APPENDIX

Appendix A

Decision of the Oklahoma Supreme Court, *Tay v. Tilley et al.* No. 120657

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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Rec'd (date) 9-16-22
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PAUL TAY,

Petitioner,

v. No. 120,657

MICHELLE DIANE TILLEY NICHOLS and MICHELLE JONES,

Respondents.

FILED
SUPREME COURT
STATE OF OKLAHOMA
SEP 16 2022
JOHN D. HADDEN
CLERK

ORIGINAL PROCEEDING TO DETERMINE CHALLENGE TO THE VALIDITY OF THE SIGNATURES FOR INITIATIVE PETITION NO. 434, STATE QUESTION 820

Petitioner filed an original proceeding to challenge the validity of the signatures to Initiative Petition No. 434, State Question 820 on grounds that signatures collected on Tribal lands are void. Original jurisdiction is assumed. *See* Rule 1.194, *Oklahoma Supreme Court Rules*, Tit. 12, ch. 15, App. 1. Petitioner's challenge is hereby denied. 34 O.S. 2021, § 8(K).

APPLICATION TO ASSUME ORIGINAL JURISDICTION IS GRANTED; THE CHALLENGE IS DENIED

FACTS AND PROCEDURAL HISTORY

On January 4, 2022, Respondents/Proponents Michelle Diane Tilley Nichols and Michelle Jones filed Initiative Petition No. 434, State Question 820 seeking to add new provisions to Title 63 that would legalize, regulate, and tax adult-use marijuana.

A timely protest was filed on January 24, 2022, challenging the gist and the constitutionality of the proposed measure. 34 O.S. 2021, § 8(C). On March 28, 2022, this Court assumed original jurisdiction and issued a written opinion holding that State Question 820 embraces only one subject in conformance with Okla. Const. art. V, § 57, the gist was not misleading, and State Question 820 was legally sufficient for submission to the people

of Oklahoma. *See In Re: State Question No. 820 Initiative Petition No. 434*, 2022 OK 30, ¶¶ 5-7, 507 P.3d 1251.

Proponents began gathering signatures for Initiative Petition No. 434, State Question 820 on May 3, 2022, and completed the signature-gathering process within the confines of the 90-day deadline set forth in 34 O.S. 2021, § 8(E).

On July 5, 2022, proponents of Initiative Petition No. 434, State Question 820submitted to the Secretary of State 118 boxes of petition pamphlets.

In accordance with 34 O.S. 2021, § 8(H), the Secretary of State counted 23,043 signature sheets bound in 116 volumes. Volumes 1 through 115 each contained 200 signature sheets and Volume 116 contained 43 signature sheets.

Of the 23,043 signature sheets submitted, 1,178 signature sheets were disqualified as one sheet contained duplicate signatures, one sheet was attached with another to the same petition pamphlet, and 1,176 sheets contained incomplete signature circulator information and/or notary public addresses. *See* Secretary of State's Certification in Case No. 120,641, filed August 22, 2022.

Okla. Const. art. V, § 2 requires that a legislative measure proposed by citizens have the signatures of 8 percent of legal voters based upon the last general election for the office of Governor. The Legislature derives the number of "legal voters" from the "total number of votes cast for the state office receiving the highest number of votes cast at the last general election." 34 O.S. 2021, § 8(H)(2).

The Secretary of State certified that 117,257 signatures were verified and matched to the Oklahoma Voter Registration files for Initiative Petition No. 434, State Question 820 and affirmed the State Election Board's certification that 1,186,385 votes were cast in the November 2018 general election for Governor and 8% of the total number of votes cast is 94,911. *See* Secretary of State's Certification, p. 2.

Proponents' suggested ballot title was submitted to the Attorney General on July 5, 2022. On July 12, 2022, the Attorney General notified the Secretary of State that the proposed ballot title did not comply with the law and filed a rewritten ballot title in accordance with 34 O.S. 2021, § 9(D). This Court issued an order on August 25, 2022, finding the signatures on the Petition numerically sufficient. 34 O.S. 2021, § 8(I).

In accordance with 34 O.S. 2021, § 8(I), this Court directed the Secretary of State to publish notice of the filing of the signed petitions and their apparent sufficiency along with the text of the rewritten ballot title and the right of any citizen to object to the sufficiency of signatures or the ballot title within 10 business days.

According to the Secretary of State's Proof of Publication filed September 1, 2022, the required notice was published in three newspapers of statewide circulation on Wednesday, August 31, 2022.

STANDARD OF REVIEW

When an initiative petition is challenged, the signatures on the petition are presumed to be valid, and the challenger has the burden of overcoming that presumption. *In re: Initiative Petition No. 317, State Question No. 556*, 1982 OK 78, ¶ 28, 648 P.2d 1207. "The law presumes the validity and regularity of the official acts of public officers within the line of their official duties." *In Re Initiative Petition No. 23, State Question No. 38*, 1912 OK 611, ¶ 3, 127 P. 862.

ANALYSIS

Petitioner challenges the validity of signatures to Initiative Petition No. 434, State Question 820 on grounds that signatures collected on Tribal lands are void.

Petitioner premises his challenge on an 1856 Treaty between the United States and the Creek Nation and Seminole Nation which, according to Petitioner, prohibits the government from engaging in political activities on treaty land. Petitioner also cites *Oklahoma v. Castro-Huerta*, __ U.S. __ , 142 S.Ct. 2486 (June 29, 2022), for his proposition that federal law preempts state jurisdiction and signatures to Initiative Petition No. 434, State Question 820 collected in Indian Country are invalid.

Petitioner raised similar arguments in *Tay v. Green*, 2022 OK 37, 508 P.3d 431, where Petitioner challenged the legal sufficiency of Initiative Petition No. 432, State Question 818. That measure sought to create a new Article in the Oklahoma Constitution to legalize, regulate, and tax adult-use marijuana and expand the regulatory framework for medical marijuana.

The Court rejected Petitioner's arguments, and we held that signatures collected and elections in Indian Country are valid:

> *McGirt* does not disenfranchise Oklahoma citizens residing in Indian country from the right to participate in state elections, which includes the right to sign an initiative petition.

Id. at ¶ 9. Here too, Petitioner states that all persons located on treaty land are subject to Tribal law and "ineligible to participate in [the] Oklahoma electoral process." Application, at 3.

Neither the 1856 Treaty between the United States and the Creek Nation and Seminole Nation nor the U.S. Supreme Court's decision in *Oklahoma v. Castro-Huerta*, __ U.S. __ , 142 S.Ct. 2486 (June 29, 2022), affect our previous analysis. Well-settled principles of claim preclusion bar Petitioner's present challenge. *See State* ex rel. *Tal v. City of Oklahoma City*, 2002 OK 97, ¶ 20, 61 P.3d 234.

Because the same arguments were raised in *Tay v. Green*, 2022 OK 37, 508 P.3d 431, considered by the Court, and rejected, we find Petitioner's challenge to the validity of the signatures to Initiative Petition No. 434, State Question 820 is without merit and should be denied.

The Court further finds the challenge is frivolous and warrants the imposition of sanctions under 34 O.S. 2021, § 8(L).

Petitioner has a history of filing original proceedings in this Court, many of which had no legitimate legal basis. A pauper's affidavit accompanied all of Petitioner's filings. Petitioner was admonished that future filings lacking in merit would result in the revocation of Petitioner's pauperis status or other sanctions. *See Tay v. Honorable Mayor George Theron (G.T.) Bynum, et al.*, Case No. 119,411 (order dated May 17, 2021). Yet, Petitioner continues to file matters in this Court lacking in merit or without a good faith legal basis, including this proceeding.

Pursuant to 34 O.S. 2021, § 8(L) and the Court's inherent authority, Petitioner's pauperis status is hereby revoked. *Winters v. City of Oklahoma City*, 1987 OK 63, 740 P.2d 724 (affirming imposition of sanctions for party's oppressive litigation conduct). Unless Petitioner establishes that he is in immediate danger of serious physical injury, Petitioner shall be required to pay the cost deposit under 20 O.S. 2021, § 15 before filing any other matter in this Court.

34 O.S. 2021, § 8(K) requires this Court to resolve objections to the signature count or ballot title "with dispatch." Due to the exigencies related to the element of time affecting this matter, the ordinary 20-day period to file a petition for rehearing is shortened. *See, e.g., In Re: Initiative Petition No. 426, State Question No. 810*, 2020 OK 43, ¶ 31, 465 P.3d 1244; *Steele v. Pruitt*, 2016 OK 87, ¶ 19, 378 P.3d 47.

Any petition for rehearing under Rule 1.13, *Oklahoma Supreme Court Rules*, Tit. 12, ch. 15, App. 1, must be filed no later than 10:00 a.m., September 20, 2022.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 16TH DAY OF SEPTEMBER, 2022.

CHIEF JUSTICE

Darby, C.J., Winchester, Edmondson, Combs and Gurich, JJ., concur;
Kane, V.C.J., Kauger, Rowe **(by separate writing)** and Kuehn, JJ., concur in part; dissent in part.

Kane, V.C.J., with whom Kauger, J., joins, concurring in part; dissenting in part
I dissent to the imposition of sanctions against the challenger under 34 O.S. 2021 § 8(L).

Appendix B

Decision of the Oklahoma Supreme Court *Tay v. Green*, 508 P.3d 431 (2022)

2022 OK 38

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

PAUL TAY,

Petitioner,

v.

JED GREEN and KRISTOPHER MASTERMAN,

Respondents.

No. 119,984
(comp. w/ 119,927)

FOR OFFICIAL PUBLICATION

ORIGINAL PROCEEDING TO DETERMINE THE CONSTITUTIONAL VALIDITY OF STATE QUESTION NO. 819, INITIATIVE PETITION NO. 433.

¶ 0 This original proceeding determines the legal sufficiency of State Question No. 819, Initiative Petition No. 433, which seeks to create a new article to the Oklahoma Constitution, Article 32, which would legalize, regulate, and tax the recreational use of marijuana by adults age 21 years and older. Petitioner, Paul Tay, alleges that State Question No. 819, Petition No. 433 is unconstitutional for four reasons: (1) it is preempted by federal law; (2) signatures gathered on and elections held on tribal land would be invalid; (3) it violates the doctrine of non-retroactivity in post-conviction proceedings; and (4) the proposed gist is insufficient. Upon review, we hold Petitioner has not established clear or manifest facial unconstitutionality regarding the proposition's provisions; however, because the gist is insufficient and misleading with respect to Section 5, we invoke the severability clause in Section 9 and strike Section 5 and any reference to the stricken provision in the gist. State Question No. 819, Initiative Petition No. 433, as severed, is legally sufficient for submission to Oklahomans for voting.

STATE QUESTION NO. 819, INITIATIVE PETITION NO. 433, AS SEVERED, IS LEGALLY SUFFICIENT.

Paul Tay, Tulsa, Oklahoma, *pro se* Petitioner.

Stephen Cale, Cale Law Office, Tulsa, Oklahoma, for Respondents.

