No. 22O144, Original

In the Supreme Court of the United States

STATES OF NEBRASKA AND OKLAHOMA,
Plaintiffs,

v.

STATE OF COLORADO,
Defendant.

On Motion for Leave to File Bill of Complaint in Original Action

COLORADO'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

CYNTHIA H. COFFMAN
Colorado Attorney General

FREDERICK R. YARGER
Solicitor General
Counsel of Record

DAVID BLAKE
Chief Deputy Attorney General

CLAUDIA BRETT GOLDIN
First Assistant Attorney General

SCOTT STEINBRECHER
GRANT T. SULLIVAN
Assistant Solicitors General

SUEANNA P. JOHNSON
Assistant Attorney General

Office of the Colorado
Attorney General
1300 Broadway
Denver, Colorado 80203
Fred.Yarger@state.co.us
720-508-6168

Counsel for Defendant State of Colorado

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT 2

ARGUMENT 14

I. This dispute does not require exercise of the Court's original jurisdiction. 14

A. Colorado has not invaded any sovereign right of the Plaintiff States. 16

B. The legal and factual issues presented by this case are better suited for resolution in the lower federal courts and through the normal appeals process. 21

II. The Plaintiff States lack standing. 24

A. Curtailing Colorado's power to regulate marijuana will not redress the Plaintiff States' injuries. 24

B. The Plaintiff States' injuries are caused by third parties who choose to violate federal and state law. 28

III. The Plaintiff States have no cause of action to preempt Colorado law. 30

IV. The United States is an indispensable party. 33

V. If it accepts the Complaint, the Court should provide for direct resolution of dispositive legal issues. 34

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Alabama v. North Carolina,
539 U.S. 925 (2003) 21

Allen v. Wright,
468 U.S. 737 (1984) 28

Am. Elec. Power Co. v. Connecticut,
131 S. Ct. 2527 (2011) 20

Arizona v. California,
298 U.S. 558 (1936) 34

Arizona v. New Mexico,
425 U.S. 794 (1976) 14, 15, 23, 24

Arkansas v. Oklahoma,
488 U.S. 1000 (1989) 21

California v. Arizona,
440 U.S. 59 (1979) 34

Connecticut v. New Hampshire,
502 U.S. 1069 (1992) 21

DaimlerChrysler Corp v. Cuno,
547 U.S. 332 (2006) 26

Douglas v. Indep. Living Ctr. of S. Cal., Inc.,
132 S. Ct. 1204 (2012) 31, 32

Durr v. Strickland,
602 F.3d 788 (6th Cir. 2010) 30

Georgia v. Tennessee Copper Co.,
206 U.S. 230 (1907) 20

Golden State Transit Corp. v. City of L.A.,
493 U.S. 103 (1989) 31

Gonzales v. Raich,
545 U.S. 1 (2005) . . . . . *passim*

Hart's Case,
16 Ct. Cl. 459 (1880), *aff'd*, 118 U.S. 62
(1886) 27

Kansas v. Colorado,
206 U.S. 46 (1907) 18

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 29

Louisiana v. Mississippi,
488 U.S. 990 (1988) 21

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 25, 28

Maryland v. Louisiana,
451 U.S. 725 (1981) . . . . . *passim*

Massachusetts v. Missouri,
308 U.S. 1 (1939) 24

Medellin v. Texas,
552 U.S. 491 (2008) 30

Milwaukee v. Illinois,
451 U.S. 304 (1981) 20

Mississippi v. Louisiana,
506 U.S. 73 (1992) 15

Montana v. Wyoming,
552 U.S. 1175 (2008) 35

Montana v. Wyoming,
555 U.S. 968 (2008) 35

Nat'l Org. for the Reform of Marijuana Laws v. United States Dep't of State,
452 F. Supp. 1226 (D.D.C. 1978) 7

New Hampshire v. Maine,
530 U.S. 1272 (2000) 34

New Hampshire v. Maine,
532 U.S. 742 (2001) 34

New Jersey v. New York,
511 U.S. 1080 (1994) 34

New Jersey v. New York,
513 U.S. 924 (1994) 34

New York v. New Jersey,
256 U.S. 296 (1921) 15

New York v. United States,
505 U.S. 144 (1992) 2, 4, 17, 27

Ohio v. Wyandotte Chems. Corp.,
401 U.S. 493 (1971) 15, 23, 24

Pennsylvania v. Alabama,
472 U.S. 1015 (1985) 21

Pennsylvania v. New Jersey,
426 U.S. 660 (1976) 14, 18

Pennsylvania v. Oklahoma,
465 U.S. 1097 (1984) 21

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 28

State v. Blanton,
588 P.2d 28 (Or. 1978) 6

Texas v. New Mexico,
134 S. Ct. 1783 (2014) 34

Texas v. New Mexico,
352 U.S. 991 (1957) 34

Texas v. United States,
Civil No. 14-254, 2015 U.S. Dist. LEXIS 18551
(S.D. Tex. Feb. 16, 2015) 17, 33

Town of Castle Rock v. Gonzales,
545 U.S. 748 (2005) 30

United States v. 1840 Embarcadero,
932 F. Supp. 2d 1064 (N.D. Cal. 2013) 30

United States v. Alaska,
501 U.S. 1275 (1991) 34

United States v. Alaska,
503 U.S. 569 (1992) 34

United States v. Oakland Cannabis Buyers' Coop.,
532 U.S. 483 (2001) 1, 16

Wyoming v. Oklahoma,
502 U.S. 437 (1992) 18, 19

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

COLO. CONST. art. XVIII, § 14 8

COLO. CONST. art. XVIII, § 16 . . . . . 8, 11

COLO. CONST. art. XVIII § 16(3) 25

COLO. CONST. art. XVIII § 16(4) 19, 25

COLO. CONST. art. XVIII § 16(5) 25

21 U.S.C. § 812(c)(10) 3

21 U.S.C. § 841 4

21 U.S.C. § 871 5

21 U.S.C. § 873(a) 4, 5

21 U.S.C. § 873(d) 4

21 U.S.C. § 878 5

21 U.S.C. § 881 4

21 U.S.C. § 903 5

ALASKA BALLOT MEASURE NO. 2, An Act to Tax and Regulate the Production, Sale, and Use of Marijuana (2014) 7, 8

Ann Arbor, Mich., CITY CHARTER § 16.2 (1974) 6

ARIZ. REV. STAT. § 36-2806 (2014) 7

CAL. HEALTH & SAF. CODE § 11362.775 (2014) 7

COLO. REV. STAT. §§ 12-43.3-101–1102 (2014) 10

COLO. REV. STAT. § 12-43.4-901 11

COLO. REV. STAT. § 12-43.4-901(2)(a) 19

COLO. REV. STAT. § 18-18-406 (2014) 11

COLO. REV. STAT. § 39-21-118(1)–(2) 11

CONN. GEN. STAT. § 21a-408h (2014) 7

CONN. GEN. STAT. § 21a-408i (2014) 7

Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, tit. V, § 538, 128 Stat. 2130 (2014) 14, 17, 32

Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, tit. VIII, § 809(b) 8

D.C. INITIATIVE 71 (2014) 8

H.B. 10-1284, 67th Gen. Assemb. (Colo. 2010) 7

NEB. REV. STAT. § 28-416(13)(a) (2014) 7

OR. BALLOT MEASURE NO. 91, Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act (2014) 8

