Case No. 16-1095

In the

United States Court of Appeals

for the

Tenth Circuit

JUSTIN E. SMITH, CHAD DAY, SHAYNE HEAP, RONALD B. BRUCE, CASEY SHERIDAN, FREDERICK D. McKEE, SCOTT DeCOSTE, JOHN D. JENSON, MARK L. OVERMAN, BURTON PIANALTO, CHARLES F. MOSER and PAUL B. SCHAUB,

Plaintiffs-Appellants,

v.

JOHN W. HICKENLOOPER, Governor of the State of Colorado,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the District of Colorado (Denver), Case No. 1:15-cv-00462-WYD-NYW · Honorable Wiley Y. Daniel, U.S. District Judge

APPELLANTS' OPENING BRIEF
Oral Argument Requested

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF RELATED APPEALS 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE FACTS 4

A. The Parties 4

B. The Controlled Substances Act 5

C. Amendment 64 8

D. The Colorado Sheriffs Have Been And Continue To Be Harmed By Amendment 64's Conflict With Federal Law 9

E. The Neighboring-State Sheriffs Have Been Harmed By Amendment 64's Conflict With Federal Law 12

F. The Neighboring-State County Attorneys Have Been Harmed By Amendment 64's Conflict With Federal Law 13

SUMMARY OF THE ARGUMENT 14

THE STANDARD OF REVIEW 18

ARGUMENT 19

I. The Supreme Court's *Armstrong* Decision Reinforced The Availability Of Equitable Relief To Enjoin Unlawful State Action 19

A. The Availability Of Equitable Actions To Enjoin State Laws Preempted By Federal Laws Is Well Established 19

B. *Armstrong* Reaffirmed A Sharply Defined Exception To The Default Rule That Actions In Equity Are Available To Enforce The Supremacy Clause 21

C. The District Court Erred In Holding That The CSA Contains An Implicit Limit On Equitable Actions Like Those Found In *Seminole Tribe* and *Armstrong* 25

D. This Court's Analysis Of The Same Issue Is Consistent With *Armstrong* And Does Not Foreclose The Equitable Action Here 31

II. Amendment 64 Is Preempted By The CSA, U.S. Foreign Policy, And International Conventions And Agreements.....33

A. Amendment 64 Is Preempted Because It Stands As An Obstacle To The Full Implementation And Accomplishment Of The Federal Marijuana Prohibition 35

B. Amendment 64 Is Preempted And Invalid Because It Is Impossible To Comply With Both The CSA And Amendment 64 41

CONCLUSION 46

REQUEST FOR ORAL ARGUMENT 47

ATTACHMENTS: Order on Motion to Dismiss, Filed February 26, 2016

Final Judgment, Filed February 26, 2016

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF DIGITAL SUBMISSION

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Albers v. Board of County Comm'rs of Jefferson County,
771 F.3d 697 (10th Cir. 2014) 18

Armstrong v. Exceptional Child Ctr. Inc.,
135 S. Ct. 1378 (2015) ..... *passim*

Carroll v. Safford,
44 U.S. (3 How.) 441 (1845) 20

Cressman v. Thompson,
719 F.3d 1139 (10th Cir. 2013) 18

Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000) 34

Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,
230 P.3d 518 (Ore. 2010) 38

Ex Parte Young,
209 U.S. 123 (1908) 20, 22

Florida Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 18, 34

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 25, 32

Gonzales v. Raich,
545 U.S. 1 (2005) 29, 36, 37, 41, 42, 45

Hines v. Davidowitz,
312 U.S. 52 (1941) 17, 18, 34

Medtronic, Inc. v. Lohr,
518 U.S. 470, 485 (1996) 37

Michigan Canners & Freezers v. Agricultural Board,
467 U.S. 461 (1984) 37, 38

Mutual Pharmaceutical Co. v. Bartlett,
133 S. Ct. 2466 (2013) 34, 42, 43, 44

N.C.A.A. v. Governor of New Jersey,
730 F.3d 208 (3d Cir. 2013) 38

Osborn v. Bank of the United States,
22 U.S. 738, 839 (1824) 19

Planned Parenthood of Kansas and Mid-Missouri v. Moser,
747 F.3d 814 (10th Cir. 2014) 29, 30, 31, 32, 33

Safe Streets Alliance v. Hickenlooper,
C.A. No. 15-cv-00349-REB-CBS, 2016 U.S. Dist. LEXIS 5934
(D. Colo. Jan. 19, 2016).....28

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996).....16, 21, 22, 27

Shaw v. Delta Airlines, Inc.,
463 U.S. 85 (1983).....20

Slater v. A.G. Edwards & Sons, Inc.,
719 F.3d 1190 (10th Cir. 2013) 18

United States v. Cannabis Cultivators Club,
5 F. Supp. 2d 1086 (N.D. Cal. 1998).....45, 46

United States v. Oakland Cannabis Buyers' Coop.,
190 F.3d 1109 (9th Cir. 1999), *rev'd by* 532 U.S. 483 (2001).....46

Verizon Md. Inc. v. Public Serv. Comm'n of Md.,
535 U.S. 635 (2002).....20

CONSTITUTIONS

Constitution of the State of Colorado, Section 16, Article XVIII .....*passim*

U.S. Constitution, Article VI, Clause 2 34

STATUTES AND RULES

18 U.S.C. §§ 2-4.....7

18 U.S.C. §§ 371 7

18 U.S.C. §§ 1956 7

21 U.S.C. § 801 *et seq*.....*passim*

21 U.S.C. §§ 811-812 5

21 U.S.C. § 812(b) 6, 35
21 U.S.C. § 812(c) 6, 35
21 U.S.C. §§ 841(a)(1), 844(a) 6
21 U.S.C. § 882(a) 32
21 U.S.C. § 903 8
28 U.S.C. § 1291 2
28 U.S.C. § 1331 1
42 U.S.C. § 1396a(a)(30)(A) .....*passim*
42 U.S.C. § 1396c 23
42 U.S.C. § 1983 32
Fed. R. Civ. P. 12(b) 3
Fed. R. Civ. P. 54(b) 1

OTHER AUTHORITIES

Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242-124 5

STATEMENT OF RELATED APPEALS

There are no prior appeals in this case. On April 1, 2016, the Court entered an order granting a motion to consolidate and procedurally consolidating two cases on appeal from the U.S. District Court for the District of Colorado: No. 16-1048 (*Safe Streets Alliance, et al., v. Hickenlooper, et al.,* D.C. No. 1:15-cv-00349-REB-CBS (D. Colo.)); and No. 16-1095 (*Smith, et al., v. Hickenlooper*, D.C. No. 1:15-cv-00462-WYD-NYW (D. Colo.)). In its April 1, 2016 Order, the Court stated, among other things, that "Appellants may file separate opening briefs, appendices, and optional reply briefs." The Plaintiff-Appellants state that separate briefs are reasonable and necessary because, among other things, the separate cases involve different Plaintiffs/Appellants, unique facts, and distinct legal issues, notwithstanding that the cases present substantially similar legal issues on appeal.

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction over the preemption claims brought by Plaintiffs-Appellants ("Plaintiffs") pursuant to 28 U.S.C. § 1331. On February 26, 2016, the District Court issued an Order allowing Defendant-Appellee's Motion to Dismiss Plaintiffs' Complaint and entered judgment pursuant to Fed. R. Civ. P. 54(b). Accordingly, the District Court's judgment is final and subject to appellate review. Plaintiffs filed a timely notice of appeal on March 25,

2016, and the Court has jurisdiction to review the District Court's final judgment as to Plaintiffs' preemption claims under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court err in finding that the U.S. Attorney General's authority to impose criminal liability and enforce the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) ("CSA") against individuals displaces any action in equity based on the CSA's preemption of conflicting state law?

2. Did the District Court err in finding that the CSA is "judicially unadministrable," as recently defined by the Supreme Court in *Armstrong*?

3. Is Colorado's Amendment 64 in conflict with and preempted by federal law, such that Plaintiffs are entitled to injunctive relief to enjoin the continued implementation and enforcement of Amendment 64?

STATEMENT OF THE CASE

This action arises from Colorado's adoption and implementation of Section 16 of Article XVIII of the Constitution of the State of Colorado (hereinafter "Amendment 64"), which is preempted by federal law, specifically the Controlled Substances Act (21 U.S.C. § 801 *et seq.*, hereinafter "CSA"), in violation of the Supremacy Clause of the United States Constitution. Plaintiffs-Appellants ("Plaintiffs") filed the underlying action in the U.S. District Court for the District of Colorado on March 5, 2015. The Complaint comprises two causes of action alleging

violation of the Supremacy Clause and preemption under federal law. Plaintiffs' prayers for relief request: (1) a declaratory judgment stating that Sections 16(3), (4), and (5) of Article XVIII of the Colorado Constitution are invalid, null, and void; (2) a preliminary and a permanent injunction against John W. Hickenlooper, Governor of the State of Colorado, prohibiting the application and implementation of Sections 16(3), (4) and (5) of Article XVIII of the Colorado Constitution; (3) costs to the Plaintiffs; and (4) any other relief the Court deems just and proper.

On May 1, 2015, Defendant filed a Motion to Dismiss the Complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Smith App. at 57-83.[1] As grounds for the Motion, Defendant argued that: (1) Plaintiffs lack standing; (2) neither the CSA, Supremacy Clause, or International Conventions create a right of private enforcement; and (3) the claims fail as a matter of law on the merits. Plaintiffs filed an opposition to Defendant's Motion on June 26, 2015, arguing that they have demonstrated standing and that Amendment 64 is in fact preempted by the CSA. Smith App. at 85-114. Plaintiffs also argued that a cause of action is available to them under the CSA and Supremacy Clause and, in particular, argued that an action in equity to enjoin unlawful actions by a state official is available under these circumstances. Defendant filed a Reply on July 13, 2015. Smith App. at 115-126.

[1] References are to the *Smith, et al., v. Hickenlooper* Joint Appendix ("Smith App.").

No hearing was held, and the District Court (Wiley Y. Daniel, U.S. District Judge) allowed the Motion to Dismiss and entered a final judgment on February 26, 2016. Smith App. at 135-165.