Gurich, J.

Facts & Procedural History

¶ 1 On October 28, 2021, Respondents Jed Green and Kristopher Masterman, filed State Question No. 819, Initiative Petition No. 433 (SQ 819) with the Oklahoma Secretary of State. SQ 819 proposed creation of a new constitutional article, Article 32, which would legalize, regulate, and tax the recreational use of marijuana by adults age 21 years and older. The Oklahoma Secretary of State published notice of the filing on November 4, 2021. Petitioner timely brought this challenge on November 5, 2021, in accordance with 34 O.S.2021, § 8(B), https://govt.westlaw.com/okjc (follow hyperlink titled "General Provisions").[1] Between January 14th and February 17th, 2022, Petitioner filed ten motions for

[1] This proceeding is companion with Petitioner's similar challenge to State Question No. 818, Initiative Petition No. 432.

summary or declaratory judgment.[2] On February 28, 2022, Petitioner filed a notice of intention to appeal and a request for a stay of signature gathering.[3]

Proposed Measure

¶ 2 Proposed Article 32 contains eleven (11) sections. Section 1 safeguards medical-marijuana patient, caregiver, and business licensees against any limiting construction of Article 32.

¶ 3 Section 2 grants personal rights and protections. Section 2 establishes the right "to grow, purchase, transport, transfer, receive, prepare and consume marijuana and marijuana products," subject to form and quantity limitations. It also permits the purchase, possession, and use of marijuana paraphernalia. Additionally, Section 2 provides general protections against arrest, prosecution, penalty, discipline, or discrimination by state and local government based solely

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[2] From January 14, 2021 to January 18, 2021, Petitioner filed eight motions for summary or declaratory judgment based on state elections in Indian country, preemption, logrolling, limitations of medical marijuana licenses under OAC 310: 681-1-3, and interpretation of Article 1, § 3 of the Oklahoma Constitution. Petitioner's amended application for this Court to assume original jurisdiction raises each issue, except logrolling. On February 10, 2022, Petitioner filed another motion for summary or declaratory judgment based on state interests in Indian country; Petitioner had also raised this issue in his amended application. On February 17, 2022, Petitioner moved for summary or declaratory judgment, asking the Court to take judicial notice of federal case law to aid its interpretation of Article 1, § 3 of the Oklahoma Constitution. Petitioner had opportunity to present his claims in this Court. We deny Petitioner's motions which request the same relief as his amended application. To the extent Petitioner raises any new challenge by way of motion, it is untimely under 34 O.S. § 8(B), which provides:

> It shall be the duty of the Secretary of State to cause to be published, in at least one newspaper of general circulation in the state, a notice of such filing and the apparent sufficiency or insufficiency of the petition, and shall include notice that any citizen or citizens of the state may file a protest as to the constitutionality of the petition, by a written notice to the Supreme Court and to the proponent or proponents filing the petition. Any such protest must be filed within ten (10) business days after publication. A copy of the protest shall be filed with the Secretary of State.

[3] We also deny Petitioner's request for a stay.

on conduct permitted under Article 32. It expands on these general protections with regard to employment, medical care, parental rights, licensure rights, and due process and equal protection rights. Further, Section 2 protects financial-service providers from liability solely for providing services to any marijuana business licensed by the State of Oklahoma. It also requires the marijuana regulatory agency to comply with privacy laws. Lastly, Section 2 addresses local and homegrow rights: it prohibits additional licensing or fees related to homegrows; limits local-government regulation thereof; allows landlords to restrict homegrows; allows landlords and businesses to restrict indoor smoking or vaping of marijuana or marijuana products—but not other forms of lawful possession or consumption; and prohibits any statute, ordinance, or regulation regarding vaping or smoking cannabis that is more restrictive than those regarding tobacco use.

¶ 4 Section 3 authorizes the medical-marijuana regulatory agency to regulate recreational marijuana and authorizes medical-marijuana business licensees to commence recreational-marijuana business of the same business-license type without additional fee, license, or registration requirements. Moreover, Section 3 establishes when and to whom dispensaries may begin recreational-marijuana sales and requires the marijuana regulatory agency to adopt regulations authorizing residential delivery.

¶ 5 Section 4 establishes a framework for taxes and expenditures. It charges an excise tax of fifteen percent (15%), subject to lowering by the Oklahoma legislature, on marijuana and marijuana products purchased by persons who are

not patient or caregiver licensees. On products purchased by patient or caregiver licensees, Section 4 imposes a seven percent (7%) excise tax, which incrementally drops to zero percent (0%) over one year. Further, Section 4 instructs the Oklahoma Tax Commission (OTC) to collect and direct taxes to a fund managed by the marijuana regulatory agency. It requires the agency to use the tax revenue to pay operational costs and allocates remaining revenue amongst various organizations, programs, and funds for certain expenditures. Subject to state or federal action permitting interstate or international export of marijuana and marijuana products, Section 4 instructs the OTC to collect a three percent (3%) wholesale tax and deposit the tax revenue in the State General Revenue Fund.

¶ 6 Section 5 regards retroactivity. It requires the Oklahoma Department of Corrections to publish within 180 days a list of persons currently incarcerated for marijuana-related state-court convictions. It permits currently incarcerated persons whose conduct would be allowed under Article 32 to request resentencing, modification, or reversal. It allows like persons who have completed their sentences to request dismissal, expungement, and vacatur of their conviction. Further, it requires the court to presume satisfaction of the criteria for the request and "without delay resentence or reverse the conviction as legally invalid, modify the judgment and sentence, or expunge and vacate the charges." Moreover, it states that expungement "shall automatically restore" firearm-ownership and voting rights. By its terms, Section 5 is applicable to juvenile cases "as if the juvenile had been of legal age at the time of the offense." Lastly, it safeguards

petitioners from any construction that would diminish or abrogate other available rights or remedies or limit legislative authority regarding same.

¶ 7 Section 6 sets state protocol should the federal government legalize marijuana. It provides that Oklahoma's restrictions would not exceed federal restrictions and Oklahoma's quantity limitations would be raised to the federal maximum. It also provides that the Oklahoma Bureau of Narcotics and Dangerous Drugs will retain its enforcement authority, subject to the legislature's authority to change the responsible agency. Finally, Section 6 states that if the federal government allows interstate transfer, Oklahoma will, too, and authorizes the legislature and governor to permit same.

¶ 8 Section 7 provides for judicial review and instructs that all rules or regulations made pursuant to Article 32 must comply with the Oklahoma Administrative Procedures Act. Section 8 empowers the legislature to modify specific provisions of Article 32 by supermajority vote and others by simple-majority vote. Section 9 is a severability clause. Section 10 provides that Article 32 will be effective immediately upon passage. Section 11 contains a list of definitions.

Standard of Review

¶ 9 Oklahoma citizens "may protest the sufficiency and legality of an initiative petition." In re State Question No. 807, Initiative Petition No. 423, 2020 OK 57, ¶ 11, 468 P.3d 383, 388 (per curiam) (internal citations omitted). Upon protest, the Court must review the petition to ensure its compliance "with the rights and restrictions established by the Oklahoma Constitution, legislative enactments, and

this Court's jurisprudence." Id., 468 P.3d at 388 (internal citations omitted). The Court's pre-election review is restricted to determining whether the proposed measure contains "clear or manifest facial constitutional infirmities," and the protestant bears the burden of proof. Id. ¶ 12, 468 P.3d at 388 (internal citations omitted).

Analysis

¶ 10 To the extent we addressed preemption and the validity of state elections in Indian country in companion case No. 119,927, we apply our holdings therein, and reject Petitioner's identical arguments.[4] We review the following issues: federal preemption by provisions of (1) the Gun Control Act of 1968, codified at 18 U.S.C. § 922(d)(3), (g)(3) (2018); (2) federal racketeering law, codified at 18 U.S.C. § 1956(a) (2018); § 1957 (2018); and (3) gist sufficiency.[5]

Federal law does not preempt SQ 819.

¶ 11 An exercise of state police power will not be found "preempted by federal action unless that is the clear and manifest purpose of Congress." In re State Question No. 807, 2020 OK 57, ¶ 16, 468 P.3d at 389. Congress communicates that purpose in three ways: (1) expressly, (2) by conveying its intent to occupy a field, or (3) by enacting legislation that directly conflicts with state law.

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[4] Tay v. Green, 2022 OK __, __ P.3d __.

[5] As noted, Petitioner also argued that Section 5 of SQ 819 violates the doctrine of non-retroactivity in post-conviction proceedings. Ultimately, we will sever Section 5 because the gist insufficiently and misleadingly fails to describe its effects upon Oklahoma law. Therefore, we will not review this additional challenge to Section 5.

¶ 12 We first consider the provisions of section 922[6] and conclude that it does not preempt SQ 819.[7] Congress did not expressly preempt States' ability to

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[6] Petitioner anchored his preemption argument upon the following provisions of 18 U.S.C. § 922:

> (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—
>
> (3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))[.]
>
> (g) It shall be unlawful for any person—
>
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))
>
> [. . .]
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[7] SQ 819 addresses firearm-ownership rights in two sections.

Section 2 provides, in part:

> (19) No conduct permitted under this Article shall be the basis for the denial, revocation or suspension of any state-issued license, including drivers' licenses, concealed carry permits, occupational or professional licensing.
>
> [. . .]
>
> (21) No licensee of the agency responsible for regulating marijuana shall be denied the right to own, purchase, possess or use a firearm, ammunition, or firearm accessories solely on the basis of conduct permitted under this Article.
>
> (22) No state or local agency, municipal or county governing authority shall restrict, revoke, suspend or otherwise infringe upon the right of a person to own, purchase or possess a firearm, ammunition, or firearm accessories or any related firearm license or certification solely on the basis of conduct permitted under this Article.
>
> (23) No state or local agency, municipal or county governing authority shall enforce or assist in enforcing a federal law that prohibits or restricts firearm use or ownership solely on the basis of conduct permitted under this Article.

Section 5 provides, in part:

> (5) Nothing in this section shall be construed to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant. The provisions of this section shall apply equally to juvenile cases as if the juvenile had been of legal age at the time of the offense. A completed expungement shall automatically restore the

legislate gun-control laws in the Gun Control Act of 1968, 18 U.S.C. §§ 921–931 (2018) (the GCA); nor did Congress implicitly convey its intent to occupy the field of gun control therein.[8] A direct and positive conflict exists where "compliance with both federal and state law is a physical impossibility . . . or where state law stands as an obstacle to the accomplishment and execution of Congress' full purposes and objectives." Id., ¶ 21, 468 P.3d at 390 (internal citations omitted). Though SQ 819 would authorize conduct subject to federal prosecution, compliance with state law and § 922(d)(3) and (g)(3) would be possible because SQ 819 does not mandate possession of firearms or ammunition by recreational-marijuana users. See id. ¶¶ 23-24, 468 P.3d at 390-91 (analyzing, under the physical-impossibility standard, whether actual conflict would exist between proposed state law and the Controlled Substances Act (CSA)). Further, SQ 819 does not impede the accomplishment and execution of Congress' purposes in enacting the GCA. Congress passed the GCA "to strengthen Federal Controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders." H.R. Rep. No. 1577, at 2 (1968) as reprinted

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person's rights to possess and use firearms. A completed expungement of marijuana related felony convictions shall also automatically restore the person's right to vote.

