COLORADO COURT OF APPEALS **2013 COA 174**

Court of Appeals No. 12CA2298
El Paso County District Court No. 11CR1680
Honorable Tim J. Schutz, Judge

The People of the State of Colorado,

Plaintiff-Appellant,

v.

Robert Clyde Crouse,

Defendant-Appellee.

ORDER AFFIRMED

Division IV
Opinion by JUDGE WEBB
Dunn, J., concurs
Bernard, J., concurs in part, dissents in part

Announced December 19, 2013

Daniel H. May, District Attorney, Terry A. Sample, Deputy District Attorney, Margaret Vellar, Chief Deputy District Attorney, Doyle Baker, Senior Deputy District Attorney, Colorado Springs, Colorado, for Plaintiff-Appellant

Charles T. Houghton, P.C., Charles T. Houghton, Colorado Springs, Colorado; Black and Graham, LLC, Clifton Black, Colorado Springs, Colorado, for Defendant-Appellee

Christopher J. Melcher, City Attorney, W. Erik Lamphere, Assistant City Attorney, Colorado Springs, Colorado, for Amicus Curiae City of Colorado Springs

¶ 1 In 2000, Colorado's voters amended our Constitution to allow persons "suffering from debilitating medical conditions" to use "medical marijuana." Colo. Const. art. XVIII, § 14 (MM Amendment). This appeal concerns only section 14(2)(e). As relevant here, it requires the return of marijuana seized from a medical marijuana patient to the patient if, as occurred here, a jury acquits the patient of state criminal drug charges arising from the seized marijuana (return provision). The prosecution contends that the Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.*, preempts the return provision.[1] It relies on only "obstacle preemption," a subset of the conflict preemption doctrine.

¶ 2 We reject this contention, for three reasons. First, the "positive conflict" phrase in the CSA's preemption section, 21 U.S.C. § 903, precludes applying obstacle preemption. Second, even if obstacle preemption applies, CSA section 885(d), which prevents

[1] The federal government has never challenged the MM Amendment. The parties filed supplemental briefs in response to the court's question whether the preemption analysis should include the most recent statement by the United States Department of Justice concerning enforcement of the CSA against conduct involving marijuana that is now permitted under state law. Those briefs did not cite authority, nor have we found any, suggesting that we should do so.

federal prosecution of "any duly authorized officer of any State . . . who shall be lawfully engaged in the enforcement of any law . . . relating to controlled substances," would preclude applying prohibitions in other CSA sections to police officers complying with a court order issued under the return provision. Third, and making the same assumption, the recipient patient's involvement in the return process also does not create obstacle preemption because the federal government could not commandeer state officials to seize and hold marijuana, and the MM Amendment does not require patients to either demand return or accept returned marijuana.

¶ 3 Therefore, we affirm the trial court's order requiring police officers to return marijuana and marijuana plants to defendant, Robert Clyde Crouse.

I. Background

¶ 4 Colorado Springs police officers searched Crouse's home. They seized marijuana and marijuana plants. The prosecution charged him with one felony count of cultivation of more than thirty marijuana plants and one felony count of possession of between five and one hundred pounds of marijuana with the intent to distribute it.

¶ 5 At trial, Crouse raised only an affirmative defense that MM Amendment section (2)(a) expressly authorizes his possession — he was a medical marijuana patient, and the marijuana that he possessed was medically necessary to treat his condition. The jury acquitted him of both charges.

¶ 6 Relying on MM Amendment section (2)(e), Crouse moved the trial court to order the police to return the seized marijuana plants and marijuana. The prosecution opposed the motion on two grounds: first, if the police returned the marijuana to him, they would violate the CSA by distributing marijuana to Crouse, and he would violate the CSA by receiving the marijuana; and, second, for these reasons, the CSA preempts this part of the MM Amendment.

¶ 7 The trial court ordered the police to return the marijuana and the marijuana plants to Crouse. The prosecution unsuccessfully sought a stay pending appeal from both the trial court and this court. Then the police returned the marijuana and the marijuana plants.

¶ 8 The prosecution appeals the trial court's order, again arguing obstacle preemption because police officers' returning marijuana to a patient would violate the CSA. It does not separately argue

preemption because a patient's receipt of such marijuana would also violate the CSA.

II. This Appeal Is Not Moot

¶ 9 Initially, we reject Crouse's contention that this appeal is moot.

¶ 10 Section 16-12-102(1), C.R.S. 2013, authorizes the prosecution to "appeal any decision of a court in a criminal case upon any question of law." C.A.R. 4(b)(2) states that, when the prosecution's appeal is authorized by statute, as it is here, this court is required to "issue a written decision answering the issues in the case and shall not dismiss the appeal as without precedential value."

¶ 11 But this court lacks jurisdiction over such an appeal unless the ruling or order that is the subject of the appeal was entered in a case that "produced a final judgment." *People v. Gabriesheski*, 262 P.3d 653, 657 (Colo. 2011). An acquittal or a dismissal of the charges in a case results in a final judgment. *Id.* And a final judgment "ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceedings." *People v. Guatney*, 214 P.3d 1049, 1050-51 (Colo.

2009) ("[P]rosecution appeals . . . are subject to the final judgment requirement of C.A.R. 1.").

¶ 12 After the jury acquitted Crouse, he sought return of the marijuana and marijuana plants. The trial court had jurisdiction to rule on that motion. *See People v. Hargrave*, 179 P.3d 226, 228 (Colo. App. 2007); *People v. Rautenkranz*, 641 P.2d 317, 318 (Colo. App. 1982) ("'We hold that the district court, once its need for the property has terminated, has both the jurisdiction and the duty to return the contested property . . . regardless and independently of the validity or invalidity of the underlying search and seizure.'" (quoting *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976)).

¶ 13 We conclude that the order granting Crouse's motion was a final judgment subject to appeal under section 16-12-102(1) because the motion was litigated and the order was entered after Crouse had been acquitted, which resolved all the charges in the case. Once the court granted the motion, nothing remained for the court to do to determine the rights of defendant and the prosecution concerning the motion. *See Guatney*, 214 P.3d at 1050-51.

¶ 14 Accordingly, we further conclude that this appeal is not moot.

III. Preemption

A. Standard of Review

¶ 15 Whether a federal statute preempts state law is an issue of federal law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 214 (1985). This issue is reviewed de novo. *Kohn v. Burlington N. & Santa Fe R.R.*, 77 P.3d 809, 811 (Colo. App. 2003).

B. The Effect of the Supremacy Clause

¶ 16 The "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. This language is known as the Supremacy Clause. Under it, state laws that "interfere with, or are contrary to, the laws of Congress" are preempted. *Brubaker v. Bd. of Cnty. Comm'rs*, 652 P.2d 1050, 1054 (Colo. 1982) (internal quotation marks omitted).

C. As an Exercise of Colorado's Police Power, Section (2)(e) of the MM Amendment Is Presumably Not Preempted by the CSA

¶ 17 Preemption analysis begins with the "assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The assumption strengthens

if the federal law involves a "field which the [s]tates have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This is so because federal law generally does not supersede "the historic police powers" of a state, unless Congress has expressed a "clear and manifest purpose" to do so. *Id.*; *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 502 (2001) (Stevens, J., concurring in the judgment) ("[F]ederal courts [must], whenever possible, . . . avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a [s]tate have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country." (internal quotation marks omitted)).

