Honorable Ronald E. Culpepper

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR COUNTY OF PIERCE

MMH, LLC, a Washington limited liability company,

Plaintiff,

and

DOWNTOWN CANNABIS COMPANY, LLC, MONKEY GRASS FARMS, LLC, and JAR MGMT, LLC, d/b/a RAINIER ON PINE, Washington limited liability companies,

Plaintiff-Intervenors,

vs.

CITY OF FIFE, a Washington municipal corporation,

Defendant,

and

ROBERT W. FERGUSON, Attorney General of the State of Washington,

Defendant-Intervenor.

NO. 14-2-10487-7

PLAINTIFF-INTERVENORS' RESPONSE TO AMICUS CURIAE BRIEF OF PIERCE COUNTY, LEWIS COUNTY, CITY OF YAKIMA, AND TOWN OF WILBUR

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

COMPANION:

GRAYBEARD, LLC, a Washington limited liability company,

Plaintiff,

vs.

CITY OF FIFE, a Washington municipal corporation,

Defendant.

I. Introduction

Plaintiff-Intervenors Downtown Cannabis Company, LLC, Monkey Grass Farms, LLC, and JAR MGMT, LLC d/b/a Rainier on Pine ("Plaintiff-Intervenors") respectfully submit this response to the Amicus Curiae Brief of Pierce County, Lewis County, City of Yakima, and Town of Wilbur ("Amicus Brief"), for the Court's consideration should the Court grant Amici's Motion for Permission to File Brief of Amicus Curiae.

II. Correction of Misstatements of Fact

Amici allege in their Statement of Facts that "both before and after the Cole Memo[1] was issued, the DEA *increased* its law enforcement activities in complete disregard of state laws decriminalizing marijuana" (emphasis in original, footnote added). Amicus Brief, p. 3, ll. 4-5. In support of this allegation, Amici cite two news media stories. *Id.* at ll. 6-9, n. 2. However, Amici fail to acknowledge and advise the Court of the following:

1. Citing one news story, Amici characterize the DEA's execution of search warrants at certain Colorado marijuana operations as being "in complete

[1] Memorandum for All United States Attorneys from James M. Cole, Deputy Attorney General, re: Guidance Regarding Marijuana Enforcement, Aug. 29, 2013 ("Cole Memo").

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

disregard of state laws." However, within the very same story, the reporters quoted U.S. Department of Justice spokesperson Jeff Dorschner as saying, "Although we cannot at this time discuss the substance of this pending investigation, the operation under way today comports with the Department's recent guidance regarding marijuana enforcement matters," and "[w]hile the investigation is ongoing, there are strong indications that more than one of the eight federal prosecution priorities identified in the Department of Justice's August guidance memo are potentially implicated."[2] Amici also fail to bring to the Court's attention that the article included additional information from Kevin Merrill, assistant special agent in charge of the DEA's Denver field division, indicating that "his investigators were aware of many instances of operators with pending license applications who would not qualify because of criminal records, failure to meet residence requirements or because they have registered the business in another name while they are in control" – in other words, the DEA was investigating operators who appeared to be violating Colorado state marijuana laws. Contrary to Amici's representations to the Court, DEA enforcement against such operators would not be "in complete disregard of state laws decriminalizing marijuana," but would in fact be completely consistent with state laws and with the traditional role of the DEA in the federal-state partnership to focus resources on investigations of activities that not only violate state law but also implicate federal enforcement priorities.

[2] "Feds raid Denver-area marijuana dispensaries, grow operations, 2 homes," by Jeremy P. Meyer, Eric Gorski and John Ingold (*The Denver Post*, Nov. 21, 2013), attached to Amicus Brief at Appendix B.