In its Order on Motion to Dismiss ("Order"), the District Court held that Plaintiffs failed to state a cause of action. Specifically, the District Court held that neither the federal statute at issue nor the international treaties which Plaintiffs allege Defendant has violated provide for private rights of action. The District Court also held that the Supremacy Clause could not be the source of a private right of action and, further, that an action in equity was unavailable to Plaintiffs based on the District Court's determination that Congress implicitly foreclosed such an action in drafting the CSA. The District Court did not address Defendant's remaining arguments that the Plaintiffs lack standing and that Amendment 64 is not preempted by the CSA.

STATEMENT OF THE FACTS

A. The Parties

Plaintiffs are law enforcement officials comprising three distinct groups from the States of Colorado, Nebraska, and Kansas. Plaintiffs Justin Smith, Chad Day, Shayne Heap, Ronald Bruce, Casey Sheridan, and Fred McKee are Sheriffs in different counties in Colorado. Plaintiffs Scott DeCoste, John Jenson, Mark Overman, and Burton Pianalto are Sheriffs in different counties in the neighboring

states of Nebraska and Kansas. Plaintiffs Charles Moser and Paul Schaub are County Attorneys in different counties in Nebraska and Kansas.

Defendant John W. Hickenlooper is the Governor of Colorado and has been sued in his official capacity based upon his enforcement and implementation of Amendment 64.

B. The Controlled Substances Act

The Controlled Substances Act was enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242-124. The CSA provides a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." Smith App. at 19 (Compl. ¶ 23). Pursuant to the CSA, various plants, drugs, and chemicals are assigned to one of five classes, called "Schedules," based on the substances' medical use, potential for abuse, and safety or dependence liability. Smith App. at 19 (Compl. ¶ 23, citing 21 U.S.C. §§ 811-812). The regulatory scheme is designed to foster the beneficial use of substances that "have a useful and legitimate medical purpose" and, by Congressional mandate, *prohibit entirely* the possession or use of substances listed in Schedule I, except as part of a strictly controlled research project. Smith App. at 19 (Compl. ¶ 24).

The CSA establishes a comprehensive regime to combat the national and international traffic in illicit drugs. The main objectives of the CSA are to prevent

drug abuse and its debilitating impacts on society and to control the legitimate and illegitimate traffic in controlled substances. Smith App. at 19-20 (Compl. ¶ 25). To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, possess with intent to distribute, possess without a valid prescription, or dispense any controlled substance except in a manner authorized by the CSA. Smith App. at 21 (Compl. ¶ 27, citing 21 U.S.C. §§ 841(a)(1), 844(a)).

In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). Marijuana is therefore subject to the most severe restrictions contained within the CSA. Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safe use in medically supervised treatment. 21 U.S.C. § 812(b)(1); Smith App. at 22 (Compl. ¶ 29). Congressional intent is unambiguous: by classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, Congress mandated that the manufacture, distribution, or possession of marijuana be a criminal offense, with the sole exception being the use of the drug as part of a U.S. Food and Drug Administration pre-approved research study. Smith App. at 22 (Compl. ¶ 30).

The Schedule I classification of marijuana was one of many essential parts of a larger regulation of economic activity, in which the regulatory scheme would be

undermined unless the intrastate activity identified by Congress were regulated as well as the interstate and international activity. Congress specifically included marijuana intended for intrastate consumption in the CSA because it recognized the likelihood that high demand in the interstate market would significantly attract such marijuana. Smith App. at 22-23 (Compl. ¶ 31).

Under the CSA, possession of marijuana generally constitutes a misdemeanor offense, with a maximum penalty of up to one year imprisonment and a minimum fine of $1,000.00. Conversely, the cultivation, manufacture, or distribution of marijuana, or the possession of marijuana with the intent to distribute, is subject to significantly more severe penalties. Such conduct generally constitutes a felony with a maximum penalty of up to five years imprisonment and a fine of up to $250,000. Smith App. at 23 (Compl. ¶ 32). It is also unlawful to conspire to violate the CSA; to knowingly open, lease, rent, use, or maintain property for the purpose of manufacturing, storing, or distributing controlled substances; and to manage or control a building, room, or enclosure and knowingly make it available for the purpose of manufacturing, storing, distributing, or using controlled substances. Federal law further criminalizes aiding and abetting another in committing a federal crime, conspiring to commit a federal crime, assisting in the commission of a federal crime, concealing knowledge of a felony from the United States, and laundering the

proceeds of CSA offenses. Smith App. at 23 (Compl. ¶ 33, citing 18 U.S.C. §§ 2-4, 371, 1956).

Congress did not intend to preempt the entire field of drug enforcement with its enactment of the CSA. Under 21 U.S.C. § 903, the CSA shall not "be construed" to "occupy the field" in which the CSA operates "to the exclusion of any [s]tate law on the same subject matter which would otherwise be within" the state's authority. Rather, Section 903 provides that state laws are preempted only when "a positive conflict" exists between a provision of the CSA and a state law "so that the two cannot consistently stand together." Smith App. at 23 (Compl. ¶ 34).

C. Amendment 64

Amendment 64 was passed as a ballot initiative in Colorado on November 6, 2012 and adopted as an amendment to Article XVIII of the Colorado Constitution on December 10, 2012. Amendment 64 comprises a sweeping set of provisions which are designed to permit: "[p]ersonal use of marijuana" and the "[l]awful operation of marijuana-related facilities," and further to require the "[r]egulation of marijuana," provided that "[s]uch regulations shall not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impractical." Smith App. at 15 (Compl. ¶ 4, citing Colo. Const. art. XVIII, § 16(3)-(5)).

By its own terms, Amendment 64 pursues only one goal – legalization of marijuana – a goal which is diametrically opposed to the main objectives which Congress has established, and repeatedly reestablished, for the control of marijuana. In doing so, Amendment 64 obstructs a number of the specific goals which Congress sought to achieve with the CSA. By permitting the cultivation, manufacture, packaging-for-distribution, and distribution of marijuana, Amendment 64 undercuts Congressional edicts, including the Congressional finding that such distribution has a "substantial and detrimental effect on the health and general welfare of the American people," 21 U.S.C. § 801(2); that local drug trafficking has "a substantial and direct effect upon interstate commerce," *id*. § 801(3); and that "[f]ederal control of the intrastate incidents" of drug trafficking "is essential to the effective control of the interstate incidents of drug trafficking," *id*. § 801(6).

D. The Colorado Sheriffs Have Been And Continue To Be Harmed By Amendment 64's Conflict With Federal Law

Each Plaintiff who is the elected Sheriff of a Colorado county has taken an oath of office to uphold the United States Constitution in the performance of his duties. Each also has taken, in the same oath of office, an oath to uphold the Colorado Constitution. Since the enactment of Amendment 64, these oaths contradict each other. Each Colorado Plaintiff-Sheriff routinely is required to violate one of these oaths in performing his duties relating to conflicting federal and Colorado marijuana laws. Situations forcing a Plaintiff-Sheriff to choose between

conflicting oaths have occurred regularly since the adoption of Amendment 64 and will continue as long as he serves his county. Smith App. at 45 (Compl. ¶ 74).

Each of the Colorado Sheriffs has encountered marijuana on a regular basis as part of his day-to-day duties and will continue to do so. These encounters arise, among other circumstances, when the Sheriffs make routine stops of individuals who possess marijuana. This includes traffic stops involving individuals who are not from Colorado and are drivers or occupants of vehicles with out-of-state license plates who are headed toward the state line. These encounters also arise under circumstances where the Colorado Sheriffs receive reports about or have reason to observe premises where marijuana is being cultivated or stored. In the course of these encounters, the Colorado Sheriffs frequently learn that the marijuana is held by individuals in facial compliance with Amendment 64. Smith App. at 46 (Compl. ¶ 76). When Colorado Sheriffs encounter marijuana while performing their duties, each is placed in the position of having to choose between violating his oath to uphold the U.S. Constitution or violating his oath to uphold the Colorado Constitution. Smith App. at 46 (Compl. ¶ 77).

Specifically, under the U.S. Constitution, the Sheriffs are required to treat the CSA as the supreme law of the land. The Sheriffs violate their oath to uphold the U.S. Constitution when they fail to take steps to enforce the CSA during these encounters and instead allow the illegal marijuana to remain in the possession of the

holder for use or further distribution. Smith App. at 46-47 (Compl. ¶ 78). Each Colorado Sheriff is aware that the CSA authorizes him to seize marijuana as contraband and to deliver such contraband to agents of the federal government for forfeiture and destruction. Each Colorado Sheriff had delivered seized marijuana to federal agents for this purpose prior to the enactment of Amendment 64. By initially taking possession of marijuana they encounter and then returning it to someone who possesses it illegally under the CSA, the Colorado Sheriffs believe they personally are violating the CSA by illegally distributing a controlled substance. Moreover, by not seizing or returning marijuana they encounter, the Colorado Sheriffs further violate their duties of office because they are placing the citizens they serve and are duty-bound to protect into increased jeopardy by allowing controlled substances to remain in increased use and commerce. Smith App. at 47 (Compl. ¶ 80).

The alternative course of action for the Colorado Sheriffs is to seize and retain the marijuana for forfeiture and destruction, thereby complying with and enforcing the CSA. If a Colorado Sheriff acts on this alternative, he will be violating his duty to uphold the Colorado Constitution. Smith App. at 47 (Compl. ¶ 81). In doing so, the Colorado Sheriff will not be fulfilling his fiscal obligations to his taxpayer-constituents, because he will have created legal exposure for his county, his employees who assist him in the seizure, and himself. The exposure is the costs and damages they would incur from a legal action by the person who owns the marijuana

for damages for seizing property in violation of the Colorado Constitution. These damages and the legal costs associated with defending or resolving such claims would be significant. Smith App. at 47-48 (Compl. ¶ 82).

Accordingly, the Colorado Sheriffs have suffered and will continue to suffer direct and significant harm arising from their regular encounters with marijuana that is held in compliance with Amendment 64, but which is indisputably possessed in violation of the CSA.

