STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE 19TH JUDICIAL DISTRICT COURT
16077 Michigan Avenue, Dearborn, Michigan, 48126

People of the City of Dearborn

vs.

Nos. 10C0214
10C0215
Hon. Mark W. Somers

Robert Michael Brandon

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OPINION AND ORDER DENYING MOTION TO DISMISS

At a session of said Court held in the City of Dearborn,
County of Wayne, State of Michigan,

on: MAR 07 2011

PRESENT: Hon. MARK W. SOMERS
District Court Judge

Following a traffic stop on January 19, 2010, defendant, Brandon, was charged with the commission of two misdemeanor criminal offenses under Dearborn municipal ordinances for illegal possession of marijuana [Sec. 14.158] and contributing to the delinquency of a minor [Sec. 14.316]. A motion to suppress evidence wherein Brandon challenged the basis for the traffic stop was heard and denied on May 14, 2010.

By way of further pre-trial motion Brandon seeks dismissal of all charges pursuant to the Michigan Medical Marihuana Act ["the MMMA"] being MCL §333.26421 *et seq*. Specifically, defendant asserts the affirmative defense provided under Sec. §8 of the MMMA arguing that on May 8, 2010, he was seen by a physician and received a certification entitling him to registration as a patient under the MMMA. Further, although he did not receive the certification until almost four (4) months after the date of arrest, Brandon asserts he was suffering from the same condition ["chronic pain"] for many years prior to his arrest and that he is, therefore, entitled to assert the affirmative defense.[1]

In support of his position, Brandon presented a "physician certification" on a form supplied by the Michigan Department of Community Health[2] that he [defendant] is

[1] Although not affecting this court's ruling, it is observed that defendant's trial was originally scheduled for March 29, 2010, more than two months before he presented himself to a doctor for certification as a medical marijuana patient – one of several facts that fairly call into question the legitimacy of his purported "medical" use of marijuana.

[2] Designated as form "DCH/MMP-020 (3/10)"

currently undergoing treatment for "severe and chronic pain" and that he "has diffuse joint pain". The form is dated May 8, 2010, and is subscribed by Dr. Heather E. Rice, M.D. directly below the following statement:

> "I hereby certify that I am a physician licensed to practice medicine in Michigan. I have responsibility for the care and treatment for the above-named patient. It is my professional opinion that the applicant has been diagnosed with a debilitating medical condition as indicated above. The medical use of marihuana is likely to be palliative or provide therapeutic benefits for the symptoms or effects of applicant's condition. This is not a prescription for the use of medical marihuana. Additionally, if the patient ceases to suffer from the above identified debilitating condition, I hereby certify I will notify the department in writing."

Dr. Rice testified that she works as an emergency room physician and as an independent contractor for Green Trees of Detroit ["Green Trees"] which she described as a "Medical Marijuana Certification Center". She is paid $10 to review each chart and $200 per hour. Dr. Rice spends an average of 20 minutes to review a chart and an average of 20 minutes meeting with a patient. She does not perform any physical examinations or conduct any form of tests. In defendant's case, he presented with no medical records and had reportedly not seen a doctor in six to eight years. Brandon had completed a medical questionnaire provided by Green Trees. All information received and relied upon by Dr. Rice came from one interview with Brandon which she described as "a history taking session with a conclusion that he met the criteria by the State of Michigan." Dr. Rice had no prior physician-patient relationship with the defendant, she did not regard herself as his treating physician, could not testify to his condition in January of 2010, and, as of the date of the hearing, had seen him only the one time, although she described the practice of Green Trees to conduct follow-up visits in usually three to six month intervals. Dr. Rice was not familiar with different strains of the marijuana plant and not able to opine as to the appropriate dosage of marijuana or THC levels for use by the defendant.[3]

In response to the defendant's motion the City of Dearborn ["the City"] opines that the affirmative defense under Sec. §8 of the MMMA is only available to a person who is a registered qualified patient at the time of their arrest, that Brandon does not in any event otherwise meet the requirements of the affirmative defense, that he was committing an offense for which the affirmative defense does not apply [operating a

[3] Again, while not forming the basis for the court's ruling in this case, the legitimacy of Brandon's asserted defense under the terms of the MMMA is questionable when considering the superficial nature of his relationship with the consulting/certifying physician. As observed in *People v. Redden*, Mich. App. Docket No. 295809, decided September 14, 2010, "a one-stop shopping event to obtain a permission slip to use medical marijuana under §8 does not meet the requirements of subsection 8(a)(1) that such authorization occurs in the course of a bona fide physician-patient relationship."

motor vehicle while under the influence of marijuana],[4] and that the entire MMMA is preempted by Federal Law and is, consequently, null and void.

