NO.16-1048, 16-1095

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAFE STREETS ALLIANCE, et al., *Plaintiffs-Appellants*,

v.

JOHN W. HICKENLOOPER, in his official capacity as Governor of Colorado, et al., *Defendants-Appellees*,

and ALTERNATIVE HOLISTIC HEALING LLC, et al., *Defendants*,

JUSTIN E. SMITH, et al., *Plaintiffs-Appellants*,

v.

JOHN W. HICKENLOOPER, Governor of the State of Colorado, *Defendant-Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Nos. 1:15-cv-00349-REB-CBS, 15-cv-00462-WYD-NYW
The Honorable Robert E. Blackburn, United States District Court Judge

AMICUS BRIEF OF THE STATES OF WASHINGTON AND OREGON IN SUPPORT OF JOHN W. HICKENLOOPER ET AL

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I. INTRODUCTION AND IDENTITY AND INTEREST OF AMICI

Our federal system "split the atom of sovereignty,"[1] leaving States free to make their own policies and choices within a unified national system. States, including the Amici States of Washington and Oregon, have a fundamental interest in the distribution of governmental authority within our federal system. Our federal system "will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). In furtherance of this goal, Amici States file this brief in support of Appellees John W. Hicklenlooper et al., as a matter of right pursuant to Fed. R. App. P. 29(a). Amici urge this Court to affirm the decisions of the District Court dismissing these challenges to Colorado's Amendment 64.[2]

States can only serve as effective laboratories of democracy if they take differing approaches to problems. In recent years, these differing approaches have increasingly included regulating and limiting access to marijuana through approaches that depart from simple prohibition. Decades ago, the idea that marijuana had medicinal properties was a fringe view. Even more extreme was the idea of removing criminal prohibitions on marijuana use. Today, these views are commonplace. Twenty-four States now authorize the production, use, and

[1] *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring).

[2] *See* Colo. Const. art. XVIII, § 16.

possession of marijuana under prescribed conditions, such as with medical recommendations.[3] A similar number have reduced or eliminated sanctions relating to personal use of marijuana.[4] Several States—Colorado, Washington, Alaska, and Oregon—regulate the production and sale of marijuana in a fashion that allows recreational use by adults. And it is both foreseeable and desirable that States will

[3] The following States have adopted "medical marijuana" laws: Alaska (Ballot Measure 8 (1998)), Arizona (Proposition 203 (2010)), California (Proposition 215 (1996)), Colorado (Ballot Amendment 20 (2000)), Connecticut (House Bill 5389 (2012)), Delaware (Senate Bill 17 (2011)), Hawaii (Senate Bill 862 (2000)), Illinois (House Bill 1 (2013)), Maine (Ballot Question 2 (1999)), Massachusetts (Ballot Question 3 (2012)), Michigan (Proposal 1 (2008)), Minnesota (Senate Bill 2470 (2014)), Montana (Initiative 148 (2004)), Nevada (Ballot Question 9 (2000)), New Hampshire (House Bill 573 (2013)), New Jersey (Senate Bill 119 (2010)), New Mexico (Senate Bill 523 (2007)), Oregon (Ballot Measure 67 (1998)), Rhode Island (Senate Bill 0710 (2006)), Vermont (Senate Bill 76 (2004)), and Washington (Initiative 692 (1998)). Maryland recently passed two medical marijuana-related laws. HB 1101 (2013) and HB 180 (2013). Nat'l Org. for the Reform of Marijuana Laws, State Info, http://norml.org/states (last visited Aug. 5, 2016).

[4] Possession of limited amounts of marijuana intended for personal use is classified as a sub-misdemeanor offense or "decriminalized" offense subject to no jail time in the following States: Alaska, California, Maine, Maryland, Massachusetts, Mississippi (first offense only), Nebraska (first offense only), New Jersey, New York (first and second offenses only), Rhode Island, and Vermont. In addition, the following States do not require jail time for possession of marijuana for personal use, despite continuing to classify the offense as a misdemeanor: Minnesota, Nevada (first and second offenses only), North Carolina, Ohio, and Oregon. *See* Nat'l Org. for the Reform of Marijuana Laws, State Info, http://norml.org/states (last visited Aug. 5, 2016); Marijuana Policy Project, Marijuana Policy in the States, http://www.mpp.org/states/ (last visited Aug. 9, 2016).

continue to exercise their sovereign prerogatives by adjusting their laws in fidelity to the beliefs of their citizens.

