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

MMH, LLC, a Washington Limited Liability Company, Plaintiff, v. CITY OF FIFE, a Washington municipal corporation, Defendant.	NO. 14-210487-7 PLAINTIFF-INTERVENORS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Assigned to Judge Ronald E. Culpepper Hearing Date: 8/29/14

I. Introduction and Relief Requested

Plaintiff-Intervenors Downtown Cannabis Company, LLC, Monkey Grass Farms, LLC, and JAR MGMT, LLC d/b/a Rainier on Pine oppose the City of Fife's Motion for Summary Judgment. The motion contends that as a matter of law, the City's Ordinance No. 1918, which bans duly licensed marijuana businesses, is a lawful exercise of its police and zoning powers.

The City's motion first posits that every local jurisdiction in Washington is free to prohibit licensed marijuana businesses from operating within its borders. If true, this would completely block the implementation of the comprehensive regulatory scheme enacted by Initiative 502. The City next contends that the federal Controlled Substances Act (CSA) preempts I-502 because the City's grant

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

of general business licenses and collection of taxes from marijuana businesses would somehow require City employees to commit federal crimes. The City has provided no support for the notion that I-502 requires violation of any provision of the CSA, which explicitly makes room for a wide variety of state-level regulations.

Because the City fails to support these assertions with admissible and material facts or applicable legal authority, the Court should deny the motion. Alternatively, the Court should continue the motion, filed just two weeks after this action commenced and before the City had answered the complaint, to allow the opportunity for discovery regarding the factual issues raised by the City's argument that the CSA preempts I-502.

II. Issues Presented

The City's motion raises the following issues:

1. To avoid preemption by I-502, the City's ordinance disallowing licenses for marijuana businesses must not be inconsistent with Washington's general laws, including I-502. I-502 replaces an illegal and invisible marijuana black market with a comprehensive regulatory system that makes marijuana commerce visible to state and federal authorities. The City's ordinance prevents the establishment of such commerce within its boundaries and, if adopted by all or even most local governments, would entirely undermine I-502. Is the City's ordinance inconsistent with I-502?

2. A federal statute does not preempt state law unless this was the "clear and manifest" intent of Congress. In the case of "field preemption," a federal statute may preempt a state ordinance if Congress has expressed its intent to occupy the field in which the state law operates. The CSA states, "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal

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

penalties, to the exclusion of any State law on the same subject matter…." Does the CSA preempt I-502 by occupying the field in which it operates?

3. Congress has expressly provided that the CSA will preempt state law only if "there is a positive conflict between [a provision of the CSA] and that State law so that the two cannot consistently stand together." This "positive conflict" preemption is narrow and occurs only when a federal statute forbids what state law requires, often termed "direct" or "impossibility" preemption. The CSA does not prohibit the City from applying its generally applicable laws governing local business licensing or local tax collection to marijuana businesses, nor does it forbid the City from making zoning decisions that would allow state-licensed marijuana businesses to operate within its borders. Does I-502 compel the City to do something that the CSA forbids, such that it is impossible for the City to comply with both laws?

4. The preemptive scope of a federal statute is based on the intent of Congress. In the CSA, Congress expressly waived preemption of most state drug laws and provides for only narrow preemption in the case of a "positive conflict." Because of this language, courts have concluded that the doctrine of implied "obstacle" preemption, in which a federal law without an express preemption provision can preempt a state law that is found to be an "obstacle" to the achievement of the federal law's purposes, does not apply to the CSA. Should this Court reach a different conclusion?

5. To show "obstacle" preemption, the City must prove that I-502 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." With the CSA, Congress intended to create a federal-state partnership to combat drug abuse and control illicit drug trafficking. Does I-502's regulatory and enforcement system to control the cultivation, distribution,

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

sale, and possession of marijuana, replace Washington's illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for, and direct new tax revenues to evidence-based drug abuse prevention and treatment programs, amount to an obstacle to the accomplishment of Congress's goals?

III. Statement of Facts

Given the early stage of this litigation, and the fact that no discovery has yet been conducted by any party, the factual record is minimal. The City's motion is unsupported by relevant facts and instead confines itself to something of a legislative history surrounding I-502 and another statute not at issue here: the Medical Use of Cannabis Act (or "MUCA"). The facts material to the City's claim of federal preemption are, at this point, wholly undeveloped. If properly developed, the evidence will show that the provisions of I-502 are not preempted by the CSA as Congress defined the preemptive scope of that law and that I-502 will, in fact, protect and even advance the goals and interests of the federal government under the CSA.

Congress passed the CSA in 1970.[1] The CSA makes it a federal crime to produce, distribute, or possess marijuana.[2] The CSA was designed "to combat the international and interstate traffic in illicit drugs. [Its] main objectives … were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."[3] As discussed below, in the CSA Congress expressly saved state drug laws from preemption, with only a narrow exception providing for preemption in the case of a "positive conflict" such that a provision of the CSA and

[1] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub L. No. 91-513, § 100-709, 84 Stat. 1236, 1242-84.
[2] 21 U.S.C. §§ 841, 844.
[3] *Gonzales v. Raich*, 545 U.S. 1, 12 (2005).

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

a provision of state law "cannot consistently stand together."[4]

Thus, with the CSA Congress enshrined a federal-state partnership to combat drug abuse and illicit drug trafficking. The federal government's role in the partnership was to control international and interstate activity and address other high-priority federal concerns. The states, meanwhile were explicitly left free to adopt their own drug laws to control and regulate controlled substances within their borders.

Since the CSA's passage, states have implemented a wide variety of criminal, civil, and regulatory approaches addressing the possession, production and distribution of marijuana. As early as the 1970s, 11 U.S. states decriminalized[5] marijuana possession.[6] Currently 17 states and the District of Columbia have decriminalized marijuana possession[7] Since 1996, 23 states and the District of Columbia have passed laws creating varying degrees of legal protection to permit marijuana use for medical purposes, including Washington.[8]

---

[4] 21 U.S.C. § 903.

[5] Decriminalization generally entails eliminating criminal laws prohibiting possession of marijuana, sometimes coupled with the imposition of civil penalties.

[6] These states are Alaska, Laws of 1975, Ch. 110; Alaska Stat. §17.12.011 (Michie 1975); California, Laws of 1975, Ch. 248; Cal. Health & Safety Code §11357(b) and (c) (West 1975); Colorado, Laws of 1975, Ch. 115; Colo.Rev. Stat. §12-22-412 (1975); Maine, Laws of 1975, Ch. 499; Me. Rev. Stat. Ann. tit. 22 §2383 (1975); Minnesota, Laws of 1976, Ch. 42; Minn. Stat. §152.15 (1976); Mississippi, Laws of 1977, Ch. 482; Miss. Code Ann. §41-29-139 (1977); Nebraska, Laws of 1978, Act. No. 808; Neb. Rev. Stat. §28-416(9); New York, Laws of 1977, Ch. 360; N.Y. Penal Law §221.05 (McKinney 1977); North Carolina, Laws of 1977, Ch. 862; N.C. Gen. Stat. §90-95 (1977); Ohio, Laws of 1976, Act No. 300; Ohio Rev. Code Ann. §2925.11(C) & (D) (1976); and Oregon, Laws of 1973, Ch. 680; Or. Rev. Stat. §167.207(3) (1973).

[7] The following jurisdictions decriminalized, beginning in 2001: Connecticut (Conn. Gen. Stat. § 21a-279a (2011)), District of Columbia (D.C. Code § 48-904.01 (2014)), Maryland (Bill 364, Approved by the Governor April 14, 2014), Massachusetts (Mass. Gen. Laws. Ch. 94C, § 32L (2008)), Nevada (Nev. Rev. Code § 453.336), Rhode Island (R.I. Gen. Laws § 21-28-4.01 (2014)), and Vermont (Vt. Stat. Ann. tit. 18, § 4230 (2013)).

