No. 144, Original

In The
Supreme Court of the United States

STATES OF NEBRASKA AND OKLAHOMA,

Plaintiffs,

v.

STATE OF COLORADO,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT

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MOTION FOR LEAVE TO FILE COMPLAINT

COME NOW the States of Nebraska and Oklahoma, by and through their Attorneys General, and move the Court for leave to file the accompanying Complaint. The grounds for the Motion are set out in

the accompanying Brief in Support of Motion for Leave to File Complaint.

Respectfully submitted,

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COMPLAINT

COME NOW the States of Nebraska and Oklahoma ("Plaintiff States"), by and through their Attorneys General, and petitions the Court as follows:

1. The jurisdiction of the Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States. The Court's jurisdiction in this case is exclusive. 28 U.S.C. § 1251(a).

2. This Court is the sole forum in which Nebraska and Oklahoma may enforce their rights under the Supremacy Clause, Article VI of the U.S. Constitution.

3. In our constitutional system, the federal government has preeminent authority to regulate interstate and foreign commerce, including commerce involving legal and illegal trafficking in drugs such as marijuana. This authority derives from the United States Constitution, acts of Congress, including the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("the CSA"), and international treaties, conventions, and protocols to which the United States is signatory.

4. The nation's anti-drug laws reflect a well-established – and carefully considered and constructed – balance of national law enforcement, foreign relations, and societal priorities. Congress has assigned to the United States Department of Justice ("DOJ") and the United States Drug Enforcement Administration ("DEA"), along with numerous other federal agencies, the task of enforcing and administering these anti-drug laws and treaty obligations. In administering these laws, the federal agencies balance the complex – and often competing – objectives that animate federal drug law and policy. Although states may exercise their police power in a manner which has an effect on drug policy and trafficking, a state may *not* establish its own policy that is directly counter to federal policy against trafficking in controlled substances or establish a state-sanctioned system for possession, production, licensing, and distribution of drugs in a manner which interferes with the federal drug laws that prohibit possession, use, manufacture, cultivation, and/or distribution of certain drugs, including marijuana. *See* 21 U.S.C.

§ 903. The Constitution and the federal anti-drug laws do not permit the development of a patchwork of state and local pro-drug policies and licensed-distribution schemes throughout the country which conflict with federal laws.

5. Despite the preeminent federal authority and responsibility over controlled substances including marijuana, marijuana extracts, and marijuana-infused products (hereinafter collectively referred to as "marijuana"), the State of Colorado recently enacted and is now implementing Amendment 64, a sweeping set of provisions which are designed to permit "Personal use of marijuana" and the "Lawful operation of marijuana-related facilities," and further to require the "Regulation of marijuana" provided that "Such regulations shall not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impractical." *See* Article XVIII, Section 16.(3), Section 16.(4) and Section 16.(5).

6. Amendment 64 and its resultant statutes and regulations are devoid of safeguards to ensure marijuana cultivated and sold in Colorado is not trafficked to other states, including Plaintiff States.

7. In passing and enforcing Amendment 64, the State of Colorado has created a dangerous gap in the federal drug control system enacted by the United States Congress. Marijuana flows from this gap into neighboring states, undermining Plaintiff States' own

marijuana bans, draining their treasuries, and placing stress on their criminal justice systems.

Federal Authority and Law Governing Controlled Substances and Other Drugs

8. The Supremacy Clause of the Constitution mandates 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.

9. The Constitution affords the federal government the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I § 8, cl. 3. The Constitution further affords the federal government the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce." U.S. Const., Art. I § 8, cl. 18. As such, the federal government has broad authority to regulate the status of drugs within the boundaries of the United States.

10. The U.S. Congress has exercised its authority to do so. The CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242-1284, is a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." The

CSA places various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids) into one of these five classes, called "Schedules," based on the substance's medical use, potential for abuse, and safety or dependence liability. 21 U.S.C. §§ 811-812. Each Schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. §§ 821-830. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping. *Id.*; 21 C.F.R. § 1301 *et seq.* (2013).

11. In adopting the CSA, Congress stated its particular concern with the need to prevent the diversion of drugs from legitimate to illicit channels. H. R. Rep. No. 91-1444, pt. 2, p. 22 (1970).

12. Marijuana was classified by Congress as a Schedule I drug. 21 U.S.C. § 812(c). Marijuana is therefore subject to the *most* severe restrictions contained within the CSA. Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safe use in medically supervised treatment. 21 U.S.C. § 812(b)(1).

13. While the statute provided for the periodic updating of the five schedules, Congress itself made the initial classifications. It identified 42 opiates, 22 opium derivatives, and 17 hallucinogenic substances as Schedule I drugs. 84 Stat. 1248. Congressional

intent is clear: by classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, Congress *mandated* that the manufacture, distribution, or possession of marijuana be a criminal offense, with the sole exception being the use of the drug as part of a United States Food and Drug Administration pre-approved research study. 21 U.S.C. §§ 823(f), 841(a)(1), 844(a).

14. The Schedule I classification of marijuana was merely one of many essential parts of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the *intrastate* activity identified by Congress were regulated as well as the interstate and international activity. Congress specifically included marijuana intended for intrastate consumption in the CSA because it recognized the likelihood that high demand in the interstate market would significantly attract such marijuana. *See, e.g.*, 21 U.S.C. § 801(3)-(6).

15. The diversion of marijuana from Colorado contradicts the clear Congressional intent, frustrates the federal interest in eliminating commercial transactions in the interstate controlled-substances market, and is particularly burdensome for neighboring states like Plaintiff States where law enforcement agencies and the citizens have endured the substantial expansion of Colorado marijuana.

