No. 144, Original

IN THE
Supreme Court of the United States

STATE OF NEBRASKA AND STATE OF OKLAHOMA,
Plaintiffs,
v.
STATE OF COLORADO,
Defendant.

On Motion For Leave To File Bill
Of Complaint In Original Action

BRIEF FOR ALL NINE FORMER ADMINISTRATORS OF DRUG ENFORCEMENT AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF STATES' MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

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INTEREST OF *AMICI CURIAE*[1]

Since the Drug Enforcement Administration ("DEA") was created in July of 1973, *see* Exec. Order No. 11,727, 38 Fed. Reg. 18,357 (July 10, 1973), ten individuals have served as Administrators of the agency. All nine former Administrators—who were appointed by and served under Presidents from both parties—appear as *amici curiae* supporting Nebraska and Oklahoma. They are:

Administrator	Dates of Service	President(s)
John R. Bartels, Jr.	1973–1975	Richard Nixon, Gerald Ford
Peter B. Bensinger	1976–1981	Gerald Ford, Jimmy Carter, Ronald Reagan
Francis M. Mullen	1981–1985	Ronald Reagan
John C. Lawn	1985–1990	Ronald Reagan, George H.W. Bush
Robert C. Bonner	1990–1993	George H.W. Bush, William Clinton
Thomas A. Constantine	1994–1999	William Clinton
Donnie R. Marshall	2000–2001	William Clinton, George W. Bush
Asa Hutchinson	2001–2003	George W. Bush
Karen Tandy	2003–2007	George W. Bush

[1] Pursuant to this Court's Rules 37.2(a) and 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief and received at least ten days' notice.

As the Administrators of Drug Enforcement for the United States of America, each of the individual *amici* headed the DEA and took an oath to enforce the federal controlled-substances laws and regulations, including the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, which includes the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq*. That law allows the Attorney General to determine the dangerousness of a particular drug. 21 U.S.C. § 811(a). The Attorney General, in turn, has delegated this authority to the Administrator of Drug Enforcement. *See* 28 C.F.R. § 0.100(b). *Amici curiae* are, therefore, particularly knowledgeable about federal drug laws and their enforcement, as well as the dangers that controlled substances, including marijuana, pose. They are uniquely situated to provide the Court with insight into the importance of granting the States' motion for leave to file a bill of complaint, particularly since the United States Department of Justice ("DOJ") has decided to stand idly by while Colorado violates federal law.

STATEMENT

1. The CSA establishes a comprehensive federal regime that makes it unlawful to "manufacture, distribute, . . . dispense, or possess" any controlled substance, except in a manner authorized by the CSA. 21 U.S.C. § 841(a)(1). Since enacting the CSA in 1970, Congress has listed marijuana as a controlled substance. *See id.* § 812(c). The manufacture, distribution, and possession with intent to distribute marijuana is a criminal offense, punishable as a felony under federal law. *Id.* § 841. Although Congress has amended the CSA several times, it has never removed marijuana from the list of controlled substances.

This Court confirmed Congress's authority to prohibit, at the federal level, the possession and sale of marijuana in *Gonzalez v. Raich*, 545 U.S. 1, 33 (2005). In that case, California, seeking to carve out an exemption from the federal drug laws for medical marijuana, argued that Congress had exceeded its constitutional authority in passing the CSA. *Id.* at 6, 15. This Court rejected that claim, explaining that Congress's authority to enact the CSA stemmed from the Commerce Clause because any state exemption to the CSA would "have a significant impact on both the supply and demand sides of the market for marijuana." *Id.* at 30. An "exemption" for a "significant segment of the [marijuana] market," the Court emphasized, "would undermine the orderly enforcement of the entire regulatory scheme." *Id.* at 28.

2. Although federal law unequivocally prohibits the manufacture, possession, or sale of marijuana, Colorado voters approved in the fall of 2012 Amendment 64, which provides that "the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol." Colo. Const. art. XVIII, § 16(1)(a). It also tasks the Colorado Department of Revenue with adopting regulations and implementing a licensing regime to govern the newly sanctioned marijuana industry in the State, *id.* § 16(5)(a), and authorizes the Colorado legislature to enact an excise tax on the sale of marijuana, *id.* § 16(5)(d).

