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SUPREME COURT, STATE OF COLORADO 2 East Fourteenth Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 12CA2298 District Court, El Paso County, 11CR1680	▲ **COURT USE ONLY** ▲
PEOPLE OF THE STATE OF COLORADO, Petitioner, v. ROBERT CLYDE CROUSE, Respondent.	Case No.: 14SC109
DANIEL H. MAY DISTRICT ATTORNEY TERRY A. SAMPLE DEPUTY DISTRICT ATTORNEY MARGARET VELLAR CHIEF DEPUTY DISTRICT ATTORNEY DOYLE BAKER SENIOR DEPUTY DISTRICT ATTORNEY Office of the District Attorney Fourth Judicial District 105 East Vermijo Avenue, Suite 500 Colorado Springs, Colorado 80903 Telephone: (719) 520 6000 Fax: (719) 520 6185 e-mail: doylebaker@elpasoco.com Atty. Reg. #'s: #11379 (May) #33919 (Sample) #18745 (Vellar) #22277 (Baker)	

PETITIONER'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains less than 9,500 words.

The brief complies with C.A.R. 28(k).

For the party raising to the issue:

It contains, under a separate heading placed before the discussion of the issue, a concise statement of the applicable standard of review with citation to authority; and a precise location in the record where the issue was raised and ruled on.

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ISSUE ON WHICH CERTIORARI WAS GRANTED

Whether, in a matter of first impression, the court of appeals erred in concluding that the federal Controlled Substances Act (CSA) does not preempt article XVIII, section 14(2)(e) of the Colorado Constitution, where the state directive requires law enforcement officers to distribute marijuana to medical marijuana patients in violation of the CSA's prohibition of such acts.

STATEMENT OF THE CASE

Robert Crouse was charged with crimes related to the possession and cultivation of marijuana. See Court File, pp. 13-14. Crouse was acquitted of the charges at trial after asserting that his alleged criminal activities were authorized under article XVIII, section 14(2)(e) of the Colorado Constitution, which permits persons to possess and use medical marijuana in certain circumstances without violating state law. Court File, pp. 185-188; 6-27-12 Transcript; 6-28-12 Transcript.

Crouse filed a post-trial motion seeking the return of the marijuana and other items of evidence seized by police. Court File, pp. 198-199. The People opposed the motion with respect to the marijuana, arguing that granting it would result in a violation of the federal Controlled Substances Act (CSA), which prohibits the

distribution of marijuana. Court File, pp. 218-223. The district court granted Crouse's motion, and the People filed an appeal with the court of appeals. Court File, pp. 229-242. In a published opinion issued December 19, 2013, the court of appeals affirmed the district court's order. See People v. Crouse, 2013 COA 174.

The People filed a petition seeking certiorari review of the court of appeals' opinion, and this court granted that petition in an order issued June 15, 2015.

STATEMENT OF THE FACTS

Colorado Springs police seized drug paraphernalia, 55 marijuana plants, and approximately 2.9 kilograms of marijuana product from Crouse's home, resulting in the filing of the charges on which he was acquitted after a jury trial. Court File, pp. 185-188; pp. 201-206.

In opposing Crouse's motion for the return of the marijuana, the People argued, among other things, that granting the motion would result in a violation of the CSA, which prohibits the distribution and possession of marijuana. Court File, pp. 220-222. The People acknowledged that article XVIII, section 14(2)(e) of the Colorado Constitution (the return directive) required the marijuana to be returned to Crouse after his acquittal on criminal charges, but they argued that federal law

preempted the conflicting state law in this instance because returning the marijuana to Crouse would stand as an obstacle to the objectives of the CSA. Court File, pp. 218-223; 9-17-12 Transcript, p. 16, lines 20-24.

Crouse argued the CSA does not preempt state laws that permit the use of marijuana for medical purposes. Court File, pp. 224-228. He contended that there is no meaningful conflict between the Medical Use of Marijuana Amendment and the CSA because Congress enacted the CSA to prevent recreational (and not medical) drug use. Court File, p. 227, ¶ 19. He further contended that the CSA does not preempt the Medical Use of Marijuana Amendment because, among other things, Congress did not intend for the CSA to occupy the entire field of drug regulation; the CSA provides immunity to prosecution under its provisions to state law enforcement officers who are enforcing state laws related to controlled substances; and the federal government has not shown any inclination to prosecuting persons who use marijuana in compliance with state law. Court File, pp. 227-228.