Amici States have chosen to limit access to marijuana not through total prohibition but through a regulated system of licensed producers, processors, and retailers. This Court should affirm the District Court's decisions dismissing these challenges to Colorado's similar regulatory and licensing system, thus allowing States to exercise their independent judgment within our federal system.

II. ISSUES ADDRESSED BY AMICI

1. Does federal law give rise to a cause of action under which Plaintiffs may assert that a state law providing for a regulated and licensed market in marijuana is preempted by federal law?

2. Does the federal Controlled Substances Act preempt a state law providing for a regulated and licensed market in marijuana?

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case of Appellees Hickenlooper et al. For purposes of this brief it suffices to note that this appeal presents two consolidated challenges to Colorado's Amendment 64. By that constitutional amendment, Colorado's voters established an alternative to prohibition as a way of controlling adult access to marijuana through regulation and licensing.

Washington voters approved their own measure at the same election, creating a regulatory and licensing system for the production, processing, and retailing of marijuana for recreational use. Initiative Measure 502 (I-502), Wash. Laws of 2013, ch. 3 (codified as amended as part of Wash. Rev. Code 69.50). Washington's law, like Colorado's Amendment 64, decriminalized under state law the possession of limited amounts of useable marijuana and marijuana-infused products by persons twenty-one years of age or older. Wash. Rev. Code § 69.50.4013(3). The initiative also established a detailed licensing program for three categories of marijuana businesses: producers, processors, and retailers. Wash. Rev. Code § 69.50.325. I-502 decriminalized producing, processing, and selling marijuana if done within the regulatory and licensing system established by the act, although these actions remain criminal outside that regulatory process. Wash. Rev. Code § 69.50.401(3).

Washington law limits the number of retail outlets and production capacity of marijuana in order to provide sufficient access to displace the illegal market without encouraging marijuana proliferation. Wash. Rev. Code § 69.50.345(2), (4); Wash. Admin. Code § 314-55-075(6)-(8) (providing for limitation on allowed plant canopy).

Oregon voters approved their measure in November, 2014. As in Colorado and Washington, Oregon's Ballot Measure 91 (codified as amended at

Or. Rev. §§ 475B.005 through .800 and Or. Rev. Stat. §§ 475.856 through .864) decriminalized under state law the possession of limited amounts of usable marijuana and marijuana-infused products by persons twenty-one years of age or older, Or. Rev. Stat. § 475.864, and created a robust system of licensing for marijuana production, processing, and wholesale and retail sales, Or. Rev. Stat. § 475B.025 through .399. Marijuana production, processing and sales are decriminalized if conducted within the confines of the licensing scheme; the same actions conducted outside the confines of the licensing scheme are crimes under Oregon law. Or. Rev. Stat. 475.856 through .864.

IV. SUMMARY OF ARGUMENT

State laws like those of Colorado and Amici States create no conflict with federal law or federal drug enforcement priorities. Rather, robust state regulatory and licensing systems further federal objectives by displacing criminal markets and limiting marijuana production and sales.

Plaintiffs lack a federal cause of action to challenge state laws as preempted. This is true because the federal Controlled Substances Act (CSA) only assigns authority to enforce the act to the Attorney General of the United States. Lacking any other cause of action to enforce the CSA, Plaintiffs are without a claim on which they can base a challenge to state laws as being preempted. Plaintiffs' effort to ground their challenge in bare equity fails because the Congressional decision to

vest authority to enforce the CSA exclusively in the Attorney General displaces any authority of other parties to challenge state law. Rather, the judgment as to whether, or when, state drug laws might conflict with federal priorities is properly vested exclusively in federal authorities and not in parties such as these Plaintiffs who lack any role in setting or achieving those priorities.

Even if Plaintiffs could present a cause of action, their claim that the CSA preempts state marijuana laws fails on the merits. The CSA expressly preserves State legislative authority regarding controlled substances. States are the primary enforcers of drug laws, and especially of laws relating to marijuana which is seldom a federal priority. The CSA preempts only state laws that positively conflict with federal law, and by seeking to achieve overlapping objectives with federal law the different means chosen by the States do not conflict.