DOJ responded by "inform[ing] the governors of [Colorado and another State] that it is deferring its right to challenge their legalization laws." Press Release, Department of Justice, *Justice Department Announces Update to Marijuana Enforcement Policy* (Aug.

29, 2013), *available at* http://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy. That same day, DOJ issued a formal memorandum to all United States Attorneys explaining that, "[i]n jurisdictions that have enacted laws legalizing marijuana," "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity." Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys (Aug. 29, 2013).

This acquiescence in Colorado's attempt to "legalize" marijuana cannot be reconciled with the DEA's subsequent recognition that the "[l]egalization of marijuana, no matter how it begins, will come at the expense of our children and public safety. It will create dependency and treatment issues, and open the door to use of other drugs, impaired health, delinquent behavior, and drugged drivers." U.S. Dep't of Justice, DEA, Demand Reduction Section, *The Dangers and Consequences of Marijuana Abuse* 6 (2014).

3. Following the Executive Branch's express abdication of its responsibility to enforce the CSA—a duly enacted and enforceable Act of Congress whose constitutionality has been sustained by this Court—two States neighboring Colorado, Nebraska and Oklahoma, filed the instant motion for leave to file a bill of complaint.

Invoking this Court's original jurisdiction, the plaintiff States allege that Amendment 64 violates the CSA and that this violation is causing harm to them and to their citizens. Among other injuries, the complaint avers that Amendment 64 has led to a signifi-

cant increase in the amount of marijuana that has crossed over the plaintiff States' borders, and that these incursions have forced them to devote more resources to drug-related law enforcement than they otherwise would, putting a strain on their police forces, overwhelming their criminal-justice systems, and draining their treasuries. *See* Complaint at 24–28, *Nebraska v. Oklahoma*, No. 144, Original (U.S. Dec. 18, 2014). They seek declaratory and injunctive relief.

SUMMARY OF ARGUMENT

The Constitution of the United States vests this Court with original jurisdiction over "all Cases . . . in which a State shall be Party." U.S. Const. art. III, § 2, cl. 2. There is accordingly no question that this Court has the authority to consider the bill of complaint tendered by the plaintiff States. And it should do so.

Although the Court may have discretion in some circumstances to decide whether to grant a State leave to file a bill of complaint, it has acknowledged that its original jurisdiction is "'obligatory . . . in appropriate cases.'" *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)). "Appropriate"—and therefore "obligatory"—cases exhibit two characteristics. *First*, this Court will exercise its original jurisdiction when there is no "alternative forum in which the issue tendered can be resolved." *Id.* at 76–77. *Second*, the Court weighs "the 'seriousness and dignity of the claim'" at issue and entertains cases in which the claims are sufficiently serious. *Id.* at 77 (quoting *Illinois v. City of Milwaukee*, 406 U.S. at 93). Both characteristics are present here.

There is no alternative forum that can hear the plaintiff States' challenge to Colorado's open violation

of federal law. No court but this Court has jurisdiction to hear this case, it is unclear whether any private party would have standing to challenge Colorado's law, and the Executive Branch has willfully ignored Colorado's violation of federal law.

Moreover, this Court's intervention is warranted when one State alleges that a neighboring State is acting in a manner that threatens the well-being of the plaintiff State's citizens. *See*, *e.g.*, *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Amendment 64 presents that type of threat: Colorado's law has already drained the plaintiff States' resources and imperiled the lives, health, and well-being of their citizens. These injuries will only continue to mount as long as Colorado authorizes the injection of a dangerous substance into the stream of commerce.

Colorado's unilateral decision to adopt a drug policy at odds with the CSA also impinges on the interests of all citizens and the United States in a uniform and coherent national drug policy.

