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)

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SUMMARY OF ARGUMENT

Seeking to avoid the straightforward application of black-letter Michigan tort law and the plain language of the Michigan Medical Marihuana Act ("MMMA"), Defendants present a diverse assortment of arguments, including preemption under two different federal laws, a state-law constitutional argument based on one distinguishable case, a vagueness claim made in a single sentence, and even a little innuendo about a secret plot to legalize marihuana entirely. Colorful as these claims are, none can rehabilitate the basic flaws in the district court's jurisdictional and statutory holdings.

The district court asserted jurisdiction by creating an exception to Michigan's longstanding tort rule of participator liability. In defense of this holding, Defendants cite more than a dozen cases, but not a single one of them is a Michigan case recognizing the exception the district court created here. As this Court has held, federal courts should not reach out to decide state-law questions when their jurisdiction is in doubt, nor – even worse – create new rules of state law in order to assert jurisdiction. Here, worse still, the district court created a novel exception to one area of Michigan law in order to assert jurisdiction over a novel question in yet *another* area of Michigan law – specifically, an issue of first impression under a new state statute. This is precisely the type of case that should be left to state courts.

On the merits, Defendants attempt to evade the MMMA's text and syntax by focusing on irrelevant distinctions and extrinsic evidence. But they cannot avoid the fact that the MMMA, by its terms, prohibits firing a patient like Plaintiff Joseph Casias for using his medicine in accordance with state law. Defendants' numerous alternative arguments for affirmance fare no better. Defendants claim the Controlled Substances Act preempts Plaintiff's claim, but do not demonstrate how CSA enforcement could be obstructed by employment protections for medical marihuana patients. Defendants' Americans With Disabilities Act preemption claim is even less plausible, since the ADA has an explicit savings clause for laws providing greater protection to individuals with disabilities, and the MMMA's protection for individuals with "debilitating medical conditions" in no way interferes with the ADA's protections for individuals with disabilities. Defendants' single-object rule argument rests entirely on one distinguishable case. Defendants' vagueness claim, made in a single conclusory sentence, is meritless.

Ultimately, none of Defendants' arguments justifies the district court's novel exception to Michigan law or its failure to resolve all ambiguities of state law in favor of remand. And Defendants cannot cure the district court's statutory analysis, which is inconsistent with the text, syntax, and purpose of the MMMA.

This Court should vacate the decision below and order remand to state court, or in the alternative reverse the dismissal of the complaint.

ARGUMENT

I. DEFENDANTS' ATTEMPT TO JUSTIFY FEDERAL JURISDICTION FAILS BECAUSE DEFENDANTS CITE NO MICHIGAN AUTHORITY SUPPORTING THE DISTRICT COURT'S NOVEL INTERPRETATION OF MICHIGAN LAW.

The question on which federal jurisdiction turns is whether, resolving all ambiguities of state law in favor of remand, Michigan law provides a colorable basis for liability against the non-diverse defendant, store manager Troy Estill. As elaborated in Plaintiff's Opening Brief, *see* Open. Br. for Appellant 14-23, Michigan law does provide a basis for liability: "[i]t is beyond question that a corporate employee or official is personally liable for all tortious or criminal acts in which he participates." *Att'y Gen. v. Ankersen*, 385 N.W.2d 658, 673 (Mich. Ct. App. 1986). There are no exceptions applicable here.

The district court's (and Defendants') contrary position finds no support in Michigan case law. Attempting to substitute quantity for quality, the Defendants cite over a dozen cases, none of which supports the district court's position that Defendant Estill cannot be liable. Defendants struggle to squeeze favorable inferences from cases stating the very rule Defendants hope to avoid; search for hidden meanings in cases about entirely different issues; and cling to cases about other jurisdictions in the hope that the law of, say, Ohio, can stand in for that of Michigan.

Though it is true, as Defendants observe, that the ordinary rule of liability for an employee who participates in a tort does not apply to claims of tortious interference with contractual relations ("TICR"), Defendants' efforts to shoehorn this case into that exception fail for two reasons: first, there is no TICR claim in this case, and second, Michigan courts have never extended the TICR exception to cover the entirely distinct tort of wrongful discharge. Accepting Defendants' TICR argument, like affirming the district court's made-up exception to Michigan tort law, would require this Court to countenance precisely what it has admonished courts *not* to do: adjudicate a remand motion by developing, rather than simply applying, the relevant state law. *See Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999) (propriety of removal based on claim of improperly joined defendant is question of state law); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999) (instructing district court to resolve all ambiguities in the controlling state law in favor of remand).

Federal courts should leave state tort law to state courts rather than indulge tenuous claims to federal jurisdiction in order to decide unsettled questions of state law. This Court should reverse the erroneous assertion of jurisdiction here.