E. The Neighboring-State Sheriffs Have Been Harmed By Amendment 64's Conflict With Federal Law

Like the Colorado Sheriffs, Plaintiffs Scott DeCoste, John Jenson, Mark Overman, and Burton Pianalto, who are elected Sheriffs from the neighboring states of Nebraska and Kansas, encounter marijuana on a regular basis as part of their day-to-day duties and will continue to do so. Smith App. at 48-49 (Compl. ¶¶ 84-85). These encounters arise during routine stops, including traffic stops, involving individuals who possess marijuana. In the course of these encounters, the neighboring-state Sheriffs frequently learn that the marijuana is possessed by individuals who purchased the marijuana in Colorado and were at the time of purchase in facial compliance with Amendment 64. *Id*.

These Plaintiffs have, since the implementation of Amendment 64 in Colorado, dealt with a significant influx of Colorado-sourced marijuana in their counties. Smith App. at 49 (Compl. ¶ 86). This influx has resulted in a diversion of

a significant amount of their time, as well as the time and resources of the Sheriffs' Offices, to counteract the increased trafficking and transportation of Colorado-sourced marijuana which is illegal in their jurisdictions. Smith App. at 49 (Compl. ¶ 87). The Sheriffs' Offices have responsibility for staffing and maintaining jails, the costs of which are borne by the Sheriffs' Offices. The Sheriffs' Offices have incurred substantial additional costs associated with the increased level of incarceration of suspected and convicted felons on charges related to Colorado-sourced marijuana include housing, food, health care, transfer to-and-from court, counseling, clothing, and maintenance. Smith App. at 49-50 (Compl. ¶ 88).

Accordingly, the neighboring-state Sheriffs have suffered and will continue to suffer direct and significant harm arising from their regular encounters with Colorado-sourced marijuana that was possessed in their jurisdictions in violation of the CSA.

F. The Neighboring-State County Attorneys Have Been Harmed By Amendment 64's Conflict With Federal Law

Since the implementation of Amendment 64 in Colorado, Plaintiffs Charles Moser and Paul Schaub, who are elected County Attorneys from the neighboring states of Nebraska and Kansas, have dealt with a significant increase in the number of criminal prosecutions related to marijuana. Most of these prosecutions are for marijuana that is from Colorado. Smith App. at 51-52 (Compl. ¶¶ 93, 95).

The increase of Colorado-sourced marijuana being trafficked in the neighboring states after the implementation of Amendment 64 has caused the Plaintiff County Attorneys to divert a significant amount of their time, their staffs' time, and other resources from prosecuting other matters to prosecuting Colorado-sourced marijuana cases. Smith App. at 52 (Compl. ¶ 96). As a result, the neighboring-state County Attorneys, and their offices, are suffering a direct and significant detrimental impact, including the diversion of limited resources to prosecute suspected felons involved in the increased illegal trafficking of Colorado-sourced marijuana in their jurisdictions. Their increased caseloads represent a significant portion of their offices' budgets and staffs' time.

The implementation of Amendment 64 harms these Plaintiff-County Attorneys in the performance of their jobs and the accomplishment of their professional goals and objectives as a result of the increased burden it places on their offices and the diversion of resources it necessitates. Since the adoption of Amendment 64, they have found themselves unable to fully implement their prosecutorial priorities as they existed and had been budgeted prior to the adoption of Colorado Amendment 64.

SUMMARY OF THE ARGUMENT

Plaintiffs have stated a viable claim in equity seeking injunctive relief to enjoin a state official's illegal implementation of a preempted state law. The District

Court Order dismissing Plaintiffs' Complaint erroneously concluded that, in enacting the CSA, Congress implicitly excluded actions in equity to enforce its terms, relying on a recent Supreme Court case to support its holding. The District Court's erroneous conclusion is based on an overbroad interpretation and misapplication of the holding in *Armstrong v. Exceptional Child Ctr. Inc.,* 135 S. Ct. 1378 (2015), and should be reversed.

Federal courts have recognized the right of private individuals to bring equitable actions for injunctive relief from preempted state laws for centuries. *Armstrong* did not eliminate this long-accepted cause of action; rather, *Armstrong* articulated a narrow restriction on equitable actions when their purpose is to enforce federal statutes that already include specific and narrow remedies for a state's failure to abide by their terms. The District Court erred in finding that such specific and narrow remedies are incorporated into the CSA and therefore erred in finding that Congress implicitly excluded equitable actions in its drafting of the CSA.

Specifically*, Armstrong* concluded that Congress implicitly foreclosed the availability of equitable actions to enforce Section 30A of the Medicaid Act based on two key provisions of the statute. First, Congress created only one means of enforcing Section 30A and vested the exclusive authority to do so with the Secretary of Health and Human Services. Second, only the Secretary of Health and Human Services (the "Secretary"), with the expertise attendant to such a position, could

determine whether a state was complying with Section 30A, given the "judgement laden" nature of the analysis involved. The Supreme Court found that these two factors, collectively, indicated that Congress intended to exclude other avenues of relief, including specifically equitable actions. *Armstrong*, 135 S. Ct. at 1385.

The Supreme Court's reasoning in *Armstrong* is consistent with another Supreme Court case, cited by the Court in *Armstrong*, in which a federal statute governing Indian gaming rights in Florida was also found to implicitly preclude private actions for equitable relief to enforce the federal statute against a non-compliant state. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996). That statute, like Section 30A, included a provision setting forth specific and limited remedial relief for tribes seeking to enforce the statute against a state. *Id*. at 73-74. The Supreme Court found that the carefully crafted remedial scheme for resolving conflicts with the states indicated Congress' intent to foreclose alternative remedies in court. *Id*.

Unlike both statutes just described, the CSA does not include a remedial scheme for situations in which a state fails to comply with its terms. The District Court erred by equating the U.S. Attorney General's authority to impose criminal liability to enforce the CSA against individuals with the kind of remedial scheme that provides an exclusive and specific avenue for relief against a state when it fails to comply with the terms of a statute.

The District Court also erred in conflating the judgment exercised by the U.S. Attorney General over when and how to enforce the CSA against individuals, with a determination as to whether Amendment 64 *conflicts* with the CSA. The former is not an issue the Court is being asked to decide, and the latter does not require an analysis that only the U.S. Attorney General is able to perform. Rather, the present action requires a straightforward preemption analysis, undertaken by federal courts across the nation on a regular basis. The District Court did not provide any explanation supporting its determination that this straightforward analysis has any parallels to the "judicially unadministrable" provision of the Medicaid Act at issue in *Armstrong*.

Finally, although the District Court did not address the issue, Plaintiffs have stated a viable claim for preemption because they have alleged sufficient facts demonstrating that Amendment 64 authorizes what is otherwise expressly prohibited and unlawful under federal law, specifically the CSA. The Supremacy Clause mandates that the Constitution and federal laws enacted by Congress shall be the supreme law of the land. The preemption doctrine, in turn, authorizes federal courts to invalidate and strike down state laws which conflict with federal laws. State laws are preempted and invalid where they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, or where compliance with both federal and state regulations is a physical impossibility. *Hines v.*

Davidowitz, 312 U.S. 52, 67 (1941); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

Amendment 64 acts as an obstacle to Congress' objectives in enacting the CSA and makes it physically impossible to comply with both the CSA and Amendment 64. The Complaint alleges more than sufficient facts demonstrating that Amendment 64 is preempted by the CSA because the purpose of the former is to authorize and commercialize marijuana, which the latter explicitly prohibits.

THE STANDARD OF REVIEW

Appellate courts review "de novo the district court's granting of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *Slater v. A.G. Edwards & Sons, Inc*., 719 F.3d 1190, 1196 (10th Cir. 2013). "To survive a motion to dismiss, a plaintiff 'must plead facts sufficient to state a claim to relief that is plausible on its face.'" *Albers v. Board of County Comm'rs of Jefferson County*, 771 F.3d 697, 700 (10th Cir. 2014) (quoting *Slater*, 719 F.3d at 1196)). At the motion-to-dismiss stage, the court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Id*. (citing *Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013) (internal quotation marks omitted)).

ARGUMENT

I. The Supreme Court's *Armstrong* Decision Reinforced The Availability Of Equitable Relief To Enjoin Unlawful State Action.

Plaintiffs have stated a viable cause of action under settled precedent permitting actions in equity to enjoin state actors from enforcing state laws that conflict with and are preempted by federal law. The District Court gave short shrift to this long-standing remedy, adopting an overly broad and legally unsound interpretation of the Supreme Court's decision in *Armstrong,* 135 S. Ct. 1378, to wrongly dismiss Plaintiffs' suit. In contrast with the District Court's conclusion to the contrary, this action can proceed pursuant to the Supreme Court's analysis in *Armstrong* and well-established precedent recognizing the availability of equitable actions to enjoin the unlawful actions of state officials.

A. The Availability Of Equitable Actions To Enjoin State Laws Preempted By Federal Laws Is Well Established.

For over two centuries aggrieved parties have sought and received injunctive relief from preempted state laws in the federal courts. The Supreme Court first addressed this issue in 1824, holding that a federal district court appropriately issued an injunction prohibiting implementation of a state law that was "repugnant to a law of the United States, made in pursuance of the constitution," explaining that the case was properly "cognizable in a Court of equity." *Osborn v. Bank of the United States*, 22 U.S. 738, 839, 859 (1824). This cause of action has been reaffirmed in the

ensuing decades. See, e.g. *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845) ("in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer"). *See also Ex Parte Young*, 209 U.S. 123, 155-56 (1908); *Shaw v. Delta Airlines, Inc*., 463 U.S. 85, 96 n.14 (1983) ("[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."). More recently, in *Verizon Md. Inc. v. Public Serv. Comm'n of Md*., 535 U.S. 635, (2002), the Supreme Court recognized an action for injunctive relief against a state despite the state's objection that the statute implicitly proscribed such an action. *Id.* at 641-44.