The district court granted Crouse's motion to return the marijuana that police had seized from him. Court File, pp. 229-235. The court determined that, contrary to the People's argument, returning the marijuana to Crouse would not violate the

CSA, which (under 21U.S.C. § 885(d)) grants immunity to law enforcement who are engaged in the enforcement of any law relating to controlled substances. Court File, p. 231. Based on this determination, the court concluded that there was no conflict between state and federal law and therefore "no preemption of Colorado's Constitutional mandate that seized medicinal marijuana be returned to a defendant upon his acquittal of the marijuana related charges." Court File, pp. 231-232.

On appeal to the court of appeals, the People argued that the CSA, 21 U.S.C. § 801 et seq., which prohibits the distribution of marijuana for medical purposes, preempts the return directive in section 14(2)(e) because 14(2)(e) is an obstacle to the purposes and objectives of the CSA. People v. Crouse, 2013 COA 174, ¶ 1. A majority of the court of appeals disagreed, for three reasons.

First, the majority interpreted 21 U.S.C. § 903, which states that no provision of the CSA shall be construed to occupy the field in which it operates absent a "positive conflict" with state law "so that the two cannot consistently stand together," to foreclose obstacle preemption. Id. at ¶¶ 2, 23-25. Second, the majority concluded that 21 U.S.C. § 885(d), which provides immunity from all liability to any state officer who is "lawfully engaged in the enforcement of any . . . law relating to controlled substances," precludes applying prohibitions in other

CSA sections to police officers who are complying with a court order issued under section 14(2)(e). Id. at ¶¶ 2, 32-39. Third, the majority concluded that the recipient patient's involvement in the return process did not create obstacle preemption because the federal government may not commander state officials to seize and hold marijuana and section 14(2)(e) does not require patients to demand return or accept returned marijuana. Id. at ¶¶ 2, 39-46.

Judge Bernard dissented from the majority's holding, concluding that the CSA's prohibition on marijuana distribution preempted the return directive in section 14(2)(e). Id. at ¶¶ 49-116. Judge Bernard was not persuaded by the majority's opinion, for (among other reasons) the following:

- The majority misconstrued the immunity provision found in 21 U.S.C. § 885(d). Properly construed, that provision provides immunity to law enforcement officers who are engaged in compelling compliance with laws that (unlike section 14(2)(e)) are consistent with the CSA. Id. at ¶¶ 50-60, 106-111.
- 21 U.S.C. § 903, which provides for the preemption of state laws that positively conflict with the CSA, applies to laws that (like section 14(2)(e))

create an obstacle to, and thus conflict with, the goals of the CSA. Id. at ¶ 73.

- Section 14(2)(e) is an obstacle to the CSA, because the former requires law enforcement officers to distribute marijuana to medical marijuana patients whereas the latter prohibits the distribution of marijuana for medical use. As a result, section 14(2)(e) obstructs the CSA's clear purposes because it requires law enforcement officers and medical marijuana patients to engage in conduct that the CSA forbids. Id. at ¶¶ 74-103.
- Because the CSA preempts section 14(2)(e), application of the preempted law is unconstitutional under the Supremacy Clause of the United States Constitution. Id. at ¶¶ 104-105.

SUMMARY OF THE ARGUMENT

A federal law may preempt state law, even in the absence of express preemptive language or an indication that Congress has intended to occupy an entire field of regulation, if the state law conflicts with federal law. Such a conflict occurs when, among other things, a state law that authorizes conduct prohibited by federal law is an obstacle to accomplishing the objectives of the federal law.

Colorado's Medical Use of Marijuana Amendment permits the possession of marijuana for medical use under certain conditions. It also requires law enforcement to return marijuana that has been seized from defendants who are prosecuted and acquitted of criminal charges related to their possession of the drug. But the federal CSA prohibits the distribution and possession of marijuana for nearly all uses, including medical. Under federal law, marijuana has no acceptable medical use and cannot be legally prescribed. Because the Colorado Amendment authorizes conduct that the CSA forbids, it is an obstacle to the objectives of Congress. Therefore, the provisions of the Colorado Amendment that authorize the possession, distribution, and use of marijuana — including provisions that authorize law enforcement to return seized marijuana — are preempted by the CSA.