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

2. Regarding the concern that "[f]ederal agents have raided a number of medical marijuana dispensaries in the Puget Sound region," Amici fail to acknowledge that medical marijuana dispensaries are not legal in Washington. In fact, the Washington State Medical Use of Cannabis Act (MUCA) is not a "state law[ ] decriminalizing marijuana" for anyone. "[A]lthough the MUCA provides for an affirmative defense, '[a]n affirmative defense does not per se legalize an activity." *Cannabis Action Coalition v. City of Kent*, 180 Wn. App. 455, 476, 322 P.3d 1246 (2014) (quoting *State v. Fry*, 168 Wn.2d 1, 10, 228 P.3d 1 (2010)). Accordingly, individuals operating medical marijuana dispensaries in Washington cannot be in "clear and unambiguous compliance with"[3] Washington state law or engaging in "conduct in compliance with [Washington] laws and regulations."[4] Rather, as stated by the U.S. Attorney for the Western District of Washington, "The continued operation and proliferation of unregulated, for-profit entities *outside of the state's regulatory and licensing scheme* is not tenable and violates both state and federal law."[5] Once again, the federal enforcement actions cited by Amici are entirely consistent with Washington state law and the traditional roles of federal and state governments within which the regulatory scheme of Initiative 502 (I-502) falls.

---

[3] Memorandum for Selected United States Attorneys from David W. Ogden, Deputy Attorney General, re: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, Oct. 19, 2009 ("Ogden Memo").

[4] Cole Memo at 3.

[5] Statement of U.S. Attorney Jenny A. Durkan on Federal Marijuana Enforcement Policy Announcement, Aug. 29, 2013, available at http://www.justice.gov/usao/waw/press/2013/August/usattorneystatement.html (emphasis supplied).

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

3. No evidence outside these two news stories supports Amici's allegation that the DEA has "increased its law enforcement activities" around marijuana. To the contrary, according to the agency's own reported statistics,[6] most enforcement metrics in Washington, Colorado, and the United States have decreased since the debate and passage of I-502 and Colorado's Amendment 64. A chart illustrating enforcement statistics for DEA eradication of indoor and outdoor marijuana grow sites and marijuana arrests in Washington, Colorado, and the United States during the 2011-2013 period is attached as Appendix A.

Federal law enforcement agencies' enforcement of federal marijuana laws – before and after debate and passage of I-502, and before and after publication of the Cole Memo – has been consistent with the traditional deference paid by the federal government to the states regarding marijuana-related activities occurring within their borders. At best, Amici's reliance on a misunderstanding of the facts concerning federal law enforcement demonstrates and reinforces the need for this court to engage in meaningful fact-finding before deciding that I-502 is preempted as an "obstacle" to the Controlled Substances Act (CSA), as Plaintiff-Intervenors have urged.

III. State Law Preemption

Local jurisdictions are permitted to pass and enforce regulations that are not in conflict with the laws of the State.[7] Fife's ordinance is inconsistent with and preempted by RCW 69.50.608, as well as being directly in conflict with I-502,[8]

[6] Available at http://www.justice.gov/dea/ops/cannabis.shtml.
[7] *City of Bellingham v. Schampera*, 57 Wn.2d 106, 108, 356 P.2d 292 (1960).
[8] Article XI, section 11, of the Washington State Constitution provides that "[a]ny county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws."

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

which is designed to drive out the black market for marijuana by providing for the licensed production, processing, or retail sale of marijuana across Washington.

A. RCW 69.50.608 Preempts the Entire Field of Setting Criminal and Civil Penalties for Uniform Controlled Substances Act Violations

RCW 69.50.608 states that, "the state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act." Amici assert that this provision only applies to criminal penalties for drug violations, and not civil, but provide no authority for this conclusion.[9] As defined in Black's Law Dictionary, "penalty" applies to both criminal and civil sanctions:

> Punishment imposed on a wrongdoer, usu. in the form of imprisonment or fine; esp., a sum of money exacted as punishment for either a wrong to the state or a *civil wrong* (as distinguished from compensation for the injured party's loss). • Though usu. for crimes, penalties are also sometimes imposed for *civil wrongs*.[10]