Disregarding the weight of precedent which overwhelmingly supports the availability of injunctive relief based on equitable principles, the District Court adopted an overly broad and erroneous interpretation of *Armstrong* to conclude that Plaintiffs have failed to state a cause of action to enjoin state officials from continued and future violations of federal law. But the actual holding in *Armstrong* not only left intact but reaffirmed the viability of "injunctive relief against state officers who are violating, or planning to violate, federal law." 135 S. Ct. 1378 at 1384. Specifically, *Armstrong* recognized that "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of

equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Id*. (citations omitted). *Armstrong* was not a rejection of the centuries of case law recognizing the availability of actions in equity. Rather, it simply – and specifically – held, in the circumstances of that case, that Congress had foreclosed such an action to enforce the Medicaid Act. Here, the District Court erred in reading into *Armstrong* a broader and more generally applicable prohibition than that set forth by the Supreme Court.

B. *Armstrong* Reaffirmed A Sharply Defined Exception To The Default Rule That Actions In Equity Are Available To Enforce The Supremacy Clause.

Notably, *Armstrong* identified only one other instance in which the Supreme Court had "discerned such congressional intent to foreclose equitable enforcement of a statutory mandate," citing its decision *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996). *Armstrong*, 135 S. Ct. at 1392 (Sotomayor, J., dissenting). The statutes discussed in *Seminole Tribe* and *Armstrong* are, respectively, the Indian Gaming Regulatory Act ("IGRA") and Section 30A of the Medicare Act. A comparison of those statutes reveals distinctive features of each which led the Supreme Court to conclude that Congress implicitly foreclosed the availability of equitable remedies as enforcement mechanisms. An equally close reading of the CSA underscores the implausibility of discerning a similar intent in this case.

The IGRA "provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located." *Seminole Tribe,* 517 U.S. at 47. The express terms of the statute require the state to negotiate in good faith with the Indian tribe, "[b]ut the duty to negotiate imposed upon the State by that statutory provision does not stand alone." *Id*. at 73. Rather, Congress included in the IGRA a "carefully crafted and intricate remedial scheme" to address the very inaction – the state's failure to negotiate with the tribe – that formed the basis of the plaintiffs' judicial action. *Id*. at 73-74. In holding that the plaintiffs in *Seminole Tribe* could not bring an equitable action against the state to force it to negotiate with the plaintiffs in good faith, the Supreme Court explained that, "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Id.* at 74. In particular, the Supreme Court determined that "the fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter." *Id*. at 75-76.

Similarly, Section 30A of the Medicaid Act (42 U.S.C. § 1396a(a)(30)(A)) is, like the IGRA, a statute that imposes specific obligations on the state. Under the Medicaid Act, a state agrees to abide by "congressionally imposed conditions" on

spending in exchange for federal funds. *Armstrong*, 135 S. Ct. at 1382. Along those lines, Section 30A of the Medicaid Act addresses the manner in which the state must reimburse health care providers providing in-home care for individuals who would otherwise require treatment in a hospital or other facility. *Id*. Section 30A gives the state discretion to determine the appropriate reimbursement rate for those health care providers based on the following parameters:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . ..

Id. at 1382 (quoting 42 U.S.C. § 1396a(a)(30)(A)). The authority to determine whether states are in compliance with the guidelines of Section 30A vests exclusively with the Secretary. If the state fails to comply with the guidelines set forth in Section 30A, the Secretary is authorized to withhold from the state federal Medicaid funds. 42 U.S.C. § 1396c. That is, like the IGRA, Section 30A includes a specific and limited form of relief in the event a *state* fails to abide by the terms of the federal statute.

In *Armstrong*, the plaintiffs argued that the state's payment plan violated Section 30A, and they brought suit under the Supremacy Clause to compel the state

to increase reimbursement rates in compliance with Section 30A. *Armstrong,* 135 S. Ct. at 1382. The Supreme Court held that the Supremacy Clause does not confer a private right of action and that the plaintiffs could not bring an action in equity because the Medicaid Act included an implicit restriction against such actions. *Id*. at 1385. In so finding, the Supreme Court explained that the Medicaid Act, "like other Spending Clause legislation," enables Congress to provide federal funds to States "in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Id.* at 1382. The Court determined that "[t]wo aspects of § 30(A) establish Congress's 'intent to foreclose' equitable relief." *Id*. at 1385. First, the Court found that the *only* method of enforcing Section 30A is through the "withholding of Medicaid funds by the Secretary of Health and Human Services." *Id*. The statute therefore provides no avenue for judicial relief, confines review and administration of the statute to the federal agency, *and* any relief comes only in the form of the agency withholding federal funds from the states. The Supreme Court found that the designation of the Secretary as the sole avenue for relief, *in conjunction with*, the "judicially unadministrable" nature of Section 30A, demonstrated Congressional intent to foreclose the possibility of alternative remedies through the courts. *Id*.

The Supreme Court's assessment of Section 30A as "judicially unadministrable," focused on the agency-specific expertise inherently necessary to

render any decision as to a state's adherence to Section 30A. "It is difficult to imagine a requirement broader and less specific," the Supreme Court explained, "than § 30(A)'s mandate that state plans provide for payments that are 'consistent with efficiency, economy, and quality of care,' all the while 'safeguard[ing] against unnecessary utilization of . . . care and services.'" *Id.* at 1385. The Supreme Court went on to conclude that "[e]xplicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that Congress 'wanted to make the agency remedy that it provided exclusive,' thereby achieving 'the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking.'" *Id*. (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002)). Thus, the Court found that the combination of Section 30A's broad and unspecific language, *together with* the Secretary's exclusive enforcement power, established Congress' implicit intent to preclude private enforcement in courts. *Id*. at 1385.

C. The District Court Erred In Holding That The CSA Contains An Implicit Limit On Equitable Actions Like Those Found In *Seminole Tribe* and *Armstrong*.

Armstrong established that a party may seek injunctive relief against a state for its failure to abide by federal law unless Congress implicitly or expressly excludes such an action. 135 S. Ct. 1378 at 1385. As just described, the *Armstrong* Court inferred Congressional intent to bar such actions from the statute's

combination of (1) granting the Secretary exclusive authority to withhold state funds as the sole remedy for failing to comply with its terms, and (2) the judgment-laden and therefore "judicially unadministrable" nature of Section 30A, the application of which requires the expertise of the governing agency. *Id*. Here, the District Court erred in reaching similar conclusions with respect to the CSA, as the provisions of the CSA on which the District Court relied – and the nature of the preemption analysis required – are readily distinguishable from those identified by the Supreme Court in *Armstrong*.

The District Court first erred when it determined that because the CSA "is designed to be implemented through a system of centralized enforcement," Congress intended to preclude other methods of enforcement. Smith App. at 161 (Order at 10). Specifically citing provisions of the CSA which delegate enforcement authority to the U.S. Attorney General and designate criminal liability as the principal enforcement mechanism, the District Court determined that "like the Medicaid Act, the CSA is designed to be implemented through a system of centralized enforcement." Smith App. at 161 (Order at 10). Based on that analysis, the District Court concluded, quoting *Armstrong,* that "[t]he 'express provision' of these methods of enforcing the CSA 'suggests that Congress intended to preclude others.'" Smith App. at 161 (Order at 10), quoting *Armstrong*, 135 S. Ct. at 1385.

The District Court's reliance on *Armstrong* to reach this conclusion is misplaced, however, because the CSA does *not* include an "express provision" providing a remedy "for a State's failure to comply with [the statute's] requirements." *Armstrong*, 135 S. Ct. at 1385. While the CSA includes a system of centralized enforcement in which the U.S. Attorney General can impose criminal liability on *individuals* who run afoul of the law, the District Court failed to identify any statutory remedy or enforcement mechanism for a *state's* failure to abide by – and in fact flagrantly reject – the CSA's terms. As explained *supra* at pp. 21-25, in both *Seminole Tribe* and *Armstrong*, the Supreme Court found that Congress had already provided a statutory remedy for a *state's* failure to comply with the terms of the statute: the IGRA requires a non-compliant state to engage in extensive mediation with the tribe, while the Medicaid Act provides for "the withholding of Medicaid funds [from the state] by the Secretary of Health and Human Services." *Armstrong*, 135 S. Ct. at 1385. The same purpose behind those "express provisions" which provided specific and limited enforcement mechanisms to remedy a *state's* failure to comply with the statutes, cannot be inferred from the provisions of the CSA cited by the District Court, which give the U.S. Attorney General authority to impose criminal liability against individuals who violate its terms. The District Court's conclusion that the U.S. Attorney General's centralized enforcement authority over criminal liability affords an appropriate and exclusive remedy for a

state's failure to enforce the Act – as opposed to simply providing a scheme for routine enforcement – cannot be reconciled with the *Armstrong* analysis.

The District Court also erred in finding that, like Section 30A, the CSA is "judicially unadministrable." Smith App. at 161 (Order at 10). Specifically, the District Court adopted the reasoning of another District Judge undertaking the same analysis, who determined that

> [t]here certainly can be no more 'judgment-laden standard' than that which confers almost complete discretion on the Attorney General to determine whether to assert the supremacy of federal law to challenge arguably conflicting state marijuana laws . . . Allowing private litigants to interfere with that discretionary decision would create precisely the type of 'risk of inconsistent interpretations and misincentives' which strongly counsel against recognizing an implicit right to a judicially created equitable remedy.