16. Although various factors contribute to the ultimate sentence received, the simple possession of marijuana generally constitutes a misdemeanor

offense with a maximum penalty of up to one year imprisonment and a minimum fine of $1,000. 21 U.S.C. § 844(a). Conversely, the cultivation, manufacture, or distribution of marijuana, or the possession of marijuana with the intent to distribute, is subject to significantly more severe penalties. Such conduct generally constitutes a felony with a maximum penalty of up to five-years' imprisonment and a fine of up to $250,000. 21 U.S.C. § 841(b).

17. It also is unlawful to conspire to violate the CSA, 21 U.S.C. § 846; to knowingly open, lease, rent, use, or maintain property for the purpose of manufacturing, storing, or distributing controlled substances, 21 U.S.C. § 856(a)(1); and to manage or control a building, room, or enclosure and knowingly make it available for the purpose of manufacturing, storing, distributing, or using controlled substances. 21 U.S.C. § 856(a)(2). Federal law further criminalizes aiding and abetting another in committing a federal crime, conspiring to commit a federal crime, assisting in the commission of a federal crime, concealing knowledge of a felony from the United States, and laundering the proceeds of CSA offenses. 18 U.S.C. §§ 2-4, 371, 1956.

18. Furthermore, the CSA provides for plenary seizure and forfeiture as "contraband" of "[a]ll controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of [the CSA]." 21 U.S.C. § 881(f). The CSA further provides that "[a]ll species

of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of [the CSA] . . . may be seized and summarily forfeited to the United States. 21 U.S.C. § 881(g). By virtue of these provisions, state and local law-enforcement officers have regularly exercised the power to seize marijuana, marijuana products, and marijuana plants found in their jurisdictions for summary forfeiture to the United States by delivery to Special Agents of the DEA or the Federal Bureau of Investigation.

19. Admittedly, by enacting the CSA, Congress did not intend to preempt the entire field of drug enforcement. Under 21 U.S.C. § 903, the CSA shall not "be construed" to "occupy the field" in which the CSA operates "to the exclusion of any [s]tate law on the same subject matter which would otherwise be within" the state's authority. Rather, Section 903 provides that state laws are preempted only when "a positive conflict" exists between a provision of the CSA and a state law "so that the two cannot consistently stand together." *Id.*

20. Given the directly contradictory provisions in Colorado Amendment 64 and the CSA, a "positive conflict" clearly exists and "the two cannot consistently stand together."

21. Colorado Amendment 64 obstructs a number of the specific goals which Congress sought to achieve with the CSA. By permitting, and in some cases requiring, the cultivation, manufacture, packaging-for-distribution, and distribution of marijuana, Amendment

64 undercuts Congressional edicts, including the Congressional finding that such distribution has a "substantial and detrimental effect on the health and general welfare of the American people," 21 U.S.C. § 801(2); that although local drug trafficking may itself not be "an integral part" of the interstate flow of drugs, it nonetheless has "a substantial and direct effect upon interstate commerce," § 801(3); and that "*[f]ederal control of the intrastate incidents" of drug trafficking "is essential to the effective control of the interstate incidents of drug trafficking.*" § 801(6)) (emphasis added).

22. Colorado state and local officials who are now required by Amendment 64 to support the establishment and maintenance of a commercialized-marijuana industry in Colorado are violating the CSA. The scheme enacted by Colorado for retail marijuana is contrary and obstructive to the CSA and U.S. treaty obligations. The retail marijuana laws embed state and local government actors with private actors in a state-sanctioned and state-supervised industry which is intended to, and does, cultivate, package, and distribute marijuana for commercial and private possession and use in violation of the CSA (and therefore in direct contravention of clearly stated Congressional intent). It does so without the required oversight and control by the DOJ (and DEA) that is *required* by the CSA – and regulations adopted pursuant to the CSA – for the manufacture, distribution, labeling, monitoring, and use of drugs and drug-infused products which are listed on lesser Schedules. *See* 21 C.F.R. Part 1300.

Treaties and Conventions Governing Controlled Substances and Other Drugs

23. In addition to violating the CSA, Amendment 64 further violates a number of international treaties to which the United States is a party.

24. Through its exclusive Constitutional power to conduct foreign policy, the United States is a party to international treaties and conventions under which it has agreed to control trafficking in drugs and psychotropic substances, such as marijuana, throughout the United States, including Colorado. These treaties are adopted by Congress and carry the same authority as federal law.

25. The three principal treaties or conventions on control of drugs to which the United States is a party and pursuant to which it has agreed to take steps to control drug trafficking, including trafficking in marijuana, are: (1) the Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol ("Single Convention"); (2) the Convention on Psychotropic Substances of 1971 ("1971 Convention"); and (3) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 ("1988 Convention").

26. The U.S. became a party to the Single Convention on November 1, 1972. Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol, https://www.unodc.org/pdf/convention_1961_en.pdf. The Single Convention specifically includes "cannabis" or marijuana. The parties to the Single

Convention, including the United States, resolved to protect against drug addiction and that the parties "[s]hould do everything in their power to combat the spread of the illicit use of drugs." Single Convention at Resolution III. The Single Convention also requires that the parties to it be "[c]onscious of their duty to prevent and combat the evil" of drug addiction, "[d]esiring to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use, and providing for continuous international co-operation and control for the achievement of such aims and objectives." *Id.* at Preamble. The Single Convention also established an International Narcotics Control Board, which may take certain steps to ensure execution of the provisions of the Convention by its signatories. *See* Single Convention, Article 14.

27. Under the Single Convention, a party shall adopt any special measures of control which the party determines to be necessary in regard to the particularly dangerous properties of a covered drug; and if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting public health and welfare, a "Party shall . . . prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only." *See* Single Convention, Article 2, 5(a) and (b). The United States adopted the Controlled Substances Act in part because the United

States had become a party to the Single Convention and was therefore committed to its design to establish effective control over international and domestic traffic in controlled substances. 21 U.S.C. § 801(7).