This Court should therefore affirm the decisions of the District Court and reject Plaintiffs' challenge to the legislative authority of Colorado and the Amici States.

V. ARGUMENT

A. State Licensing and Regulation of Marijuana Furthers the Objectives of Federal Law as Articulated by the Department of Justice

The U.S. Department of Justice (DOJ) issued guidance to federal prosecutors on August 29, 2013, which provided that the DOJ would not seek to intervene in or challenge the voter initiatives in states that legalized marijuana for

recreational use so long as the states maintained a system of strict regulation that observed the eight federal enforcement priorities detailed in the written guidance. James M. Cole, *Memorandum for all United States Attorneys: Guidance Regarding Marijuana Enforcement*, at 2 (Aug. 29, 2013) (*DOJ Guidance*), http://tinyurl.com/nrc9ur8 (last visited Aug. 5, 2016). That memo listed the following enforcement priorities:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

DOJ Guidance at 1-2.

The DOJ has not taken any steps to stop or interfere with the implementation of state recreational marijuana initiatives. This is likely because the States' objectives are similar to the federal priorities as articulated in the *DOJ Guidance*. Washington's law, for example, was enacted to take "marijuana out of the hands of illegal drug organizations," and "bring[] it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol." Wash. Laws of 2013, ch. 3, § 1(3) (*codified as* Note *following* Wash. Rev. Code § 69.50.101). Oregon's recreational marijuana law specifically adopts the eight priorities in the DOJ Guidance and provides that the purpose of the law, among others, is to "establish a comprehensive regulatory framework concerning marijuana under existing state law." Or. Rev. Stat. § 475B.005.

The DOJ expressly recognized that robust state regulatory systems may advance federal interests:

> [C]onduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, *a robust system may affirmatively address those priorities* by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for.

DOJ Guidance at 3 (emphasis added).

B. Plaintiffs Lack A Federal Cause of Action to Challenge State Law as Preempted

Plaintiffs argue that the CSA preempts Colorado's Amendment 64 based upon the Supremacy Clause to the federal Constitution. Plaintiffs offer no claim that the CSA creates for them any cause of action to enforce the CSA. Safe Streets Br. at 20; Smith Br. at 19-31; Nebraska & Oklahoma Br. at 16-20. Indeed, even sovereign states only have authority to enforce the CSA when delegated by the Attorney General or Congress under narrowly-confined circumstances not applicable here. 21 U.S.C. § 878(a) (Attorney General may designate state and local law enforcement to enforce the CSA); 21 U.S.C. § 822(c) (granting States limited authority to enforce the CSA against online pharmacies but without creating a private right of action). As the District Court concluded, "federal courts have uniformly held that there are no private rights of action under the CSA." Safe Streets App. at A365 (citing a litany of cases); *see, e.g.*, *Durr v. Strickland*, 602 F.3d 788, 789 (6th Cir.), *cert. denied*, 559 U.S. 1087 (2010); *Jones v. Hobbs*, 745 F. Supp. 2d 886 (E.D. Ark. 2010), *aff'd sub nom. Williams v. Hobbs*, 658 F.3d 842 (8th Cir. 2011), *cert. dismissed*, 133 S. Ct. 97 (2012).

Plaintiffs have similarly abandoned any argument they might have offered that they can derive a cause of action directly from the Supremacy Clause. Safe Streets Br. at 20; Smith Br. at 19-31; Nebraska & Oklahoma Br. at 16-20. This concession, too, is wise because the Supremacy Clause confers no private right of

action. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015). The Supremacy Clause is a rule of priority and not "a source of any federal rights." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

Plaintiffs, rather, attempt to forge a cause of action from equity in the absence of any statutory basis for their claim. The Supreme Court's recent decision in *Armstrong* forecloses this effort, as the District Court correctly concluded. Federal courts are courts of limited jurisdiction, and their authority to entertain a claim depends upon the presentation of a proper claim. *See Armstrong*, 135 S. Ct. at 1384. As the Court acknowledged, "in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer." *Id.* (quoting *Carroll v. Stafford*, 3 How. 441, 463 (1845) (alteration in *Carroll*)). But even in the context of equity, a federal court "can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Armstrong*, 135 S. Ct. at 1385 (quoting *INS v. Pangilinan*, 486 U.S. 875, 883 (1988)).