ORE. REV. STAT. § 167.207 (1976) 6

WASH. REV. CODE §§ 69.50.325-369 (2014) 8

1 COLO. CODE REGS. § 212-2 R103 (2014) 11

1 COLO. CODE REGS. § 212-2 R305 (2014) 11

1 COLO. CODE REGS. § 212-2 R306 (2014) 11

1 COLO. CODE REGS. § 212-2 R309 (2014) 11

1 COLO. CODE REGS. § 212-2 R402.D (2014) 11

OTHER AUTHORITIES

Br. for Texas, et al. as Amici Curiae, *Armstrong v. Exceptional Child Ctr., Inc.*, No. 14-15 (Nov. 2014) 31, 32

Br. of Amici Curiae W. Va., et al., Supporting Plaintiffs-Appellants, *Kolbe v. O'Malley*, No. 14-1945 (4th Cir. Nov. 12, 2014), ECF No. 33-1 . . . . . 23, 24

Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015) 5

James M. Cole, Memorandum for U.S. Att'ys, Guidance Regarding Marijuana Enforcement (August 29, 2013), *available at* http://tinyurl.com/nrc9ur8 . . . . . *passim*

James M. Cole, Memorandum for U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), *available at* http://tinyurl.com/oqg2owq 10

Colo. Dep't of Pub. Health and Env't, Med. Marijuana Registry Program Update (Jan. 31, 2009, Dec. 31, 2009, and Dec. 31, 2010) a*vailable at* http://tinyurl.com/n5p2uwy, http://tinyurl.com/mhemq2f, http://tinyurl.com/o2srfg6 9

Compl., *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, No. 15-cv-349 (D. Colo. Feb. 19, 2015), ECF No. 1 22

Compl., *Smith v. Hickenlooper*, No. 15-cv-462 (D. Colo. Mar. 5, 2015), ECF No. 1 22

Conflicts Between State and Federal Marijuana Laws: Hearing Before S. Comm. On the Judiciary, 113th Cong. (Sept. 10, 2013) (live testimony of James M. Cole, Deputy Attorney General), *available at* http://tinyurl.com/nbm6qq4. 13

Conflicts Between State and Federal Marijuana Laws: Hearing Before S. Comm. On the Judiciary, 113th Cong. (Answers by James M. Cole to Questions for the Record) (Sept. 10, 2013), *available at* http://tinyurl.com/povoazz 13

Dep't of Justice, Denial of Application, Docket No. 05-16, 74 Fed. Reg. 2101, 2102 (Jan. 14, 2009) 3

Dep't of the Treasury, Fin. Crimes Enforcement Network, FIN-2014-G001, BSA Expectations Regarding Marijuana-Related Businesses (2014), *available at* http://tinyurl.com/lxn4p2b . . . 13, 14

El Paso Cnty., Colo., Federal Awards Reports in Accordance with the Single Audit Act and OMB Circular A-133 (July 29, 2014), *available at* http://tinyurl.com/pq6s9qu 4

Indictment, *People v. Nguyen*, Grand Jury Case No. 14CR01 (Denver Dist. Ct. Mar. 20, 2015) 29

Legis. Council of the Colo. Gen. Assemb., *2012 State Ballot Information Booklet,* Research Pub. No. 614 (Sept. 10, 2012), *available at* http://tinyurl.com/n8r5c29 16

Letter from Eric H. Holder, Jr., U.S. Attorney General, to Governors John Hickenlooper and Jay Inslee (Aug. 29, 2013), *available at* http://tinyurl.com/ny9xsfa 12

Mem. in Supp. of Mot. of U.S. to Intervene, *Texas v. New Mexico*, No. 141, Original (Feb. 2014) 33

Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009) 3, 5

Mot. By the States of New York, et al., to Intervene, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. Sept. 2, 2014), ECF No. 1510244 23

Nat'l Conf. of State Legs., State Med. Marijuana Laws (Mar. 16, 2015), *available at* http://tinyurl.com/nfoy2gr 7

David W. Ogden, Memorandum for Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), *available at* http://tinyurl.com/nry8vtv . . . . . *passim*

Press Release, U.S. Att'y for the Dist. of Colo., Denver Attorney And Others Named In Superseding Indictment (April 28, 2014), *available at* http://tinyurl.com/onperzj 29

Press Release, U.S. Att'y for the Dist. of Colo., Third Wave Of Warning Letters Results In Closure Of All 10 Targeted Marijuana Stores Within 1,000 Feet Of A School (Sept. 18, 2012), *available at* http://tinyurl.com/o59nsgd 10

RAND Corporation, What America's Users Spend on Illegal Drugs: 2000–2010 (Feb. 2014), *available at* http://tinyurl.com/ly32krz 6

STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE (10th ed. 2013) 20

ANN TONEY, COLO. MED. MARIJUANA LAW 89 (2012) 8, 9

U.S. Border Patrol, Sector Profile—Fiscal Year 2013, *available at* http://tinyurl.com/kvv4x6x 16

INTRODUCTION

Colorado's voters, as well as those in nearly half the States, have made a policy decision to legalize and regulate marijuana at the state level. Marijuana-related activities, of course, remain illegal under federal law. *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001). But this case does not concern questions the Court settled a decade ago in *Raich* and *Oakland Cannabis*. No one contends that Colorado law trumps the federal marijuana ban or immunizes anyone from federal prosecution. Instead, the question here is whether a State that chooses to legalize marijuana is then prohibited from regulating the market for it.

Nebraska and Oklahoma concede that Colorado has power to legalize the cultivation and use of marijuana—a substance that for decades has seen enormous demand and has, until recently, been supplied exclusively through a multi-billion-dollar black market. Yet the Plaintiff States seek to strike down the laws and regulations that are designed to channel demand away from this black market and into a licensed and closely monitored retail system. They suggest that the federal government will backfill the resulting regulatory vacuum, even though the Presidential Administration has indicated it lacks the resources and the inclination to fully enforce the federal marijuana ban; Congress has partially endorsed the Administration's non-enforcement policy; and the States have, for the last four decades, carried out the vast majority of marijuana enforcement across the country.

The Plaintiff States' attempt to selectively manipulate Colorado's marijuana laws—leaving legalization intact but eliminating large swaths of state regulatory power—is a dangerous use of both the Supremacy Clause and the Court's original jurisdiction, and it is unlikely to redress the Plaintiff States' alleged injuries. The Court should deny the Motion for Leave to File and dismiss the Complaint.

STATEMENT

1. Nebraska and Oklahoma filed this action in December 2014, citing an alleged increase in cross-border marijuana trafficking and asserting that Colorado law has "created a dangerous gap in the federal drug control system." Compl. ¶ 7. The Complaint, however, does not challenge marijuana legalization as a general matter. For example, the Plaintiff States do not object to Colorado's legalization and regulation of *medical* marijuana, although medical marijuana makes up over half of the State's $700 million marijuana industry and, like recreational marijuana, is also vulnerable to out-of-state diversion. *See Raich*, 545 U.S. at 31–32. And the Plaintiff States disclaim any argument that a State can be forced "to criminalize marijuana." Br. in Supp. at 15. To the contrary, "legaliz[ing] marijuana," according to the Plaintiff States, is "a decision any state may make with respect to its own criminal law." *Id*. at 5; *see also New York v. United States*, 505 U.S. 144, 166 (1992) ("[E]ven 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.").

The Complaint instead asks the Court to strike down only those laws that empower Colorado to authorize, monitor, and regulate recreational marijuana businesses. Compl. at 28–29. In other words, if Plaintiffs' requested relief is granted, recreational marijuana would remain legal, but Colorado would lose the ability to monitor and regulate its retail supply and distribution. According to the Complaint, this outcome is appropriate because federal law requires federal authorities—specifically, the Department of Justice and the Drug Enforcement Administration—to exercise "oversight and control" of controlled substances. Compl. ¶ 22.

