UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
Case No. 11-1227

JOSEPH CASIAS,

Plaintiff-Appellant,

v.

WAL-MART STORES INC.; WAL-MART STORES EAST L.P.; and TROY ESTILL,

Defendants-Appellees.

On appeal from: U.S. District Court for the Western District of Michigan
(Hon. Robert J. Jonker, U.S. District Judge)

OPENING BRIEF FOR APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, plaintiff-appellant Joseph Casias states that he is not a subsidiary or affiliate of a publicly owned corporation.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant respectfully requests oral argument in light of the importance and novelty of the issues presented. If the district court's basis for asserting jurisdiction is upheld, it would represent a significant shift both in the standard for deciding whether a defendant is properly joined and in the substance of Michigan tort law. As to the substantive issue (assuming federal jurisdiction), the question whether the Michigan Medical Marihuana Act protects patients from discharge is a question of first impression both in this Court and in the courts of Michigan.

SUBJECT MATTER AND APPELLATE JURISDICTION

This Court has jurisdiction over this appeal from a district court's final judgment. *See* 28 U.S.C. § 1291. The appeal was timely filed seven days after the judgment. R.E. 44; R.E. 45; R.E. 47. *See* Fed. R. App. P. 4(a)(1)(A).

The district court's subject matter jurisdiction is disputed and at issue in this appeal. The asserted basis for jurisdiction is diversity. *See* 28 U.S.C. § 1332.

ISSUES PRESENTED

1. Under this Court's precedent, a district court deciding whether a case is properly removed to federal court on the basis of diversity jurisdiction must resolve all factual and legal ambiguities in favor of remand to state court. Defendants assert that diversity jurisdiction lies because the in-state Defendant was not a proper defendant under Michigan tort law. Did the district court err in asserting jurisdiction over this case based on a novel interpretation of Michigan tort law regarding who is a proper defendant?

2. The Michigan Medical Marihuana Act allows the use of marihuana for medical purposes on a physician's recommendation. The law also protects medical marihuana patients from "disciplinary action by a business." Plaintiff, who suffers from sinus cancer and a brain tumor, uses medical marihuana in accordance with his doctor's recommendation and state law. When Defendants learned of Plaintiff's use of medical marihuana, they fired him. Assuming federal jurisdiction exists, did the district court err in holding that the Plaintiff lacked any tort or statutory cause of action under the Michigan Medical Marihuana Act?

STATEMENT OF THE CASE

Michigan is one of 15 states that have decriminalized the medicinal use of marihuana. In addition, the Michigan Medical Marihuana Act ("MMMA") protects medical marihuana patients from disciplinary actions by businesses.

Plaintiff Joseph Casias has been battling sinus cancer and a brain tumor for more than a decade. In accordance with his oncologist's recommendation and Michigan law, Joseph uses medical marihuana outside of work to control the extreme pain his illness causes.

Joseph worked for five years at the Battle Creek, Michigan Wal-Mart, which recognized him as Associate of the Year in 2008. In November 2009, Defendants found out Joseph was using medical marihuana, and for that reason Defendants fired him.

On June 29, 2010, Joseph filed suit in state court asserting two state-law causes of action: wrongful discharge in violation of public policy, and violation of the MMMA. On August 5, 2010, Defendants noticed removal to federal court

claiming that Defendant Troy Estill, the store manager who by his own admission fired Joseph, was not a proper defendant. Joseph moved to remand to state court, and Defendants moved to dismiss for failure to state a claim. On February 11, 2011, the district court denied the motion to remand and granted the motion to dismiss. Plaintiff timely appealed on February 18, 2011.

STATEMENT OF FACTS

The following facts are drawn from the Plaintiff's Complaint and the Declaration of Troy Estill filed by Defendants. R.E. 1, Ex. A2 (Compl.); R.E. 1, Ex. B (Estill Decl.). In deciding the propriety of removal based on a claim of fraudulent joinder, all factual ambiguities should be resolved in favor of the non-removing party, i.e. the Plaintiff. *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999). Likewise, in considering a motion to dismiss for failure to state a claim, all well-pleaded facts in the Plaintiff's complaint are taken as true. *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011).

Plaintiff Joseph Casias, a 30-year-old resident of Battle Creek, Michigan, has been living with sinus cancer and an inoperable brain tumor for over a decade. R.E. 1, Ex. A2 (Compl.), at 2. Joseph's condition has required extensive treatment and chemotherapy, interferes with his ability to speak, and is a source of severe and daily pain. *Id.*

For five years, in spite of the pain caused by his medical condition, Joseph held a job at the Wal-Mart store in Battle Creek (owned and operated by Defendant Wal-Mart Stores Inc. and/or Defendant Wal-Mart Stores East L.P., hereinafter collectively "Wal-Mart"), where he began as an entry-level grocery-stocker in 2004 and progressed to become an inventory control manager whom Wal-Mart recognized as Associate of the Year in 2008. *Id.* Throughout his successful career at Wal-Mart, Joseph had to cope with pain in his head and neck twenty-four hours a day. *Id.* The pain relief medicine prescribed by Joseph's oncologist helped Joseph a little, but Joseph continued to experience constant pain as well as nausea, a side effect of the medication. *Id.*

In 2008, the people of Michigan, by voter initiative, enacted the Michigan Medical Marihuana Act ("MMMA"), which allows the use of marihuana to treat certain severe medical conditions such as Joseph's. *See* M.C.L. 333.26424. In addition to protecting medical marihuana patients from "arrest, prosecution, or penalty in any manner," the MMMA protects patients against "disciplinary action by a business" for their use of medical marihuana as authorized under state law. M.C.L. 333.26424(a).

After the MMMA was enacted, Joseph's oncologist recommended that he try marihuana in accordance with state law. R.E. 1, Ex. A2 (Compl.), at 7. With his doctor's recommendation, Joseph obtained the appropriate registry card from

the state on June 15, 2009. *Id.* Joseph found medical marihuana very helpful to treat his condition: it dramatically reduced his pain to half its previous severity, or better. *Id.* at 5, 7. Additionally, the marihuana did not produce the previous painkiller's side of effect of nausea, so Joseph gained back some of the weight he had lost during his treatment. *Id.* at 7.