[8] Alaska (Alaska Stat. §§ 17.37.10 - 17.37.80 (2007)), Arizona (Ariz. Rev. Stat. §§ 36-2801 - 36-2819 (2010)), California (Cal. Health & Saf. Code §§ 11362.5 - 11362.83 (West 2003)), Colorado (C.O. Const. art. XVIII, §14 (2001)), Connecticut (Conn. Gen. Stat. §§ 21a-408 - 21a-429 (2012)), Delaware (Del. Code Ann. tit. 16 § 49a (2012)), Hawaii (Haw. Rev. Stat. §§ 329-121 - 329-128 (2000)), Illinois (410 Ill. Comp. Stat. 130/1 – 130/999 (2014)), Maine (Me. Rev. Stat. Tit. 22, §§2421 - 2430-B (1999)), Maryland (Md. Code Ann., Health-Gen. § 13-3301 et. seq. (2014)), Massachusets

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

Three-quarters of these jurisdictions have also created a regulatory framework for licensing and controlling the lawful production and distribution of marijuana for medical purposes, even though the medical use of marijuana remains just as illegal under federal law as production and distribution of marijuana for non-medical purposes. These non-criminal and regulatory approaches to marijuana have long been an active component of the federal-state partnership under the CSA and have survived for over 30 years without a court finding of federal preemption.

In Washington, the facts will show, the State's prior tactics of criminalizing marijuana production, sale, and possession and incarcerating offenders have proven to be ineffective means to prevent the abuse and illicit distribution of marijuana. These tactics have driven marijuana distribution underground where it has escaped effective control and fueled criminal organizations. Prohibition and criminalization have also resulted in serious unintended consequences, including violence, black market marijuana becoming available to minors, and the substantial collateral consequences of incarceration and criminal records on those convicted of marijuana offenses, their families, and their communities. Thus, if properly developed, the facts will show that Washington's prior prohibition of all marijuana production, sale, and possession failed to achieve – and even undermined – the goals of the CSA and the federal government's enforcement priorities.

(Mass. Gen. Laws ch. 94C, §§ 1-2 to 1-17 (2012), Michigan (Mich. Comp. Law §§ 333.26423; 333.26424(j); 333.26426(d) (2008)), Minnesota (Minn. Stat. §§ 152.22 – 152.37 (2014)), Montana (Mont. Code. Ann. § 50-46-301 - 50-46-344 (2004)), Nevada (Article 4, section 38 of the Nevada Constitution, Nev. Rev. Stat. § 453A), New Hampshire, New Jersey (N.J. Stat. Ann. § C.24:6I), New Mexico (N.M.Stat. Ann. § 26-2B-1, § 30-31C-1 (2007)), New York (N.Y Public Health Law Art. §§ 33, Title 5-A (2014)), Oregon (Or. Rev. Stat. §§ 475.300 - 475.346 (1998)), Rhode Island (R.I. Gen. Laws Chapter §§ 21-28.6. (2006)), Vermont (Vt. Stat. Ann. tit. 18 §§ 4472 - 4474l (2004)), Washington (Wash. Rev. Code § 69.51A (1998)), and Washington, D.C. (D.C. Code Ann. § 7-1671.01 - 7-1671.13 (2010)).

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

In 2012, Washington voters adopted a new approach to marijuana regulation and enforcement by passing I-502.[9] In so doing, the voters did not authorize complete and unregulated legalization. Instead, I-502 removes criminal penalties under Washington law for limited marijuana possession, production, processing, and sale by and to adults over the age of 21, only where those limited activities comply with a robust regulatory regime administered by the Washington State Liquor Control Board (WSLCB).

If properly developed, the evidence will show that this approach will be equally or more effective at combating drug abuse and controlling illicit drug-trafficking than the pre-existing total criminal prohibition on all marijuana-related activity. The evidence will show that, like the wide variety of state approaches to marijuana that have come before, Washington's new approach is consistent with the federal-state partnership under the CSA and, in fact, advances the goals of the CSA and the federal government's stated enforcement priorities.

The City's motion reports—accurately—the reaction of the United States Department of Justice to the adoption of I-502. The Justice Department has produced a series of public guidance memoranda to U.S. attorneys nationwide, which articulate federal enforcement policies under the CSA in light of recent efforts by states to legalize limited marijuana production and distribution for medical and non-medical purposes. The most pertinent of these memoranda is an August 29, 2013 memorandum by Deputy Attorney General James M. Cole, issued after Washington and Colorado decided to allow limited and tightly controlled marijuana production and sale to supply an above-board and regulated market for

[9] WASH. SEC. OF STATE, *Nov. 6, 2012 General Election Results*, "Initiative Measure No. 502 Concerns marijuana," available at (http://vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana.html).

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

1 adults.[10]

2 The memorandum identifies eight federal law enforcement priorities,
3 outside of which "the federal government has traditionally relied on states and
4 local law enforcement agencies to address marijuana activity through enforcement
5 of their own narcotics laws." I-502 addresses each of the federal priorities as
6 follows.

- 7 Preventing distribution to minors. I-502 expressly prohibits licensed
8 retail stores from selling marijuana to anyone under the age of 21 and
9 leaves in place all state criminal penalties for doing so.[11] I-502 also
10 continues to prohibit the possession of marijuana by anyone under
11 the age of 21 and leaves in place all state criminal penalties.[12] I-502
12 and WSLCB rules do not allow anyone under the age of 21 to have an
13 interest in or be employed by any licensed marijuana producer,
14 processer, or retailer. I-502 brings these businesses, unlike black
15 market enterprises, under the regulation of the WSLCB, which will
16 use its enforcement resources to inspect and investigate the premises
17 and practices of licensed businesses in much the same way as it
18 enforces alcohol age restrictions against sellers of alcohol. I-502
19 contains several provisions funding education and prevention
20 programs that, among other things, will seek to prevent marijuana
21 use by children and young adults.
- 22 Preventing marijuana revenue from reaching criminal enterprises. I-
23 502 and WSLCB rules require background checks on anyone seeking

24

25 [10] Memorandum for All United States Attorneys from James M. Cole, Deputy Attorney General, re: Guidance Regarding Marijuana Enforcement, Aug. 29, 2013.

26 [11] RCW 69.50.360(3), 357(2), 401(3); *see also* RCW 69.50.406.

[12] RCW 69.50.4013-4014.

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

a license to operate a lawful marijuana business and disclosure of all financial investors in such businesses. I-502 and WSLCB rules also require full accounting and financial reporting of the revenues and profits of marijuana businesses.

- Preventing diversion of marijuana to states where it remains illegal. I-502 and WSLCB rules have created a comprehensive, electronic bar code system to track and account for all lawful marijuana produced in Washington from seed to sale, preventing its diversion to the black market and ensuring that it remains in Washington.[13] These rules also provide for the destruction of all unsold marijuana and for extensive security measures to deter the theft of lawfully produced marijuana. Also, individual sale and possession amount limits discourage acquisition and transportation of large amounts of marijuana under threat of felony prosecution;[14]
- Preventing marijuana activity that is a cover or pretext for other illegal activity. As noted above, I-502 and WSLCB rules require full disclosure and vetting of participants in licensed marijuana businesses, discouraging the participation of those involved in other criminal activity. The control and disclosure of marijuana inventories and revenues will also make it difficult to operate a shadow enterprise under cover of a licensed marijuana business. I-502 does not allow licensed marijuana retail stores to be integrated with any other business.[15]
- Preventing marijuana-related violence and firearm use. Creating

[13] WAC 314-55-083(4).
[14] RCW 69.50.4013(3), 360(3).
[15] RCW 69.50.357(1).

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

lawful channels of production and sale will allow lawful market competition and the civil justice system to replace black market violence as the primary means of obtaining market share and resolving disputes. Cutting organized gangs and cartels out of marijuana profits will suppress their violent methods. Violence by licensed marijuana businesses places their licenses and livelihoods at risk. I-502 and WSLCB rules also provide for extensive security measures to deter violent crime and prohibit the possession of firearms on the premises of any licensed marijuana business.