Further, Washington's Uniform Controlled Substances Act (UCSA) itself includes civil penalties in addition to criminal ones. For example, drug paraphernalia offenses[11] and uses of marijuana in view of the general public[12] are civil infractions. These civil infractions are subject to monetary "penalties" – RCW 7.80. The criminal versus civil distinction offered by Amici is incorrect, and it does not matter that "Fife's ordinance is a civil zoning regulation."[13]

Moreover, even if Amici's criminal versus civil distinction were relevant, Fife's zoning regulations in fact do impose criminal penalties. Violations of Fife's

---

[9] Amicus Brief, p. 7, ¶ 4.
[10] BLACK'S LAW DICTIONARY, p. 1168 (8th ed. 2004) (emphasis added).
[11] RCW 69.50.4121.
[12] RCW 69.50.445.
[13] Amicus Brief, p. 8, ¶ 2.

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

zoning regulations,[14] which include operating a state-licensed and fully compliant I-502 business, can lead to local civil[15] and criminal charges.[16] A state-licensed I-502 business can be penalized simply for existing and operating in Fife. These penalties, set by Fife, are inconsistent with the UCSA because they outlaw and punish activities that are permitted under state law. Only the state of Washington may set penalties for violations of the UCSA.

Fife has impermissibly set penalties for violations of the UCSA by banning I-502 businesses. Although it is undisputed that I-502 and its corresponding regulations allow local jurisdictions to enforce generally applicable zoning regulations, banning these businesses runs afoul of RCW 69.50.608. Fife's ordinance, and the penalty provisions it relies upon, are inconsistent with I-502 and should be preempted and repealed. Moreover, Fife's ordinance is in conflict with I-502 generally.

B. Fife's Ordinance Conflicts with I-502's Goal of Driving Out Black Market Sales of Marijuana

"A local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits. Where a conflict is found to exist, under the principle of conflict preemption, the local regulation is invalid."[17] Amici argue that this Court "need not address 'Conflict' preemption because of I-502's specific reservation of local jurisdiction and its creation of concurrent jurisdiction."[18] Citing to *Lawson v. City of Pasco*, 168 Wn.2d 675, 230 P.3d 1038 (2010), Amici appear to be claiming that Fife's ordinance and I-502 can

---

[14] FMC 19.96.010.
[15] FMC 19.96.030 (B)(4).
[16] FMC 19.96.030 (B)(5).
[17] *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004); 6A Eugene McQuillin, *The Law of Municipal Corporations* § 24.54, at 150 (3rd rev. ed. 1997) ("that which is allowed under state law cannot be prohibited by ordinance").
[18] Amicus Brief, p. 14, ¶ 2.

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

be "harmonized" and that no conflict exists, but provide zero explanation for why this is the case. This Court should not be persuaded by this cursory analysis, as it attempts to sidestep the fundamental question of whether Fife's ordinance directly and irreconcilably conflicts with I-502.

Additionally, despite suggesting that this Court need not address conflict preemption in this instance, Amici earlier in its brief cite to cases that examined local laws under the conflict analysis. For example, in *Lawson,* 168 Wn.2d at 682, the Washington Supreme Court examined the "more nuanced question" of whether a local law irreconcilably conflicts with state law. Similarly, in *Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d 621 (1998), the Court examined conflict preemption.

An impermissible conflict was not found in *Rabon*, and Amici cite the case as authority that "ordinances may validly forbid that which state law allows."[19] However, the state and local laws at issue in *Rabon* were fundamentally different than Fife's ordinance and I-502. The state law in *Rabon*, RCW 16.08.090, specifically assigned regulation of dangerous dogs to local jurisdictions: "Potentially dangerous dogs *shall be regulated only by local, municipal, and county ordinances.* Nothing in this section limits restrictions local jurisdictions may place on owners of potentially dangerous dogs" (emphasis added). I-502, on the other hand, was passed by Washington voters to replace the state's illegal marijuana market with a tightly regulated one that provides "adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market."[20] Unlike RCW 16.08.090's explicit and exclusive assignment of regulation of dangerous dogs to local jurisdictions, I-502

[19] Amicus Brief, p. 11, ¶ 2.
[20] RCW 69.50.345(2)(c), (6)(b).

