Nos. 16-1048, 16-1095

In the United States Court of Appeals for the Tenth Circuit

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

v.

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

and

STATE OF NEBRASKA, et al.
Movants-Intervenors

On Appeal from the U.S. District Court for the District of Colorado, No. 1:15-CV-00349-REB-CBS (Blackburn, J.)
(caption continued on inside cover)

Amicus Curiae Brief of Law Professors in Support of the Respondent State of Colorado and Affirmance

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

v.

JOHN HICKENLOOPER,
in his capacity as Governor of Colorado,
Defendant-Appellee

and

STATE OF NEBRASKA, et al.
Movants-Intervenors

On appeal from the U.S. District Court for the District of Colorado, No. 1:15-CV-00462-WYD-NYW (Daniel, J.)

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Interest of Amicus Curiae

Amici curiae respectfully submit this brief pursuant to Federal Rule of Appellate Procedure 29(a).[1] Amici are four scholars of federal and state drug laws and the federalism disputes that surround them. The Amici include:

> Robert A. Mikos, Professor of Law, Vanderbilt University Law School, Nashville, Tennessee
>
> Sam Kamin, Vincente Sederberg Professor of Marijuana Law and Policy, University of Denver, Sturm College of Law, Denver, Colorado
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> Douglas A. Berman, Robert J. Watkins/Procter & Gamble Professor of Law, The Ohio State University, Moritz College of Law, Columbus, Ohio
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Amici seek to help explain to the court why Congress would have wanted to limit the ability of non-federal parties, like the Plaintiffs in these cases, to initiate preemption challenges under the federal Controlled Substances Act (CSA).

Summary of Argument

This court should affirm the decisions below dismissing Plaintiffs' consolidated preemption claims. The judges below rightly found that Congress had precluded non-federal actors like the diverse Plaintiffs assembled here from initiating preemption challenges under the Controlled Substances Act. *Safe Streets Alliance, et al., v.*

[1] Pursuant to Fed. R. App. P. 29, counsel for both appellants, appellees, and movants-intervenors have been contacted, and all consent to the filing of this brief. None of the parties authored the brief in whole or part, and no one contributed money for preparing or filing the brief.

Hickenlooper, et al., No. 15-cv-349-REB-CBS, 2016 WL 223815 (D. Colo. Jan. 19, 2016); *Smith v. Hickenlooper*, No. 15-cv-462-WYD-NYW, 2016 WL 759163 (D. Colo., Feb. 26, 2016).

This brief seeks to explain *why* Congress opted for such preclusion.[2] The rationale stems from the recognition that some preemption challenges brought under the CSA could, quite perversely, *undermine* Congress's policy objectives. To minimize this risk, Congress vested *exclusive* authority to initiate preemption challenges under the CSA in an expert *federal* agency, the Department of Justice (DOJ). Pursuant to that authority, the DOJ has decided (so far) that it would not serve federal interests to challenge state marijuana reforms, despite the differences between state and federal law. The Plaintiffs' attempt to circumvent the DOJ's decision and to disregard Congress's considered delegation of enforcement authority to the agency should be dismissed.

[2] The parties agree that the outcome of this case depends on congressional intent. Although the parties disagree about how the inquiry into congressional intent should be framed, Amicus contend that Congress's preference for exclusive federal enforcement is sufficiently clear to preclude the Plaintiffs' claims, regardless of which frame is used.

ARGUMENT

I. Blocking State Reforms Carries Risks for Congress.

Although preemption is supposed to vindicate congressional interests, e.g., *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 96 (1992), some preemption challenges may hinder rather than help Congress to achieve its policy objectives. The risk posed by such perverse preemption challenges arises for at least two reasons, both of which are aptly illustrated by the Plaintiffs' present challenges to Colorado's Amendment 64.