ARGUMENT

This Court has original and *exclusive* jurisdiction over all justiciable cases or controversies between two or more States. U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). For that reason, over the last twenty-five years, this Court has granted twelve of the thirteen motions by a State to file a bill of complaint against another State.[2] It should similarly allow Nebraska and Oklahoma to file their complaint against Colorado.

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[2] *See Texas v. New Mexico*, 134 S. Ct. 1050 (2014) (mem.) (granting motion for leave to file a bill of complaint); *Florida v. Georgia*, 135 S. Ct. 471 (2014) (mem.) (same); *Montana v. Wyo-*

I. THE COMPLAINT FALLS WITHIN THIS COURT'S ORIGINAL JURISDICTION

Whatever discretion this Court might retain to decline to hear certain matters involving States as parties, its jurisdiction is "obligatory" in "appropriate" cases that exhibit two characteristics. *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992). *First*, the Court considers "the availability of an alternative forum in which the issue tendered can be resolved." *Id.* at 77. *Second*, the Court examines "'the nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim.'" *Ibid.* (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)). Each of these factors counsels in favor of allowing Nebraska and Oklahoma to proceed in this case.

A. There Is No Alternative Forum

Although this Court is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim,"

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ming, 552 U.S. 1175 (2008) (mem.) (same); *South Carolina v. North Carolina*, 552 U.S. 804 (2007) (mem.) (same); *New Jersey v. Delaware*, 546 U.S. 1028 (2005) (mem.) (same); *Alabama v. North Carolina*, 539 U.S. 925 (2003) (mem.) (same); *New Hampshire v. Maine*, 530 U.S. 1272 (2000) (mem.) (same); *Virginia v. Maryland*, 530 U.S. 1201 (2000) (mem.) (same); *Kansas v. Nebraska*, 525 U.S. 1101 (1999) (mem.) (same); *New Jersey v. New York*, 511 U.S. 1080 (1994) (mem.) (same); *Louisiana v. Mississippi*, 510 U.S. 941 (1993) (mem.) (same); *Connecticut v. New Hampshire*, 502 U.S. 1069 (1992) (mem.) (same); *Arkansas v. Oklahoma*, 546 U.S. 1166 (2006) (mem.) (denying motion for leave to file a bill of complaint). This Court dismissed a fourteenth motion after the States moved for dismissal under Supreme Court Rule 46. *See Texas v. Louisiana*, 515 U.S. 1184 (1995) (mem.).

Maryland v. Louisiana, 451 U.S. 725, 744 (1981) (internal quotation marks omitted), it has repeatedly concluded that "[i]t [is] proper to entertain [a] case" when it lacks "assurances . . . that a State's interests under the Constitution will find a forum for appropriate hearing and full relief," *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992). In this case, the plaintiff States' only recourse is through this Court. There is no other avenue, judicial or extrajudicial, through which they can pursue the relief they seek. That fact alone counsels strongly in favor of granting the plaintiff States leave to file their bill of complaint. *See*, *e.g.*, *Mississippi v. Louisiana*, 506 U.S. at 77–78.

1. The original-jurisdiction statute provides that "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a). As this Court explained in *Mississippi v. Louisiana*, the statutory "description of [its] jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases [between two States] to any other . . . court." 506 U.S. at 77–78. "This follows," the Court reasoned, "from the plain meaning of 'exclusive,'" which means to "'debar from possession.'" *Id.* at 78 (quoting *Webster's New International Dictionary* 890 (2d ed. 1942)). Nebraska and Oklahoma accordingly cannot bring suit against Colorado in any alternative judicial forum.

2. The plaintiff States' lack of an alternative judicial forum is particularly significant here, given two considerations.

a. *First*, in some cases, this Court has declined jurisdiction because of pending actions brought by private parties in other courts that address the same in-

terests that the States have. *See*, *e.g.*, *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam); *see also Louisiana v. Mississippi*, 488 U.S. 990, 991 (1988) (mem.) (White, J., dissenting) (noting that, "[h]ad Louisiana not intervened in [a] private action, denying leave to file would surely be indefensible").