[8] 21 U.S.C. § 927 provides:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

in 1968 U.S.C.C.A.N. 4410, 4411. SQ 819 does not attempt to alter or weaken the GCA or limit enforcement of federal law by federal agents.[9] Any immunity created by SQ 819 applies to prosecution under state law, not federal law. Further, it applies to possession and use of marijuana and marijuana products, not to other activities addressed by the GCA. Moreover, because the federal government cannot force States to criminalize recreational marijuana possession or use, it cannot prevent States from decriminalizing recreational marijuana possession or use.

[9] Because § 922 references the CSA, we note that SQ 819 similarly does not impede the accomplishment and execution of Congress' purposes in enacting the CSA. See In re State Question No. 807, 2020 OK 57, ¶¶ 26–27, 30, 34, 468 P.3d at 391–93 (concluding same regarding a similar proposition). A contrary conclusion would violate principles of federalism. See Prigg v. Pennsylvania, 41 U.S. 539, 541 (1842) ("[I]t might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or instructed to them by the Constitution."). The anti-commandeering doctrine bars Congress from appropriating state power for federal purposes. See generally Prigg, 41 U.S. 539; Printz v. United States, 521 U.S. 898 (1997); Murphy v. NCAA, __ U.S.__, 138 S.Ct. 1461 (2018). Congress may greatly depend on States to police and regulate controlled substances under the standards established by the CSA, but a State's decision to do so according to a different, yet complementary state standard, does not frustrate Congress' purposes in enacting the CSA.

¶ 13 Likewise, SQ 819 is not preempted by 18 U.S.C. § 1956(a)[10] and § 1957[11]. Petitioner does not explain his claim that § 1957 preempts SQ 819, but he asserts SQ 819 conflicts with § 1956(a) because it will require state officials to participate in money laundering through its excise-tax provisions. In 2020, Petitioner made a similar argument in his challenge to SQ 807; the Court determined that "government entities are not subject to the criminal law provisions of RICO because they cannot form the necessary malicious intent for the predicate acts." In re State Question No. 807, 2020 OK 57, ¶ 38, 468 P.3d at 394. The same is true with respect to § 1956(a) and § 1957. Moreover, Petitioner assumes the State

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[10] 18 U.S.C. § 1956(a)(1) provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

[11] § 1957 punishes anyone who, in certain circumstances, "knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity." § 1957(a).

would be involved in a transaction involving "specified unlawful activity." § 1956(a)(1); § 1957(a). Section 1956(c)(7) defines "specified unlawful activity."[12] That definition references the CSA—first, regarding offenses against a foreign nation for financial transactions in the United States, § 1956(c)(7)(B)(i), and second, regarding "any act or acts constituting a continuing criminal enterprise." § 1956(c)(7)(C). But the CSA provides immunity to "any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." 21 U.S.C. § 885(d) (2018). Therefore, the State's enforcement of Article 32 would not meet the definition of "specified unlawful activity."

¶ 14 Further, the illegality of an activity does not bar its taxation. In re State Question No. 807, 2020 OK 57, ¶ 39, 468 P.3d at 395 (collecting cases). Because the State's excise tax would be lawful, so would its appropriation of tax revenue. Id. ¶ 40, 468 P.3d at 395 ("[I]t is axiomatic that if the states and federal government are permitted to tax illegal activity, they are permitted to use the resulting revenue."). Thus, § 1956(a) and § 1957 do not preempt SQ 819.

Challenge to the Gist

¶ 15 Under 34 O.S.2021, § 3, https://govt.westlaw.com/okjc (follow hyperlink titled "General Provisions"), "[a] simple statement of the gist of the proposition shall

[12] § 1957(f)(3) defines the term "specified unlawful activity" by "the meaning given in section 1956."

be printed on the top margin of each signature sheet." The gist statement "must be brief, descriptive of the effect of the proposition, not deceiving but informative and revealing of the design and purpose of the petition." In re Initiative Petition No. 344, State Question No. 630, 1990 OK 75, ¶ 14, 797 P.2d 326, 330; see also In re State Question No. 820, Initiative Petition No. 434, 2022 OK 30, ¶ 6, __ P.3d __ (declaring the "'gist must present an outline, or rough sketch, of what the initiative petition will accomplish,'" informing prospective signers "of the 'potential effects' so those signers understand the changes that would be made to Oklahoma's statutory code." (internal citations omitted)). The proposed gist follows:

> The Oklahoma Marijuana Regulation and Right to Use Act This constitutional amendment: grants the right to use marijuana to persons 21 years of age and older; ***establishes individual*** patient, professional, privacy, employment, medical, parental, student, ***firearm ownership***, state-licensure, and due process ***rights***; has a fiscal impact and pays for itself with taxes on marijuana sales; sets a tax rate of 15% on marijuana sales, except for persons with a medical marijuana patient or caregiver license; directs surplus revenue to pay for education, local and military veterans mental health programs, programs for families with disabled children, rural water infrastructure, law enforcement training, research, marijuana waste clean-up, and agricultural damage insurance, and individual criminal record expungement; adapts to future federal legalization of marijuana, including a 3% wholesale export tax; ***allows persons with minor marijuana convictions to apply for resentencing, vacatur and/or expungement; provides for judicial review***, severability and provides definitions of terms used in this amendment; becomes effective upon passage and provides time for implementation.

(emphasis added).

¶ 16 Petitioner argues that SQ 819's gist is insufficient and misleading because it does not warn voters of federal criminal consequences for marijuana possession

and use. We rejected Petitioner's argument regarding SQ 818 because the gist sufficiently explained changes to be made to Oklahoma law. Likewise, we reject Petitioner's argument that the gist must describe federal consequences. However, we conclude the gist insufficiently informs voters of Section 5's effect on Oklahoma law.

¶ 17 The gist fails to describe two significant effects of Section 5: (1) the bypass of judicial process for resentencing, modification, reversal, dismissal, expungement, or vacatur; and (2) the automatic and absolute restoration of firearm-ownership and voting rights upon completed expungement. As written, the gist misleads potential signatories to believe SQ 819 adheres to established judicial process. In reality, it does not provide for a procedure whereby the State may object to resentencing, modification, reversal, dismissal, expungement, or vacatur. Section 5(4) provides: "Upon receiving a petition, ***the court shall presume*** the petitioner satisfies the criteria . . . and ***without delay*** resentence or reverse the conviction as legally invalid, modify the judgment and sentence, or expunge and vacate the charges."[13] Similarly, the gist misleads potential

[13] Recently, this Court upheld the sufficiency of the gist of State Question No. 820, Initiative Petition No. 434—a proposition that also seeks to legalize, regulate, and tax adult-use marijuana. See In re: State Question No. 820, Initiative Petition No. 434, 2022 OK 30, __ P.3d __. There, the gist sufficiently described the effect of SQ 820's retroactivity provisions. Id. ¶ 6, __ P.3d at __. The gist explained: "It would provide a judicial process for people to seek modification, reversal, redesignation, or expungement of certain prior marijuana-related judgments and sentences." This explanation was sufficient because SQ 820 did not attempt to bypass the established judicial process regarding modification, reversal, redesignation, or expungement. With respect to any qualifying "person currently serving a sentence for conviction . . . who would not have been guilty of an offense or who would have been guilty of a lesser offense under this Act had it been in effect at the time of the offense," SQ 820 would require the court to "presume the petitioner satisfies the criteria [for resentencing, modification, or reversal] and without delay" grant the request "unless the State opposes the petition or alleges that granting the petition would pose an unreasonable risk of danger to an identifiable individual's safety." If the State objects, SQ 820 provides that the petitioner is

signatories about its effect on a petitioner's firearm-ownership and voting rights. The gist explains that SQ 819 "establishes individual . . . firearm ownership . . . rights" but does not address voting rights nor the process for restoring either the possession of firearms or voting rights. Section 5(5) provides: "A completed expungement [of marijuana related felony convictions] shall automatically restore the person's rights to possess and use firearms. A completed expungement of marijuana related felony convictions shall also automatically restore the person's right to vote." Not only does this provision deviate from established practice by automatically restoring these significant rights, it further delegates authority to the trial court dependent only upon a completed expungement. Moreover, restoration is absolute, unqualified, and does not take into account whether a petitioner has other non-marijuana-related felony convictions.[14] The above-mentioned omissions

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"entitled to a hearing on the record, including the opportunity to question witnesses and present evidence" and "[t]he State shall bear the burden of proving, by clear and convincing evidence, that the petitioner does not satisfy the criteria [for resentencing, modification, or reversal] or that granting the petition would pose an unreasonable risk of danger to an identifiable individual if alleged." With respect to any qualifying "person who has completed his or her sentence for a conviction . . . [and] who would not have been guilty of an offense or who would have been guilty of a lesser offense under this Act had it been in effect at the time of the offense," the judicial process to "have a conviction dismissed, expunged, and vacated as legally invalid or redesignated as a civil infraction" is the same, except that "[u]nless requested by the applicant, no hearing is necessary . . . ." Unlike SQ 820, SQ 819 would not provide judicial process for the State to rebut the presumption or otherwise oppose the granting of the petition—a significant deviation from established judicial process under Oklahoma law..

[14] SQ 820 did not address voting rights. Though it addressed firearm-ownership rights, its effect thereon is much different than that of SQ 819. In keeping with the trial courts' power and authority, SQ 820 did not automatically restore firearm-ownership rights upon the filing of a judicial order, like expungement. Further, its effect on firearm-ownership rights was prospective only:

> A person shall not be denied by the state or local government the right to own, purchase or possess a firearm, ammunition, or firearm accessories based solely on conduct that is addressed and permitted by this Act. No state or local agency, municipal or county governing authority shall restrict, revoke, suspend or otherwise infringe upon the right of a person to own, purchase, or possess a firearm, ammunition, or firearm accessories or any related firearms license or certification based solely on conduct that is addressed and

and scant explanations regarding fundamental deviations from established practice, render the gist deceitful and insufficiently informative with respect to the effect of Section 5 on Oklahoma law. [15] Under the severability clause in Section 9, the Court severs Section 5[16] and strikes the portion of the gist referencing its provisions.[17]

¶ 18 The remaining gist, although not all-encompassing,[18] informs potential signatories "'of what the measure is generally intended to do'" without "'the taint of misleading terms or deceitful language.'" In re Initiative Petition No. 426, State Question No. 810, 2020 OK 44, ¶¶ 6, 7, 465 P.3d 1259, 1262, 1263; see also In re Initiative Petition No. 409, State Question No. 785, 2016 OK 51, ¶ 3, 376 P.3d 250, 252 ("The gist . . . is 'not required to contain every regulatory detail so long as its outline is not incorrect.'" (internal citation omitted)). Thus, we assume original

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permitted by this Act.