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

granted the state Liquor Control Board (LCB) regulatory authority to "establish the procedures and criteria necessary" and adopt rules "deemed necessary or advisable" to accomplish the goal of creating a statewide, regulated marijuana market.[21]

Allowing local jurisdictions to ban marijuana sales would directly contradict the purpose of I-502. For I-502 to succeed, the marijuana marketplace must function throughout the state, taking into consideration population distribution.[22] I-502 specifically tasks LCB with creating that regulated marketplace, and authorizes the agency to determine locations of the retail outlets that will provide the mandated "adequate access" to state-legal marijuana.[23] Local bans like Fife's ordinance directly conflict with I-502's assignments of responsibility and grants of authority to LCB and therefore violate Article XI, section 11 of the Washington state constitution.

IV. Federal Law Preemption

A. Amici's Central Argument Fails Under the Dual Sovereignty and Anti-Commandeering Doctrines

Amici argue that I-502 is preempted by the federal Controlled Substances Act (CSA) because it "requires government employees to allow the violation of federal law"[24] and "allows and even encourages activities that are illegal under federal law."[25] However, these arguments have already been made and rejected in preemption challenges to state laws and local ordinances that decriminalize and regulate medical use of marijuana. *See, e.g.*, *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 760 (2010) ("The city further explains '[t]he

[21] RCW 69.50.345, -.342.
[22] *See* RCW 69.50.345(2)(a).
[23] RCW 69.50.342(6).
[24] Amicus Brief, p. 18, ¶ 1-2.
[25] Amicus Brief, p. 16, ¶ 1-2.

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

"obstacle" to federal goals presented by Section 11362.775 is the creation of the exemption for collectives,' which is 'being abused' 'by allowing the diversion of "medical" marijuana to those not qualified to use it.'"); *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 827 (2008) *cert. denied*, 556 U.S. 1235 (2009) ("Counties assert that [medical marijuana] identification cards make it 'easier for individuals to use, possess, and cultivate marijuana' in violation of federal laws").

Like medical marijuana laws and ordinances that create patient identification cards and license and regulate dispensaries, I-502 creates a robust system of identifying marijuana producers, processors, and retailers who meet strict health and safety standards and will, therefore, be exempted from state criminal and civil penalties that otherwise apply to individuals growing and selling marijuana in Washington.[26] As with state and local medical marijuana laws and ordinances, this means I-502 allows, under state law, activities that remain illegal under federal law. Here lies the essence of Amici's complaint: under I-502, "thousands of people do and will violate federal law [without violating] Washington law."[27] To Amici, this is "the fundamental preemption question."[28]

That question has already been answered. The argument that the CSA preempts state marijuana laws that allow, under state law, activities that are illegal under federal law fails because it rests on the faulty premise that the federal government can conscript state actors in pursuit of its goals:

> Counties also appear to assert the identification card laws present a significant obstacle to the CSA because the bearer of an identification card will not be arrested by California's law enforcement officers despite being in violation of the CSA. However, the unstated predicate of this argument is that the federal government is entitled to conscript a state's law enforcement officers into enforcing federal enactments, over the objection of that state, and this entitlement will be obstructed

[26] RCW 69.50.325, -.360, -.363, -.366.
[27] Amicus Brief, p. 19, n. 11.
[28] *Id.*

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

> to the extent the identification card precludes California's law enforcement officers from arresting medical marijuana users. The argument falters on its own predicate because Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws.

San Diego v. NORML, 165 Cal. App. 4th at 827.