- Preventing driving under the influence or other adverse public health consequences. I-502 does not remove any criminal penalty for driving under the influence of marijuana, which remains a criminal violation under state law. I-502 enhances enforcement of these laws by establishing a bright-line blood concentration of the psychoactive component of marijuana that constitutes a per se violation of state law. I-502 also dedicates funding to research and education about impairment that will promote the prevention of driving under the influence of marijuana.
- Preventing marijuana growth on public lands. I-502 does not purport to authorize any activity on public lands. I-502 and WSLCB rules also require the disclosure of all land and property information, including addresses and leases, to ensure that licensed operations occur in known locations and on private property; and
- Preventing marijuana possession or use on federal property. I-502 does not purport to authorize marijuana possession or use on federal property and in no way hinders federal law enforcement on federal

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

property. In fact, I-502 prohibits the use of marijuana in any public place, whether federal, state, or local.

In addition to these specific provisions, I-502 and WSLCB regulations will move marijuana production and sale out of the unregulated black market and into a regulated system where the WSLCB will use its enforcement resources, supported by dedicated funding from marijuana excise tax revenues to monitor, investigate and control licensed businesses, which will improve the accomplishment of all of these federal priorities.[16]

"Outside of these enforcement priorities," the Cole memorandum observed, "the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activities through enforcement of their own narcotics laws." For example, the memo continued, "the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property," leaving "such lower-level or localized activity to state and local authorities…."

In stark contrast to the City's allegation in its motion, the Justice Department memorandum did not condemn "state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes." Rather, the Justice Department acknowledged that "strong and effective regulatory systems to control the cultivation, distribution, sale, and possession of marijuana" were possible. And it expressed the view that a "robust 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

[16] RCW 69.50.540(4)

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

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." Therefore, the Justice Department concluded that in states with such regulatory systems, "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."

The upshot of the Cole memorandum is that the Justice Department did not, nearly a year after the passage of I-502, view the Initiative as an obstacle to federal law enforcement. To the contrary, the Justice Department saw the potential for I-502 to serve a complementary role.

The Justice Department expressly reserved the right to file suit "to challenge the regulatory structure" established by the State if it later determined that the structure was deficient. One year after issuing its guidance memo, after the WSLCB has issued comprehensive rules regulating the licensing and limited production and sale of marijuana, the Justice Department has still not taken such action. This strongly suggests that federal law enforcement agencies continue to see I-502 as a help rather than a hindrance to achieving the purposes of the CSA.

The City, meanwhile, has come forward with *absolutely no evidence* that the State of Washington has failed to enact a strong and effective regulatory system for addressing marijuana in a manner consistent with the CSA and federal enforcement priorities. The Court must therefore infer that the State has done so.

Given the time to develop a factual record, Plaintiff-Intervenors intend to present evidence that the federal government is largely inactive in the areas of state and local enforcement of marijuana laws. Since the passage of the CSA, Congress has approached marijuana regulation as a state and federal partnership. This partnership operates in every U.S. state, despite a wide variety of state-level

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

approaches to marijuana regulation, from outright prohibition, to total decriminalization, to state-regulated production and distribution for medical purposes. In no case has the federal government attempted to declare any of these state laws preempted by the CSA.

As this case proceeds, the Court will also learn greater detail about federal enforcement priorities, and the fact that the Department of Justice has been consistent in its position that federal interests are focused on priority matters like interstate and international trafficking, violent criminal enterprises, money laundering, and the sale of marijuana to minors. The Court will hear from such experts as law enforcement and public health officials that these federal priorities not only overlap with Washington's own goals, but are in fact better served by I-502, Washington's new approach.

Discovery in this case will also yield other evidence about Washington's historical approach to marijuana, and the ways that it was ineffective in meeting the state and CSA's goals of preventing violent crime, preventing property crime, enhancing public health, and protecting the safety of Washington citizens. A factual record will be developed to show how Washington's new approach improves upon the state's effectiveness in these areas. Without this evidence, and with no factual record at all, the Court is left with nothing but the inferences it may draw in the absence of a factual record, all of which on summary judgment must be drawn against the City, which has offered no factual support for its positions on these critical matters.

IV. Argument and Authority

Summary judgment is only proper if there is no genuine issue of material fact.[17] The moving party bears the initial burden of demonstrating that there are

[17] CR 56(c).

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

no genuine issues of material fact.[18] If the moving party fails to meet that initial burden, the Court must deny the motion.[19] All doubts regarding the existence of material facts and all inferences from the facts must be resolved against the moving party.[20]

A. The Purpose of I-502 is to Replace Criminal Sanctions on Adults who Possess Small Amounts of Marijuana with a Tightly Regulated Statewide System where Marijuana is Available to Adult Consumers to Drive Out Illicit Production and Distribution

A local jurisdiction is allowed to make and enforce within its limits a regulation that is not in conflict with the laws of the State.[21] However, when a city enacts an ordinance that prohibits an act that a state general law permits, it exceeds its authority and the ordinance is invalid.[22] Fife has prohibited what the people of the State of Washington, by enacting I-502, have expressly authorized.

1. To Accomplish its Goal of Driving Out the Black Market for Marijuana; I-502 Seeks to Ensure that Marijuana Sales Will Occur Throughout the State

I-502 is unique: Washington State voters passed the initiative to replace a failed system that involved illegal sales of marijuana throughout the state with a statewide tightly regulated market for the legal sale of marijuana in small amounts to adults. No other regulatory scheme, with perhaps the exception of alcohol, has had as a purpose driving out an illegal market and replacing it with a highly regulated legal market. If local governments were allowed to prohibit sales in their jurisdictions those actions would defeat the purpose behind I-502. Indeed, I-502, which was closely modeled after Washington's alcohol licensing laws, did not

---

[18] *Young v. Key Pharm., Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182 (1989).

[19] *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

[20] *Westlake View Condo. Assoc. v. Sixth Ave. View Partners, LLC*, 146 Wn. App. 760, 766, 193 P.3d 161 (2008).

[21] *City of Bellingham v. Schampera*, 57 Wn.2d 106, 108, 356 P.2d 292 (1960).

[22] *Id.*

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

include a "local option" provision that would allow a local jurisdiction to prohibit marijuana sales.

Washington state citizens were explicit in enacting I-502: they wanted to replace criminal sanctions with a tightly regulated market that:

> (1) Allows law enforcement resources to be focused on violent and property crimes;
> (2) Generates new state and local tax revenue for education, health care, research, and substance abuse prevention; and
> (3) Takes marijuana out of the hands of illegal drug organizations and bring it under regulation tightly regulated, state-licensed system similar to that for controlling hard alcohol.[23]

In order to carry out the third purpose, it is critical that retail operations be located throughout the state so that people will not resort to the illegal market for marijuana. The statute provides that the WSLCB has the task of ensuring that retail outlets are available in each county to ensure that marijuana is available for sale to adults throughout the state: "There may be licensed, in no greater number in each of the counties of the state than as the state liquor control board shall deem advisable, retail outlets established for the purpose of making marijuana concentrates, useable marijuana, and marijuana-infused products available for sale to adults aged twenty-one and over."[24] The WSLCB must also "[d]etermin[e], in consultation with the office of financial management, the maximum number of retail outlets that may be licensed in each county, taking into consideration: (a) population distribution; (b) security and safety issues; and (c) the provision of adequate access to licensed sources of usable marijuana and marijuana-infused products to discourage purchases from the illegal market."[25]

[23] Laws of 2013, c 3, § 1 (emphasis added).
[24] RCW 69.50.354 (emphasis added).
[25] Laws of 2013, c 3, § 10(2) (emphasis added).

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

The goal of discouraging illegal markets by making licensed marijuana available to those age 21-and-over is furthered by the regulations implementing I-502. WAC 314-55-081, for example, provides that the Board will determine the locations of marijuana retail business within each county based on demand:

> The number of retail locations will be determined using a method that distributes the number of locations proportionate to the most populous cities within each county. Locations not assigned to a specific city will be at large. At large locations can be used for unincorporated areas in the county or in cities within the county that have no retail licenses designated. Once the number of locations per city and at large have been identified, the eligible applicants will be selected by lottery in the event the number of applicants exceeds the allotted amount for the cities and county.

The WSLCB, following statutory directives, authorized retail business licenses in all 39 counties in Washington.[26] The Board determined that 31 retail business licenses should be located within Pierce County, 17 of which are specified for at-large locations in the county. Pursuant to the statute, the Board made this determination after carefully considering the population distribution in the county and the need to provide adequate access to licensed marijuana to discourage the illegal market.