Smith App. at 161-62 (Order at 10-11 (citing *Safe Streets Alliance v. Hickenlooper,* C.A. No. 15-cv-00349-REB-CBS, 2016 U.S. Dist. LEXIS 5934, at *6-7 (D. Colo. Jan. 19, 2016))). The District Court concluded that "[l]ike the Medicaid Act at issue in *Armstrong*, the CSA imposes a judgment-laden standard upon the Attorney General regarding the CSA's enforcement that achieves 'expertise' and 'uniformity' and avoids 'the comparative risk of inconsistent interpretations and resulting administrative guidance that can arise out of an occasional interpretation of the

statute in a private action.'" Smith App. at 162 (Order at 11 n.4, quoting *Armstrong*, 135 S. Ct. at 1385).[2]

As an initial matter, the issue at bar is not whether the Attorney General should use her discretion to "assert the supremacy of federal law to challenge arguably conflicting state marijuana laws." Smith App. at 161-62 (Order at 10-11 (citation omitted)). The Attorney General is not a party to this action. Nor is the supremacy of federal law over state law subject to the whims or discretion of the Attorney General; as explained by the Supreme Court, the Supremacy Clause "creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance

[2] Such a broad reading of *Armstrong* would effectively preclude a legal challenge to state misconduct arising under any federal law administered by a federal agency. The Court has previously noted, in reviewing a statutory and regulatory scheme of similar complexity to the Medicaid Act and Section 30A, that "centralized uniformity of interpretation of the federal law is impossible (at least until a Supreme Court ruling)," in the context of private actions for injunctive relief against state officials. *Planned Parenthood of Kansas and Mid-Missouri v. Moser,* 747 F.3d 814, 830 (10th Cir. 2014) (finding no private right of action from Title X of the Public Health Service Act where federal agency charged with administering statute had ample power to enforce the requirements of the law and Title X "does not clearly notify States that they are subject to such suits"). However, not all federal laws are so complex or enacted under the Spending Clause. Here, it is difficult to imagine federal courts reaching inconsistent outcomes on so straightforward a matter as whether a state law legalizing marijuana is preempted by a federal law that classifies the same drug as an illegal substance. Fortunately, even that outcome need not be tested because no less than the Supreme Court has already weighed in on a nearly identical state statute legalizing marijuana and found that it was preempted by the CSA. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that the CSA's prohibition on medical marijuana preempted a California law permitting possession of marijuana.

thereof,' as 'the supreme Law of the Land.' . . . It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Armstrong*, 135 S. Ct. at 1383. In reaching its conclusion, the District Court mischaracterized the injunctive relief actually requested here, which would not, in any way, impact the Attorney General's ability to enforce the terms of the CSA or impose on her discretionary charging authority. Rather, the requested relief seeks only to prevent the *state* from implementing and applying Amendment 64 in contravention of the CSA.

Moreover, apart from citing the Attorney General's discretion with respect to charging authority, the District Court did not make any finding that the terms of the CSA which Plaintiffs allege directly conflict with state law are so broad and unspecific that only the Attorney General could determine whether the former preempts the latter. In *Armstrong*, the Supreme Court recognized that any preemption analysis regarding Section 30A would first require a court to determine whether, for example, a state's rate of pay to a healthcare provider was "consistent with efficiency, economy, and quality of care," while "safeguard[ing] against unnecessary utilization of . . . care and services." *Armstrong*, 135 S. Ct. at 1385 (alteration in original). In contrast to that particularized assessment of healthcare value, the preemption analysis here is exactly the kind of analysis federal courts undertake on a regular basis across the country. *See Planned Parenthood*, 747 F.3d

at 830 ("once the courts recognize a federal preemption defense to an enforcement action, allowing suits to enjoin state enforcement does not increase the risk of nonuniform interpretation of federal law . . . multiple courts already have the authority to interpret the federal law in deciding whether that law provides a preemption defense to state enforcement action."). The District Court did not identify any aspect of the CSA, apart from the Attorney General's expertise in charging matters, which would render routine judicial preemption analysis on such a straight-forward issue "judicially unadministrable."

D. This Court's Analysis Of The Same Issue Is Consistent With *Armstrong* And Does Not Foreclose The Equitable Action Here.

Finally, in a decision that predates *Armstrong* but is consistent with its holding, the Court contemplated whether a law enacted under the Spending Clause – like the Medicaid Act in *Armstrong* – implicitly or explicitly precluded an equitable right of action. In *Planned Parenthood of Kansas and Mid-Missouri v. Moser*, 747 F.3d 814 (10th Cir. 2014), the Court explained that the Supremacy Clause alone cannot be the source of a private right of action. *Id*. at 822. Instead, like the Supreme Court, the Court held that determining whether an equitable cause of action is foreclosed "is a matter of statutory interpretation that depends on the specifics of the federal statute." *Id*. at 817. Specifically, the Court held that an equitable action to enforce a statute pursuant to the Supremacy Clause is implicitly foreclosed by Congress if four conditions are all met: "(1) the statute does not

specifically authorize injunctive relief, (2) the statute does not create an individual right (which may be enforceable under 42 U.S.C. § 1983), (3) the statute is enacted under the Constitution's Spending Clause, and (4) the state action is not an enforcement action in adversary legal proceedings to impose sanctions on conduct prohibited by law." *Planned Parenthood,* 747 F.3d at 817. Notably, the CSA fails to meet at least two of the necessary criteria for implicit foreclosure: it was not enacted pursuant to the Spending Clause, and it does specifically authorize injunctive relief.

As to the latter, unlike Section 30A, which limits enforcement through administrative channels only, the CSA expressly grants courts the power to issue injunctions for violations of the statute. *See* 21 U.S.C. § 882(a) ("The district courts of the United States and all courts exercising general jurisdiction in the territories and possessions of the United States shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations of this title."). *Cf. Gonzaga Univ*., 536 U.S. at 290 (finding no private right of action under FERPA based in part on centralized review system: "[i]t is implausible to presume that the same Congress [that added the centralized review provision] intended private suits to be brought before thousands of federal – and state – court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly

sought to avoid."). Thus, unlike Section 30A, the enforcement of the CSA is not confined to a governing federal agency.

The District Court's determination that the CSA implicitly excludes a private right of action for equitable relief is not supported by *Armstrong* or the Court's substantially similar and consistent analysis in *Planned Parenthood*. Accepting the District Court's holding that the CSA implicitly forecloses actions in equity would essentially ban equitable actions for injunctive relief of any statute which is primarily overseen by a government agency or official and render void centuries of precedent supporting private individuals' "ability to sue to enjoin unconstitutional actions by state and federal officers." *Armstrong*, 135 S. Ct. at 1384. The District Court erred in concluding that the CSA implicitly precludes private actions in equity to enjoin state actors from illegally implementing preempted state law.

II. Amendment 64 Is Preempted By The CSA, U.S. Foreign Policy, And International Conventions And Agreements.

The Court should also decide that Amendment 64 is preempted by the CSA, and therefore, Plaintiffs are entitled to an injunction against the continued implementation and enforcement of the unlawful Amendment 64.

Everywhere in the United States, including in Colorado, it is unlawful under federal law to cultivate, distribute, sell, or possess marijuana. The federal marijuana control laws are clear, comprehensive, and absolute. Colorado's regulatory scheme is directly at odds with federal law. Amendment 64 authorizes what is otherwise

expressly prohibited and unlawful under federal law. Because of the inherent and irreconcilable conflict between the federal marijuana prohibitions and Colorado's marijuana authorization, Amendment 64 is preempted by federal law. The Court should exercise its power to enjoin enforcement of Amendment 64.

The Supremacy Clause mandates that the Constitution and federal laws enacted by Congress shall be the supreme law of the land. *See* U.S. Const. art. VI, cl. 2. The preemption doctrine authorizes federal courts to invalidate and strike down state laws which conflict with federal laws. The Supreme Court has stated that state laws are preempted, and thus invalid, when they conflict with federal law in at least two circumstances. First, "federal-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." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects").

Second, "federal-impossibility preemption" applies where "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *see also Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) ("[I]t has long been settled that state

laws that conflict with federal laws are 'without effect.'") (citations omitted). Under either analysis, Amendment 64 is preempted by federal law and is therefore invalid.

A. Amendment 64 Is Preempted Because It Stands As An Obstacle To The Full Implementation And Accomplishment Of The Federal Marijuana Prohibition.

The purpose of the CSA is to effectuate federal drug control policies, as well as U.S. foreign policy and obligations pursuant to international treaties and conventions. In enacting the CSA, Congress' intent was to combat domestic and international trafficking of illicit drugs, combat drug abuse and its debilitating impacts on society, and establish a federal scheme to regulate and control the intrastate and interstate handling of controlled substances. 21 U.S.C. § 801(1)-(6); Smith App. at 19-20 (Compl. ¶ 25). Congress designated marijuana a Schedule I controlled substance, and therefore it is subject to the most severe restrictions under the CSA. 21 U.S.C. § 812(c); Smith App. at 22 (Compl. ¶ 29). Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safe use in medically supervised treatment. 21 U.S.C. § 812(b)(1); Smith App. at 22 (Compl. ¶ 29). As a result, under federal law applicable in every state, including Colorado, the CSA imposes an absolute prohibition on the manufacture, cultivation, possession, and distribution of marijuana. Smith App. at 22-23 (Compl. ¶¶ 30-33).

While reviewing the history and purpose of the CSA, and affirming Congress' power to regulate marijuana, the Supreme Court has said: "The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Raich*, 545 U.S. at 12-13; *id* at 19 ("a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets"). The Supreme Court also recognized that the CSA is designed and intended to regulate and control both interstate and intrastate marijuana activities:

> Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.

Id. at 22.

The unresolvable conflict between the CSA and Amendment 64 is beyond dispute. The purpose of Amendment 64 is to authorize, legitimize, and commercialize marijuana activity. Among other things, Colorado licenses marijuana cultivation and manufacturing facilities; licenses the retail sale and distribution of marijuana; regulates the marketing of marijuana; and regulates personal cultivation, possession, transportation, distribution, and use of marijuana.

See Smith App. at 39-45 (Compl. ¶¶ 65-72). In summary, Colorado encourages, promotes, and participates in activities that are prohibited by federal law. Consequently, Amendment 64 is preempted because it stands as an obstacle to the full implementation and realization of the purpose of federal laws controlling marijuana.

The Supreme Court has repeatedly emphasized "'[t]he purpose of Congress is the ultimate touch-stone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citations omitted). The Supreme Court has also recognized the "main objectives" of the CSA: "conquer[ing] drug abuse"; "control[ing] the legitimate and illegitimate traffic in controlled substances"; and controlling intrastate and interstate drug activities with a comprehensive federal regulatory scheme. *Raich*, 545 U.S. at 12, 22. Thus, in *Raich*, the Supreme Court concluded that the CSA's prohibition on the local cultivation and use of marijuana was clearly within Congress' power under the Commerce Clause. *Id.* at 19-22.

