

No. _____

**In The
Supreme Court of the United States**

—————◆—————
MICHAEL S. WINTERS,

Petitioner,

v.

CYNTHIA TOWNSLEY WILLIS,

Respondent.

—————◆—————
**On Petition For Writ Of Certiorari To The
Supreme Court Of The State Of Oregon**

—————◆—————
PETITION FOR WRIT OF CERTIORARI

—————◆—————
J. RYAN KIRCHOFF
Counsel of Record
Jackson County Counsel
10 S. Oakdale
Medford, OR 97501
(541) 774-6162
kirchojr@jacksoncounty.org
Attorney for Petitioner

G. FRANK HAMMOND
LAW OFFICES OF FRANK HAMMOND, LLC
107 East Main, Ste. 22
Medford, OR 97501
(541) 414-3474
frank@frankhammondllaw.com
Attorney for Petitioner

July 26, 2011

QUESTIONS PRESENTED

Pursuant to state law, a person submits to a sheriff an application for a license to *possess* a firearm in a concealed manner. Or. Rev. Stat. § 166.291. Although the application materials satisfy all criteria for issuance of the license under state law, the applicant is comprehensively prohibited under Gun Control Act of 1968 from *possessing* or acquiring a firearm by any means. 18 U.S.C. § 922(g)(3).

The questions presented are:

1. Is the state law preempted to the extent it requires issuance of a license to a person who is otherwise comprehensively prohibited under federal law from possessing or acquiring a firearm by any means?

2. For purposes of implied-conflict preemption, does the *non-obstante* provision in the Supremacy Clause preclude speculation about ways in which hypothetical actions of government agencies could theoretically reconcile the conflicting state and federal laws?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all the parties to the proceedings in the Oregon Supreme Court, whose judgment is sought to be reviewed:

A. Petitioners on Review-Appellants-Respondents

Michael Winters, in his official capacity
as Jackson County Sheriff

Robert M. Gordon, in his official capacity
as Washington County Sheriff*

B. Respondents on Review-Respondents-Petitioners

Cynthia Townsley Willis

Paul Sansone

Steven Schwerdt

Lee Wallick

* *Robert M. Gordon, in his official capacity as Washington County Sheriff, was also a Petitioner on Review in the Oregon Supreme Court proceedings, pursuant to an order consolidating his contemporaneous Petition for review. Sheriff Gordon is likewise contemporaneously filing separate Petition for Certiorari.*

TABLE OF CONTENTS

| | Page |
|--|------|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF CONTENTS..... | iii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED | 1 |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE..... | 5 |
| A. THE CONFLICTING FEDERAL AND STATE LAWS | 5 |
| 1. The Gun Control Act of 1968 | 5 |
| 2. Oregon’s Concealed Handgun Licens- ing Statute | 6 |
| B. PROCEEDINGS BELOW..... | 8 |
| REASONS FOR GRANTING THE PETITION..... | 11 |
| A. THE OREGON SUPREME COURT DE- CIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT CONTRADICTS PERTINENT DECISIONS OF THIS COURT AND RENDERS IMPLIED-CONFLICT PRE- EMPTION ALL BUT MEANINGLESS | 11 |

TABLE OF CONTENTS – Continued

| | Page |
|--|------|
| B. THE COURT SHOULD GRANT REVIEW BECAUSE THE OREGON SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT | 14 |
| CONCLUSION | 17 |

TABLE OF APPENDICES

| | |
|---|---------|
| Opinion of the Oregon Supreme Court, filed May 19, 2011 | App. 1 |
| Opinion of the Oregon Court of Appeals, filed June 16, 2010 | App. 30 |
| Opinion and Order of the Jackson County Circuit Court, filed May 22, 2008..... | App. 53 |
| 18 U.S.C. § 922(g) | App. 60 |
| 18 U.S.C. § 927 | App. 63 |
| Or. Rev. Stat. § 166.291 | App. 64 |
| Or. Rev. Stat. § 166.292 | App. 75 |
| Or. Rev. Stat. § 166.295 | App. 77 |
| U.S. Const., Art. VI, cl. 2 | App. 79 |