Under the statute, Fife can formally object to individual applicants and/or premises the Board has authorized to be licensed in Fife.[27] However, the Board may override the objections and grant the licenses.[28] While the initiative contemplates input from local jurisdictions and grants a procedure by which local jurisdictions can object to a particular licensee from operating in its jurisdiction, I-502 does not grant local jurisdictions the authority to ban retail marijuana businesses. Rather, the initiative expressly grants the Board the authority to

[26] *See* www.liq.wa.gov.
[27] RCW 69.50.331(7)-(9).
[28] *Id.*

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

determine "[r]etail outlet locations."[29] Blanket prohibitions, such as Fife's Ordinance 1872, conflict with I-502 and undermine I-502's express purposes and goals.

2. Allowing Local Jurisdictions to Ban Marijuana Retail Operations Would Conflict 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."[30] Fife's ban on retail stores conflicts with I-502's purpose of driving out the black market sales of marijuana.

An instructive case is *Entertainment Industry Coalition v. Tacoma-Pierce County Health Dep't*.[31] There, a state law allowed certain types of public establishments to determine whether their facilities would allow cigarette smoking. The TPCHD enacted a rule that prohibited those establishments from making such an election. The trial court found that the TPCHD rule conflicted with the state general law. The State Supreme Court affirmed the trial court and held:

> Like our previous cases, the Health Board resolution banning smoking also irreconcilably conflicts with specific state statutory provisions. By prohibiting smoking in all indoor public locations, the local regulation does not allow business owners to designate smoking areas. The Act permits smoking in certain public areas, providing that a "[s]moking area may be designated in a public place by the owner...." RCW 70.160.040(1). The resolution, by imposing a complete smoking ban, prohibits what is permitted by state law: the ability of

---

[29] RCW 69.50.342(6).

[30] *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").

[31] 153 Wn.2d 657, 105 P.3d 985 (2005).

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

> certain business owners and lessees to designate smoking and nonsmoking locations in their establishments.[32]

The same is true here. State law allows the WSLCB to grant licenses for retail stores to be established throughout the state. Fife, by banning all stores within its jurisdiction, took action that conflicts with what is allowed by state law. As in *Entertainment Industry Coalition*, Fife's ordinance should be found to be invalid.

Another illustrative case is *Parkland Light & Water Co.*[33] In *Parkland*, the Washington Supreme Court invalidated a local regulation where the Tacoma-Pierce County Board of Health, by resolution, ordered certain water districts and providers to fluoridate their water supply.[34] State law granted water districts the authority to decide whether to fluoridate the water supply system of the water district.[35] In invalidating the local regulation, the Court determined that

> [t]he resolution ordering fluoridation takes away any decision-making power from water districts with respect to the content of their water systems, and the express statutory authority granted to water districts pursuant to RCW 57.08.012 would be rendered meaningless. The purpose of the statute is to give water districts, not the [health board], the authority over water fluoridation.[36]

Here, I-502 authorized the WSLCB to determine how many retail operations were needed in each county to ensure that there was an adequate number to discourage people from buying from the black market. Allowing cities, including Fife, to make unilateral decisions as to whether retail operations would

---

[32] *Id.* at 664.
[33] 151 Wn.2d at 428
[34] *Parkland*, 151 Wn.2d at 433-34.
[35] *Id.* at 432.
[36] *Id.* at 433-34.

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

be allowed within their jurisdictions conflicts with this goal. As such, Fife's prohibition must be held to be invalid.

3. I-502 is fundamentally different than the state laws involved in the cases cited by Fife

Fife relies upon *Lawson v. City of Pasco* and *Weden v. San Juan County* to argue against conflict preemption.[37] *Lawson* addressed whether a local jurisdiction had the authority to prohibit recreational vehicles from parking in motor home parks. *Weden* addressed whether a local jurisdiction could ban personal water craft. Neither case involved a situation similar to that which is present here: a statutory scheme enacted to force out illegal market activity and replace it with a tightly regulated statewide market. Allowing local jurisdictions to ban recreational vehicles from motor home parks had nothing to do with forcing out illegal market activity. Moreover, such a ban did not conflict with the general regulation of mobile home parks. Allowing local jurisdictions to ban personal water craft did not involve illegal market activity and the state never expressed an interest in ensuring that owners of personal watercraft could use their watercraft throughout the state.

In contrast, I-502 was enacted to eradicate the illegal market in marijuana, and, in order to do so, marijuana must be available throughout the state. Allowing local jurisdictions to ban marijuana sales would directly contradict the purpose of I-502. For I-502 to succeed, marijuana sales must be available throughout the state. In addition, here, in contrast to *Lawson* and *Weden*, the statutes explicitly grant the Board the authority to determine where the permitted activity should occur and this authority is granted to the Board to further an important public policy – discouraging illegal marijuana markets.

[37] *Lawson v. City of Pasco*, 168 Wn.2d 675, 230 P.2d 1038 (2010); *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998)

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

4. WAC 314-55-020 does not permit Fife to adopt a blanket prohibition on retail outlets

WAC 314-55-020 is consistent with the statutes' grant of authority to the Board to determine the locations of marijuana retail outlets. WAC 314-55-020 merely states that "[t]he issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements." Fife argues that this provides it authority to ban all marijuana retail stores. However, by its plain meaning, all the WAC allows is for local jurisdictions to enforce its generally applicable zoning regulations as it would to any other business.

It is a general rule that where a state statute licenses a particular activity, local governments may enact reasonable regulations of the licensed activities within their jurisdictions, but they may not prohibit the activity outright.[38] Moreover, as discussed, an outright ban would conflict with the statutory grant of authority to the Board to determine marijuana retail locations for public policy purposes, and nothing in WAC 314-55-020 changes this.

5. The Absence of a "Local Option" Further Evidences that Fife's Outright Ban is Preempted by a Conflict with I-502

The initiative was closely modeled after Washington's alcohol licensing laws, RCW 66; everything from the language to the structure of the initiative is strikingly similar. Noticeably absent from the initiative, however, is a "local option" provision.[39] Local option is a process by which a local community, such as a city or town, may elect to prohibit the sale of alcohol within a community by

[38] *See Second Amendment Found. v. City of Renton*, 35 Wn. App. 583, 589, 668 P.2d 596 (1983) (finding no conflict between an ordinance prohibiting firearms in bars and general state law allowing possession of a firearm with a license, but determining that an absolute and unqualified local prohibition against possession of a firearm by a licensee would conflict with state law).
[39] *See* RCW 66.40.

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

popular vote, thereby preventing the state from licensing businesses to sell alcohol in that community. Local option exercised by popular vote is necessary to implement a ban on the sale of alcohol because local governments do not have the power of prohibition.[40] Given the initiative's similarities to alcohol licensing statutes, the exclusion of a local option indicates that the outright prohibition of marijuana retail businesses, by any method, would directly conflict with state law.

B. Defendant Cannot Meet its Burden to Prove That No Factual Dispute Exists Regarding Whether I-502 Is Preempted by Federal Law

The City next contends that the CSA preempts I-502. In enacting the CSA, Congress's twin goals were to combat drug abuse and to control illicit drug-trafficking. Congress expressly contemplated the creation of a federal-state partnership to serve these ends. Before I-502's passage, Washington pursued these goals through the outright criminalization of all marijuana production, distribution, sale, and possession. In 2012, voters opted for a different approach, one in which the marijuana market would be regulated in the open rather than driven underground, law enforcement would continue to concentrate on priority areas, such as preventing the sale of marijuana to minors and impaired driving, and new tax revenues would be dedicated to effective strategies for protecting public health. The federal government shares these priorities.

1. To Prove Its Preemption Case, the City Carries a Heavy Burden

Notwithstanding the common aims of the federal and State governments and notwithstanding the Department of Justice's acknowledgement that the State's new approach may effectively address the CSA's goals, the City suggests that the CSA preempts I-502. To prevail, the City must surmount overwhelming hurdles.

[40] *See City of Tacoma v. Keisel*, 68 Wn. 685, 690, 124 P. 137 (1912).

