Draft v 1.4 Work Product for Forthcoming State Class Action Lawsuit in

WILDSTAR v STATE OF CALIFORNIA; JACQUELINE MCGOWAN

Arguing the Validity of State cannabis law under CA Prop 64 when there is "positive conflict" with Federal Law under the Controlled Substance Act.

INTRODUCTION

On June 28, 2021, Supreme Court Justice Clarence Thomas issued a statement asserting that federal marijuana laws are inconsistent and outdated. *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236 (2021). Justice Thomas recognized that marijuana is legal in one way or another in 36 states, yet noted that the 2005 ruling in *Gonzales v. Raich*, 545 U.S. 1, which determined that the federal government could enforce prohibition against marijuana possession, is still the law. "The [*Raich*] Court stressed that Congress had decided 'to prohibit *entirely* the possession or use of [marijuana]' and had 'designate[d] marijuana as contraband for *any* purpose.'" *Id.* citing *Raich*, at 24-27, 125 S. Ct. 2236, 2236 (2021). (emphasis in original).

Thomas then outwardly acknowledged the discord that currently exists between state and federal marijuana laws, and the harm that this discord causes. For example, he said:

> Many marijuana-related businesses operate entirely in cash because federal law prohibits certain financial institutions from knowingly accepting deposits from or providing other bank services to businesses that violate federal law. Black & Galeazzi, Cannabis Banking: Proceed With Caution, American Bar Assn., Feb. 6, 2020. Cash-based operations are understandably enticing to burglars and robbers. But, if marijuana-related businesses, in recognition of this, hire armed guards for protection, the owners and the guards might run afoul of a federal law that imposes harsh penalties for using a firearm in furtherance of a "drug trafficking crime." 18 U. S. C. §924(c)(1)(A). A marijuana user similarly can find himself a federal felon if he just possesses a firearm. §922(g)(3). Or petitioners and similar businesses may find themselves on the wrong side of a civil suit under the Racketeer Influenced and Corrupt Organizations Act ["RICO"]. See, *e.g.*, *Safe Streets Alliance v. Hickenlooper, 8*59 F. 3d 865, 876-877 (CA10 2017)

*Standing Akimbo, LLC v. United State*s, 141 S. Ct. 2236, 2238 (2021).

Accordingly, individuals and businesses can be in full compliance with California state marijuana laws. Nonetheless, those same individuals and businesses are invariably susceptible to incalculable harm due to the current conflict that exists between state and federal law.

Despite "the federal government's current approach "[a]s a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana", *id.* Congress has always made clear its intention as it relates to controlled substances. Marijuana is still classified as a Schedule 1 controlled substance under the Controlled Substance Act. There are no signs that Congress intends to change that classification. Moreover, Congress has made express findings that the intrastate

distribution, cultivation, and possession of controlled substances, including marijuana, significantly affects interstate commerce, a domain entirely under Congress's control.

When Congress intends an outcome, federal law must preempt state law. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. As the *Raich* court held, if California wishes to legalize the growing, possession, and use of marijuana, it must seek permission to do so "in the halls of Congress." *Raich*, at 33, 125 S. Ct. 2236, 2236 (2021).

In November of 2016, the California electorate passed the Control, Regulate and Tax Adult Use of Marijuana Act ("AUMA"), Proposition 64, (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 64, p.178.), legalizing the recreational use of marijuana. Yet, federal law still flatly forbids the intrastate possession, cultivation, or distribution of marijuana. Controlled Substances Act, 84 Stat. 1242, 1247, 1260, 1264; 21 U. S. C. §§802(22), 812(c), 841(a), 844(a). Given the lack of ambiguity in federal law and Congress's intention, there is currently a positive conflict that exists between Prop 64 and federal law.

I.