2. The federal government's "oversight and control" in this area, however, is limited to a blunt instrument: criminal prohibition. The Complaint characterizes the Controlled Substances Act (the "CSA" or "Act") as "a comprehensive framework for regulating the production, distribution, and possession" of controlled substances. Compl. ¶ 10. That may be true for some drugs; it is not true for marijuana. Under the CSA, virtually all possession, manufacture, and distribution of marijuana is a federal crime. 21 U.S.C. § 812(c)(10).[1] Federal officials may criminally punish marijuana activities and may seize marijuana-related assets.

---

[1] The federal marijuana ban is subject to two limited exceptions: a federal "compassionate use program" that serves eight patients, *see* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1433 (2009), and "controlled research projects," which supply marijuana to around 500 users, *see* Dep't of Justice, Denial of Application, Docket No. 05-16, 74 Fed. Reg. 2101, 2102 (Jan. 14, 2009).

21 U.S.C. §§ 841, 881. But contrary to the Plaintiff States' suggestion, federal officials may not otherwise "regulat[e] the production, distribution, and possession," or the "manufacture, distribution, labeling, monitoring, and use," of marijuana. Compl. ¶¶ 10, 22; *see Raich*, 545 U.S. at 24 (explaining that for non-Schedule I drugs, the CSA's "regulatory scheme is designed to foster the beneficial use of those medications, [and] to prevent their misuse," but for substances like marijuana, the CSA is designed "to prohibit entirely the[ir] possession or use").

The federal government also lacks power to significantly shape state marijuana policy. To be sure, the federal ban reaches all marijuana-related conduct, including wholly intrastate, "purely local" use unconnected to the national market. *Raich*, 545 U.S. at 9, 32–33. But Congress decided against formally involving the States in the criminal prohibition. Unlike other federal regulatory statutes, the CSA does not require States to mirror federal policy to avoid express preemption or to maintain eligibility for federal funds. *See* 21 U.S.C. § 873(a), (d); *cf. New York v. United States*, 505 U.S. at 166–67 (describing Congress's options for "encourag[ing] a State to regulate in a particular way"). Thus, Colorado—despite legalizing marijuana cultivation and use—still receives federal law enforcement grants.[2]

---

[2] *See, e.g.*, El Paso Cnty., Colo., Federal Awards Reports in Accordance with the Single Audit Act and OMB Circular A-133, at 9 (July 29, 2014) (showing a $520,187 grant from the White House Office of National Drug Control Policy), *available at* http://tinyurl.com/pq6s9qu.

Indeed, the States' role in CSA enforcement is affirmatively limited: state officials may enforce the CSA only if given that power by the Attorney General. 21 U.S.C. §§ 871, 878. And while the CSA requires the Attorney General to "cooperate with local, State, tribal and Federal agencies concerning traffic in controlled substances," 21 U.S.C. § 873(a), it imposes no affirmative duties on the States. The CSA also expressly accommodates state drug laws, disclaiming any "intent on the part of Congress to occupy the field" of controlled-substances regulation and prohibiting a finding of preemption "unless there is a positive conflict between [the CSA] and [a] State law so that the two cannot consistently stand together." 21 U.S.C. § 903.

In practice, this statutory design means that marijuana policy is driven almost entirely by state and local officials pursuing state and local priorities. "Since the CSA's implementation more than forty years ago, nearly all marijuana enforcement in the United States has taken place at the state level." Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 84 (2015). Federal arrests make up a tiny fraction—less than 1%—of marijuana-related arrests. *Id*. "[T]he federal government does not have the resources to impose [criminal sanctions] frequently enough to make a meaningful impact on proscribed behavior." Mikos, *supra* note 1, 62 VAND. L. REV. at 1464. As a result, displacing state marijuana laws—and leaving regulation up to the federal government—would create a massive regulatory vacuum. And it would do so in the context of a product whose use is staggeringly widespread.

3. A decade ago, the Court observed that marijuana is an "extraordinarily popular substance" with an "enormous demand for recreational use" that "has thrived in the face of vigorous criminal enforcement efforts." *Raich*, 545 U.S. at 32. At the time, the Department of Justice described marijuana as "pervasive[ ]" and "stead[ily] availab[le]," with a "stable" U.S. market totaling $10.5 billion. Br. for Pet'rs at 19–20 (Aug. 2004), *Gonzales v. Raich* (No. 03-1454) (internal citations and quotation marks omitted).

The market has expanded since then. A study commissioned by the White House Office of National Drug Control Policy estimated that the national market was $41 billion in 2010, when nearly 25 million Americans consumed an estimated 5,743 metric tons of marijuana. RAND Corporation, What America's Users Spend on Illegal Drugs: 2000–2010, at 4, 58–59, 61, 65 (Feb. 2014), *available at* http://tinyurl.com/ly32krz.

4. The widespread use of marijuana, and the resulting difficulty in suppressing the market for it, has led state and local governments to use a broad range of regulatory approaches to address its manufacture, distribution, and use among adults.

As early as the 1970s, States began loosening criminal restrictions on marijuana possession. Oregon, for example, categorized possession of less than an ounce as a "violation" rather than a crime, punished by a ticket that carried only a $100 fine. *See State v. Blanton*, 588 P.2d 28, 28 (Or. 1978) (quoting ORE. REV. STAT. § 167.207 (1976)). Local governments were even more permissive, reducing fines to as low as $5. *See, e.g.*, Ann Arbor, Mich., CITY CHARTER § 16.2 (1974). By 1978, eleven States had decriminalized small amounts

of the drug. *See Nat'l Org. for the Reform of Marijuana Laws v. United States Dep't of State*, 452 F. Supp. 1226, 1229 n.2 (D.D.C. 1978). Plaintiff Nebraska was among them, and to this day Nebraska remains a decriminalization State. NEB. REV. STAT. § 28-416(13)(a) (2014) (classifying first-time possession of one ounce or less as an "infraction" punished by a $300 fine).

Since then, state policy has continued to evolve. In the 1990s, a wave of States began legalizing medical use of marijuana. Over time, many of these States authorized large-scale cultivation and distribution. *See* CAL. HEALTH & SAF. CODE § 11362.775 (2014) (permitting groups to "collectively or cooperatively . . . cultivate marijuana for medical purposes"); *see also*, *e.g.*, ARIZ. REV. STAT. § 36-2806 (2014) (authorizing "registered nonprofit medical marijuana dispensar[ies]"); CONN. GEN. STAT. §§ 21a-408h and 21a-408i (2014) (authorizing State-licensed dispensaries and producers).[3]

Today, 23 States, as well as the District of Columbia and Guam, have chosen to legalize medical marijuana. *See* Nat'l Conf. of State Legs., State Med. Marijuana Laws (Mar. 16, 2015), *available at* http://tinyurl.com/nfoy2gr. And in the last three years, voters in four States took another step, passing laws to legalize, but strictly regulate, recreational marijuana. ALASKA BALLOT MEASURE NO. 2, An Act to Tax and

---

[3] Colorado adopted a statutory program to license and regulate medical marijuana businesses in 2010. *See* H.B. 10-1284, 67th Gen. Assemb. (Colo. 2010). Plaintiffs do not challenge that ongoing program.

Regulate the Production, Sale, and Use of Marijuana (2014); COLO. CONST. art. XVIII, § 16; OR. BALLOT MEASURE NO. 91, Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act (2014); WASH. REV. CODE §§ 69.50.325–369 (2014).[4]

Colorado is one of those States.