It follows, as the District Court explained, that "the right to call on the equity powers of a federal court to enjoin enforcement of an allegedly preempted state law must be found in substantive federal law." Safe Streets App. at A364 (citing *Armstrong*, 135 S. Ct. at 1385). Plaintiffs' claim fails to do so because the CSA both (1) clearly vests its enforcement authority in the federal Attorney General and

not in other litigants, and (2) provides no private rights to Plaintiffs. 21 U.S.C. §§ 841-851 (vesting criminal enforcement authority in the Attorney General); 21 U.S.C. § 881 (similarly vesting civil enforcement authority); 21 U.S.C. § 875 (vesting administrative enforcement authority).

Vesting enforcement authority in a particular officer, such as the Attorney General, allows federal law to be enforced in a manner that reflects federal policy and priorities. *See Armstrong*, 135 S. Ct. at 1384 (noting Congressional discretion to impose "mandatory private enforcement"). "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001); *see also Friends of the E. Hampton Airport, Inc. v. Town of East Hampton*, No. 15-cv-2246-JS-ARL, 2015 WL 3936346, at *9 (E.D.N.Y. June 26, 2015) (Congress intended to foreclose equitable enforcement of a federal statute by placing authority in the Secretary of Transportation through a comprehensive administrative enforcement scheme); *Duit Constr. Co. v. Bennett*, No. 4:13-cv-00458-KGB, 2016 WL 1259398, at *4 ("*Armstrong* bolsters this Court's conclusion that enforcement of the FAHA lays with the Secretary of Transportation and not with Duit as a private litigant."), *dismissed*, 2016 WL 1273946 (E.D. Ark. Mar. 30, 2016).

Given the interrelationship between federal and state sovereignty, particularly as it relates to federal and state enforcement of laws regarding

controlled substances, it makes sense for Congress to vest enforcement authority in the Attorney General without allowing other litigants to enter that relationship. The Attorney General, as the relevant federal authority, has determined that properly implemented regulatory systems like Colorado's do not pose an obstacle to federal priorities. *DOJ Guidance* at 2. The Attorney General must apply a "judgment-laden standard" providing "expertise" and "uniformity" to the complex application of the CSA. *Armstrong*, 135 S. Ct. at 1385. Allowing other litigants to interfere with the prosecutorial discretion vested in the Attorney General would lead to "inconsistent interpretations" that arise from inappropriate application of a statute in a private action. *Id*.

Inferring a right of action for litigants other than the federal Attorney General is particularly inappropriate where those other litigants are afforded no affirmative rights by the federal statute in question, the CSA. The CSA prohibits specific conduct, including the manufacture, delivery, and possession of marijuana. 21 U.S.C. §§ 841, 844. It establishes no affirmative right on the part of others, however, to preclude that conduct. In particular, it affords Plaintiffs no right to preclude Colorado from adopting an alternative regulatory system that seeks to control access to marijuana through a licensed market rather than total prohibition of marijuana. This Court should accordingly defer to the views of the federal official in whose authority enforcement is vested. Without any right to preclude

others from entering the marijuana business, Plaintiffs have no cause of action to challenge Colorado's Amendment 64 as federally preempted.

C. The Controlled Substances Act Does Not Preempt Amendment 64

Even if Plaintiffs had presented a cause of action, they have not presented a valid basis for preemption of Colorado's Amendment 64. Consideration of a claim that federal law preempts state law "starts with the assumption that the historic police powers of the States are not to be superseded by [federal law] unless that is the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (*Cipollone*'s alterations omitted, current alteration ours).

The presumption disfavoring preemption of state law is particularly strong when a state legislates within its "historic police powers." *See Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). Though federal law has long prohibited the manufacture, distribution, and use of certain drugs, States have always been on the front lines of making and enforcing drug policy, particularly as to marijuana. In fact, nearly all marijuana enforcement in the United States—more than ninety-nine percent—takes place at the state and local level.[5] In 2010, for example, there were

[5] Marijuana Policy Project, *State-By-State Medical Marijuana Laws* 14 (2015), https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/state-by-state-medical-marijuana-laws-report/ (last visited August 5, 2016).