¶ 18 By enacting the CSA, Congress did not intend to preempt the entire field of drug enforcement. Under 21 U.S.C. § 903, the CSA shall not "be construed" to "occupy the field" in which the CSA operates "to the exclusion of any [s]tate law on the same subject matter which would otherwise be within" the state's authority. Rather, section 903 provides that state laws are preempted only when "a positive conflict" exists between a provision of the CSA and a state law "so that the two cannot consistently stand together." *Id.*

¶ 19 One reason for maintaining state control is that "the regulation of drug abuse is a state concern with special local problems necessitating use of the state police power." *Ledcke v. State*, 296 N.E.2d 412, 420 (Ind. 1973). "Congress evidently intended that both federal and state governments should regulate the drug traffic which has become so prevalent." *State v. Allard*, 313 A.2d 439, 444 (Me. 1973). When viewed from the perspective that drug abuse and drug trafficking should be concurrently regulated by the federal and state governments, Congress' statement in section 903 that the CSA "does *not* generally preempt state law gives the usual assumption against preemption additional force." *Nat'l Pharmacies, Inc. v. De Melecio*, 51 F. Supp. 2d 45, 54 (D.C.P.R. 1999) (emphasis in original).

D. The Assumption Against Preemption Has Not Been Overcome

1. The Test

¶ 20 Although Congress may preempt "state regulation contrary to federal interests," it cannot "commandeer the legislative processes of the States." *New York v. United States*, 505 U.S. 144, 188 (1992) (internal quotation marks and alterations omitted). Thus, on the one hand, federal authorities may enforce federal marijuana laws

involving crimes committed solely in Colorado. *See Gonzales v. Raich*, 545 U.S. 1, 32-33 (2005) (locally grown and used marijuana is subject to federal regulation under the Commerce Clause). And Colorado law cannot supersede such federal laws. *Id.* at 29. But, on the other hand, Congress cannot compel the State of Colorado to "enact or administer" federal laws concerning such crimes in Colorado state courts. *See New York*, 505 U.S. at 148.

¶ 21 A federal law can preempt a state law in three different ways. First, Congress can occupy an entire legislative field leaving "'no room for the states to supplement it.'" *In re Estate of MacAnally*, 20 P.3d 1197, 1201 (Colo. App. 2000) (quoting *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1147 (Colo. 1997)). Second, a federal law can expressly preempt other laws. *Id.* Third, a state statute can conflict with federal law. *Id.*

¶ 22 Conflict preemption has two forms: impossibility and obstacle preemption. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000). Impossibility preemption exists "where it is impossible for a private party to comply with both state and federal law." *Id.* Obstacle preemption exists "where under the circumstances of [a] particular case, [the challenged state law]

stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 373 (internal quotation marks omitted).

¶ 23 Here, the prosecution limits its argument to obstacle preemption. But the particular wording of CSA § 903 — "there is a positive conflict [such that] the two cannot consistently stand together" — has been interpreted as foreclosing obstacle preemption:

> Because Congress provided that the CSA preempted only laws positively conflicting with the CSA so that the two sets of laws could not consistently stand together, and omitted any reference to an intent to preempt laws posing an obstacle to the CSA, we interpret title 21 United States Code section 903 as preempting only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible.

Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 481 (Cal. Ct. App. 2008). We consider *County of San Diego* well-reasoned and follow it here.

¶ 24 "Congressional intent is determined primarily from the statute's plain language, and secondarily from the statute's legislative history." *Greenwood Trust Co.*, 938 P.2d at 1147. The

"positive conflict" phrase demands more than that the state law "stands as an obstacle to the accomplishment and execution" of the federal law. *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (internal quotation marks omitted).

¶ 25 Therefore, based on the plain language of the CSA, we conclude that it cannot be used to preempt a state law under the obstacle preemption doctrine.[2] Nevertheless, we offer an alternative analysis of the obstacle preemption doctrine because no federal court has addressed the viability of this doctrine under the CSA.

¶ 26 Obstacle preemption analysis involves two steps. First, the purposes and intended effects of the relevant federal and state laws are determined. Second, those purposes and intended effects are compared to see if the state law impedes accomplishment of the federal purposes, which is the "ultimate touchstone in every [preemption] case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). At the second stage, to determine whether a sufficient obstacle exists, a court examines "the federal statute as a whole." *Crosby*, 530 U.S. at 373. "For

[2] The parties have not cited, nor have we found, any useful legislative history on section 903.

when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered . . . ." *Id.* (internal quotation marks omitted).

2. The Purposes and the Intended Effects of Federal and Colorado Marijuana Laws

a. Federal Marijuana Laws

¶ 27 The CSA lists marijuana as a schedule I controlled substance. 21 U.S.C. § 812 Schedule I (c)(10). Thus, as a matter of federal law, marijuana does not have a "currently accepted medical use in treatment," it poses a "high potential for abuse," and it lacks "accepted safety for use . . . under medical supervision." §§ 812(b)(1)(A)-(C). Physicians cannot prescribe marijuana as medicine under federal law, 21 C.F.R. § 1301.13 (2010). In other words, the CSA "designates marijuana as contraband for *any* purpose." *Raich*, 545 U.S. at 27 (emphasis in original).

¶ 28 The CSA prohibits, among other acts, distributing a controlled substance. 21 U.S.C. § 841(a). Even so, 21 U.S.C. § 885(d) "carve[s] out a specific exemption for distribution of controlled substances by law enforcement officers." *United States v. Cortes-Caban*, 691 F.3d 1, 20 (1st Cir. 2012). The purpose of section

885(d) is to "protect[] accepted law enforcement tactics . . . in which officers handle and transfer drugs." *Id.*; *see also* H.R. Rep. No. 91–1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4625 (explaining that section 885(d) "exempts state and local officers when lawfully engaged in enforcing any law relating to controlled substances").

b. Colorado Marijuana Laws

¶ 29 For many years, Colorado law has criminalized the cultivation, possession, and distribution of marijuana. § 18-18-406, C.R.S. 2013.

¶ 30 Colorado's voters created an exception when they approved the MM Amendment, which became effective on the Governor's proclamation. 2001 Colo. Sess. Laws 2379.[3] As indicated, MM Amendment section (2)(a) provides patients "an affirmative defense" to state prosecution. And MM Amendment section (2)(e) states that marijuana and paraphernalia "seized by state or local law enforcement officials from a patient . . . in connection with the

[3] Effective December 10, 2012, *see* 2013 Colo. Sess. Laws 3291, Colorado's voters amended our constitution to state that "the use of marijuana should be legal for persons twenty-one years of age or older." Colo. Const. art. XVIII § 16(1)(a). This amendment does not contain a return provision.

claimed medical use of marijuana shall be returned immediately" to the medical marijuana patient "upon the determination" of the prosecutor that the patient "is entitled to the protection contained in this section as may be evidenced . . . by . . . acquittal.

3. Applying the Test

¶ 31 Turning to the second step of the analysis and reading the CSA as a whole, we conclude that the return provision of the MM Amendment is not preempted, for two reasons. First, it does not require police officers to violate the CSA. Second, it does not require patients to do anything.

a. The Police Officers

¶ 32 The prosecution's argument that police officers who return marijuana to medical marijuana patients violate the CSA prohibition against distributing controlled substances is unpersuasive because it ignores the exemption in section 885(d). Three cases have rejected this argument, based on section 885(d). *State v. Okun*, 296 P.3d 998, 1002 (Ariz. Ct. App. 2013) ("This provision immunizes law enforcement officers such as the Sheriff from any would-be federal prosecution for complying with a court order to return Okun's marijuana to her."); *City of Garden Grove v.*

Superior Court, 68 Cal. Rptr. 3d 656, 678 (Cal. Ct. App. 2007); *State v. Kama*, 39 P.3d 866, 868 (Or. Ct. App. 2002).