A. Defendants Offer No Michigan Authority Supporting The District Court's Novel Interpretation Of Michigan Law.

The authorities Defendants cite fall broadly into four categories: (1) state cases merely applying the rule of participator liability or a similar rule, without

suggesting the exception that the district court created for this case; (2) federal cases holding that someone who does not participate *at all* in a legal wrong cannot be liable for it; (3) discrimination cases discussing the relevance of evidence and not who may be liable; and (4) cases that are not authoritative decisions of Michigan law because they were not decided by Michigan courts or did not apply Michigan law. The propriety of removal based on the claim that defendant was improperly joined is a question of state law, *Jerome-Duncan*, 176 F.3d at 907, but Defendants, like the district court, fail to cite a single Michigan case creating an exception that would exempt Defendant Estill from liability. Under existing Michigan law, Estill is liable. At worse, his liability is debatable, and federal courts must resolve all ambiguities in favor of remand. *Coyne*, 183 F.3d at 493. Therefore, the district court's assertion of jurisdiction was erroneous.

Most of Defendants' Michigan authorities simply restate and apply the participator-liability rule of *Ankersen*, 385 N.W.2d at 673 ("[A] corporate employee or official is personally liable for all tortious or criminal acts in which he participates[.]"), which governs this case. *See Allen v. Morris Bldg. Co.*, 103 N.W.2d 491, 493 (Mich. 1960); *Bush v. Hayes*, 282 N.W. 239, 240 (Mich. 1938); *Wines v. Crosby & Co.*, 135 N.W. 96, 97 (Mich. 1912); *see also Elezovic v. Bennett*, 731 N.W.2d 452, 460 (Mich. Ct. App. 2007) (dicta acknowledging participator-liability rule). None of these cases defined a threshold of participation

below which a participator is not liable. Two of Defendants' other authorities applied the same participator-liability rule, unremarkably, to excuse defendants who did not participate in the tort *at all*. *See Wilke v. Adkins*, 2007 WL 1828788, at *9 (Mich. Ct. App. June 26, 2007) ("plaintiffs failed to introduce any evidence" that defendant "personally committed or participated in" the tort); *Rockwell v. Hillcrest Country Club*, 181 N.W.2d 290, 296 (Mich. Ct. App. 1970) (corporate officer not liable because he "had not personally participated in the alleged tort"). Thus, far from contravening the participator-liability rule or announcing an exception to it, these cases demonstrate the pervasiveness of the rule and underscore how remarkable the district court's departure from it was.

Defendants mischaracterize the only other potentially relevant case they cite, *Urbanski v. Sears Roebuck & Co.*, 2000 WL 33421411 (Mich. Ct. App. May 2, 2000). *Urbanski* applies a test – "significant control" over "hiring, firing, promoting or disciplining" employees – that implicates, not exculpates, Defendant Estill in this case. Open. Br. for Appellant 18-19 (citing *Urbanski*, 2000 WL 33421411, at *3-4). Resisting the reasoning of *Urbanski*, Defendants argue that "even if Estill had 'significant control' over personnel decisions in general, he did not have any control over or input into the decision to terminate Plaintiff." Appellees' Br. 24. Tellingly, Defendants offer no citation to *Urbanski* or any case for this argument; Defendants are simply recharacterizing the test to produce the

outcome they want. Applying *Urbanski*, Estill *did* have "significant control" over hiring and firing workers, including Joseph: when Estill fired Joseph, Joseph's employment ended. The "significant control" test thus supports Estill's joinder as a Defendant.

Next, Defendants mischaracterize *Alexander v. Electronic Data Systems Corp.*, 13 F.3d 940 (6th Cir. 1994), *on remand*, 870 F. Supp. 749 (E.D. Mich. 1994), , and *Fletcher v. Advo Systems, Inc.*, 616 F. Supp. 1511 (E.D. Mich. 1985), as excusing defendants not involved in certain "decisions." In fact, these opinions found defendants improperly joined because (unlike Defendant Estill in this case) they played *no role* in the wrongful act whatsoever. *See Alexander*, 13 F.3d at 948-49 (remanding without deciding whether defendants were improperly joined), *on remand*, 870 F. Supp. at 753 ("[P]laintiff's complaint fails to specify *any* actions on the part of defendant Jeros, and merely alleges that defendant Brechtelsbauer was 'part of the management team that interviewed plaintiff.' The complaint does not allege any individual wrongs by the defendants."); *Fletcher*, 616 F. Supp. at 1515 ("Plaintiff failed to set forth in his complaint the involvement, if any, Defendant Murray had in his hiring and discharge.").

Wandering further afield, Defendants cite evidentiary rulings in statutory discrimination cases. These authorities are twice removed from this case, because they involved neither tort law nor the question of who is a proper defendant.

Rather, the cases considered whether, in adjudicating employment discrimination claims, trial courts had properly excluded or disregarded remarks by other employees – employees who were not even defendants. *See Krohn v. Sedgwick James of Mich., Inc.*, 624 N.W.2d 212, 216-19 (Mich. Ct. App. 2001); *Thompson v. City of Lansing*, 410 F. App'x 922, 924, 929 (6th Cir. 2011). It is unclear how evidentiary rulings regarding statements of non-defendants in discrimination cases could shed light on who is a proper defendant in a wrongful discharge case.