THIS COURT SHOULD FIND THAT A POSITIVE CONFLICT EXISTS BETWEEN FEDERAL LAW AND CALIFORNIA'S PROP 64

A. Current Cannabis Law

1. The controlled substance act

The Federal Controlled Substance Act ("CSA") categorizes all controlled substances into five schedules. 21 U.S.C. §§ 841-863, § 812. The CSA's restrictions on the manufacture, distribution, and possession of a controlled substance depend upon the schedule in which the drug has been placed. *Id.* at §§ 821- 829. Marijuana has been classified by the CSA as a Schedule I substance, designating the drug as having a "high potential for abuse." 21 U.S.C. § 812; see also *United States v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483 (2001). This makes it a federal crime to use, possess, or distribute marijuana, no matter the amount. See *Gonzales v. Raich*, 545 U.S. 1, 12 (2005) ("The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.").

By classifying marijuana as a Schedule I drug, Congress mandated that the manufacture, distribution, or possession of marijuana be a criminal offense, with the sole exception as the drug being used as part of a Food and Drug Administration preapproved research study. 21 U.S.C. §§ 823, 841(a)(1), 844(a); *United States v. Oakland Cannabis Buyers' Coop*., 532 U.S.483,489-490, 492 (2001). Thus, violators of the CSA are subject to criminal and civil penalties, and ongoing or anticipated violations may be enjoined. 21 U.S.C. §§ 841-863, 882(a).

2. Legality of marijuana in California

California's Compassionate Use Act of 1996 ("CUA"), [Cal. Health & Safety Code §) 11362.5 (added by Initiative Measure, Prop 215, as approved by voters on Nov. 5, 1996)] gives a person who uses marijuana for medical purposes

on a physician's recommendation a defense to certain state criminal charges on the drug, including possession. In 2004, the state legislature expanded the criminal immunities of the CUA through the Medical Marijuana Program Act ("MMP"), [Cal. Health & Safety Code §§) 11362.7 et seq.], which implemented the CUA.

The CUA and MMP "exempt the 'collective or cooperative[ ]. . . cultiva[tion]' of medical marijuana by qualified patients and their designated caregivers from prosecution or abatement under specified state criminal and nuisance laws that would otherwise prohibit those activities." *The Kind & Compassionate v. City of Long Beach*, 2 Cal. App. 5th 116, 120 (2016) (citations omitted).

In 2015, the California Legislature passed the Medical Cannabis Regulation and Safety Act ("MCRSA"), establishing permitting for commercial medical marijuana cultivation, testing, manufacturing, dispensing, and delivering operations at the state level.

Also in 2015, the Medical Marijuana Regulation and Safety Act ("MMRAS") was enacted to establish a statewide regulatory system for medical marijuana businesses, governing, among other things, cultivation, processing, transportation, testing, and distribution of medical marijuana, and allowing for medical marijuana businesses to operate for profit. Bus. & Prof. Code, §§ 19300-19360.

In November of 2016, and most relevant to the issues presented herein, the California electorate passed the Control, Regulate and Tax Adult Use

of Marijuana Act ("AUMA"), Proposition 64, (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 64, p.178.), which established a comprehensive system to legalize, control, and regulate the possession, cultivation, and sale of nonmedical marijuana. Prop. 64, §§ 1, 3.

The Prop 64 change was accomplished in two independent steps. First, California Health and Safety Code section 11357, which formerly prohibited the possession of any amount of cannabis, no longer contains a prohibition against the possession of 28.5 grams or less. Second, newly enacted California Health and Safety Code section 11362.1 declares that, subject to stated restrictions, and "notwithstanding any other provision of law," it is lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to possess not more than 28.5 grams of marijuana (§ 11362.1, subd. (1)); to cultivate not more than six living marijuana plants and possess the marijuana produced by the plants (§ 11362.1, subd. (3)); and to smoke or ingest marijuana or marijuana products (§ 11362.1, subd. (4)). In addition, Section 11362.2 places restrictions on personal cultivation of marijuana, section 11362.3 specifies places where it cannot be used, section 11362.4 provides penalties for violations of the restrictions on use and possession, and section 11362.45 provides that the new laws shall not be construed to amend, repeal, affect, restrict, or preempt existing laws pertaining to the use, sale, and ingestion of marijuana under specified circumstances (for example, while driving a motor vehicle).