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

First, the City must overcome the heavy presumption of validity that attends state statutes. In challenging the validity of a state statute, the City must "establish that no set of circumstances exists under which the [statute] would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."[41] Thus, to find that I-502 is preempted by the CSA, the City must show that every possible implementation of I-502 would necessarily be preempted by the CSA.[42]

Next, the City must meet a heavy burden to show preemption of a State law in an area, such as drug regulation or local law enforcement, that belongs to the State's historical police powers. When federal legislation exists in a field which the States have traditionally occupied, courts must "start with the assumption that 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."[43] Much precedent recognizes that the areas of business licensing, drug regulation, and criminal sanctions have traditionally been left to the police powers of the states.[44] Also, a well-established canon disfavors statutory interpretations that raise

---

[41] *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941, 943 (9th Cir. 1992) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed.2d 697 (1987)).

[42] *See Committee of Dental Amalgam Mfrs. & Distributors v. Stratton*, 92 F.3d 807, 810 (9th Cir. 1996) (holding that preemption of California's Proposition 65, requiring consumer warnings on certain medical devices, would require that every possible warning label satisfying Proposition 65 be in conflict with the Medical Device Amendments to the Food, Drug and Cosmetics Act).

[43] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947).

[44] *See, e.g.*, *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968, 1983 (2011) ("Regulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern."); *Gonzales v. Oregon*, 546 U.S. 243, 270, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006) (noting that the "structure and limitations of federalism … allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (internal quotation omitted)); *Murphy v. Waterfront Commission of New York*, 378 U.S. 52, 96, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964) (White, J., concurring) (states have primary responsibility for the administration of the criminal law, and "federal preemption of areas of crime control traditionally reserved to the States has been relatively unknown and this area has been said to be at the core of the continuing viability of the States in our federal system").

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

constitutional concerns,[45] like preemption or Tenth Amendment anti-commandeering principles.

Finally, the City must face this reality, as expressed by a unanimous Supreme Court: "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."[46]

2. The CSA Contains a Provision That Saves Most State Laws from Preemption

The preemptive effect—if any—of a federal law is a question of Congressional intent. If intended by Congress, a federal statute may preempt state law in one of two ways.[47] First, if intended to occupy the field it regulates, a federal statute may preempt all state laws operating in the same field, including those that do not conflict with the federal statute.[48] This is so-called "field preemption." Second, a federal statute may simply preempt those state laws that create a significant conflict with it, something known as "conflict preemption."[49] It bears

[45] *New York v. United States*, 505 U.S. 144, 170, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (it is a rule of statutory construction that "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress'" (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988)).

[46] *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 166-67, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989) (internal quotation marks omitted).

[47] Congressional intent to preempt may be expressed or it may be implied. *Altria Group, Inc. v. Good.*, 555 U.S. 70, 129, S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008).

[48] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted."); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.").

[49] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73, 120 S. Ct. 2288, 2294 (2000) ("We will find preemption where it is impossible for a private party to comply with both state and federal law and where under the circumstances of a particular case, the challenged law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (internal quotation and citation omitted)).

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

1 repeating that a federal statute has absolutely no preemptive effect, even if
2 inconsistent with state laws, unless Congress intended for it to have that effect.[50]
3 When a federal law contains an express preemption clause, courts must
4 "focus on the plain wording of the clause, which necessarily contains the best
5 evidence of Congress' preemptive intent."[51] Here the CSA expressly prescribes the
6 intended scope of its preemptive effect. 21 U.S.C. § 903 contains what the Supreme
7 Court has referred as the CSA's "nonpre-emption provision."[52] That section
8 provides: "No provision of this subchapter shall be construed as indicating an
9 intent on the part of the Congress to occupy the field in which that provision
10 operates, including criminal penalties, to the exclusion of any State law on the
11 same subject matter which would otherwise be within the authority of the State…"
12 This sweeping disclaimer of preemptive effect is subject to a narrow carve-out if
13 "there is a positive conflict between that provision of this subchapter and that
14 State law so that the two cannot consistently stand together."
15 This Court must now determine whether any provision of I-502 falls within
16 Congress's narrow carve-out to the CSA's "nonpre-emption provision." More
17 precisely, since the City raises a facial challenge to I-502 without relying on any
18 material facts, this Court must decide whether any provision of I-502 is preempted
19 under Congress's narrow language under all possible factual circumstances.
20
21
22
23
24
25
26

---

[50] *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 325, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) for the standard that pre-emption must be the "clear and manifest purpose of Congress," and holding that ERISA does not pre-empt California wage statute where it was regulating areas traditionally regulated by states and where ERISA, though specifically pre-empting other related areas of traditional state regulation, did not expressly pre-empt in the specific area of the California statute).

[51] *Chamber of Commerce of the United States v. Whiting,* ___ U.S. ___, 131 S. Ct. 1968, 1977, 179 L. Ed. 2d 1031 (2011), quoting *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L. Ed. 2d 387 (1993).

[52] *Gonzales v. Oregon,* 546 U.S. 243, 289, 126 S. Ct. 904, 934, 163 L. Ed. 2d 748 (2006); *see also City of Hartford v. Tucker,* 225 Conn. 211, 215, 621 A.2d 1339, 1341 (1993) (referring to section 903 as the CSA's "antipreemption" provision)

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

3. The CSA Does Not Preempt I-502 by Occupying the Entire Field of Marijuana Regulation

Apparently invoking field preemption, the City first claims (without a single citation to authority) that "the United States Congress has expressed its intent to … occupy the regulation and taxation of marijuana …."[53] In fact the opposite is true. As discussed above, the CSA expresses Congress's intent *not* to occupy the field of marijuana regulation: "No provision in this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates …"[54] Courts have consistently held that § 903 disclaims field preemption.[55] The City's claim that the CSA preempts I-502 by occupying the field of marijuana regulation is wrong and the Court must reject it.

4. There Is No "Positive Conflict" between the CSA and I-502 that Requires Preemption of the Latter

The City then appears to raise conflict preemption, arguing that "states are forbidden from frustrating the purposes of federal law and, when there is a conflict between federal and state law, courts must follow federal law." The City offers absolutely no supporting authority for this conclusory assertion.

Unquestionably Congress expressed its intent to save most state laws from preemption by the CSA. Instead, Congress intended to preempt state law only if "there is a positive conflict between that provision of this subchapter and that

---

[53] Motion, p. 21.

[54] 21 U.S.C. § 903.

[55] *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 251, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006) ("The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by [section 903]."); *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 819, 81 Cal. Rptr. 3d 461 (2008) ("The parties agree, and numerous courts have concluded, that Congress's statement in the CSA [section 903] demonstrates Congress intended to reject express and field preemption of state laws concerning controlled substances."); *Southern Blasting Services, Inc. v. Wilkes County,* 288 F.3d 584, 590 (4th Cir. 2002) (interpreting a nearly-identical nonpre-emption statute at 18 U.S.C. § 848, finding that "[t]his statutory language makes clear that Congress did not intend to occupy the field ….").

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

State law so that the two cannot consistently stand together." Courts interpreting the CSA's non-preemption provision (or a nearly identical version in 18 U.S.C. § 848) have concluded that it only preempts a state law that *requires* what the federal law *prohibits* (or vice versa).[56] This is referred to as a "direct" or "impossibility" conflict because it is absolutely and physically impossible for a person to comply with both statutes.[57] The scope of direct or impossibility conflict is extremely narrow. The Supreme Court has cautioned that "[i]mpossibility pre-emption is a demanding defense."[58]

Hence the question is whether I-502 *requires* the City to do something that federal law prohibits. The City answers yes, citing the fact that it must grant business permits or licenses and establish zones where marijuana businesses may operate, and because it may collect tax and other revenues from marijuana businesses.

To prevail, therefore, the City must demonstrate that one of these three actions is required by I-502 and violates the CSA. The City cites Justice Department guidance memoranda in an effort to show that I-502 subjects City employees to federal prosecution for aiding and abetting violations of the CSA.[59] Of

---

[56] *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 180 L. Ed. 2d 580, 79 (2011) ("The question for 'impossibility' is whether the private party could independently do under federal law what state law *requires* of it." (emphasis added)); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963) (preemption will be found "where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce").