889,133 marijuana arrests at the local level,[6] compared to only 8,117 at the federal level.[7] Moreover, federal Drug Enforcement Administration agents "primarily investigate major narcotics violators [and] enforce regulations governing the manufacture and dispensing of controlled substances[.]" Bureau of Justice Statistics, *Drugs and Crime Facts*, http://www.bjs.gov/content/dcf/enforce.cfm (last visited Aug. 5, 2016). State laws decriminalizing the possession of small quantities of marijuana do not implicate the federal interest pursued by federal law enforcement because states allow possession only in such small quantities as to elude federal interest. *See, e.g.*, Wash. Rev. Code § 69.50.4013(3) (exempting the possession of small amounts of marijuana by adults aged 21 or older from the crime of possession a controlled substance).

The provision of the Controlled Substances Act that expressly describes its preemptive scope primarily *preserves*, rather than preempts, State legislative authority:

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[6] *See* American Civil Liberties Union, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests* 8, 37 (June 2013), https://www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report (citing FBI/Uniform Crime Reporting Program Data: County-Level Detailed Arrest and Offense Data, 1995-2010) (last visited Aug. 5, 2015).

[7] *See* United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Federal Justice Statistics, 2010*, at 9 tbl. 4 (Dec. 2013), http://www.bjs.gov/content/pub/pdf/fjs10.pdf (last visited Aug. 5, 2015) (Table 4: Characteristics of suspects arrested by the Drug Enforcement Administration, by type of drug, 2010).

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. This express Congressional statement that the CSA does not generally preempt state law led one Supreme Court justice to characterize it as a "nonpre-emption clause." *Gonzales v. Oregon*, 546 U.S. 243, 289 (2006) (Scalia, J., dissenting). Rather, federal law reflects the role of the States as both the primary regulators of marijuana and as policy laboratories. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

Federal preemption can take several forms. "First, the States are precluded from regulating conduct in a field that Congress . . . has determined must be regulated by its exclusive governance." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). "Second, state laws are preempted when they conflict with federal law." *Id.* Conflict preemption arises in two ways: impossibility preemption and obstacle preemption. *Id.* Impossibility preemption arises when it is physically impossible to comply with federal and state law at the same time. *Id.* Obstacle preemption applies "where the challenged state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Congress has significantly narrowed the range of federal preemption issues relevant here. Because Congress made clear that it only intended to preempt state laws that create a "positive conflict" with the CSA, Congress did not "occupy the field" of regulating controlled substances. Field preemption is thus inapplicable under the CSA. 21 U.S.C. § 903; *see also Cty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 476 (Cal. Ct. App. 2008) ("numerous courts have concluded[] that . . . 21 U.S.C. § 903[] demonstrates Congress intended to reject express and field preemption of state laws concerning controlled substances"). As to conflict preemption, because the statute limits preemption to state laws where "there is a positive conflict between . . . [the CSA] and that State law so that the two cannot consistently stand together," courts have held that obstacle preemption is irrelevant under the CSA, because the only form of conflict the CSA is concerned with "is a positive conflict." 21 U.S.C. § 903; *see, e.g.*, *San Diego NORML*, 81 Cal. Rptr. 3d at 481; *People v. Crouse*, No. 12CA2298, 2013 WL 6673708, at *4 (Colo. App. Dec. 19, 2013). Indeed, other federal statutes specify that both impossibility and obstacle preemption apply, demonstrating that Congress knows how to write such a clause if that is its intent. *See, e.g.*, 21 U.S.C. § 350e(e). Congress' omission of any mention of obstacle preemption in 21 U.S.C. § 903 thus demonstrates an intent to exclude it.

Thus, as many courts have held, the only type of preemption ultimately at issue under the CSA is the "impossibility preemption" aspect of conflict preemption. *See, e.g.*, *San Diego NORML*, 81 Cal. Rptr. 3d at 480-81 ("Because Congress provided that the CSA preempted only laws positively conflicting with the CSA so that the two sets of laws could not consistently stand together, and omitted any reference to an intent to preempt laws posing an obstacle to the CSA, we interpret title 21 United States Code section 903 as preempting only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible."); *Crouse*, 2013 WL 6673708, at *4 (same); *cf. S. Blasting Servs., Inc. v. Wilkes Cty.*, 288 F.3d 584, 591 (4th Cir. 2002) (reaching same conclusion as to substantively identical preemption clause in 18 U.S.C. § 848).