Finally, having found no supporting Michigan case law, Defendants resort to cases that are not authoritative statements of Michigan law because they were not decided by Michigan courts or do not involve Michigan law. Defendants' main 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), are federal cases and cite no Michigan authority, so they do not demonstrate the existence, under *Michigan* law, of an exception to the participator-liability rule. The Supreme Court and this Court have long recognized that federal courts' applications of state law are not authoritative statements of that law because federal courts are necessarily "outsiders" in matters of state law. *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941). "No matter how seasoned the judgment of the District Judge may be, it cannot escape being a forecast rather than a determination." *Walker v. Felmont Oil Corp.*, 240 F.2d 912, 917 (6th Cir. 1957). Therefore, the views of federal

courts attempting to discern state law do not constitute state law and cannot create new exceptions to state law.[1] Last, and surely least, of the Defendants' citations is *Butler v. Cooper Standard Auto., Inc.*, 376 F. App'x 487 (6th Cir. 2010) – a *non-precedential*, *federal* court case, which applied the law not of Michigan but of *Ohio*. Defendants do not even attempt to explain how a federal court's application of Ohio law could govern this Michigan case.

Defendants, like the district court, cannot cite a single Michigan decision creating an exception that would exempt Defendant Estill from liability under the longstanding participator-liability rule. This Court should reverse the district court's novel application of Michigan law and leave the development of Michigan law to Michigan courts.

B. Defendants' Proposed Conflation Of Tortious-Interference And Wrongful Discharge Claims Would Result In An Interpretation of Michigan Law Even More Novel Than The District Court's.

Defendants' alternative theory to support jurisdiction is that this Court should extend to claims of wrongful discharge an exception to employee liability that applies to claims of tortious interference with contractual relations ("TICR").

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[1] Defendants attempt to bolster *Freeman* and *Yanakeff* by claiming they were endorsed by this Court. Appellees' Br. 25-26. This is flatly wrong. In the case Defendants cite, this Court merely remanded for the district court to determine whether defendants were properly joined; this Court did not discuss the relevant state-law standard, much less apply it or endorse any exceptions to it. *See Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 948-49 (6th Cir. 1994).

Such an application would, like the district court's holding, represent a completely new development in Michigan tort law and therefore be an inappropriate basis for federal jurisdiction.

Defendants are correct that the participator-liability rule does not apply to TICR claims. *Reed v. Mich. Metro Girl Scout Council*, 506 N.W.2d 231, 233 (Mich. Ct. App. 1993). But Defendants cannot point to a single Michigan case applying the TICR exception to a wrongful discharge claim. The closest they come is *Covell v. Spengler*, 366 N.W.2d 76 (Mich. Ct. App. 1985), which involved both a TICR claim and a wrongful discharge claim but disposed of them separately. *Compare id.* at 79-80 (wrongful discharge claim foreclosed by Whistleblowers' Protection Act), *with id.* at 80 (applying TICR exception to TICR claim).[2] The court never suggested the TICR exception could apply to a wrongful discharge claim.

Defendants point to one *federal* court decision supporting application of the TICR exception to wrongful discharge, *Smetts v. Whiteford Sys., Inc.*, 1990 WL 299250, at *7 (W.D. Mich. Apr. 11, 1990), but the very same court subsequently

[2] Although the court's discussion of the final claim was cursory, the briefing clarifies that this claim (Count IV) was for TICR. *See* R.E. 23, Ex. 1 (Br. for Appellant, *Covell v. Spengler*), at 12 (appellate issue: "Does Count IV of plaintiff's complaint state a valid cause of action ... [for] interference with contractual relations?"); R.E. 23, Ex. 2 (Br. for Appellee, *Covell v. Spengler*), at vii (reciting procedural history).

cautioned against overreading the exception, *see Moellers N. Am., Inc. v. MSK Covertech, Inc.*, 912 F. Supp. 269, 271-72 (W.D. Mich. 1995). Moreover, these are federal cases and therefore merely "forecast[s] rather than [] determinations" of state law. *Walker*, 240 F.2d at 917.

Undeterred by the absence of supporting authority, Defendants suggest TICR and wrongful discharge claims are so similar that the exception for one must apply to the other. *See* Appellees' Br. 27-28. But a Michigan court actually had a chance to adopt such a rule, and did not. *See Covell*, 366 N.W.2d 76. And for good reason: though wrongful discharge bears some superficial resemblance to TICR, the two are fundamentally different. First, the parties to a wrongful discharge claim are the employer and the employee: wrongful discharge is the termination of an employee under a circumstance that violates public policy. *See McNeil v. Charlevoix County*, 772 N.W.2d 18, 24 (Mich. 2009). In a TICR claim, by contrast, the plaintiff must show that the defendant instigated a breach of a contract where, crucially, "the defendant was a 'third party' to the contract or business relationship." *Reed*, 506 N.W.2d at 233; *accord, e.g., Derderian v. Genesys Health Care Sys.*, 689 N.W.2d 145, 158 (Mich. Ct. App. 2004). Second, the wrong committed in TICR is to cause the breach of a contract, *see Derderian*, 689 N.W.2d at 157, whereas the wrong committed in a wrongful discharge case is, specifically, firing an employee, *see McNeil*, 772 N.W.2d at 24. In fact, TICR

need not involve an employment relationship at all. *See, e.g., Reed*, 506 N.W.2d at 232-33 (dispute over contract to purchase camp); *Derderian*, 689 N.W.2d at 150 (doctor claimed hospital contracted with his practice group under false pretenses and thereby lured group away from other business relationships). The two torts are thus different in nature and there is no reason to assume an exception that applies to one applies to the other.