Joseph complied with all the MMMA's requirements and provisions. *Id.* In accordance with state law, Joseph at no time ingested marihuana in the workplace, and never performed duties of any kind for Wal-Mart while under the influence of marihuana. *Id.* Joseph made do with his other prescription painkillers throughout the workday and used the marihuana once daily when he got home from work. *Id.*

In November 2009, Joseph twisted his knee at work. *Id.* He was not under the influence of marihuana at the time; he simply stepped the wrong way on his knee while pushing a cart. *Id.* Wal-Mart policy requires drug testing of all employees injured at work, so Joseph was given a urinary drug test. *Id.* at 8. The method used to test for marihuana in urine is to screen for certain metabolites that stay in the urine for days or weeks. *Id.* Therefore a urinary drug test cannot indicate whether the subject is currently under the influence of marihuana, only whether the subject has used it within the previous several days or weeks. *Id.*

Approximately one week after his injury, Joseph was informed that he had tested positive for marihuana. *Id.* The following week, Joseph was called into the

office of the store manager, Defendant Troy Estill. *Id.* Defendant Estill told Joseph that he was being fired because he failed a drug test. *Id.* at 8-9; R.E. 1, Ex. B (Estill Decl.) ¶ 10. Defendant Estill acknowledged that Joseph had a medical marihuana card, but he said that Wal-Mart does not honor it. R.E. 1, Ex. A2 (Compl.), at 9. Defendant Wal-Mart made the decision to fire Joseph; Defendant Estill implemented that decision. R.E. 1, Ex. B (Estill Decl.) ¶ 10. Both Joseph and Defendant Estill are citizens of Michigan; the corporate defendants are not. R.E. 1, Ex. A2 (Compl.), at 2; R.E. 1, Ex. B (Estill Decl.) ¶¶ 1, 3.

Joseph sued Wal-Mart and the store manager Estill in state court in June 2010 for wrongful discharge and violation of the MMMA. R.E. 1, Ex. A2. Defendants removed the case to federal court and moved to dismiss for failure to state a claim, R.E. 1; R.E. 16; Joseph moved to remand to state court and opposed the motion to dismiss, R.E. 9; R.E. 25.

In an opinion and order dated February 11, 2011, the district court denied Joseph's motion to remand and granted Defendants' motion to dismiss. R.E. 44. In determining jurisdiction, the court acknowledged that Michigan law holds employees liable for torts in which they participate, whether or not done for the benefit of the employer. *See id.* at 7. Nonetheless, the court held that Defendant Estill could not be liable under Michigan law because he did not make the decision to fire Joseph and so his participation in firing Joseph was too slight, in the court's

view, to expose him to liability. *See id.* at 8-9. Disregarding Estill's citizenship for the purposes of determining diversity, the court asserted jurisdiction. *See id.* at 9-10. On the merits, the court held that the MMMA does not protect Joseph because, according to the court, the MMMA does not regulate private employment at all. *See id.* at 11-14. Protecting patients from discharge for medical marihuana use, the court felt, would be a "radical departure" from prior Michigan employment law. *Id.* at 13. In light of these premises, the court interpreted the MMMA as not applying to a patient fired for the use of medical marihuana, *see id.* at 14-16, and therefore dismissed the case, *see id.* at 19-20.

Joseph timely appealed to this Court on February 18, 2011. R.E. 47.

STANDARD OF REVIEW

Questions of subject matter jurisdiction are reviewed de novo. *O'Bryan v. Holy See*, 556 F.3d 361, 372 (6th Cir. 2009). Accepting as true all well-pleaded allegations in the complaint, courts review de novo the dismissal of a complaint for failure to state a claim. *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011).

SUMMARY OF ARGUMENT

In dismissing this case, the district court made two distinct and significant errors: first, stretching state law in order to assert federal jurisdiction over this case; and second, holding that the Michigan Medical Marihuana Act permits an

employer to fire a severely ill individual such as Joseph Casias for following his doctor's advice to use medical marihuana in accordance with Michigan law.

First, regarding the threshold issue of jurisdiction, this Court has cautioned repeatedly that courts assessing the propriety of a lawsuit's removal to federal court must respect the limited role of the federal judiciary and therefore must resolve all doubts in favor of remand. The district court's failure to heed this instruction resulted in an improper assertion of federal jurisdiction here.

The question on which jurisdiction turns is whether Troy Estill, the Wal-Mart store manager who fired Joseph, is a proper defendant under Michigan law. For more than a hundred years, Michigan courts have held that wrongdoers, even wrongdoers acting on behalf of a corporation, are liable for the torts in which they "participate." No Michigan case establishes a threshold of involvement below which an employee is deemed not to have "participated" in a tortious act; to the extent Michigan law in analogous contexts suggests any such test, it is one that would implicate, not exculpate, Defendant Estill in Joseph's firing. Nonetheless, the district court took it upon itself to fashion a new exception for tort liability in Michigan. Only by applying this newly-created exception was the court able to conclude that Estill was an improper Defendant.

Under this Court's clear precedent, a court is to resolve all legal ambiguities of state law in favor of remand. In light of the century-old tradition of Michigan

tort law holding that employees of a business are liable for the torts in which they participate, and in the absence of any relevant exception, the district court should have found that the store manager who fired Joseph Casias was a proper defendant. But instead of hewing closely to Michigan tort law as expounded by Michigan courts, the district court created an exception based on its own policy preferences. The sovereignty of the State of Michigan requires that the development of Michigan tort law be left to Michigan courts, as this Court has wisely counseled in prohibiting precisely what the district court did here. Therefore this Court should vacate the judgment below for lack of jurisdiction and order a remand to state court.

Second (assuming this Court reaches the merits), the district court erred by applying its own policy preferences and preconceptions about the Michigan Medical Marihuana Act, rather than interpreting the text in accordance with its syntax and its purpose of protecting medical marihuana patients.

In 2008, the people of Michigan voted overwhelmingly to enact the MMMA to protect individuals like Plaintiff Joseph Casias, who uses medical marihuana in accordance with state law and his doctor's recommendation in order to control the severe and constant pain caused by his brain tumor and sinus cancer. The stated purposes and the plain language of the MMMA make clear that Michigan voters wanted to protect Joseph not only from criminal prosecution under state law but

also from other consequences, such as being fired from his job, for his use of medical marihuana in accordance with state law. The MMMA embodies the simple principle of decency and dignity that no one should have to choose between adequate pain relief and gainful employment.

The district court's cramped reading of the relevant language in the MMMA is at odds with the syntax of the provision, the broad remedial purpose of the law, and other MMMA provisions confirming that the Act protects patients from being fired for using their medicine. The driving force behind the district court's reading was its own preconception that the MMMA could not possibly apply to non-state actors and that such appliations would be (in the district court's words) "radical" and "sweeping." The court's assumption about the MMMA's supposed limitation to state action derived from a selective reading of the law and from one Michigan criminal case that had no occasion to consider the implications of the MMMA for non-state actors. And no matter how "radical" the district court may think it is to provide employment protections to severely ill individuals who need medical marihuana, this is what the language of the law accomplishes. Finally, the reading of the law that protects employees is the reading most consonant with the law's purpose, which would be meaningfully obstructed were the law's patient protections construed so narrowly that economic sanctions by private, out-of-state

corporations could deter Michigan patients from using marihuana as a medicine in accordance with state law.

Reading the MMMA's text in light of its syntax and purpose rather than political judgments about the wisdom of the law, this Court should hold that the law protects patients like Joseph and that the district court erred in holding otherwise and dismissing the case.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ASSERTING JURISDICTION BASED ON A NOVEL INTEPRETATION OF MICHIGAN TORT LAW RATHER THAN HEEDING THIS COURT'S INSTRUCTION TO RESOLVE ALL STATE-LAW AMBIGUITIES IN FAVOR OF REMAND.