The *Safe Streets* Plaintiffs attempt to rebut the conclusion of these courts by citing an example of a case in which the Supreme Court considered—but rejected—an obstacle preemption argument in a case about a federal statute with a preemption clause that reads similarly to 21 U.S.C. § 903. Safe Streets Br. at 35-36 (citing *Wyeth v. Levine*, 555 U.S. 555, 573-81 (2009). But cases are not authority for propositions they do not consider. The Court in *Wyeth* rejected obstacle preemption on its merits without any discussion of the issue resolved by *San Diego NORML* and *Crouse*. *Wyeth* therefore is not authority for the

proposition that obstacle preemption arises under a statute that preserves state authority except only in cases of "positive conflict."

The question therefore becomes solely whether the Plaintiffs' "compliance with both federal and state regulations is a physical impossibility." *Arizona*, 132 S. Ct. at 2501 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). "Impossibility pre-emption is a demanding defense." *Wyeth*, 555 U.S. at 573. Where state law merely allows what federal law prohibits, it is not impossible to comply with both laws at the same time. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617-18 (2011). But Amendment 64 does not require Plaintiffs to do anything, much less do anything that would violate federal law. Rather, their argument is simply that Colorado's Amendment 64 regulates, but does not prohibit, others from taking actions that violate federal law. Amici concur with Hickenlooper's argument that Plaintiffs accordingly lack standing to bring this claim, but even if Plaintiffs could demonstrate standing, they could not show that it is physically impossible to comply with both federal and state law.

The *Smith* Plaintiffs contend that county sheriffs find it impossible to comply with both federal and state law based on the argument that federal law authorizes them to seize marijuana for forfeiture to federal agents. Smith Br. at 38-39. But notably the *Smith* Plaintiffs never contend that federal law *requires* them to engage in such seizures, and the applicable federal statute merely

authorizes state law enforcement to seize marijuana. 21 U.S.C. § 881. The *Smith* Plaintiffs therefore do not describe a situation in which federal law requires a sheriff to do anything that state law prohibits.

Plaintiffs contend that it is impossible to comply with both federal and state law by discounting the option of not entering the marijuana business. Safe Streets Br. at 33-34 (citing *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2477 (2013)); Smith Br. at 42-43 (same). These Plaintiffs, of course, are not in the marijuana business, and so they are reduced to asserting a claim that is not their own, harkening again to Hickenlooper's well-taken argument regarding standing. Even so, the case on which Plaintiffs rely involved a federal law that required pharmaceutical labels to read in one way and a state law that required them to read another way. The Court rejected the idea that not selling the product at all was an option that avoided conflict. *Mutual Pharm. Co.*, 133 S. Ct. at 2477. Impossibility preemption arises "[w]hen federal law forbids an action that state law requires[.]" *Id.* at 2476. Plaintiffs' argument misses the point, which is that state law merely authorizes marijuana businesses, through a regulatory regime that seeks to address the same social problems as federal law through an alternative means.

Plaintiffs place much emphasis upon an argument that the State itself encourages violations of federal law, but this misses the point of Colorado's Amendment 64, as well as of comparable state laws like those of Amici States.

State law does not seek to maximize the use of marijuana, but to provide an alternative regulatory scheme. It goes without saying that prohibition does not prevent the production and use of marijuana.[8] States adopting alternative regulatory and licensing systems seek to displace the illegal market and organized crime while restricting distribution to adults. Washington law, for example, limits both the number of retail outlets and the volume of marijuana production. Wash. Rev. Code § 69.50.345(2), (4); Wash. Admin. Code § 314-55-075(6)-(8). Those under age 21 are generally not allowed to enter retail stores. Wash. Rev. Code. § 69.50.345(2); *but see* Wash. Laws of 2015, ch. 70, § 12 (*codified as* Wash. Rev. Code. § 69.50.357(2)) (providing a limited exception for medical patients). State regulation and licensing thus furthers the same objectives that the CSA seeks to accomplish, but by a different—and perhaps more successful—means.