5. Colorado's current recreational marijuana policy, challenged here, must be understood in the context of the State's historical experience with marijuana regulation—and, in particular, the federal government's decision not to interfere with the State's marijuana legalization and regulatory efforts over the past fifteen years.

In 2000, Colorado's voters passed Amendment 20, which created a medical-use program that, for the first time since the early twentieth century, authorized individuals to cultivate, possess, and use limited amounts of marijuana in Colorado. COLO. CONST. art. XVIII, § 14. For a decade, however, the program remained small, and the State enacted few statutes or regulations to implement it. ANN TONEY, COLO. MED. MARIJUANA LAW 89 (2012) (footnotes omitted).

The landscape changed radically when the current Presidential Administration began implementing an express policy of marijuana non-enforcement. On

---

[4] The District of Columbia also recently legalized recreational marijuana. D.C. INITIATIVE 71 (2014). Congress did not invalidate this law through its power to review District of Columbia legislation; it did, however, attempt to block enactment of the law in a spending bill. Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, tit. VIII, § 809(b).

October 19, 2009, the Administration released the "Ogden Memo," declaring that although marijuana remains unlawful under the CSA, federal "investigative and prosecutorial resources . . . should not focus . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." David W. Ogden, Memorandum for Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, at 1–2 (Oct. 19, 2009), *available at* http://tinyurl.com/nry8vtv. The memorandum directed federal resources to be allocated to enumerated enforcement priorities, such as sales to minors and marijuana operations with ties to criminal enterprises. *Id*. at 2.

After the Ogden Memo was released, users flocked to the States' legalized marijuana markets. TONEY, *supra*, at 90. In Colorado, for example, the medical marijuana registry listed only 5,051 patients as of January 2009. By the end of the year—after publication of the Ogden Memo—the number had multiplied *eightfold*, to over 41,000. A year later the number had multiplied again, nearly tripling to over 116,000 registered patients. Colo. Dep't of Pub. Health and Env't, Med. Marijuana Registry Program Update (Jan. 31, 2009, Dec. 31, 2009, and Dec. 31, 2010) a*vailable at* http://tinyurl.com/n5p2uwy, http://tinyurl.com/mhemq2f, http://tinyurl.com/o2srfg6.

The Colorado legislature—facing a ballooning but unregulated legal market—responded quickly to the new environment. In the legislative session immediately following the release of the Ogden Memo, the Colorado General Assembly enacted the Medical

Marijuana Code, which authorizes, and comprehensively regulates, cultivation, manufacture, and distribution of medical marijuana on a commercial scale. *See* COLO. REV. STAT. §§ 12-43.3-101–1102 (2014).

In reaction to this new regulatory approach, and to similar regulatory efforts in other States, the Department of Justice issued updated guidance to federal law enforcement. Although it reiterated the policy of non-enforcement, the new memorandum suggested that "[t]he Ogden Memorandum was never intended to shield [commercial marijuana cultivation and sale] from federal enforcement action." James M. Cole, Memorandum for U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, at 2 (June 29, 2011), *available at* http://tinyurl.com/oqg2owq.

Despite this apparent shift in policy, however, the Department of Justice did not shut down Colorado's commercial medical marijuana operations, nor did it interfere with Colorado's regulatory framework. Instead, federal enforcement remained consistent with the 2009 Ogden Memo. For the vast majority of commercial medical marijuana facilities operating in compliance with Colorado law—numbering in the hundreds at the time—Federal authorities took no formal or informal action. *See, e.g.*, Press Release, U.S. Att'y for the Dist. of Colo., Third Wave Of Warning Letters Results In Closure Of All 10 Targeted Marijuana Stores Within 1,000 Feet Of A School (Sept. 18, 2012), *available at* http://tinyurl.com/o59nsgd (describing an initiative to close "marijuana stores within 1,000 feet of a school," which led to store

closures or relocations without the filing of criminal charges or civil forfeiture actions).

6.a. In the absence of any apparent federal obstacle to expanding state regulation of marijuana, Colorado, in a 2012 statewide vote, passed Amendment 64, authorizing all persons over age 21 to possess, cultivate, and use specified amounts of marijuana and directing the State to establish a system to license, regulate, and tax retail marijuana businesses. COLO. CONST. art. XVIII, § 16. Legislation and administrative regulations soon followed to implement Amendment 64's provisions.

Building on the State's experience with medical marijuana, Colorado's new regulatory system mandates, among other restrictions, a "seed-to-sale tracking system" for each individual marijuana plant, 1 COLO. CODE REGS. §§ 212-2 R103, R309 (2014); security and electronic surveillance requirements for all marijuana businesses, *id*. §§ 212-2 R305, R306; and quantitative limits on sales to both in-state residents (one ounce) and those who cannot prove in-state residence (one-quarter ounce), *id*., §§ 212-2 R402.D. Marijuana-related activity that does not comply with Colorado's regulatory framework—for example, untaxed sales, distribution by unlicensed entities, and certain regulatory violations by licensed businesses—remains unlawful and, in most cases, criminal. *See, e.g.,* COLO. REV. STAT. §§ 12-43.4-901; 18-18-406 (2014); *id*. § 39-21-118(1)–(2).

6.b. After the voters passed Amendment 64, but before Colorado's regulatory framework went into effect, the federal government announced its position on Amendment 64 and a similar Washington State law.

Attorney General Eric Holder made clear to the Governors of Colorado and Washington that the Department of Justice would not "seek to challenge [the new] state laws," at least "not at this time." Letter from Eric H. Holder, Jr., U.S. Attorney General, to Governors John Hickenlooper and Jay Inslee (Aug. 29, 2013), *available at* http://tinyurl.com/ny9xsfa. Deputy Attorney General Cole, meanwhile, provided updated guidance to federal law enforcement officials. This new guidance (the "Cole Memo") stated that the law enforcement priorities identified in the 2009 Ogden Memo would "continue to guide the Department's enforcement of the CSA against marijuana-related conduct." James M. Cole, Memorandum for U.S. Att'ys, Guidance Regarding Marijuana Enforcement, at 2 (August 29, 2013), *available at* http://tinyurl.com/nrc9ur8.

More specifically, however, the Cole Memo clarified that in States like Colorado, which have "implemented strong and effective regulatory and enforcement systems . . . , conduct in compliance with those laws and regulations is less likely to threaten . . . federal priorities." *Id*. at 3. In those States, "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity." *Id*. The memo instructed federal law enforcement "not [to] consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities." *Id*.

In testimony to the Senate Judiciary Committee, Deputy Attorney General Cole explained the reasons

for the Administration's policy: preempting state marijuana laws would lead to a regulatory vacuum, and "what you'd have is legalized marijuana and no enforcement mechanism within the state to try and regulate it. That's probably not a good situation to have." *Conflicts Between State and Federal Marijuana Laws: Hearing Before S. Comm. On the Judiciary*, 113th Cong. (Sept. 10, 2013) (live testimony of James M. Cole, Deputy Attorney General), *available at* http://tinyurl.com/nbm6qq4. He further explained that dismantling a state's regulatory system would lead to an expanded black market, instead of "the state regulat[ing] on a seed to sale basis." *Id*.[5]

6.c. Since issuing the Cole Memo, the Administration has continued to issue guidance to accommodate state marijuana legalization. In early 2014, for example, the Treasury Department's Financial Crimes Enforcement Network explained "how financial institutions can provide services to marijuana-related businesses consistent with their [Bank Secrecy Act] obligations." Dep't of the Treasury, Fin. Crimes Enforcement Network, FIN-2014-G001, BSA Expectations Regarding Marijuana-Related Businesses, at 1 (2014), *available at*

---

[5] He also addressed the effect of the Department's new policy on various international treaties, explaining that the permissive approach to state regulation of marijuana "does not violate the United States' treaty obligations" and "the Department and the Administration are committed to continuing to fully cooperate with the international community." *Conflicts Between State and Federal Marijuana Laws: Hearing Before S. Comm. On the Judiciary*, 113th Cong. (Answers by James M. Cole to Questions for the Record at 4) (Sept. 10, 2013), *available at* http://tinyurl.com/povoazz.

http://tinyurl.com/lxn4p2b. The goal of the guidance was to "enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses." *Id*.

