Case Nos. 16-1048 (L), 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' REPLY BRIEF

Oral Argument Requested

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INTRODUCTION

In their Opening Brief, the Smith Plaintiffs explained how they have properly presented viable claims for injunctive relief to enjoin Colorado state officials from implementing Amendment 64 because it is preempted by the federal Controlled Substances Act. In this regard, Plaintiffs addressed errors in the District Court's order dismissing Plaintiffs' Complaint.

In this Reply Brief, Plaintiffs offer additional arguments as necessary to respond to the issues presented in Defendants' Briefs. In addition, the Smith Plaintiffs adopt and incorporate by reference the arguments presented by the Safe Streets Plaintiffs in their Reply Brief.

ARGUMENT

I. Plaintiffs' Claims May Proceed In Equity To Enjoin State Officers From Implementing Laws That Are Preempted By The Federal CSA.

In their Opening Brief, regarding the issues raised by the Supreme Court's decision in *Armstrong v. Exception Child Center, Inc.*, 135 S. Ct. 1378 (2015), Plaintiffs described at length the bases to support the correct finding that Plaintiffs have properly stated viable claims in equity seeking to enjoin the actions of state officials who have implemented laws that are in conflict with and preempted by controlling federal law. *See* Smith Plaintiffs' Opening Brief at 19-33. For centuries, federal courts have recognized the rights of individuals to bring preemption actions in equity for injunctive relief against state officials who are

acting in violation of federal law. While *Armstrong* explained how to determine if Congress has implicitly limited the Court's traditional equitable power to hear such suits, the District Court erred in applying *Armstrong* and dismissing Plaintiffs' preemption claims.

Regarding application of *Armstrong* to this case, the Smith Plaintiffs adopt and incorporate by reference the arguments presented by the Safe Streets Plaintiffs in their Reply Brief. In this reply brief, the Smith Plaintiffs offer additional arguments as necessary to further respond to Defendants' briefs.

II. Plaintiffs Have Article III Standing To Pursue The Preemption Claims.

Plaintiffs' claims should not be dismissed because Plaintiffs satisfy all three prongs of Article III standing: (1) they have suffered an injury in fact; "(2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000).[1]

[1] Defendants have briefed and asked this Court to rule on both the issues of standing and the merits of the federal preemption question presented in Plaintiffs' suits. Plaintiffs respectfully suggest that the Court should reach and decide all of the issues presented, as they have been fully briefed and presented to the District Court, and now they have been raised by the Defendants and briefed for this Court. Remanding issues to the District Court would not serve the interests of the parties or judicial economy. It is certainly within this court's power to resolve these issues that have been presented. *See Cavic v. Pioneer Astro Industries, Inc.*, 852 F.2d 1421, 1425 (10th Cir. 1987) ("It is a general rule that a federal appellate court will

A. Plaintiffs Have Been Injured, And The Injuries Are Caused By Colorado's Adoption Of Amendment 64.

By adopting and implementing Amendment 64, Defendants have created and authorized a legal market for recreational marijuana in Colorado. Defendants' actions in creating and overseeing this legalization and regulatory scheme have caused Plaintiffs' injuries.

The Colorado Sheriffs. The Colorado Sheriffs have been harmed by Amendment 64's conflict with federal law. Each Colorado Sheriff has taken an oath of office to uphold the United States Constitution in the performance of his duties. Smith App. at 45 (Compl. ¶ 74). Each also has taken, in the same oath of office, an oath to uphold the Colorado Constitution. *Id.* Since the enactment of Amendment 64, these oaths contradict each other because of the clear and direct conflict between Amendment 64 and the federal CSA. Situations forcing a Plaintiff-Sheriff to choose between conflicting oaths have occurred regularly since the adoption of Amendment 64. *Id.*

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not consider an issue 'which was not presented to, considered or decided by the trial court.' *Eureka-Carlisle Co. v. Rottman*, 398 F.2d 1015, 1019 (10th Cir. 1968). *See also Pell v. Azar Nut Co., Inc.*, 711 F.2d 949, 950 (10th Cir. 1983). The rule may be relaxed when the issue is one of law and the proper resolution is beyond doubt or where injustice might otherwise result. *Singleton v. Wulff*, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976). Further, 'the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.' *Id.*").