28. The United States became a party to the 1971 Convention on April 16, 1980. 1971 Convention on Psychotropic Substances, https://www.unodc.org/pdf/convention_1971_en.pdf. The 1971 Convention does not specifically define cannabis or marijuana but includes it by reference to "psychotropic substance," a classification which includes tetrahydrocannabinol ("THC"), the psychoactive ingredient in marijuana, as a "Schedule I" substance. *See* 1971 Convention, Article I (e) and Schedule I. Per Resolution I of the 1971 Convention, States are invited, "to the extent they are able to do so, to apply provisionally the measures of control provided in the [1971 Convention] pending its entry into force for each of them." *See* 1971 Convention, Resolution I.

29. The 1971 Convention seeks to prevent and combat abuse of certain psychotropic substances, including THC, and the illicit traffic of them. *Id.* at Preamble. In amending the CSA in connection with the United States becoming a party to the 1971 Convention, Congress declared that it "has long recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances for non-scientific and non-medical purposes, and has provided strong and effective legislation to control illicit trafficking and to regulate legitimate uses of psychotropic substances in this country. Abuse

of psychotropic substances has become a phenomenon common to many countries, however, and is not confined to national borders. It is therefore essential that the United States cooperate with other nations in establishing effective controls over international traffic in such substances." 21 U.S.C. § 801a.

30. The United States became a party to the 1988 Convention on February 20, 1990. 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, http://www.unodc.org/pdf/convention_1988_en.pdf. The purpose of the 1988 Convention is to promote cooperation among countries to address more effectively the various aspects of illicit traffic of narcotic drugs and psychotropic substances having international dimension, including "cannabis." The 1988 Convention mandates that countries which are signatory to the Convention "shall take necessary measures, including legislative and administrative measures, in carrying out the party's obligations under the 1988 Convention. *See* 1988 Convention, Article 2, 1.

Colorado's Amendment 64

31. Amendment 64 was passed as a ballot initiative in Colorado at the biennial regular election held on November 6, 2012. The voters in Colorado approved the Amendment, resulting in its adoption as an amendment to Article XVIII of the Colorado Constitution on December 10, 2012.

32. Section 1 of Article XVIII includes among its "purposes and findings" that "In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare 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." Section 1 further includes a finding and declaration "that marijuana should be regulated in a manner similar to alcohol" to the effect that: (1) selling, distributing, or transferring marijuana to individuals of twenty-one years of age or older is legal; (2) "taxpaying business people" will be permitted to conduct sales of marijuana; and (3) marijuana offered for sale must be labeled according to state regulations and are subject to additional state regulations.

Section 4 of Amendment 64

33. Section 4 of Amendment 64 is entitled "LAWFUL OPERATION OF MARIJUANA-RELATED FACILITIES." It provides that "*Notwithstanding any other provision of law*" certain acts "are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older." Amendment 64, Section 4 (emphasis added). The acts which Section 4 deems lawful notwithstanding any other provision of law – including the CSA – are:

- "Manufacture, possession, or purchase of marijuana accessories or the sale of marijuana accessories to a person who is twenty-one years of age or older";
- "Possessing, displaying, or transporting marijuana or marijuana products; purchase of marijuana from a marijuana cultivation facility; purchase of marijuana or marijuana products from a marijuana product manufacturing facility; or sale of marijuana or marijuana products to consumers, if the person conducting the activities described in this paragraph has obtained a current, valid license to operate a retail marijuana store or is acting in his or her capacity as an owner, employee or agent of a licensed retail marijuana store";
- "Cultivating, harvesting, processing, packaging, transporting, displaying, or possessing marijuana; delivery or transfer of marijuana to a marijuana testing facility; selling marijuana to a marijuana cultivation facility, a marijuana product manufacturing facility, or a retail marijuana store; or the purchase of marijuana from a marijuana cultivation facility, if the person conducting the activities described in this paragraph has obtained a current, valid license to operate a marijuana cultivation facility or is acting in his or her capacity as an owner, employee, or agent of a licensed marijuana cultivation facility";

- "Packaging, processing, transporting, manufacturing, displaying, or possessing marijuana or marijuana products; delivery or transfer of marijuana or marijuana products to a marijuana testing facility; selling marijuana or marijuana products to a retail marijuana store or a marijuana product manufacturing facility; the purchase of marijuana from a marijuana cultivation facility; or the purchase of marijuana or marijuana products from a marijuana product manufacturing facility, if the person conducting the activities described in this paragraph has obtained a current, valid license to operate a marijuana product manufacturing facility or is acting in his or her capacity as an owner, employee, or agent of a licensed marijuana product manufacturing facility";

- "Possessing, cultivating, processing, repackaging, storing, transporting, displaying, transferring or delivering marijuana or marijuana products if the person has obtained a current, valid license to operate a marijuana testing facility or is acting in his or her capacity as an owner, employee, or agent of a licensed marijuana testing facility"; and

- "Leasing or otherwise allowing the use of property owned, occupied or controlled by any person, corporation or other entity for any of the activities conducted lawfully in accordance with . . . this subsection."

34. Section 4 of Amendment 64 permits and enables the operation of marijuana-cultivation facilities, marijuana- and marijuana-products-manufacturing facilities, licensed marijuana-testing facilities, licensed retail establishments to sell marijuana; the transportation, distribution, advertising, packaging and sales in support of these licensed operations; leasing, renting, and maintaining property for the purpose of such trafficking; and/or aiding and abetting another to do so.

Section 5 of Amendment 64

Section 5 of Amendment 64 is entitled "REGULATION OF MARIJUANA." It provides, among other things, that "Not later than July 1, 2013, the [Department of Revenue] shall adopt regulations necessary for implementation of this section. Such regulations *shall not prohibit the operation of marijuana establishments*, either expressly or through regulations that make their operation unreasonably impracticable. Amendment 64, Section 5 (emphasis added). The regulations that Section 5 mandates, despite their express conflict with the CSA and the treaty obligations of the United States "shall" include, among others, the following:

- "Procedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment . . . ";

- "A schedule of application, licensing and renewal fees . . . ";
- "Qualifications for licensure . . . ";
- "Security requirements for marijuana establishments";
- "Labeling requirements for marijuana and marijuana products sold or distributed by a marijuana establishment"; and
- "Health and safety regulations and standards for the manufacture of marijuana products and the cultivation of marijuana."

