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 Complaint

REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

Plaintiff States, in support of their Motion for Leave to File Complaint, submit the following:

I. ARGUMENT

A. Plaintiff States are Challenging Colorado's Violation of Federal Law, Not its Decriminalization of Marijuana.

The question here is whether a State can affirmatively facilitate the violation of federal law. To be sure, Plaintiff States are not challenging Colorado's *decriminalization* of marijuana. Plaintiff States agree that Colorado is free to make policy decisions that part ways with its neighboring states. Rather, Plaintiff States challenge only Colorado's creation of a regulatory scheme that affirmatively facilitates the violation of federal law. In accordance with Amendment 64, Colo. Const. art. XVIII, § 16, Colorado licenses the cultivation, preparation, packaging, and sale of marijuana and then profits from the illegal marijuana market.

Colorado's licensure of the production, distribution, and sale of a drug expressly proscribed by federal law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Michigan Canners & Freezers v. Agricultural Bd.*, 467 U.S. 461, 478 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). A state's disagreement with national drug control policy does not

entitle that state to pursue policies that directly undermine federal law. *See Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012). This Court must consider "what effect would arise if not one, but many or every, state adopted similar legislation." *Wyoming v. Oklahoma,* 502 U.S. 437, 453-54 (1992) (quoting *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989)). And Colorado's theory does not just apply to marijuana – it would allow states to undermine federal prohibitions on any Schedule I controlled substance. Here, that result would effectively be the nullification of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq*.

As long as the federal government possesses the power to establish comprehensive national drug policy, Colorado cannot roguishly facilitate the dismantling of that policy. The current Presidential Administration's non-enforcement policy cannot be viewed as a waiver of Colorado's obligation to abide by federal law. Brief in Opp. at 8-14.

The Presidential Administration's failures to enforce the law did not transform Colorado into a large-scale hub for the industrial production and distribution of illegal marijuana. Rather, Colorado did so by its own actions. Further, this failure does not authorize Colorado to "undermine the orderly enforcement" of an act of Congress. *Gonzales v. Raich*, 545 U.S. 1, 28 (2005).

Colorado has established itself as a geographic region in which marijuana may be produced on an industrial scale. But it has done so within a larger

interstate market in which this in-demand product is illegal. In doing so, Colorado has guaranteed a torrent of illegal drugs will flow into and through Plaintiff States. *See The Legalization of Marijuana in Colorado, The Impact, Volume 2, at Section 7: Diversion of Colorado Marijuana,* Rocky Mountain High Intensity Drug Trafficking Area (Aug. 2014), *available at* http://tinyurl.com/ka7qufu.

Plaintiff States should not become corridors for trafficking federal contraband because of Colorado's choice to participate in and profit from the illegal marijuana market. Given this direct assault on the health and welfare of Plaintiff States' citizenry, Plaintiff States submit Colorado's illegal action carries such seriousness as to invoke this Court's original jurisdiction.

It is unsurprising that Colorado wishes to delay ultimate resolution of these purely legal questions by this Court. Colorado generated approximately $44 million in revenue in 2014 by facilitating these violations of federal law. Coloradoan, *Colorado collects $44M in 2014 recreational pot taxes* (Feb. 11, 2015), *available at* http://tinyurl.com/o39kbf4.

Colorado proposes Plaintiff States simply rely on two existing lawsuits filed in federal district court in Colorado. Brief in Opp. at 21-24. However, as noted by Colorado, it is unclear whether those parties have standing to challenge Colorado's law. Brief in Opp. at 22. Even if these parties have standing, they cannot represent Plaintiff States' sovereign interests. *See*

Wyoming v. Oklahoma, 502 U.S. at 450, 452 (concluding "Wyoming's interests would not be directly represented" by private parties); *see also Maryland v. Louisiana*, 451 U.S. 725, 743 (1981) (none of the plaintiff States' interests were "directly represented" in another ongoing suit raising similar issues).

For example, in *Smith v. Hickenlooper*, No. 15-cv-462 (D. Colo. Mar. 5, 2015), Sheriff Hayward of Deuel County, Nebraska, Sheriff Overman of Scotts Bluff County, Nebraska, and Sheriff Jenson of Cheyenne County, Nebraska, are not state officials but, rather, are county officials elected by the voters of each respective county. *See* Neb. Rev. Stat. §§ 23-1701 *et seq*. Thus, State interests are not "actually being represented by one of the named parties to the suit." *Maryland v. Louisiana*, 451 U.S. at 743.

For the reasons outlined above, Plaintiff States' claim is of the type and magnitude deserving of the Court's attention and the other lawsuits cannot vindicate Plaintiff States' sovereign interests.

B. Plaintiff States' Injuries are Directly Linked to Colorado's Affirmative Facilitation of the Violation of Federal Law and are Redressable by this Action.

Plaintiff States are directly injured by Colorado's facilitation of the free production of marijuana under the guise of "regulation" which has resulted in an influx of harmful, illegal marijuana being trafficked from Colorado into its neighbors.