TABLE OF AUTHORITIES

Page

CASES

| | |
|--|-------|
| <i>Barrett v. U.S.</i> , 423 U.S. 212 (1976)..... | 2 |
| <i>Caron v. U.S.</i> , 524 U.S. 308 (1998) | 6 |
| <i>Conkle v. Wolfe</i> , 722 N.E.2d 586 (Ohio 1998) | 5 |
| <i>Crosby v. Nat’l Foreign Trade Council</i> , 530 U.S. 363 (2000)..... | 11 |
| <i>Fla. Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)..... | 10 |
| <i>Gade v. Nat’l Solid Wastes Mgmt. Ass’n</i> , 505 U.S. 88 (1992)..... | 12 |
| <i>Geier v. Am. Honda Motor Co.</i> , 529 U.S. 861 (2000)..... | 11 |
| <i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941) | 12 |
| <i>Huddleston v. U.S.</i> , 415 U.S. 814 (1974) | 2 |
| <i>Int’l Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987) | 12 |
| <i>New York v. U.S.</i> , 505 U.S. 144 (1992)..... | 9, 15 |
| <i>Oefinger v. Zimmerman</i> , 601 F. Supp. 405 (W.D. Pa. 1984)..... | 5 |
| <i>Perez v. Campbell</i> , 402 U.S. 637 (1971) | 12 |
| <i>PLIVA, Inc. v. Mensing</i> , 131 S. Ct. 2567 (2011)..... | 16 |
| <i>Printz v. U.S.</i> , 521 U.S. 898 (1997) | 9, 15 |
| <i>U.S. v. Mobley</i> , 956 F.2d 450 (3rd Cir. 1992) | 2 |
| <i>U.S. v. Moore</i> , 109 F.3d 1456 (9th Cir. 1997)..... | 2 |

TABLE OF AUTHORITIES – Continued

| | Page |
|--|----------------|
| <i>Willis v. Winters</i> , 253 P.3d 1058 (2011) | 1 |
| <i>Wyeth v. Levine</i> , 555 U.S. 555 (2009) | 11 |
| CONSTITUTIONAL PROVISIONS | |
| U.S. Const., Art. VI, cl. 2 | 14, 16 |
| STATUTES | |
| 18 U.S.C. § 922(g) | 2, 3, 5, 9, 14 |
| 18 U.S.C. § 922(g)(3) | 3, 5, 8, 13 |
| 18 U.S.C. § 927 | 6, 11 |
| 21 U.S.C. § 802 | 3, 5 |
| Or. Rev. Stat. § 166.291 | 2, 6, 8, 10 |
| Or. Rev. Stat. § 166.291(1)(a)-(o) | 7 |
| Or. Rev. Stat. § 166.292 | 13 |
| Or. Rev. Stat. § 166.292(1) | 13 |
| Or. Rev. Stat. § 166.293(5) | 8 |
| Or. Rev. Stat. § 166.295 | 8 |
| Or. Rev. Stat. § 166.295(1)(a) | 8 |
| SECONDARY SOURCES | |
| <i>Preemption</i> , 86 Va. L. Rev. 225, 234 (2000) | 16 |

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Black’s Law Dictionary 931 (7th ed. 1999).....13

Webster’s Third New Int’l Dictionary 724 (un-
abridged ed. 2002).....13

OPINIONS BELOW

The decision of the Oregon Supreme Court is reported at *Willis v. Winters*, 253 P.3d 1058, 350 Or. 299 (2011), and is reprinted in the Appendix (“App.”) at App. 1-29. The decision of the Oregon Court of Appeals is reported at *Willis v. Winters*, 234 P.3d 141 (2010), and is reprinted at App. 30-52. The order and memorandum opinion of the Jackson County Circuit Court is reprinted at App. 53-59.



JURISDICTION

The Oregon Supreme Court rendered its decision on May 19, 2011, *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All pertinent constitutional and statutory provisions are set forth in the Appendix, App. 60-79.



INTRODUCTION

The Gun Control Act of 1968 comprehensively regulates the interstate and intrastate sale, delivery, transportation, and possession of firearms and ammunition. It was enacted in response to a national concern with the use of firearms in crimes and with

their general availability to those whose possession thereof was contrary to the public interest. Those concerns manifested the need to strengthen federal regulation of firearms.

One of the principal purposes of the Gun Control Act is to keep firearms out of the hands of people whom Congress deemed potentially irresponsible and dangerous.¹ The essential aim was to deny access to guns and ammunition to those people or, failing that, to punish possession as a federal offense. Accordingly, the Act comprehensively prohibits certain classes of persons from possessing or acquiring firearms and ammunition by any means. 18 U.S.C. § 922(g). App. 60-62.