[15] The misleading nature of the gist is compounded by including reference to "judicial review," following the portion of the gist that references Section 5.

[16] The Court may view as severable any provisions that are not "integral parts of the petition." In re Initiative Petition No. 315, State Question No. 553, 1982 OK 15, ¶ 5, 649 P.2d 545, 548. An integral part of a proposition is a part "which could not be severed without defeating the whole." In re Initiative Petition No. 358, State Question No. 658, 1994 OK 27, ¶ 11, 870 P.2d 782, 787. Because the proposition would not be defeated without Section 5, Section 5 is severable under Section 9. Section 9(1) provides:

> The provisions hereof are severable, and if any part or provision hereof shall be void, invalid, or unconstitutional, the decision of the court so holding shall not affect or impair any of the remaining parts or provision hereof, and the remaining provisions hereof shall continue in full force and effect.

[17] The Court strikes the following portion of the gist: "allows persons with minor marijuana convictions to apply for resentencing, vacatur and/or expungement."

[18] The gist does not mention impairment testing, workplace policy, and legislative-amendment procedure.

jurisdiction and hold SQ 819, as severed, is legally sufficient for submission to Oklahomans for voting.

INITIATIVE PETITION NO. 819, STATE QUESTION NO. 433, BY SEVERING SECTION 5 AND PORTIONS OF THE GIST REFERENCING SECTION 5, IS LEGALLY SUFFICIENT TO SUBMIT TO THE PEOPLE OF OKLAHOMA.

DARBY, C.J., KAUGER, WINCHESTER, EDMONDSON, COMBS, AND GURICH, JJ., CONCUR;

KANE, V.C.J. DISSENTS **(BY SEPARATE WRITING)**;

ROWE, J. CONCURS IN PART; DISSENTS IN PART **(BY SEPARATE WRITING)**, KUEHN, J., CONCURS IN PART; DISSENTS IN PART.

ORIGINAL

2022 OK 38

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

PAUL TAY,

Petitioner,

v.

JED GREEN and KRISTOPHER MASTERMAN,

Respondents.

No. 119,984
(comp. w/ 119,927)

FOR OFFICIAL PUBLICATION

ROWE, J., concurring in part, dissenting in part:

¶1 I concur with the Court's decision to assume original jurisdiction. I must dissent, however, from the Court's holding that State Question No. 819, Initiative Petition No. 433 ("SQ 819") is constitutionally sufficient to submit to the people of Oklahoma for the same reasons I set forth in *In re State Question No. 820, Initiative Petition 434*, 2022 OK 30. SQ 819 is preempted by federal law and, thus, conflicts with the Oklahoma Constitution

¶2 The right to an initiative petition is the first power reserved for the people of Oklahoma under Article 5, § 2 of the Oklahoma Constitution.[1] Our prior

[1] Article V, § 2 of the Oklahoma Constitution states:

> The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and fifteen per centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws

decisions make clear that the right of initiative is precious and warrants zealous protection. *In re State Question No. 807, Initiative Petition 423*, 2020 OK 57, ¶ 10, 468 P.3d 383, 388-89. The right of initiative, however, is not absolute; any citizen may protest the sufficiency or legality of an initiative petition. *Id.* ¶ 11, 468 P.3d at 389. When such a protest is made, this Court must review the petition to determine whether it complies with the Oklahoma Constitution, legislative enactments, and our own jurisprudence. *Id.*

¶3 Article 1, § 1 of the Oklahoma Constitution states, "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land." Likewise, the federal Supremacy Clause set out in the second paragraph of Article VI of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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.

Pursuant to these provisions, when a potential conflict between state and federal law arises, the state law is preempted. *In re State Question 807*, 2020 OK 57, ¶ 17, 468 P.3d at 390. Federal law has identified three forms of preemption that may

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necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the Office of Governor.

arise from federal action: express preemption, field preemption, and conflict preemption. *Id.* ¶ 17, 468 P.3d at 389.

> Express preemption occurs when a federal statute includes a provision stating that it displaces state law and defining the extent to which state law is preempted. Field preemption occurs when Congress expresses an intent to occupy an entire field, such that even complementary state regulation in the same area is foreclosed. Finally, conflict preemption occurs when there is an actual conflict between state and federal law.

Id. (internal citations omitted).

¶4 The Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904, the federal law which governs the use and trafficking of controlled substances, including marijuana, explicitly addresses the issue of federal preemption of state law:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Section 903 makes clear that the CSA was not intended to occupy the field to exclusion of state law with respect to regulating the use and trafficking of controlled substances. However, Section 903 does provide that the CSA preempts state law in instances where a "positive conflict" arises.

¶5 A "positive conflict" arises either when it is impossible to comply with both federal and state law, or where state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives. *See*

Hillsborough City, Fla. v. Automated Med Labs, Inc., 471 U.S. 707, 713 (1985). Even if the changes proposed in SQ 819 were to become law, it does not appear that compliance with state and federal law would be impossible. SQ 819 does not, for instance, contain any mandates that would require Oklahomans to violate the provisions of the CSA.

¶6 The passage of SQ 819 would, however, clearly present an obstacle to the accomplishment and execution of Congress's full purposes and objections expressed in the CSA. The purpose of the CSA was "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzalez v. Raich*, 545 U.S. 1, 12 (2005). Marijuana is considered a Schedule I controlled substance under the CSA. 21 C.F.R. § 1308.11(d)(23). It is illegal for any person to manufacture, distribute, or dispense marijuana and also illegal for any person to possess marijuana with the intent to manufacture, distribute, or dispense it. 21 U.S.C. §§ 841(a)(1), 844(a).

¶7 If SQ 819's proposed amendments become law, there will unquestionably be a proliferation in the cultivation, manufacture, distribution, dispensation, and recreational use of marijuana in Oklahoma. These outcomes are hardly hypothetical. With these activities sanctioned and licensed by the State of Oklahoma, it would be virtually impossible for federal law enforcement to accomplish Congress's objective in the CSA to control the production, sale, and use of controlled substances.

¶8 When we confronted this issue in the past, it was asserted that the CSA could not be understood as preempting state laws which legalize trafficking in marijuana because that would mean the CSA violates the anti-commandeering doctrine. *See In re State Question 807*, 2020 OK 57, 468 P.3d 383. The anti-commandeering doctrine operates as a limit on federal preemption. "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018) (quotation omitted).

¶9 The CSA does not violate the anti-commandeering doctrine by preempting state laws which undermine its purpose and objectives. The CSA contains no direct mandate for the states to adopt drug enforcement regulations which mirror its provisions; the CSA merely prohibits certain conduct on behalf of individuals. Congress anticipated that states would adopt regulatory schemes that are generally complementary to federal law, even if not perfectly consistent with the CSA. Sanctioning activity that is proscribed by federal law, however, is in no sense complementary.

¶10 SQ 819's proposed amendments clearly present a substantial obstacle to Congress's objectives expressed in the CSA to control the production, sale, and use of controlled substances. SQ 819 is preempted by federal law and, thus, fails to comply with the Oklahoma Constitution. Accordingly, I cannot find that it is fit for submission to the people of Oklahoma.

Appendix C

Decision of the Oklahoma Supreme Court *Tay v. Kiesel*, 468 P.3d 383 (2020)

2020 OK 57

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ORIGINAL

IN RE: STATE QUESTION No. 807, INITIATIVE PETITION No. 423

PAUL TAY,

Petitioner,

v.

RYAN KIESEL and MICHELLE TILLEY,

Respondents.

No. 118,582

FOR OFFICIAL PUBLICATION

ORIGINAL PROCEEDING TO DETERMINE THE CONSTITUTIONAL VALIDITY OF STATE QUESTION NO. 807, INITIATIVE PETITION NO. 423

¶0 This is an original proceeding to determine the legal sufficiency of State Question No. 807, Initiative Petition No. 423. The petition seeks to create a new article to the Oklahoma Constitution, Article 31, for the purpose of legalizing, regulating, and taxing the use of marijuana by Oklahoma adults. Petitioner Paul Tay filed this protest alleging the petition is unconstitutional because it violates the federal supremacy provisions of Article VI, clause 2 of the United States Constitution and Article 1, Section 1 of the Oklahoma Constitution. Petitioner alleges the proposed measure is preempted by existing federal statutes including the Controlled Substances Act, 21 U.S.C. §§ 801-904, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, and Section 280E of the Internal Revenue Code, 26 U.S.C. § 280E. Because the United States Supreme Court has not addressed this question, the Supremacy Clause permits us to perform our own analysis of federal law. Upon our review, we hold Petitioner has not met

his burden to show clear or manifest facial constitutional infirmities because he has not shown State Question No. 807 is preempted by federal law. On the grounds alleged, the petition is legally sufficient for submission to the people of Oklahoma.

STATE QUESTION NO. 807, INITIATIVE PETITION NO. 423 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

Paul Tay, Tulsa, Oklahoma, *pro se* Petitioner.

D. Kent Meyers and Melanie Wilson Rughani, Crowe & Dunlevy, Oklahoma City, Oklahoma, for Respondents.

PER CURIAM:

I.
FACTS AND PROCEDURAL HISTORY

¶1 On December 27, 2019, Respondents Ryan Kiesel and Michelle Tilley (Respondents) filed State Question No. 807, Initiative Petition No. 423 (SQ 807) with the Secretary of State of Oklahoma. SQ 807 proposes for submission to the voters the creation of a new constitutional article, Article 31, which would legalize, regulate, and tax the use of marijuana by adults under Oklahoma law. Notice of the filing was published on January 3, 4, & 8, 2020. Within ten business days, Petitioner Paul Tay (Petitioner) brought this original proceeding pursuant to the provisions of 34 O.S. Supp. 2015 § 8(b)[1], challenging the constitutionality of SQ

[1] Title 34 O.S. Supp. 2015 § 8(b) provides:

807. Petitioner alleges the proposed amendment by article is unconstitutional because it violates the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, as well as Okla. Const., art. 1, § 1, which provides that the United States Constitution is the supreme law of the land. Specifically, Petitioner contends SQ 807 is preempted by the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-904, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, and Section 280E of the Internal Revenue Code, 26 U.S.C. § 280E (2018).

II.
THE PROPOSED MEASURE

¶2 The proposed Article 31 contains seventeen (17) sections. Section 1 provides for definitions used throughout Article 31. Section 2 contains limitations, noting Article 31 does not affect or limit laws that govern use by minors under twenty-one (21) years of age or use in certain circumstances or locations. Section 3 provides Article 31 will not limit the rights and privileges of medical marijuana patients, or the rights of employers and governments except in the ways provided.