The Executive Branch is not alone in seeking to harmonize federal enforcement priorities with state law. Congress has formally endorsed the Department's permissive approach to state marijuana legalization, at least with respect to medical marijuana regimes. On December 16, 2014, in the Consolidated and Further Continuing Appropriations Act of 2015, Congress codified the policy of federal non-enforcement: "None of the funds made available in this Act to the Department of Justice may be used . . . to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Pub. L. No. 113-235, tit. V, § 538, 128 Stat. 2130 (2014).

ARGUMENT

I. This dispute does not require exercise of the Court's original jurisdiction.

The Court's original jurisdiction is "invoked sparingly," *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976), and is reserved for exceptional circumstances: when one State acts directly to violate a second State's sovereign rights. *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976) (per curiam) ("[T]o engage this Court's original jurisdiction, a plaintiff State must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State.").

Two factors govern the Court's discretion to hear original proceedings. First, the Court considers "the

nature and interest of the complaining State" and, in particular, the "seriousness and dignity of the claim." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal quotations and citations omitted). This is a high hurdle: "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *Maryland v. Louisiana*, 451 U.S. 725, 736 n.11 (1981) (quoting *New York v. New Jersey*, 256 U.S. 296, 309 (1921)).

Second, the Court considers "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. at 77. This alternative forum need not be one in which the States themselves could be opposing parties. The question is instead whether the legal issues can be adjudicated as readily—or more readily—in the other forum. *Arizona v. New Mexico*, 425 U.S. at 796 (denying original jurisdiction because private parties "raise[d] the same constitutional issues" in a state district court proceeding). This reflects the Supreme Court's central role as appellate "overseer[ ]" rather than as a tribunal of first resort. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971).

Here, both factors counsel against the Court accepting jurisdiction.

A. Colorado has not invaded any sovereign right of the Plaintiff States.

The premise of this suit is that because the market for marijuana is national (and, indeed, international[6]), Colorado's decision to legalize and regulate recreational marijuana within its borders "created a dangerous gap in the federal drug control system." Compl. ¶ 7. If this is true for Colorado, then it is also true for the 23 States that have legalized medical marijuana. The Court has made clear that *all* marijuana-related activity, including medical use, is subject to the federal prohibition. *Raich*, 545 U.S. at 28 ("[T]he mere fact that marijuana . . . is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA."); *Oakland Cannabis Buyers' Coop*., 532 U.S. at 499. The Plaintiff States' premise, however, is incorrect for two reasons.

First, contrary to the Plaintiff States' allegations, the dozens of States that have legalized marijuana have no power to create "gaps" in the *federal* drug control system. State law cannot alter the CSA's reach. *Raich*, 545 U.S. at 29. The Plaintiff States concede this point when they admit Colorado has the sovereign right to legalize marijuana despite the CSA. Br. in

---

[6] In 2013, the U.S. Border Patrol seized over 2.4 million pounds of marijuana. U.S. Border Patrol, Sector Profile—Fiscal Year 2013, *available at* http://tinyurl.com/kvv4x6x. Channeling demand away from the international black market is one reason given in favor of Colorado's decision to legalize and regulate the substance. Legis. Council of the Colo. Gen. Assemb., *2012 State Ballot Information Booklet,* Research Pub. No. 614, at 15 (Sept. 10, 2012), *available at* http://tinyurl.com/n8r5c29 ("Current state policies that criminalize marijuana . . . have contributed to an underground market.").

Supp. at 5, 15; *cf. New York*, 505 U.S. at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.").

Second, because the federal government is responsible for enforcing the CSA, any alleged "gap in the federal drug control system," Compl. ¶ 7, is the result of federal, not state, enforcement policy. The Plaintiff States may object to the Ogden and Cole Memos, but States like Colorado did not promulgate them. And the memos are not the only source of relevant federal policy. Although the Plaintiff States claim "*Congress* intended the CSA to prohibit the type of legalization effectuated by Colorado here," Br. in Supp. at 23 (emphasis in original), they ignore Congress's recent decision to forbid federal interference with state medical-legalization laws—including those that authorize commercial production and sale. Pub. L. No. 113-235, tit. V, § 538. Congress, in other words, is not only aware of the so-called "gaps" in the CSA; it is facilitating them.

At bottom, then, the Plaintiff States' quarrel is not with Colorado but with the federal government's "relaxed view of [federal] enforcement obligations under the CSA." Br. in Supp. at 23. But if the Plaintiff States' goal is to close alleged "gaps in the *federal* drug control system," Compl. ¶ 7 (emphasis added), they should do what they have already done in another setting: sue the federal government for declining to enforce federal law. *See Texas v. United States*, Civil No. 14-254, 2015 U.S. Dist. LEXIS 18551, at *114 (S.D. Tex. Feb. 16, 2015) (in a case that includes the States of Nebraska and Oklahoma as plaintiffs, holding that

the Executive Branch's immigration policies amount to "completely abandon[ing] entire sections of this country's immigration law").

Whatever the outcome of that suit, the Plaintiff States' quarrel with *federal* enforcement policy is not an inter*state* dispute appropriate for the Court's original jurisdiction. A State does not "inva[de]" the sovereign rights of another State, *Maryland v. Louisiana*, 451 U.S. at 736 n.11, by making a policy decision that parts ways with its neighbors.

In the context of original-jurisdiction cases, this focus on direct injury to a sovereign or quasi-sovereign interest is crucial. "Each State stands on the same level with all the rest"; the "cardinal rule" is "equality of right." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). Colorado "is bound to yield its own views to none," including Nebraska and Oklahoma. *Id*. Original jurisdiction is therefore appropriate only when a State "reaches . . . into the territory" of another State in an attempt to manipulate its resources or citizens, and thereby directly injures the other State's sovereign or quasi-sovereign interest. *Id*.; *see also Pennsylvania v. New Jersey*, 426 U.S. at 663.

For example, in *Maryland v. Louisiana*—the case on which the Plaintiff States chiefly rely to support their claim of original jurisdiction, Br. in Opp. at 24–27—the Court adjudicated a challenge to a Louisiana law that was "clearly intended" to reach across state lines and directly impose tax burdens on other States and their citizens. 451 U.S. at 736–37 (noting that the natural gas tax at issue was "clearly intended to be passed on to the ultimate consumer," including the plaintiff States, who were "major purchasers"). And in *Wyoming*

v. Oklahoma, the Court considered a challenge to an Oklahoma law that mandated Oklahoma companies limit the business they conducted with Wyoming coal producers. 502 U.S. 437 (1992). By targeting interstate business relationships, the law reached across state lines, "directly affect[ing] Wyoming's ability to collect severance tax" on coal sold to Oklahoma; this caused a "direct injury" to Wyoming's "sovereign" interests that justified the exercise of original jurisdiction. *Id*. at 451.