A case is removable to federal court based on diversity jurisdiction "only if *none* of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (emphasis added). Under the presumptions that apply to removal, including this Court's instruction to resolve all doubts and ambiguities of state law in favor of remand, Michigan citizen Troy Estill is a proper defendant and his presence in the suit together with Plaintiff Joseph Casias, also a Michigan citizen, defeats diversity jursidiction here.

A. Out Of Respect For State Sovereignty, This Court Has Instructed District Courts To Resolve All Ambiguities Of State Law In Favor Of Remand.

Courts reviewing attempts at removal must be respectful of the constitutional balance between dual federal and state sovereignties. As the Supreme Court has explained, "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta,* 292 U.S. 263, 270 (1934).

The Supreme Court's mandate of judicial restraint is "even more compelling in the context of removal than in the context of original jurisdiction," because "the decision whether to remove a suit to federal court directly implicates the constitutional allocation of authority between the federal and state courts." *Palkow v. CSX Transp., Inc.*, 431 F.3d 543, 555 (6th Cir. 2005). For these reasons, this Court has instructed that "removal statutes are to be narrowly construed," *id.*, with "[t]he burden to establish federal jurisdiction . . . clearly upon the defendants as the removing party." *Alexander v. Elec. Data Sys. Corp.,* 13 F.3d 940, 948-49 (6th Cir. 1994).

More specifically, this Court has counseled judicial restraint in the context of attempted removal based on "fraudulent joinder" – i.e., the claim, made here by Defendants, that diversity jurisdiction lies because the non-diverse defendant is not

subject to liability and therefore not a proper defendant at all. Under this Court's precedent, a defendant is considered "fraudulently joined" only if there is no "colorable basis for predicting that a plaintiff may recover" against that defendant. *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999); *see also Alexander*, 13 F.3d at 949 ("There can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged or on the facts in view of the law[.]" (citation and internal quotation marks omitted)). The phrase "fraudulent joinder" is not meant to invite an examination of the plaintiff's state of mind; on the contrary, the plaintiff's motivation for joining non-diverse defendants is irrelevant. *See Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999); *see also* 16 Moore's Fed. Prac. § 107.14[2][c] (noting that "[t]he term 'fraudulent joinder' is a bit misleading because it requires neither a showing of fraud nor joinder in one sense").

Federal courts must look to state law to determine whether a defendant in a state-law cause of action is properly joined, *see Jerome-Duncan*, 176 F.3d at 907, and this Court has given specific direction about how a district court should perform the delicate task of evaluating a claim to removal that turns on a dispute of state law: "[t]he district court must resolve all . . . ambiguities in the controlling . . . state law in favor of the non removing party." *Coyne*, 183 F.3d at 493 (second ellipsis in original; citation and quotation marks omitted); *see also Alexander*, 13

F.3d at 949. In fact, this Court has explained that as a general matter, "[*a*]*ll doubts* as to the propriety of removal are resolved in favor of remand" to state court. *Coyne*, 183 F.3d at 493 (emphasis added); *see also Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 405 (6th Cir. 2007) (same).

As detailed in the following sections, the district court did not apply these principles, most notably this Court's instruction to resolve all ambiguities of law in favor of remand. When this Court applies this presumption, the outcome is clear: this Court should hold that a colorable claim exists against Defendant Troy Estill, and this Court should vacate the decision below and order the case remanded to state court.

B. Michigan Law Holds Corporate Employees Liable For The Torts In Which They Participate; The District Court Erred By Creating An Exception To This Rule Rather Than Applying The Rule.

Under Michigan law, "[i]t is beyond question that a corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation." *Att'y Gen. v. Ankersen*, 385 N.W.2d 658, 673 (Mich. Ct. App. 1986) (leading case). Originally articulated over a century ago, this bedrock principle of Michigan tort law has been repeatedly reaffirmed by the Michigan courts in a variety of contexts. *See, e.g.*, *Dep't of Ag. v. Appletree Marketing, L.L.C.*, 779 N.W.2d 237, 246 (Mich. 2010) ("Michigan law has long provided that corporate

officials may be held personally liable for their individual tortious acts done in the course of business, regardless of whether they were acting for their personal benefit or the corporation's benefit.") (claim of conversion); *Ankersen*, 385 N.W.2d at 673 (Mich. Ct. App. 1986) (nuisance); *Allen v. Morris Bldg. Co.*, 103 N.W.2d 491 (Mich. 1960) (willful change in natural flowage of water); *Bush v. Hayes*, 282 N.W. 239, 240 (Mich. 1938) (conversion); *Wines v. Crosby & Co.*, 135 N.W. 96, 97 (Mich. 1912) (promotion and sale of a compound known to be dangerous); *Hemppling v. Burr*, 26 N.W. 496, 496 (Mich. 1886) (fraud).

This Court has likewise acknowledged this principle. *See Olympic Forest Prods. v. Cooper*, 148 F. App'x 260, 263 (6th Cir. 2005) (mem.) (citing *Ankersen*); *Southampton Assocs., L.P. v. K. Jess, Inc.*, 46 F.3d 1131, No. 93-1616, 1995 WL 25431, at *4 (6th Cir. Jan. 23, 1995) (mem.) (citing *Ankersen*).

The district court in this case acknowledged the principle as well, *see* R.E. 44 (Opinion and Order), at 7, but then created an exception out of whole cloth.[1] The district court's theory is that since Defendant Estill did not make the decision

[1] Only one exception has been recognized by the Michigan courts, and that is for claims of tortious interference with contractual relations, a claim not raised here. *See generally Reed v. Mich. Metro Girl Scout Council*, 506 N.W.2d 231, 233 (Mich. Ct. App. 1993); *see also Covell v. Spengler*, 366 N.W.2d 76 (Mich. Ct. App. 1985) (case involved both tortious interference claim and wrongful discharge claim against employees; court dismissed tortious interference claim on the basis of the noted exception and disposed of wrongful discharge claim separately).

to fire Joseph, he cannot be liable. *See id.* at 8-9. In the district court's view, "All Mr. Estill did is communicate the corporation's policy decision to Mr. Casias," and "acting solely as a messenger cannot impose liability on a corporate employee." *Id.* at 9. But this is not a legal rule to be found anywhere in Michigan precedent; rather, it is a pure policy judgment by the district court. No Michigan case has espoused this view of employee liability, nor have Michigan courts carved out a category of "participation" so minor that liability does not attach when an employee participates in a tort. In the context of a motion to remand, it is not the district court's place to substitute its judgment for, add to, or subtract from the black-letter law as expressed by the Michigan courts.