It shall be the duty of the Secretary of State to cause to be published, in at least one newspaper of general circulation in the state, a notice of such filing and the apparent sufficiency or insufficiency of the petition, and shall include notice that any citizen or citizens of the state may file a protest as to the constitutionality of the petition, by a written notice to the Supreme Court and to the proponent or Respondents filing the petition. Any such protest must be filed within ten (10) business days after publication. A copy of the protest shall be filed with the Secretary of State.

¶3 Section 4 legalizes the personal use of marijuana. Section 4 declares the possession and use of certain amounts of marijuana to be not unlawful and not an offense under state law. It also provides similar status to personal cultivation of marijuana plants. In addition, Section 4 provides certain protections for personal use in such areas as parental rights, parole, privacy, eligibility in public assistance, and possession of firearms. Section 5 creates civil fines and penalties for violations of the possession and use restrictions found in Article 31, primarily in Section 4.

¶4 Section 6 renames the Oklahoma Medical Marijuana Authority to the Oklahoma Marijuana Authority (Authority) and gives it power over licensing for the commercial cultivation and sale of marijuana. Section 7 requires the Authority to promulgate rules and regulations for implementation and enforcement of Article 31. Section 7 also sets out comprehensive areas that must be addressed by those regulations, including labelling, security, inspection, and testing procedures.

¶5 Section 8 provides protections for licensees, declaring conduct authorized by Article 31 as not unlawful under Oklahoma law. Section 8 further notes that contracts will not be unenforceable on the basis marijuana is prohibited by federal law, and professionals will not be subject to discipline in Oklahoma for providing advice to licensees based on federal law prohibitions. Section 9 provides

for various restrictions on licensees, concerning areas such as location, security, and the need to comply with Authority inspection.

¶6 Section 10 allows local governments, subject to the provisions of Section 4 and 8, to regulate the time, place, and manner of business licensed under Article 31. However, Section 10 also prevents local governments from prohibiting licensees in their jurisdictions after the next election, from prohibiting transportation of marijuana, and from adopting unduly burdensome regulations or ordinances.

¶7 Section 11 imposes an excise tax of fifteen percent (15%) on the gross receipt of sales of marijuana by licensees to consumers. Section 11 also permits the Legislature to alter the excise tax rate after November 3, 2024, and requires the Oklahoma Tax Commission (OTC) to both collect the tax and establish rules and procedures for collection. Section 12 creates the Oklahoma Marijuana Revenue Trust Fund (Fund) to receive the proceeds from the excise tax. Section 12 also provides for percentage-based distribution of that revenue after costs for running the Authority are deducted. Revenue from the Fund will be distributed in the following manner: 1) four percent (4%) to the political subdivisions where the retail sales occurred; 2) forty-eight percent (48%) to grants for public schools; and 3) forty-eight percent (48%) to provide grants to agencies and non-profit

organizations to increase access to drug addiction treatment services. Section 12 also contains provisions to prevent legislative undercutting of funding in those areas due to the new revenue from the Fund.

¶8 Section 13 provides for judicial review of rules and regulations adopted by the Authority pursuant to the Oklahoma Administrative Procedures Act (APA). Section 14 requires the Authority to publish an annual report concerning licensees, any actions taken against them, revenues and expenses of the Authority, and revenue collected by the OTC.

¶9 Section 15 provides for retroactive application of Article 31. Section 15 allows those convicted of once-criminal conduct made lawful by Article 31 to petition for resentencing, reversal of conviction and dismissal, or modification of their judgment and sentence. Section 15 also creates a procedure for the State to oppose such a petition, including based on an unreasonable risk of danger to an identifiable individual's safety. Section 16 is a severability clause, and Section 17 notes Article 31's effective date will be ninety (90) days after it is approved by the people of Oklahoma.

III.
STANDARD OF REVIEW

¶10 "The first power reserved by the people is the initiative," which includes "the right to propose amendments to the Constitution by petition...." Okla. Const. art. 5, § 2; *In re: Initiative Petition No. 420, State Question No. 804*, 2020 OK 9, ¶12, ___ P.2d ___; *In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶2, 376 P.3d 250. This Court has repeatedly noted that the right of initiative is precious, and one which the Court must zealously preserve to the fullest measure of the spirit and letter of the law. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶12; *Okla. Oil & Gas Ass'n v. Thompson*, 2018 OK 26, ¶4, 414 P.3d 345; *In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶3, 142 P.3d 400.

¶11 However, while the right of initiative is zealously protected by the Court, it is not absolute. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶13; *Okla. Oil & Gas Ass'n*, 2018 OK 26 at ¶5. Any citizen of Oklahoma may protest the sufficiency and legality of an initiative petition. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶13; *In re Initiative Petition No. 409*, 2016 OK 51 at ¶2; *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶2, 164 P.3d 125. Upon such a protest, it is the duty of this Court to review the petition to ensure that it complies with the rights and restrictions established by the Oklahoma Constitution, legislative enactments, and this Court's jurisprudence. *In re:*

Initiative Petition No. 420, 2020 OK 9 at ¶13; *In re: Initiative Petition No. 384*, 2007 OK 48 at ¶2.

¶12 Pre-election review of an initiative petition under 34 O.S. Supp. 2015 § 8 is confined to determining whether there are "clear or manifest facial constitutional infirmities" in the proposed measure. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶13 (quoting *In re: Initiative Petition No. 358, State Question No. 658*, 1994 OK 27, ¶7, 870 P.2d 782). Further, because the right of the initiative is so precious, the Court has held that "all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts." *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶12; In re Initiative Petition No. 403, State Question No. 779, 2016 OK 1, ¶3, 367 P.3d 472. Thus, a protestant bears the heavy burden of demonstrating the required clear or manifest constitutional infirmity. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶14; *In re Initiative Petition No. 362, State Question No. 669*, 1995 OK 77, ¶12, 899 P.2d 1145.

IV.
ANALYSIS

A. Principles of Federal Preemption and the Anticommandeering Doctrine

¶13 Petitioner's argument rests on the interpretation and application of the federal supremacy provisions of the United States Constitution[2] and the Oklahoma Constitution.[3] Petitioner asserts SQ 807 is preempted because it conflicts with existing federal legislation concerning controlled substances such as marijuana. The federal government, acting through Congress, has the power to preempt state law pursuant to the Supremacy Clause. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); *Craft v. Graebel-Oklahoma Movers, Inc.*, 2007 OK 79, ¶11, 178 P.3d 170. State law and state constitutional provisions must also yield to the United States Constitution. *See Okla. Coalition for Reproductive Justice v. Cline*, 2012 OK 102, ¶2, 292 P.3d 27; In *re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶12-13, 838 P.2d 1.

¶14 With respect to both the United States Constitution and federal statutes enacted by Congress, this Court is governed by the decisions of the United States Supreme Court and must pronounce rules of law that conform to extant Supreme Court jurisprudence. *Hollaway v. UNUM Life Ins. Co. of America*, 2003

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[2] U.S. Const. art. VI, cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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.

[3] Okla. Const., art. 1, § 1 reinforces the federal Supremacy Clause, and provides: "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

OK 90, ¶15, 89 P.3d 1022; *Bogart v. CapRock Communications Corp.*, 2003 OK 38, ¶13, 69 P.3d 266; *Cline*, 2012 OK 102 at ¶12 ("Because the United States Supreme Court has spoken, this Court is not free to impose its own view of the law...").

¶15 However, subject to decisions of the United States Supreme Court, we are free to promulgate judicial decisions grounded in our own interpretation of federal law. *Hollaway*, 2003 OK 90 at ¶15; *Bogart*, 2003 OK 38 at ¶13. The Supreme Court of the United States has yet to directly address federal law preemption of state marijuana regulation. Because the United States Supreme Court has not considered this question we are free to make our own determination on preemption and indeed have a duty to do so since the question has been placed before us. That is a freedom we do not have where the United States Supreme Court has pronounced clear rules on federal questions, such as an individual's right to abortion protected by the United States Constitution. See, e.g., *In re Initiative Petition No. 395, State Question No. 761*, 2012 OK 42, 286 P.3d 637; *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, 838 P.2d 1. An individual's constitutional right to an abortion is hardly the only area in which this Court has determined it is bound by United States Supreme Court precedent on federal questions. For example, in Lewis v. Sac and Fox Tribe of Okla. Housing

Auth., 1994 OK 20, ¶5, 896 P.2d 503, the Court noted its jurisdiction to adjudicate certain civil actions concerning Indian matters was limited by opinions of the United States Supreme Court addressed to the question. In *Cities Service Gas Co. v. Okla. Tax Com'n*, 1989 OK 69, ¶7, 774 P.2d 468, the Court noted it was obligated to apply the United States Supreme Court's four pronged test to decide whether state taxes on interstate commerce were permissible under the commerce clause. In *Bailess v. Paukune*, 1953 OK 349, 254 P.2d 349, the Court overruled a prior decision concerning interpretation of the General Allotment Act of February 8, 1887, on remand from an appeal to the United States Supreme Court, because that Court's interpretation was binding.

¶16 Petitioner asserts SQ 807 is constitutionally infirm because it conflicts with federal legislation. When it comes to the preemptive effect of federal legislation, the purpose of Congress is the ultimate touchstone. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.ed.2d 398 (2008). Consideration of any issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not preempted by federal action unless that is the clear and manifest purpose of Congress. *Altria Group, Inc.*, 555 U.S. at 78; Cipollone, 505 U.S. at 516; *Rice v. Santa Fe Elevator Corp.*, 331 U.S 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). The preemption doctrine is thus not an

independent grant of legislative power to the Congress but rather a rule of decision applied in the case of an apparent conflict between federal and state law. *Murphy v. Natl. Collegiate Athletic Ass'n*, ___ U.S. ___, 138 S.Ct. 1461, 1479 (2018). *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324-25, 135 S.Ct. 1378, 191 L.Ed.2s 471 (2015).

¶17 There are three varieties of preemption that may arise from federal action: express preemption, field preemption, and conflict preemption. *Murphy*, 138 S.Ct. at 1480. *See English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). Express preemption occurs when a federal statute includes a provision stating that it displaces state law and defining the extent to which state law is preempted. *See Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 256, 133 S.Ct. 1769, 185 L.Ed.2d 909. Field preemption occurs when Congress expresses an intent to occupy an entire field, such that even complementary state regulation in the same area is foreclosed. *Arizona v. U.S.*, 567 U.S. 387, 401, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012). Finally, conflict preemption occurs when there is an actual conflict between state and federal law. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914. Despite nuances in how they arise, these forms of preemption all function in essentially the same way:

> Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.

Murphy, 138 S.Ct. at 1480.

¶18 While the Supremacy Clause and the preemption doctrine may effectively prevent States from regulating areas controlled by federal law, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Murphy* at 1477. Known as the anticommandeering doctrine, this principle means that even a particularly strong federal interest does not enable Congress to command a state government to enact state regulation or enable it to compel a state to enact and enforce a federal regulatory scheme. *See id.* at 1466-77; *New York v. United States*, 505 U.S. 144, 161 & 178, 112 S.Ct. 2408, 120 L.ed.2d 120 (1992).