Here, Colorado does not intend, nor has it attempted, to reach across the border to invade the Plaintiff States' sovereign rights. Colorado's marijuana laws stop at the state border. *See, e.g.*, COLO. CONST. art. XVIII § 16(4) (providing only that the regulated manufacture and distribution of marijuana "shall not be an offense *under Colorado law*"). When a person purchases marijuana in Colorado and transports it across state lines, that person is violating not only federal law and the laws of the Plaintiff States but, in many cases, the laws of Colorado itself. *See* COLO. REV. STAT. § 12-43.4-901(2)(a) (making it unlawful to buy, sell, transfer, give away, or acquire recreational marijuana except as allowed by Amendment 64 and the Retail Marijuana Code). Indeed, it is *Colorado's* sovereignty that is at stake here: Nebraska and Oklahoma filed this case in an attempt to reach across their borders and selectively invalidate state laws with which they disagree.

The Plaintiff States nonetheless argue that this case "is akin to when the Court has exercised original jurisdiction over suits between states involving cross-border nuisances." Br. in Supp. at 12. Plaintiffs' analogy is inapt for two reasons. First, those nuisance

cases involved direct injuries to the complaining States' quasi-sovereign rights in the land, air, and water within their borders, not policy disputes regarding third-party conduct that violates federal law. *See, e.g.*, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (explaining that a State has a "quasi-sovereign" interest "in all the earth and air within its domain"). Second, cross-border nuisance cases rely on federal common law, which may be invoked only "in a few and restricted instances" and only in "the absence of an applicable Act of Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 313–14 (1981) (internal quotation marks omitted). Here, this entire dispute is about "an applicable Act of Congress," making resort to the common law inappropriate—especially because doing so could override national marijuana enforcement policy. *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2536–37 (2011) ("[T]he Court remains mindful that it does not have creative power akin to that vested in Congress. . . . Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders. . . . [I]t is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest.").

The paradigmatic original jurisdiction case is one "sounding in sovereignty and property, such as those between states in controversies concerning boundaries, and the manner of use of the waters of interstate lakes and rivers." STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE 622 (10th ed. 2013). Over the past 25 years, all but two of the Court's State-versus-State

cases fit that description. This novel case does not.[7] Absent a direct affront to their sovereignty, the Plaintiff States do not raise a claim appropriate for this Court's original jurisdiction. The Plaintiff States have failed to demonstrate, by clear and convincing evidence, that Colorado has directly and seriously injured their sovereign rights. *See Maryland v. Louisiana*, 451 U.S. at 736 n.11.

B. The legal and factual issues presented by this case are better suited for resolution in the lower federal courts and through the normal appeals process.

As the Plaintiff States concede, "the issue presented could conceivably be resolved in a suit brought by non-sovereign parties in a district court." Br. in Supp. at 9. That alternative is not merely conceivable: Two suits are now pending in federal district court that raise claims essentially identical to those at issue here.

---

[7] During that time, the only original jurisdiction cases outside the paradigm described above were an interstate compact dispute and a challenge to taxes borne by out-of-state consumers. *See Alabama v. North Carolina*, 539 U.S. 925 (2003); *Connecticut v. New Hampshire*, 502 U.S. 1069 (1992).

Amici Former DEA Administrators, in emphasizing that this Court has accepted 12 of 13 State-versus-State cases in the last 25 years, ignore that the present case is vastly different from all 13 of those. Former DEA Administrators' Amicus Br. at 6–7 & n.2. Amici also ignore the many State-versus-State cases this Court rejected just outside their arbitrary 25-year window. *See, e.g.*, *Arkansas v. Oklahoma*, 488 U.S. 1000 (1989); *Louisiana v. Mississippi*, 488 U.S. 990 (1988); *Pennsylvania v. Alabama*, 472 U.S. 1015 (1985); *Pennsylvania v. Oklahoma*, 465 U.S. 1097 (1984).

In the first, a group of plaintiffs seek to enjoin the operation not only of individual marijuana businesses but also the State's entire regulatory system. *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, No. 15-cv-349 (D. Colo.). Governor Hickenlooper, as well as the state officials responsible for implementing Colorado's marijuana laws, are named as defendants. The plaintiffs request an order "[d]eclaring that those portions of the Colorado Constitution and the Retail Marijuana Code that purport to authorize or facilitate violations of the federal drugs laws are preempted by federal law." *Id.*, Compl. ¶ 136, ECF No. 1 (Feb. 19, 2015).

In the second suit, a group of twelve sheriffs and county attorneys from Colorado and Kansas—as well as from Plaintiff Nebraska—assert injuries identical to those alleged here. Namely, they cite "increased and significant costs associated with . . . the increased influx of Colorado-sourced marijuana in their counties." *Smith v. Hickenlooper*, No. 15-cv-462, Compl. ¶ 89, ECF No. 1 (D. Colo. Mar. 5, 2015). And, as in this case, the plaintiffs seek an order under the Supremacy Clause striking down the Colorado laws that authorize and regulate recreational marijuana businesses. *Id.* ¶¶ 104–108.

The plaintiffs in these cases face the same hurdles the Plaintiff States face here—such as Article III standing and the lack of a cause of action. But the cases will proceed as litigation normally does, in courts whose traditional role is to adjudicate trial-level disputes. And after all relevant legal and factual issues have been fully vetted by the lower courts, this Court will have the opportunity to fulfill its traditional role as

appellate "overseer." *Wyandotte Chems.*, 401 U.S. at 498–99; *Arizona v. New Mexico*, 425 U.S. at 797 (finding that a pending state-court action provided an appropriate forum to litigate constitutional questions, which could be brought to this Court on appeal).

The Court does not lightly accept original jurisdiction over disputes like this one, which raise unprecedented claims that have not yet been subject to the normal trial and appellate process. And for good reason:

> As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. . . . It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.

Wyandotte Chems., 401 U.S. at 497. This suit is the type of "anomaly" the Court warned against in *Wyandotte Chemicals*. States regularly diverge on policy issues—indeed, diversity in public policy is the very definition of federalism. If conflicting state policy were grounds for an original jurisdiction proceeding, the Court could be called upon to entertain interstate lawsuits challenging all manner of state laws as being inconsistent with federal statutes, including, for example, differing state approaches to the regulation of pollutants, *cf. West Virginia v. EPA*, No. 14-1146, Mot. By the States of New York, et al., to Intervene, ECF No. 1510244 (D.C. Cir. Sept. 2, 2014), and differing state approaches to the regulation of firearms, *cf. Kolbe v. O'Malley*, No. 14-1945, Br. of Amici Curiae W. Va., et

al., Supporting Plaintiffs-Appellants, ECF No. 33-1 (4th Cir. Nov. 12, 2014).

For every case like this one, in which the Court is "called upon to . . . apply unfamiliar legal norms" and "forced . . . awkwardly to play the role of factfinder," the Court "unavoidably . . . reduc[es]" its attention "to those matters of federal law and national import as to which [it is] the primary overseer[ ]." *Wyandotte Chems.*, 401 U.S. at 498; *see also Arizona v. New Mexico*, 425 U.S. at 796–97 (noting issue was being adjudicated by other parties in state court and this Court could address the issue through the normal appellate process). Because the lower courts are available to address the issues raised here—and are in fact doing so—the Court should not expand its original jurisdiction to include the Plaintiff States' novel claims.

II. The Plaintiff States lack standing.

To invoke this Court's original jurisdiction, a case must "present a justiciable controversy between . . . States." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). The complaining State must therefore "assert[ ] a right against the other State which is susceptible of judicial enforcement." *Id*. Here, the Plaintiff States do not assert rights susceptible of judicial enforcement: they have failed to satisfy the redressability and causation components of Article III standing.