Oregon law allows a person to possess a firearm in a concealed manner when the person holds a license to do so issued by a sheriff pursuant to Or. Rev. Stat. § 166.291, App. 64-74. Cynthia Willis (“Willis”) applied for such a license in this case. Although her application materials satisfied the criteria under state law, she is expressly prohibited under federal

¹ The Gun Control Act has been authoritatively construed, and courts have consistently adhered to that construction. See *Huddleston v. U.S.*, 415 U.S. 814, 824-825 (1974)(extensively reviewing the legislative history and finding the principal purpose was to keep firearms out of the hands of those not legally entitled to possess them because of their particular status); *Barrett v. U.S.*, 423 U.S. 212, 218 (1976)(same); *U.S. v. Moore*, 109 F.3d 1456 (9th Cir. 1997); *U.S. v. Mobley*, 956 F.2d 450 (3rd Cir. 1992)(same).

law from possessing or acquiring a firearm by any means. 18 U.S.C. § 922(g)(3), App. 60.² The Sheriff denied the application for that reason.

The Oregon Supreme Court required the Sheriff to issue the license notwithstanding. While recognizing that federal law expressly prohibits Willis from possessing or acquiring a firearm by any means, the court skirted the preemptive result by merely concluding the state and federal laws serve different purposes. Indeed, the issuance of the license in this case permits the licensee to *possess* a firearm in a *concealed manner* when Congress has otherwise expressly prohibited the licensee from *possessing* or acquiring a firearm in *any manner*. The effect of issuing the license – as well as the court’s decision – is antagonistic to both the text of 18 U.S.C. § 922(g) and the overall congressional objective.

The court did not address the Sheriff’s arguments regarding the effect of issuing the license in this case and proceeded instead to further disclaim any “obstacle” simply because the state law does not prevent federal law enforcement from taking whatever hypothetical steps may be theoretically possible to reconcile the conflict with state law. The court essentially imposed what could be construed as an

² The applicant admittedly uses marijuana for medicinal purposes on a regular basis. Marijuana, whether it is used for medicinal or recreational purposes, is a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802).

ultimatum on the *executive branch* of the federal government to enforce a *congressional* objective. Adherence to the Supremacy Clause should not be made to be contingent in such a way. The decision contradicts pertinent decisions of this Court and renders implied-conflict preemption all but meaningless.

As this case demonstrates, the mounting constitutional and political tension between the states and the federal government over medical marijuana has expanded into the intersection of federal and state firearms regulation. The Sheriff respectfully implores the Court to grant review in this case (1) to remove the obstacle created by the decision below to the objective of keeping firearms out of the hands of people whom Congress deemed potentially irresponsible and dangerous, (2) to address whether a state law is beyond the reach of the Supremacy Clause simply because it serves a purpose different from a seemingly conflicting federal law, and (3) to address whether the *non-obstante* provision in the Supremacy Clause precludes speculation about ways in which hypothetical actions of third-parties could potentially reconcile the conflicting state and federal laws.



STATEMENT OF THE CASE

A. THE CONFLICTING FEDERAL AND STATE LAWS

1. The Gun Control Act of 1968

As previously noted, one of the principal objectives of the Gun Control Act is to keep firearms out of the hands of people whom Congress considered to be potentially dangerous and irresponsible. Thus, certain classes of persons are prohibited from possessing firearms, including unlawful users of controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)). 18 U.S.C. § 922(g)(3), App. 60-62.³ Such a person is comprehensively prohibited from possessing or acquiring a firearm by any means.

Notably, the Gun Control Act is designed to *enhance*, and not to supersede the efforts of the states to adopt and enforce more stringent state laws pertaining to possessing and dealing in firearms. *See Conkle v. Wolfe*, 722 N.E.2d 586 (Ohio 1998). That is why the Act does not explicitly preempt all state law on the subject. *See Oefinger v. Zimmerman*, 601 F. Supp. 405, 412 (W.D. Pa. 1984)(analyzing the Act's preemptive effect on state law), *affirmed*, 779 F.2d

³ Section 922(g) applies only to possession of firearms or ammunition "in or affecting commerce." That jurisdictional condition is not disputed in this proceeding and further discussion herein is omitted for that reason. Analysis regarding Willis's status as an "unlawful user of any controlled substance," as defined under 21 U.S.C. § 802, is also omitted for the same reason.