35. Section 5 of Amendment 64 prohibits state regulations which would ban commercial marijuana establishments of the type permitted and enabled by Section 4, requires the issuance by state employees of licenses to operate marijuana establishments, requires regulation by state employees of advertising in support of marijuana sales, and requires state employees to develop health and safety regulations and standards for the manufacture of marijuana products.

Colorado Legislation Implementing Amendment 64

36. In order to fully implement Colorado Amendment 64, the Colorado General Assembly adopted several bills during the 2013 legislative session, which were signed into law on May 28, 2013.

37. Colorado House Bill 13-1317, among other things, provided for a state marijuana enforcement division and gives the division the authority to regulate medical marijuana and retail marijuana. The law also created a regulatory framework for retail marijuana. The law further requires the state licensing authority to promulgate rules as required by Amendment 64, and authorizes the state licensing authority to promulgate other rules *intended to support the commercialization of marijuana cultivation, distribution, and sale under state auspices* with the assistance of the department of public health and environment. 2013 CO H.B. 1317.[1]

38. Colorado Senate Bill 13-283, as passed, implements certain provisions of Amendment 64. Among its provisions, the bill: (1) requires recommendations to the General Assembly regarding criminal laws which need to be revised to ensure statutory compatibility with Amendment 64; (2) designates a relatively small number of specified locations where marijuana may *not* be consumed; (3) allows retail marijuana stores to deduct certain business expenses from their state income taxes that are prohibited by federal tax law; and (4) authorizes Colorado to

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[1] *Concerning the Recommendations Made in the Public Process for the Purpose of Implementing Retail Marijuana Legalized by Section 16 of Article XVIII of the Colorado Constitution, and, in Connection Therewith, Making an Appropriation, as amended and passed is now codified* at C.R.S. 12-43.4-101, *et seq.*, as the Colorado Retail Marijuana Code.

designate state agencies to carry out other duties under the bill. 2013 CO S.B. 283.

Colorado Retail Marijuana Rules

39. Amendment 64 and the implementing legislation (particularly, House Bill 13-1317) required that the State Licensing Authority, the Executive Director of the Colorado Department of Revenue, promulgate certain rules on or before July 1, 2013.

40. To comply with these requirements, the State Licensing Authority adopted emergency rules governing "Retail Marijuana" in the State of Colorado. These rules became effective on October 15, 2013 as The Permanent Rules Related to the Colorado Retail Marijuana Code ("the Permanent Rules"). Pursuant to the Permanent Rules, retail marijuana dispensaries and establishments were permitted to commence operations on January 1, 2014. In 2014, the Colorado Marijuana Enforcement Division adopted a series of modifications to the Permanent Rules ("the Modifications"), but generally left the Permanent Rules unchanged with respect to the ongoing operations of marijuana dispensaries and establishments. As of October 30, 2014, the effective date of the most recent modifications, the scheme adopted by Colorado for the commercialization and regulation of marijuana under the auspices of state regulation was, in essence, fully implemented. 1 CCR 212-2.

Unconstitutionality of Colorado Amendment 64 and Its Implementing Statutes and Regulations

41. Because Amendment 64, in both its stated purpose and necessary operation, conflicts with the federal government's carefully crafted balance of competing objectives in the enforcement of federal drug-control laws, its passage already has resulted in detrimental impacts on Plaintiff States.

42. Amendment 64 directly conflicts with federal law and undermines express federal priorities in the area of drug control and enforcement, and regulates and enables the retail and other use of marijuana in the United States. Colorado's adoption of a law that enables and supports the commercialization of marijuana cultivation, distribution, and sale under state auspices with the assistance of the Colorado Department of Public Health and Environment undermines the national enforcement regime set forth in the CSA and reflected in the long-standing and well-established federal controlled-substances enforcement policy and practice as it relates to marijuana, including the federal government's prioritization of enforcement against Schedule I drugs. Amendment 64 also interferes with U.S. foreign relations and broader narcotic and psychotropic-drug-trafficking interdiction and security objectives, and thereby harms a wide range of U.S. interests. Because Amendment 64 attempts to set state-specific drug regulation and use policy, it legislates in an area constitutionally reserved to the federal government, conflicts with the federal drug-control laws and federal drug-control

policy, conflicts with foreign policy and relations, and obstructs the accomplishment and execution of the full purposes and objectives of Congress – and is therefore preempted.

43. The State of Colorado's pursuit of a policy to promote widespread possession and use and the commercial cultivation, distribution, marketing, and sales of marijuana, and ignoring every objective embodied in the federal drug control and regulation system (including the federal government's prioritization of the interdiction of Schedule I drugs including marijuana), directly conflicts with and otherwise stands as an obstacle to the mandate of Congress that *all* possession and use of Schedule I drugs, including marijuana, *be prohibited.* This prohibition embodies not just the considered judgment of Congress, but also the treaty obligations proposed and agreed-to by the United States (and relied upon by other countries who are parallely obligated), and are embodied in the U.S. drug control laws and regulations.

44. Amendment 64 stands in direct opposition to the CSA, the regulatory scheme of which is designed to foster the beneficial and lawful use of those medications on Schedules II-V, to prevent their misuse, and to *prohibit entirely* the possession or use of marijuana, as one of the controlled substances listed in Schedule I, anywhere in the United States, except as a part of a strictly controlled research project. It also stands in direct opposition to the obligations of the United States as a party to the Single Convention, the 1971 Convention, and the

1988 Convention to *prohibit entirely* the cultivation of cannabis or tetrahydrocannabinol except, in limited circumstances, as specifically authorized or regulated by the United States. Such interference with federal priorities, driven by a state-determined policy as to how possession and use of a controlled substance should be regulated, constitutes a violation of the Supremacy Clause.