Defendants analogize TICR to wrongful discharge because "both involve employment contracts," but in order to make this statement true, Defendants must limit it to claims "[i]n the employment context." Appellees' Br. 28. The fact that claims *in the employment context* involve employment is a tautological statement, proving nothing.

Finally, and most importantly, even if the TICR exception *should*, for some reason, apply to wrongful discharge claims, there is no indication in Michigan law that it *does*. Yet again, Defendants ask the federal courts to "develop" – i.e., amend – rules of Michigan law that do not suit them. As this Court has recognized, this is inappropriate: a federal court deciding a remand motion must resolve all ambiguities in the applicable state law in favor of remand. *E.g., Coyne*, 183 F.3d at 493.

Because neither Defendants nor the district court identified an applicable exception to the longstanding Michigan rule that employees who participate in a

tort are subject to liability, Defendant Estill was properly joined, diversity between the parties does not exist, and the district court erred in asserting jurisdiction.

II. DEFENDANTS' STATUTORY INTERPRETATION PARROTS THE DISTRICT COURT'S ANALYSIS, FOCUSES ON IRRELEVANT DISTINCTIONS AND APPLICATIONS, AND SUBSTITUTES EXTRINSIC EVIDENCE FOR TEXT.

The bulk of Defendants' statutory analysis reiterates the reasoning of the district court. Defendants' additional arguments seek to avoid the key words of the statute – "disciplinary action by a business" – by focusing on other terms, applications not relevant to this case, extrinsic evidence, and interpretations of other statutes with different language.

Defendants repeat the district court's question-begging assumption that the MMMA regulates only state action, Appellees' Br. 30, 32-33; the court's analysis of section 4(f) out of context, *id.* at 33; the court's circular argument that section 7(c) cannot support Plaintiff's reading, *id.* at 37-38; and the court's reliance on cases about other medical marihuana laws with different language, *id.* at 42. Plaintiff stands by his rebuttals of these points. *See* Open. Br. for Appellant 35-41.[3]

[3] The Washington Supreme Court's recent rejection of employment protections for medical marihuana patients, *Roe v. Teletech Customer Care Mgmt.*, 2011 WL 2278472 (Wash. June 9, 2011), is inapposite for the same reason as the other out-of-state cases Defendants cite: none interpreted statues with language similar to the MMMA's.

The Defendants' other arguments seek to avoid, rather than interpret, the key words of the MMMA. Defendants urge that rules of construction "are not inflexible and must give way where syntax requires a different reading," Appellees' Br. 32, but never explain why their reading is "required." In response to Plaintiff's argument based on the words of the key statutory phrase – "business or occupational or professional licensing board or bureau," M.C.L. 333.26424(a) – Defendants argue that it is possible to read "or" as if it were a comma, but Defendants' only example of such a reading involves items that make sense *only* if read as a series. *See* Appellees' Br. 32 (citing *Omaha Healthcare Ctr. v. Johnson*, 246 S.W.3d 278, 282-83 (Tex. Ct. App. 2008) ("safety or professional or administrative services directly related to health care")). Beyond this one example from one out-of-state intermediate appellate court, Defendants offer no reason to read the key phrase as if it contained a comma rather than the word "or." In fact, the MMMA consistently uses the serial comma rather than the double-"or" syntax to denote a series of items. *See* Open. Br. for Appellant 28-31.

Defendants' only response to Plaintiff's consistent-syntax argument is that "nearly every" one – but not even all! – of the MMMA's uses of the serial comma involves nouns or verbs, not adjectives. Appellees' Br. 35. This is a wholly irrelevant distinction. Moreover, even if this distinction were meaningful, it does not consistently hold: the MMMA uses the serial comma at least once for

adjectives. M.C.L. 333.26426(g) ("any local, county or state governmental agency").

Defendants argue at length about the meaning of "employer" and whether the word "business" is broad enough to cover all "employers." Appellees' Br. 35-37. This Court need not fix the precise boundaries of the term "business," since Defendants concede, as they must, that Wal-Mart constitutes a "business." *See id.* at 35 ("Wal-Mart and Estill agree that some businesses (*including Wal-Mart*) are employers." (emphasis added)). The MMMA prohibits "disciplinary action by a business." Wal-Mart is a "business." No one disputes that firing Joseph Casias was a "disciplinary action." The precise scope of "business" and the degree of regulation of "employers" need not be established to resolve this case.

Alternatively, Defendants' argument could be read as claiming a law cannot cover a "business" if it does not cover all "employers." This suggests an astonishing principle of statutory interpretation: that courts should expand or narrow the substance of words with clear meanings whenever courts think the words used are of inappropriate scope. This Court should reject this atextual, judges-know-best approach to statutory interpretation.