For one thing, litigants can easily misjudge the policy objectives behind a federal statute, and hence, Congress's inclination to preempt a state law touching on the same subject. To illustrate, consider Plaintiffs' challenge to Colorado's requirement that licensed marijuana vendors test the marijuana they sell for dangerous chemical and biological contaminants. *See* Colo. Rev. Stat. § 12-43.4-202(3)(a)(IV). Colorado's requirement is designed to "ensure … that products sold for human consumption do not contain contaminants that are injurious to health." *Id.* Notwithstanding any other laudable purpose the requirement might serve, Plaintiffs insist that it is preempted because it undermines Congress's goal of combatting the *incidence* of marijuana use. In the Plaintiffs' own words:

> [R]egulatory requirements [including testing] assure customers of the safety of the premises and products sold by licenses. The result of this state oversight is a larger volume of sales for the recreational marijuana industry …

Safe Streets Second Amended Complaint, at ¶ 37. Put more bluntly, Plaintiffs suggest that Congress would have wanted to stop states from making marijuana safer, because if the states succeeded, people would use more of the drug.

Not surprisingly, Plaintiffs' description of Congress's policy objectives appears incomplete (to put it mildly). While *one* of the purposes of the CSA is to reduce the incidence of illicit drug use, the statute surely has other goals, including reducing the *harms* caused by drug use. E.g., 21 U.S.C. § 801(2) (finding that drug use can have a "detrimental effect on the health and general welfare of the American people"); *see also* James M. Cole, Dep. Att'y General, to U.S. Att'ys, Guidance Regarding Marijuana Enforcement, 1-2 (Aug. 29, 2013) ("Cole Memorandum"), *available at* http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (listing *eight* priorities that are "particularly important to the federal government" regarding enforcement of the federal CSA). In light of these other purposes, it is far from clear that Congress would condemn a state law that protects consumer health, even if the law did boost the rate of drug use. As the Supreme Court has recognized,

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525–26 (1987); *see also In Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 678 (2003) (Thomas, J., concurring) (warning of the "danger of invoking obstacle pre-emption based on the arbitrary selection of one purpose to the exclusion of others"). Indeed, Plaintiffs' suggestion that Congress would necessarily condemn state laws that make illicit drugs safer is undermined by the fact that *Congress itself* has passed regulations that do the same—i.e., that arguably make illicit drug transactions safer, even though, as a consequence (at least under Plaintiffs' reasoning), they might thereby boost the incidence of such transactions.

E.g., 18 U.S.C. § 924(c) (making it a crime to use or carry a firearm during or in relation to a drug trafficking offense); 21 U.S.C. § 841(b) (enhancing penalties for drug trafficking offenses when use of a drug results in death or serious bodily injury).[3]

Second, even when litigants accurately describe Congress's policy objectives, they might still misjudge whether a state law hinders those objectives. *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 17-21 (2013) (discussing the "False Conflicts" raised by some preemption claims under the CSA). Plaintiffs' challenge to Colorado's marijuana licensing system illustrates this danger. Under Colorado law, individuals who want to avoid state criminal sanctions for producing or selling marijuana must first obtain a license from the state. *See* Colo. Rev. Stat. § 12-43.4-102 (emphasizing that it remains a state crime to traffic marijuana without a license). In return for the exemption from the state's prohibitions on commercial production and sale, licensees must pay hefty fees, collect and remit taxes on marijuana sales, follow strict regulations governing their operations, and submit to pervasive monitoring (among many other things). *See* Colo.

[3] It is worth noting that Plaintiffs' reasoning could be used to block a broad range of state drug laws, unrelated to marijuana reforms, that – like Colo. Rev. Stat. § 12-43.4-202(3)(a)(IV) – seem designed to prevent harms to drug users. For example, Oklahoma recently passed legislation promoting the use of opiate antagonists to treat heroin overdoses. E.g., 63 Okl. St. § 1-2506.1(A) (authorizing first responders "to administer, without prescription, opiate antagonists when encountering an individual exhibiting signs of an opiate overdose"); *see also* Oklahoma State Dep't of Health, Naloxone Project, available at https://www.ok.gov/health/Disease,_Prevention,_Preparedness/Injury_Prevention_Service/Unintentional_Poisoning/Naloxone_Project/index.html (indicating that state officials are providing training and supplies to first responders to increase use of Naloxone, an opiate antagonist). Under Plaintiffs' reasoning, however, Oklahoma's law is suspect because it helps assure heroin (and other illicit opioid) users that life-saving help is nearby should they ever happen to overdose.