B. SQ 807 is not preempted by the Controlled Substances Act, 21 U.S.C. §§ 801 – 904.

¶19 Petitioner argues several federal provisions effectively preempt SQ 807. First, Petitioner argues SQ 807 is unconstitutional because it is preempted by the provisions of the Controlled Substances Act (CSA), 21 U.S.C. §§ 801 – 904. The CSA governs the use and trafficking of controlled substances, including

marijuana. Marijuana is a Schedule I controlled substance pursuant to the CSA, and thus it is illegal under federal law for any person to manufacture, distribute, or dispense, marijuana, and also illegal under federal law for any person to possess marijuana with intent to manufacture, distribute, or dispense it. See 21 U.S.C. §§ 841(a)(1) & 844(a) (2018). Petitioner asserts this prohibition renders SQ 807 facially unconstitutional.

¶20 The CSA contains an explicit preemption provision. Title 21 U.S.C. § 903 (2018) provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

Section 903 states that the CSA's provisions do not expressly preempt state law and are not intended to exclusively occupy any field to the exclusion of state law. Thus, of the three types of preemption only conflict preemption is relevant.

¶21 Federal courts have interpreted the "positive conflict" language used in Section 903 to mean that state laws are preempted only in cases of actual conflict with federal law such that compliance with both federal and state law is a physical impossibility, *see Hillsborough County, Fla. v. Auto. Medical*

Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714, or where state law stands as an obstacle to the accomplishment and execution of Congress' full purposes and objectives. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

¶22 Petitioner first argues SQ 807 explicitly states an intention to usurp the supremacy of the CSA. This is incorrect. SQ 807 does not mention the CSA, nor does it state any intent to comprehensively regulate all controlled substances to the exclusion of the CSA. However, Petitioner correctly notes that SQ 807 effectively provides limited immunity from prosecution under state law for possession and distribution of marijuana. The decision to exercise that immunity, by either possessing and using marijuana as a consumer or taking advantage of the licensing scheme for production and distribution, could subject individuals to federal prosecution under the CSA. Petitioner argues this makes compliance with both federal and state law impossible.

¶23 The physical impossibility standard is a high burden. Federal precedent suggests that anything short of explicitly conflicting commands to act one way and also act the opposite way is insufficient to satisfy that burden. *See Wyeth v. Levine*, 555 U.S. 555, 571-73, 581, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009); *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31, 116 S.Ct. 1103, 134

L.Ed.2d 237 (1996). Respondents assert that SQ 807 does not create a situation where compliance with both federal and state law is impossible. SQ 807 contains no affirmative mandate that individuals use marijuana or that they grow it for commercial distribution. Oklahomans, Respondents argue, "can elect to refrain from using cannabis and, thus, be fully compliant with both federal and state law."[4]

¶24 In *Wyeth*, the Supreme Court determined physical impossibility was a "demanding defense" that did not apply where a state law required a drug manufacturer to change its warning labels after they had been approved by the FDA because there was no evidence to suggest the FDA would object to the amended warning label. 555 U.S. 555 at 571-73. In a more factually relevant scenario, in *Barnett Bank, N.A.*, the Court did not find physical impossibility in a scenario where a federal statute authorized the sale of insurance and a state statute forbade the same sale of insurance. 517 U.S. 25 at 31. The Court noted the "two statutes do not impose directly conflicting duties on national banks-as they would, for example, if the federal law said, 'you must sell insurance,' while the state law said, 'you may not.'" *Id.* In the present matter, the proposed Article 31 contains no mandate that requires Oklahomans to violate any provision of the CSA. Thus,

[4]Respondents/Proponents Ryan Kiesel and Michelle Tilley's Brief in Response to Protest Challenging Constitutionality of Initiative Petition No. 423, February 18, 2020, p. 5.

it is not facially physically impossible to comply with both state law and the CSA, were SQ 807 to be adopted.

¶25 Petitioner additionally contends SQ 807 stands as an obstacle to the accomplishment and execution of Congresses' purposes in enacting the CSA. That is also a high threshold to meet. *See Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607, 131 S.Ct. 1968, 563 U.S. 582 (2011). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* at 373.

¶26 The manifest purpose of the CSA was "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzales v. Raich*, 545 U.S. 1, 12, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). SQ 807 does not purport to limit or prevent federal authorities from enforcing federal law. SQ 807 instead would alter how Oklahoma regulates marijuana and would provide a form of limited immunity under state law for users and producers that satisfy the measure's requirements. Further, the federal government lacks the power to compel Oklahoma, or any other state, to enforce the provisions of the CSA or to criminalize possession and use of marijuana under state law. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1475-79, 200 L.Ed.2d 854 (2018) (discussing and applying the anticommandeering doctrine).

¶27 Petitioner argues one of the purposes of the CSA was to bring the United States into compliance with various treaty obligations, including the Vienna Convention on Psychotropic Substances. *See* 21 U.S.C. § 801a (2018). In support of his argument, Petitioner cites old decisions of the United States Supreme Court that struck down state laws inconsistent with U.S. treaty obligations and established the supremacy of the federal government. *See Ware v. Hylton,* 3 U.S. 199, 1 L.Ed. 568 (1796) (holding treaty provisions are binding as U.S. domestic law and take precedence over state law); *M'Culloch v. Maryland*, 17 U.S. 316, 4 L.Ed. 579 (1819) (holding state action may not impede valid constitutional exercises by the federal government). However, beyond conclusory statements Petitioner makes no argument as to how exactly SQ 807 prevents the U.S. from complying with its treaty obligations as reinforced in the CSA.

¶28 "'The case for federal preemption 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.'" *Wyeth*, 555 U.S. at 575 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989). Respondents argue the CSA was never intended to coerce the states to follow or adopt its specific regulatory scheme, and

the states are free to engage in their own complementary regulation of controlled substances, even if that regulation differs in scope and standards.

¶29 Respondents' argument is supported by the anticommandeering doctrine and the recent decision of the Supreme Court of the United States in *Murphy*. In that case, the Court invalidated a federal law that prohibited states from authorizing sports gambling schemes. Specifically, the challenged provision of the Professional Amateur Sports Protection Act (PASPA) made it unlawful for a state to sponsor, operate, advertise, promote, license, or authorize by law or compact gambling and betting on competitive sporting events. *Murphy*, 138 S.Ct. at 1470. The Court concluded that a state repealing an existing ban on sports gambling constituted "authorization" of that activity, but that the PASPA provision at issue was an unconstitutional violation of the anticommandeering doctrine because it unequivocally dictated what a state legislature could and could not do. *Id.* at ¶1478. However, the *Murphy* Court noted that the anticommandeering doctrine and preemption require separate analysis. Notably, because the challenged PASPA provision did not impose any restrictions on private actors, the Court determined federal preemption was not implicated. *Id.* at 1481.

¶30 The posture of this case is distinct from *Murphy*. Clearly Congress lacks the power to enact a law ordering a state legislature to refrain from enacting a

law licensing the growing and use of marijuana for individual consumption. *See id.* at 1482. That is not what the CSA does. Rather, unlike the challenged provisions of PASPA, the CSA's restrictions are directed at private individuals. Still, *Murphy* is useful by analogy to reinforce the limits of the CSA's intended scope and the limits of its preemption. In enacting the CSA, Congress specifically chose to leave room for state regulation of controlled substances, likely in part because its ability to compel the states is limited (per *Murphy*) but also because it relied on the states to voluntarily shoulder the burden of policing and regulating controlled substances. *See* 21 U.S.C. § 903 (2018). The fact that Oklahoma might choose to do so in a far less restrictive way than the CSA does not mean doing so inherently frustrate the CSA's overarching purposes.

¶31 The reasoning of the Supreme Court of Arizona concerning its medical marijuana statute is instructive on that point:

> The state-law immunity AMMA provides does not frustrate the CSA's goals of conquering drug abuse or controlling drug traffic. Like the people of Michigan, the people of Arizona 'chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana.' *Ter Beek*, 846 N.W.2d at 539.

Reed-Kaliher v. Hoggat, 237 Ariz. 119, ¶23, 347 P.3d 136 (2015). By adopting SQ 807, the people of Oklahoma would be going farther than the people of Arizona, but they would still simply be parting ways with Congress on the scope of

acceptable marijuana use and how unacceptable use is to be penalized. Use by those under 21, in public, and under other conditions, would remain prohibited. Further, SQ 807 also makes no attempt to impede federal enforcement of the CSA where marijuana is concerned.[5]

¶32 Not all states are in agreement. The Supreme Court of Oregon relied on *Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984) in finding Oregon's medical marijuana statute was preempted by federal law in *Emerald Steel Fabricators, Inc.* v. *Bureau of Labor and Industries*, 230 P.3d 518 (Oregon 2010).[6] At a glance, *Michigan Canners and Freezers Ass'n*, might appear to be controlling. In that case the Supreme Court concluded Michigan's Agricultural Marketing and Bargaining Act was preempted by the federal Agricultural Fair Practices Act

[5] While the potential for such enforcement remains, the reality is that the Justice Department has shown little interest of late in using federal resources to enforce federal marijuana prohibitions in the states that have legalized its use. At his confirmation hearing, Attorney General William Bar noted: "[t]o the extent that people are complying with state laws on distribution and production, we're not going to go after that." Brian Tashman, *What We Learned from William Barr's Confirmation Hearing*, ACLU, Jan. 16, 2019, https://www.aclu.org/blog/civil-liberties/executive-branch/what-we-learned-william-barrs-confirmation-hearing. In each budget cycle since FY 2014, Congress has passed an appropriate rider preventing the Department of Justice from using taxpayer funds to prevent the states from "implementing their own laws that authorize the use, distribution, possession, or cultivation of marijuana. *See* Pub. L. No. 116-6, div. C, Section 537, 133 Stat. 138 (2019); *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016).

[6] Also, in *People v. Crouse*, 2017 CO 5, 388 P.3d 39, the Supreme Court of Colorado determined a specific provision of Colorado's medical marijuana scheme requiring law enforcement officers to return medical marijuana seized from an individual later acquitted of a state drug charge was preempted by the CSA because it would require state police officers to violate federal law. *People* concerns a distinct factual scenario not directly implicated by Petitioner's challenge to SQ 807.

because the former stood as an obstacle to the accomplishment of the latter's purpose.

¶33 Michigan's law gave food producer's associations the option to obtain from the state the right to act as the exclusive bargaining agent for all producers of a particular commodity. *Id. at 466*. Doing so would interfere with producers' freedom to bring their products to market individually or through an association, as guaranteed by the Agricultural Fair Practices Act. *See id.* at 464-65. The Court concluded that "because the Michigan Act authorizes producers' associations to engage in conduct that the federal Act forbids, it 'stands as an obstacle to the—accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 478 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1984)).