B. Prop 64 Is Preempted by the CSA and Is Therefore Unconstitutional

1. Applicable law

States' enactment of marijuana regulations does not affect the fact that the CSA prohibits marijuana. See *Ross v. Raging Wire Telecoms*., Inc., 42 Cal. 4th 920, 926 (2008) ("No state law could completely legalize marijuana . . . because the drug remains illegal under federal law."). Prop 64 is contrary to federal law, and under the Supremacy Clause of the Constitution of the United States (Article VI, Clause 2), California's Prop 64 is void. See *Clark v. Coye*, 60 F.3d 600, 603 (9th Cir. 1995) (citing *Edgar v. Mite Corp.*, 457 U.S. 624, 631 "It has long been established that 'a state statute is void to the extent that it actually conflicts with a valid federal statute.'") "[S]tate legalization of marijuana cannot overcome federal law." *Feinberg v. Comm'r*, 916 F.3d 1330, 1338 n. 3 (10th Cir. 2019). See also *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) ("Limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach.)

The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. Thus, the Supremacy clause provides "a rule of decision," i.e., which law controls. *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018). It specifies that federal law is supreme "in case of a conflict with state law." *Id.* at 1479. (emphasis added).

The CSA preemption statute, Section 903, specifically provides that:

> 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 togeth*er.

21 U.S.C. § 903; (emphasis added).

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

Section 11 of the AUMA specifically provides that "no provision or provisions of this Act shall be interpreted or construed in a manner to create a positive conflict with federal law, including the federal Controlled Substances Act[.]"

2. A positive conflict exists between Prop 64 and federal law

a. Congress has made its intent clear

The way that preemption works is quite simple:

> The U.S. Supreme Court's cases have identified three different types of pre-emption— "conflict," "express," and "field"--but all of them work in 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 pre-empted.

Murphy v. NCAA, 138 S. Ct. 1461, 1465 (2018).

Admittedly, if a state law does not conflict with a federal law, state law governs. *Aronson v. Quick Point Pencil Co*., 440 U.S. 257, 262 (1979). Federal law supersedes state law only when Congress intended such an outcome. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240 (1996) (congressional purpose is "the ultimate touchstone"). Courts must determine Congress's intent "from the language of the pre-emption statute and the "'statutory framework' surrounding it." *Id.* at 486 (citation omitted).

In the context of controlled substances, thus including marijuana, Congress has made clear its intention. The CSA included findings and declarations regarding the effects of drug distribution and use on the public health and welfare and regarding the effects of intrastate drug activity on interstate commerce. Congress has made express findings that the intrastate distribution, cultivation, and possession of controlled substances affects interstate commerce, including findings that the "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances," *id*. at § 801 (4); that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate" and "[t]hus, it is not feasible to distinguish" between such substances "in terms of controls," *id.* at § 801 (5); and that "[f]ederal control of the intrastate incidents of the traffic in controlled

substances is essential to the effective control of the interstate incidents of such traffic," *id.* at § 801 (6).

Congress also found, that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801 (2). Congress further found:

> A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a Substantial and direct effect upon interstate commerce because-
>
> (A) after manufacture, many controlled substances are transported in interstate commerce,
>
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
>
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

Id. at § 801 (3).

The U.S Supreme court supported the purpose of Congress in the seminal case of in *Gonzales v. Raich*, 545 U.S. 1, (2005) *(Raich*), where the *Raich* court had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Raich*, 545 U.S. at 22. (emphasis added).