Rev. Stat. § 12-43.4-101, *et seq*. (detailing the Colorado Retail Marijuana Code); 1 Colo. Code Regs. § 212-2, *et seq*. (detailing regulations promulgated under the Code). In the eyes of the Plaintiffs, Colorado's licensing system serves only one purpose: to promote, foster, enable, assist, legitimize, etc. the marijuana industry in Colorado. E.g., Safe Streets Opening Brief, at 27 (claiming that licensing regime "has the purpose and effect of authorizing, assisting, and facilitating federal drug crimes"). And because Congress has sought to suppress the marijuana industry, Plaintiffs insist that the state licensing system must be blocked. *Id.*

But even assuming that Congress was interested only in suppressing the marijuana industry, Plaintiffs may have misjudged the impact that Colorado's regulations have had on the industry. Far from subsidizing it, as Plaintiffs claim, Colorado's regulations have actually imposed heavy costs on the marijuana industry. E.g., 1 Colo. Code Regs. § 212-2.209 (imposing annual licensing fees ranging from $800-$5,000); *id.* at 2.406 (requiring licensees to meet strict sanitary standards); *id.* at 2.405 (requiring licensees to closely track inventory); *id.* at 2.902 (requiring vendors to collect and remit state taxes on retail marijuana sales). As does any heavily regulated industry, the marijuana industry naturally attempts to pass these regulatory costs on to consumers in the form of higher prices, which, in turn, serves to *suppress* demand for marijuana, not *boost* it. *See, e.g.*, JIM LEITZEL, REGULATING VICE 161 (Cambridge, 2008) (discussing effects of a licensing system).

To be sure, the Colorado's licensing requirement is much less restrictive than the state prohibition regime it replaced. Vendors who comply with the requirements of Amendment 64 no longer face the prospect of long prison sentences and steep fines for trafficking marijuana, at least under state law. Marijuana trafficking may thus be

more prevalent today than it was prior to 2012. But Colorado's old prohibition regime (and the rate of drug use / trafficking under it) is not the relevant point of comparison for preemption analysis, because blocking Colorado's *new* licensing regime—i.e., finding it preempted—would not necessarily restore the old prohibition regime. Congress could not, of course, force Colorado to re-instate its ban on marijuana production and sales. *See Printz v. United States*, 521 U.S. 898, 935 (1995) (holding that Congress may not compel a state to enact or enforce a law); *see also* Mikos, *Preemption Under the Controlled Substances Act*, *supra*, at 16 (explaining that anti-commandeering rule bars Congress from forcing states to ban marijuana trafficking); Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 U.C.L.A. L. REV. 74, 102-04 (2015) (same). Thus, if a court were to find that Colorado's licensing regime is preempted, it would be up to Colorado to decide whether (or not) to re-instate prohibition.

Whether Colorado would do so would depend (in the short term) on the state's severability rules, see *Voting for America, Inc. v. Steen*, 732 F.3d 382, 398 (5th Cir. 2013) ("Severability is a state law issue that binds federal courts."), and, in the longer term, on the State's opinion toward the commercial production and sale of marijuana. After all, the State's voters might not want to go back to the old prohibition regime; they might prefer instead the laissez-faire marijuana policy the anti-commandeering rule entitles them to espouse. *See* Robert A. Mikos, *How to Make Preemption Less Palatable: State Poison Pill Legislation*, 85 GEO. WASH. L. REV. 1, 39-45 (2017 forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2756155 (explaining how state might react to preemption of its marijuana reforms). And if Plaintiffs think marijuana

is too cheap and accessible in Colorado *now*, they should consider how much cheaper and more accessible it might become if the State stopped restricting marijuana production and distribution altogether and instead allowed *anyone* (licensed or not) to grow and sell the drug without fear of government reprisals. *See* Mikos, *Preemption Under the Controlled Substances Act*, *supra*, at 18-19 (noting that preempting state marijuana regulations "would have the very perverse effect of relaxing—*not tightening*—state controls on marijuana," and would thereby "widen the gap between state and federal drug policy"). Not surprisingly, this is an outcome Congress would not have wanted to chance.