In holding that the CSA does not preempt the return directive in article XVIII, section 14(2)(e) of the Colorado Constitution, the majority opinion of the court of appeals misconstrues preemption law. Specifically, the majority misreads 21 U.S.C. § 903 and 21 U.S.C. § 855(d) to foreclose preemption. Nothing in either provision demonstrates an intent to save state laws that, like the return directive in section 14(2)(e), pose an obstacle to the accomplishment and execution of the

CSA's objective of eradicating the possession, distribution, and use of marijuana. Moreover, the majority fails to recognize that the return directive does not merely permit the occurrence of conduct that violates the CSA; it requires law enforcement officers to act in violation of the CSA and therefore is an obstacle to the purposes and objectives of the federal act.

In these circumstances, the appropriate relief is for this Court to reverse the decision of the court of appeals that requires the Colorado Springs Police Department to return Crouse's marijuana to him.

STANDARD OF REVIEW

Whether federal law prohibiting the possession and distribution of marijuana preempts Colorado law requiring law enforcement authorities to distribute marijuana for medical purposes is a question of law. See, e.g., Timm v. Prudential Ins. Co. of America, 259 P.3d 521, 524 (Colo.App. 2011) (federal preemption is a question of law). Such questions are subject to de novo review on appeal. Id.

Crouse's motion for the return of his marijuana is found in the Court File at pp. 198-199. The People's response is found in the Court File at pp. 218-223. The transcript of the hearing on Crouse's motion is found in the 9-17-12 Transcript.

The district court's order granting Crouse's motion on the ground that the CSA does not preempt the Medical Use of Marijuana Amendment is found in the Court File at pp. 229-235. The court of appeals' opinion affirming the district court's order is attached as an appendix to the People's petition for certiorari and may also be found at 2013 COA 174.

ARGUMENT

The court of appeals erred in concluding that the federal Controlled Substances Act (CSA) does not preempt article XVIII, section 14(2)(e) of the Colorado Constitution, where the state directive requires law enforcement officers to distribute marijuana to medical marijuana patients in violation of the CSA's prohibition of such acts.

A. Preemption under the Federal Controlled Substances Act

Under the Supremacy Clause of the United States Constitution, the "Constitution, and the Laws of the United States . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. "Under this principle, Congress has the power to preempt state law." Arizona v. United States, 567 U.S.___, ___, 132 S.Ct. 2492, 2500, 183 L.Ed.2d 351 (2012). "Congress's preemption power is, of course, expansive. It is hornbook law that Congress may preempt any state law

that obstructs, contradicts, impedes, or conflicts with federal law." Robert A. Mikos, On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime, 62 Vand. L. Rev. 1421, 1445 (2009).

Federal law may preempt state law in one of three ways:

1) In enacting federal law, Congress may explicitly define the extent to which it intends to preempt state law;

2) Absent any express preemptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the states must leave all regulatory activity in that area to the Federal Government; or

3) In areas where Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent the state law actually conflicts with federal law.

Michigan Canners and Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984). See also Dep't of Health v. The Mill, 887 P.2d 993, 1004 (Colo. 1994).

A state law conflicts with federal law — and is preempted by federal law —

if it is physically impossible to comply with both the state and federal regulations or the state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Arizona v. United States, ___ U.S. at ___, 132 S.Ct. at 2501.

Article XVIII, section 14(2(e) of the Colorado Constitution (the return directive) conflicts with the federal CSA. Under section 14(2)(e), property that is possessed, owned or used in connection with the medical use of marijuana shall not be forfeited under any provision of state law other than as a sentence imposed after conviction of or entry of a plea to a criminal offense, and "[s]uch property shall be returned immediately . . . upon acquittal" of a criminal charge. In direct opposition to section 14(2)(e) is the CSA, which prohibits the distribution and possession of all marijuana without regard to whether state law permits its use for medical purposes. 21 U.S.C. §§ 841, 844(a).