The *Raich* court noted that, "[o]ne need not have a degree in economics to understand why. . . an exemption [from the CSA] for the vast quantity of marijuana (or other drugs) locally cultivated for personal use . . . [would] have a substantial impact on the interstate market for [marijuana]." *Id*. at 28. Thus, the policy judgment Congress made in the CSA "that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity." *Id*. Nor, said the Court, can "limiting the activity to marijuana possession and cultivation 'in accordance with state law'. . . serve to place [California's law] beyond congressional reach." *Id*. at 29.

The *Raich* court thus soundly rejected the notion that the marijuana production and use at issue "were not 'an essential part of a larger regulatory scheme' because they had been 'isolated by the State of Califonia, and [are] policed by the State of California,' and thus remain 'entirely separated from the market.'" *Id*. at 30. "The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition," concluded the Court, and one that Congress rationally rejected when it enacted the CSA. *Id*. In the end, concluded the Court, if California wished to legalize the growing, possession, and use of marijuana, it would have to seek permission to do so "in the (2021 of Congress." *Id*. at 33.

In sum, the language of the CSA preemption statute and the statutory framework surrounding it makes clear Congress' intent. Because the intrastate

distribution, cultivation, and possession of controlled substances substantially and directly affects interstate commerce, Congress intended the CSA to supersede any state law that legalizes a controlled substance, including marijuana. Congress has not amended the CSA to remove marijuana from Schedule I, nor have considerable efforts to administratively reschedule marijuana been successful.

b. The Ninth Circuit recognizes that Congress's findings are rational

Even further, the Ninth Circuit has made its own finding, not simply deferring to the mere existence of Congressional findings in sustaining the CSA against Commerce Clause challenges. The Ninth Circuit has independently adjudged that Congress's findings that the intrastate distribution, cultivation, and possession of controlled substances substantially affect interstate commerce are rational. See *United States v. Visman*, 919 F.2d 1390, 1393 (9th Cir. 1990) (stating that, in *Rodriquez-Camacho*, 468 F.2d 1220 (9th Cir. 1972) "[w]e concluded that Congress had a rational basis for making its findings"); *United States v. Thornton*, 901 F.2d 738 , 741 (9 th Cir. 1990) ("Congress has stated and we have confirmed that drug trafficking is a national concern which affects interstate commerce."; *Rodriquez-Camacho*, 46 8 F.2 d at 1222 (recognizing that court was not required to defer to Congress's findings if "'the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent,'" but holding that "[s]uch is not the case as regards controlled substances. It is sufficient that Congress had a rational basis for making its findings." (emphasis added, quoting *Stafford v. Wallace*, 258 U.S. 49 5, 521 (1922)).

c. The CSA does not run afoul of the Tenth Amendment

Furthermore, the CSA does not run afoul of the Tenth Amendment, as many Prop 64 proponents surmise. The Tenth Amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." USCS Const. Amend. 10.

However, "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States [and] Congress may legislate in areas traditionally regulated by the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). 21 U.S.C. § 841(a)(1)) prohibits the distribution and cultivation of marijuana for any purpose (unless otherwise authorized by the CSA). And because the CSA is a lawful exercise of Congressional authority under the Commerce Clause, section 841(a)(1) does not "intrude. . . into an area traditionally regulated by the states." *United States v. Kim*, 94 F.3d 1247, 1250 n. 4 (9th Cir. 1996); *accord United States v. Rosenberg*, 515 F.2d 1 90, 19 8 n.14 (9 th Cir.) ("If the Constitution allows the federal government to regulate the dispensation of drugs, it allows it to do so in every case, and not just where more than a certain quantity of drugs is involved. The question of whether federal criminal laws have been violated is a federal issue to be determined in federal courts."