The United States Constitution enumerates the limited powers of the federal government and, in the Tenth Amendment thereto, specifically reserves all other powers to the states, or to the people. The Supreme Court has long held that the Tenth Amendment restrains Congress both from requiring a state to enact or keep on its books any law requiring or prohibiting certain acts, *New York v. U.S.*, 505 U.S. 144, 166 (1992), and also from commandeering state actors to enforce federal laws:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. 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 (1997) (emphasis added). Since the federal government cannot, as a constitutional matter, count on state resources to enforce the CSA, a state's decision not to impose criminal or civil sanctions on certain marijuana-related activities, and to create a regulatory system for distinguishing between state-legal and illegal marijuana activity, cannot be said to pose an obstacle to the federal government's pursuit of CSA goals without violating the Tenth Amendment. The federal government's remedy, if one is needed, is to increase deployment of its own law enforcement resources:

> If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

> commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal. That patients may be more likely to violate federal law if the additional deterrent of state liability is removed may worry the federal government, but the proper response—according to *New York* and *Printz*—is to ratchet up the federal regulatory regime, *not* to commandeer that of the state.

Conant v. Walters, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring; footnote omitted).

It also bears noting that Amici's argument is also foreclosed by the CSA itself. While Amici wrongly believe that merely "allowing" activity that is in violation of federal law is a sufficient predicate for finding federal preemption, in the CSA Congress has said that it did *not* intend to exclude state laws "including criminal penalties" unless there is "a positive conflict between [a provision of the CSA] and that State law so that the two cannot consistently stand together." Merely allowing that which federal law prohibits is not such a "positive conflict."

Finally, a state licensing system for marijuana cultivation and distribution arguably facilitates, rather than frustrates, federal efforts to enforce the CSA:

> Finally, the Court will state the obvious: The AMMA [Arizona Medical Marijuana Act] affirmatively provides a roadmap for federal enforcement of the CSA, if it wished to so. Dispensaries are easily identified. They are, in fact, ready targets for federal prosecution under the CSA, should federal authorities deem it appropriate.

Under Advisement Ruling and Writ of Mandamus, *White Mountain Health Care Inc. v. County of Maricopa, et al.*, Superior Court of Arizona, Maricopa County, Cause No. CV 2012-053585 at 8 (Gordon, J., Dec. 3, 2012).

B. Amici Rely Too Heavily on *Michigan Canners* and *Emerald Steel*

Amici cite two cases in support of their argument that the CSA preempts I-502: *Michigan Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984), and *Emerald Steel Fabricators, Inc. v. Bureau of Labor &*

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

Indus., 348 Or. 159, 230 P.3d 518 (2010). However, neither case carries the weight Amici assign it.

Michigan Canners addressed the question of whether the federal Agricultural Fair Practices Act (AFPA) preempted certain provisions of the State of Michigan's Agricultural Marketing and Bargaining Act (Michigan Act). Unlike the CSA, the AFPA did not contain language specifying that only state laws creating a "positive conflict" would be subject to federal preemption. However, the Court noted that because the Michigan Act provisions at issue were "cast in permissive rather than mandatory terms," 467 U.S. at 478 n.21, it was "not a case in which it [was] impossible for an individual to comply with both state and federal law." *Id.*

Applying implied obstacle analysis, the Court first found that the Congressional goal of the AFPA was "to shield [agricultural] producers from coercion by both processors and producers' associations," 467 U.S. at 471, or, in other words, "to prohibit producers' associations from coercing a producer to agree to membership or any other agency relationship that would impinge on the producer's independence." *Id.* at 477. The Court then turned to the Michigan Act and found that its provisions establishing an "agency shop" arrangement among agricultural producers whenever an association's membership constituted more than 50 percent of the producers of a particular commodity, and its members' production accounted for more than 50 percent of the commodity's total production, allowed associations to coerce producer compliance with association marketing contracts, force producers to pay fees to the association, and preclude producers from marketing their goods themselves. *Id.* at 466-68, 478. These *coercive* provisions, therefore, stood as an obstacle to the accomplishment of the

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

Congressional goal of shielding producers from coercion by associations, and were preempted. *Id.* at 478.