The CSA prohibits the distribution and possession of all marijuana without regard to whether state law permits its use for medical purposes. 21 U.S.C. §§ 841, 844(a). Under the CSA, there is no personal property right in marijuana or marijuana-related paraphernalia. See 21 U.S.C. §§ 881(a)(1), (a)(3), and (a)(10). Under the CSA, marijuana has no acceptable medical use and cannot be lawfully

prescribed. Gonzales v. Raich, 545 U.S. 1, 27, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005)). See also United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 486, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001) (there is no medical necessity exception to the federal prohibition against manufacturing and distributing marijuana). The CSA defines marijuana as a Schedule I drug and prohibits its use and distribution in all circumstances except for federally-approved research projects. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. at 491. See also Coates v. Dish Network, LLC, 2015 CO 44, 350 P.3d 849, ¶ 19 (Colo. 2015) (citing 21 U.S.C. § 812(b)(1)(A)-(C)). Schedule I is the most restrictive of the five schedules on which a drug may be placed, and it is reserved for drugs with no currently accepted medical use in the United States, a high potential for abuse, and a lack of accepted safety for medical use under medical supervision. Oakland Cannabis Buyers' Cooperative., 532 U.S. at 491-492.

In practical effect, the return directive in Colorado's Medical Use of Marijuana Amendment legalizes conduct that Congress intended to outlaw in enacting the CSA. The provision requires law enforcement officers to distribute marijuana in violation of the CSA. Under the CSA, delivery of marijuana to another satisfies the distribution requirement, regardless of whether there is an

exchange of money. See 21 U.S.C. § 802(11) (defining "distribute" to mean the delivery of a controlled substance); 21 U.S.C. § 802(8) (the word "deliver" means "the actual constructive, or attempted transfer of a controlled substance"); United States v. Washington, 41 F.3d 917, 919-920 (4th Cir. 1994) (money need not be exchanged for distribution of a controlled substance to occur).

Because Colorado's Amendment requires law enforcement authorities to distribute marijuana, it is an obstacle to the objectives of Congress, and on that basis it is preempted by the CSA. In this regard, the Oregon Supreme Court's opinion in Emerald Steel Fabricators, Inc., v. BOLI, 348 Or. 159, 230 P.3d 518 (2010), which compares obstacle preemption in the context of state laws authorizing medical marijuana to obstacle preemption in other contexts, is persuasive:

> If Congress chose to prohibit anyone under the age of 21 from driving, states could not authorize anyone over the age of 16 to drive and give them a license to do so. The state law would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress (keeping everyone under the age of 21 off the road) and would be preempted. Or, to use a different example, if federal law prohibited all sale and possession of alcohol, a state law licensing the sale of alcohol and authorizing its use would stand as an obstacle to the full accomplishment of Congress's purposes. ORS 475.306(1) [the Oregon statute which permits possessors of lawfully-issued registry cards to use medical marijuana] is no different. To the extent that ORS 475.306(1) authorizes persons holding medical marijuana

> licenses to engage in conduct that the Controlled Substances Act explicitly prohibits, it poses the same obstacle to the full accomplishment of Congress's purposes (preventing all use of marijuana, including medical uses).

Emerald Steel Fabricators, Inc. v. BOLI, 348 Or. at 182, 230 P.3d at 531.

Here, the Colorado law that obligates law enforcement to return marijuana to medical users of the drug who have been acquitted of marijuana-related crimes is an obstacle to the full accomplishment of Congress's purposes under the CSA, i.e., to prevent the distribution and use of marijuana for, among other things, medical purposes. In light of this fact, holding of the majority of the court of appeals that the CSA does not preempt article XVIII, section 14(2(e) of the Colorado Constitution is erroneous.

B. The flaws in the reasoning of the court of appeals' majority opinion

1. The majority opinion misconstrues 21 U.S.C. § 903 to foreclose obstacle preemption.

The plain language of the CSA provides for the preemption of state laws that positively conflict with the CSA:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict

> between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903

The United States Supreme Court has construed § 903 as "explicitly contemplat[ing] a role for the States in regulating controlled substances." Gonzalez v. Oregon, 546 U.S. 243, 251, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006). Under this construction, states may pass laws related to controlled substances (including marijuana) as long as they do not create a "positive conflict" such that state law and federal law "cannot stand consistently together."