The district court cited four Michigan decisions in support of its policy position; none of these authorities even remotely supports the district court's extension of Michigan law, and one of them actually undermines it. Two of the cases simply applied the general rule that corporate employees who participate in tortious conduct *are* subject to liability. *See Allen v. Morris Bldg. Co.*, 103 N.W.2d 491, 493 (Mich. 1960); *Bush v. Hayes*, 282 N.W. 239, 240 (Mich. 1938). Because the defendants in these cases did participate significantly in the torts alleged, the district court read these cases as implicitly denying that lower levels of participation can subject an employee to liability. *See* R.E. 44 (Opinion and Order), at 8-9. But neither of these decisions said or implied anything of the kind,

or purported to define the outer boundary of "participation." The *Bush* case merely held that one of two individual defendants was subject to liability for conversion because he "participated" in conversion of the plaintiff's property by refusing to return it to him, *see Bush*, 282 N.W. at 240, and the other defendant was not liable because there was "*no* . . . evidence of conversion by this defendant," *id.* at 241 (emphasis added). The *Allen* case held that an individual defendant was liable for water damage to plaintiff's property because he supervised the work that led to the damaging water flowage and thus "participated in the tort"; as in *Bush*, there was no suggestion that a lesser degree of "participation" would have produced a different result. *Allen*, 103 N.W.2d at 493. The district court's characterization of *Bush* and *Allen* as having "*rejected* the idea that any participation, however slight, is sufficient to expose an individual to personal liability for a corporation's wrongful conduct," *see* R.E. 44 (Opinion and Order), at 8-9 (emphasis added), finds no support in the holdings or dicta of either case. In fact, no Michigan court has defined a threshold of participation below which the rule does not apply.

The district court's citation of *Champion v. Nationwide Security, Inc.*, 517 N.W.2d 777 (Mich. Ct. App. 1994), is glaringly inapposite. The question the court answered in that case was whether a supervisor's actions triggered respondeat

superior liability *for his employer corporation*, not whether he was personally liable. *See id.* at 779-80.[2]

The district court's citation of the unpublished case *Urbanski v. Sears Roebuck & Co.*, No. 211223, 2000 WL 33421411 (Mich. Ct. App. May 2, 2000) (per curiam) is more nearly on point, but it actually provides authority *against* the district court's holding. In *Urbanski*, the court extended the rule of *Champion* from the respondeat superior context to the personal-liability context (although the court was interpreting a specific statutory definition rather than general tort law principles and therefore the case is not entirely on point). The *Urbanski* rule is that an employee is personally liable if she has "significant control" over "hiring, firing, promoting or disciplining"; applying this test, *Urbanski* held that a human resources assistant could not be liable for violations of other employees' statutory civil rights because "[h]er job responsibilities . . . did not include supervisory functions" but rather only "administrative duties related to personnel matters." *Id.* at *3-4.

Application of this test to the instant case *supports* liability for Defendant Estill: in stark contrast to the human resources assistant in *Urbanski*, Estill was a manager, and not just of human resources but of an entire store. This job title

[2] The plaintiff sued the supervisor also, but the trial court dismissed the claim against him, and the plaintiff was not appealing that decision. *See id.* at 779 n.1.

clearly implies "supervisory functions" including "significant control" over "hiring, firing, promoting or disciplining" employees – control that Defendant Estill wielded in this very case by personally firing Joseph Casias.[3] Thus, none of the district court's state-law authorities supports the court's jurisdictional holding, and in fact one of the state cases militates *against* that holding.

Perhaps recognizing the tenuousness of its state-law citations, the district court turned to two federal cases, *Freeman v. Unisys Corp.*, 870 F. Supp. 169 (E.D. Mich. 1994), and *Yanakeff v. Signature XV*, 822 F. Supp. 1264 (E.D. Mich. 1993). These cases cannot bear the weight the district court placed on them. First, both interpreted a specific term – "employer" – in a Michigan civil rights statute; the decisions did not address common law torts or distinguish any of the Michigan cases the Plaintiff cites here. *See Freeman*, 870 F. Supp. at 173; *Yanakeff*, 822 F. Supp. at 1266 n.2. Second, the same court later "decline[d] to endorse [these cases'] broad statement" about exceptions to employee liability. *Young v. Bailey Corp.*, 913 F. Supp. 547, 551 n.4 (E.D. Mich. 1996) (rejecting a claim that a supervisor was an improper defendant, and remanding case to state court). Third

[3] Defendants offered no evidence that Estill lacked such responsibilities, and it is Defendants' burden to establish jurisdiction. *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 948-49 (6th Cir. 1994). Moreover, it strains credulity to imagine a store manager lacked "significant control" over "hiring, firing, promoting or disciplining" employees and that every personnel decision at the Battle Creek, Michigan, Wal-Mart store was made by corporate headquarters in Arkansas.

and most important, neither *Freeman* nor *Yanakeff* cited any Michigan authority, so they do not demonstrate the existence, under *Michigan* law, of an exception to the rule that employees are liable for torts in which they participate. The same principles of federalism that counsel caution when asserting federal jurisdiction require district courts to resolve ambiguities in favor of remand rather than take it upon themselves to develop state law. *See Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 405 (6th Cir. 2007); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999); *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994). Therefore, the district court's own opinion about what state law should be, and the views of other federal courts attempting to discern state law, do not constitute state law and cannot create new exceptions to state law.

The district court's exception to a long-standing rule of Michigan tort law is thus a creature of the court's own invention. And it is one that would have ramifications throughout Michigan tort law, altering which defendants would be liable and under what circumstances. For example, under the district court's exception, a corporate employee who makes a fraudulent representation in a business negotiation at the direction of a corporate officer would be immune for his tortious conduct. The district court's exception would permit an employee to raise as an affirmative defense the fact he was "just following orders." Michigan courts should decide for themselves whether such changes are advisable.

Though the district court likened Defendant Estill to "the receptionist or secretary who typed the termination letter," R.E. 44 (Opinion and Order), at 9, it is hardly clear Michigan courts would accept this analogy; after all, Defendant Estill is the manager of the entire store, not a typist whose work is interchangeable with that of another employee. Estill did not merely type up someone else's decision to fire Joseph; rather, he implemented that decision by actually firing Joseph. Michigan courts might well wish to continue holding managers liable to discourage manager complicity in any of a number of personnel decisions (such as firing an employee because of race, or punishing a whistleblower, to name a few) that contravene state public policy. Of note, Michigan wrongful discharge law already protects a manager who refuses to carry out an unlawful act ordered by his superiors. *See McNeil v. Charlevoix County*, 772 N.W.2d 18, 24 (Mich. 2009) ("An at-will employee's discharge violates public policy if . . . the employee is discharged for the failure or refusal to violate the law in the course of employment."). And even if Michigan courts find that some threshold level of participation in a tort is required for liability, they might set that threshold differently than the district court did here – for instance, by drawing the line between typists and managers, rather than between managers and corporate headquarters.

Ultimately, even if it is assumed for the sake of argument that the district court's exception is an advisable refinement to the Michigan rule of employee liability, the crucial consideration for purposes of jurisdiction is not the *wisdom* of the district court's refinement but the very fact that it *is* a refinement. In the context of assessing jurisdiction, this Court has admonished district courts not to refine state law, but simply to apply it.