Therefore, Prop 64 has no effect on the enforceability of federal law, or the criminal nature of marijuana possession, cultivation, or use. By virtue of the

Supremacy clause and 21 U.S.C. § 903, the CSA preempts state or local laws that affirmatively authorize the distribution, cultivation, or possession of marijuana under Prop 64. As the Supreme Court itself has recognized, "[f]or marijuana (and other drugs that have been classified as 'schedule I' controlled substances), there is but one express exception [to the statutory prohibition against distribution and cultivation], and it is available only for Government-approved research projects." *Oakland Cannabis Buyers' Cooperative*, 532 U.S. at 489-90. (emphasis added). Under the Supremacy clause, the CSA reigns supreme over California state cannabis laws and individuals operating under Prop 64 in California are currently in violation of federal law.

B. It Is a Continuous Violation of Due Process To Allow a Law to be Simultaneously Lawful Under State Law But Unlawful Under Federal Law

The essence of due process infiltrates the entire supremacy analysis because it violates the essence of due process to allow a law to be simultaneously lawful and unlawful. An essential element of due process is notice of the proscribed conduct. Since the court assumes that one "is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972).

Not surprisingly, federal policy regarding enforcement of the CSA has shown ambivalence even "where a person or entity's possession and distribution of marijuana was consistent with well-regulated state law." *Green Earth Wellness*

Center, LLC v. Atain Specialty Insurance Co., 163 F.Supp.3d 821, 832 - 33 (citing "the nominal federal prohibition against possession of marijuana [which] conceals a far more nuanced (and perhaps even erratic) expression of federal Policy."). The manner in which this unresolved positive conflict between state and federal law causes due process harm to the People of California is endless.

No more obvious is the harm caused to the people than in the context of Federal raids that continue to disrupt California's implementation of the both the CUA and Prop 64. The seminal case addressing such policies is *Raich*, 545 U.S. 1, (2005). In *Raich*, Drug Enforcement Administration ("DEA") agents raided the homes of two seriously ill Californians who were in compliance with the CUA. Plaintiffs brought suits seeking injunctive and declaratory relief prohibiting the enforcement of the federal CSA to the extent that it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. *Id*. at 7. The case made its way to the Supreme Court, where the Supreme Court, as detailed above, found that Congress's Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana *even if in compliance with California law*.

In *Shulman v. Kaplan*, No. 2:19-CV-05413-AB (FFMx), 2020 U.S. Dist. LEXIS 244161 (C.D. Cal. Oct. 29, 2020) (*Shulman*), plaintiffs sought damages under RICO related their cannabis business. In granting the defendants' motion to dismiss, the district court held that the plaintiffs could not allege violations of RICO because any remedy would violate federal law. "Plaintiffs damages under

RICO are inextricably intertwined with their cannabis cultivation—any relief would remedy Plaintiffs' lost profits from the sale, production, and distribution of cannabis. . .[and] [a]ny potential remedy. . . would contravene federal law under the CSA." *Id.* at 4-5.

> A court order requiring monetary payment to Plaintiffs for the loss of profits or injury to a business that produces and markets cannabis would, in essence (1) provide a remedy for actions that are unequivocally illegal under federal law; and (2) necessitate that a federal court contravene a federal statute (the CSA) in order to provide relief under a federal statute (RICO). The Court finds this approach to be contrary to public policy. *Id.* at 5-6.

The *Shulman* court also held, for similar reasons, that the Lanham Act does not protect illegal activities such as Cannabis Cultivation.

> Cannabis is illegal under federal law. *In re Morgan Brown*, 119 U.S.P.Q. 2d 1350, at *3 ("marijuana . . . remain[s a] Schedule I controlled substance[ ] under federal law . . . . "). Thus, when a mark is used for cannabis products, the Lanham Act does not recognize the user's trademark priority or any derivative claims, regardless of any state laws that may contradict the federal statute. *See id.*, 119 U.S.P.Q. 2d 1350, at *5; *In re JJ206*, 120 U.S.P.Q. 2d 1568, at *2-*3; *CreAgri v. USANA Health Services Inc.*, 474 F.3d 626, 630 (9th Cir. 2007).
>
> As the Ninth Circuit has stated, extending trademark protection for use on unlawful products would "put the government in the anomalous position of extending the benefits of trademark protection to a seller based upon actions the seller too in violation of that government's own laws." *CreAgri*, 474 F.3d at 630. As such, because any alleged use of the Iron Triangle trademark was on

> cannabis products which are illegal under federal law, Plaintiffs cannot state a claim for violation of the Lanham Act. *Id.* at 7

The *Shulman* court ultimately granted the defendants' motion to dismiss with prejudice, leaving plaintiffs no remedy to pursue these actions.