In this case, the majority of the court of appeals construed 21 U.S.C. § 903 to foreclose obstacle preemption because § 903 omits any specific reference to an intent to preempt laws that pose an obstacle to the CSA. Crouse, 2013 COA 174, ¶ 23 (following County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 481 (Cal. Ct. App. 2008)). In the majority's view, a state marijuana law is in "positive conflict" with the CSA only when it is simultaneously impossible to comply with both laws. Id.

By contrast, Judge Bernard's dissent construed § 903 to include both the impossibility and obstacle prongs of conflict preemption. Id. at ¶ 73 (Bernard, J. dissenting). Citing Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 873-

874, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), Judge Bernard noted that, among other things, the United States Supreme Court has refused to abide either variety of conflict preemption when interpreting federal statutes that expressly restrict the scope of their preemptive effect. Crouse, 2013 COA 174, ¶ 73 (Bernard, J. dissenting). In Geier, a majority of the Court held that a federal agency safety standard that required auto manufacturers to equip some, but not all, of their vehicles with passive restraint mechanisms preempted a California tort suit based on a manufacturer's violation of a state law that required the installation of airbags in all cars. Geier, 529 U.S. at 866-867. In reaching this conclusion, the majority stated that the state law was an obstacle to the federal objective of "gradually developing [a] mix of alternative passive restraint devices for safety-related reasons." Id. at 886. The majority rejected the dissent's attempt to "require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists," noting that conflict preemption "turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent." Id. at 884.

Judge Bernard's application of obstacle preemption in this case is true to the reasoning of Geier, and his construction of 21 U.S.C. § 903 is consistent with the

United State Supreme Court's construction of similar language in the preemption provision in another federal statute. In Wyeth v. Levine, 555 U.S. 555, 567-581, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009), the Court applied both impossibility and obstacle preemption in construing the effect of a provision in the Food Drug and Cosmetic Act that stated that a state law would be preempted only where it was in "direct and positive conflict" with federal law.

Consistent with Wyeth, courts in other states have construed the language in 21 U.S.C. § 903 to encompass both the impossibility and obstacle prongs of conflict preemption and have analyzed the preemption issue under both prongs when analyzing the interplay between their state's laws and the CSA. See Qualified Patients Ass'n v. City of Anaheim, 187 Cal.App.4th 734, 756-763, 115 Cal. Rptr. 3d 89, 106-110 (2010); Ter Beek v. City of Wyoming, 297 Mich.App. 446, 457-464, 823 N.W.2d 864, 870-874 (2012); Emerald Steel Fabricators, Inc. v. BOLI, 348 Or. at 175-178, 230 P.3d at 527-529 These courts have recognized what the court of appeals' majority opinion fails to acknowledge: state appellate courts must abide by federal statutes, which are 'the supreme law of the Land,' and by the United States Supreme Court's stated understanding of those statutes. Nitro-Lift Technologies, L.L.C. v. Howard, ___ U.S. ___, 133 S.Ct. 500, 184

L.Ed.2d 328 (2012) (quoting U.S. Const. article VI, cl. 2, and vacating a decision of the Oklahoma Supreme Court that failed to adhere to the United States Supreme Court's interpretation of a federal statute).

Nothing in 21 U.S.C. § 903 demonstrates an intent to save state laws that pose an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA. The court of appeals' contrary interpretation reads the CSA to allow a conflict that obstacle preemption would otherwise prohibit, thus creating a perverse situation where the CSA is allowed to "defeat its own objectives, or . . . to "'destroy itself.'" Geier, id. at 872 (quoting American Telephone and Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 228, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998)).

2. The majority opinion misconstrues 21 U.S.C. § 885(d) to foreclose obstacle preemption.

As one commentator notes, "the preemptive effect of the CSA has been muddied somewhat by confusion over the meaning and significance of a relatively obscure provision of the CSA granting immunity to state agents who enforce state drug laws." Mikos, On the Limits of Supremacy, 62 Vand. L. Rev. at 1457. That provision, 21 U.S.C. § 885(d), provides that, subject to exceptions that have no applicability here, no civil or criminal liability will be imposed by virtue of the

CSA upon any duly authorized officer of any state or a political subdivision within a state "who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances."