Perhaps on remand in this very case, Michigan courts will carve out precisely the exception that the district court believed should apply to Troy Estill. But in our federal system of dual sovereignties, the district court should (as this Court has instructed) leave that decision to the courts of Michigan rather than rushing into the breach. Such a result works no injustice against Defendant Estill, whose actual liability would not be determined by a remand order: he would, instead, have every opportunity to argue for dismissal before the courts of Michigan. It is in this way that Michigan courts may apply and develop their own common law, instead of having federal district courts do it for them.

For these reasons, the district court's novel exception to Michigan tort law principles cannot govern this case in the face of this Court's clear and repeated instruction to resolve all state-law ambiguities in favor of remand. *See Smith*, 505 F.3d at 405; *Coyne*, 183 F.3d at 493; *Alexander*, 13 F.3d at 949.

C. Under Michigan Tort Law As Defined By Michigan Courts, Defendant Estill Is Subject To Liability Because He Participated In Firing Joseph Casias.

Once this Court dispenses with the district court's novel exception, the Michigan common law rule on employee liability is straightforward in its application and clearly covers Defendant Estill. Defendant Estill admits he participated in the firing of Plaintiff: he was the very person who fired him. *See* R.E. 1, Ex. B (Estill Decl.) ¶ 10. Because Defendant Estill participated in the tort, he is subject to liability. *Att'y Gen. v. Ankersen*, 385 N.W.2d 658, 673 (Mich. Ct. App. 1986). No Michigan authority supports exempting Defendant Estill from the general, century-old Michigan tort rule that employees are liable for the torts in which they participate.

Applying Michigan law, it is clear Plaintiff has a "colorable basis," *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999), for recovery against Defendant Estill because he participated in – by personally carrying out – the wrongful discharge of which Plaintiff complains. Because Plaintiff's claim against Defendant Estill has a "colorable basis," Estill is a proper defendant, his Michigan citizenship cannot be ignored, and the requirement of absolute diversity is not satisfied. Therefore the district court lacked jurisdiction, and this Court should vacate the judgment below and order the case remanded to state court.

II. ON THE MERITS, PLAINTIFF STATES EITHER A VALID CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY OR A VALID CAUSE OF ACTION UNDER THE MMMA ITSELF.

Assuming the district court had jurisdiction, it should not have dismissed Joseph's complaint. The plain text of the MMMA, supported by the law's purpose, prohibits Joseph's firing, and Michigan courts recognize a cause of action for wrongful discharge in violation of public policy where "the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees." *McNeil v. Charlevoix County*, 772 N.W.2d 18, 24 (Mich. 2009) (citing *Suchodolski v. Michigan Consolidated Gas Co.*, 316 N.W.2d 710, 711-12 (Mich. 1982)).[4] An exception to this type of claim exists where the statute barring discharge also provides a remedy for such discharge. *See Dudewicz v. Norris-Schmid, Inc.*, 503 N.W.2d 645, 650 (Mich. 1993) ("[B]ecause the WPA provides relief to Dudewicz for reporting his fellow employee's illegal activity, his public policy claim is not sustainable."), *overruled on other grounds, Brown v. Mayor of Detroit*, 734 N.W.2d 514 (Mich. 2007). But where "the [statute] provide[s] no remedy at all, it could not have provided plaintiff's exclusive remedy," and

[4] Michigan law also recognizes wrongful discharge claims in two other situations not relevant here. *See id.* at 24 (noting cause of action also exists if the employee is fired for refusing to violate the law or is fired for "exercising a right conferred by a well-established legislative enactment").

therefore a common law claim is viable. *Driver v. Hanley*, 575 N.W.2d 31, 36 (Mich. Ct. App. 1997).

The two counts of Plaintiff's complaint in this case are thus asserted in the alternative: Plaintiff either has a wrongful discharge claim because the MMMA provides a statutory protection but no remedy, or Plaintiff has a cause of action under the MMMA itself. Because the MMMA contains no express cause of action for a qualifying patient, and the test for implied causes of action has become stricter in recent years, *see, e.g., Lash v. City of Traverse City*, 735 N.W.2d 628, 635-37 (Mich. 2007), Plaintiff relies principally on his wrongful discharge claim. But if the Court concludes that a cause of action is implied in the MMMA itself, Plaintiff maintains a statutory claim under the MMMA.

A. The MMMA Allows The Medical Use Of Marihuana And Protects Patients Against Being Fired For Using It In Accordance With State Law.

The substantive question at issue in this case is whether the MMMA prohibits the discharge of state-law-compliant medical marihuana patients such as Joseph. The text, purpose and structure of the MMMA make clear that it does.

The starting point for the interpretation of any statute is its text. *See Nawrocki v. Macomb County Rd. Comm'n*, 615 N.W.2d 702, 711 (Mich. 2000). "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc. v. Att'y Gen.*, 540

N.W.2d 693, 695 (Mich. Ct. App. 1995) (per curiam). In interpreting Michigan initiatives, "provisions are liberally construed to effectuate their purposes." *Id.*

1. The MMMA's text protects patients against disciplinary action by businesses.

Enacted by the voters in 2008, the MMMA allows the medical use of marihuana when recommended by a physician for certain serious medical conditions including Joseph's. Under the law, a "qualifiying patient" – i.e., a person diagnosed by a physician with a "debilitating medical condition," M.C.L. 333.26423(h), such as cancer, *see* M.C.L. 333.26423(a)(1) – can obtain a "registry identification card" from the state, *see* M.C.L. 333.26426. The law forbids arrest or prosecution of a qualifying patient who has been issued a registry card. M.C.L. 333.26424(a).

The MMMA also protects employees from being disciplined for their use of medical marihuana in accordance with the MMMA. Specifically, the MMMA protects "[a] qualifying patient who has been issued and possesses a registry identification card" from being "denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act." M.C.L. 333.26424(a) (hereinafter the "patient-protection provision").

According to the plain words of the text, this provision protects state-recognized medical marihuana patients (such as Joseph) not only from criminal consequences such as arrest and prosecution, but also from the "deni[al] [of] any right or privilege" including, by way of illustration, a "disciplinary action by a business" (such as Wal-Mart).

In spite of the disjunctive separating "business" from the words that follow it – "occupational or professional licensing board or bureau" – the district court read the word "business" as modifying the words "licensing board or bureau" rather than as a stand-alone noun. *See* R.E. 44 (Opinion and Order), at 14-16. But the use of "or" instead of a comma between "business" and "occupational" signifies that "business" is to be read independently from "occupational or professional licensing board or bureau." Normally, when a series of more than two items is used in a statute, the word "or" appears only between the last two words in the series, and commas are used to separate the other words. *See, e.g., In re Renshaw*, 222 F.3d 82, 92 (2d Cir. 2000) ("In accordance with common English usage, when Congress wishes to indicate that a series of items is a set of alternatives, it consistently separates the items by commas and uses an 'or' before the last one."); *accord*, *In re Mehta*, 262 B.R. 35, 41 (D.N.J. 2001). Therefore, if the MMMA meant a "licensing board or bureau" of a "business or occupational or professional" kind, it would most naturally have said "business, occupational or

professional licensing board or bureau" instead of what it actually says: "business *or* occupational or professional licensing board or bureau." M.C.L. 333.26424(a) (emphasis added). Reading the choice of "or" in lieu of a comma as a significant one is necessary to give each word of a statute independent meaning and render no word "surplusage." *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001). Thus, consistent with normal rules of syntax and the anti-surplusage canon, "business" is a stand-alone noun.