A. Curtailing Colorado's power to regulate marijuana will not redress the Plaintiff States' injuries.

To satisfy Article III standing requirements, "it must be likely, as opposed to merely speculative, that the [plaintiff's] injury will be redressed by a favorable

decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted). This case fails that test. A decision in the Plaintiff States' favor will hinder Colorado's ability to channel demand for recreational marijuana into a regulated and monitored market. This is more likely to aggravate, rather than subdue, the cross-border trafficking on which the Plaintiff States' allegations of injury rest.

The Plaintiff States seek to invalidate only those laws that enable Colorado to regulate the supply side of its recreational marijuana market. Compl. at 28–29 (seeking invalidation of only COLO. CONST. art. XVIII, §§ 16(4) and (5) and related statutes and regulations, which authorize marijuana-related facilities and empower the State to strictly regulate them). They do not challenge Colorado's authority to legalize marijuana generally, nor do they seek an order compelling Colorado law enforcement officials to take any particular actions against marijuana traffickers. They in fact disclaim any intent to do so: "Plaintiff States are not suggesting the CSA requires Colorado to criminalize marijuana or to strip Colorado authorities of prosecutorial discretion." Br. in Supp. at 15. Plaintiffs' requested relief would leave intact section 16(3) of Amendment 64 (authorizing personal use, cultivation, and transfer without remuneration of one ounce or less of recreational marijuana); all of Amendment 20 (authorizing medical use of marijuana); and the entire Medical Marijuana Code.

The Plaintiff States, in other words, are requesting this Court to allow Colorado to legitimize in-state *demand* for an "extraordinarily popular substance," *Raich*, 545 U.S. at 28, while limiting the State's ability

to regulate and monitor its *supply*. This is a recipe for more cross-border trafficking, not less. Deputy Attorney General Cole cited this very concern in explaining why the Department of Justice has declined to interfere with Colorado's regulation of recreational marijuana. *See* above at 13.

Perhaps the Plaintiff States rely on the possibility that Colorado will pass new laws in response to a court order gutting Amendment 64's regulatory provisions. But nothing suggests the Colorado General Assembly would, or could, respond to this case in a manner the Plaintiff States would find acceptable. *See DaimlerChrysler Corp v. Cuno*, 547 U.S. 332, 344 (2006) (holding that plaintiffs lacked standing because their claim "depend[ed] on how legislators [would] respond" to a court order). And even assuming Colorado responded with new legislation, one can only speculate how the new laws would in fact staunch the "flow" of "Colorado-sourced marijuana . . . into and through Plaintiff States." Br. in Supp. at 14. Interstate marijuana traffickers currently act in violation of the laws of multiple jurisdictions, including, in many cases, the laws of Colorado. It is speculative that new laws, against a backdrop of state marijuana legalization, would cause these third parties to cease committing federal and state crimes.

To achieve the Plaintiff States' asserted goal—*i.e.*, to close the alleged "gap" in the CSA—the Court would be required to do what it has no power to do: either (1) order Congress to allocate more resources to federal marijuana enforcement while invalidating the Cole and Ogden Memos or (2) require Colorado to enact and enforce a new set of criminal laws prohibiting

marijuana. On the federal side, the United States is not a party to this case and, absent joinder, will not be bound by the Court's ruling. And even if the federal government were a party, the Court could not order Congress to make an appropriation to more strictly enforce the CSA. "[A]bsolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people." *Hart's Case*, 16 Ct. Cl. 459, 484 (1880), *aff'd*, 118 U.S. 62 (1886). As for Colorado, a sovereign State cannot be compelled to pass and enforce legislation against the will of its voters. Ordering Colorado to recriminalize the use and cultivation of recreational marijuana, and further ordering the State to allocate resources to enforce that prohibition, would violate the Tenth Amendment. *New York v. United States*, 505 U.S. at 188 ("Whatever the outer limits of [State] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."). The alleged "gaps" in the CSA about which the Plaintiff States complain cannot be mended by a judicial decree in this case.

This Court undoubtedly has the power, in the appropriate case, to nullify state laws that are preempted by a federal statute. Here, however, the CSA does not support the Complaint's preemption claims. And even if it did, the Plaintiff States have not demonstrated that their requested relief would in fact redress, rather than aggravate, their alleged injuries.

B. The Plaintiff States' injuries are caused by third parties who choose to violate federal and state law.

For a plaintiff to have standing, "there must be a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. Standing generally cannot be based on "injury that results from the independent action of some third party not before the court.'" *Maryland v. Louisiana*, 451 U.S. at 736 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). When a third party is the source of an alleged injury, causation "hinge[s] on the response of [that] regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Lujan*, 504 U.S. at 562; *see also Allen v. Wright*, 468 U.S. 737, 758 (1984).

Here, it is not Colorado's conduct per se that purportedly injures Nebraska and Oklahoma. The Plaintiff States do not allege that Colorado itself has engaged in cross-border diversion, because Colorado has not done so. It is instead the activity of third parties who illegally divert marijuana across state lines about which the Plaintiff States complain. Compl. ¶¶ 55, 57. And further complicating this causal chain is, in *Lujan*'s words, "the response of others"—namely, the actions of the Department of Justice, the entity responsible for enforcing the CSA. Article III causation, therefore, depends on both the actions of third-party marijuana traffickers and the laws and enforcement policies of multiple levels of government.

The Justice Department has stated an intention of continuing to "[p]revent[ ] the diversion of marijuana from states where it is legal . . . to other states." Cole

Memo at 1. Thus, here, the third parties that are allegedly injuring the Plaintiff States are not only violating the CSA but are doing so in a way that falls outside the scope of the Cole Memo's non-enforcement framework. Additionally, these third parties are violating the Plaintiff States' law and (in cases of unregulated distribution of marijuana and possession of sizable amounts of marijuana) Colorado law. Indeed, state and local law enforcement officials in Colorado, often in coordination with federal authorities, continue to enforce criminal laws relating to marijuana, focusing on offenders who operate in violation of both state and federal law. *See, e.g.*, Press Release, U.S. Att'y for the Dist. of Colo., Denver Attorney And Others Named In Superseding Indictment (April 28, 2014) ("This case is being investigated by [federal law enforcement] and the Denver Police Department."), *available at* http://tinyurl.com/onperzj. This includes prosecuting those who engage in out-of-state diversion. *People v. Nguyen*, Grand Jury Case No. 14CR01, Indictment (Denver Dist. Ct. Mar. 20, 2015) (indicting 37 defendants for a scheme to operate a marijuana distribution ring from Colorado to Minnesota).

In this setting, causation comes down to whether current federal and state criminal laws are being enforced in a manner consistent with the Plaintiff State's own preferences. The Plaintiff States, however, have not challenged the enforcement efforts of Colorado or the Justice Department. And had they tried, they would face another hurdle: a plaintiff generally has no legally cognizable interest in the manner in which a State carries out its law enforcement functions. *See, e.g.*, *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] citizen lacks standing to contest the policies of the

prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."); *cf. Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (describing the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands"). The causal chain, because it depends on both the unlawful behavior of private individuals and the law enforcement policies of the federal government, is too attenuated to satisfy Article III standing requirements.

III. The Plaintiff States have no cause of action to preempt Colorado law.

The CSA is enforceable only by the United States Attorney General. Congress chose not to create a cause of action for civil litigants to enforce the CSA's provisions. *See, e.g.*, *Durr v. Strickland*, 602 F.3d 788, 789 (6th Cir. 2010) (affirming that "no private right of action exists under" the CSA); *United States v. 1840 Embarcadero*, 932 F. Supp. 2d 1064, 1072 (N.D. Cal. 2013) ("[C]ourts have consistently held that there is no private right of action under the CSA . . . .").