Respecting the latter argument, the court observes as a preliminary matter that state political subdivisions do have standing to invoke the Supremacy Clause when challenging state regulations that conflict with federal law.[5] As a result, this court is compelled to then acknowledge and adopt the following findings of fact and conclusions of law as dispositive of all issues presented:

> (1) First, the MMMA creates a statutory scheme for the regulation of marihuana as medicine under state law by: (1) providing therein that "the 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";[6] (2) creating therein statutory rules for

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[4] Although the court agrees that the MMMA specifically preserves the prohibition of operating a motor vehicle while under the influence of marijuana [MCL §333.26427(b)(4)], the defendant is not charged with that offense.

[5] A municipality's standing to challenge state regulations under the Supremacy Clause and the effect of Federal pre-emption on conflicting state regulation is explained in *San Diego Unified Port District v. Gianturco*, 457 F. Supp. 283, 290 (1978):

"The reason for distinguishing between constitutional challenges based on the Supremacy Clause and challenges based on other constitutional provisions lies in the purpose of the Supremacy Clause. The Supremacy Clause mandates that "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S.Const., Art. VI, cl. 2. **This provision forbids state regulation which conflicts with federal law.** It establishes a structure of government which defines the relative powers of states and the federal government. The Supremacy Clause does not confer a "right" on any individual, but it does impose a general limitation on state power.

Other constitutional provisions, unlike the Supremacy Clause, do confer fundamental rights on individual citizens. The Fourteenth Amendment, for example, guarantees that all citizens enjoy equal protection of the laws and due process of law. These are not structural limitations on government power in the Supremacy Clause sense, but they are rights given to individual citizens which limit governmental power generally. Such rights accrue to individual citizens, not to units of government. Consequently, political subdivisions have no legitimate basis for asserting constitutional rights which are intended to limit governmental action vis-a-vis individual citizens.

If the Supremacy Clause is to be effective in achieving its purpose, its dictates must be enforceable by political subdivisions of states as well as by individuals. Political subdivisions can be profoundly affected by state action which conflicts with federal law. If political subdivisions were prevented from challenging preempted state legislation and regulation, such legislation and regulation often would go unchecked even though expressly prohibited by the Constitution. It makes no sense to prevent subdivisions of state government from acting to ensure state compliance with the commands of a constitutional provision that establishes the basic federal system of our government." [emphasis added]. *See also: Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827, 100 S. Ct. 52, 62 L. Ed. 2d 35 (1979) (local school district had capacity to challenge constitutionality of state statute under supremacy clause); [9] *Greater Heights Academy v. Zelman*, 522 F.3d 678 (2008); U.S. v. Brown, 49 F.3d 1162 (6th Circuit, 1995); *San Diego Unified Port District v. Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978), *aff'd*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000, 71 L. Ed. 2d 866, 102 S. Ct. 1631 (1982) (political subdivision can challenge constitutionality of state legislation under Supremacy Clause); *South Macomb Disposal Authority v. Township of* Washington, 790 F.2d 500, 504-505 (1986); and City of Alpine v. Abbott, (09-CV-059, U.S. Dist. Ct., Western Dist. of Texas) decided July 28, 2010.

[6] MCL §333.26427(a)

qualification and registration of persons with the Department of Health [the "Department"] as patients and caregivers and the issuance of identification cards to those persons by the Department;[7] (3) establishing the quantity of marihuana that a patient or caregiver may possess under the Act;[8] (4) requiring the promulgation and administration of rules and imposition of fees by the Department of Health;[9] (5) establishing procedural and substantive protections under both civil and criminal law for the medical use of marijuana that extend to patients, caregivers and physicians;[10] and (6) providing for confidentiality of registration records and criminal penalties for divulging any such confidential information.[11]

(2) Second, the Constitution of the United States "and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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." Constitution, Art. VI, Sec. 2 [the "Supremacy Clause"]

(3) Third, the Commerce Clause of the United States Constitution empowers Congress to, *inter alia*, regulate commerce among the states and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof". Constitution, Art. I, Sec 8.

(4) Forth, the Controlled Substances Act ("the CSA") was duly enacted by and pursuant to the lawful authority granted to Congress under the Commerce Clause of the Constitution and extends to regulation of the *intra*state manufacture, distribution and possession of marijuana. *Raich v. Gonzalez*, 545 U.S. 1, 22, (2005).