It is telling that the federal government itself has never championed Plaintiffs' bold preemption claims. Indeed, in a twist of irony, the claim that state marijuana regulations are preempted by federal law has been championed instead by some members of the marijuana industry, a group that does not share Congress's goals. For example, as related by Professor Robert Mikos,

> In one suit, … a medical marijuana dispensary in California convinced a state court that a local licensing requirement was preempted by federal law. It did not do so because it supported the federal ban [on marijuana trafficking], but because it wanted to operate free and clear of the local government's interference—the local government had ordered the dispensary to close because it failed to comply with the licensing ordinance. … [I]t seems safe to say that the court erred in that case, for Congress would clearly prefer to have some state-imposed restrictions on marijuana distribution than none at all.

Id. at 19.

In theory, of course, courts might lessen the risk of perverse preemption results by dismissing such strategic (or just ill-conceived) preemption claims on the merits. *E.g., Wigod v. Wells Fargo Bank*, 673 F. 3d 547 (7th Cir. 2012) (rejecting a preemption

challenge against a state law that undermined one congressional purpose, because it furthered another). But there is no guarantee that courts will be able to accurately divine what Congress would have wanted regarding the vast array of state drug laws that could be challenged under the CSA. Congress's preemptive intentions are often expressed (if at all) only in vague terms. E.g., 21 U.S.C. § 903 (disavowing field preemption and declaring that state law is preempted only to the extent it poses a "positive conflict" with the CSA). Hence, courts (and litigants) often must resort to guessing whether Congress would have wanted to preempt a given state law based on clues found in the substantive provisions of a statute, its legislative history, and similarly indeterminate sources—a process that "provide[s] little basis for confidence about outcomes." Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 882 (2008).

Although Plaintiffs claim that the courts' analyses of their preemption claims would be routine, straightforward, and clear,[4] they grossly understate the difficulty of the task courts must perform in preemption lawsuits. Consider just one of the claims that Plaintiffs now seek to bring—that Colorado law is preempted to the extent it requires state or local officials to return marijuana they have wrongfully (under state law) seized from private citizens. E.g., Smith Opening Brief, at 11. The identical claim has been levied by officials in other states in a variety of state fora (where federal procedural rules do not necessarily apply). Notwithstanding the similarities in the claims, however, decision-makers have reached starkly different conclusions about

[4] E.g., Smith Complaint, at ¶ 30; Smith Opening Brief, at 17 & 46; Safe Streets Opening Brief, at 10 & 16; Nebraska & Oklahoma Opening Brief, at 24.

whether the state requirements are preempted.[5] The conflicting results surrounding just one type of state drug reform demonstrate that judicial review of preemption claims under the CSA is anything but simple and error-free.

II. Giving the DOJ Exclusive Authority to Initiate Preemption Challenges Limits These Risks.

To reduce the risk of perverse results in preemption cases, Congress chose to give an expert federal agency, the DOJ, *exclusive* authority to initiate preemption challenges under the CSA. The DOJ is uniquely capable of vetting preemption claims to ensure that they will be brought only when they are likely to advance the policy objectives of the CSA.

For one thing, the DOJ has unmatched expertise regarding the CSA. The DOJ handles all of the criminal and civil enforcement actions brought under the statute. In fiscal year 2012 alone, the agency handled *24,563* drug trafficking cases, including nearly 7,000 involving marijuana. UNITED STATES SENTENCING COMMISSION,

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[5] *Compare People v. Crouse*, 2013 WL 6673708, ¶ 32 (Co. App. 2013), *certiorari granted*, 2015 WL 3745183 (Colo.) (finding requirement to return seized marijuana is not preempted because CSA immunizes actions of state law enforcement officers); *The City of Garden Grove v. Kha*, 157 Cal. App. 4th 355, 388 (Cal. App. 2008) (same and adding that it would be "unreasonable to believe" requirement would undermine federal policy objectives); *State v. Okun*, 296 P.3d 998, 1002 (Ariz. App. 2013) (immunity); *State v. Kama*, 39 P.3d 866, 868 (Or. App. 2002) (immunity), *with State v. Ehrensing*, 296 P.3d 1279, 1286 (Or. App. 2013) (refusing to order sheriff to return seized marijuana in part due to federal preemption concerns); Op. Or. Att'y Gen., No. OP-2012-1 (Jan. 19, 2012) (opining that a "requirement to return marijuana" is preempted because it "obstructs the accomplishment of the Controlled Substances Act's purpose and intended effect to prohibit the distribution and possession of all marijuana"); Op. Mich. Att'y Gen., No. 7262 (Nov. 10, 2011) (reaching the "the unavoidable conclusion" that the state's medical marijuana law "is preempted by the CSA to the extent it requires law enforcement officers to return marihuana to registered patients or caregivers").