¶34 However, we find *Michigan Canners* was properly distinguished by the Supreme Court of Michigan in *Ter Beek v. City of Wyoming*, 846 N.W.2d 531 (Mich. 2014). There, the court explained:

> The United States Supreme Court concluded that the Michigan Act was preempted by the AFPA because the Michigan Act, by compelling individual producers to effectively join and be bound by the actions of accredited associations, "empowers producers' associations to do precisely what the federal Act forbids them to do" and "imposes on the producer the same incidents of association

> membership with which Congress was concerned in enacting" the AFPA. *Id.* at 478, 104 S.Ct. 2518. **In other words, the AFPA guaranteed individual producers the freedom to choose whether to join associations; the Michigan Act, however, denied them that right.**
>
> Such circumstances are not present here. Section 4(a) simply provides that, under state law, certain individuals may engage in certain medical marijuana use without risk of penalty. As previously discussed, while such use is prohibited under federal law, § 4(a) does not deny the federal government the ability to enforce that prohibition, nor does it purport to require, authorize, or excuse its violation. Granting Ter Beek his requested relief does not limit his potential exposure to federal enforcement of the CSA against him, but only recognizes that he is immune under state law for MMMA-compliant conduct, as provided in § 4(a). Unlike in *Michigan Canners*, the state law here does not frustrate or impede the federal mandate.

Id. at 539-40 (emphasis added).

¶35 Based on the above analysis and the lack of a bright line rule concerning conflict preemption in this area, we find Petitioner has not demonstrated that SQ 807 is clearly or manifestly unconstitutional due to its alleged preemption by the CSA. Like the people of Michigan and Arizona, the voters of Oklahoma, should they adopt SQ 807, would be parting ways with Congress only regarding the scope of acceptable use of marijuana. *See Reed-*

Kaliher v. Hoggatt, 237 Ariz. 119, ¶¶22-23, 347 P.3d 136 (2015); *Ter Beek*, 846 N.W.2d at 536-41.[7]

C. SQ 807 unlikely to result in State violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 – 1968.

¶36 Petitioner also asserts SQ 807 is unconstitutional because it would create a state-sponsored agency specifically to engage in criminal money laundering by levying and collecting an excise tax on cannabis and creating a fund to funnel that money to other agencies and non-profit entities. Petitioner thus asserts SQ 807 necessitates violation of The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 – 1968.

¶37 RICO prohibits persons from receiving income derived from a pattern of racketeering activity, which includes "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in Section 102 of the Controlled Substance Act) punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (2018). RICO is to be read broadly. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). RICO also created a new civil cause

[7] It should also be noted that one of the specific purposes of the CSA is to conquer drug abuse. *See Gonzales*, 545 U.S. at 12. Much of the excise tax revenue that would be collected if SQ 807 is adopted would be directed to programs specifically designed to combat drug abuse. That collection and funding effort would serve to aid one of the primary purposes of the CSA, not thwart it.

of action for any person injured in their business or property by reason of a violation of its prohibitions. *RJR Nabisco, Inc. v. European Cmty.*, ___ U.S. ___, 136 S.Ct. 2090, 2096, 195 L.Ed.2d 476 (2016). *See* 18 U.S.C. § 1964 (2018). Petitioner, however, is not alleging a private RICO claim.[8] Rather, he is asserting SQ 807, if adopted, would result in an inevitable violation of RICO's provisions. Though petitioner does not specifically invoke the preemption doctrine, his framing of this tension implies a form of conflict preemption.

¶38 Respondents acknowledge that, like the CSA, RICO remains a potential ongoing threat to any individuals engaged in the cannabis business. However, Respondents also correctly note that Petitioner is not asserting SQ 807 is unconstitutional because of RICO's potential application to individual private citizens. Rather, Petitioner argues SQ 807 is unconstitutional because it will force the State of Oklahoma and its officials to engage in RICO violations through the

[8] Respondent's challenge Petitioner's standing to make such a claim, noting he has alleged no injury to his own interests. However, we need not consider that issue because Petitioner's challenge is to the legal sufficiency of SQ 807 and he is not seeking to invoke the private right of action created by 18 U.S.C. § 1964.

Thus far, many attempts by private citizens to assert RICO violations by marijuana businesses have failed. *See Ainsworth v. Owenby*, 326 F.Supp.3d 1111 (D. Oregon 2018); *Bokaie v. Green Earth Coffee LLC*, 2018 WL 6813212 (N.D. Cali. 2018). *But see Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017). Of note, the Tenth Circuit in *Safe Streets Alliance* also concluded that the plaintiff organizations had failed to allege any viable substantive right to enforce the preemptive provisions of the CSA, thus implying that individuals may not possesses the option of challenging state marijuana laws in federal court as preempted by the CSA. *See* 859 F.3d at 901-04.

excise tax provisions.[9] Petitioner's argument is flawed for several reasons. First, government entities are not subject to the criminal law provisions of RICO because they cannot form the necessary malicious intent for the predicate acts. *See Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991).[10] Further, state and local officials are granted immunity from the majority of the provisions of the CSA that create the predicate acts for a RICO violation.[11]

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[9] As Petitioner notes in his response:

> 9. All elements of probable cause to bring criminal felony charges against state officials who promulgate IP 423, if it becomes article 31, Oklahoma Constitution, exist under [RICO].

Petitioner/Protestant's Brief in Response to Respondents/Respondents Ryan Kiesel and Michelle Tilley's Response, ¶9.

[10] The Second Circuit Court of Appeals has indicated it is possible to seek prospective injunctive relief against a sovereign entity in a civil action pursuant to RICO. *See Gingras v. Think Finance, Inc.*, 922 F.3d 112, 124-25 (2nd Cir. 2019). However, Petitioner is not seeking injunctive relief. He is arguing SQ 807 is facially unconstitutional because it would require the State to engage in criminal RICO violations. *Gingras* is thus not directly applicable.

[11] Title 21 U.S.C. § 885(d) (2018) provides:

> Except as provided in sections 2234 and 2235 of Title 18, no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

In *Smith v. Superior Ct.*, 239 Cal.Rptr.3d. 256, 260 (Cal. App. Dep't Super. Ct. 2018), a California appellate court applied Section 885(d) and concluded the San Francisco Police Department was immune from federal prosecution under the CSA when complying with California law for the return of marijuana lawfully possessed under California law. *But see People v. Crouse*, 2017 CO 5, ¶8, 388 P.3d 39 (holding state law return provision to be preempted by the CSA because an officer could not be "lawfully engaged" in enforcement activities under state law if state law required violation of federal law).

¶39 Petitioner's RICO argument is focused on the excise tax provisions of SQ 807 that would result in the state handling tax revenue from the marijuana industry and appropriating it for use.[12] In addition to the specific limitations of RICO itself when applied to a sovereign entity, Petitioner's argument is flawed because illegality of a given activity is not a bar to its lawful taxation. Petitioner attempts to paint the excise tax provisions of SQ 807 as a form of racketeering. Sections 11 and 12 of SQ 807 create an excise tax and revenue framework very similar to the state's other existing excise taxes. The United States Supreme Court has upheld the taxation of federally-unlawful activities on multiple occasions. *See Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778, 114 S.Ct. 1937, 128 L.Ed.2d 767; *U.S. v. Sullivan*, 274 U.S. 259, 263, 47 S.Ct. 607, 71 L.Ed. 1037 (1927). *Kurth Ranch* concerned the punitive nature of a tax on marijuana specifically, and the Court explained:

> As a general matter, the unlawfulness of an activity does not prevent its taxation. **Montana no doubt could collect its tax on the possession of marijuana**, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction.

[12] Petitioner states:

> State Question 807 would create a state-sponsored agency specifically to engage in criminal felony RICO money laundering, by excise sales taxing cannabis purchases and creating a trust fund to funnel excise sales tax receipts to other agencies and private non-profit entities.

Protest to Challenge the Constitutionality of State Question 907, Petitioner Number 423, ¶9.

511 U.S. at 778 (internal citations omitted) (emphasis added). Multiple states have taxed marijuana in various ways despite criminal prohibitions. *See State v. Gulledge*, 896 P.2d 378 (Kan. 1995); *State v. Garza*, 496 N.W.2d 448 (Neb.1993); *Sisson v. Triplett*, 428 N.W.2d. 565 (Minn. 1988).

¶40 The U.S. Government itself already collects taxes on marijuana businesses that are illegal under federal law. *See* IRS, *Taxpayers Trafficking in a Schedule I or II Controlled Substance*, Dec. 10, 2014, https://www.irs.gov/pub/irs-wd/201504011.pdf. Title 26 U.S.C. § 280E (2018), which Petitioner cites in support of his argument, actually supports the legal taxation of marijuana. Section 280E forbids marijuana businesses from deducting business expenses from their gross income when calculating their federal income taxes.[13] Implicit in the provision is the acknowledgement that marijuana businesses are otherwise paying taxes on illegal activity. Further, it is axiomatic that if the states and federal government are permitted to tax illegal activity, they are permitted to use the resulting revenue. Based on the above analysis, Petitioner has not shown that SQ

[13] Specifically, 26 U.S.C. § 280E (2018) provides:

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

807 is clearly and manifestly unconstitutional because it would force the state and state officials to engage in unlawful conduct that violates RICO by taxing marijuana in Oklahoma.[14]

V.
CONCLUSION

¶41 In considering federal law questions, the Supremacy Clause requires this Court adhere to decisions of the United States Supreme Court. We have previously declared unconstitutional various initiative petitions and state laws that infringed upon rights the United States Supreme Court has expressly determined are guaranteed by the United States Constitution. We have also followed United States Supreme Court precedent on federal questions in diverse areas such as Indian law and application of the Commerce Clause. However, the United States Supreme Court has never addressed preemption of state marijuana laws under federal statutes such as the CSA.

¶42 Petitioner argues that this uncertainty concerning federal preemption of state marijuana regulations compels this Court to declare SQ 807 unconstitutional. The opposite is true. The burden is on a protestant to

[14] Though Respondents discuss the potential application of other federal statutes, such as 18 U.S.C. §§ 1956 & 1957 (2018) (money laundering) and 18 U.S.C. § 1960 (2018) (prohibition of unlicensed money transmitting business), those statutes are not discussed by Petitioner in his filings.

demonstrate that a proposed initiative is clearly and manifestly unconstitutional on its face. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶14.

¶43 This Court acknowledges the lack of controlling federal precedent has created uncertainty concerning the interplay between state regulatory schemes permitting marijuana use and existing federal law. The people of Oklahoma have spoken once on this interplay between state regulations and existing federal law in the approval and implementation of SQ 788, Oklahoma's legalization of medical marijuana. We have confronted that uncertainty, and considered the question in depth by examining the parameters of SQ 807, the language of federal statutes such as the CSA, and principles of preemption under the Supremacy Clause. Based on the above analysis, Petitioner has failed to meet his burden of demonstrating that SQ 807 is clearly or manifestly unconstitutional. We hold therefore that State Question No. 807, Initiative Petition No. 423, is legally sufficient for submission to the people of Oklahoma.