(5) Fifth, the CSA establishes a comprehensive regulatory scheme pursuant to which drugs listed under Schedule I are deemed by Congress to have a high potential for abuse, a lack of any accepted medical use, and an absence of any accepted safety standards for use in medically supervised treatment. *Id.* at p.14. All drugs listed on Schedule I are, therefore, contraband *per se*. [see: *Id.*at 2621; USC §844]

(6) Sixth, upon enactment of the CSA in 1970 Congress itself listed marijuana on Schedule I and "[b]y classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or

[7] MCL §333.26426
[8] MCL §333.26424
[9] MCL §333.26425
[10] MCL §333.26424
[11] MCL §333.26426((h)

possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study." [*Id.* at p.14].

(7) Seventh, while Congress has provided for the periodic updating of the controlled substance schedules under the terms of the CSA, no such action has occurred with respect to the classification of marijuana, Federal trial and appellate courts have uniformly upheld the right of Congress to regulate narcotics and they have universally and unwaveringly rejected attempts to challenge the classification of marijuana on Schedule I.[12]

This court finds that in consequence of the lawful designation of marijuana as a Schedule I narcotic under the Controlled Substances Act the MMMA is rendered unconstitutional and void in its entirety by operation of the Supremacy Clause of the United States Constitution. Whereas this finding is dispositive, the court declines to rule on the remaining issues presented by the parties.

Federal pre-emption occurs in either of two ways – by the expressly stated intention of Congress to preempt state action by exclusively occupying an entire field of regulation, or where State action constitutes an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Jones v. Rath Packing Co.*, 430 U.S. 519; 97 S. Ct. 1305; 51 L. Ed. 2d 604; (1977):

"The first inquiry is whether Congress, pursuant to its power to regulate commerce, U. S. Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, see, *e.g.*, U.S. Const., Art. I, § 10; *Patapsco Guano Co.* v. *North Carolina*, 171 U.S. 345, 358 (1898), "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*,

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[12] *See e.g.: United States v. Fogarty*, 692 F.2d 542, 547-8 (8th Cir.1982): "Thus, even assuming, arguendo, that marijuana has some currently accepted medical uses, the Schedule I classification may nevertheless be rational in view of countervailing factors such as the current pattern, scope, and significance of marijuana abuse and the risk it poses to public health. See 21 U.S.C. § 811(c)(1)-(8). Finally, it should be noted that under Section 811 Congress has provided a comprehensive reclassification scheme, authorizing the Attorney General to reclassify marijuana in view of new scientific evidence. In establishing this scheme, Congress provided an efficient and flexible means of assuring the continued rationality of the classification of controlled substances, such as marijuana." *See also*: *United States v. Kiffer*, 477 F.2d 349 (2d. Cir. 1973); *United States v. Fry*, 787 F.2d 903, (4th Cir. W. Va. 1986); *United States v. Smith*, 46 Fed. Appx. 247 (6th Cir. Tenn. 2002); *United States v. Greene*, 892 F.2d 453, (6th Cir. Tenn. 1989); *United States v. White Plume*, 447 F.3d 1067 (8th Cir. 2006); *United States v. Chan*, 2006 U.S. Dist. (N.D. Cal. Mar. 17, 2006); *United States v. Middleton*, 690 F. 2d. 820 (11th cir. 1982); and *Alliance for Cannibis Therapeutics v. DEA*, 304 U.S. App D.C. 400, 15 F. 3rd 1131 (D.C Cr. 1994).

331 U.S. 218, 230 (1947). This assumption provides assurance that "the federal-state balance," *United States* v. *Bass,* 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has "unmistakably... ordained," *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624, 633 (1973); *Rice* v. *Santa Fe Elevator Corp., supra,* at 230.

Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941). Accord, *de Canas* v. *Bica,* 424 U.S. 351, 363 (1976); *Perez* v. *Campbell,* 402 U.S. 637, 649 (1971); *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra,* at 141; *id.,* at 165 (WHITE, J., dissenting). This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. See *De Canas* v. *Bica, supra,* at 363-365; *Swift & Co.* v. *Wickham,* 230 F. Supp. 398, 408 (SDNY 1964), appeal dismissed, 382 U.S. 111 (1965), aff'd on further consideration, 364 F. 2d 241 (CA2 1966), cert. denied, 385 U.S. 1036 (1967)."

In this court's view, the MMMA cannot withstand the City's constitutional challenge under either test. In the first instance, by the express declaration of its intent in banning the manufacture, distribution and possession of all Schedule I narcotics Congress has declared them to be contraband *per se* and has left no room for States to regulate those substances – period.