¶ 33 As the court in *City of Garden Grove* explained:

> [D]istribution of a controlled substance is generally prohibited under 21 U.S.C. § 841(a)(1), but that section does not apply to persons who regularly handle controlled substances in the course of their professional duties. For example, in *United States v. Feingold* (9th Cir.2006) 454 F.3d 1001, 1008, the court held that 21 U.S.C. § 841(a)(1) could only be applied to a doctor if, in distributing a controlled substance, he intended "to act as a pusher rather than a medical professional." (Relying on *United States v. Moore*, [423 U.S. 122 (1975)]).
>
> By analogy, it would stand to reason that the only way a police officer could be found in violation of 21 U.S.C. § 841(a)(1) for distributing a controlled substance is if he or she intended to act as a drug peddler rather than a law enforcement official. In this case, it is quite obvious the police do not want to give Kha his marijuana back at all, let alone have him use it for illicit purposes. They are acting under the compulsion of a lawful court order. Therefore, we cannot see how anyone could regard compliance with this order a violation of 21 U.S.C. § 841(a)(1).
>
> Assuming someone could, it seems to us clear the police would be entitled to immunity under 21 U.S.C. § 885(d).

68 Cal. Rptr. 3d at 681. We consider this case well-reasoned, and follow it here.

¶ 34 Because *City of Garden Grove* is not binding authority, however, we amplify its analysis as follows:

- The Colorado Springs police officers who returned the marijuana were "duly authorized officer[s]" of a "political subdivision" of the state of Colorado.
- Marijuana is a "controlled substance," and the MM Amendment fits within "any law relating" to it. *See*, *e.g.*, *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (citation omitted)); *Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) ("The key phrase in this provision is 'relating to,'" the "'ordinary meaning of [which] is a broad one — "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with."'" (citation omitted)). Had Congress intended a narrower immunity, it could have used limiting language, such as "enforcement of this Act" or

"enforcement of any criminal law relating to controlled substances."

- The officers were engaged in "enforcement" because they acted under a court order that implemented a mandatory provision of the MM Amendment. *See* Black's Law Dictionary 608 (9th ed. 2009) ("enforcement" means "[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement"); *cf. Falk v. Perez*, ___ F. Supp. 2d ___, ____, 2013 WL 5230632 (N.D. Ill. 2013) ("officers enforcing court orders should not be charged with evaluating the legality of the order, but simply with executing it"); *Miller v. City of Anderson*, 777 N.E.2d 1100, 1104 (Ind. App. 2002) (Enforcement means "those activities in which a government entity or its employees compel or attempt to compel the obedience of another to laws, rules or regulations, or sanction or attempt to sanction a violation thereof.").[4]

[4] We do not share the dissent's comfort in statements about section 885(d) by the court in *United States v. Rosenthal*, 266 F. Supp. 2d 1068 (N.D. Cal. 2003). On appeal, the Ninth Circuit endorsed the court's statement that "Rosenthal was implementing or facilitating

- And for the same two reasons, the officers were "lawfully engaged." Prosecutions of police officers under the CSA where a defense based on section 885(d) has been rejected involve circumstances where the defendant officers were acting outside of their prescribed duties.[5]

---

the purpose of the [medical marijuana] statute; he was not compelling anyone to do or not to do anything." 454 F.3d 943, 948 (9th Cir. 2006). But then it added:

> *Kama* is not inconsistent with such a theory. In that case, the state law mandated the return of marijuana to the individual from whom the marijuana had been seized, and therefore the officers in question were "enforcing" the state law that required them to deliver the marijuana to that individual because he had a state-law right to its return. 178 Or. App. at 564–65, 39 P.3d 866. Here, in contrast, the state law does not give any person a right to *obtain* medical marijuana from any particular source, and the Oakland Ordinance does not mandate that Rosenthal manufacture marijuana.

454 F.3d at 948. Had the circuit court intended to also endorse the district court's view — adopted by the dissent — that the 885(d) immunity "cannot reasonably be read to cover acting pursuant to a [state] law which itself is in conflict" with the CSA, 266 F. Supp. 2d at 1079, it could have said so. Instead, it acknowledged *Kama*.

[5] *See, e.g.*, *United States v. Wright*, 634 F.3d 770, 775–77 (5th Cir. 2011) (rejecting defense under section 885(d) as to deputy sheriff found guilty of attempting to possess with the intent to distribute

Here, the prosecution does not dispute that the action the court ordered was part of these officers' duties.

¶ 35 The dissent's analysis that because the return provision is preempted by the CSA prohibition against distribution, police officers returning marijuana under this provision are not "lawfully engaged" for purposes of the section 885(d) exemption, does not persuade us. In our view, section 885(d) must be used in the preemption calculus, not disregarded based on a premature preemption conclusion. This is so because preemption analysis "requires interpreting the full [legislative] scheme[,] . . . not merely reading each word of the statute in isolation." *Comm'ns Import Export S.A. v. Republic of Congo*, 916 F. Supp. 2d 48, 56 (D.D.C. 2013).

¶ 36 In the CSA, Congress not only prohibited distribution of controlled substances, among other things, but it also created an

---

cocaine); *United States v. Sanchez–Berrios*, 424 F.3d 65, 71–72 (1st Cir. 2005) (affirming the convictions of three officers for conspiring to distribute over five kilograms of cocaine); *United States v. Serrano–Beauvaix*, 400 F.3d 50, 52 (1st Cir. 2005) (affirming convictions of an officer and former officer for conspiracy to distribute over five kilograms of cocaine); *United States v. Reeves*, 730 F.2d 1189, 1195–96 (8th Cir. 1984) (rejecting defense under section 885(d) as to sheriff and his deputy found guilty of conspiracy to distribute and distribution of marijuana).

exemption for law enforcement officers who are lawfully engaged in the enforcement of laws "relating to" controlled substances. Reading the prohibition against distribution in isolation would ignore congressional recognition in section 885(d) that the prohibition is not absolute. Hence, we examine how courts have interpreted this section, and compare those interpretations to the officers' conduct here.

¶ 37 Courts have acknowledged the potential application of section 885(d) to "reverse sting" operations, where undercover law enforcement officers sell controlled substances. *See*, *e.g.*, *Cortes-Caban*, 691 F.3d at 21 ("This provision protects accepted law enforcement tactics such as sting or reverse-sting operations in which officers handle and transfer drugs." (footnote omitted));[6] *United States v. Mustakeem*, 759 F. Supp. 1172, 1176 (W.D. Pa. 1991) (discussing DEA guidelines on reverse sting operations, which do not require a court order authorizing the operation).

---

[6] The court also noted that this section protects "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 § 841." 691 F.3d at 21 (footnote omitted).

Placing drugs into criminals' hands is inimical to the policies of the CSA.[7] Here, to bolster its obstacle preemption argument, the prosecution says the same about placing marijuana in the hands of a patient based on a mandatory return order.

¶ 38 Therefore, we conclude that the officers did not violate the CSA by complying with the court's order.[8] And because they did not violate the CSA, their conduct could not be an impediment to accomplishing its objectives.

---

[7] Relevant findings and declarations include: a "major portion" of drug trafficking occurs in interstate and foreign commerce; local drug trafficking that is not "an integral part of the interstate . . . flow" of drugs still has "a substantial and direct effect upon interstate commerce"; "[l]ocal distribution and possession of controlled substances" swells interstate drug trafficking; it is not feasible to distinguish between interstate and intrastate distribution; and "[f]ederal control of the intrastate incidents" of drug trafficking "is essential to the effective control of . . . interstate incidents" of drug trafficking. 21 U.S.C. §§ 801(3)-(6).

[8] Further, even if the patient who received returned marijuana could be prosecuted for violating the CSA's ban on possession, the police officers who returned it would not be culpable on an aider and abettor theory under 18 U.S.C. § 2. As the court observed in *City of Garden Grove*, these officers' only intent was to do what the court had ordered, despite their misgivings. *See also Qualified Patients Ass'n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 107 (Cal. Ct. App. 2010) ("[G]overnmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws.").

b. Crouse

¶ 39 In contrast to the prosecution's detailed arguments for obstacle preemption based on the police officers' returning marijuana, the prosecution's appellate briefs contain only general references to the patient's role in this process and conclusory statements about the consequences. Because the prosecution has not offered a meaningful alternative preemption argument based only on the patient's role, we need not address whether preemption would be required solely on that basis. *See*, *e.g.*, *Meridian Ranch Metro. Dist. v. Colo. Ground Water Comm'n*, 240 P.3d 382, 390 (Colo. App. 2009) ("Because, however, the Metro Districts did not develop any argument with respect to this point in their briefs, we do not consider it.").