The Colorado Sheriffs encounter marijuana on a regular basis as part of their day-to-day duties, for example, when the Sheriffs make routine stops of individuals who possess marijuana. 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). The Sheriffs violate their oaths 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). On the other hand, if the Colorado Sheriffs enforce the CSA, in violation of Amendment 64, they then create potential civil liability for their counties, their employees who assist them, and themselves. Smith App. at 47-48 (Compl. ¶ 82). These damages and the legal costs associated with defending or resolving such claims would be significant. *Id.* Therefore, the Colorado Sheriffs have suffered direct and significant harm arising from the conflict between Amendment 64 and the CSA.

The Neighboring-State Sheriffs and County Attorneys. Likewise, the Neighboring-State Sheriffs and County Attorneys have been harmed by

Amendment 64's conflict with federal law. Plaintiffs 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). 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).

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 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. Since the adoption of Amendment 64, the Plaintiff-County Attorneys 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.

The specific injuries the Plaintiffs have suffered are caused by Defendants' legalization and regulation of recreational marijuana. It makes no difference whether other sources of marijuana may exist and what impact those other sources of marijuana may have on Plaintiffs, because it is uncontroverted that Defendants' actions have in fact created a legal, regulated public market for the distribution of recreational marijuana and, as a result, state-authorized recreational marijuana now exists in Colorado and the neighboring states, where it did not exist before Amendment 64. Therefore, Defendants' actions have caused Plaintiffs' injuries. That Plaintiffs may suffer other injuries from other sources does not undermine their ability to bring these preemption claims against these Defendants.

B. A Court Order Halting Colorado's Authorization And Regulation Of The Recreational Marijuana Industry Would Redress Plaintiffs' Injuries.

Defendants argue that Plaintiffs fail the redressability prong of the standing inquiry because, according to Defendants, even if Plaintiffs' claims succeed Colorado's medical marijuana laws will remain in place, and therefore enjoining Amendment 64's legalization of recreational marijuana is unlikely to redress Plaintiffs' injuries. State Defendants' Br. at 53-54. Plaintiffs' injuries, however, are in fact redressable by the relief they seek: a court order enjoining Amendment 64 and halting Colorado's authorization and regulation of the recreational

marijuana industry would redress the Plaintiffs' injuries which, as described above, are caused by Colorado's implementation of Amendment 64.

First, for purposes of Article III standing, Plaintiffs need not prove with certainty that all harm and injuries will be eliminated. Rather, Plaintiffs need only show an increased likelihood that their injuries will be redressed by the relief they seek. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997) (standing requires a likelihood that the injury-in-fact will be redressed by a favorable decision). *See also Bronson v. Cook*, 500 F.3d 1099, 1109-10 (10th Cir. 2007) (Constitutional standing under Article III requires proof of a substantial likelihood that defendant's conduct caused plaintiff's injury). An injury is redressable for Article III purposes if "a favorable decision would create 'a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *U.S. Magnesium, LLC v. E.P.A.*, 690 F.3d 1157, 1166 (10th Cir. 2012) (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)).

Defendants' argument focuses on the fact that Colorado's medical marijuana laws will remain in place even if Plaintiffs obtain the relief they seek. As stated above, the injuries Plaintiffs have suffered are directly related to and specifically caused by Colorado's implementation of Amendment 64, which has introduced legal recreational marijuana into the marketplace and caused injury to the Plaintiffs in Colorado and the neighboring states. For example, Plaintiffs have suffered from

the increased burdens placed on law enforcement resources, resulting from the implementation of Amendment 64, such as the increased burdens that have resulted when Plaintiffs encounter individuals in possession of marijuana that was obtained apparently in facial compliance with Amendment 64. Smith App. at 46, 48-49, 51-52 (Compl. ¶¶ 76, 84-85, 96).

Second, for purposes of standing, the redressability prong is satisfied when Plaintiffs challenge "government action that permits or authorizes third-party conduct that would otherwise be illegal." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004). Here, if the Court enjoins enforcement of Amendment 64, there will no longer be a conflict between Colorado's recreational marijuana laws and the federal CSA, and Plaintiffs will no longer be subject to the harms caused by Colorado's laws authorizing and regulating recreational marijuana industry, which is preempted by federal law.