The *Michigan Canners* analysis does not apply to state regulation of marijuana activity, as recently explained by the Michigan Supreme Court:

> [T]he AFPA guaranteed individual producers the freedom to choose whether to join associations; the Michigan Act, however, denied them that right.
>
> Such circumstances are not present here. Section 4(a) [of the Michigan Medical Marihuana Act] simply provides that, under state law, certain individuals may engage in certain medical marijuana use without risk of penalty. As previously discussed, while such use is prohibited under federal law, § 4(a) does not deny the federal government the ability to enforce that prohibition, nor does it purport to require, authorize, or excuse its violation. Granting Ter Beek his requested relief does not limit his potential exposure to federal enforcement of the CSA against him, but only recognizes that he is immune under state law for MMMA-compliant conduct, as provided in § 4(a). Unlike in *Michigan Canners,* the state law here does not frustrate or impede the federal mandate.

Ter Beek v. City of Wyoming, 495 Mich. 1, 17, 846 N.W.2d 531 (2014). Like the Michigan Medical Marihuana Act, I-502 simply provides compliant licensees with protection from penalties under state law; it does not purport to protect individuals from enforcement of federal law.

This distinction – between protection from state penalties and protection from federal law enforcement – was the crux of the problematic holding in *Emerald Steel*. In that case, the Oregon Supreme Court found that the phrase "may engage in" included in O.R.S. § 475.306(1), a subsection of the Oregon Medical Marijuana Act (OMMA), implied that a patient was authorized to engage in medical use of marijuana *even under federal law*. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or. 159, 178, 230 P.3d 518 (2010). The Court therefore held that specific subsection of the OMMA, but nothing else in the statute, preempted under federal law ("In holding that federal law does preempt that subsection, we do not hold that federal law preempts the other sections of the

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

Oregon Medical Marijuana Act *that exempt medical marijuana use from criminal liability*"). *Id.* at 172 n.12 (emphasis added). In essence, the Oregon Supreme Court found "may engage in" to be much broader than "exempt … from criminal liability" and to extend beyond the state's power to remove state-law penalties for specified activities.

Amici fail to mention that the Oregon Supreme Court has since retreated from the *Emerald Steel* analysis. "*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted." *Willis v. Winters,* 350 Or. 299, 310 n.6, 253 P.3d 1058 (2011). Regardless, the language of I-502 carefully and explicitly limits the protections offered licensed producers, processors, and retailers to state law. *See, e.g.*, RCW 69.50.366 ("The following acts, when performed by a validly licensed marijuana producer or employee of a validly licensed marijuana producer in compliance with rules adopted by the state liquor control board to implement and enforce chapter 3, Laws of 2013, *shall not constitute criminal or civil offenses under Washington state law*") (emphasis added). *Emerald Steel* does not support Amici's argument that the CSA preempts I-502.

C. Amici Rely on Unfounded and Non-Precedential Opinions Arguing that Local Government Employees Violate Federal Law by Implementing and Administering State Regulation of Marijuana

Amici describe in great detail the sequence of events surrounding the passage and subsequent veto by then-Governor Gregoire of SB 5073 (2011), legislation that would have regulated the production and distribution of medical marijuana, and cite to statements from U.S. Attorneys in the Eastern and Western Districts of Washington and other state officials about the theoretical risks of state

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

employees violating federal laws while implementing state marijuana laws.[29] As discussed in greater detail in Plaintiff-Intervenors' Memorandum in Opposition to Defendant's Motion for Summary Judgment,[30] there are no statements from federal officials that the actions of local officials to implement local business, zoning, and building codes of general application could give rise to criminal liability under the federal CSA. These events and statements occurred in 2011 and 2012, prior to I-502's passage on November 6, 2012, so it is worth briefly looking at what has happened subsequently to see if any state officials have been charged with federal marijuana crimes.