No analogous pending litigation exists here. Indeed, it is unclear whether a private party would have standing to challenge Colorado's law. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662–63 (2013). Moreover, even if a private party had standing, he or she would not be able to represent the plaintiff States' sovereign interests. *See Wyoming v. Oklahoma*, 502 U.S. at 450, 452 (concluding that the case "was an appropriate one for the exercise of [the Court's] original jurisdiction," in part because "no pending action exists to which [the Court] could defer adjudication" and because "[e]ven if such action were proceeding, . . . Wyoming's interests would not be directly represented"); *see also Maryland v. Louisiana*, 451 U.S. at 743 (noting that the plaintiff States' "interests" were not "actually being represented by . . . the named parties" in another ongoing suit raising issues similar to those included in the States' complaint).

b. *Second*, the importance of allowing the plaintiff States to proceed in this forum is heightened by the futility of the States' pursuing extrajudicial governmental relief. One of the many virtues of our tripartite federal government is the potential for recourse from a coordinate branch when efforts to secure relief from one branch have proven unsuccessful. Litigants who unsuccessfully challenge a law in the judicial system may petition the legislature to change it or the Executive to alter its enforcement policy. *See*, *e.g.*, *Dep't of*

Homeland Sec. v. MacLean, 135 S. Ct. 913, 923 (2015). Here, however, neither Congress nor the Executive represents a realistic alternative to this Court as a means of relief.

Congress has already taken all necessary and appropriate action to preempt Colorado's law by enacting the CSA and by confirming repeatedly over the last forty years that marijuana should remain a controlled substance whose manufacture and distribution for recreational use is proscribed. There is no reason to believe that additional congressional enactments would be met with greater respect from Colorado. If Colorado chooses to disregard the laws Congress has duly enacted, and this Court declines to intervene, Congress's hands are tied.

The Executive Branch offers the plaintiff States no more help. As explained above, DOJ has already announced that it will not stand in the way of Colorado's decision to "legalize" marijuana and, in essence, license the wholesale and retail sale and distribution of marijuana in direct violation of the CSA.

To be sure, the Executive Branch suggests that "state and local law enforcement" is capable of "addressing marijuana-related activity." Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys 3 (Aug. 29, 2013). But state and local law-enforcement actions are wholly insufficient to enforce the CSA in Colorado because "[n]o part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337 (1816). Moreover, it is highly unlikely that Colorado would prosecute persons for pos-

sessing or selling marijuana in light of the State's choice to "legalize" the sale of marijuana.[3]

Moreover, the President's refusal to deploy DEA agents not only violates his constitutional obligation to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3, cl. 5, but also seriously undermines the effectiveness of the agency itself. This alone warrants the Court's attention.

From the outset, the DEA's mission has been to provide a uniform front to fight the "all-out global war on the drug menace." 5 U.S.C. app. p. 215. In fact, President Nixon created the DEA to unite "anti-drug forces under a single unified command" so that they could overcome the "distinct handicap" of "fragmented forces" "fighting the war on drug abuse." *Ibid.* Leaving enforcement up to the several States undercuts the purpose of the DEA to enable "drug law enforcement officers . . . to spend more time going after the traffickers and less time coordinating with one another." *Id.* at 216. The first federal piece of legislation focusing on marijuana—the Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970)—was enacted amidst "dissatisfaction with enforcement efforts at state and local levels." *Gonzalez v. Raich*, 545 U.S. 1, 11 (2005).

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[3] Indeed, between 2012 and 2013, the number of cases filed in Colorado state court alleging at least one marijuana offense plunged by 77 percent. Charges of petty marijuana possession plunged by 81 percent. *See* John Ingold, *Marijuana Case Filings Plummet in Colorado Following Legalization*, The Denver Post (Jan. 12, 2014), *available at* http://www.denverpost.com/marijuana/ci_24894248/marijuana-case-filings-plummet-colorado-following-legalization.