To be entitled to relief, Plaintiffs need not show that the relief they seek would eliminate marijuana from the marketplace. Plaintiffs need only show that the injuries of which they have complained in this action likely would be redressed by the relief sought. Here, Plaintiffs brought these claims specifically because of the harm caused by the Colorado-supported and regulated market for legal recreational marijuana. Plaintiffs seek to enjoin Defendants' continued implementation of Amendment 64. The relief Plaintiffs seek would eliminate the

Colorado-regulated market for recreational marijuana. Therefore, a ruling enjoining enforcement of Colorado's legalization and regulation of the recreational marijuana industry would eliminate the specific harm-causing conduct of Defendants, of which the Plaintiffs have complained, and significantly increase the likelihood that Plaintiffs' injuries would be redressed.

III. Amendment 64 Is Preempted by the Controlled Substances Act Under Both Obstacle and Impossibility Preemption.

As explained in Plaintiffs' Opening Brief, at 33-46, Amendment 64 is preempted by the federal CSA, and it fails judicial scrutiny under both the obstacle and impossibility preemption doctrines. Under controlling federal law, applicable everywhere in the United States, including Colorado, it is unlawful to cultivate, distribute, sell, or possess marijuana. Colorado's regulatory scheme under Amendment 64 is directly at odds with federal law, because it purports to authorize, legitimize, and regulate that which is expressly prohibited and unlawful under federal law. The conflicts between the CSA and Amendment 64 cannot be resolved, and therefore, the Court should enjoin Colorado's implementation of Amendment 64.

A. Amendment 64 Fails Under Obstacle Preemption.

Amendment 64 is preempted because it stands as an obstacle to the full implementation and accomplishment of the federal CSA. It is clear that the purpose of the CSA is to fight drug abuse by regulating the activity of illegal drugs in the

interstate and intrastate markets. Plaintiffs' Opening Br. at 35. It is also beyond dispute that to accomplish the objectives the CSA imposes an absolute prohibition on the manufacture, cultivation, possession, and distribution of marijuana. *Id.* Amendment 64 is in direct and unresolvable conflict with the CSA because its purpose is to authorize, legitimize, and commercialize marijuana activity. In other words, Amendment 64 does exactly what the CSA prohibits. As a result, Amendment 64 is preempted because it stands as an obstacle to the full implementation and realization of the purpose of the CSA.

Defendants cite three state court decisions in support of the argument that Amendment 64 does not fail obstacle preemption analysis. State Defendants' Br. at 62. However, Defendants' arguments fail to demonstrate that Amendment 64 can survive judicial scrutiny.

First, Defendants suggest that Colorado's regulatory scheme can co-exist alongside the CSA. State Defendants' Brief at 62. This argument completely fails to recognize, however, that the intent and design of Colorado's law is diametrically opposed to the intent and design of the CSA. Amendment 64 does not just regulate recreational marijuana, but rather creates a legal market for marijuana, which is the opposite of the CSA prohibitions which completely outlaw and make illegal the market for marijuana.

Second, Defendants argue that Amendment 64's regulatory scheme is akin to regulations which impose tax burdens on marijuana businesses. *Id.* at 64. That argument fails because imposing tax burdens on marijuana businesses is consistent with and does not stand as an obstacle to the accomplishment of the purposes of the CSA. On the other hand, Colorado's regulatory scheme is not intended or designed to burden the marijuana industry in order to accomplish purposes consistent with the CSA. In fact the opposite is true: Amendment 64 is designed and intended to legalize the recreational marijuana industry, and as a result, directly undermines the accomplishment of the objectives of the CSA.

Third, Defendants argue that the Supreme Court decision in *Michigan Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984), does not compel a finding of preemption in this case. State Defendants' Brief at 65-66. In their argument, Defendants ignore the central principles of preemption that are reinforced in the *Michigan Canners* case. For example, the Supreme Court clearly held that the state law in issue was preempted and invalid because it authorized conduct that federal law prohibited, and as a result, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress." *Michigan Canners*, 467 U.S. at 478. That approach was followed by the Third Circuit in *N.C.A.A. v. Governor of New Jersey*, 730 F.3d 208, 236 (3d Cir. 2013) (state law purporting to legalize sports gambling that was

prohibited by federal law was preempted and invalid because the state law posed an obstacle to the full accomplishment of the purpose of the federal prohibition on sports gambling). Most recently, the Ninth Circuit also supported this approach, while addressing a different issue regarding California's laws regulating the market for medical marijuana. *United States v. McIntosh*, -- F.3d --, 2016 U.S. App. Lexis 15029, *32-22 n.5 (9th Cir. Aug. 16, 2016) ("Under the *Supremacy Clause of the Constitution*, state laws cannot permit what federal law prohibits. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.").