45. Amendment 64 conflicts with and otherwise stands as an obstacle to the full purposes and objectives of Congress, including its purpose to fulfill the treaty obligations of the United States pursuant to the international Conventions, in creating a uniform and singular federal policy and regulatory scheme for interstate or intrastate possession and use of controlled substances, a scheme which expressly includes marijuana, and its regulatory scheme for registration, inventory control, advertising, and packaging for drugs intended for human consumption.

46. Colorado's permission and enabling in direct contravention of these prohibitions also conflicts with and otherwise stands as an obstacle to the full purposes and objectives of Congress in creating a comprehensive system of penalties for individuals who are unlawfully in possession of, or using, marijuana in the United States in violation of the CSA's scheme for interstate or intrastate possession and use of controlled substances, or who are aiding and abetting another to do so, and for registration, inventory control, advertising, and/or packaging for drugs intended for human consumption.

47. The Permanent Rules, promulgated by the Colorado Department of Revenue as described above, lack safeguards to prevent the interstate transfer of marijuana sold by retail dispensaries within Colorado.

48. The Permanent Rules permit persons over the age of twenty-one years of age who do not possess evidence of Colorado residency to purchase up to one quarter ounce of marijuana in a single sales transaction. *See* Permanent Rules, R 402. A person over the age of twenty-one years of age who does possess evidence of Colorado residency may purchase up to one ounce of marijuana in a single sales transaction. *See id.*

49. The Permanent Rules are devoid of any requirement that marijuana purchased at a retail dispensary be consumed, in its entirety, at the point of purchase.

50. The Permanent Rules are further devoid of any prohibition on multiple purchases of marijuana from the same retail dispensary in a brief period of time, nor do the Permanent Rules prohibit a single person from making multiple purchases of marijuana from separate retail dispensaries in even a single day.

51. The Permanent Rules provide for tracking of marijuana inventory by a Retail Marijuana Store "to ensure its inventories are identified and tracked from the point they are transferred from a Retail Marijuana Cultivation Facility or Retail Marijuana Products Manufacturing Facility through the point of

sale, given to a Retail Marijuana Testing Facility, or otherwise disposed of." *See* Permanent Rules, R 405. However, the Permanent Rules are devoid of any requirement that marijuana be tracked after the point of sale.

52. The Permanent Rules are further devoid of any requirement that a purchaser of marijuana from a Retail Marijuana Store be subjected to a criminal background check. Thus, the Permanent Rules lack any safeguard to prevent criminal enterprises, gangs, and cartels from acquiring marijuana inventory directly from Retail Marijuana Stores.

53. Due to the foregoing, the Permanent Rules lack safeguards to prevent the retail sale of marijuana either to persons intending to transport marijuana to other states or to persons engaged in a criminal enterprise.

Detrimental Impact of Amendment 64 On the Plaintiff States

54. By reason of the foregoing, the State of Colorado's actions have caused and will continue to cause substantial and irreparable harm to the Plaintiff States for which Plaintiff States have no adequate remedy except by this action.

55. Since the implementation of Amendment 64 in Colorado, Plaintiff States have dealt with a significant influx of Colorado-sourced marijuana.

56. The detrimental economic impacts of Colorado Amendment 64 on the Plaintiff States, especially in regard to the increased costs for the apprehension, incarceration, and prosecution of suspected and convicted felons, are substantial.

57. Plaintiff States' law enforcement encounters marijuana on a regular basis as part of day-to-day duties and will continue to do so. These types of encounters arise, among other circumstances, when Plaintiff States' law-enforcement officers make routine stops of individuals who possess marijuana purchased in Colorado which, at the time of purchase, complied with Amendment 64. *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), http://www.rmhidta.org/html/August%202014%20Legalization%20of%20MJ%20in%20Colorado%20the%20Impact.pdf.

58. The result of increased Colorado-sourced marijuana being trafficked in Plaintiff States due to the passage and implementation of Colorado Amendment 64 has been the diversion of a significant amount of the personnel time, budget, and resources of the Plaintiff States' law enforcement, judicial system, and penal system resources to counteract the increased trafficking and transportation of Colorado-sourced marijuana.

59. Plaintiff States have incurred significant costs associated with the increased level of incarceration of

suspected and convicted felons on charges related to Colorado-sourced marijuana include housing, food, health care, transfer to-and-from court, counseling, clothing, and maintenance.

60. The increased costs to Plaintiff States' law enforcement include the costs associated with the arrest, impoundment of vehicles, seizure of contraband and suspected contraband, transfer of prisoners, and appearance of law enforcement personnel in court for arraignment, trial, and/or sentencing (including the overtime costs associated with appearing in court and/or obtaining replacement law-enforcement personnel for the court-appearing officers).

61. Plaintiff States are suffering a direct and significant detrimental impact – namely the diversion of limited manpower and resources to arrest and process suspected and convicted felons involved in the increased illegal marijuana trafficking or transportation.

62. Colorado Amendment 64 harms Plaintiff States' law enforcement, judicial, and penal system personnel in their individual and official capacities in the performance of their jobs and the accomplishment of their professional goals and objectives as a result of the greater burdens it places and the diversion of resources it necessitates.

63. Accordingly, Plaintiff States have suffered direct and significant harm arising from the increased presence of Colorado-sourced marijuana in violation of the CSA.

64. Unless restrained by this Court, Colorado-sourced marijuana undoubtedly will continue to flow into and through Plaintiff States in violation of the Controlled Substances Act and thus compromise federal laws and treaty obligations.

65. Plaintiff States have suffered irreparable injury as a result of Colorado's unconstitutional usurping of federal law regarding the interdiction of marijuana.