¶ 40 But we will take up this argument, for two reasons. First, the dissent does so, explaining that the prosecution sufficiently raised the issue. Second, if the dissent is correct, addressing it provides a more complete foundation for further appellate review.

¶ 41 Whether the CSA preempts a state's law that permits, but does not require, its citizens to engage in conduct that the CSA prohibits has divided other courts. *Compare Ter Beek v. City of Wyoming*,

823 N.W.2d 864, 872 (Mich. App. 2012) (no preemption); *Qualified Patients Ass'n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 109 (Cal. Ct. App.) (same), *with Emerald Steel Fabricators, Inc. v. BOLI*, 230 P.3d 518 (Or. 2010) (preemption).[9]

¶ 42 The MM Amendment does not require patients to do anything. Here, Crouse chose to invoke the return provision, and he accepted the returned marijuana. For this reason, we conclude that the MM Amendment is not preempted merely because it permits patients to engage in conduct involving marijuana which the CSA prohibits.

¶ 43 *Ter Beek* informs our analysis. There, as here, the Michigan statute did not "exempt qualified medical-marijuana users from

---

[9] *Emerald Steele*, on which the dissent relies, is distinguishable in two ways. First, the civil employment dispute did not require the court to include section 885(d) in its preemption analysis, nor did the court do so. Second, in allowing the employer to raise a preemption defense in a state enforcement action alleging disability discrimination against a medical marijuana patient, the court acted consistent with United States Supreme Court precedent that recognizes state law can neither prohibit private action that federal law allows or require private action that federal law prohibits. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 367 (2000) (state law "penalizes some private action that the federal Act (as administered by the President) may allow"); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 875 (2000) (requirement that auto manufacturers install air bags conflicted with federal regulations that "deliberately provided the manufacturer with a range of choices among different passive restraint devices").

federal prosecutions." *Compare Ter Beek*, 823 N.W. 2d at 873, *with* MM Amendment, § 14(2)(a) (patient "charged with a violation of *the state's* criminal law . . . will be deemed to have established an affirmative defense" (emphasis added)). And the *Ter Beek* court observed, as have we, that "Congress cannot require the states to enforce federal law." 823 N.W. 2d at 873 (citing *Printz v. United States*, 521 U.S. 898, 924 (1997), and *New York*, 505 U.S. at 166). On these grounds, the court concluded that "while Congress can criminalize all uses of medical marijuana . . . Michigan is not required to criminalize all medical uses of marijuana and the immunity afforded to qualified patients for the medical use of marijuana . . . [by the Michigan statute] is not preempted" as an obstacle to the purposes and objectives of the CSA. *Id.* at 873-74.

¶ 44 Similarly, the court's decision in *Qualified Patient Ass'n* begins by recognizing that "the unstated predicate" of the obstacle preemption 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." 115 Cal. Rptr. 3d at 108 (internal quotation marks omitted). The court rejected obstacle preemption, explaining that if the federal government is concerned

that "patients may be more likely to violate federal law if the additional deterrent of state liability is removed," then "the proper response — according to *New York* and *Printz* — is to ratchet up the federal regulatory regime, not to commandeer that of the state." *Id.* (internal quotation marks omitted).

¶ 45 Both *Ter Beek* and *Qualified Patients Ass'n* addressed their states' respective immunity provisions for medical marijuana patients. But those courts' rationales for rejecting obstacle preemption apply equally to the return provision at issue here. Immunity provisions allow patients to possess and use medical marijuana without fear of state prosecution. Possession and use are no different whether the patient lawfully grew the marijuana, purchased it from a state-approved source, or obtained its return from law enforcement through requesting a court order. Nor would any resulting tension with the CSA be different.[10]

---

[10] *State v. Ehrensing*, 296 P.3d 1279, 1283-84 (Or. App. 2013), also cited in the dissent, does not support a contrary conclusion because the court limited its holding to "(1) express statutorily prescribed preconditions of the particularized OMMA 'return' provision, ORS 475.323(2), were not satisfied here; and (2) the omnibus 'evidence return' provisions — and, specifically, ORS 133.643 — do not authorize return of items whose possession would be unlawful under either state or federal law." Here, the

¶ 46 Preempting a state law or constitutional provision immunizing medical marijuana patients from state prosecution would in effect recriminalize their possession and use of marijuana. Preempting the return provision of the MM Amendment would allow state officers to keep seized marijuana. But federalism prevents the federal government from requiring states to seize and hold marijuana, just as this principle prevents the federal government from requiring states to criminalize possession and use of marijuana. *See Printz*, 521 U.S. at 933 (duty imposed on state law enforcement agencies to conduct criminal background checks on prospective firearms purchasers is unconstitutional). Thus, obstacle preemption does not allow the federal government to accomplish indirectly that which it would be unable do directly. *Cf. United States v. Smith*, 47 F.3d 681, 684 (4th Cir. 1995) ("The government should not be allowed to do indirectly what it cannot do

---

prosecution does not dispute that Crouse has satisfied the return provision of our Constitution, and that provision does not depend on lawful possession. Further, *Ehrensing* expressly eschewed preemption analysis because "[p]reemption principles are implicated only if defendant is, in fact, entitled under operative Oregon statutes to return of the marijuana. That is, if, as a matter of Oregon law, defendant has no such entitlement, the matter is concluded and preemption is inapposite." *Id.* at 1283.

directly."); *Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1207 (Colo. 1994) ("We cannot subscribe to a legislative practice that allows one branch of the government to limit constitutionally established 'executive' offices and thus to do indirectly that which they are prohibited from doing directly.").

¶ 47 Accordingly, we conclude that the return provision of the MM Amendment is not subject to obstacle preemption.

IV. Conclusion

¶ 48 We affirm the trial court's order returning the marijuana and the marijuana plants to defendant.

JUDGE DUNN concurs.

JUDGE BERNARD concurs in part and dissents in part.

JUDGE BERNARD concurring in part and dissenting in part.

¶ 49 I concur with the majority's conclusion that this appeal is not moot. I disagree with the majority's holding that the federal Controlled Substances Act (the CSA) does not preempt Colo. Const. art. XVIII, § 14(2)(e). I therefore respectfully dissent from section III of the majority's opinion.

I. Section 885(d) Provides Immunity Only When Police Officers Are Lawfully Engaged in Enforcing Drug Laws

A. What Is the Right Question to Ask to Decide This Case?

¶ 50 21 U.S.C. § 885(d) states that "no civil or criminal liability shall be imposed" under the CSA on state law enforcement officers who are "lawfully engaged in the enforcement of any law . . . relating to controlled substances." Based on the plain language of section 885(d), I conclude that a court must *first* determine whether law enforcement officers were "lawfully engaged in the enforcement" of drug laws. The court can only move on to decide whether the immunity that section 885(d) grants should apply to the officers' conduct after it answers this preliminary question.

¶ 51 In other words, the right question that section 885(d) asks in this case is: Are officers immune because they were lawfully

engaged in the enforcement of section14(2)(e)? The wrong question is: Are officers lawfully engaged in the enforcement of that constitutional provision because they are immune?

¶ 52 The answer to the right question is obtained by determining whether section 14(2)(e) is preempted by the CSA. If the Colorado constitutional provision is preempted, then it is unconstitutional. And police officers are not "lawfully engaged" when they enforce unconstitutional laws.