43.⁴ But that, of course, does not mean Congress intended to permit states to enact laws that impede its objective. As the Court previously explained, Congress enacted the Gun Control Act with the intention of keeping firearms out of the hands of people it considered to be potentially irresponsible or dangerous, “even if those persons were not deemed potentially dangerous by the States.” *Caron v. U.S.*, 524 U.S. 308, 315 (1998)(citation omitted).

2. Oregon’s Concealed Handgun Licensing Statute

Oregon law allows a person to obtain a license to possess a firearm in a concealed manner. The license is issued upon written application to the sheriff and payment of a specified fee. Or. Rev. Stat. § 166.291, App. 64-74.⁵ In order to qualify for a license, the applicant must state that he or she:

- Is not an illegal alien or legal resident alien;
- Is not under 21 years of age;

⁴ 18 U.S.C. § 927 states: “No provision of this chapter shall be construed as indicating an intent on the part of 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.” App. 63.

⁵ The statute also requires the applicant to satisfy other procedures. Those procedures are not pertinent to the preemption questions raised in this case.

- Is not subject to a warrant or on any form of pretrial release;
- Has never been convicted of a felony or misdemeanor or found guilty except for insanity, of a felony, or misdemeanor within the 4 years prior to the application;
- Has not been committed to the Oregon Health Authority, has not been found to be mentally ill, and is not subject to an order under Or. Rev. Stat. § 426.130;
- Has not been discharged from the jurisdiction of a juvenile court;
- Has not been convicted of an offense involving controlled substances or participated in a court-supervised drug diversion program;
- Is not subject to a stalking protective order or related sanction under state law;
- Has not received a dishonorable discharge from the military; and
- Is not required to register as a sex offender in any state.

See Or. Rev. Stat. § 166.291(1)(a)-(o), App. 64-67.

If the applicant meets the criteria enumerated above – and pays the appropriate fee – the Sheriff is *required* to issue the license. Or. Rev. Stat.

§ 166.291(1)(the Sheriff “shall issue the person a concealed handgun license * * * .”), App. 64.⁶

B. PROCEEDINGS BELOW

Willis submitted to the Sheriff an application to renew her concealed handgun license pursuant to Or. Rev. Stat. § 166.291. She is a regular user of medical marijuana. App. 54-55. Such a person is an unlawful user of a “controlled substance” as defined in section 102 of the Controlled Substances Act, and is for that reason within the class of persons enumerated in 18 U.S.C. § 922(g)(3) who are prohibited from possessing or acquiring a firearm by any means. The sheriff denied the application for that reason, even though the applicant had satisfied all the criteria and procedures required by state law. App. 54.

Willis challenged the decision in the Jackson County Circuit Court.⁷ The matter proceeded through a full evidentiary trial. App. 53-55. The Sheriff argued state law is preempted to the extent it requires him to issue the license to a person who is prohibited

⁶ The license, unless revoked under Or. Rev. Stat. § 166.295, is valid for a period of four years from the date on which it is issued. The criteria for renewal are, with the exception of fingerprints and reference requirements, the same as those for issuance of the license in the first instance under Or. Rev. Stat. § 166.191. Or. Rev. Stat. § 166.295(1)(a).

⁷ Pursuant to Or. Rev. Stat. § 166.293(5), judicial review of a decision denying an application for a license is filed in the Circuit Court of the county in which the applicant resides.

by 18 U.S.C. § 922(g) from possessing a firearm. *Id.*⁸ Although Willis did not dispute that she was indeed expressly prohibited by federal law from possessing a firearm, the court found no implied-conflict preemption and ordered the Sheriff to issue the license. App. 56-57. The court reasoned, the purpose of the state statute is merely to “provide a defense to criminal prosecution under state law for [possessing] a concealed [firearm].” *Id.*

The Sheriff appealed. The Oregon Court of Appeals affirmed. The court rejected the Sheriff’s implied-preemption argument simply because, the state and federal statutes serve different purposes. With reference to the anti-commandeering principals articulated in *Printz v. U.S.*, 521 U.S. 898 (1997) and *New York v. U.S.*, 505 U.S. 144 (1992), the court reasoned, “the concealed [firearm] statutes do not *affirmatively authorize* controlled substance users to possess handguns; rather, they exempt a licensee from state criminal liability for possession of a concealed [firearm].” App. 48-49.