Since November 2012, six additional states have passed medical marijuana laws,[31] three states and the District of Columbia have passed decriminalization laws,[32] and Washington and Colorado have passed full legalization and regulation laws. Meanwhile, the U.S. Department of Justice released the Cole Memo on August 29, 2013, acknowledging that a "robust [state] system may affirmatively address [federal enforcement] priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for."[33] On February 14, 2014, the

---

[29] Amicus Brief, pp. 18-19, n.11.
[30] Plaintiff-Intervenors' Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 26-27.
[31] Illinois (410 Ill. Comp. Stat. 130/1 – 130/999 (2014)), Maryland (Md. Code Ann., Health-Gen. § 13-3301 et. seq. (2014)), Massachusetts (Mass. Gen. Laws ch. 94C, §§ 1-2 to 1-17 (2012), Minnesota (Minn. Stat. §§ 152.22 – 152.37 (2014)), N.H. Rev. Stat. Ann. 126-X (2013), and New York (N.Y Public Health Law Art. §§ 33, Title 5-A (2014)).
[32] Maryland (Bill 364, Approved by the Governor April 14, 2014), Rhode Island (R.I. Gen. Laws § 21-28-4.01 (2014)), Vermont (Vt. Stat. Ann. tit. 18, § 4230 (2013)), District of Columbia (D.C. Code § 48-904.01 (2014)).
[33] Memorandum for All United States Attorneys from James M. Cole, Deputy Attorney General, re: Guidance Regarding Marijuana Enforcement, Aug. 29, 2013.

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

U.S. Departments of Justice and the Treasury released simultaneous memos on how financial institutions may provide services to marijuana-related businesses,[34] indicating that this "guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses."[35] During this period of time, no state employee has been federally prosecuted for dutifully implementing a state marijuana regulatory law. If federally regulated banks can directly process and hold the funds of marijuana sales that are unlawful under federal law, there is no argument that local government officials will violate federal law by implementing their generally applicable local ordinances to state-legal marijuana businesses.

D. Amici Misrepresent Congress's Assessment of the Preemption Question

Amici assert "Congress itself has recognized that Section 903 of the CSA preempts states' attempts to legalize marijuana."[36] This is false. As a preliminary matter, the bill cited by Amici for this proposition has never even had a committee hearing. It strains credibility to hold it up as Congressional interpretation of the preemptive scope of the CSA.

Several bills relating to marijuana have been introduced in Congress in recent years.[37] These bills do not focus on the question of whether the CSA preempts state laws regulating marijuana. Rather, they acknowledge and address the fact that even in the absence of federal preemption, the federal government

---

[34] Memorandum for All United States Attorneys from James M. Cole, Deputy Attorney General, re: Guidance Regarding Marijuana Related Financial Crimes, Feb. 14, 2014; Memorandum from Department of the Treasury – Financial Crimes Enforcement Newtwork, FIN-2014-G001, Subject: BSA Expectations Regarding Marijuana-Related Businesses, Feb. 14, 2014.

[35] *Id.*

[36] Amicus Brief, p. 19, ¶ 1.

[37] *See, e.g.*, H.R. 499, Ending Federal Marijuana Prohibition Act of 2013 (sponsored by Rep. Polis), https://beta.congress.gov/bill/113th-congress/house-bill/499; H.R. 1523, Respect State Marijuana Laws Act of 2013 (sponsored by Rep. Rohrabacher), https://beta.congress.gov/bill/113th-congress/house-bill/1523; and H.R. 2306, Ending Federal Marijuana Prohibition Act of 2011 (sponsored by Rep. Frank), https://beta.congress.gov/bill/112th-congress/house-bill/2306.

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

remains free to enforce federal marijuana laws against individuals acting in compliance with state laws legalizing marijuana. This dichotomy, created by our federalist system of dual sovereigns, poses challenges to state efforts to fully and efficiently implement their laws. For example, federally-insured banks remain reluctant to provide financial services to marijuana businesses, and universities subject to federal Drug-Free Workplace standards remain reluctant to conduct marijuana research outside the constraints of DEA approval. Most of the recent bills introduced in Congress seek to remove these obstacles by making legal under federal law that which is already legal under state law, or by prohibiting use of federal dollars to investigate state-legal marijuana activities.