[57] *Southern Blasting Servs.,* 288 F.3d at 591 ("The 'direct and positive conflict' language in 18 U.S.C. § 848 simply restates the principle that state law is superseded in cases of an actual conflict with federal law such that 'compliance with both federal and state regulations is a physical impossibility." (quoting *Hillsborough,* 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714)); *County of San Diego v. San Diego NORML,* 165 Cal. App. 4th 798, 823, 81 Cal. Rptr. 3d 461, 479 (2008) ("The phrase 'positive conflict,' particularly as refined by the phrase that 'the two [laws] cannot consistently stand together,' suggests that Congress … intended to supplant only state laws that could not be adhered to without violating the CSA."); *State v. Allard,* 313 A.2d 439, 444 (Me. 1973) (conflict with the CSA must make "concurrent viability of both statutes impossible").

[58] *Wyeth v. Levine*, 555 U.S. 555, 573, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009).

[59] Motion, pp. 22-23.

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

course, those memoranda say no such thing.[60] The City points to no statement by a federal official 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 CSA.

Next, the City points to federal statutes that outlaw the manufacture, storage, or distribution of marijuana as well as the use of property or communication services (such as the mail) for these purposes.[61] Of course, the City has no intention of engaging in these activities. So instead, the City argues that its permitting, zoning, and tax-collecting activities each constitute a conspiracy (21 U.S.C. § 846) or a continuing criminal enterprise (21 U.S.C. § 848) to engage in these activities. But the City cites absolutely no authority for the notion that a local government's exercise of its generally applicable permitting, zoning, and taxing powers exposes it to criminal liability for participation in a drug offense. The undersigned have diligently searched for such authority and found none.[62]

---

[60] *See, e.g.*, Federal Defendant's Motion to Dismiss and Memorandum of Law in Support Thereof at 14-15, State of Arizona vs. United States of America, et al., Cause No. 2:11-cv-01072 (D. Ariz. 2011) ("Here, Plaintiffs point to a letter from United States Attorney Burke that emphasizes that the Department of Justice 'will continue to vigorously prosecute individuals and organizations that participate in unlawful manufacturing, distribution and marketing activity involving marijuana.' … The letter also explains that 'the CSA may be vigorously enforced against those individuals and entitites wh operate large marijuana production facilities,' as well as those '[i]ndividuals and organizations – including property owners, landlords and financiers – that knowingly facilitate the actions of traffickers.' … But nothing in the letter refers to state employees. Plaintiffs thus resort to citations and discussion of various letters sent by other United States Attorneys around the country, each of which addresses a state regulatory regime distinct from Arizona's, and none of which genuinely threatens imminent prosecution anyway. What Mr. Burke's letter and the other cited guidance make clear is that the Department of Justice retains discretion to determine how to allocate its prosecutorial resources, and it is mere speculation for Plaintiffs to suggest that Arizona state employees could be subject to federal prosecution") (citations omitted).

[61] Motion, pp. 22-23.

[62] *See, contra, Conant v. Walters*, 309 F.3d 629, 635-36 (9th Cir. 2002) (physician's issuance of a medical marijuana authorization to a patient does not constitute either aiding and abetting or conspiracy); *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 759-60 (2010) ("a city's compliance with state law in the exercise of its regulatory, licensing, zoning, or other power with respect to the operation of medical marijuana dispensaries that meet state law requirements would not violate conflicting federal law"); *San Diego v. NORML*, 165 Cal. App. 4th 798, 825-26 (2008), *cert. denied*, 556 U.S. 1235 (2009) (state law requirement that counties process applications

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

The elements of a conspiracy claim under 21 U.S.C. § 846 are: (1) an agreement to commit violations of the CSA; (2) one or more "overt acts" in furtherance of those violations; and (3) the requisite intent needed to accomplish the underlying offense.[63] Simple knowledge of a conspiracy without an intent or agreement to accomplish an agreed-upon and specific objective does not constitute a violation of section 846.[64] These elements are absent when a local government exercises its power to license, zone, or collect revenues. The City does not enter into an "agreement" to accomplish a specific unlawful objective by engaging in these activities.

A continuing criminal enterprise claim under 21 U.S.C. § 848, requires proof that (1) the defendant's conduct was a violation of federal drug laws; (2) the conduct was part of an ongoing series of violations; (3) the defendant engaged in the conduct in concert with five or more persons; (4) the defendant was the "organizer, supervisor, or manager of the criminal enterprise" and (5) the defendant gained significant income or resources from the enterprise.[65] To be guilty of a continuing criminal enterprise, the City would therefore have to directly violate the CSA. To repeat, the City nowhere claims that its employees will be authorized to manufacture, distribute, or sell marijuana, so there is no basis for imposing continuing criminal enterprise liability on the City. For the same reason, i.e., because the City has committed no predicate offense, the City has no liability under the Racketeering Influenced and Corrupt Organizations Act, popularly

---

for, maintain records of, and issue cards to individuals entitled to claim exemption from state marijuana laws does not require county employees to engage in conduct banned by CSA).

[63] *U.S. v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980).

[64] *Id.* at 891.

[65] *U.S. v. Garcia*, 988 F.2d 965, 967 (9th Cir. 1993) (citing *U.S. v. Sterling*, 742 F.2d 521, 525 (9th Cir. 1984)).

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

known as "RICO."[66]

Therefore, the City has failed to identify any action that I-502 requires it to take that is unlawful under the CSA.[67] In the absence of such a showing, the City's claim that it is impossible to comply with both I-502 and the CSA fails, which defeats its argument for impossibility preemption.

5. I-502 May Not Be Declared Invalid as an Obstacle to the CSA

As mentioned above, the City also asserts that I-502 somehow frustrates the CSA's purposes. In assessing whether there is a conflict between federal and state law, the Supreme Court on occasion has considered the doctrine of implied "obstacle preemption." Under this doctrine, where Congress did not expressly state its preemptive intent in a federal statute, a court may look beyond the question whether there is an "impossibility" conflict and consider whether state law creates an obstacle to achievement of the federal law's purpose. The City apparently raises this "obstacle preemption" issue here.

At the outset, I-502 is not subject to an obstacle preemption analysis. As mentioned above, obstacle preemption is an implied preemption doctrine. A state law within the state's traditional police powers may be preempted only if it is Congress's "clear and manifest intent" to do so.[68] When Congress has stated its preemptive intent expressly in a federal law, courts must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress'

---

[66] RICO imposes liability on anyone engaged in a "pattern of racketeting activity," which requires commission of one of the predicate offenses identified in 18 U.S.C. § 1961(1) (2013).

[67] It bears noting that I-502 does not require local governments to take any specific action with respect to state-licensed marijuana businesses. Cities and counties do not need to adopt zoning or other regulatory ordinances specific to such businesses. They could simply issue licenses in accordance with pre-defined commercial activities (agriculture, commercial food processing, retail, e.g.) or elect not to require local licenses for businesses with valid I-502 state licenses.

[68] *Rice*, 331 U.S. at 230.

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

preemptive intent."[69] The CSA contains an express statement of Congress's preemptive intent and is not subject to the doctrine of implied obstacle preemption.

Courts that have squarely addressed the issue have held that 21 U.S.C. § 903 (and statutes with similar language) do not preempt state laws that might conceivably pose some obstacle to federal law. For example, in *County of San Diego v. San Diego NORML*, the California Court of Appeal held that the plain language of § 903 foreclosed an obstacle preemption analysis.[70] Instead, the court concluded that the provision signified Congress's intent to invalidate only those laws that failed under impossibility preemption analysis. The court reasoned, "The phrase 'positive conflict,' particularly as refined by the phrase 'the two [laws] cannot consistently stand together,' suggests that Congress did not intend to supplant all laws posing some conceivable obstacle to the purposes of the CSA, but instead intended to supplant only state laws that could not be adhered to without violating the CSA."[71] The court further observed, "when Congress has intended to craft an express preemption clause signifying that both positive and obstacle conflict preemption will invalidate state laws, Congress has so structured the express preemption clause."[72]

6. Even if Obstacle Preemption Were Applicable, I-502 is Not an Obstacle to Achieving the Purposes of the CSA

Obstacle preemption occurs when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[73]

---

[69] *Chamber of Commerce of the United States v. Whiting,* ___ U.S. ___, 131 S. Ct. 1968, 1977, 179 L. Ed. 2d 1031 (2011), quoting *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).
[70] *San Diego NORML*, 165 Cal. App. 4th at 823.
[71] *Id.*
[72] *Id.* at 824.
[73] *Florida Lime & Avocado Growers*, 373 U.S. at 141 (internal quotation omitted).