STATE QUESTION NO. 807, INITIATIVE PETITION NO. 423 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

¶44 Gurich, C.J., Kauger, Winchester, Edmondson and Combs, JJ., concur;

¶45 Darby, V.C.J., Kane **(by separate writing)** and Rowe **(by separate writing)**, JJ., dissent;

¶46 Colbert, J., not participating.

2020 OK 57

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA ORIGINAL

IN RE STATE QUESTION NO. 807, INITIATIVE PETITION NO. 423

PAUL TAY,

Petitioner,

v.

RYAN KIESEL and MICHELLE TILLEY,

Respondents.

No. 118,582

FOR OFFICIAL PUBLICATION

Kane, J., with whom Darby, J. joins, dissenting:

¶1 A growing number of states wish to differ with the federal government as to the regulation of marijuana. Before us is an attempt to have Oklahoma join these states. The majority finds the petition is legally sufficient for submission to the people, but I find the proposed measure stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and is, therefore, preempted by the Controlled Substances Act (CSA).[1] I also part with the majority's reliance on the anticommandeering doctrine in support of their conclusion that the proposed measure is not preempted by the CSA. I therefore dissent.

[1] I have no issue with the majority's conclusion that compliance with both federal and state law is not physically impossible.

¶2 Our preemption analysis begins with the assumption that the historic police powers of the states are not superseded by federal law unless that is the clear and manifest purpose of Congress. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). Section 903 of the CSA sets forth Congress's clear and manifest purpose to preempt state law, specifically when "there is a positive conflict between [a provision of the CSA and a state law] so that the two cannot consistently stand together." 21 U.S.C.A. § 903 (current through P.L. 116-142). Such "positive conflict" exists either when it is physically impossible to comply with both state and federal law or when state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The United States Supreme Court has previously found when state law authorizes conduct that federal law forbids, it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Mich. Canners & Freezers Ass'n v. Agric. Mktg. and Bargaining Bd.*, 467 U.S. 461, 478 (1984) (citing *Hines*, 312 U.S. at 67).

¶3 We next look to the purposes and objectives of Congress in the CSA. The United States Supreme Court has determined:

> The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.

> To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. The CSA categorizes all controlled substances into five schedules. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body.

Gonzales v. Raich, 545 U.S. 1, 12-13 (2005) (footnotes and citations omitted). Congress has continued to classify marijuana as a Schedule I drug despite extensive efforts to have it unclassified or reclassified. *See* 21 U.S.C.A. § 812(c)(10) (current through P.L. 116-142). Marijuana is classified as a Schedule I drug based on Congress's belief that marijuana has high potential for abuse, there is no accepted medical use, and there is a lack of accepted safety for use under medical supervision. *See id.* § 812(b)(1)(A)-(C). Federal law prohibits ***all*** production, sale, and use of marijuana.[2] State Question 807 authorizes the widespread production, sale, and use of marijuana. The proposed measure affirmatively authorizes conduct the CSA expressly forbids. This clearly presents an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and is preempted.

¶4 The majority leans on this notion that state law immunity would not frustrate the CSA's goals of conquering drug abuse or controlling drug traffic because, if SQ 807 is approved, Oklahoma would "simply be parting ways with Congress on the

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[2] The sole exception is using marijuana as part of a Food and Drug Administration preapproved research study. *See Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (citing 21 U.S.C. § 823(f)).

scope of acceptable marijuana use." This notion of "scope of acceptable use" comes from decisions on the legalization of medical marijuana, not recreational marijuana. *See Reed-Kaliher v. Hoggat*, 347 P.3d 136, 141-142 (Ariz. 2015); *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 539 (Mich. 2014). Congress is clear that there is no acceptable use of marijuana. The proposed measure makes the scope of acceptable use extremely broad, permitting use by anyone 21 years of age or older. This "parting of ways" leaves a gaping hole between Congress's scope of acceptable use (none) and Oklahoma's (anyone 21 or older). If that is not "a positive conflict" between the CSA and Oklahoma law "so that the two cannot consistently stand together," then what is? The majority's decision makes the already narrow preemption provision in 21 U.S.C.A. § 903 a complete nullity.

¶5 Some clarification as to preemption and the anticommandeering doctrine is warranted. The analysis employed by the majority blends consideration of obstacle preemption with the anticommandeering doctrine and *Murphy v. National Collegiate Athletic Association*, __ U.S. __, 138 S. Ct. 1461 (2018), to bolster its holding. Preemption is based on the Supremacy Clause and means that when federal and state law conflict, federal law prevails and state law is preempted. *See id.* at 1476. ***"[E]very form of preemption is based on a federal law that regulates the conduct of private actors, not the States."*** *Murphy*, 138 S. Ct. at 1481 (emphasis added). The anticommandeering doctrine is based on the Tenth Amendment and is a limit to Congress's legislative powers. *See id.* at 1476. Congress does not have the power to issue direct orders to the governments of

the states. *Id.* In *Murphy*, the United States Supreme Court found there was ***no federal preemption provision in PAPSA because PAPSA regulates states, not private actors.*** *Id.* at 1481. The *Murphy* Court then found "there is simply no way to understand the provision prohibiting state authorization as anything other than a ***direct command to the States***. And that is exactly what the anticommandeering rule does not allow." *Murphy*, 138 S. Ct. at 1481 (emphasis added).

¶6 In sum, preemption is implicated when federal law regulates private actors; the anticommandeering doctrine is implicated when federal law regulates the states. In *Murphy*, the Supreme Court found preemption was not implicated. Rather, the PAPSA provision regulated the states and violated the anticommandeering doctrine. The Supreme Court did ***not*** find the PAPSA provision regulated private conduct and that the state law did not stand as an obstacle to the purposes of PAPSA and, therefore, was not preempted. That is an important distinction. Because the United States Supreme Court found preemption was not implicated in *Murphy*, they did not undergo an obstacle preemption analysis. As a result, *Murphy* cannot support the majority's holding that SQ 807 does not stand as an obstacle to the purposes of the CSA and, therefore, is not preempted. Here, there is no question the CSA regulates the conduct of private actors and that § 903 of the CSA is a preemption provision. Therefore, the only inquiry is whether the proposed state law stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of the CSA (not whether the CSA violates the anticommandeering statute).[3]

¶7 Furthermore, any suggestion that this Court should find SQ 807 is not preempted because the federal government is aware of the widespread state legalization of medical and/or recreational marijuana but has declined to enforce the CSA is irrelevant. Congress creates federal laws. The executive branch is responsible for enforcing those laws. This branch is charged with interpreting the laws in a way that gives effect to the intent of Congress. Congressional intent is clear: the production, sale, and use of marijuana for any purpose is prohibited, and any state law that permits such acts is preempted. Despite a shift in public opinion and many states legalizing medical and/or recreational marijuana, Congress has continued to classify marijuana as a Schedule I drug and prohibit ***all*** production, sale, and use of it. In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518, 533 (Or. 2010), the Supreme Court of Oregon aptly noted "whatever the wisdom of Congress's policy choice to categorize marijuana as a Schedule I drug, the Supremacy Clause requires that we respect that choice when, as in this case, state law stands as an obstacle to the accomplishment of the full purposes of the federal law."

¶8 I respectfully dissent.

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[3] In fact, the CSA does not violate the anticommandeering doctrine. The CSA regulates the conduct of private actors, not the States. Therefore, the CSA does not implicate the anticommandeering doctrine.

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA **ORIGINAL**

IN RE STATE QUESTION No. 807, INITIATIVE PETITION No. 423

PAUL TAY,

Petitioner,

v.

RYAN KIESEL and MICHELLE TILLEY,

Respondents.

No. 118,582

FOR OFFICIAL PUBLICATION

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Rowe, J., with whom Darby, VCJ., joins, dissenting:

¶1 I dissent from the Court's opinion holding that State Question No. 807, Initiative Petition No. 423 ("SQ 807") is not preempted by federal law and legally sufficient for submission to the people of Oklahoma.

¶2 The Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904, which governs the use and trafficking of controlled substances, explicitly addresses the issue of federal preemption of state law:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. As the Court notes in its opinion, a "positive conflict" arises either when it is impossible to comply with both federal and state law, or where state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives. *See Hillsborough City, Fla. v. Automated Med Labs, Inc.*, 471 U.S. 707, 713 (1985).

¶3 The Court correctly concludes that the proposed constitutional amendments in SQ 807 contain no mandate that would require Oklahomans to violate the provisions of the CSA. However, passage of SQ 807 would clearly present an obstacle to the accomplishment and execution of Congress's full purposes and objections, expressed in the CSA. The purpose of the CSA was "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzalez v. Raich*, 545 U.S. 1, 12 (2005). Marijuana is considered a Schedule I controlled substance under the CSA. 21 C.F.R. § 1308.11(d)(23). It is illegal for any person to manufacture, distribute, or dispense marijuana and also illegal for any person to possess marijuana with the intent to manufacture, distribute, or dispense it. 21 U.S.C. §§ 841(a)(1), 844(a).

¶4 If SQ 807's proposed amendments become law, there will unquestionably be a proliferation in the cultivation, manufacture, distribution, dispensation, and recreational use of marijuana in Oklahoma. These outcomes are hardly hypothetical. In a world where these activities are sanctioned and licensed by the State of Oklahoma, it will become virtually impossible for federal law enforcement, operating with limited resources, to accomplish Congress's

objective in the CSA to control the production, sale, and use of controlled substances.

¶5 Contrary to the Court's analysis, reading the CSA as preempting state laws which legalize and regulate trafficking in marijuana would not run afoul of the anti-commandeering doctrine. The anti-commandeering doctrine operates as a limit on federal preemption. "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018) (quotation omitted). The CSA contains no direct mandate for the states to adopt drug enforcement regulations which mirror its provisions; the CSA merely prohibits certain conduct on behalf of individuals. Congress anticipated that states would adopt regulatory schemes that are generally complementary to federal law, even if not perfectly consistent with the CSA. Sanctioning activity that is proscribed by federal law, however, is in no sense complementary.

¶6 The Court likens the question before us to that addressed by the United States Supreme Court in *Murphy v. National Collegiate Athletic Association*, where the Court invalidated a federal law, the Professional Amateur Sports Protection Act (PASPA), that prohibited states from authorizing or licensing gambling on sporting events. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. at 1470. The Court found that PASPA violated the anti-commandeering doctrine because it "unequivocally dictate[d] what a state legislature may and may not do." *Id.* at 1478.

PASPA, however, is distinguishable from the CSA in a number of important ways. First, PASPA did not make sports gambling a federal crime. *Id.* at 1471. This meant that the burden of enforcing its provisions would fall exclusively on state government, thus conscripting state law enforcement for federal purposes. *Id.* Second, and most importantly, the CSA does not contain any provisions unequivocally dictating what a state legislature may and may not do.

¶7 SQ 807's proposed constitutional amendments clearly present a substantial obstacle to Congress's objectives expressed in the CSA to control the production, sale, and use of controlled substances. Therefore, SQ 807 is preempted by federal law.

¶8 Accordingly, I respectfully dissent.