¶ 53 The federal district court's decision in *United States v. Rosenthal*, 266 F. Supp. 2d 1068 (N.D. Cal. 2003), *rev'd on other grounds*, 454 F.3d 943 (9th Cir. 2006), is pertinent to the analysis of the right question. The district court concluded that the phrase "lawfully engaged in the enforcement," which is found in section 885(d), means "engaged in enforcing, that is, compelling compliance with . . . a law related to controlled substances which is consistent . . . or at least not inconsistent . . . with [the CSA]." 266 F. Supp. 2d at 1079. In such circumstances, section 885(d) "cannot reasonably be read to cover acting pursuant to a law which itself is in conflict with the [CSA]." *Id.*

¶ 54 A law professor who has written extensively on the issue of whether the CSA preempts various aspects of state medical marijuana laws agrees with this perspective. He recognizes that *State v. Okun*, 296 P.3d 998, 1001-02 (Ariz. Ct. App. 2013); *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 678 (Cal. Ct. App. 2007); and *State v. Kama*, 39 P.3d 866, 868 (Or. Ct. App. 2002), "have held that [section 885(d)] immunizes the act of returning medical marijuana to its owner pursuant to a state statute or court order." Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. Health Care L. & Pol'y 5, 29 (2013). But he "criticize[s] this interpretation of [section 885(d)] as being 'difficult to reconcile with the CSA's preemption language and congressional intent.'" *Id.* at 29-30 (quoting Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1458 (2009)). It is difficult to reconcile this interpretation with the CSA because "granting state police . . . immunity under section [section 885(d)] for distributing . . . marijuana would render the express preemption language of [21 U.S.C. § 903] meaningless." Mikos, *On the Limits of Supremacy*, 62 Vand. L. Rev. at 1458.

¶ 55 Two additional factors point out why the preemption analysis in this case should not ask the wrong question. First, section 885(d) may not protect state officers from injunctive relief, or from punishment for contempt if officers violate an injunction issued by a federal court. 21 U.S.C. § 882(a) gives federal district courts jurisdiction to enjoin violations of the CSA. *See Ex Parte Young*, 209 U.S. 123, 160 (1908) (prospective declaratory or injunctive relief may be granted against state officials who, in their official capacities, enforce unconstitutional laws).

¶ 56 Section 885(d) only refers to "civil or criminal liability." As a commentator has pointed out, "even if [section 885(d)] bars a court from holding a state officer criminally liable, it might not block the court from enjoining the officer from performing her job." Mikos, *Preemption Under the Controlled Substances Act*, 16 J. Health Care L. & Pol'y at 30 n.155.

¶ 57 Second, section 885(d) does not protect medical marijuana patients who receive marijuana distributed by the police from liability. Section 885(d) only protects law enforcement officers.

¶ 58 The prosecution has clearly raised the issue on appeal of whether medical marijuana patients may be subject to federal

criminal prosecution for their act of receiving marijuana from police officers if section 14(2)(e) is preempted by the CSA. The prosecution's opening brief contends that (1) the part of section 14(2)(e) that "authorize[s] the . . . distribution and possession . . . of marijuana — including provisions that authorize law enforcement to return seized marijuana — [is] preempted by the CSA"; (2) "the Colorado law that obligates law enforcement [officers] to return marijuana to medical users of the drug who have been acquitted of marijuana-related crimes is an obstacle" to the fulfillment of Congress' objectives under the CSA; and (3) defendant "had no right to the return of his medical marijuana."

¶ 59 It is certainly possible to advance an argument that marijuana patients are protected from prosecution for other reasons than those supplied by section 885(d) by relying on cases such as *Ter Beek v. City of Wyoming*, 823 N.W.2d 864, 873 (Mich. Ct. App. 2012), and *Qualified Patient's Ass'n v. City of Anaheim*, 155 Cal. Rptr. 3d 89, 109 (Cal. Ct. App. 2010). But the insertion of this argument into the analysis undercuts the major premise that the resolution of the preemption issue should begin with the immunity bestowed by section 885(d).

¶ 60 These two additional circumstances indicate that asking the wrong question — whether officers are lawfully engaged in the enforcement of section 14(2)(e) because they are immune — will lead to anomalous results. The anomaly would be that section 14(2)(e) would be preempted in certain situations, but not in others. Preemption analysis does not, in my view, contemplate such partial or piecemeal results.

B. Analysis of the Cases Relied Upon by the Majority

¶ 61 *Rosenthal*, 454 F.3d at 948; *Okun*, 296 P.3d at 1001-02; *Ter Beek*, 823 N.W.2d at 872-74; *Qualified Patient's Ass'n*, 155 Cal. Rptr. 3d at 107-111; *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 480-81 (Cal. Ct. App. 2008); *City of Garden Grove*, 68 Cal. Rptr. 3d at 678; and *Kama*, 39 P.3d at 868, do not suggest a different result.

¶ 62 First, *Rosenthal*, *Okun*, and *Kama* did not discuss the question presented by this appeal, which is whether officers would be entitled to immunity under section 885(d) if they were enforcing an unconstitutional law. The Ninth Circuit's analysis in *Rosenthal* proceeds under the tacit assumption that officers acted to enforce a constitutional law. And the court did not discuss how to apply

section 885(d) if the officers had been enforcing a law that conflicted with the CSA. *Rosenthal*, 454 F.3d at 948. There is no conflict or preemption analysis, and the words "conflict" and "preemption" do not even appear in the opinion.

¶ 63 *Okun* expressly declined to address the issue whether the CSA preempted Arizona's law. *Okun*, 296 P.3d at 1002-03.

¶ 64 In *Kama*, there was "no debate" that the medical marijuana patient was entitled to have the police return his marijuana. Even if the court assumed that the act of returning the marijuana "might constitute delivery of a controlled substance," the prosecution had not "explained — and [the court] did not understand — why police officers would not be immune from any federal criminal liability that otherwise might arise from doing so." *Kama*, 39 P.3d at 868. Again, there is no conflict or preemption analysis in the opinion.

¶ 65 Second, *City of Garden Grove* is distinguishable for several reasons. The prosecution relied on the concept of "field preemption," which requires a different analysis than obstacle preemption. *See* 68 Cal. Rptr. 3d at 675 (The prosecution argued that, "in enacting the CSA, Congress intended to occupy the field of marijuana regulation so extensively that ordering the return of a

medical marijuana defendant's medical marijuana under state law would be absolutely anathema to congressional intent."). Field preemption is not applicable to this case "because 21 U.S.C. § 903 expressly declares that Congress did not intend to occupy the entire field of controlled substances regulation 'unless there is a positive conflict' between the CSA and state law." *Ter Beek*, 823 N.W.2d at 871 n.5.

¶ 66 *City of Garden Grove* does not discuss section 885(d) in the context of whether officers were "lawfully engaged" in law enforcement when they returned marijuana to medical marijuana patients. Rather, the court included that statute in its analysis of whether the prosecution had standing. 68 Cal. Rptr. 3d at 663-64.

¶ 67 *City of Garden Grove* also does not involve a specific statute or state constitutional section that required police officers to return seized marijuana to medical marijuana patients. *Id.* at 678. The prosecution therefore did not argue that a state statute or constitutional provision was unconstitutional because it was preempted by the CSA. The court consequently did not consider what effect an unconstitutional law might have on officers' immunity under section 885(d).

¶ 68 The *City of Garden Grove* court obviously proceeded from the assumption that the constitutionality of a state law was not at issue in the case. It stated that "federal supremacy principles do not prohibit the return of marijuana to a qualified user whose possession of the drug is *legally* sanctioned under state law." *Id.* at 678 (emphasis added).

¶ 69 Third, although *Ter Beek* also discussed preemption, it is distinguishable, too. It analyzed a state statute granting immunity from state prosecution. The opinion makes clear that "the immunity granted under the [state] statute was not intended to include protection from federal prosecutions." 823 N.W.2d at 873. The opinion does not mention section 885(d), and the court does not consider whether officers returning marijuana could be prosecuted under federal law. Rather, the opinion merely states that the state immunity provision is not preempted by the CSA because "it only grants immunity from *state* prosecution[s]." *Id.* at 873-74 (emphasis added).