A contrary reading would be at odds with the way the double-"or" syntax and the serial comma are *consistently* used throughout the rest of the MMMA. Twice elsewhere in the law, the text employs the "*x* or *y* or *z* [noun]" construction – the construction at issue here – to indicate "either an *x*, or a [noun] of the *y* or *z* kind," rather than (as Defendants would prefer) three different kinds (*x*, *y*, and *z*) of the noun. For example, where the MMMA stipulates that it shall not permit the possession or medical use of marihuana "on the grounds of any *preschool or primary or secondary school*," M.C.L. 333.26427(b)(2)(B) (emphasis added), the phrase "preschool or primary or secondary school" clearly indicates "either a preschool, or a school of a primary or secondary kind." The alternative – "a preschool school, a primary school, or a secondary school" – would refer to an awkward redundancy, a "preschool school."

The statute uses the same double-"or" syntax again later in the same section, where it provides that "[n]othing in this act shall be construed to require . . . [a] *government medical assistance program or commercial or non-profit health insurer* to reimburse a person for costs associated with the medical use of marihuana." M.C.L. 333.26427(c)(1) (emphasis added). Here again, the italicized phrase is most naturally read as denoting "either a government medical assistance program, or a health insurer of a commercial or non-profit kind." Thus, the construction "*x* or *y* or *z* [noun]" is consistently used throughout the MMMA to mean "either an *x*, or a [noun] of *y* or *z* kind." Following this pattern, the phrase at issue in this case – "business or occupational or professional licensing board or bureau," M.C.L. 333.26424(a) – means "either a business, or an occupational or professional licensing board or bureau."

Complementing the MMMA's use of the double-"or" to indicate that separated items are *not* part of a series, the statute consistently uses a serial comma to separate items that *are* part of a series. Whenever the MMMA "wishes to indicate that a series of items is a set of alternatives, it consistently separates the items by commas and uses an 'or' before the last one." *Renshaw*, 222 F.3d at 92. The MMMA indicates all manner of three-or-more-item series using the serial comma. *See, e.g.*, M.C.L. 333.26423(c) (defining an "Enclosed, locked facility" as a "closet, room, or other enclosed area"); M.C.L. 333.26424(a) (protecting a

qualifying patient from "arrest, prosecution, or penalty in any manner"); M.C.L. 333.26424(h) (prohibiting the seizure and forfeiture of "[a]ny marihuana, marihuana paraphernalia, or licit property" that is "possessed, owned, or used in connection with the medical use of marihuana"); M.C.L. 333.26424(j) (recognizing a registry card issued by "another state, district, territory, commonwealth, or insular possession of the United States"); M.C.L. 333.26426(g) (restricting searches "by any local, county or state governmental agency"); M.C.L. 333.26426(i) (annual report to the legislature may not "disclose any identifying information about qualifying patients, primary caregivers, or physicians"); M.C.L. 333.26427(b)(4) (stipulating the MMMA shall not permit a person under the influence of marihuana to "[o]perate, navigate, or be in actual physical control" of a "motor vehicle, aircraft, or motorboat").[5]

Cumulatively, these examples exhaustively demonstrate that when the MMMA wants to indicate a series, it uses commas alone for all items except the final one; conversely, when the MMMA uses the word "or" twice to connect a group of three words, it is not denoting a series at all, but a stand-alone noun

[5] If there is anything in the MMMA that approaches an exception to this practice, it is the statute's use of the common penal construction "*a* or *b*, or both," as in "imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both." M.C.L. 333.26424(k); *see also* M.C.L. 333.26426(h)(4) (same construction, different penalty amounts). But this is not a true three-item series: it is two items, followed by the option of "both" of the items together.

followed by two adjectives modifying a different noun. In light of the pattern identified, if the MMMA meant a "business or occupational or professional" kind of "licensing board or bureau," it would read "business, occupational or professional licensing board or bureau" instead of what it actually says: "business *or* occupational or professional licensing board or bureau." M.C.L. 333.26424(a) (emphasis added).

In sum, Joseph's reading of the MMMA – with "business" understood as a stand-alone noun – is supported by general rules of syntax, the surplusage canon, and the consistent usage of syntax in the MMMA itself. A contrary reading would flout all of these rules and usages.

2. Reading the MMMA as prohibiting adverse employment actions against patients best effectuates the MMMA's remedial purpose of protecting patients.

In addition to its syntax, the MMMA's purpose supports reading the word "business" as a stand-alone noun in the patient-protection provision. A Michigan court would "liberally construe" the provision at issue "to effectuate [the initiative's] purposes." *Welch Foods, Inc. v. Att'y Gen.*, 540 N.W.2d 693, 695 (Mich. Ct. App. 1995) (per curiam).

In the MMMA, the voters of Michigan found that "[m]odern 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." M.C.L. 333.26422(a). In light of the evolving science in this field, in 2008 the people of Michigan joined twelve other states in removing criminal penalties for the medical use of marihuana. *See* M.C.L. 333.26422(c).[6]

In addition to acknowledging the important medical benefits of marihuana, the people of Michigan understood that patients would avail themselves of these benefits only if they were free from both criminal *and* civil consequences that could befall medical marihuana users. Thus, while the chief purpose of the MMMA was to "allow under state law the medical use of marihuana," the second and related goal was more generally to "provide protections for the medical use of marihuana." R.E. 25, Ex. B, at 1 (Initiated Law 1 of 2008 (Michigan Medical Marihuana Act), preamble).

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[6] Since then, two more states have followed suit, *see* N.J. Stat. 24:6I-1 to -16; Ariz. Rev. Stat. 36-2801 to -2819, and the U.S. Department of Justice has instructed its prosecutors that they "should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana," including, specifically, "individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law." R.E. 25, Ex. A (Memo. from David W. Ogden, Deputy Att'y Gen., to Selected United States Attorneys, at 1-2 (Oct. 19, 2009)).

This purpose supports the most natural reading of the syntax: "business" is a stand-alone noun that indicates patients are protected from adverse employment actions for the use of their medicine. To constrict the meaning of this provision by reading "business" as a mere modifier of "licensing board or bureau" would contract the scope of protections for patients, thereby frustrating the full realization of the law's purpose to "provide protections for the medical use of marihuana." *Id.* Put concretely, if patients can lose their jobs for using a particular medicine, they could be deterred from using that medicine – deterred as effectively (and in some instances more effectively) than if they faced a risk of state prosecution for using it. Permitting the firing of patients would undermine the law's aim to help severely ill patients, like Joseph, for whom medical marihuana is uniquely beneficial. The district court's read-in limitation on the protections of the MMMA thus contravenes the law's purpose as well as its text.