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

This analysis involves defining the purpose and intended effects of the federal law as a whole, the effect of the state law, and making a judgment as to whether the latter presents an obstacle to the achievement of the former.[74]

A "high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act."[75] In determining whether the City has surmounted this high threshold, this Court's inquiry is sharply circumscribed: "Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law."[76] As a consequence, state laws almost invariably survive obstacle preemption analysis unless the State strays into matters, like foreign affairs or immigration, that are committed to the federal government. For example, in *Crosby v. Nat'l Foreign Trade Council,*[77] the Supreme Court struck down a state statute purporting to impose economic sanctions on a foreign government where Congress had vested the President with the authority and discretion to implement such sanctions as he saw fit. Courts have been loath to invalidate exercises of powers traditionally committed to state and local governments, such as local law enforcement, drug regulation, zoning, and licensing.

a. The Fifth Amendment does not create an obstacle to federal law enforcement of the CSA.

---

[74] *Crosby*, 530 U.S. at 373 ("What is a sufficient obstacle [to federal objectives] is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."); *Florida Lime & Avocado Growers*, 373 U.S. at 144–46 (engaging in this analysis).
[75] *Chamber of Commerce of U.S. v. Whiting*, 563 US __, 131 S.Ct. 1968, 1985 (2011) (internal quotations and citations omitted).
[76] *Chamber of Commerce of U.S. v. Whiting*, 563 US __, 131 S.Ct. 1968, 1985 (2011) (internal quotations and citations omitted).
[77] 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000).

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

In support of its obstacle preemption claim, the City offers just one argument. I-502, it asserts, violates license applicants' Fifth Amendment rights, giving them a defense to any federal criminal prosecution and thereby creating an obstacle to federal law enforcement. But I-502 does not do this. The City's reliance on *Leary*[78], *Haynes*[79], *Marchetti*[80], and *Grosso*[81] is misplaced. Those cases involved individuals who invoked their Fifth Amendment privilege against self-incrimination by refusing to submit documents to the federal government that would tend to prove their violations of federal law – receipt of marijuana in *Leary*, possession of sawed-off shotguns in *Haynes*, and gambling in *Marchetti* and *Grosso*. The Court held that valid assertions of the Fifth Amendment privilege cannot serve as the basis for a criminal conviction.

In contrast, individuals who obtain I-502 licenses have chosen—in advance—not to assert their Fifth Amendment privilege and have voluntarily waived the privilege—again in advance—specifically to avail themselves of the exemptions from state criminal and civil penalties that would otherwise apply to their production, processing, and selling of marijuana. This waiver does not impede federal enforcement of the CSA.[82] No one is compelled or coerced to obtain a Washington State marijuana business license. Individuals who choose both to produce, process, or sell marijuana in Washington State and to invoke their Fifth Amendment privilege by refusing to obtain a state license, comply with tracking and reporting requirements, or pay state taxes, remain in the same legal posture

[78] *Leary v. United States*, 395 U.S. 6 (1969).
[79] *Haynes v. United States*, 390 U.S. 85 (1968).
[80] *Marchetti v. United States*, 390 U.S. 39 (1968).
[81] *Grosso v. United States*, 390 U.S. 62 (1968).
[82] *See, e.g., Garner v. United States*, 424 U.S. 648 (1976) (prosecution of gambler who voluntarily completed income tax returns); *U.S. v. Kordel*, 397 U.S. 1 (1970) (prosecution of corporate vice president who voluntarily provided responses to interrogatories during civil litigation).

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

as before I-502's passage. They are subject to felony prosecution and civil asset forfeiture under both state and federal law. Now, however, with the passage of I-502, individuals who wish to engage in marijuana commerce in Washington State may choose to waive their Fifth Amendment privilege, obtain proper licensing, comply with regulatory requirements, pay taxes – and receive significant legal benefits in return.

Neither the Marihuana Tax Act of *Leary*, nor the registration requirement of the National Firearm Act at issue in *Haynes*, nor the federal wagering registration and tax laws in *Marchetti* and *Grosso* offered individuals any legal protections in exchange for their prospective waiver of the privilege against self-incrimination – other than, of course, the circular protection of not being prosecuted for refusing to waive the privilege against self-incrimination. I-502's licensing, regulatory, and tax requirements, on the other hand, offer compliant individuals explicit exemption from state law criminal and civil penalties for producing, processing, and selling marijuana.[83] This is a quite significant legal benefit since more than 99 percent of marijuana law enforcement is conducted by state and local law enforcement pursuant to state and local laws.[84] Moreover, under the current Administration, individuals complying with I-502's licensing, regulatory, and taxing provisions receive de facto protection from federal prosecution, even if they are operating large, commercial marijuana enterprises:

> [B]oth the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests.

[83] RCW 69.50.366, -.363, -.360.

[84] In 2010, law enforcement agencies made 853,839 arrests for marijuana offenses in the United States. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, available at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010. Of these, federal law enforcement agencies were responsible for only 8,108. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 at 207, available at https://www.census.gov/compendia/statab/2012/tables/12s0328.pdf.

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

> Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective regulatory system.[85]

b. The Federal Government Does Not View Initiative 502's Regulatory Provisions as an Obstacle to Enforcement of the CSA.

The Department of Justice guidance memoranda detail why, in the Department's view, state regulatory schemes like Washington's pose no serious obstacle to federal law enforcement. To the contrary, the Department of Justice views strong and effective regulatory systems as consistent with federal enforcement priorities. Specifically, those memoranda emphasize that "replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market" and "the existence of a strong and effective regulatory system" can directly support federal enforcement priorities. As such, City employees acting in their roles to process applications for I-502 business licenses will *support,* not undermine, federal goals by helping maintain a strong and effective regulatory system and to create a tightly regulated market that replaces an otherwise illicit marijuana trade. The Department of Justice further observed that such systems operate in localized environments where federal enforcement activity has historically been absent due to limited resources and deference to the traditional power of states to enforce their own local criminal codes.

The City has affirmatively brought these memoranda to the Court's attention and nowhere disputes their substance. While federal agencies have no special authority to pronounce on preemption absent delegation by Congress, the Supreme Court has recognized that they "have a unique understanding of the

[85] DOJ Memo, supra note 12, at 3.

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

statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[86] The Department of Justice has direct experience administering and enforcing the CSA, and is in the best position to comment on whether Washington's regulatory scheme will pose an obstacle to that enforcement. The weight courts must accord an agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.[87] All three Justice Department memos have offered consistent and thorough descriptions of CSA enforcement priorities, and directly address how a robust system of regulation can assist the Justice Department in achieving those enforcement goals. The City having offered no facts justifying the Court's rejection of the Justice Department's assessment, the Court must accept that assessment for purposes of this motion.

Since the passage of the CSA, the federal and state governments have worked together to meet similar goals through enforcement of their separate laws. In enacting the CSA, Congress expressly intended to create a partnership between the federal and state governments. As noted in the Justice Department's guidance memoranda, the federal government has never worked alone to control illicit drug trafficking, drug sales to minors, and the funding of criminal enterprises through the sale of illegal drugs. To the contrary, it has always needed—and received—the assistance of state governments enforcing their own internal laws, which vary widely from state to state.

The precise balance that is struck through this federal-state partnership is not obvious on the face of these numerous laws. Instead, the interplay between

[86] *Wyeth,* 555 U.S. at 576-77 (citations omitted).
[87] *Id.* at 577 (citations omitted).

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

federal and state enforcement has been choreographed through constant cooperation between federal and state governments, who have thus far functioned effectively in allocating the division of labor without the need for litigation over whose laws reign supreme on any one issue despite a wide variety of state approaches to controlling and even regulating the production, distribution, and use of marijuana within their borders.