Ironically, after arguing that the word "business" is too narrow to cover employers, *id.* at 35-37, Defendants contend that "business" is too broad because it could require results inconsistent with federal law. *Id.* at 39-40. Some of

Defendants' examples are incorrect – for example, the Drug-Free Workplace Act does *not* require firing individuals who use drugs outside work.[4] But even assuming that some MMMA applications would be preempted, this is no reason the MMMA is not effective where valid. For instance, the fact that the MMMA's confidentiality provision must yield to a federal subpoena does not render the provision wholly void; rather, it is preempted only "to the extent it conflicts with the federal law by preventing the federal government's exercise of its subpoena power." *United States v. Mich. Dep't of Cmty. Health*, 2011 WL 2182418, at *13 (W.D. Mich. June 3, 2011). Thus the possibility of preemption in some other circumstances should not affect the interpretation of the MMMA here.

Defendants next urge the Court to foresake the text of the MMMA in favor of extrinsic evidence. This argument is problematic, first, because it improperly substitutes legislative history for text, *see, e.g., Welch Foods, Inc. v. Att'y Gen.*, 540 N.W.2d 693, 695-96 (Mich. Ct. App. 1995) (holding that initiative regulating drink bottles applied to sparkling fruit juice because of initiative's plain language, even though ballot proposal stated the law pertained to soda and beer). Second,

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[4] The Drug-Free Workplace Act requires federal contractors and grantees to prevent drug use *in the workplace*. *See* 41 U.S.C. §§ 701(a)(1)(A), 701(a)(1)(D)(ii), 701(a)(1)(F), 702(a)(1)(A), 702(a)(1)(D)(ii), 702(a)(1)(F), 706. The MMMA does not require accommodation of marihuana use "in any workplace." M.C.L. 333.26427(c)(2).

Defendants' evidence proves at most that employee protections were not the *focus* of the MMMA campaign. But other important aspects of the MMMA, such as physician protections, M.C.L. 333.26424(f), and patient confidentiality, M.C.L. 333.26426(h), did not appear in the ballot summary, either. *See* Appellees' Br. 7-8. Finally, Defendants repeat their (and the district court's) mistake of generalizing about the whole MMMA based on one criminal case. Defendants borrow the O'Keefe Declaration from the same criminal case, *People v. Redden*, 2010 WL 3611716 (Mich. Ct. App. Sept. 14, 2010), from which they leap to the conclusion the MMMA only regulates state actors. Defendants cling to the baseless expectation that a single criminal case necessarily addressed all applications, civil or criminal, of the MMMA.

Defendants' irrelevant distinctions and tangents should not distract from the plain text, which – interpreted in light of its syntax, purpose and structure – prohibits exactly what happened in this case: a "disciplinary action by a business" against a qualifying patient.

III. DEFENDANTS' VARIOUS ALTERNATIVE ARGUMENTS FOR AFFIRMANCE ARE MERITLESS.

A. The MMMA Does Not Positively Conflict With The CSA, Nor Pose An Obstacle To Its Enforcement.

Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was

the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Controlled Substances Act ("CSA") evinces no such intent; on the contrary, it contains an express anti-preemption provision limiting its preemptive force to circumstances of "positive conflict." 21 U.S.C. § 903.

The CSA criminalizes the possession, manufacture, and distribution of marihuana. 21 U.S.C. §§ 841(a), 844(a) . But the CSA also allows the states to continue their longstanding practice of enacting varying penal drug laws, *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006) (the CSA "explicitly contemplates a role for the States in regulating controlled substances"), and does not prohibit laws decriminalizing marihuana use for medical purposes. *See United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1100 (N.D. Cal. 1998) (no conflict between the CSA and California's decriminalization of medical marihuana); *City of Garden Grove v. Super. Ct.*, 68 Cal. Rptr. 3d 656, 677 (Cal. Ct. App. 2007) (same), *cert. denied*, 129 S. Ct. 623 (2008). The CSA does not regulate employment relationships at all.

Defendants argue for "conflict" preemption, of which there are two types: (1) "actual conflict" (also called "positive conflict" or "impossibility"), under which a state law is preempted "to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law," and (2) "obstacle preemption," under which preemption occurs "where the state law stands

as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (citations omitted). The CSA does not preempt the MMMA's patient protections under either theory.

1. The CSA does not positively conflict with the MMMA.

Defendants do not even claim "it is impossible to comply with both state and federal law," *id.*, nor could they. Nothing in the MMMA requires Defendants (or anyone else) to do anything that federal law forbids. All Defendants must do is refrain from firing a qualified patient because of his or her marihuana use outside of work in accordance with state law. Defendants need have no involvement themselves with any conduct illegal under federal law. Thus, there is no positive conflict.

2. Obstacle preemption is unavailable under the CSA, and in any event the MMMA poses no obstacle because CSA enforcement is no more difficult whether state-law-compliant medical marihuana users can be fired or not.