⁸ The Sheriff also argued that issuance of the license would violate federal law by likely deceiving gun dealers regarding the lawfulness of selling a firearm to a person who is prohibited from possessing a firearm. The Sheriff did not present that question to the Oregon Supreme Court and likewise does not present that question to this Court.

On review, the Oregon Supreme Court rejected the Sheriff's arguments about the irrelevant characterization of Or. Rev. Stat. § 166.291 and ignored argument concerning the effect of the license. App. 20-21. As the Sheriff argued, no matter what is the purpose of the state law, the issuance of the license in this case allows the person to *possess* a firearm in a *concealed manner*.

The court acknowledged that Congress has expressly prohibited the applicant from *possessing* a firearm, but avoided the preemptive effect by concluding the state statute and federal statutes serve different purposes. App. 19-21. The court reasoned:

“[T]he fact remains that the statute is not directly concerned with the *possession* of firearms, but with the *concealment* of firearms in specified locations – on one's person or in one's car. Although, in their briefing, the sheriffs treat the distinction as having no practical significance, there is nothing in the federal preemption analysis that would support that kind of broad brush approach.”

App. 20-21. (emphasis in original) (citation omitted).

In support of that conclusion, the court cited a single decision of this Court, *Fla. Lime Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). App. 21.

Upon reaching that conclusion, the court proceeded in dicta to point out that state law in this

case does not pose an “obstacle” to federal law because the state law does not prevent federal law enforcement from taking whatever hypothetical steps may be theoretically possible to reconcile the conflict. App. 22-24.



REASONS FOR GRANTING THE PETITION

A. THE OREGON SUPREME COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT CONTRADICTS PERTINENT DECISIONS OF THIS COURT AND RENDERS IMPLIED-CONFLICT PREEMPTION ALL BUT MEANINGLESS

An implied-conflict preemption analysis is applied when the federal law contains a preemption provision such as 18 U.S.C. § 927. Such a provision, even if construed as a “savings provision,” does not foreclose ordinary working of implied-conflict preemption principles. *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1196-1204 (2009); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

Federal law impliedly preempts state law when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000). While there is no distinct formula for this type of preemption,

Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941), the Court has instructed on more than one occasion that it does not necessarily matter whether the state and federal laws serve different or similar purposes. *Perez v. Campbell*, 402 U.S. 637, 651-652 (1971).⁹ As the Court in *Hines* explained, “The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject.” *Hines*, 312 U.S. at 70.

In this case, however, the Oregon Supreme Court considered the purpose of the state law and looked no further. In particular, the court merely concluded, “. . . [T]he [state] statute is not directly concerned with the *possession* of firearms, but with [their] *concealment*.” App. 20-21. That approach contradicts what this Court has consistently instructed in nearly all of its implied-conflict preemption decisions. Whatever the purpose of the state law, the conflict with the congressional objective truly is striking.

As previously noted, one of the principal purposes of the Gun Control Act is to keep firearms out of the

⁹ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 105-106 (1992); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

hands of people whom Congress classified as potentially irresponsible and dangerous. Willis is without question one of those persons. 18 U.S.C. § 922(g)(3), App. 60. She is both expressly and comprehensively prohibited from possessing or acquiring a firearm *by any means*. 18 U.S.C. § 922(g), App. 60-63.

The issuance of the license in this case permits Willis to conceal a firearm on her person.¹⁰ And the reality is, to *conceal* a firearm on one's person is to likewise *possess* a firearm on one's person. It is possession no matter how one looks at it. Thus, the conduct in which she is permitted—and expected¹¹—to engage is expressly prohibited by 18 U.S.C. § 922(g)(3). App. 60.

Furthermore, issuing a license to Willis in this case is hardly consistent with the objective of preventing her access to guns. It is true that states are allowed to enact firearms laws that are more stringent or at least consistent with the Gun Control Act, but it is fair to say that issuing the license under state law in these circumstances is not what congress had in mind. The effect of the state law in this case is

¹⁰ See *Webster's Third New Int'l Dictionary* 724 (unabridged ed. 2002)(defining “license” as “permission to do or not to do something”). Black's Law Dictionary provides a similar definition: “A revocable permission to commit that act that would otherwise be unlawful.” *Black's Law Dictionary* 931 (7th ed. 1999).