Secondly, by taking *affirmative legislative action* to implement regulations that "allow" and protect the manufacture, distribution and use of medical marijuana "in accordance with" state law[13] it is simply beyond credulity to believe the MMMA has any practical effect other than to officially sanction, encourage and facilitate the manufacture, distribution and possession of a Schedule I narcotic in direct violation of federal law. In so doing, it is in direct conflict with and acts as an obstacle to Congressional efforts to ban those substances from interstate commerce. As noted above, the Supreme Court's decision in *Raich, supra,* settles the *inter-* vs- *intra* state issue in favor of federal regulation and, by application, federal pre-emption regarding all Schedule I drugs – including marijuana. Particularly noteworthy to the "obstacle" analysis is the Supreme Court's observation regarding the effect of an increasing number of state medical marijuana laws: "Congress could have rationally concluded that the aggregate impact on

[13] MCL §333.26424

the national market of all the transactions exempted from federal supervision is unquestionably substantial" *Raich, supra* @ p.32. In a similar vein, a further specific example of the effect of state medical marijuana laws running contrary to Congressional purpose is the MMMA's own provision granting protections to "visiting qualifying patient[s]" holding a "registry identification card, or its equivalent, that is issued under the laws of another state, district, territory, commonwealth, or insular possession of the United States". As the MMMA makes no provision for supplying a "visiting qualifying patient" with marijuana manufactured in Michigan,[14] the Act has the unmistakable practical effect of inviting such visitors to transport their own supply of the drug across state lines and through interstate commerce.

It is true that "states are not required to enforce federal law or to prosecute people for engaging in activities prohibited by federal law".[15] Moreover, the State of Michigan and its political subdivisions could simply decide not to proscribe, or not to prosecute anyone for the manufacture, distribution or possession of any federally controlled substance under state or local law – whether for medical or even, for that matter, purely "recreational" use. From the forgoing constitutional authority, however, it is equally evident that the state and its political subdivisions cannot constitutionally attempt to create a government-approved regulatory scheme that "allows" the manufacture, distribution and possession of controlled substances which Congress has lawfully declared to be contraband *per se* under Schedule I of the CSA. Any such effort can only be viewed as an affirmative act that is irreconcilable with and creates obstacles to the accomplishment and execution of the full purposes and objectives of Congress. Alternatively stated, where compliance with both the Federal regulation prohibiting the manufacture, distribution and possession of Schedule I drugs and the MMMA is an impossibility, the state's regulation must fail:

> "Of course, a state statute is void to the extent that it actually conflicts with a valid federal statute; and
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> "[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Jones* v. *Rath Packing Co.*, [430 U.S. 519,] 526, 540-541 [(1977)]. Accord, *De Canas* v. *Bica*, 424 U.S. 351, 363 (1976)." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)". *Edgar v. Mie Corp.*, 457 U.S. 624,631 (1982).[16]

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[14] Only the patient and their designated "caregiver" are protected from state prosecution for the manufacture, distribution or possession of the drug for the patient's use [MCL §333.26424(a)-(e)] and the sale of marijuana to anyone for whom the manufacturer has not been designated as the caregiver constitutes a felony under the Act – "in addition to any other penalties for the distribution of marijuana" [MCL §333.26424(k)].

[15] MCL §333.26422

[16] Although not raised by the defendant in this case, it may also be observed that what the citizens of the State cannot do collectively by attempting to define marihuana as "medicine" and regulating its use, the

The MMMA's findings and declarations that "Modern medical research, including as found by the National Academy of Sciences Institute of Medicine in a March 1999 report, has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions"[17] may very well be true, but they must yield to the lawful exercise of pre-emptive Congressional authority.

This court concludes with the observation made by the majority in *Raich*:

> "We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress." *Id.* at 29.

NOW, THEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that the MMMA is void and that Defendant's motion to dismiss brought pursuant to §8 thereof be, and the same is hereby **DENIED.**

Hon. Mark W. Somers

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defendant cannot achieve through asserting individual constitutional protection either. [*See e.g.: People v. Alexander*, 56 Mich. App. 400 (1974), "Defendant further argues that the Michigan laws which prohibit the possession, use and sale of marijuana violate his right to privacy, equal protection and due process. These same arguments have been raised in many other jurisdictions, and have met with little success. We also find them to be without merit"; *See also: Kuromiya v. United States*, 37 F. Supp. 2d 717, 1999 U.S. Dist. (E.D. Pa. 1999) holding ". . . there is no fundamental right of privacy to select one's medical treatment without regard to criminal laws, and courts have consequently applied only rational review to regulations affecting these matters."]. Neither at this point in our jurisprudence would even a claim of medical necessity entitle defendant to protection, *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

[17] MCL §333.26422;