In direct conflict with the CSA, Colorado has created a legalization scheme the purpose of which is to authorize and legitimize activities which are expressly prohibited under federal law. In *Michigan Canners & Freezers v. Agricultural Board*, 467 U.S. 461 (1984), the Supreme Court struck down a state law that authorized conduct that was prohibited under federal law. The Supreme Court held the state law was preempted and invalid because it authorized conduct that federal

law prohibited, and therefore the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 478. The Oregon Supreme Court applied these principles, in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Ore. 2010), when reviewing provisions of the Oregon Medical Marijuana Act, which authorized and regulated the medical use of marijuana and protected individuals from the threat of state criminal prosecution. The Oregon Supreme Court held that the state licensing and authorizing regime was preempted and invalid: by "affirmatively authorizing a use that federal law prohibits," the Oregon law stood "as an obstacle to the implementation and execution of the full purposes and objectives" of the CSA. *Id.* at 529-30; *see also N.C.A.A. v. Governor of New Jersey*, 730 F.3d 208, 236 (3d Cir. 2013) (holding that state law which licensed sports gambling was preempted and invalid because state law posed an obstacle to accomplishment of the purposes of gambling prohibitions under federal law).

The effects of Amendment 64 and the ways in which it conflicts with the CSA are described in the Complaint. For example, the CSA expressly authorizes collaboration and cooperation between federal and local law enforcement officials to enforce the CSA. Smith App. at 24 (Compl. ¶ 36). The CSA provides state law enforcement with the power to seize and forfeit contraband, including marijuana, to federal authorities. Smith App. at 24-25 (Compl. ¶ 37). Plaintiffs have regularly

exercised their authority to seize marijuana for forfeiture to federal agents. *Id.* However, Amendment 64 now requires state and local officials, including the Colorado Sheriffs, to support the establishment and maintenance of a commercial marijuana industry in Colorado. Smith App. at 26 (Compl. ¶ 40). The Colorado Sheriffs thus are forced to either follow Colorado law, in violation of the CSA, or follow federal law, in violation of Amendment 64. Smith App. at 46-48 (Compl. ¶¶ 76-83).

The neighboring-state Plaintiffs also are adversely impacted by Amendment 64's conflict with the CSA. Smith App. at 48-54 (Compl. ¶¶ 84-103). Amendment 64 has had the direct and very real effect of increasing the amount of Colorado-sourced marijuana flowing into neighboring states. Smith App. at 49 (Compl. ¶ 86). The neighboring-state Plaintiffs are therefore expending increased resources to combat the illegal drug activities. Smith App. at 49 (Compl. ¶ 87). The burdens include the costs of increased arrests, incarcerations, and prosecutions, as well as the diversion of money and resources away from other important programs and services. Smith App. at 49-50 (Compl. ¶¶ 88-90). Accordingly, Amendment 64 interferes with the full accomplishment of the intent and purpose of the CSA, and Amendment 64 directly impacts the Plaintiffs.

Defendant has argued that a Court finding of preemption would interfere with the state's primary role in protecting the public health and safety of its citizens,

interfere with the police powers which are reserved to the states, and have the effect of forcing the state to enforce the federal drug laws under the CSA. Smith App. at 78-82 (Def.'s Mot. Dismiss at 22-26). None of these issues raised by Defendant should change the Court's analysis or the conclusion that Amendment 64 is in conflict with, and preempted by, the CSA.

This case does *not* require the Court to determine whether or to what extent Colorado is required to adopt laws criminalizing marijuana; whether Colorado is required to take any actions to enforce the CSA; or whether Colorado must refrain from regulations, such as taxation, on marijuana-related activities (so long as those activities, if in violation of the CSA, are not thereby legalized and supported). Plaintiffs do not seek any ruling or remedy that would impose any such duties on Colorado. Plaintiffs have not pled and do not argue that Colorado is required to adopt *any* state law; that Colorado is required to affirmatively take any action with regard to how the state deals with the health and safety of its citizens; or that Colorado is required to affirmatively enforce the CSA, or to adopt its own State laws imposing criminal penalties with respect to marijuana activities. Plaintiffs have not asked the Court for any such relief, and nothing in Plaintiffs' claims would require the Court to impose any such duties.

To the contrary, Plaintiffs' claims seek to stop Colorado from sanctioning, establishing, regulating, and participating in a legalized marketplace for marijuana,

where the state's affirmative actions are in direct conflict with and impose an obstacle to the full accomplishment of federal law. Amendment 64 officially creates and endorses the market for marijuana in Colorado, by among other things, licensing and regulating the cultivation, manufacturing, distribution, marketing, and retail sale of marijuana. This case does not arise in circumstances where the State has taken no action, or where the state has taken action that is different than but consistent with federal law. Consequently, the Court should find that that Amendment 64 is preempted by federal law.[3]

B. Amendment 64 Is Preempted And Invalid Because It Is Impossible To Comply With Both The CSA And Amendment 64.

Amendment 64 is also preempted and invalid under the doctrine of impossibility preemption. Defendant has stated: "With only limited exceptions, *all* marijuana-related conduct is illegal under the CSA." Smith App. at 76-78 (Def.'s

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[3] *See Raich*, 545 U.S. at 29 (citations and footnote omitted):

> [L]imiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond Congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "'superior to that of the States to provide for the welfare or necessities of their inhabitants,'" however legitimate or dire those necessities may be . . . . Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause . . . so too state action cannot circumscribe Congress' plenary commerce power.

Mot. Dismiss at 20-22 (footnote omitted)). Defendant also has cited *Raich*, 545 U.S. at 24, with this parenthetical explanation: "for non-Schedule I drugs, the CSA's 'regulatory scheme is designed to foster the beneficial use of those medications, [and] to prevent their misuse,' but for substances like marijuana, the CSA is designed only 'to prohibit entirely the[ir] possession or use.'" Smith App. at 77 (Def.'s Mot. Dismiss at 21). Nevertheless, Defendant has argued that impossibility preemption does not apply because "one may simultaneously comply with the CSA, the International Conventions (assuming they impose any duties on individuals, which they do not), and Colorado law by simply refraining from marijuana-related activities." Smith App. at 78 (Def.'s Mot. Dismiss at 22 (footnote omitted)). Defendant's argument renders impossibility preemption meaningless and ignores the real substance and effect of Amendment 64.

In *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013), the Supreme Court explained impossibility preemption: "Even in the absence of an express pre-emption provision, the Court has found state law to be impliedly pre-empted where it is 'impossible for a private party to comply with both state and federal requirements.'" *Id*. at 2473 (citations omitted). In *Bartlett*, the Supreme Court held that it was impossible for a pharmaceutical company to comply with both a state-law duty to strengthen a warning label on its pharmaceutical product and also a federal-law labeling requirement. *Id.* The Supreme Court rejected the argument

that it was not impossible to comply with both state and federal law because the drug seller could simply refrain from selling its products:

> We reject this "stop-selling" rationale as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be "all but meaningless." The incoherence of the stop-selling theory becomes plain when viewed through the lens of our previous cases. In every instance in which the Court has found impossibility pre-emption, the "direct conflict" between federal- and state-law duties could easily have been avoided if the regulated actor had simply ceased acting.

Id. at 2477 (citation omitted).

Likewise, this Court should reject Defendant's "stop-selling" rationale and, instead, look at Amendment 64 as it was intended and as it is actually operating. It is impossible for an actor in the Colorado-created marketplace, including the Colorado Sheriffs, to comply with both state and federal law. The Court need not consider these issues in the abstract. Rather, Plaintiffs have pled in the Complaint an abundance of facts explaining exactly how Amendment 64 directly conflicts with federal law. Plaintiffs encounter situations every day, in Colorado and neighboring states, where individuals are acting in accordance with the state laws Defendant is

enforcing, while at the same time acting in direct contravention of federal law. As stated in the Complaint, Plaintiffs are directly harmed by these conflicts.[4]

Defendant suggests that *Bartlett* does not apply, because the CSA prohibits – but does not regulate – marijuana, and therefore the Defendant reasons that the preemption analysis should come out differently. Smith App. at 78 (Def.'s Mot. Dismiss at 22 n.10). This argument stands the CSA on its head. As the Defendant states, the CSA establishes a comprehensive regulatory scheme under federal law to control the manufacture, distribution, and use of all drugs that are not outright banned. Smith App. at 76-77 (Def.'s Mot. Dismiss at 20-21). Accordingly, a scheme set up by a state to regulate the manufacture, distribution, and use of any drug – including marijuana – must be, as the Defendant concedes, preempted as an obstacle to the CSA's regulatory regime. Smith App. at 76 (Def.'s Mot. Dismiss at 20).

Regardless, it is clear from federal law, and the allegations stated in the Complaint, that the CSA both prohibits and regulates the marijuana market. The Supreme Court has recognized Congress' intent to regulate – and the legitimacy of Congress' power to regulate – the interstate and intrastate marijuana market. In

[4] Furthermore, when the Colorado Sheriffs encounter marijuana, if they comply with federal law and do not return the marijuana, they are not only required to violate Amendment 64 but they also expose themselves, their departments, and their constituents to civil liability and consequent damages. Smith App. at 47-48 (Compl. ¶¶ 81-82).

Raich, 545 U.S. 1, the plaintiffs asked the Court to find that individual, intrastate marijuana activity was beyond the reach of federal regulatory power under the Commerce Clause, but the Court rejected that challenge. The Supreme Court found that the CSA *regulates* economic activity, including "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 26. The Court also found that the CSA properly regulated and prohibited intrastate and interstate marijuana activity, to achieve its purpose: "One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance." *Id.* at 28.

The Supreme Court therefore rejected the claim that California's law could legitimately exempt the local marijuana market from the reach of the CSA. *Id.* ("The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but 'visible to the naked eye,' under any commonsense appraisal of the probable consequences of such an open-ended exemption.") (citation omitted). *See also United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1100 (N.D.

Cal. 1998) ("A state law which purports to legalize the distribution of marijuana for any purpose, . . . even a laudable one, nonetheless directly conflicts with federal law[.]"), *rev'd on other grounds by United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999), *rev'd by* 532 U.S. 483 (2001).

Consequently, Defendant is wrong to argue that the CSA does not regulate the marijuana market, and it is clear that Amendment 64 fails under both the impossibility and obstacle preemptions.

CONCLUSION

For all of the above-stated reasons, the District Court's February 26, 2016 Order on Motion to Dismiss should be reversed, and the Court should order the District Court to enter judgment for Plaintiffs, including an injunction against the further enforcement of Amendment 64.

Respectfully submitted on June 3, 2016.