QUICK FACTS: MARIJUANA TRAFFICKING OFFENSES (2013). Through its voluminous casework, the DOJ has acquired unmatched expertise regarding the substance of the statute and how best to enforce it. But the agency also plays a crucial role in promulgating regulations under the statute. Most notably, Congress has empowered the agency to schedule and re-schedule drugs under the CSA. 21 U.S.C. § 811; *see also* 28 C.F.R. § 0.100(b) (delegating the Attorney General's scheduling authority to the Drug Enforcement Administration (part of the DOJ)).

Pursuant to this authority, the agency has issued three lengthy opinions regarding the scheduling of marijuana under the CSA. E.g., Drug Enforcement Agency, Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 21 C.F.R. 40,552 (2011) (detailing the agency's most recent decision rejecting a rescheduling petition). In forming these (and other) scheduling opinions, the agency has acquired unmatched insight into Congress's policy goals. *See id.* (providing detailed explanations of the criteria Congress established for scheduling decisions). The agency's unique experience enforcing, defending, re-examining, and revising federal drug policy make the DOJ far more qualified than any non-federal party to decide whether (or not) a state law hinders federal objectives, and thus, whether (or not) to challenge such law as preempted. *See, e.g.*, *Armstrong v. Exceptional Child Center, Inc.*, 135 S.Ct. 1378, 1385 (2015) (noting the advantages of granting federal agencies exclusive control over initiating preemption challenges); *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (recognizing that federal agencies are best-equipped to judge the wisdom of initiating enforcement actions under congressional statutes); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (recognizing that federal agencies' interpretations of congressional statutes are entitled to deference). In other words, as

compared to non-federal parties, the DOJ seems less likely to misjudge Congress's objectives or the effect that a given state drug law has on them and is thereby less likely to wage a preemption challenge that could undermine congressional objectives—powerful reasons for entrusting preemption enforcement to the agency.

Second, Congress is likely to harbor fewer misgivings about the motivations of the DOJ, as compared to some non-federal parties who might seek to challenge state drug laws under the CSA. To be clear, the Amici do not question the motives of the non-federal Plaintiffs in the case at bar. But if these Plaintiffs—including landowners, a non-profit organization, in-state sheriffs in their individual capacities, out-of-state sheriffs and county attorneys in their official capacities, and two state governments—can initiate a preemption challenge under CSA, then presumably, so could any number of other aggrieved parties, both public and private, domestic and foreign.[6] Not all of these other non-federal plaintiffs would necessarily share the present Plaintiffs' interest in, say, suppressing drug trafficking and drug use. For example, an association of marijuana distributors might champion preemption to defeat restrictive state licensing requirements,[7] or an association of marijuana consumers might

[6] For example, the Plaintiffs suggest that Colorado's regulations have breached United States' treaty obligations and thereby caused a grievance with several foreign nations, including Mexico, Thailand, Bolivia, and Colombia, among others. Smith Complaint, at ¶ 63.

[7] *See Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 638–42 (Cal. Ct. App. 2011) (enjoining local licensing requirement as preempted by federal law, at behest of medical marijuana dispensary that had been denied license), *appeal docketed sub nom. Pack v. S.C.*, 268 P.3d 1063 (Cal. 2012), and *appeal dismissed as moot*, 283 P.3d 1159 (Cal. 2012). The irony of the *Pack* case is discussed in Mikos, *Preemption Under the Controlled Substances Act*, *supra*, at 19.

champion preemption to remove onerous state taxes on marijuana sales.[8] Misgivings about how some non-federal plaintiffs might use preemption to further their own (rather than Congress's) interests gave Congress another reason to give the DOJ *exclusive* authority to initiate preemption challenges.