66. Plaintiff States have no adequate alternative remedy at law to enforce their rights other than those which can be provided by this Court.

67. It is necessary and appropriate for this Court, with its exclusive and original jurisdiction, to declare Colorado Amendment 64 unconstitutional as it conflicts with the CSA and corresponding federal laws and treaty obligations.

68. This court is the sole forum in which Plaintiff States may enforce their rights and seek their necessary and appropriate remedies.

WHEREFORE, the Plaintiff States pray that the State of Colorado:

1. Be subject to a declaratory judgment stating that Sections 16(4) and (5) of Article XVIII of the Colorado Constitution are preempted by federal law, and therefore unconstitutional and unenforceable under the Supremacy Clause, Article VI of the U.S. Constitution;

2. Be enjoined from any and all application and implementation of Sections 16(4) and (5) of Article XVIII of the Colorado Constitution;

3. Be enjoined from any and all application and implementation of statutes or regulations promulgated pursuant to Sections 16(4) and (5) of Article XVIII of the Colorado Constitution; and

4. Be ordered to pay the Plaintiff States' costs and expenses associated with this legal action, including attorneys' fees.

Respectfully submitted,

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December 2014

[SEAL]

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, SCOTT GESSLER, Secretary of State of the State of Colorado, do hereby certify that: the attached are true and exact copies of Article XVIII, Section 16 of the Colorado constitution. . . .

> **IN TESTIMONY WHEREOF** I have unto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver this 10th day of December, 2014.

[SEAL]

/s/ Scott Gessler
SECRETARY OF STATE

* * *

Section 16. Personal use and regulation of marijuana.

(1) Purpose and findings.

(a) In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare 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.

(b) In the interest of the health and public safety of our citizenry, the people of the state of

Colorado further find and declare that marijuana should be regulated in a manner similar to alcohol so that:

(I) Individuals will have to show proof of age before purchasing marijuana;

(II) Selling, distributing, or transferring marijuana to minors and other individuals under the age of twenty-one shall remain illegal;

(III) Driving under the influence of marijuana shall remain illegal;

(IV) Legitimate, taxpaying business people, and not criminal actors, will conduct sales of marijuana; and

(V) Marijuana sold in this state will be labeled and subject to additional regulations to ensure that consumers are informed and protected.

(c) In the interest of enacting rational policies for the treatment of all variations of the cannabis plant, the people of Colorado further find and declare that industrial hemp should be regulated separately from strains of cannabis with higher delta-9 tetrahydrocannabinol (THC) concentrations.

(d) The people of the state of Colorado further find and declare that it is necessary to ensure consistency and fairness in the application of this section throughout the state and that, therefore, the matters addressed by this section are, except as specified herein, matters of statewide concern.

(2) Definitions. As used in this section, unless the context otherwise requires,

(a) "Colorado Medical Marijuana Code" means article 43.3 of title 12, Colorado Revised Statutes.

(b) "Consumer" means a person twenty-one, years of age or older who purchases marijuana or marijuana products for personal use by persons twenty-one years of age or older, but not for resale to others.

(c) "Department" means the department of revenue or its successor agency.

(d) "Industrial hemp" means the plant of the genus cannabis and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration that does not exceed three-tenths percent on a dry weight basis.

(e) "Locality" means a county, municipality, or city and county.

(f) "Marijuana" or "marihuana" means all parts of the plant of the genus cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marihuana concentrate. "Marijuana" or "marihuana" does not include industrial hemp, nor does it include fiber produced from the stalks, oil, or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other

ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other product.

(g) "Marijuana accessories" means any equipment, products, or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, composting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, vaporizing, or containing marijuana, or for ingesting, inhaling, or otherwise introducing marijuana into the human body.

(h) "Marijuana cultivation facility" means an entity licensed to cultivate, prepare, and package marijuana and sell marijuana to retail marijuana stores, to marijuana product manufacturing facilities, and to other marijuana cultivation facilities, but not to consumers.

(i) "Marijuana establishment" means a marijuana cultivation facility, a marijuana testing facility, a marijuana product manufacturing facility, or a retail marijuana store.

(j) "Marijuana product manufacturing facility" means an entity licensed to purchase marijuana; manufacture, prepare, and package marijuana products; and sell marijuana and marijuana products to other marijuana product manufacturing facilities and to retail marijuana stores, but not to consumers.

(k) "Marijuana products" means concentrated marijuana products and marijuana products that are comprised of marijuana and other ingredients and are intended for use or consumption, such as, but not limited to, edible products, ointments, and tinctures.

(l) "Marijuana testing facility" means an entity licensed to analyze and certify the safety and potency of marijuana.

(m) "Medical marijuana center" means an entity licensed by a state agency to sell marijuana and marijuana products pursuant to section 14 of this article and the Colorado Medical Marijuana Code.

(n) "Retail marijuana store" means an entity licensed to purchase marijuana from marijuana cultivation facilities and marijuana and marijuana products from marijuana product manufacturing facilities and to sell marijuana and marijuana products to consumers.

(o) "Unreasonably impracticable" means that the measures necessary to comply with the regulations require such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson.

(3) Personal use of marijuana. Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado

or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older:

(a) Possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.

(b) Possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale.

(c) Transfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.

(d) Consumption of marijuana, provided that nothing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.

(e) Assisting another person who is twenty-one years of age or older in any of the acts described in paragraphs (a) through (d) of this subsection.

(4) Lawful operation of marijuana-related facilities. Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or be a basis for

seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older:

(a) Manufacture, possession, or purchase of marijuana accessories or the sale of marijuana accessories to a person who is twenty-one years of age or older.

(b) Possessing, displaying, or transporting marijuana or marijuana products; purchase of marijuana from a marijuana cultivation facility; purchase of marijuana or marijuana products from a marijuana product manufacturing facility; or sale of marijuana or marijuana products to consumers, if the person conducting the activities described in this paragraph has obtained a current, valid license to operate a retail marijuana store or is acting in his or her capacity as an owner, employee or agent of a licensed retail marijuana store.