¶ 70 *Qualified Patient's Ass'n* is distinguishable for the same reason. The court observed that the prosecution did not claim that it was "enforcing a *federal* criminal sanction attached to the *federal*

marijuana law." 155 Cal. Rptr. 3d at 109. Instead, the prosecution sought "to enforce the state sanction of probation revocation which is solely a creature of state law." *Id.* The opinion does not discuss whether a state law that requires an affirmative act that violates the CSA is preempted by the CSA. The opinion does not refer to section 885(d).

¶ 71 Fourth, I respectfully submit that *San Diego NORML*, 81 Cal. Rptr. 3d at 480-81, is based on an unnecessarily rigid analysis of the concept of "conflict preemption" that has been eschewed by the United States Supreme Court. "Conflict pre-emption" analysis asks whether state law "actually conflicts" with federal law. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

¶ 72 There are two varieties of conflict preemption. *Id.* One variety is "impossibility preemption," which occurs when "compliance with both federal and state regulations is a physical impossibility[.]" *Fla. Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 142-43 (1963). The other variety is "obstacle preemption," which occurs when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¶ 73 21 U.S.C. § 903 preempts states laws if they "positive[ly] conflict" with the CSA in such a way that the two laws "cannot consistently stand together." I interpret this language to incorporate both varieties of conflict preemption for the following reasons.

1. Conflict preemption is applicable "[e]ven without an express provision for preemption." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).
2. The United States Supreme Court has cautioned that the differences between the two varieties of conflict preemption are not "rigidly distinct." *Id.* at 372 n.6 (internal quotation marks omitted).
3. The Supreme Court "has not previously driven a legal wedge — only a terminological one — between 'conflicts' that preempt or frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000).

4. The Supremacy Clause "nullifies" state laws under both varieties of conflict preemption, and the Court has "assumed that Congress would not want either kind of conflict." *Id.* at 873.
5. The Court has refused to "tolerate" either variety of conflict preemption when interpreting federal statutes that, akin to 21 U.S.C. § 903, expressly restrict the scope of their preemptive effect. *Id.* at 873-74.
6. After the division of the California Court of Appeals decided *San Diego NORML*, the Supreme Court explored the reach of a federal statute that preempted state medication laws if they had a "direct and positive conflict" with federal law. *Wyeth v. Levine*, 555 U.S. 555, 567 (2009). The Supreme Court analyzed this federal preemptive statute, which I submit contains language similar to that found in 21 U.S. C. § 903, under both varieties of conflict preemption. *Id.* at 568-73, 573-81.

II. The CSA Preempts the Part of Section14(2)(e) that Requires Police Officers to Return Marijuana to Medical Marijuana Patients

A. Marijuana Is A Controlled Substance Under Federal Law

¶ 74 In enacting the CSA, Congress made a series of findings and declarations. The findings and declarations that are relevant to my analysis are (1) illegal distribution and possession of controlled substances have a "substantial and detrimental effect on the health and general welfare of the American people"; (2) a "major portion" of drug trafficking occurs in interstate and foreign commerce; (3) local drug trafficking that is not "an integral part" of the interstate flow of drugs still has "a substantial and direct effect upon interstate commerce"; (4) "local distribution and possession of controlled substances" swells interstate drug trafficking; (5) it is not feasible to distinguish between interstate and intrastate distribution; and (6) "[f]ederal control of the intrastate incidents" of drug trafficking "is essential to the effective control" of interstate incidents of drug trafficking." 21 U.S.C. § 801(1)-(6).

¶ 75 Based on these findings and declarations, the United States Supreme Court has stated that the CSA's "main objectives" are to "conquer drug abuse and to control the legitimate and illegitimate

traffic in controlled substances." *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). In enacting the CSA, "Congress was particularly concerned" with preventing "the diversion of drugs from legitimate to illicit channels." *Id.* at 12-13.

¶ 76 And, as the majority points out, the CSA classifies marijuana as (1) a schedule I controlled substance, 21 U.S.C. § 812 Schedule I (c)(10); (2) that threatens a high potential for abuse and that does not have any accepted medical usage, 21 U.S.C. §§ 812(b)(1)(A)-(C); and (3) that is contraband for any purpose, *Raich*, 545 U.S. at 27.

B. Returning Seized Marijuana to Marijuana Patients Is Distribution of a Controlled Substance Under Federal Law

¶ 77 The CSA defines the term "distribute" to mean "to deliver . . . a controlled substance[.]" 21 U.S.C. § 802(11). The word "deliver" means "the actual, constructive, or attempted transfer of a controlled substance." 21 U.S.C. § 802(8). "Any individual who participates in *any manner* in the unauthorized distribution of such 'controlled substances' is amenable to [the CSA] and the sanctions" that it provides. *United States v. Pruitt*, 487 F.2d 1241, 1245 (8th Cir. 1973) (emphasis added).

¶ 78 The CSA does not contain "a sale or buying requirement to support a conviction; there is now an offense of participation in the transaction viewed as a whole." *Id.*; *accord United States v. Cortes-Caban*, 691 F.3d 1, 18-19 (1st Cir. 2012) ("Congress, recognizing that narcotics typically pass through several hands before reaching the ultimate user, opted to view the transaction as a whole and intended to make illegal participation at any and all stages."). And "[t]he underlying goal of the distribution is . . . irrelevant to the question of whether there was a 'distribution.'" *Id.* at 19 (citation omitted).

¶ 79 Section 14(2)(e) states that marijuana "seized by state or local law enforcement officials from a patient . . . in connection with the claimed medical use of marijuana *shall* be returned immediately" to the medical marijuana patient "upon the determination" of the prosecutor that the patient "is entitled to the protection contained in this section as may be evidenced . . . by . . . acquittal." (Emphasis added.)

¶ 80 Based on federal authority such as *Cortes-Caban* and *Pruitt*, I conclude that section 14(2)(e) requires police officers and medical marijuana patients to distribute a controlled substance. When the

officers engage in the physical act of returning marijuana to medical marijuana patients after such patients have been acquitted of criminal charges, the officers deliver it — "actually . . . transfer" it — to them. *See* 21 U.S.C. § 802(8), (11). When the patients engage in the physical act of receiving the marijuana, they "participat[e] in the transaction [when it is] viewed as a whole." *Pruitt*, 487 F.2d at 1245. And this exchange constitutes the illegal distribution of a controlled substance under federal law even though the "goal" of the exchange is to further the purposes of section 14(2)(e). *Cortes-Caban*, 691 F.3d at 19.

¶ 81 *City of Garden Grove* states that the only way that police officers could violate the CSA by distributing a controlled substance would be if they "intended to act as . . . drug peddler[s] rather than . . . law enforcement official[s]." 68 Cal. Rptr. at 3d at 681. *See also Qualified Patients Ass'n*, 155 Cal. Rptr. 3d at 109 ("[G]overnmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws."). I respectfully suggest that the reasoning in these two cases does not insulate police officers and medical marijuana patients from federal prosecution for two reasons.

¶ 82 First, the present-day situation is that distribution of marijuana remains illegal under federal law. Police officers and medical marijuana patients are therefore on notice that the conduct required by section 14(2)(e) violates the CSA and that such conduct is subject to prosecution or injunctive action in federal court. They could obviously argue in a state court proceeding — almost certainly successfully — that they did not intend to violate *state* law because they were protected by section 14(2)(e). But the likelihood of success of their argument in federal court that they did not intend to violate *federal* law is, to me, significantly diminished because the CSA's prohibitions are so clear.