Third, Congress can also more easily influence the DOJ's enforcement decisions, and thereby ensure that the agency faithfully and competently exercises its delegated authority. Congress wields considerable influence over the DOJ, *See* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. REV. 757, 789-810 (1999) (detailing Congress's influence over DOJ enforcement decisions), influence it does not hold over non-federal litigants. Among other things, Congress confirms key DOJ officials, holds public oversight hearings regarding agency actions, and sets the agency's budget. *Id.* Congress has not hesitated to use this influence when it disapproves of how the agency has enforced federal drug policy. For example, due to concerns the DOJ was not giving marijuana reform states *enough* latitude (rather than too much), Congress passed a budget restriction stipulating that "[n]one 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." Consol. and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130 § 538 (Dec. 16, 2014). In short, these three unique qualities of the DOJ help

[8] *See No Over Taxation, et al. v. John Hickenlooper, et al.*, No. 1014CV32249 (D. Denv, Co.) (April 14, 2016) (rejecting claim brought by marijuana growers and consumers that Colorado's tax on marijuana is preempted by federal law).

to explain why Congress would give the agency exclusive authority to enforce the CSA.[9]

While acknowledging that the DOJ has exclusive authority to bring criminal and civil enforcement actions, Plaintiffs nonetheless insist that Congress did not similarly give the agency exclusive authority to initiate preemption actions. E.g., Safe Streets Opening Brief, at 24 ("[T]he express enforcement provisions of the CSA leave little doubt that they were designed to be used against individuals who *violate* the federal drug laws, not state and local officers who implement laws that *conflict* with them."). However, the Plaintiffs' distinction between criminal and civil enforcement, on the one hand, and preemption enforcement on the other, is misguided. For one thing, *all* enforcement actions under the CSA—whether criminal, civil, or preemption—serve the same statutory purposes. In addition, the issues involved in these different types of enforcement actions overlap, as the Plaintiffs' complaint demonstrates.[10] In one of their briefs, for example, the Plaintiffs allege that Defendants have erected a regulatory regime that has the "purpose and effect of authorizing, assisting, and facilitating federal drug crimes", Safe Streets Opening Br., at 26, allegations which, if true, would constitute criminal aiding and abetting violations of the CSA, 18 U.S.C.

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[9] Although Congress has empowered the states to enforce some provisions of the CSA, they still do so only with the permission of the DOJ. *E.g.*, 21 U.S.C. § 878(a).

[10] Indeed, although the Plaintiffs deny it, Safe Streets Opening Brief, at 26, their preemption suit might be calculated to pressure the DOJ into bringing criminal prosecutions against marijuana businesses in Colorado. Namely, by blocking Colorado's regulation of those businesses, the Plaintiffs would remove one of the justifications the DOJ has given for not cracking down on the industry—the presence of "strong and effective" state controls. *See* Cole Memorandum, *supra* (stating DOJ enforcement policy).

§ 2.[11] For these reasons, it makes sense for Congress to have consolidated *all* enforcement authority in the DOJ. *Cf. Armstrong*, 135 S.Ct. at 1385 (noting that "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others") (citation omitted).

III. Allowing Non-Federal Parties to Initiate a Preemption Challenge Under the CSA Would Undermine Congress's Careful Delegation of Enforcement Authority and the DOJ's Exercise of that Authority

Allowing non-federal plaintiffs to initiate preemption challenges under the CSA would undermine the DOJ's enforcement decisions and disregard Congress's considered judgment to delegate exclusive enforcement authority to the agency.

In response to state marijuana reforms like Amendment 64, the DOJ has promulgated detailed memoranda to guide the agency's enforcement of the CSA. E.g., Cole Memorandum, *supra*. Under these guidelines, the DOJ has urged federal prosecutors to focus on marijuana offenses that implicate key federal enforcement priorities, like preventing distribution to minors and curbing inter-state smuggling. *Id.* While it has not endorsed the legalization of marijuana trafficking, the agency has acknowledged that such trafficking is less likely to threaten these federal priorities when a state has implemented "strong and effective regulatory and enforcement

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[11] Although these criminal accusations lack merit (and have never been charged by the DOJ), they may be essential to the Plaintiffs' preemption suit. Under the anti-commandeering rule, Congress may only preempt active state support of federal drug crimes, not mere tolerance thereof. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1449 (2009) ("[T]he Court has never held that Congress could block states from merely allowing some private behavior to occur, even if that behavior is forbidden by Congress. To be sure, the Court has found myriad state laws preempted, but only when the states have punished or subsidized (broadly defined) behavior Congress sought to foster or deter.").