Defendants' obstacle preemption theory fails as a threshold matter. Congress limited the scope of CSA preemption to circumstances in which "there is a *positive conflict* between [a CSA provision] and [a] State law *so that the two cannot consistently stand together*." 21 U.S.C. § 903 (emphasis added). This language indicates Congress intended to preempt only those state laws in positive conflict with the CSA, and no others. *See County of San Diego v. San Diego*

NORML, 81 Cal. Rptr. 3d 461, 478-81 (Cal. Ct. App. 2008), *cert. denied*, 129 S. Ct. 2380 (2009); *see also S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 590-91 (4th Cir. 2002) (interpreting language materially identical to 21 U.S.C. § 903 as allowing only impossibility preemption). Defendants note other courts have analyzed obstacle preemption notwithstanding similar statutory language, *see* Appellees' Br. 46, but none of these cases considered the argument that the language *precludes* obstacle preemption. Cases do not stand for propositions they assume without deciding. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006).

Even assuming obstacle preemption can occur under the CSA, a state employment-law protection that does not purport to exempt anyone from the requirements of federal law poses no obstacle to CSA enforcement. Although Michigan has directed businesses operating within its borders to heed the distinction between criminal and non-criminal uses of marihuana under state law, federal officers may of course ignore Michigan law when enforcing federal law.

Obstacle preemption applies if "the purpose of the [federal] act cannot otherwise be accomplished." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Clearly, the CSA's objectives may otherwise be accomplished notwithstanding the MMMA's employment protection: federal officers may continue to investigate and prosecute those who possess, cultivate, transport, or sell

medical marihuana in violation of federal law. *See County of San Diego*, 81 Cal. Rptr. 3d at 481-83 (CSA did not preempt issuance of state identification cards to qualifying patients); *City of Garden Grove*, 68 Cal. Rptr. 3d at 677 (rejecting preemption challenge to medical marihuana law, because "[e]nforcement of the CSA can continue as it did prior to" the law's passage (citations and internal quotation marks omitted)). It is no harder for federal law enforcement officers to arrest a marihuana user whether he has a job or not. Nor does the MMMA itself purport to alter federal law in any manner. *United States v. Hicks*, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010).

Defendants' principal authority, *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, 230 P.3d 518 (Or. 2010), held that a section of Oregon's medical marihuana law was preempted where it attempted to "authorize" the use of marihuana and thereby redefine, in contradiction to federal law, what qualifies as the "illegal use of drugs" as defined in Oregon's disability law. *See Emerald Steel*, 230 P.3d at 525, 529. But the MMMA provision upon which Plaintiff relies does not redefine anything; it merely protects a discrete and narrowly defined set of individuals from being disciplined for certain conduct.

The theory at the heart of the *Emerald Steel* case and Defendants' other authorities – i.e., that state law is preempted whenever it authorizes what the CSA prohibits – is inapplicable here. If the MMMA provision at issue "authorizes"

anything, it is that medical marihuana patients keep their jobs. Neither the CSA, nor for that matter the Drug-Free Workplace Act cited by Defendants, *see supra* at 16 n.4, prohibits employing a worker who uses marihuana outside of work.

Moreover, the broad principle Defendants draw from *Emerald Steel* is itself on shaky ground, both as a matter of precedent and logic. Distinguishing *Emerald Steel*, the Oregon Supreme Court recently disavowed the rule that "any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted." *Willis v. Winters*, 2011 WL 1886286, at *5 n.6 (Or. May 19, 2011). And it is easy to see why. *Emerald Steel* relied heavily on the distinction between "affirmatively authoriz[ing]" the use of marihuana and decriminalizing it; the court invalidated only the "authorizing" provisions and not the "decriminalizing" provisions of Oregon's law. *See Emerald Steel*, 230 P.3d at 525 & n.11, 526 n.12, 530, 533, 536. But this is a distinction without a difference: removing penalties associated with particular conduct, i.e. "decriminalizing" it, has the ineluctable effect of "authorizing" that conduct. To pretend otherwise is semantics. Preemption is not about labels, but effects. *See, e.g., Crosby*, 530 U.S. at 373.

Thus, what Defendants are actually challenging is no less than the decriminalization of medical marihuana itself. *See* Appellees' Br. 52 ("Plaintiff must argue the MMMA redefines what constitutes illegal drug use ... ."). But the mere fact that state and federal criminal law do not march in lockstep does not

create a conflict; on the contrary, under the Tenth Amendment, "[e]ven where Congress has the authority ... to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Printz v. United States*, 521 U.S. 898, 924 (1997) (citation and internal quotation marks omitted). If federal prohibition of certain conduct could preempt a State's decriminalization of that same conduct, the result would be precisely what *Printz* forbids: federal law would *force* States to enact matching criminal prohibitions. Under this theory, the scope of preemption in the field of criminal law would be staggering: preemption would arise from each of the "countless ... federal criminal provisions [prohibiting] conduct that happens not to be forbidden under state law." *Gonzales*, 546 U.S. at 290 (Scalia, J., dissenting).[5]

Finally, Defendants' extensive discussion of *Gonzales v. Raich*, 545 U.S. 1 (2005), is beside the point. *Raich* merely upheld congressional Commerce Clause power to regulate drugs, and its entire discussion relates to that context; *Raich* did