(c) Cultivating, harvesting, processing, packaging, transporting, displaying, or possessing marijuana; delivery or transfer of marijuana to a marijuana testing facility; selling marijuana to a marijuana cultivation facility, a marijuana product manufacturing facility, or a retail marijuana store; or the purchase of marijuana from a marijuana cultivation facility, if the person conducting the activities described in this paragraph has obtained a current, valid license to operate a marijuana cultivation facility or is acting in his or her capacity as an owner, employee, or agent of a licensed marijuana cultivation facility.

(d) Packaging, processing, transporting, manufacturing, displaying, or possessing marijuana or marijuana products; delivery or transfer of marijuana or marijuana products to a marijuana testing facility; selling marijuana or marijuana products to a retail marijuana store or a marijuana product manufacturing facility; the purchase of marijuana from a marijuana cultivation facility; or the purchase of marijuana or marijuana products from a marijuana product manufacturing facility, if the person conducting the activities described in this paragraph has obtained a current, valid license to operate a marijuana product manufacturing facility or is acting in his or her capacity as an owner, employee, or agent of a licensed marijuana product manufacturing facility.

(e) Possessing, cultivating, processing, repackaging, storing, transporting, displaying, transferring or delivering marijuana or marijuana products if the person has obtained a current, valid license to operate a marijuana testing facility or is acting in his or her capacity as an owner, employee, or agent of a licensed marijuana testing facility.

(f) Leasing or otherwise allowing the use of property owned, occupied or controlled by any person, corporation or other entity for any of the activities conducted lawfully in accordance with paragraphs (a) through (e) of this subsection.

(5) Regulation of marijuana.

(a) Not later than July 1, 2013, the department shall adopt regulations necessary for implementation

of this section. Such regulations shall not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable. Such regulations shall include:

(I) Procedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment, with such procedures subject to all requirements of article 4 of title 24 of the Colorado Administrative Procedure Act or any successor provision;

(II) A schedule of application, licensing and renewal fees, provided, application fees shall not exceed five thousand dollars, with this upper limit adjusted annually for inflation, unless the department determines a greater fee is necessary to carry out its responsibilities under this section, and provided further, an entity that is licensed under the Colorado Medical Marijuana Code to cultivate or sell marijuana or to manufacture marijuana products at the time this section takes effect and that chooses to apply for a separate marijuana establishment license shall not be required to pay an application fee greater than five hundred dollars to apply for a license to operate a marijuana establishment in accordance with the provisions of this section;

(III) Qualifications for licensure that are directly and demonstrably related to the operation of a marijuana establishment;

(IV) Security requirements for marijuana establishments;

(V) Requirements to prevent the sale or diversion of marijuana and marijuana products to persons under the age of twenty-one;

(VI) Labeling requirements for marijuana and marijuana products sold or distributed by a marijuana establishment;

(VII) Health and safety regulations and standards for the manufacture of marijuana products and the cultivation of marijuana;

(VIII) Restrictions on the advertising and display of marijuana and marijuana products; and

(IX) Civil penalties for the failure to comply with regulations made pursuant to this section.

(b) In order to ensure the most secure, reliable, and accountable system for the production and distribution of marijuana and marijuana products in accordance with this subsection, in any competitive application process the department shall have as a primary consideration whether an applicant:

(I) Has prior experience producing or distributing marijuana or marijuana products pursuant to section 14 of this article and the Colorado Medical Marijuana Code in the locality in which the applicant seeks to operate a marijuana establishment; and

(II) Has, during the experience described in subparagraph (I), complied consistently with section

14 of this article, the provisions of the Colorado Medical Marijuana Code and conforming regulations.

(c) In order to ensure that individual privacy is protected, notwithstanding paragraph (a), the department shall not require a consumer to provide a retail marijuana store with personal information other than government-issued identification to determine the consumer's age, and a retail marijuana store shall not be required to acquire and record personal information about consumers other than information typically acquired in a financial transaction conducted at a retail liquor store.

(d) The general assembly shall enact an excise tax to be levied upon marijuana sold or otherwise transferred by a marijuana cultivation facility to a marijuana product manufacturing facility or to a retail marijuana store at a rate not to exceed fifteen percent prior to January 1, 2017 and at a rate to be determined by the general assembly thereafter, and shall direct the department to establish procedures for the collection of all taxes levied. Provided, the first forty million dollars in revenue raised annually from any such excise tax shall be credited to the Public School Capital Construction Assistance Fund created by article 43.7 of title 22, C.R.S., or any successor fund dedicated to a similar purpose. Provided further, no such excise tax shall be levied upon marijuana intended for sale at medical marijuana centers pursuant to section 14 of this article and the Colorado Medical Marijuana Code.

(e) Not later than October 1, 2013, each locality shall enact an ordinance or regulation specifying the entity within the locality that is responsible for processing applications submitted for a license to operate a marijuana establishment within the boundaries of the locality and for the issuance of such licenses should the issuance by the locality become necessary because of a failure by the department to adopt regulations pursuant to paragraph (a) or because of a failure by the department to process and issue licenses as required by paragraph (g).

(f) A locality may enact ordinances or regulations, not in conflict with this section or with regulations or legislation enacted pursuant to this section, governing the time, place, manner and number of marijuana establishment operations; establishing procedures for the issuance, suspension, and revocation of a license issued by the locality in accordance with paragraph (h) or (i), such procedures to be subject to all requirements of article 4 of title 24 of the Colorado Administrative Procedure Act or any successor provision; establishing a schedule of annual operating, licensing, and application fees for marijuana establishments, provided, the application fee shall only be due if an application is submitted to a locality in accordance with paragraph (i) and a licensing fee shall only be due if a license is issued by a locality in accordance with paragraph (h) or (i); and establishing civil penalties for violation of an ordinance or regulation governing the time, place, and manner of a marijuana establishment that may

operate in such locality. A locality may prohibit the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana stores through the enactment of an ordinance or through an initiated or referred measure; provided, any initiated or referred measure to prohibit the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana stores must appear on a general election ballot during an even numbered year.