Yet the Plaintiff States seek to use the CSA as a preemptive weapon to selectively invalidate state laws that deviate from a policy of marijuana prohibition.[8]

---

[8] The Plaintiff States also cite three international treaties as support for their preemption claims. Compl. ¶¶ 23–30. Like the CSA, the treaties do not provide a cause of action. *See Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) ("[T]he background presumption is that '[i]nternational agreements, even those directly benefitting private persons, generally do not . . . provide for a private cause of action in domestic courts.'" (citation omitted)). Additionally, the treaties do not place any duties on

They attempt to do so by bringing a claim directly under the Supremacy Clause. Compl. at 28–29. The Supremacy Clause, however, has been described as a rule of priority rather than "a source of any federal rights." *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989) (internal quotation marks omitted). Here, no one disputes the priority of the CSA compared to state laws legalizing marijuana—in this sense, the CSA is supreme. *Raich*, 545 U.S. at 29. The question, then, is whether the Supremacy Clause empowers the Plaintiff States to tinker with Colorado law by leaving legalization intact but removing Colorado's power to regulate recreational marijuana businesses.

This term, the Court is considering whether litigants have a stand-alone cause of action to offensively preempt state law, even when the allegedly preempting federal statute is not privately enforceable. *Armstrong v. Exceptional Child Ctr., Inc.*, No. 14-15. In an earlier case, four Justices already answered "no" to that question, explaining that "if Congress does not intend for a statute to supply a cause of action for its enforcement, it makes no sense to claim that the Supremacy Clause itself must provide one." *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1212 (2012) (Roberts, C.J., dissenting). Even the Plaintiff States agree with this analysis. They filed an amicus brief in *Armstrong* arguing that stand-alone preemption claims "subject[ ] [the States] to unwarranted lawsuits on account of [a] misguided

---

Colorado—instead, the United States is the signatory. And the United States has stated that the Cole and Ogden Memos do not affect compliance with those treaties. *See* above at note 5.

interpretation of the Supremacy Clause." Br. for Texas, et al. as Amici Curiae at 2 (Nov. 2014), *Armstrong* (No. 14-15).

The *Douglas* majority, while not directly addressing the question, warned against grafting a preemption cause of action onto a federal statute. *Douglas*, 132 S. Ct. at 1210–11. In the majority's view, if a federal agency charged with enforcing a federal statute has taken a position on the interaction between that statute and state law, allowing private Supremacy Clause suits would threaten to "defeat the uniformity that Congress intended by centralizing administration of the federal program." *Id*.

Here, a stand-alone cause of action for preemption raises similar concerns. The federal government has determined not to affirmatively displace Colorado's marijuana laws and regulatory framework. The Executive fears the regulatory vacuum that this would create. *See* above at 13. And Congress has endorsed a policy, at least with respect to medical marijuana, supportive of state regulatory and licensure laws. *See* Pub. L. No. 113-235, tit. V, § 538. This suit threatens to upset those administrative and political decisions.

The Court, if it does not dismiss this case outright, should at minimum allow additional briefing after it decides *Armstrong*. This will enable the parties to address whether, in the wake of that case, the Plaintiff States have a cause of action to preempt Colorado law under the CSA.

IV. The United States is an indispensable party.

Colorado understands the Plaintiff States' frustration that national marijuana policy now hinges on a series of executive memoranda articulating a policy of "prosecutorial discretion." *See, e.g.*, Cole Memo at 3. But, again, although the Plaintiff States are willing to challenge the Administration's non-enforcement of federal law, *see Texas v. United States*, 2015 U.S. Dist. LEXIS 18551, they have not done so here.

This demonstrates the need for the federal government's involvement in this case. The Complaint and Brief in Support raise questions of federal enforcement policy that are "distinctively federal interests, best presented by the United States itself." *See Maryland v. Louisiana,* 451 U.S. at 745 n.21 (1981). As explained above in the Statement, Colorado's marijuana regulations grew out of the federal government's policy of deferring to state-level efforts to legalize and regulate marijuana within their borders. A court order invalidating Colorado's regulatory laws would not close the alleged "gap" in the CSA, a statute that only the federal government may enforce. *See* above at 24–27.[9]

---

[9] Nor would a Court order against Colorado ensure federal compliance with international treaties. *See* Compl. ¶¶ 23–30. Indeed, the United States has argued in previous cases that "Ensuring that treaty obligations are satisfied is a distinctly federal interest that is best presented . . . by the United States . . . ." Mem. in Supp. of Mot. of U.S. to Intervene at 9, *Texas v. New Mexico*, No. 141, Original (Feb. 2014).

The Plaintiff States' claims are therefore "dependent upon the rights and the exercise of an authority asserted by the United States." *Arizona v. California*, 298 U.S. 558, 571 (1936). The United States—or, at least, the Department of Justice—is an indispensable party. *See California v. Arizona*, 440 U.S. 59, 61–63 & n.3 (1979). That means either the federal government must intervene as a defendant or the suit must be dismissed. *See id.*; *Maryland v. Louisiana*, 451 U.S. at 745 n.21 ("We have often permitted the United States to intervene in appropriate cases where distinctively federal interests, best presented by the United States itself, are at stake."); *Texas v. New Mexico*, 352 U.S. 991 (1957) ("[T]he bill of complaint is dismissed because of the absence of the United States as an indispensable party."); *see also Texas v. New Mexico*, 134 S. Ct. 1783 (2014) (granting leave for the United States to intervene in a case with implications for a federal water project and the government's relationship with Mexico).

V. If it accepts the Complaint, the Court should provide for direct resolution of dispositive legal issues.

Typically, when the Court grants leave to file a complaint, it directs the defendant to file an answer and refers the matter to a Special Master. *See, e.g.*, *New Jersey v. New York*, 513 U.S. 924 (1994); 511 U.S. 1080 (1994). In some cases, however, this Court directly decides controlling issues of law on either a motion to dismiss or a motion for summary judgment. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 756 (2001); 530 U.S. 1272 (2000); *United States v. Alaska*, 503 U.S. 569 (1992); 501 U.S. 1275 (1991).

The legal questions in this case are suitable for the latter approach. Whether the Plaintiff States have a cause of action, and whether the CSA preempts Colorado's authorization and regulation of recreational marijuana businesses, are legal questions that may be decided on summary judgment. Colorado respectfully requests that, if the Court accepts the Complaint, it set a schedule for the filing of a dispositive motion, as well as a supporting brief, opposition, and reply. The Court would retain the option of appointing a Special Master if, upon reviewing the motion and briefing, referral appears more appropriate. *See Montana v. Wyoming*, 555 U.S. 968 (2008); 552 U.S. 1175 (2008).

CONCLUSION

For the foregoing reasons, the Court should deny the Motion for Leave to File Complaint. Alternatively, the Court should set a schedule for filing dispositive motions and supporting briefs.

Respectfully submitted,

CYNTHIA H. COFFMAN
Colorado Attorney General

FREDERICK R. YARGER
Solicitor General
Counsel of Record

DAVID BLAKE
Chief Deputy Attorney General

CLAUDIA BRETT GOLDIN
First Assistant Attorney General

SCOTT STEINBRECHER
GRANT T. SULLIVAN
Assistant Solicitors General

SUEANNA P. JOHNSON
Assistant Attorney General

Office of the Colorado Attorney General
1300 Broadway
Denver, Colorado 80203
Fred.Yarger@state.co.us
720-508-6168

Counsel for Defendant State of Colorado

MARCH 27, 2015