[5] For example, some states permit handgun sales to individuals 18 to 21 years old, *see* Idaho Code Ann. § 18-3302A; Tex. Penal Code Ann. § 46.06(a)(2), even though federal law forbids it, 18 U.S.C. § 922(b)(1). Some states do not criminalize the solicitation of 16- and 17-year-olds for sexual activity, *see* Conn. Gen. Stat. § 53a-90a(a); Wis. Stat. § 948.075, even though federal law prohibits it, 18 U.S.C. § 2422(b). And medical marihuana laws are just one of several ways in which states have decriminalized conduct relating to controlled substances. *See, e.g.*, N.M. Stat. Ann. § 30-31-27.1 (no criminal prosecution for drug possessor who seeks medical assistance for an overdosing user).

not discuss any employment relationship or prevent states from enacting marihuana laws not in lockstep with the CSA. *See id.* at 22; *see also id.* at 63 (Thomas, J., dissenting) (noting CSA enforcement continues notwithstanding state decriminalization of medical marihuana).

Simply put, requiring Defendants to let Joseph Casias keep his job poses no obstacle to the enforcement of federal drug laws. If the federal government wanted to enforce the CSA against Joseph – and it apparently does not, *see* R.E. 25, Ex. A (Memo. of David W. Ogden, Deputy Att'y Gen.) (discouraging "prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law") – Michigan's requirement that Defendants not fire Joseph would not obstruct federal law enforcement. In fact, had Defendants complied with the MMMA and not fired Joseph, federal officers would have known exactly where to find him: at work.

B. The ADA Preempts Only Laws Providing Less Protection To Individuals With Disabilitis, And The MMMA Does Not Obstruct ADA Enforcement.

Oblivious to the irony of claiming that a federal law protecting individuals with "a physical or mental impairment that substantially limits one or more major life activities," 42 U.S.C. § 12102(1)(A), preempts a state law protecting individuals with "debilitating medical condition[s]," M.C.L. 333.26423(h),

Defendants claim the ADA preempts Plaintiff's claim under the MMMA. This claim fails at several levels.

First, notwithstanding Defendants' argument that the ADA would permit firing a patient who uses a federally prohibited drug, Appellees' Br. 55-59, the ADA's anti-preemption clause explicitly disclaims preemption of any state law "that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act." 42 U.S.C. § 12201(b). The MMMA constitutes precisely this type of law. It permits patients with "debilitating medical condition[s]," M.C.L. 333.26423(h), such as cancer, *see* M.C.L. 333.26423(a)(1), to use medical marihuana without being subject to arrest, prosecution, or "disciplinary action by a business." M.C.L. 333.26424(a). Therefore the MMMA falls squarely within the ADA's anti-preemption clause, and preemption is foreclosed.

Defendants argue the anti-preemption clause does not apply to the MMMA because all "illegal drug users" are excluded from the ADA's definition of "individal with a disability." Appellees' Br. 54. This argument fails for two reasons. First, under the anti-preemption clause, a state law that provides more generous protection by covering *more* people with disabilities is not preempted. Second, "illegal use of drugs" under the ADA "does not include the use of a drug taken under supervision by a licensed health care professional." 42 U.S.C. §

12210(d)(1). A physician must authorize an individual to become a qualifying medical marihuana patient protected by the MMMA, *see* M.C.L. 333.26426(a) & 333.26423(*l*), so such patients fall outside the ADA's exception for individuals engaged in the "illegal use of drugs."

If the explicit anti-preemption provision were not enough, the MMMA is fully consonant with Congress's purpose behind the ADA and poses no obstacle to ADA enforcement. Defendants claim that permitting a wrongful discharge claim in this case would upset the ADA's intended "balance" between workers' rights and employer choices, *see* Appellees' Br. 54-55, but Congress itself rejected Defendants' argument via the anti-preemption clause, which demonstrates that greater state-law protections would not upset any "balance" the ADA intended to strike. Moreover, notwithstanding Defendants' resort to legislative history, the ADA's four stated purposes focus exclusively on eliminating discrimination against people with disabilities, not on employer interests. *See* 42 U.S.C. § 12101(b)(1)-(4).

Defendants fail to identify any aspect of ADA enforcement to which the MMMA poses an obstacle. ADA-protected individuals can make the same claims, and employers can make the same accommodations, whether Michigan law protects medical marihuana users or not. Defendants' authorities establish only that the ADA prempts state laws providing *less* protection, just as the anti-

preemption clause says. *See Hubbard v. SoBreck, LLC*, 554 F.3d 742, 745 (9th Cir. 2009); *Lentz v. City of Cleveland*, 410 F. Supp. 2d 673, 700 (N.D. Ohio 2006); *Wood v. County of Alameda*, 875 F. Supp. 659, 666 (N.D. Cal. 1995). The only other ADA-preemption case Defendants cite specifically *rejects* preemption of a wrongful discharge claim where, as here, state law provides greater protection than the ADA. *See Danfelt v. Bd. of County Comm'rs*, 998 F. Supp. 606, 611 (D. Md. 1998).

Finally, Defendants' argument about workplace safety is disingenuous: the MMMA does not require accommodation of marihuana use in the workplace. *See* M.C.L. 333.26427(c)(2). The ADA's safety exemption, 42 U.S.C. § 12113(b), is not implicated at all.