Plaintiffs also assert obstacle preemption, but as detailed above, obstacle preemption does not apply here. *San Diego NORML*, 81 Cal. Rptr. 3d at 481; *Crouse*, 2013 WL 6673708, at *4. Even if it did, Plaintiffs would be mistaken in arguing that that federal law precludes the States from regulating and limiting access to marijuana by means different than total prohibition. Obstacle preemption

[8] Total arrests for marijuana related offenses nearly doubled between 1982 and 2007, despite uniform national criminal prohibition of marijuana. Bureau of Justice Statistics, *Drugs and Crime Facts*, http://www.bjs.gov/content/dcf/tables/drugtype.cfm (last visited Aug. 5, 2016).

"analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992)). Instead, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Id.* (quoting *Gade*, 505 U.S. at 110).

Obstacle preemption arises only if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 141 (quoting *Hines*, 312 U.S. at 67). Whether the State seeks to control access to and abuse of marijuana through prohibition or through a regulatory alternative, the federal government remains free to prosecute violators of federal law. *See Gonzales v. Raich*, 545 U.S. 1, 17-19 (2005). If anything, State regulation discourages activities that violate federal law by displacing the illegal market and the organized crime associated with it, thus addressing these negative behaviors in a way that assists in achieving federal objectives. *See Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994) (noting the deterrent effect of state taxation of marijuana on behaviors that federal law seeks to eliminate); *see also Wyeth*, 555 U.S. at 578 (state

regulation though alternative means can complement federal objectives, rather than obstruct them).

States choosing not to regulate and license marijuana retain their sovereign authority to enforce their own criminal prohibitions, but have no constitutional interest in telling their neighbors what laws they can pass. Indeed, the very notion invites the spectacle of states trying to dictate laws to their neighbors on controversial topics.

Whatever preemption might flow from the CSA, it is clearly not a comprehensive marijuana policy. By its express terms, the CSA does not occupy the field. 21 U.S.C. § 903. The CSA does not prevent States from decriminalizing marijuana. Congress has not funded enforcement for a national marijuana prohibition, and both Congress and the executive branch have expressed a strong willingness to allow States to experiment with different marijuana policies.[9] This Court should defer to the view of the federal agency charged with enforcing the CSA. *Wyeth*, 555 U.S. at 576-77. The federal Department of Justice has explained that it does not view state laws with "strong and effective regulatory and enforcement systems" as obstacles to its objectives. *DOJ Guidance* at 2-3.

[9] *See, e.g.*, *DOJ Guidance* at 2; *see also* Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538 ("None of the funds made available in this Act to the Department of Justice may be used . . . to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.").

Nor could Congress mandate that States prohibit marijuana. The consequence of invalidating State laws that decriminalized marijuana under state law and provide alternative regulatory approaches would accordingly be to keep the decriminalization while destroying the State regulatory system, thus exacerbating any harm that residents or neighboring states might claim. Federal authorities have acknowledged as much.[10] Under the Tenth Amendment's anti-commandeering doctrine, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992) (alteration in *New York*, quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 425 U.S. 264, 288 (1981)). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162. "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166. "No matter how powerful the federal interest involved, the Constitution

[10] Deputy Attorney General Cole, who authored the *DOJ Guidance*, acknowledged in Congressional testimony that challenging state regulatory laws would be against the interest of the federal government for this reason. Marijuana Policy Project, *State-By-State Medical Marijuana* Laws 12 (2015), https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/state-by-state-medical-marijuana-laws-report/ (last visited August 5, 2016).

simply does not give Congress the authority to require the States to regulate." *New York*, 505 U.S. 178.

VI. CONCLUSION

For these reasons, this Court should affirm the decisions of the District Court dismissing these actions.

RESPECTFULLY SUBMITTED this 15th day of August 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief Of Amicus States complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it was prepared using Times New Roman 14 point typeface and contains 5,522 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify (1) that all the required privacy redactions have been made as required by Tenth Circuit Rule 25.5, (2) that the submitted hard copies are exact copies of the version submitted electronically, and (3) that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and according to the program is free of viruses.

DATED this 15th day of August 2016.

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CERTIFICATE OF SERVICE

I hereby certify that:

1. On August 15, 2016, the Amicus Brief Of The States was served as follows:

2. The Amicus Brief Of The States Of Washington and Oregon was sent electronically to the parties via the court's electronic filing system.

3. All parties required to be served have been served.

4. I am a member of the Bar of the Tenth Circuit Court Of Appeals.

DATED this 15th day of August 2016.

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