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February 7, 2017

Elisabeth Shumaker, Clerk
United States Court of Appeals for the Tenth Circuit
The Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257

Re: *Safe Streets v. Hickenlooper*, Case No. 16-1048, and *Smith v. Hickenlooper*, Case No. 16-1095—State Defendants’ Response to Safe Streets’ submission of *People v. Crouse*, 2017 CO 5, 2017 Colo. LEXIS 68 (Colo. Jan. 23, 2017), as supplemental authority.

Dear Ms. Shumaker:

The issue in the present case—whether private plaintiffs have a cause of action to affirmatively invalidate the entirety of a State’s recreational marijuana laws and regulations—was not before the court in *Crouse*. Instead, the *Crouse* court faced the defensive invocation of a preemption provision. That is, *Crouse* involved a typical situation, “long recognized” by the Supreme Court, in which “an individual claims federal law immunizes him from state regulation.” *Armstrong v. Exceptional Child Ctr., Inc.* 135 S. Ct. 1378, 1384 (2015). The analysis in *Crouse* is therefore irrelevant to Plaintiffs’ novel claim here, namely, that they have a standalone “private right of action” to override state law and supplant the “enforcement of federal [controlled substances] law [by] federal actors.” *Id.*

Crouse was a narrow decision. It held that Section 903 of the Controlled Substances Act (“CSA”) expressly preempts one particular provision of the medical marijuana section of the Colorado Constitution, which requires law enforcement officers to return medical marijuana seized from an individual who is later acquitted of a state drug charge. *See* 21 U.S.C. § 903 (stating that the CSA does not preempt state law on the same subject matter “unless there is a positive conflict between [a] provision of [the CSA] and that state law such that the two cannot consistently stand together”). The present case does not involve medical marijuana laws or the specific constitutional provision at issue in *Crouse*. Here, Plaintiffs are claiming that the entire subject matter of recreational marijuana, regardless of the specific content of any particular provision of state law, is off-limits for a State unless it either declines to regulate recreational marijuana or prohibits all recreational-marijuana-related activity. *Crouse* does not support Plaintiffs’ expansive argument in this case, which no court has adopted.

Sincerely,

FOR THE ATTORNEY GENERAL

s/Frederick R. Yarger _____

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