Fourth, Defendants argue that preventing the continued implementation of Amendment 64 would interfere with Colorado's "historic police powers." State Defendants' Brief at 66. This argument fails, however, because it is based upon a faulty premise. Plaintiffs are not seeking to force Colorado to criminalize marijuana or enforce criminal laws with respect to marijuana. As Plaintiffs have already stated: Plaintiffs have not asked the Court for any relief that would require Colorado to take any action or impose any duty on Colorado with respect to enforcing criminal laws under the CSA or Colorado's own criminal laws regarding marijuana activity. Plaintiffs' Opening Brief at 40. Instead, Plaintiffs' claims seek to stop Colorado from authorizing and regulating a legalized marketplace for recreational marijuana, where Colorado's Amendment 64 is in direct conflict with and creates an obstacle

to the full accomplishment of the federal CSA. Colorado cannot shield Amendment 64 from proper federal preemption scrutiny simply by invoking principles of state police powers. *See Gonzalez v. Raich*, 54 U.S. 1, 29 (2005) ("It is beyond peradventure that federal power over commerce is 'superior to that of the states to provide for the welfare or necessities of inhabitants,' …. 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.") (citations and footnote omitted).

B. Amendment 64 Fails Under Impossibility Preemption.

Amendment 64 is also preempted under the doctrine of impossibility preemption, because it is impossible for an actor in the marijuana market place created by Amendment 64 to comply with both state and federal law. Defendants have previously acknowledged: "With only limited exceptions, *all* marijuana-related conduct is illegal under the CSA." Smith App. at 76-78 (Def's Mot. Dismiss at 20-22 (footnote omitted)). In their brief, Defendants make an even starker concession (abandoning an argument they presented to the District Court): "It is true that a State cannot avoid preemption by asserting that individuals may comply with state and federal laws by declining to engage in commercial activity. *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2477 (2013)." State Defendants' Br. at 61. By these concessions, Defendants appear to abandon all arguments that Amendment 64 can

survive impossibility preemption analysis. Defendants again refer to Colorado's right to "retain traditional police power," *id*. at 61, but Defendants do not suggest that such powers permit Colorado to maintain its regulatory scheme for the legalization of a recreational marijuana marketplace, when that scheme is completely at odds with the CSA. Simply calling Amendment 64 an exercise of Colorado's police power does not rescue the regulatory scheme from the impossibility problem: it is impossible to comply with Colorado's legalization scheme and the CSA's prohibition on the cultivation and distribution of marijuana.

Nevertheless, Defendants argue that Colorado should be able to retain its police powers to decide for itself how it will choose to regulate marijuana at the state level. This argument completely ignores the manner in which Colorado's exercise of its police powers conflict with the CSA. Colorado's exercise of its police power via Amendment 64 does not simply complement the federal regulations found in the CSA. Rather, Amendment 64 is in direct conflict with the CSA, such that it is impossible to comply with both the CSA and Amendment 64. The Ninth Circuit recent decision in *McIntosh* (reviewing a different legal issue), highlighted the impossibility of reconciling the state's argument with the controlling and conflicting federal law:

> The CSA prohibits the use, distribution, possession, or cultivation of any marijuana…. The State Medical Marijuana Laws are those state laws that authorize the use, distribution, possession, or cultivation of medical

> marijuana. Thus, the CSA prohibits what the State Medical Marijuana Laws permit…. [W]e consider whether a superior authority, which prohibits certain conduct, can prevent a subordinate authority from implementing a rule that officially permits such conduct by punishing individuals who are engaged in conduct officially permitted by the lower authority. We conclude that it can.

2016 U.S. App. Lexis 15029, at *24-25. Likewise, in this case, the CSA preempts the conflicting and subordinate Colorado Amendment 64.

CONCLUSION

For all of these reasons, the District Court's February 26, 2016 Order on Motion to Dismiss should be reversed.

Respectfully submitted on August 29, 2016.

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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 3,656 words.

Respectfully submitted on August 29, 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 August 29, 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 9.3.6030; Definitions version 51920 – 7.67030 [August 29, 2016]; Vipre engine version 3.9.2671.2 – 3.0), and, according to the program, is free of viruses.

Respectfully submitted on August 29, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 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/ Kirstin E. Largent