3. The MMMA's discussion of accommodations that employers need not make supports a broad reading of the patient-protection provision.

After protecting qualifying patients from "disciplinary action by a business," M.C.L. 333.26424(a), the MMMA goes on to stipulate that "[n]othing in this act shall be construed to require . . . [a]n employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana." M.C.L. 333.26427(c)(2) (hereinafter the "workplace proviso"). The

presence of a proviso exempting businesses from the need to provide certain types of accommodation confirms by implication that the earlier patient-protection provision forbidding "disciplinary action by a business" does in fact require businesses to make some accommodations – specifically, not disciplining patients for their doctor-sanctioned use of marihuana as medicine outside the workplace. Were the patient-protection provision read narrowly so as not to cover businesses, it would be difficult to imagine why the MMMA would bother exempting certain types of accommodation from the requirements of the statute; under the narrow reading of the patient-protection provision, there would be no requirements from which employers could possibly need exemption. To strip "business" of its significance as a stand-alone noun would be to render the workplace proviso superfluous. *Cf. Pi-Con, Inc. v. A.J. Anderson Const. Co.*, 458 N.W.2d 639, 651 (Mich. 1989) ("[T]he entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole."), *quoted in* R.E. 44 (Opinion and Order), at 12.

State courts in California and Washington have rebuffed a similar argument in interpreting their own medical marihuana laws, but what these courts rejected was the argument that a negative inference *standing alone* could create a protection, not that a negative inference in one provision could confirm what is

stated in a more explicit provision elsewhere in the statute. *See Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200, 204-07 (Cal. 2008); *Roe v. Teletech Customer Care Mgmt.*, 216 P.3d 1055 (Wash. Ct. App. 2009), *cited in* R.E. 44 (Opinion and Order), at 17 n.7. Additionally, the provision from which the California court was asked to draw a negative inference was enacted several years after California decriminalized medical marihuana, *see* 174 P.3d at 207; for this reason, too, it is understandable the California court did not find it particularly probative of the original statute's meaning. Also of note, the Washington decision is currently under review by that State's highest court. *See Roe v. Teletech Customer Care Mgmt.*, 228 P.3d 19 (Wash. 2010).

In sum, not only do the text of the patient-protection provision and the overall purpose of the MMMA indicate that "business" is to be read as a stand-alone noun; the workplace proviso confirms this intepretation. For all of these reasons, this Court should hold that the MMMA's patient-protection provision prohibits "disciplinary action by a business."

B. The District Court's Statutory Interpretation Rests On A Faulty Premise About The MMMA As A Whole And On The Court's Own Policy Views, Rather Than The Text Of The MMMA.

The district court began its statutory analysis not with the text itself but with a key presupposition about the scope of the MMMA. According to the court, "the MMMA does not regulate private employment" and the MMMA's protections are

only directed at "prosecution or other adverse action by *the state*." R.E. 44 (Opinion and Order), at 12 (emphasis in original). The district court arrived at this conclusion in part by looking at a Michigan *criminal* case interpreting the MMMA. *See id.* at 12-13 (discussing *People v. Redden*, --- N.W.2d ---, Nos. 295809 & 295810, 2010 WL 3611716 (Mich. Ct. App. Sept. 14, 2010)). Unsurprisingly, given its context, the criminal case had no occasion to discuss the statute's applicability to private employment, so it cannot support the district court's assumption that the MMMA regulates state action only. The court also based its state-action limitation on the fact that certain *other* provisions of the MMMA, not at issue here, are directed at state actors. *See* R.E. 44 (Opinion and Order), at 14. But the district court never explained why a statute cannot cover certain applications in one provision and other applications in a separate provision. Certainly nothing in the MMMA provisions about state action forecloses the regulation of private actors by other MMMA provisions.

The district court's preconceptions about what the MMMA must mean are also reflected in the court's repeated characterization of Joseph's claim as an extraordinary one. Before the district court even addressed the statutory text, it had already characterized a prohibition on firing patients for their medicine as "a radical departure from the general rule of at-will employment in Michigan." *Id.* at 13. This characterization is not difficult to refute; in fact, as the district court itself

noted later on in its opinion, Michigan law spells out a variety of other prohibited grounds for firing an employee. *See id.* at 18 (citing M.C.L. 37.2202(1) ("religion, race, color, national origin, age, sex, height, weight, or marital status"); M.C.L. 37.1102(1) (disability); and M.C.L. 15.362 (actions as whistleblower)). The district court strained to characterize these *eleven* separate prohibited grounds of discharge as "very few" in number, *id.*; in any event, it seems clear that adding a twelfth would not mark a "radical departure" in Michigan employment law, nor render the MMMA (as the district court also put it) "sweeping legislation." *Id.* at 19. On the contrary: prohibiting the firing of an employee based on his medicine falls comfortably within the range of other statutory employment protections in Michigan, where an employee cannot be fired for certain physical characteristics, M.C.L. 37.2202(1) ("height, weight"); for certain physical conditions, M.C.L. 37.1102(1) (disability); or for taking advantage of other health-related state statutes, *see* M.C.L. 333.12606 (exercising rights under state anti-smoking law). In the face of these many and diverse steps along Michigan's path away from pure at-will employment, the district court's insistence that MMMA's patient protections are too "radical" or "sweeping" sounds more like policy-making than statutory interpretation.

When the district court finally arrived at the text of the patient-protection provision on which Joseph relies, the court seemed determined to interpret the text

in line with its preconceived views about what it must say. As discussed in Part II.A, above, the district court's conclusion that "business" modifies "licensing board or bureau" is belied by the syntax of the provision; is inconsistent with the statute's purpose to "provide protections for the medical use of marihuana," R.E. 25, Ex. B, at 1 (Initiated Law 1 of 2008 (Michigan Medical Marihuana Act), preamble); and is difficult to reconcile with the workplace proviso exempting employers from a duty to accommodate patients who use marihuana in the workplace or come to work under the influence.

The district court's discussion of other MMMA provisions that could shed light on what the critical words mean is similarly unpersuasive. First, the Court discusses a provision stating:

> A *physician* 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 or disciplinary action by the Michigan board of medicine, the Michigan board of osteopathic medicine and surgery, or any other business or occupational or professional licensing board or bureau [for recommending medical marihuana in the course of a bona fide physician-patient relationship]. . . .