In *Ross v. RagingWire Telecomms*., Inc., 42 Cal. 4th 920, the California Supreme Court affirmed an employer's ability to terminate an employee for marijuana use, despite the fact that the employee's use was legal under California law. The affected employee filed suit under the California Fair Employment and Housing Act ("FEHA"), claiming that because he possessed a physician's recommendation to use medical marijuana to treat back spasms, his termination violated state law prohibitions against disability discrimination. The California Supreme Court upheld the validity of Ross's termination holding that "[n]o state law could completely legalize marijuana . . . *because the drug remains illegal under federal law*." 21 U.S.C. §§ 812, 844(a)) (see *Raich*, *supra*, 545 U.S. 1, 26–29; *United States v. Oakland Cannabis Buyers'*. (emphasis added). *Cooperative*, *supra*, 532 U.S. 483, 491–495)" Thus, under *Ross*, an employee in compliance with Prop 64 can be terminated by their employer based solely on their violation of federal law.

In *Tracy v. USAA Casualty Insurance Co*., the plaintiff sought coverage on her USAA homeowner's insurance policy when her medical marijuana plants were stolen. *Tracy v. USAA Cas. Ins. Co.*, No. 11-00487 LEK-KSC, 2012 U.S. Dist.

LEXIS 35913 (D. Haw. Mar. 16, 2012) The *Tracy* court determined, "[t]o require Defendant to pay insurance proceeds for the replacement of medical marijuana plants *would be contrary to federal law and public policy*, *as reflected in the CSA*, *Gonzalez*, and its progeny. . . " *Id.* at *39. (emphasis added).

In all of these cases, individuals conducting legal activity, under state law, were injured, in violation of their due process rights to notice, even though their actions were fully compliant with state laws.

On June 28, 2021, the Supreme Court denied review of the case *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236 (2021) (*Standing Akimbo*), however, Justice Clarence Thomas issued a noteworthy statement in connection to the court's refusal to hear the appeal. In the statement, Justice Thomas identified the conflict that exists between state and federal law, and the harm that this conflict is causing the American People. *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236 (2021).

In *Standing Akimbo,* a Colorado-based medical marijuana company sued the Internal Revenue Service after it attempted to collect business information that could show the company was in violation of Tax Code § 280E [1] in that the dispensary was not given federal tax breaks that other businesses were provided. Section 280E states the following:

> No deduction 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

[1] Expenditures in connection with the illegal sale of drugs

> 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.

26 U.S.C.S. § 280E

Thus, under 280E, businesses that "consist of trafficking in a controlled substance" cannot deduct business expenses from their taxes, including state legal marijuana firms.

The result is that despite operating legally under state law, businesses engaged in marijuana distribution are unable to deduct their expenses related to the business on their federal tax returns because the business "consists of trafficking in a controlled substance" "The effect on these businesses, which are already incredibly regulated, is a 60 to 70 effective tax rate." Roger Russel, *Supreme Court Denies marijuana dispensaries' challenge to the IRS* (June 30, 2021), .https://www.accountingtoday.com/news/supreme-court-denies-hearing-on-cannabis-issue quoting James Mann, former deputy assistant attorney general of the Tax Division of the Department of Justice in charge of federal appellate tax litigation.

Justice Thomas' statement did not disagree with the court's denial of hearing the case, but instead outlined the conflicts between federal and state laws in the control of cannabis distribution, cultivation, and possession.