¹¹ The resulting conduct is precisely what the state legislature anticipated. See Or. Rev. Stat. § 166.292(1)(“ * * * The license must be signed by the licensee and carried whenever the licensee [possesses] a concealed handgun.”).

antagonistic to both the text of 18 U.S.C. § 922(g) and the overall congressional objective.

B. THE COURT SHOULD GRANT REVIEW BECAUSE THE OREGON SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Supremacy Clause 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.”

U.S. Const., Art. VI, cl. 2.

After rejecting the preemptive result on grounds the state and federal laws serve different purposes, the court proceeded further in dicta to explain that state law does not pose an obstacle in this case because law “does not in any way preclude full

enforcement of the federal law by federal law enforcement officials.” App. 22-23. Along those lines, the court referred to the anti-commandeering principals articulated in *Printz v. U.S.*, 521 U.S. 898 (1997) and *New York v. U.S.*, 505 U.S. 144 (1992), and basically concluded that a state law is not preempted when federal law enforcement is theoretically able to take whatever actions may be needed to enforce the federal law and thereby resolve the conflict with state law.¹²

There are two fundamental problems in the court’s reasoning. First, the court’s reasoning basically creates an exception to the Supremacy Clause by imposing what could be construed as an ultimatum on the *executive branch* of the federal government to enforce a *congressional* objective, despite a conflicting state law. That renders implied-conflict preemption almost entirely non-existent; and the Supremacy Clause is simply not meant to work that way.

Second, the court’s reasoning is based on speculation – in particular, speculation about hypothetical actions that could be taken by law enforcement against persons who possess concealed firearms and use medical marijuana. As a plurality of the Court recently explained, if these conjectures suffice

¹² The Court also explained that congress may not compel Oregon to use its concealed handgun licensing statute to implement federal law. Neither sheriff made such an argument at any point in the proceedings. The issues presented in this case have nothing to do with anti-commandeering principles.

to prevent federal and state law from conflicting for Supremacy Clause purposes it is unclear when the Supremacy Clause would have any force outside of expressed preemption. See *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011)(plurality).

On its face, the Supremacy Clause makes federal law “the supreme Law of the Land” even absent an express statement by Congress. U.S. Const., Art. VI, cl. 2., App. 79. The *non-obstante* provision of the clause plainly contemplates implied-conflict preemption by describing federal law as effectively repealing contrary state law. *Preemption*, 86 Va. L. Rev. 225, 234 (2000). It suggests that courts should not strain to speculate about ways to reconcile federal law with seemingly conflicting state law.

But that sort of strained speculation to reconcile federal law with conflicting state law is precisely what occurred in this case. The court avoided the preemptive result based on a hypothetical scenario in which federal law enforcement officials take action to enforce the Gun Control Act against persons such as Willis. If that sort of speculation is allowed for purposes of implied-conflict preemption, it is difficult to image when the doctrine would have any meaning at all. Such a result demonstrates why the Court should adopt the reasoning articulated by the recent plurality. Review is warranted to clarify the effect of the Supremacy Clause’s *non-obstante* provision.



CONCLUSION

The Oregon Supreme Court's decision essentially renders conflict-preemption all but meaningless. The Court should grant this petition for writ of certiorari (1) to remove the obstacle created by the decision below to the objective of keeping firearms out of the hands of people whom Congress deemed potentially irresponsible and dangerous, (2) to address whether a state law is beyond the reach of the Supremacy Clause simply because it serves a purpose different from a seemingly conflicting federal law, and (3) to address whether the *non-obstante* provision in the Supremacy Clause precludes speculation about ways in which hypothetical actions of third-parties could potentially reconcile the conflicting state and federal laws.

Respectfully submitted,

J. RYAN KIRCHOFF

Counsel of Record

Jackson County Counsel

10 S. Oakdale

Medford, OR 97501

(541) 774-6162

kirchojr@jacksoncounty.org

Attorney for Petitioner

G. FRANK HAMMOND

LAW OFFICES OF

FRANK HAMMOND, LLC

107 East Main, Ste. 22

Medford, OR 97501

(541) 414-3474

frank@frankhammondllaw.com

Attorney for Petitioner