M.C.L. 333.26424(f) (emphasis added) (hereinafter the "physician-protection provision"). The district court argued that because the sample entities named (the Michigan boards of medicine and of osteopathic medicine and surgery) are public and not private entities, the word "business" cannot be interpreted so as to cover private entities. *See* R.E. 44 (Opinion and Order), at 15. But these two examples

must be viewed in context: the provision in which they appear protects doctors, not patients, so it makes perfect sense that the statute would be most concerned with the denial of licenses, and that public licensing boards would be the most relevant examples. This takes nothing away from the independent meaning of the word "business," which in that clause instructs that a business (such as a private medical practice group of associated doctors) may not discipline one of its employees or associates for recommending marihuana as medicine in the course of a bona fide doctor-patient relationship. *See* M.C.L. 333.26424(f).

The district court also ignored the fact that the same provision goes on to stipulate that it does not prevent a "professional licensing board" – but not a "business" – from "sanctioning a physician for failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions." *Id.* The reference to "professional licensing board" separately from a "business" underscores that the latter is not a mere incident of the former but rather a distinct concept. The drafters went out of their way to preserve the authority of, very specifically, a "professional licensing board" to discipline physicians for violating the standard of care, even as the drafters protected doctors from discipline by a "business" or by an "occupational or professional licensing board or bureau" for recommending marihuana to their bona fide patients.

After overreading the physician-protection provision, the district court used circular logic to minimize the significance of the workplace proviso supporting Joseph's reading of the MMMA. This proviso (as noted in Part II.A.3, above) cautions that "Nothing in this act shall be construed to require . . . [a]n employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana." M.C.L. 333.26427(c)(2). According to the district court, the workplace proviso cannot support a negative inference that the word "business" is a stand-alone noun encompassing "employers," because "the remainder of the statute is silent on the rights of employees." R.E. 44 (Opinion and Order), at 17. But implicit in the claim that "the remainder of the statute is silent on the rights of employees," is the conclusion that the statute's multiple references to a "business" do not implicate employees – presumably because, in the court's view, the word "business" is not a stand-alone noun. Instead of considering the workplace proviso's bearing on the interpretation of the term "business," the district court simply assumed its conclusion that "business" is not a stand-alone noun and then dismissed the workplace proviso as insufficient to alter that conclusion. This is classic circular reasoning.

The district court also suggested that the patient-protection provision could not speak to the rights of employees because it does not use the term "employee" or "employer." *See id.* at 17. But the term "business" obviously includes

enterprises, like Wal-Mart, that sell goods and employ workers. *See* Black's Law Dictionary 226 (9th ed. 2009) (defining "business" as a "commercial enterprise carried on for profit"); Webster's New World College Dictionary 198 (4th ed. 1999) ("a commercial or industrial establishment; store, factory, etc."); *see generally Welch Foods*, 540 N.W.2d at 695 (initiative language to be given ordinary meaning, which may be ascertained from dictionary). The fact that the MMMA does not use the most specific word possible ("employer") does not mean that subsets of the more general word the statute does use ("business") are excluded from its scope.

The district court suggested that reading the MMMA to apply to a business would contravene the holdings of other state courts. *See* R.E. 44 (Opinion and Order), at 19 n.8. This is incorrect. Though a handful of courts have found that *other* states' medical marihuana laws lack employee protections, such decisions have not involved any statutory language comparable to the MMMA provision cited here.[7] The district court can point to no other court that has rejected a claim under the expansive language of the MMMA or any statute with similar language.

[7] *See, e.g., Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200, 204-07 (Cal. 2008); *Johnson v. Columbia Falls Aluminum Co.*, No. DA 08-0358, 2009 WL 865308, at *2 (Mont. 2009).

Finally, the district court found it contrary to common sense that Michigan would provide employment protections to someone engaged in a federal felony while not extending protections to "a legal drug under prescription." R.E. 44 (Opinion and Order), at 13 n.5. The district court's concern is one founded in its own policy predilections and not the MMMA, which explicitly aims to "provide protections for the medical use of marihuana." R.E. 25, Ex. B, at 1 (Initiated Law 1 of 2008 (Michigan Medical Marihuana Act), preamble). Perhaps it is precisely because marihuana remains illegal under federal law and carries a resulting stigma that the people of Michigan saw the need to provide special employment protections to medical marihuana patients, so patients are not deterred from their medicine by the preconceptions of those who view Congress's intolerance of marihuana as undermining any claim that marihuana has medical value for cancer patients like Joseph. Whatever the explanation, this protection is part of the voter initiative the people of Michigan passed, and a court must give effect to the law enacted rather than the court's belief about the wisdom of that law.

C. Properly Read, The MMMA Protects Joseph Casias From Discharge, And He Has Stated A Valid Cause Of Action On These Facts.

Because Joseph obtained a registry card under the MMMA, *see* R.E. 1, Ex. A2 (Compl.), at 7, he is by the statute's terms protected from the denial of "any right or privilege" and specifically from "disciplinary action by a business" such as

Defendant Wal-Mart and its agent Defendant Estill. M.C.L. 333.26424(a). The MMMA stipulates that "[n]othing in this act shall be construed to require . . . [a]n employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana," M.C.L. 333.26427(c)(2), but Joseph did not ingest marihuana at work or work under the influence of marihuana, *see* R.E. 1, Ex. A2 (Compl.), at 7. Therefore, Joseph is entitled to the law's protection.

When Defendants found out Joseph was a medical marihuana patient, they fired him. *See id.* at 8-9. Because Joseph was "discharged in violation of an explicit legislative statement prohibiting discharge of employees," *McNeil v. Charlevoix County*, 772 N.W.2d 18, 24 (Mich. 2009), he has a cause of action for wrongful discharge. In the alternative, if this Court finds a wrongful discharge claim is not viable because there is an implied cause of action under the MMMA, Joseph has stated a claim under the MMMA itself.

CONCLUSION

Because the district court lacked jurisdiction, this Court should reverse with instructions to remand to state court. In the alternative, if federal subject matter jurisdiction lies, this Court should, in accordance with the language and purpose of the MMMA, reverse the district court's dismissal of the complaint.

Dated: April 27, 2011

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE UNDER RULE 32(a)(7)(C)

I certify that this brief exceeds 30 pages but complies with Fed. R. App. Pro. 32(a)(7)(B) because this brief contains 10,286 words, including footnotes and excluding those parts of the brief not counted under Fed. R. App. Pro. 32(a)(7)(B)(iii) and 6th Cir. R. 28(b).

/s/ Scott Michelman

CERTIFICATION OF SERVICE

I certify that on April 27, 2011, I served this brief by ECF on all registered counsel for appellees.

/s/ Scott Michelman

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

All items below are found in the district court's electronic docket, Case No. 1:10-CV-781 (W.D. Mich.). Documents are grouped together by event.

Case initiating documents:	
Complaint (originally filed in state court, June 29, 2010)	R.E. 1, Ex. A2
Notice of Removal (Aug. 5, 2010)	R.E. 1
Decl. of Troy Estill in support of removal	R.E. 1, Ex. B
Plaintiff's motion to remand:	
Motion to Remand (Aug. 16, 2010)	R.E. 9
Brief in Support	R.E. 10
Brief in Opposition	R.E. 15
Reply Brief	R.E. 23