The Executive Branch's choice to stand down in the face of Colorado's open violation of federal drug laws contributes to the significant toll exacted by marijuana trafficking on the American public. Even in its memorandum announcing its policy to let Amendment 64 stand unchecked, DOJ recognized that "Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels." Memorandum from James M. Cole, *supra*, at 1. In light of the CSA, Colorado's efforts to funnel that revenue into its state coffers demand this Court's attention.

3. Arguing in support of this Court's original jurisdiction, Alexander Hamilton wrote that "there are many . . . sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the union." The Federalist No. 80, at 404 (Garry Wills ed., 1982). In his view, it was "essential to the peace of the Union" to entrust *this* tribunal—"having no local attachments" and being therefore "likely to be impartial"—with exclusive jurisdiction to "determin[e] causes between two states." *Id.* at 404–05.

Nebraska and Oklahoma have presented a compelling and legitimate claim against Colorado's flagrant violation of federal law—a violation that the Executive Branch has determined to ignore. It is hard to imagine a clearer case for the exercise of this Court's original jurisdiction.

B. The Plaintiff States' Sovereign Interests Are At Stake

Nebraska and Oklahoma's interests are also sufficiently grave to warrant the exercise of this Court's original jurisdiction and are akin to interests this Court has sought to protect in adjudicating many other original actions.

This Court has frequently exercised its original jurisdiction not only in cases involving boundary disputes, but also in cases "directly affecting" non-property "interests of a state." *Missouri v. Illinois*, 180 U.S. 208, 240–41 (1901). Rather than limiting its jurisdiction to particular subject matter, this Court has instead explained that it will grant States leave to file a complaint so long as they raise claims of sufficient "seriousness." *Illinois v. City of Milwaukee*, 406 U.S. at 93.

By facilitating, if not guaranteeing, the entrance of marijuana into the streams of interstate commerce, the plaintiff States allege, Colorado has forced them to deploy significant resources, both human and financial, in their efforts to protect their citizens' welfare. These claims are substantially similar to claims this Court has considered before in at least two types of cases. That similarity, in turn, demonstrates that the plaintiff States' allegations are sufficiently serious to invoke this Court's original jurisdiction.

1. *First*, the claims that Nebraska and Oklahoma wish to pursue are analogous to claims that have been raised in numerous original-jurisdiction cases sounding in nuisance. In these cases, the Court has recognized that its original jurisdiction may be invoked in cases between States where the policy choices of one State

threaten "the health and comfort of the inhabitants" of another State. *Missouri v. Illinois*, 180 U.S. at 241.[4]

a. In *New York v. New Jersey*, for example, this Court considered an original action that New York had filed seeking to enjoin New Jersey's discharge of sewage into Upper New York Bay. 256 U.S. 296, 298 (1921). Because New York averred that the discharge "gravely menaced" "[t]he health, comfort and prosperity of the people of the State," the Court agreed that the State was a "proper party to represent and defend such rights by resort to the remedy of an original suit in this court." *Id.* at 301–02.

Similarly, in *Missouri v. Illinois*, this Court considered Missouri's application for an injunction to restrain Illinois's discharge of raw sewage into the Mississippi River. 180 U.S. at 242–43. "It [wa]s true that no question of boundary [wa]s involved, nor of direct property rights belonging to the complainant state," this Court acknowledged. *Id.* at 241. Yet, the Court determined that it should exercise its original jurisdiction because the "health and comfort of the inhabitants of [Missouri were] threatened." *Id.*

b. Similar reasoning applies here. Colorado has deliberately authorized trafficking in a controlled substance that Congress and the Administrators of Drug

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[4] Nuisance suits are among the most common cases that this Court adjudicates pursuant to its original jurisdiction. *See*, *e.g.*, *New Jersey v. City of New York*, 283 U.S. 473 (1931) (seeking to enjoin New York from dumping garbage drifting onto New Jersey's beaches); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (seeking to enjoin Tennessee from releasing poisonous gas); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (seeking to enjoin Virginia from obstructing ships with a suspension bridge).

