prosecution and penalty if they are in possession of 2.5 ounces of usable marihuana and in possession of a registration identification card. MCL 333.26424. Not only is this section of the MMMA quite similar to the statute struck down by the Oregon Supreme Court in *Emerald Steel Fabricators*, it is also contrary to the clear prohibition expressed in the CSA. *see* 21 USC § 844(a) Finally, MCL 333.26428 mandates that a court dismiss a marihuana prosecution if a defendant successfully "assert[s] the medical purpose for using marihuana." To reiterate, Congress has determined that marihuana has no recognized medical use and strictly prohibits its possession, manufacture or distribution. The MMMA, however, allows a person to do what the federal law prohibits. The MMMA stands as an obstacle to the enforcement of federal law because it authorizes the very conduct that federal law prohibits, and in doing so, conflicts with Congress's purpose and objective to prohibit the illegal

use and distribution of controlled substances. Because the MMMA conflicts with the CSA, it is pre-empted and without effect.

The Court of Appeals, however, held that the MMMA was not preempted under obstacle preemption grounds because "users of marijuana for medical purposes are still subject to federal prosecution [and] Congress cannot require the states to enforce federal law." *Ter Beek v City of Wyoming*, 297 Mich App 446, 462-463; 823 NW2d 864 (2012) The Court of Appeals did not analyze 21 USC §903 nor cite to *Michigan Canners*. Moreover, although the Court of Appeals in a footnote cited to *Emerald Steel Fabricators*, the Court of Appeals clearly misconstrued the holding of the Oregon Supreme Court's decision. In fact, *Emerald Steel Fabricators* stands in opposition to the conclusions reached by the Court of Appeals that there is no preemption because users of medical marihuana are still subject to federal prosecution. The Oregon Supreme stated:

> To be sure, state law does not prevent the federal government from enforcing its marihuana laws against medical marihuana users in Oregon if the federal government chooses to do so. But the state law at issue in *Michigan Canners* did not prevent the federal government from seeking injunctive and other relief to enforce the federal prohibition in that case. Rather, state law stood as an obstacle to the enforcement of federal law in *Michigan Canners* because state law affirmatively authorized the very conduct that federal law prohibited, as it does in this case.

Emerald Steel Fabricators is persuasive and should be followed by this Court because it properly applied the preemption principles set forth in *Michigan Canners*. Like Oregon's medical marihuana law at issue in that case, the MMMA stands as an obstacle to the enforcement of federal law because it authorizes what the federal law prohbits. This is so regardless of whether the federal government chooses to enforce the CSA against medical marihuana users. Therefore, this Court should reverse the decision of the Court of Appeals and hold that the MMMA is preempted by the CSA.

RELIEF REQUESTED

WHEREFORE, Amicus curiae respectfully requests that this Court find that the trial court correctly held that the CSA preempts the MMMA. Amicus also respectfully requests this Court find that the Court of Appeals erred in reversing the decision of the trial court. Finally, Amicus respectfully requests that this Court reverse the decision of the Court of Appeals, and reinstate dismissal of the Plaintiff-Appellee's lawsuit on federal preemption grounds.

Respectfully submitted,

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