In relying on § 885(d) as a basis to foreclose obstacle preemption, the majority of the court of appeals made two errors of statutory construction. First, the majority erred in concluding that the officers who returned Crouse's marijuana to him were engaged in the "enforcement" of Colorado's return directive "because they acted under a court order that implemented a mandatory provision of the MM Amendment." Crouse, 2013 COA 174, ¶ 34. The majority applied definition of "enforcement" in Black's Law Dictionary, 608 (9th ed. 2009) to reach its conclusion, but that definition ("[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement") does not support the majority's understanding of the word. The officers who returned Crouse's marijuana were not compelling anyone to do anything; they were implementing the return directive at the direction of the district court. As one federal judge has observed in construing § 885(d), a person who implements or facilitates the purpose of a statute without compelling anyone else to act or refrain from acting is not engaged in an act of enforcement. United States v. Rosenthal, 266 F.Supp.2d 1068, 1078 (N.D.

Cal. 2003), rev'd on other grounds, 454 F.3d 943 (9th Cir. 2006). Complying with the return directive (which is what the officers in this case did by returning Crouse's marijuana) cannot be considered "enforcement" of the directive any more than a motorist's compliance with the speed limit can be considered to be "enforcement" a traffic law.

The majority made a second error in construing § 885(d) by assuming that officers who return marijuana to patients under article XVIII, section 14(2(e) of the Colorado Constitution are "lawfully engaged" in the enforcement of a law related to controlled substances. As Judge Bernard's dissenting opinion observes, the Crouse majority's interpretation of § 885(d) is flawed because it presupposes that officers who comply with section 14(2)(e)'s return directive are immune from prosecution under the CSA, without first determining if the officers' compliance is lawful, i.e., whether they are complying with a law that is unconstitutional because it is preempted by the CSA. Crouse, 2013 COA 174, ¶ ¶ 50-52 (Bernard, J. dissenting).

If the majority had the benefit of this court's recent opinion in Coates v. Dish Network, LLC, 2015 CO 44, 350 P.3d 849, ¶ 19 (Colo. 2015), it would have concluded that law enforcement's compliance with the return directive does

not automatically trigger the immunity provided under § 885(d). In Coates, this Court held that a licensed medical marijuana user who was fired for using marijuana outside of work did not state a claim for relief under a state statute (section 24-34-402.5(1), C.R.S. 2015) that makes it an unfair and discriminatory labor practice to discharge an employee for his or her "lawful" conduct outside of work. The opinion construes the term "lawful" in its "general, unrestricted sense" to mean "that which complies with applicable 'law,' including state and federal law." Coates, 2015 CO 44, ¶ 18. Coates does not address preemption, but the opinion notes in passing that, under the Supremacy Clause, federal law shall prevail if there is any conflict between federal and state law. Id. at ¶ 19, quoting Gonzales, 545 U.S. at 29, 125 S.Ct. 2195.

Although Coates does not interpret the "lawfully engaged" language in § 885(d), that language is substantially the same as the "lawful" language in section 24-34-402.5(1), and the federal statute should be construed no differently than the state statute. Under both statutes, conduct must not violate state or federal law in order to be "lawful." Section 885(d) should not be read to provide immunity for acts of distribution that are lawful under state law but unlawful under federal law. To hold otherwise "would render the express preemption language of [21 U.S.C. §

903] meaningless." Mikos, On the Limits of Supremacy, 62 Vand. L. Rev. at 1457. See also Rosenthal, id., 266 F.Supp.2d at 1079 (to be "lawfully engaged in the enforcement of any law" related to controlled substances means compelling compliance with laws that are at least not inconsistent with the CSA). There is no reason to believe that Congress, having proscribed the distribution of marijuana for nearly all purposes (including medical), intended to provide immunity for the distribution of medical marijuana under state law.