systems to control the cultivation, distribution, sale, and possession of marijuana…" *Id.* In addition to acknowledging that state regulations can *promote* federal objectives, the DOJ has also recognized the logical corollary: that challenging those regulations could undermine federal objectives. Most notably, in opposing the grant of Original Jurisdiction over an earlier (nearly identical) preemption challenge to Amendment 64 brought by Plaintiff-Intervenors Nebraska and Oklahoma, the Solicitor General of the United States warned that "[i]f plaintiffs were to prevail … the result might be that Colorado's regulatory regime would be enjoined but the sale and possession of marijuana would still be lawful under Colorado's laws." Brief for the United States as Amicus Curiae, *States of Nebraska & Oklahoma v. State of Colorado*, No. 144 (2015). It should come as no surprise, then, that the DOJ has declined to broadly challenge state marijuana reforms, notwithstanding ample opportunity to do so.[12]

Plaintiffs disagree with the DOJ's enforcement decisions, and they now seek to circumvent those decisions by bringing their own preemption lawsuit. Plaintiffs may believe they are vindicating Congress's designs, but Congress did not empower non-

[12] In the twenty years since California adopted the first medical marijuana law (1996), roughly half of the states have adopted their own reforms concerning medical and / or recreational marijuana. Nonetheless, the DOJ has never claimed that state regulations are preempted in their entirety, as Plaintiffs do here. To be sure, the DOJ has challenged *some* provisions of state law, but only to the extent they impair federal investigations. *E.g.*, *United States v. Michigan Department of Community Health*, 2011 WL 2412602, at *12 (W.D. Mich. 2011) (unreported) (finding state privilege of medical marijuana records preempted by the CSA, insofar as it blocked the Attorney General from obtaining records for federal criminal investigation). In *Gonzales v. Raich*, 545 U.S. 1 (2005), the DOJ did not claim—nor did the Supreme Court hold—that California's medical marijuana law was *preempted* (i.e., null and void). Rather, the DOJ merely argued—and the *Raich* Court merely held—that Congress had the constitutional authority to prohibit intrastate activities that California allowed as a matter of state law.

federal parties to second guess the judgments of the DOJ. Because the Plaintiffs suit undermines Congress's delegation of enforcement power to the DOJ and the DOJ's decisions on how to use that power, it should be dismissed.

Dismissal would not leave the Plaintiffs without recourse. The Plaintiffs could still seek redress through the political process, a process that is much better suited to making the policy judgments required by their preemption lawsuit. For example, the Plaintiffs could petition the DOJ to bring a preemption challenge against Amendment 64 on their behalf. *Cf. Armstrong*, supra, 135 S.Ct. at 1389 (Breyer, J., concurring) (suggesting that plaintiffs should instead approach agency with their concerns). Or they could petition Congress to authorize non-federal parties to initiate preemption challenges under the CSA (and perhaps to clarify its preemptive intentions under the statute).

And Plaintiffs would also have the ability to raise their preemption claims *defensively*, if they ever face a cognizable risk of federal sanctions for heeding an obligation imposed by state law. *Cf. Armstrong*, *supra*, 135 S.Ct. at 1384 (noting continued availability of defensive preemption claims). For example, if the Plaintiff-sheriffs were ever threatened with federal prosecution, they could presumably challenge their state law duty to return marijuana as preempted. Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STANFORD L. & POL'Y REV. 633, 662 (2011) (discussing conditions under which such a claim might be cognizable). In the case at bar, however, the Plaintiffs have not raised their preemption challenge in response to any cognizable threat, and thus, cannot avail themselves of the limited exceptions recognized by *Armstrong*.

Conclusion

Because preemption challenges under the CSA can generate perverse outcomes, Congress gave the DOJ exclusive authority to initiate them. Congress's choice, and the DOJ's decisions regarding how to exercise its delegated authority, are entitled to respect and deference. For these reasons, the court should affirm the decisions below and dismiss the Plaintiffs' preemption claims.

Respectfully Submitted this 15th day of August, 2016.

Counsel for Amicus Curiae

/s/ Michael Francisco

Certificate of Compliance

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32 and Tenth Circuit R. 32 because it uses 13-point Equity font, a proportionally spaced typeface.

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/s/ *Michael Francisco*

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August 15, 2016

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