Here is where this Court's obstacle analysis should stop. The City asks this Court to determine that I-502 has created such an obstacle to the accomplishment of the CSA's purposes that the two cannot stand together, when even the federal government has not taken that position. But the City has identified no combination of facts and law that supports its position. Therefore, CR 56 requires the Court to deny the City's motion.

But if the Court's analysis does not stop here, then the Court must continue the motion under CR 56(f) to give the parties time to conduct discovery and develop additional facts pertinent to the City's obstacle preemption claim.

c. If the Court does not deny the City's motion on the pleadings and records on file to date, it must continue the City's motion to allow the parties to develop the material facts necessary to reach a decision

As discussed above, the City has failed to meet its initial burden of coming forward with undisputed evidence that I-502 constitutes an obstacle to the achievement of the CSA's purposes. If, notwithstanding that failure, the Court looks to Plaintiff-Intervenors to affirmatively come forward with evidence that I-502 poses no such obstacle, then Plaintiff-Intervenors request a continuance of the motion under CR 56(f) until they have had time to conduct sufficient discovery and assemble facts to make that showing. This case is in its infancy and any delay would be far outweighed by the benefit of deciding this important question based

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

on a sufficient factual record.

If the Court intends to engage in a detailed factual assessment of the likely operational impact of state law on the federal government's ability to accomplish the goals of a federal law, only detailed facts will do. Those facts will illustrate the following points.

First, a partnership between federal and state governments has historically existed in most states, including Washington, with the two governments coordinating their tactics for achieving the purposes of the CSA: to combat drug abuse and control the illicit distribution of drugs. Since the passage of the CSA, state governments have consistently enforced state laws to address intrastate issues like criminal sanctions and public health and safety, with federal law filling in the interstices to address interstate and international matters and specific enforcement priorities.

Second, this federal-state partnership operates in every U.S. state, despite a wide variety of state-level approaches to marijuana regulation, from outright prohibition by some state governments to decriminalization by others, and even including regulatory schemes in seventeen states and Washington, D.C. to govern the production and distribution of medical marijuana. In no case has the federal government sought a declaration that the CSA preempts any of these state laws.

Third, in Washington and elsewhere, the federal government has historically not devoted resources to the prosecution of purely local marijuana-related CSA violations unless those violations trigger one of the eight federal enforcement priorities.

Fourth, prior to passage of I-502, Washington relied on criminal prohibition of marijuana production, processing, sale, and possession as its principal tactic for combating marijuana abuse and controlling illicit marijuana distribution. No

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

state dollars were dedicated to prevention[88], and public funding for marijuana treatment was variable and limited.[89]

Fifth, intensified enforcement of marijuana laws – increased numbers of arrests, e.g. – does not decrease marijuana use or marijuana abuse.[90] As a corollary, decriminalizing marijuana and deprioritizing enforcement of marijuana laws does not increase marijuana use of marijuana abuse.[91] On the other hand, criminalizing marijuana does artificially inflate its value and introduce violence into its trade by turning marijuana into a black market commodity.[92] It also imposes significant calculable and non-quantifiable costs and consequences on individuals arrested, convicted, and charged with marijuana offenses.[93] These costs and consequences can contribute to poverty, which in turns increases, rather than decreases, the risk of drug abuse.[94]

Sixth, in enacting I-502, the people of the State of Washington have adopted a new approach to addressing marijuana, replacing outright prohibition with a system that legalizes select and carefully regulated production and sale of marijuana and directs new tax revenues to strategies proven to be effective at preventing and treating marijuana abuse and dependence. Not all marijuana use is marijuana abuse.[95] Most marijuana users do not develop marijuana dependence

---

[88] Declaration of Kevin Haggerty in Support of Plaintiff-Intervenors' Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Haggerty Dec."), ¶ 25.

[89] Declaration of Roger Roffman in Support of Plaintiff-Intervenors' Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Roffman Dec."), ¶ 23.

[90] Declaration of Katherine Beckett in Support of Plaintiff-Intervenors' Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Beckett Dec."), ¶ 15; Declaration of Mark Cooke in Support of Plaintiff-Intervenors' Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Cooke Dec."), ¶ 4, Ex. B; Roffman Dec., ¶ 19.

[91] Beckett Dec., ¶ 17; Cooke Dec., ¶ 4, Ex. B.

[92] Cooke Dec., ¶ 5, Ex. C.

[93] Beckett Dec., ¶¶ 13, 16

[94] Haggerty Dec., ¶ 29.

[95] Roffman Dec., ¶¶ 9-16; Haggerty Dec., ¶¶ 8-15.

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

or cannabis use disorder.[96] For those who do, effective treatment strategies exist.[97] Marijuana dependence treatment services delivered in voluntary, non-criminal justice settings are as effective in producing positive results as services delivered in coercive, criminal justice settings[98], and by avoiding the additional law enforcement and court costs that attend coerced treatment, they can deliver more services to more clients, more cost-effectively.[99]

Effective substance abuse *prevention* programs exist, too.[100] Moreover, effective youth prevention programs exist for substances that are legally available to adults, like alcohol and tobacco.[101] While these programs currently are underfunded and therefore not widely or well implemented[102], I-502 dedicates funding from new marijuana excise tax revenues to these programs.[103]

Seventh, I-502's strict regulation allows the State to ensure, for example, that adulterated products do not reach the market, and it allows the State to monitor and control both the distribution of marijuana and the movement of marijuana-related proceeds. Moreover, this frees up state law enforcement to focus, as do federal enforcement agencies, on federal-state enforcement priorities, such as preventing sales of marijuana to minors and criminal trafficking outside of the regulated system. As Deputy Attorney General James Cole noted last September in testimony before the U.S. Senate Judiciary Committee:

> COLE: "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

[96] Roffman Dec., ¶ 17; Haggerty Dec. ¶ 16.
[97] Roffman Dec., ¶ 20.
[98] Roffman Dec., ¶ 21.
[99] Roffman Dec. ¶ 22; Cooke Dec., ¶ 3, Ex. A.
[100] Haggerty Dec., ¶¶ 19-22.
[101] Haggerty Dec., ¶23.
[102] Haggerty Dec., ¶ 24-26.
[103] Haggerty Dec., ¶¶ 27-28.

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

to try and regulate it. And that's probably not a good situation to have."

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."[104]

Factual details concerning these issues and the functioning of the federal-state partnership are necessary if the Court intends to second-guess federal and state enforcement agencies and assess the extent to which I-502 will impact that partnership and the accomplishment of the CSA's goals on the ground. The Department of Justice has consistently made its enforcement priorities clear, and has also made clear that it is capable of carrying those goals forward in coordination with state governments.

To grant the City's motion without such an inquiry would be to remove from the hands of our state and federal executives the ability and flexibility to continue their cooperation within the bounds of the traditional federal-state partnership Congress intended.

V. Conclusion

To obtain summary judgment on this issue, the City carries a heavy burden to prove that there is no material factual dispute. The material facts yet to be discovered in this case, however, are certainly in dispute. The City's Motion is unsupported by the scant facts it has provided, and further rests on mistaken interpretations of the relevant laws.

DATED this 18th day of August, 2014.

[104] Exchange between Senator Patrick Leahy, Chair of the U.S. Senate Judiciary Committee, and Deputy Attorney General James Cole on September 10, 2013, during the hearing, "Conflicts Between State and Federal Marijuana Laws," available online at http://www.judiciary.senate.gov/hearings/hearing.cfm?id=094c28995d1f5bc4fe11d832f90218f9.

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

GORDON THOMAS HONEYWELL

By: /s/ Salvador A. Mungia
Salvador A. Mungia, WSBA 14807
Attorneys for Plaintiffs-Intervenors

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

By: ______________________________
Sarah A. Dunne, WSBA No. 34869
Attorneys for Plaintiffs-Intervenors

GARVEY SCHUBERT BARER

By /s/ Donald B Scaramastra
Donald B. Scaramastra, WSBA #21416
Jared Van Kirk, WSBA #37029
Dominique R. Scalia, WSBA#47313
Attorneys for Plaintiff-Intervenors