The true purpose of § 885(d) is "readily apparent," and that purpose is not to require law enforcement agents to distribute marijuana for public use:

> In order to handle narcotics legally during drug investigations, both state and federal law enforcement agents must have immunity. Without it undercover agents and informants could not feel secure handling narcotics in the course of a drug sting; in theory, by handling the drugs, they could face the same charges as the drug pushers they investigate. Yet such technical violations of the CSA clearly help facilitate the Act's overriding purpose of eradicating the illicit drug trade. Hence, granting immunity for such infractions makes perfect sense.

Mikos, Id. at 1458-1459. See also United States v. Cortes-Caban, 691 F.3d 1, 20-21 (1st Cir. 2012) (§ 885(d) "protects accepted law enforcement tactics such as sting or reverse-sting operations in which officers handle and transfer drugs, the transfer of suspected drugs to DEA laboratory agents for analysis, or to a clerk of

court in the course of presenting evidence at trial, none of which could give rise to prosecution under [the CSA]").

"Congress obviously intended that the CSA would apply to 'the unlawful conduct of law enforcement officers,' or it would have had 'no reason to have enacted' section 885(d)." Crouse at ¶ 108 (Bernard, J. dissenting) (quoting Cortes-Caban, 691 F.3d at 21). Because the return directive in section 14(2)(e) is preempted and therefore unconstitutional, officers who comply with that directive violate the CSA and are therefore not entitled to immunity under 21 U.S.C. § 885(d).

3. The majority opinion confuses state laws that require an affirmative act in violation of the CSA (and are therefore preempted) with laws that merely permit the occurrence of conduct that violates the CSA (and are therefore not preempted).

The Congress cannot compel the states to enact, administer, or enforce a federal regulatory program:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz v. United States, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). In Printz, the Supreme Court held that federal legislation that required state law enforcement agencies to conduct criminal background checks of prospective firearms purchasers was unconstitutional. Id.

Relying on Printz, the Crouse majority concluded that the CSA does not preempt the return directive in Article XVIII, section 14(2(e) of the Colorado Constitution because: (1) the federal government may not require states to seize and hold marijuana in the first instance, and therefore (2) preempting a state constitutional provision immunizing medical marijuana patients from state prosecution would in effect recriminalize their possession and use of marijuana. Crouse at ¶ 46.

The majority's conclusion ignores the plain language of the CSA, which prohibits all distribution of marijuana, including the redistribution of previously-seized marijuana.

> The conduct in question is an affirmative act, which is the physical act of returning marijuana. Police officers who return marijuana to medical marijuana patients distribute it, and those medical marijuana patients are complicit in such distribution. And distribution of marijuana is a federal crime under the CSA.

Crouse at ¶ 92 (Bernard, J. dissenting).

Because the return directive in section 14(2)(e) requires law enforcement officers to violate the CSA by engaging in conduct that the CSA forbids, section 14(2)(e) is an obstacle to the purposes and objectives of the federal act. See, e.g., Michigan Canners and Freezers Assn., 467 U.S. at 478, 104 S.Ct. 2527 (to the extent Michigan law empowered associations of agricultural producers to do precisely what federal law forbade them to do, that law was an obstacle to the objectives of Congress and therefore preempted by federal law).

CONCLUSION

For the reasons stated in this opening brief, the court of appeals erred in affirming the district court's order requiring the Colorado Springs Police Department to return Crouse's marijuana to him. The court of appeals' opinion should be reversed.

DANIEL H. MAY #11379
DISTRICT ATTORNEY

Doyle Baker, #22277
Senior Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that a copy of this Opening Brief has been delivered as indicated below to:

Charles T. Houghton, Esq.
Charles T. Houghton, P.C.
P.O. Box 847
Colorado Springs, Colorado 80901
(ICCES)

Clifton Black, Esq.
Black & Graham, LLC
128 South Tejon Street, Suite 410
Colorado Springs, Colorado 80903
(ICCES)

Laura Haynes, Esq.
Laura Haynes, P.C.
31 N. Tejon, Suite 413
Colorado Springs, Colorado 80903
(ICCES)

W. Erik Lamphere, Esq.
Office of the City Attorney
City of Colorado Springs
P.O. Box 1575, Mail Code 510
Colorado Springs, Colorado 80901
(ICCES)

12-11-15
Date