If Plaintiff States' requested relief is granted, Colorado would lose its ability to participate in and profit from the illegal marijuana market. Colorado does not, and cannot, dispute that significant amounts of Colorado marijuana are being diverted into Plaintiff States. *See* Kirk Siegler, *Colorado's Pot Industry Looks To Move Past Stereotypes*, NPR (Dec. 2, 2014), *available at* http://tinyurl.com/q9nzhjm (Colorado's former Attorney General admitting Colorado is "becoming a major exporter of marijuana"). Colorado does not, and cannot, dispute that this diversion of Colorado marijuana drains Plaintiff States' treasuries and stresses Plaintiff States' criminal justice and law enforcement systems. *See The Legalization of Marijuana in Colorado, The Impact, Volume 2, at Section 7: Diversion of Colorado Marijuana,* Rocky Mountain High Intensity Drug Trafficking Area (Aug. 2014), *available at* http://tinyurl.com/ka7qufu. Plaintiff States recognize that illegal marijuana will continue to exist in their jurisdictions even if Colorado's law is stricken, but logic (and pre-Amendment 64 trafficking statistics) dictates that a return to the status quo ante would eliminate Colorado's present status as a sanctuary for industrial-scale marijuana production, thereby substantially diminishing the volume of illegal marijuana trafficked to its neighboring states.

Colorado Attorney General Cynthia H. Coffman agrees that "[i]llegal drug dealers are simply hiding in plain sight, attempting to use the legalized market as cover." *See Thirty-Two Person "Legal" Marijuana Drug Trafficking Conspiracy Dismantled,* Colorado

Department of Law (March 26, 2015), *available at* http://tinyurl.com/oyu4sbk. In fact, "[m]ore and more criminals are moving to Colorado to exploit our state's drug laws, sell marijuana throughout the United States, and line their pockets with drug money," said Keven R. Merrill, Assistant Special Agent in Charge for the Denver Field Division of the Drug Enforcement Administration. *Id.*

This is hardly a surprise – as recently as 2011, the U.S. Department of Justice shared the view that creation of a marijuana licensing scheme "authorizes conduct contrary to federal law and threatens the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances." *Pack v. Superior Court*, 199 Cal. App. 4th 1070, 1094 (Cal. App. 2d Dist. 2011) (quoting U.S. Attorney Melinda Haag, Letter to Oakland City Attorney John A. Russo (Feb. 1, 2011)); *see also* Letter from U.S. Attorney Jenny A. Durkan and U.S. Attorney Michael C. Ormsby to Washington Governor Christine Gregoire (Apr. 14, 2011), *available at* http://tinyurl.com/kezrg5z (notifying Washington that the proposed licensing scheme would undermine federal law and that others such as landlords and financiers should also know that facilitating this conduct violates federal law).

To fix this problem, Plaintiff States are not, as Colorado suggests, asking this Court to invalidate the Cole and Ogden Memos or require Colorado to criminalize marijuana. Brief in Opp. at 26-27. Plaintiff States are simply asking this Court to strike down a

preempted state law that is directly causing their injury.

Colorado has facilitated the interstate market for marijuana under the guise of regulation. It is a fair and reasonable demand on the part of Plaintiff States that their states not become corridors for trafficking federal contraband because Colorado chooses to violate federal law.

C. This Court's *Armstrong* Decision Should Not Foreclose this Action.

Plaintiff States recognize that "the Supremacy Clause is not the source of any federal rights," "does not create a cause of action," and "is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Armstrong v. Exceptional Child Ctr., Inc.,* 575 U.S. ___, at 3 (2015). Nonetheless, the "federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Id.* at 5. Plaintiff States are requesting injunctive relief.

There is precedent to allow an original jurisdiction action under the Supremacy Clause. In *Maryland v. Louisiana*, 451 U.S. 725 (1981), several states sued Louisiana challenging the constitutionality of the "first-use" tax that Louisiana imposed on natural gas imported into the state. The Court recognized the well-settled principle that "a state statute is void to the extent it conflicts with a federal statute – if, for

example, 'compliance with both federal and state regulations is a physical impossibility' . . . or where the law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. at 747 (citations omitted). The Court accordingly held that the Louisiana law "violate[d] the Supremacy Clause" and enjoined its further enforcement. *Id*. at 760.

The Colorado scheme at issue here is no less violative of the Supremacy Clause. The CSA and Colorado's scheme are fundamentally at odds. Colorado's scheme frustrates the purpose and intent of the CSA, and there is, at the very least, "an imminent possibility of collision" between the CSA and Colorado's scheme. This Court has the inherent equitable authority to block Colorado's illegal action, and *Armstrong* should not foreclose this original jurisdiction action.

D. This Case Presents, Exclusively, Questions of Law.

Plaintiff States are requesting a declaration and injunction, not damages. This case presents, exclusively, questions of law and can be expeditiously resolved by this Court on summary judgment. Plaintiff States join Colorado's request that this Court set a schedule for filing dispositive motions after granting leave to file the complaint.

II. Conclusion

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

Respectfully submitted,

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