¶ 83 Second, assuming for the purposes of argument that section 14(2)(e) provides an effective defense in federal court, it will only serve as a shield from criminal responsibility until it is declared to be unconstitutional. I respectfully submit that the day of such a declaration may not be far in the future.

¶ 84 I recognize that police officers "are charged to enforce laws until and unless they are declared unconstitutional." *Michigan v. DeFillipo*, 443 U.S. 31, 38 (1979). But once such a declaration is made, police officers are presumptively on notice that their conduct

is unlawful if they continue to enforce an unconstitutional statute. *See K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (suit challenging enforcement of state abortion statute; "[W]here a state actor enforces an unconstitutional law, he is stripped of his official clothing and becomes a private person subject to suit."); *Lawrence v. Reed*, 406 F.3d 1224, 1231-33 (10th Cir. 2005) (qualified immunity case under 42 U.S.C. § 1983; "[O]fficers can rely on statutes that authorize their conduct — but not if the statute is obviously unconstitutional."); *Vives v. City of New York*, 405 F.3d 115, 117 (2d Cir. 2005) (request for declarative relief, an injunction, and money damages; "We have held that absent contrary direction, state officials . . . are entitled to rely on a presumptively valid state statute . . . until and unless the statute is declared unconstitutional." (internal quotation marks and alterations omitted)).

¶ 85 *City of Garden Grove* did not face the question of what would happen if a court declared that a medical marijuana law that police officers were enforcing by returning marijuana to medical marijuana patients was unconstitutional. I respectfully submit that, from the point of such a declaration forward, police officers

and medical marijuana patients would be on notice that their conduct would no longer be innocent because state law no longer protects their conduct. In such circumstances, officers who return marijuana to medical marijuana patients would knowingly act as "drug peddler[s] rather than . . . law enforcement official[s]," and medical marijuana patients would be knowingly complicit in such distribution.

¶ 86 In my view, section 14(2)(e) places police officers and marijuana patients in a classic "Catch 22." If they comply with federal law, they risk prosecution under state law. If they comply with state law, they risk prosecution or restraint by injunction under federal law.

¶ 87 So how should this dilemma be resolved? Are state law and federal law co-equal in this context? They are not because the Supremacy Clause says that they are not. Which law should give way? When state law and federal law collide head on, the Supremacy Clause makes clear that federal law must control.

C. Section 14(2)(e) Obstructs the CSA's Clear Purposes

¶ 88 Like the majority, I begin my preemption analysis assuming that the CSA does not preempt section 14(2)(e) because enforcement

of drug laws is one of the historic police powers of a state. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). To take the next step in the analysis, I must determine what Congress intended when it passed the CSA. Indeed, the key to the preemption analysis is congressional intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996). To discern Congress' intent in this case, I must look to (1) the language of 21 U.S.C. § 903 and its surrounding statutory framework; (2) the CSA's purpose and structure; and (3) how Congress intended the statute to affect "business, consumers, and the law." *Id.*

¶ 89 To overcome the assumption that the CSA does not preempt section 14(2)(e), I must therefore determine whether Congress has expressed a "clear and manifest purpose" to preempt section 14(2)(e). *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Unlike the majority, I conclude that Congress has expressed such a purpose, and, as a result, I would further conclude that section 14(2)(e) is preempted. I reach this conclusion because section 14(2)(e) frustrates the operation of the CSA within its "'chosen field'" and "'refuse[s]'" its "'natural effect.'" *Crosby*, 530 U.S. at 373 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

¶ 90 A reading of 21 U.S.C. § 903 makes clear that Congress did not intend to preempt the entire field of drug enforcement. But that statute also makes clear that Congress intended to preempt state laws if they "positive[ly] conflict" with the CSA in such a way that the two laws "cannot consistently stand together." Even if Congress did not "completely displace[] state regulation in a specific area," state laws are "nullified to the extent that [they] actually conflict[] with federal law." *Hillsborough County, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

¶ 91 Such a positive conflict occurs if a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. I conclude that the CSA preempts section 14(2)(e) because this state constitutional provision "obstructs the accomplishment of the objectives" of the CSA. *Willis v. Winters*, 253 P.3d 1058, 1064 (Or. 2011). It does so because it requires police officers and medical marijuana patients to "engage in conduct that [the CSA] forbids." *Mich. Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984).

¶ 92 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.

¶ 93 I recognize that the state of Colorado might well be able to repeal some or all of its criminal drug laws — a course of dubious wisdom — without running afoul of the Supremacy Clause. *See New York v. United States*, 505 U.S. 144, 148 (1992). In doing so, Colorado would abandon all or part of the field to federal enforcement activities. But section 14(2)(e) does not merely walk away from part or all of the drug enforcement field. Rather, it requires police officers and medical marijuana patients to act in that field in an affirmative way that violates federal law, and this affirmative act obstructs the enforcement of the CSA.

¶ 94 Section 14(2)(e) obstructs at least some of the reasons why Congress enacted the CSA. By requiring the distribution of marijuana in specified circumstances, section 14(2)(e) undercuts Congress' concerns, for example, that such distribution has "substantial and detrimental effect on the health and general

welfare of the American people," 21 U.S.C. § 801(2); that local drug trafficking that is not "an integral part" of the interstate flow of drugs still has "a substantial and direct effect upon interstate commerce," § 801(3); and that "[f]ederal control of the intrastate incidents" of drug trafficking "is essential to the effective control of the interstate incidents of drug trafficking," § 801(6).

¶ 95 Although no appellate opinion in Colorado has directly addressed the issue in this case, authority from other jurisdictions buttresses my conclusion. The Oregon Supreme Court concluded in *Emerald Steel Fabricators, Inc. v. BOLI*, 230 P.3d 518, 529 (Or. 2010), that a state law that authorized medical marijuana patients to use marijuana was an obstacle to the enforcement of the CSA because the state law "affirmatively authorized the very conduct that federal law prohibited[.]" I find the following analogy that appears in the opinion to be particularly 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.

Id. at 531.

¶ 96 I reframe this analogy in the context of this case as follows. If Congress chooses to prohibit all persons from distributing marijuana, then a state law cannot require police officers to transfer marijuana, and the state law cannot authorize medical marijuana patients to receive it. Such a state law is an obstacle to the full accomplishment of *Congress'* purposes because it imposes conflicting duties, and federal law would preempt it. *See Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (A state statute is an obstacle to a federal statute if the two laws impose conflicting duties, such as "if the federal law said, 'you must sell insurance,' while the state law said, 'you may not.'"). Section 14(2)(e) imposes a duty that conflicts with the CSA because the Colorado constitutional provision "force[s] some individuals to . . . distribute marijuana while the federal ban remain[s] in place." Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 12 McGeorge L. Rev. 147, 159 (2012).

¶ 97 *State v. Ehrensing*, 296 P.3d 1279, 1286 (Or. App. 2013), involved facts similar to those here. A trial court ordered a sheriff to return marijuana to a medical marijuana patient after the court

had dismissed the criminal charges against the patient on speedy trial grounds. The trial court relied, in part, on a general statute that authorized the return of property which defendants are "lawfully entitled to possess." *See* Or. Rev. Stat. Ann. § 133.643(3) (West 2013).

¶ 98 The Oregon Court of Appeals reversed. It observed that the trial court should not have ordered the sheriff to return the marijuana because construing the statute in a manner that would "authorize — indeed compel — the return of items whose possession would violate federal law could, as the parties' preemption-related contentions manifest, give rise to 'serious constitutional problems.'" *Id.* at 1286 (quoting *Bernstein Bros., Inc. v. Dep't of Revenue*, 661 P.2d 537, 541 (Or. 1983)).

¶ 99 I recognize that the federal government cannot commandeer Colorado law enforcement officers to "enact or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). But I conclude that the CSA has never posed such a threat because it "'does not require [our state legislature] to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.'"