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REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument and represent that oral argument is warranted and will aid the Court's decisional process. The consolidated cases involve multiple claims by multiple parties, and the consolidated appeals present numerous bases for reversal of the decision below. Appellants submit that oral argument will assist the Court in addressing the issues presented.

Respectfully submitted on June 3, 2016.

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ATTACHMENTS

Decision Under Review
[Per 10th Cir. R. 28.2(A)(1)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Wiley Y. Daniel

Civil Action No. 15-cv-00462-WYD-NYW

JUSTIN E. SMITH,
CHAD DAY,
SHAYNE HEAP,
RONALD B. BRUCE,
CASEY SHERIDAN,
FREDERICK D. MCKEE,
SCOTT DECOSTE,
JOHN D. JENSON,
MARK L. OVERMAN,
BURTON PIANALTO,
CHARLES F. MOSER, and
PAUL B. SCHAUB,

Plaintiffs,

v.

JOHN W. HICKENLOOPER, Governor of the State of Colorado,

Defendant.

ORDER ON MOTION TO DISMISS

I. INTRODUCTION

This matter is before the Court on Defendant John Hickenlooper, Jr.'s ["Hickenlooper"] Motion to Dismiss Plaintiff's Complaint Under Rules 12(b)(1) and 12(b)(6) filed on May 1, 2015. A response in opposition to the motion was filed on June 26, 2015, and a reply was filed on July 13, 2015. Thus, the motion is fully briefed. Also, on January 27, 2016, the "Governor's Notice of Supplemental Authority Supporting His Motion to Dismiss" was filed.

II. BACKGROUND

Colorado's voters adopted Amendment 64 in 2012, adding Article XVIII, Section 16 to the Colorado Constitution. This amendment legalized the use, possession, sale, distribution, and cultivation of marijuana by persons over the age of twenty-one. Plaintiffs, who are law enforcement officials from Colorado, Kansas, and Nebraska, argue that three provisions of Amendment 64—section 3 (governing the personal use of recreational marijuana), section 4 (governing recreational marijuana facilities), and section 5 (providing for the regulation of recreational marijuana)—are invalid because they conflict with federal law and international treaties and therefore violate the Supremacy Clause. (*See* Compl., ECF No. 1, ¶¶ 65-73, 106.) Plaintiffs also allege that the pertinent provisions of Amendment 64 are preempted by the Controlled Substances Act [the "CSA"], 21 U.S.C. §§ 801 *et seq*., and American foreign policy. Plaintiffs seek a declaration that Sections 16(3)-(5) of Amendment 64 are unconstitutional and an injunction barring their continued implementation and enforcement.

Plaintiffs' theory is that through the CSA and various International Conventions and treaties[1], Bilateral Initiatives, and Trade Agreements [herein collectively referred to as "International Conventions"], Congress intended to prevent the states from adopting marijuana-related laws that do not adhere to a policy of marijuana prohibition. Arguing that Congress has "preeminent federal authority and responsibility over controlled substances," Plaintiffs allege that permitting states to regulate marijuana, rather than

[1] Plaintiffs argue that Amendment 64 contravenes the Single Convention on Narcotic Drugs of 1961, the Convention on Psychotropic Substances of 1971, and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. (Compl., ¶ 41.)

independently criminalizing it, will create a "patchwork" that "interferes with the federal drug laws." (Compl., ¶¶ 3, 4.) Plaintiffs fall into three groups:

- Sheriffs from Colorado (Defendants Smith, Day, Heap, Bruce, Sheridan, and McKee) who appear only in their individual capacities;
- Sheriffs from counties in other states (Nebraska and Kansas) (Defendants Hayward, Jensen, Overman, and Pianalto), who appear in their individual and official capacities; and
- County Attorneys Moser and Schaub, both of whom sue the Governor in their individual and official capacities.

(*Id*., ¶¶ 8–19.)

Defendant Hickenlooper asserts that this case should be dismissed for three reasons. First, he argues that the Plaintiffs lack standing. Second, he asserts that Plaintiffs fail to state a cause of action because the CSA, the Supremacy Clause, and the International Conventions neither include nor create a right of private enforcement. Finally, Hickenlooper argues that Plaintiffs' claims fail as a matter of law on the merits, as Amendment 64 is not preempted by the CSA or U.S. Foreign Policy conventions or agreements. I find for the reasons set forth below that Hickenlooper's motion to dismiss should be granted and this case dismissed.

III. ANALYSIS

A. Standard of Review

Hickenlooper seeks to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Under Rule 12(b)(1), a complaint may be dismissed for lack of subject matter jurisdiction. A facial attack on the complaint's allegations as to subject matter jurisdiction, as in this case, "questions the sufficiency of the complaint." *Holt v. United*

States, 46 F.3d 1000, 1002 (10th Cir. 1995). In reviewing a facial attack, the Court "must accept the allegations in the complaint as true." *Id*.

As to a motion to dismiss filed under that Rule 12(b)(6), the court must "accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Jordan-Arapahoe, LLP v. Bd. of County Comm'rs of Cnty. of Arapahoe*, 633 F.3d 1022, 1025 (10th Cir. 2011). Plaintiff "must allege that 'enough factual matter, taken as true, [makes] his claim for relief ... plausible on its face.'" *Id*. (quotation and internal quotation marks omitted). "A claim has facial plausibility when the [pleaded] factual content [ ] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id*. (quotation omitted).

B. The Merits of the Motion

I first address Hickenlooper's argument that Plaintiffs have no cause of action under the CSA, the International Conventions, or the Supremacy Clause, and find it is dispositive. I note that "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 278, 286 (2001). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id*. This is determined by statutory intent. *Id*. Without such intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

The Supreme Court has held that "'[t]he question whether Congress ... intended to create a private right of action [is] definitively answered in the negative' where a

'statute by its terms grants no private rights to any identifiable class.'" *Gonzaga Univ. v. John Doe*, 536 U.S. 273, 283-84 (2002) (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979)). "For a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'" *Id*. at 284 (quotation omitted). "[E]ven where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action must still show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id*. (emphasis in original) (quotation omitted). "Absent Congressional intent to create both a right and a remedy in favor of a plaintiff, a cause of action does not exist." *Cuba Soil and Water Conservation Dist. v. Lewis*, 527 F.3d 1061, 1064 (10th Cir. 2008).

Turning to the CSA, I agree with Hickenlooper that federal courts have uniformly held that the CSA does not create a private right of action. This was noted by Judge Blackburn in a recent decision in *Safe Streets Alliance, et al. v. Hickenlooper, et al.*, Civil Action No. 15-cv-349-REB-CBS (D. Colo. January 19, 2016) (ECF No. 118 at 8-9) [hereinafter "the January 19, 2016 Order"] (citing cases); *see also Shmatko v. Ariz. CVS Stores LLC*, No. 14-CV-01076, 2014 WL 3809092, at *2 (D. Ariz. Aug. 1, 2014) (dismissing case for lack of subject matter jurisdiction because "[f]ederal law unequivocally holds. . . that the . . . CSA do[es] not create private rights of action that can give rise to a federal question.")

As Judge Blackburn stated in support of his ruling in the *Safe Streets* case, "[t]here is a strong presumption that criminal statutes, enacted for the protection of the general public, do not create private rights of action." (January 19, 2016 Order at 8.)

Moreover, as in the *Safe Streets* case, Plaintiffs here "point to nothing in the text of the CSA that includes the type of "rights-creating language" which "explicitly confer[s] a right directly on a class of persons that includes the plaintiff" or "identif[ies] the class for whose especial benefit the statute was enacted." (*Id*. at 8) (quoting *Love v. Delta Air Lines*, 310 F.3d 1347, 1352 (11th Cir. 2002)). Instead, according to its plain terms, "[t]he [CSA] is a statute enforceable only by the Attorney General and, by delegation, the Department of Justice." *Schneller v. Crozer Chester Med. Ctr*., 387 F. App'x 289, 293 (3d Cir. 2010) (citing 21 U.S.C. § 871(a)). I adopt the well reasoned analysis of Judge Blackburn in the *Safe Streets Alliance* case and find that the CSA does not create a private right of action. Moreover, Plaintiffs have not shown that the statute provides a private remedy.

I also find that Plaintiffs have not shown that a private right of action or remedy exists under the International Conventions they rely upon. *See Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) ("[T]he background presumption is that '[i]nternational agreements, even those directly benefitting private persons, generally do not . . . provide for a private cause of action in domestic courts.'" (citation omitted)). Additionally, these conventions, treaties, and agreements impose no duties on Colorado and confer no rights on Plaintiffs. Instead, the United States is the signatory, and the United States Attorney General's Office has stated that the federal government's permissive approach to state regulation of marijuana (as outlined in the Cole Memo) "does not violate the United States' treaty obligations." *Conflicts Between State and Federal Marijuana Laws: Hearing Before S. Comm. On the Judiciary*, 113th Cong.

(Answers by James M. Cole to Questions for the Record at 4) (Sept. 10, 2013), available at http://tinyurl.com/povoazz.

Moreover, Plaintiffs may not use the Supremacy Clause to graft a private right of action for preemption onto the CSA or the International Conventions. This was made clear by the recent decision of the Supreme Court in *Armstrong v. Exceptional Child Ctr.,* ___ U.S. ___, 135 S. Ct. 1378 (2015). There, the Supreme Court made clear that the Supremacy Clause was "a rule of decision", "instruct[ing] courts what to do when state and federal laws clash." *Id*. at 1383. It is "not the 'source of any federal rights,'" and "does not create a cause of action." *Id*. In so holding, the Court noted that the Supremacy Clause must be read in the context of the Constitution as a whole, and that "Article I vests Congress with broad discretion over the manner of implementing its enumerated powers, giving it authority to 'make all Laws which shall be necessary and proper for carrying [them] into Execution.'" *Id*. at 1383 (quoting Art. I, § 8.) It then stated:

> If the Supremacy Clause includes a private right of action, then the Constitution *requires* Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law. It would be strange indeed to give a clause that makes federal law supreme a reading that limits Congress's power to enforce that law, by imposing mandatory private enforcement—a limitation unheard-of with regard to state legislatures.