Enforcement have repeatedly identified as extremely dangerous. Indeed, since 1970, Congress has maintained that the drug "has a high potential for abuse" and "no currently accepted medical use in treatment in the United States," and that "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision." 21 U.S.C. § 812(b)(1). Neither Congress nor an Administrator has ever made the decision to remove the drug from the list of prohibited controlled substances despite several petitions urging the DEA to do so. *See*, *e.g.*, 37 Fed. Reg. 18,097 (Sept. 7, 1972); 66 Fed. Reg. 20,038-01 (Apr. 18, 2001); 76 Fed. Reg. 40,552-01 (July 8, 2011).

i. The dangers of marijuana are irrefutable. The DEA has found that (1) the "evidence overwhelmingly leads to the conclusion that marijuana has a high potential for abuse," 66 Fed. Reg. at 20,038; (2) marijuana use is "sufficient to create a hazard to . . . health or to the safety of other individuals or to the community," *id.* at 20,040; *see also* 76 Fed. Reg. at 40,553; and (3) even before States began "legalizing" marijuana, there was a "significant diversion of the substance from legitimate drug channels," 66 Fed. Reg. at 20,041; *see also* 76 Fed. Reg. at 40,553.

Moreover, several recent studies underscore the perils of the drug. One study shows that fatal car crashes involving marijuana tripled in the United States between 1999 and 2010. *See* Joanne E. Brady & Guohua Li, *Trends in Alcohol and Other Drugs Detected in Fatally Injured Drivers in the United States 1999–2000*, 179 Am. J. Epidemiology 692 (2014). Others show that long-term marijuana use beginning in an individual's teenage years has a negative effect on intellectual function. *See* Sarah Glynn, *Marijuana Can*

Lower IQ in Teens, Medical News Today (Sept. 19, 2012); Christian Nordqvist, *Teen Cannabis Use Linked to Lower IQ*, Medical News Today (Aug. 28, 2012). According to several more studies, marijuana use has been linked with depression, suicidal thoughts, schizophrenia, and juvenile crime. *See Drug Abuse: Drug Czar, Others Warn Parents That Teen Marijuana Use Can Lead to Depression*, Life Science Weekly (May 31, 2005); *Non-Medical Marijuana III: Rite of Passage or Russian Roulette?* (CASA White Paper, 2008). And, in June, the Administration's top addiction scientist emphasized that marijuana use has destructive effects on memory, cognition, and learning, and can lead to psychosis. *See* Nora D. Volkow et al., *Adverse Health Effects of Marijuana Use*, 370 New Eng. J. Med. 2219 (2014).

Other well-respected bodies agree with these findings as well as the conclusion that marijuana poses a grave public-health risk. The American Medical Association, for example, stated in 2013 that marijuana is a "dangerous drug and as such is a public health concern." Am. Med. Ass'n House of Delegates, *Policy Statement on Cannabis* 6 (2013). The American Academy of Pediatrics believes that "[a]ny change in the legal status of marijuana, even if limited to adults, could affect the prevalence of use among adolescents." Comm. on Substance Abuse & Comm. on Adolescence, *Legalization of Marijuana: Potential Impact on Youth*, 113 Pediatrics 1825, 1825–26 (2004). The American Academy of Child and Adolescent Psychiatry, too, is particularly "concerned about the negative impact of . . . marijuana on youth. Adolescents are especially vulnerable to the many adverse development, cognitive, medical, psychiatric, and addictive effects of mari-

juana." Am. Academy of Child & Adolescent Psychiatry, *Medical Marijuana Policy Statement* (June 11, 2012).

ii. Nor may Colorado plausibly contend that it has "hermetically sealed off from the larger interstate marijuana market" the marijuana that flows through it. *Raich*, 545 U.S. at 30. In *Raich*, this Court recognized that a similar contention was "a dubious proposition, and, more importantly, one that Congress . . . rationally rejected." *Ibid.* This Court explained that, through the CSA, Congress had created a "closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except [as] authorized by the CSA." *Id.* at 13. It concluded that the CSA foreclosed an "exemption" for any "segment of the [marijuana] market," as any state experimentation "would undermine the orderly enforcement of the entire regulatory scheme." *Id.* at 28. This conclusion was based on the commonsense notion that even one State's choice to "legalize" marijuana could affect all States, given the "likelihood that the high demand in the interstate market will draw . . . marijuana into that market." *Id.* at 19.