Raich v. Gonzales, 500 F.3d 850, 867 n.17 (9th Cir. 2007) (quoting *Reno v. Condon*, 528 U.S. 141, 151 (2000)).

¶ 100 The reasoning of *Emerald Steel* and *Ehrensing* further convinces me that section 14(2)(e) does not merely protect Colorado police officers and medical marijuana patients from being commandeered by the federal government, or from acting as proxies for federal officers, in the *enforcement* of federal law. Rather, section 14(2)(e) requires police officers and medical marijuana patients to become complicit in the *violation* of federal law. *See United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1100 (N.D. Cal. 1998) ("A state law which purports to legalize the distribution of marijuana for any purpose, . . . even a laudable one, nonetheless directly conflicts with federal law[.]"), *rev'd on other grounds by United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109 (9th Cir. 1999), *rev'd by* 532 U.S. 483 (2001).

¶ 101 Opinions that the attorneys general of Michigan and Oregon have supplied on this issue also support my conclusion. *See Colo. Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988) ("Since the Attorney General's opinion is issued pursuant to statutory duty, the opinion is obviously entitled to respectful consideration as a

contemporaneous interpretation of the law by a governmental official charged with the responsibility of such interpretation.").

¶ 102 A Michigan medical marijuana law required police officers to return marijuana that they had seized to the medical marijuana patients from whom they had seized it. Michigan's Attorney General expressed the opinion that the CSA preempts the Michigan law because it is "impossible" for Michigan law enforcement officers to comply with their duty to return marijuana under state law *and* their federal law duty not to distribute or assist in the distribution of marijuana. Op. Mich. Att. Gen., No. 7262 at *5 (Nov. 10, 2011).

¶ 103 Oregon's Attorney General concluded that the CSA likewise preempted a similar Oregon law. "Returning marijuana to users would constitute distribution of a controlled substance" under the CSA, which would "obstruct[] the accomplishment" of the CSA's "purpose and intended effect to prohibit the distribution and possession of all marijuana[.]" Op. Or. Att. Gen., No. OP-2012-1 at *8-*9 (Jan. 19, 2012).

¶ 104 Because I conclude that the CSA preempts section 14(2)(e), I further conclude that its application is unconstitutional. *See Crosby*, 530 U.S. at 388 (application of a preempted law is

unconstitutional under the Supremacy Clause); *Celebrity Custom Builders v. Indus. Claims Appeal Office*, 916 P.2d 539, 541 (Colo. App. 1995) ("[S]ince a preemption claim is a challenge to the constitutionality of a statute," a holding that a statute is preempted "constitutes a finding that a state statute is unconstitutional.").

¶ 105 In summary, section 14(2)(e) *requires* police officers to violate federal law by engaging in affirmative conduct that the CSA forbids. This mandate creates an obstacle to achieving the purposes and the objectives of the CSA. The existence of this obstacle means that the CSA preempts section 14(2)(e).

D. Application of Section 885(d)

¶ 106 Once I reach the conclusion that the conduct required by section 14(2)(e) is preempted and thus rendered unconstitutional by federal law, the prospect that section 885(d) grants immunity to Colorado police officers and medical marijuana patients engaging in such conduct vaporizes. The plain language of Section 885(d) makes clear that "civil or criminal liability" may be imposed under the CSA on state law enforcement officers who are not "lawfully engaged in the enforcement of any law . . . relating to controlled substances."

¶ 107 The conclusion I reach here is therefore supported by cases such as *Cortes-Caban*, 691 F.3d at 21; *United States v. Wright*, 634 F.3d 770, 775-77 (5th Cir. 2011); and *United States v. Reeves*, 730 F.2d 1189, 1195-96 (8th Cir. 1984). I submit that these decisions are based on the implicit premise that officers who are engaged in enforcing valid, constitutional state and federal laws are protected by subsection 885(d). These decisions do not consider whether officers who are engaged in enforcing invalid, unconstitutional laws are protected by subsection 885(d).

¶ 108 *Cortes-Caban*, 691 F.3d at 21, stated that "only those officers 'lawfully' enforcing the controlled substances laws are protected under" section 885(d). Those officers "who exceed lawful enforcement techniques" may be prosecuted. *Id.* "If the police engage in illegal activity in concert with the defendant beyond the scope of their duties," then the proper course is to "prosecut[e] the police," not to free the defendant. *Hampton v. United States*, 425 U.S. 484, 490 (1976) (plurality opinion). Indeed, 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). *Cortes-Caban*, 691 F.3d at 21.

¶ 109 *Wright* observed that state law did not "support the contention that any deputy sheriff can break federal drug laws in the course of his own independent investigations[.]" 634 F.3d at 777. Because it is preempted and thus unconstitutional, section 14(2)(e) likewise does not support the contention that Colorado police officers and medical marijuana patients can violate the CSA.

¶ 110 *Reeves* discussed section 885(d) in the context of whether the evidence submitted at a trial was insufficient to prove that law enforcement officers intended to distribute marijuana "except insofar as it related to their law enforcement duties[.]" *Reeves*, 730 F.2d at 1195. The court concluded that there was sufficient intent to establish that the officers were not engaged in a "reverse sting" operation that was authorized by federal law. *Id.* at 1196. The obvious implication of the court's reasoning is that the officers intended to break an existing federal law, and that the validity of that law had not been challenged. There is no indication in the opinion that the court considered what the result would be if the officers had acted under an unconstitutional state law.

¶ 111 Cases such as *United States v. Sanchez-Berrios*, 424 F.3d 65, 71-72 (1st Cir. 2005), and *United States v. Serrano-Beauvaix*, 400 F.3d 50, 52 (1st Cir. 2005), are inapposite to the analysis in this case. They do not analyze the issue whether law enforcement officers who had been charged with crimes were immune from criminal liability under section 885(d).

III. The Trial Court's Order Should Be Disapproved

¶ 112 For the reasons I discuss above, I would disapprove the trial court's order returning the marijuana and the marijuana plants to defendant. There are three Colorado opinions that provide further support for such a result. I recognize that they do not engage in any preemption analysis, and that they do not cite section 885(d). But these cases are helpful because they analyze situations analogous to the one that I have reached at this step of my analysis: a legal landscape in which federal law is relevant and controlling.

¶ 113 *Coats v. Dish Network*, 2013 COA 62, ¶¶ 6-19, was a statutory interpretation case. It addressed the issue whether a licensed medical marijuana user was involved in "lawful activity" for purposes of a statute that barred employers from firing employees engaged in lawful activities on their own time away from work. The

majority concluded that, "because activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law . . . an activity that violates federal law but complies with state law cannot be 'lawful[.]'" *Id.* at ¶ 14 (citation omitted).

¶ 114 In *People v. Watkins*, 2012 COA 15, the division concluded that a defendant's probation could be revoked because he had possessed marijuana and, by doing so, he had violated the CSA. The division held that section 14 does not "permit a court to enter a probation order that would have the effect of exempting a probationer," who is a licensed medical marijuana patient, "from complying with federal criminal statutes outlawing possession and use of marijuana." *Id.* at ¶ 1.

¶ 115 *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 973-75 (Colo. App. 2011), was an unemployment compensation benefits case. It analyzed the issue whether a licensed medical marijuana user could be denied benefits. His employer fired him after a test determined that he had marijuana in his system during working hours. A state statute says that employees must be denied benefits in such circumstances if the tests identify controlled substances in the employees' systems, and the employees have not been ingesting

the controlled substances under doctors' prescriptions. Relying, in part, on the CSA, the majority concluded that the use of marijuana by a licensed medical marijuana patient was not "pursuant to a prescription." *Id.* at 974.

¶ 116 I emphasize that the scope of this dissent is limited to the conclusion that the CSA preempts the part of section 14(2)(e) that requires police officers to return seized marijuana to medical marijuana patients. I take no position on whether the CSA preempts any other provision of section 14.