Thomas heavily criticized "the Federal government's current approach" to marijuana regulation characterizing it as "a half-in, half-out regime that

simultaneously tolerates and forbids local use of marijuana." *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237 (2021). He pointed to the blanket and intrastate ban on cannabis affirmed by the court in 2005 with *Raich.* But, Thomas wrote, since that decision a series of federal policies regarding state-legal marijuana have gone against *Raich* and created an uncertain legal area for cannabis.

Thomas used the Colorado dispensary's conflict in tax court to evidence a "concealed trap for the unwary" created by current marijuana laws. *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237 (2021). The importance of these "concealed traps" has grown, Thomas pointed out. They apply to the 36 states that legalized medical cannabis and the 18 states that legalized adult-use marijuana. "This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary." *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237 (2021)

Prop 64 is in positive conflict with federal law and suffers from the same legal infirmities that Justice Thomas expressed in his recent statement. Under our system of government, conduct cannot be simultaneously lawful and unlawful and not be a violation of due process. There is one law that controls any given activity, and all other laws must flow without conflict with that controlling law. The supremacy/preemption analysis determines that controlling law. For the reasons stated above, federal law preempts Prop 64. Thus, this Court should find the obvious: Federal law and Prop 64 are in positive conflict.

C. There Is a Solution: Nickolas Wildstar's Restoration Act

On July 19, 2021, Nickolas Wildstar, as Governor Elect for the September 14, 2021, Special Election Recall of current Governor Gavin Newsom, wrote a letter to California Attorney General Robert Bonta (Exhibit ("Ex") A) wherein Mr. Wildstar provided statements to AG Bonta as to why Prop 64 was an illegal initiative, and why the act must be repealed. The letter was a "submission of [Wildstar's] intention to repeal Prop 64." Ex A.

In the letter, Mr.Wildstar declared that it is his campaign's "promise to repeal Prop 64" because Prop 64 was an illegal initiative that "mandates licensees, to enlist in a licensing scheme that requires that they break federal law by trafficking in a controlled substance, cannabis, in a for-profit, recreational licensing scheme." Ex A. Mr. Wildstar's underlying motivation, "despite the fact cannabis is illegal to begin with" is that the combination of Prop 64 and MMRSA have caused the elimination of medical cannabis, due to market forces. *Id.* Mr. Wildstar is a medical cannabis patient that has seen his rights "as well as the rights of numerous other medical cannabis patients in California," be "violated by the passage of Prop 64." Ex B. His view on Prop 64 is that its legalization of "recreational, for-profit, taxable cannabis [w]as a way to monopolize the industry and create undue hardships for the less profitable, medical cannabis community." Ex A.

Mr. Wildstar proposes what he has titled "The Restoration Act" if he is successful in his repeal of Prop 64. Ex B. The Restoration Act is a "bridge

legislation to allow current licensees and those in pending license status to continue to operate until they transition from a federally illegally for-profit status to federally legal not-for-profit status." Ex B.

The current state agency that provides oversight of Prop 64 cannabis licensees is the Department of Cannabis Control (DCC) or its predecessor agency, the Bureau of Cannabis Control (BCC), and this will be disbanded in Mr. Wildstar's Act. Ex B. "All regulated cannabis activities within the state will require a permit from the newly formed Department of Cannabis Administration (DCA)." Ex B. The Restoration Act provides a detailed framework of how the DCA will operate in conjunction with current licensees. It sets forth the rules and requirements for current licensees under the new purview of the DCA. Mr. Wildstar acknowledges that "[t]he repeal of Prop 64 will result in a certain amount of confusion and disruption within the licensed cannabis industry." *Id*. Thus, "[t]he purpose and intent of the Restoration Act is to provide a regulatory framework that minimizes that confusion and disruption." *Id*.

Conclusion

This Court should find that Proposition 64 is a void contract as it mandates that those who wish to be in compliance with state cannabis law must knowingly violate higher federal law which puts those who seek licenses under California Proposition 64 in positive conflict with federal law.