Marijuana sold in Colorado does not stay in Colorado. In 2013, there were 288 Colorado interdiction seizures of marijuana destined for other states compared to 58 in 2008—a 397 percent increase. *See* Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact* 90 (2014). And, indeed, Colorado's attorney general, John Suthers, expressly admitted that his State is "becoming a major exporter of marijuana." Kirk Siegler, *Colorado's Pot Industry Looks To Move Past Stereotypes*, NPR (Dec. 2, 2014), *available at* http://www.

npr.org/2014/12/02/367767955/colorados-pot-industry-looks-to-move-past-stereotypes. Marijuana purchased in Colorado can and will be transported elsewhere, including into Nebraska and Oklahoma. This is the very "commerce" that Congress is constitutionally empowered to regulate. *Raich*, 545 U.S. at 29–30. In the CSA, Congress has used that power to prohibit it.

* * *

In light of these dangers, Nebraska and Oklahoma's interest in guarding against the flow of marijuana across their borders is sufficiently serious to invoke this Court's original jurisdiction. Colorado's law—if left unchecked—"gravely menace[s]" "[t]he health, comfort and prosperity of the people" in its neighboring States. *New York v. New Jersey*, 256 U.S. at 301–02. Just as this Court intervened to stop States from discharging toxic chemicals, *see*, *e.g.*, *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, or dumping garbage, *see New Jersey v. City of New York*, 283 U.S. 473, this Court should intervene to stop the "pollution" that Colorado's effort to establish a market in illicit controlled substances is causing in Nebraska and Oklahoma, to the detriment of their citizens' health and welfare.

2. *Second*, this Court has recognized that it should intervene when the costs associated with the policy choices of one State are passed on to another.

a. In *Maryland v. Louisiana*, for example, the Court permitted eight States to challenge a Louisiana law—which imposed a tax on natural gas moving out of State, but largely exempted Louisiana consumers from paying the tax—on the ground that it violated the Supremacy Clause. 451 U.S. at 733. The challenging States argued that the law increased their and their

inhabitants' costs as purchasers of natural gas and interfered with the federal regulation of the transportation and sale of natural gas. *Id.* at 737–39, 746. This Court agreed that the exercise of its original jurisdiction was appropriate because the tax "implicat[ed] serious and important concerns of federalism" and had adverse "ramifications for" the plaintiff States. *Id.* at 744–45.

Similarly, in *Wyoming v. Oklahoma*, this Court allowed Wyoming to challenge an Oklahoma law requiring coal-fired electric utilities in Oklahoma to burn a mixture containing at least 10 percent Oklahoma-mined coal. 502 U.S. at 442–45. Wyoming alleged that Oklahoma utilities had reduced their purchases of Wyoming coal, costing the State hundreds of thousands of dollars in severance taxes annually. *Id.* This Court permitted the suit, reasoning that "[i]t [was] beyond peradventure that Wyoming ha[d] raised a claim of sufficient 'seriousness and dignity'" because "Oklahoma, acting in its sovereign capacity, [had] passed the Act, which directly affect[ed] Wyoming's ability to collect severance tax revenues, an action undertaken in its sovereign capacity." *Id.* at 451 (citation omitted).