Contrary to Amici's representation to the Court, it seems Congress understands that the CSA does *not* preempt states' attempts to legalize marijuana, as evidenced in a September 10, 2013 exchange between Senator Patrick Leahy, Chair of the U.S. Senate Judiciary Committee, and Deputy Attorney General James Cole. The exchange also indicates that the U.S. Department of Justice is by no means certain that a legal challenge to a particular state's regulatory scheme would succeed:

> LEAHY: "Now, you said in your testimony that the Department reserves its right to file a lawsuit challenging the state laws of Colorado and Washington at a later time. The law is clear, of course, that the federal government can't force a state to criminalize a particular type of conduct or activity. So, such a lawsuit would have to, what, challenge the state laws focusing on the regulatory frameworks set up by them but not question it on of whether they have to criminalize or not criminalize, is that correct?
>
> COLE: "That's correct, Chairman Leahy. This was a difficult issue that we had to contend with in deciding whether or not to seek any preemption action here because it would be a very challenging lawsuit to bring to preempt the state's decriminalization law. We *might* have an easier time with the regulatory scheme and preemption, but then what you'd have is *legalized marijuana* and no enforcement mechanism within the state to try and regulate it. And that's probably not a good situation to have."

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

LEAHY: "Kind of an incentive for a black market, isn't it?"

COLE: "Very much so, sir, and money going into organized criminal enterprises instead of going into state tax coffers and having the state regulate from a seed to sale basis what happens to it."[38]

V. Conclusion

Amici may be uncomfortable with the different approaches to marijuana regulation under state and federal laws that is tolerated under the CSA and our nation's system of federalism. However, not only does the CSA expressly disavow preemption except in a narrow set of circumstances, it is also well established that in areas traditionally regulated by the states, like the exercise of police powers, there exists a strong presumption that federal law does not preempt state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) ("the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

It is uncontested that Washington could, if it so desired, repeal all of its marijuana laws and leave enforcement entirely in the hands of the federal government, much as states did with alcohol leading up to the repeal of Prohibition. Instead, Washington has taken a smaller and tightly restricted step, creating limited exceptions to marijuana laws that remain on the books, in an effort to bring the vast illicit market out of the shadows and under regulatory control. Such choices fall within the scope of the states' traditional policing powers, do not require anyone to engage in activity prohibited by the CSA, do not pose an obstacle to the federal government's enforcement of federal law, and – as acknowledged by the U.S. Department of Justice itself – likely better complement

[38] "Conflicts Between State and Federal Marijuana Laws," September 10, 2013 U.S. Senate Judiciary Committee hearing, available online at http://www.judiciary.senate.gov/hearings/hearing.cfm?id=094c28995d1f5bc4fe11d832f90218f9 (emphasis added).

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
(206) 464-3939

federal marijuana enforcement priorities than would the unregulated Wild West that would follow full repeal of state marijuana laws.

DATED this 27th day of August, 2014.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

By: /s/ Alison C. Holcomb
Sarah A. Dunne, WSBA #34869
Alison C. Holcomb, WSBA #23303
Mark M. Cooke, WSBA #40155
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Tel: (206) 624-2184
Fax: (206) 624-2190
E-mail: dunne@aclu-wa.org
holcomb@aclu-wa.org
mcooke@aclu-wa.org
Attorneys for Plaintiff-Intervenors

GARVEY SCHUBERT BARER

By /s/ Jared Van Kirk
Donald B. Scaramastra, WSBA #21416
Jared Van Kirk, WSBA #37029
Dominique R. Scalia, WSBA #47313
1191 Second Avenue, Suite 1800
Seattle, WA 98101-2939
Tel: (206) 464-3939
Fax: (206) 464-0125
E-mail: dscaramastra@gsblaw.com
dscalia@gsblaw.com
jvankirk@gsblaw.com
ACLU of Washington Foundation Cooperating Attorneys for Plaintiff-Intervenors

GORDON THOMAS HONEYWELL

By /s/ Salvador A. Mungia
Salvador A. Mungia, WSBA 14807
PO Box 1157
Tacoma, WA 98401-1157
Tel: (253) 620-6500
Fax: (253) 620-6565
E-mail: smungia@gth-law.com
ACLU of Washington Foundation Cooperating Attorneys for Plaintiff-Intervenors