Id. at 1384 (emphasis in original).

The Supreme Court in *Armstrong* rejected the argument that its "preemption jurisprudence—specifically, the fact that we have regularly considered whether to enjoin the enforcement of state laws that are alleged to violate federal law", demonstrated that

the Supremacy Clause creates a cause of action for its violation. 135 S. Ct. at 1384. It stated that the ability to sue to enjoin unconstitutional actions by state and federal officers is a "judge-made" equitable remedy, and that it does not "rest[] upon an implied right of action contained in the Supremacy Clause." *Id*. Thus, to the extent Plaintiffs imply that they may bring a cause of action for preemption directly under the Supremacy Clause, this argument is without merit.

Plaintiffs argue, however, that the *Armstrong* decision permits them to proceed in equity to enjoin enforcement of Amendment 64. While *Armstrong* did find that there might be a right to sue in equity to enjoin unconstitutional actions, as noted above, I find that there is no such right in this case. The Supreme Court in *Armstrong* made clear that "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." 135 S. Ct. at 1385. Thus, "'[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" *Id*. (quotation and internal quotation marks omitted).

In *Armstrong*, the Court found that the Medicaid Act at issue in the case "implicitly preclude[d] private enforcement of § 30A, and that the respondents could not, "by invoking [the Court's] equitable powers, circumvent Congress's exclusion of private enforcement." 135 S. Ct. at 1385. This holding was based on two aspects of the Medicaid Act which the Supreme Court found established "Congress' 'intent to foreclose' equitable relief. *Id*. (quotation omitted). First, "the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements" was "the withholding of Medicaid funds by the Secretary of Health and Human Services. *Id*. The

Court held that "the 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id*. (quoting *Alexander*, 532 U.S. at 290).

Second, the Court found that while "[t]he provision for the Secretary's enforcement by withholding funds might not*, by itself*, preclude the availability of equitable relief", it did so "when combined with the judicially unadministrable nature" of the statute's text. *Armstrong*, 135 S. Ct. at 1385 (emphasis in original). It stated:

> It is difficult to imagine a requirement broader and less specific than § 30(A)'s mandate that state plans provide for payments that are "consistent with efficiency, economy, and quality of care," all the while "safeguard[ing] against unnecessary utilization of ... care and services." Explicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that Congress "wanted to make the agency remedy that it provided exclusive," thereby achieving "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking," and avoiding "the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." . . .

Id. (quotation omitted). The Supreme Court concluded that "[t]he sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, . . . shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts." *Id*.

I find that the same result applies here, Plaintiffs' arguments notwithstanding. First, there is nothing in the CSA which expressly permits private enforcement of the Act's provisions. I also find, as in *Armstrong*, that the CSA implicitly precludes private enforcement, and that Plaintiffs may not, by invoking the court's equitable powers, "circumvent Congress's exclusion of private enforcement." 135 S. Ct. at 1385. In that

regard, I note that enforcement of the Act is expressly delegated to the Attorney General of the United States, with criminal liability being the principal enforcement mechanism. *See, e.g.,* 21 U.S.C. §§ 841-51, 877; *Schneller*, 387 F. App'x at 293.[2] Only in limited circumstances does the CSA grant other parties enforcement powers—and these powers never apply to private litigants. 21 U.S.C. § 878(a) (empowering the Attorney General to "designate[ ]" State and local law enforcement officers to enforce the CSA); § 882(c) (granting States limited authority to enforce the CSA against online pharmacies, but expressly noting that "[n]o private right of action is created under this subsection"). Thus, like the Medicaid Act, the CSA is designed to be implemented through a system of centralized enforcement. The "express provision" of these methods of enforcing the CSA "suggests that Congress intended to preclude others.'" *Armstrong*, 135 S. Ct. at 1385 (quotation omitted).[3]

When combined with the "judicially unadministrable nature" of the CSA's text, I find that the equitable relief Plaintiffs seek is precluded. I agree on that issue with Judge Blackburn's analysis of the issue in the *Safe Streets* case, wherein he noted:

> There certainly can be no more "judgment-laden standard" than that which confers almost complete discretion on the Attorney General to determine

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[2] The Attorney General may also enforce the CSA through civil forfeiture proceedings (*id*., § 881) or administrative proceedings. (*Id*. § 875.)

[3] I note that the Department of Justice has implemented a policy of non-enforcement through the Cole Memo. Congress, meanwhile, has endorsed this policy of non-enforcement to allow states to implement medical marijuana regulations that conflict with the CSA—even the commercial medical marijuana regime that Colorado has implemented. Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, tit. V, § 538, 128 Stat. 2130 (2014) ("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."). This case, if successful, would directly undermine current federal enforcement policy as articulated in the Cole memo.

> whether to assert the supremacy of federal law to challenge arguably conflicting state marijuana laws. . . . The Department of Justice has made a conscious, reasoned decision to allow the states which have enacted laws permitting the cultivation and sale of medical and recreational marijuana to develop strong and effective regulatory and enforcement schemes. ***See*** James M. Cole, **Guidance Regarding Marijuana Enforcement**, United States Department of Justice, Office of the Deputy Attorney General (August 29, 2013). . . . Allowing private litigants to interfere with that discretionary decision would create precisely the type of "risk of inconsistent interpretations and misincentives" which strongly counsel against recognizing an implicit right to a judicially created equitable remedy. ***See Armstrong***, 135 S.Ct. at 1385.

(January 19, 2016 Order at 10-11) (quotation and internal footnote omitted). I adopt his well reasoned analysis herein.[4]

I find that the same analysis applies to the International Conventions. None of them creates a private right of action, and none indicates that Congress intended private litigants to enforce them by way of the courts' equitable powers. Moreover, Plaintiffs have not shown how these Conventions would be judicially administrable. Accordingly, I find that Plaintiffs have no cause of action under the Intentional Conventions to preempt Colorado law.

Based on the foregoing, I find that both the first and second claims for relief fail to state viable claims for relief, and that Defendant Hickenlooper's motion to dismiss should

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[4] Plaintiffs' argument that courts routinely interpret and enforce the CSA and that the CSA permits injunctions as a remedy for violations of the statute misses the mark. The issue here relates to the method of enforcement of the CSA. Courts do not make charging decisions under the CSA. Like the Medicaid Act at issue in *Armstrong*, the CSA imposes a judgment-laden standard upon the Attorney General regarding the CSA's enforcement that achieves "'expertise'" and "'uniformity'" and avoids "'the comparative risk of inconsistent interpretations and resulting administrative guidance that can arise out of an occasional interpretation of the statute in a private action.'" *Armstrong*, 135 S. Ct. at 1385 (quoting *Gonzaga Univ.*, 536 U.S. at 292). As in the *Gonzaga University* case, "[i]t is implausible to presume that the same Congress [that added the centralized review provision for enforcement in most instances by the Attorney General] intended private suits to be brought before thousands of federal – and state – court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly sought to enjoin." 536 U.S. at 290.

be granted. Since I find that Plaintiffs have no right of action, there is no need to address Hickenlooper's remaining arguments in his motion to dismiss as to these claims.

IV. CONCLUSION

In conclusion, it is

ORDERED that Defendant John Hickenlooper, Jr.'s Motion to Dismiss Plaintiff's Complaint Under Rules 12(b)(1) and 12(b)(6) filed on May 1, 2015 (ECF No. 23) is **GRANTED**, and Plaintiffs' claims in this case are **DISMISSED WITH PREJUDICE**.

Dated: February 26, 2016

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-00462-WYD-NYW

JUSTIN E. SMITH,
CHAD DAY,
SHAYNE HEAP,
RONALD B. BRUCE,
CASEY SHERIDAN,
FREDERICK D. MCKEE,
SCOTT DECOSTE,
JOHN D. JENSON,
MARK L. OVERMAN,
BURTON PIANALTO,
CHARLES F. MOSER, and
PAUL B. SCHAUB,

Plaintiffs,

v.

JOHN W. HICKENLOOPER, Governor of the State of Colorado,

Defendant.

FINAL JUDGMENT

Pursuant to and in accordance with Fed. R. Civ. P. 58(a) and the Order on Motion to Dismiss, filed on February 26, 2016, by the Honorable Wiley Y. Daniel, Senior United States District Judge, and incorporated herein by reference as if fully set forth, it is hereby

ORDERED that judgment is hereby entered in favor of Defendant, John W. Hickenlooper, Governor of the State of Colorado, and against Plaintiffs, Justin E. Smith, Chad Day, Shayne Heap, Ronald B. Bruce, Casey Sheridan, Frederick D. McKee, Scott DeCoste, John D. Jenson, Mark L. Overman, Burton Pianalto, Charles F. Moser, and Paul B. Schaub, on Defendant's Motion to Dismiss. It is further

ORDERED that plaintiff's complaint and action are **DISMISSED WITH PREJUDICE.** It is further

ORDERED that Defendant shall have its costs by the filing of a Bill of Costs with the Clerk of this Court within fourteen (14) days of entry of judgment, and pursuant to the procedures set forth in Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

DATED at Denver, Colorado this 26th day of February, 2016.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

/s/ Robert R. Keech
Robert R. Keech,
Deputy Clerk

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B), because this brief, exclusive of the items listed in Rule 32(a)(7)(B)(iii), contains 11,015 words.

Respectfully submitted on June 3, 2016.

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CERTIFICATE OF DIGITAL SUBMISSION

Counsel for Appellants hereby certifies that all required privacy redactions have been made, which complies with the requirements of Federal Rule of Appellate Procedure 25(a)(5).

Counsel also certifies that the hard copies submitted to the Court are exact copies of the ECF filing from June 3, 2016.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Vipre software version 9.3.6012; Definitions version 49858 – 7.65772 [June 3, 2016]; Vipre engine version 3.9.2671.2 – 3.0), and, according to the program, is free of viruses.

Respectfully submitted on June 3, 2016.

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Attorneys for the Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that seven (7) printed copies of the foregoing will be shipped via Federal Express overnight delivery to the Clerk, United States Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, 1823 Stout Street, Denver, Colorado 80257-1823, for delivery to the Court within two (2) business days of the above date.

s/ Stephen Moore
Senior Appellate Paralegal
COUNSEL PRESS INC.