b. As in these cases, Colorado's law ultimately passes costs on to other States and their citizens. Colorado stands to profit by taxing the marijuana sold within its borders, while the plaintiff States are bound to sustain considerable costs to counteract illegal marijuana trafficking that flows across their borders. Indeed, according to the plaintiff States, the steadily increasing influx of marijuana from Colorado has forced them to pump more money into law enforcement and criminal justice than they otherwise would, leaving them fewer funds with which to tackle other pressing

matters of public health and welfare. *See* Complaint at 24–28, *Nebraska v. Colorado*, *supra*; Brief in Support of Motion for Leave To File Complaint at 8–9, 11, 13–14, *Nebraska v. Colorado*, *supra*. This kind of conflict directly "implicate[s] the unique concerns of federalism forming the basis of [this Court's] original jurisdiction." *Maryland v. Louisiana*, 451 U.S. at 743.

c. In deciding whether to exercise original jurisdiction, the Court appropriately proceeds not only by examining the consequences of the Colorado law on the plaintiff States, but also "'by considering . . . what effect would arise if not one, but many or every, State adopted similar legislation.'" *Wyoming v. Oklahoma*, 502 U.S. at 453–54 (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)). The time to assess whether the CSA preempts States from aiding and abetting the marijuana trade themselves is now, before more States attempt to "legalize" the production and sale of marijuana, with all the attendant adverse consequences.

II. THE COMPLAINT PRESENTS AN IMPORTANT QUESTION THAT SHOULD BE RESOLVED BY THIS COURT

Although the question whether Nebraska and Oklahoma have properly invoked the Court's original jurisdiction is distinct from the question whether the plaintiff States will prevail on the merits, this Court has previously disposed of similar motions on grounds going to the merits. *See*, *e.g.*, *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). A brief discussion of the reasons the plaintiff States should ultimately succeed on the merits is therefore warranted.

1. The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which

shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. For that reason, any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is void. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Amendment 64 poses this type of "obstacle."

a. *Raich* squarely forecloses any argument that Colorado's affirmative efforts to establish a marijuana market throughout the State can co-exist with the proscriptions of the CSA. In enacting the CSA, Congress sought "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Raich*, 545 U.S. at 12–13. Those parts of Amendment 64 that authorize the Colorado state government to help establish a "legal" market for an illegal controlled substance undermine these congressional objectives completely.

Moreover, by licensing the sale of marijuana, Colorado's law directly and affirmatively conflicts with the CSA. Colorado's law contemplates acts by state officials and others that cannot be carried out without violating federal law. *See* 21 U.S.C. § 841 (declaring it unlawful to "manufacture, distribute, or dispense, or possess" marijuana "with intent to manufacture, distribute, or dispense" the drug); *id*. § 846 (subjecting to certain penalties persons who "attempt or conspir[e]" to violate the CSA); 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commis-

sion, is punishable as a principal"). Indeed, to carry out the Colorado law, state officials are required to aid, abet, and otherwise willfully participate in violations of federal law.

b. The current Administration's decision to turn a blind eye toward Colorado's rampant violation of federal law does not make that violation any less onerous or actionable. Indeed, even when the federal government has not acted to diligently enforce its laws, this Court has held that States "may not pursue policies that undermine federal law." *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012). Yet that is exactly what Colorado has done here. This Court should intervene to vindicate Congress's interest in a uniform drug policy.

2. Persons of good faith may debate the wisdom of federal drug policy, including the continued classification of marijuana as a controlled substance. But so long as the CSA remains on the books, those debates must be held at the federal level; and unless and until Congress or the DEA acts to reclassify marijuana, it will remain, as a matter of federal law, a dangerous drug that cannot lawfully be manufactured, distributed, or sold anywhere in the United States. Simply put, Colorado has no discretion or authority to depart from that determination.

In our system of dual sovereignty, some policy issues are left to the States; some are the subject of federal-state cooperation; and still others are reserved exclusively to the federal government. The federal government made the choice in 1970 that a uniform, comprehensive, and consistent *national* approach to controlled substances was necessary. That choice has been ratified by this Court, *Raich*, 545 U.S. at 33, and

must be respected by both the States and the citizenry. Principles of federalism, properly understood, therefore support the plaintiff States' suit against Colorado.

CONCLUSION

The motion for leave to file a bill of complaint should be granted.

Respectfully submitted.

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