Because the MMMA protects individuals with certain "debilitating medical conditions," M.C.L. 333.26422(a), it is precisely the type of statute that Congress expressly saved from preemption, 42 U.S.C. § 12201(b). At the very least, it does not create any obstacle to ADA enforcement.

C. The MMMA Does Not Violate The Single-Object Rule.

Defendants' single-object rule claim, Mich. Const. art IV, § 24, relies on a single, distinguishable case, *Hildebrand v. Revco Discount Drug Centers*, 357 N.W.2d 778 (Mich. Ct. App. 1984), which Defendants cherry-pick from a larger body of jurisprudence demonstrating the constitutionality of the MMMA.

Hildebrand held that the Forensic Polygraph Examiners Act, which regulated polygraph equipment and administrators, could not also prohibit firing workers on the basis of a polygraph. *Id.* at 781. This holding vindicates the goal of ensuring affected parties have appropriate notice of what a law contains. *See id.* An employer could not be expected to know that a law regulating who could give a polygraph would also restrict the permissible uses of a polygraph.

By contrast, the MMMA's formal title, which states that the Act serves (among other things) "to provide protections for the medical use of marihuana," R.E. 25, Ex. B, at 1 (Initiated Law 1 of 2008 (MMMA)), is broad enough to cover patient protections from discharge. Barring disciplinary action against a patient is simply one way to achieve the MMMA's overall purpose of protecting patients. "A statute may authorize the doing of all things which further its general purpose." *Ace Tex Corp. v. City of Detroit*, 463 N.W.2d 166, 169 (Mich. Ct. App. 1990). Defendants' contentions notwithstanding, the weight of authority demonstrates that legislation does not violate the single-object rule "simply because it contains more than one means of attaining its primary object." *Pohutski v. City of Allen Park*, 641 N.W.2d 219, 230 (Mich. 2002); *accord, Health Care Ass'n Workers Comp. Fund v. Bureau of Worker's Comp.*, 694 N.W.2d 761, 770 (Mich. Ct. App. 2005); *City of Ann Arbor v. Nat'l Ctr. for Mfg. Sciences*, 514 N.W.2d 224, 228 (Mich. Ct. App. 1994). Indeed, legislation may properly contain "all matters germane to its

object, as well as all provisions that directly relate to, carry out, and implement the principal object," even if "not directly mentioned in the title." *Pohutski*, 641 N.W.2d at 230; *accord, People v. Sharif*, 274 N.W.2d 17, 19 (Mich. 1978); *Wayne County Bd. of Comm'rs v. Wayne County Airport Auth.*, 658 N.W.2d 804, 831 (Mich. Ct. App. 2002); *H.J. Tucker & Assocs. v. Allied Chucker & Eng'g Co.*, 595 N.W.2d 176, 181 (Mich. Ct. App. 1999); *Ace Tex Corp.*, 463 N.W.2d at 169-70.

Finally, it strains credulity to imagine an employer firing a medical marihuana user without first consulting an Act that "provide[s] protections" for such use. Defendants' real problem is not that they were without notice of the law, *see Hildebrand*, 357 N.W.2d at 781, but rather that they did not comply with it. Thus, the single-object rule cannot help them.

D. Defendants' Vagueness Claim Is Meritless.

Defendants' argument that the MMMA is unconstitutionally vague, to which Defendants devote a single sentence, is easily rejected. "When a statute is not concerned with criminal conduct or first amendment considerations, the court must be fairly lenient in evaluating a claim of vagueness." *Doe v. Staples*, 706 F.2d 985, 988 (6th Cir. 1983). Outside these contexts, a vagueness claim can succeed only if a law is "impermissibly vague *in all of its applications*," that is, failing to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489,

497-98 (1982) (citation omitted, emphasis added). The MMMA clearly communicates what is prohibited: disciplinary action by a business against a qualifying patient for the medical use of marihuana in accordance with state law. That is not vague, and certainly not vague in all applications. Defendants' argument therefore fails.

CONCLUSION

Because the district court lacked jurisdiction, this Court should order remand to state court. If jurisdiction lies, this Court should, in accordance with the MMMA's text, reverse the dismissal of the complaint.

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Respectfully submitted,

/s/ Scott Michelman

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

I certify that this brief exceeds 15 pages but complies with Fed. R. App. Pro. 32(a)(7)(B) because this brief contains 6,905 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 June 16, 2011, I served this brief by ECF on all registered counsel for appellees.

/s/ Scott Michelman

SUPPLEMENTAL DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

In addition to the documents cited in Plaintiff's Opening Brief, Plaintiff designates as relevant to Plaintiff's Reply Brief the following additional documents from the district court's electronic docket, Case No. 1:10-CV-781 (W.D. Mich.).

Pl.'s Reply Brief in Support of Mot. To Remand, Ex. 1: Br. for Appellant, *Covell v. Spengler*	R.E. 23, Ex. 1
Pl.'s Reply Brief in Support of Mot. To Remand, Ex. 2: Br. for Appellee, *Covell v. Spengler*	R.E. 23, Ex. 2