(g) Each application for an annual license to operate a marijuana establishment shall be submitted to the department. The department shall:

(I) Begin accepting and processing applications on October 1, 2013;

(II) Immediately forward a copy of each application and half of the license application fee to the locality in which the applicant desires to operate the marijuana establishment;

(III) Issue an annual license to the applicant between forty-five and ninety days after receipt of an application unless the department finds the applicant is not in compliance with regulations enacted pursuant to paragraph (a) or the department is notified by the relevant locality that the applicant is not in compliance with ordinances and regulations made pursuant to paragraph (f) and in effect at the time of application, provided, where a locality has enacted a numerical limit on the number of marijuana

establishments and a greater number of applicants seek licenses, the department shall solicit and consider input from the locality as to the locality's preference or preferences for licensure; and

(IV) Upon denial of an application, notify the applicant in writing of the specific reason for its denial.

(h) If the department does not issue a license to an applicant within ninety days of receipt of the application filed in accordance with paragraph (g) and does not notify the applicant of the specific reason for its denial, in writing and within such time period, or if the department has adopted regulations pursuant to paragraph (a) and has accepted applications pursuant to paragraph (g) but has not issued any licenses by January 1, 2014, the applicant may resubmit its application directly to the locality, pursuant to paragraph (e), and the locality may issue an annual license to the applicant. A locality issuing a license to an applicant shall do so within ninety days of receipt of the resubmitted application unless the locality finds and notifies the applicant that the applicant is not in compliance with ordinances and regulations made pursuant to paragraph (f) in effect at the time the application is resubmitted and the locality shall notify the department if an annual license has been issued to the applicant. If an application is submitted to a locality under this paragraph, the department shall forward to the locality the application fee paid by the applicant to the department upon request by the locality. A license issued by

a locality in accordance with this paragraph shall have the same force and effect as a license issued by the department in accordance with paragraph (g) and the holder of such license shall not be subject to regulation or enforcement by the department during the term of that license. A subsequent or renewed license may be issued under this paragraph on an annual basis only upon resubmission to the locality of a new application submitted to the department pursuant to paragraph (g). Nothing in this paragraph shall limit such relief as may be available to an aggrieved party under section 24-4-104, C.R.S., of the Colorado Administrative Procedure Act or any successor provision.

(i) If the department does not adopt regulations required by paragraph (a), an applicant may submit an application directly to a locality after October 1, 2013 and the locality may issue an annual license to the applicant. A locality issuing a license to an applicant shall do so within ninety days of receipt of the application unless it finds and notifies the applicant that the applicant is not in compliance with ordinances and regulations made pursuant to paragraph (f) in effect at the time of application and shall notify the department if an annual license has been issued to the applicant. A license issued by a locality in accordance with this paragraph shall have the same force and effect as a license issued by the department in accordance with paragraph (g) and the holder of such license shall not be subject to regulation or enforcement by the department during the term of

that license. A subsequent or renewed license may be issued under this paragraph on an annual basis if the department has not adopted regulations required by paragraph (a) at least ninety days prior to the date upon which such subsequent or renewed license would be effective or if the department has adopted regulations pursuant to paragraph (a) but has not, at least ninety days after the adoption of such regulations, issued licenses pursuant to paragraph (g).

(j) Not later than July 1, 2014, the general assembly shall enact legislation governing the cultivation, processing and sale of industrial hemp.

(6) Employers, driving, minors and control of property.

(a) Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.

(b) Nothing in this section is intended to allow driving under the influence of marijuana or driving while impaired by marijuana or to supersede statutory laws related to driving under the influence of marijuana or driving while impaired by marijuana, nor shall this section prevent the state from enacting and imposing penalties for driving under the influence of or while impaired by marijuana.

(c) Nothing in this section is intended to permit the transfer of marijuana, with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.

(d) Nothing in this section shall prohibit a person, employer, school, hospital, detention facility, corporation or any other entity who occupies, owns or controls a property from prohibiting or otherwise regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property.

(7) Medical marijuana provisions unaffected. Nothing in this section shall be construed:

(a) To limit any privileges or rights of a medical marijuana patient, primary caregiver, or licensed entity as provided in section 14 of this article and the Colorado Medical Marijuana Code;

(b) To permit a medical marijuana center to distribute marijuana to a person who is not a medical marijuana patient;

(c) To permit a medical marijuana center to purchase marijuana or marijuana products in a manner or from a source not authorized under the Colorado Medical Marijuana Code;

(d) To permit any medical marijuana center licensed pursuant to section 14 of this article and the

Colorado Medical Marijuana Code to operate on the same premises as a retail marijuana store; or

(e) To discharge the department, the Colorado Board of Health, or the Colorado Department of Public Health and Environment from their statutory and constitutional duties to regulate medical marijuana pursuant to section 14 of this article and the Colorado Medical Marijuana Code.

(8) Self-executing, severability, conflicting provisions. All provisions of this section are self-executing except as specified herein, are severable, and, except where otherwise indicated in the text, shall supersede conflicting state statutory, local charter, ordinance, or resolution, and other state and local provisions.

(9) Effective date. Unless otherwise provided by this section, all provisions of this section shall become effective upon official declaration of the vote hereon by proclamation of the governor, pursuant to section 1(4) of article V.

Source: Initiated 2012: Entire section added, effective upon proclamation of the Governor, **L. 2013**, p. 3291, December 10, 2012.

Editor's note: (1) In subsection (4)(c), changed "vaild" to "valid"; in subsection (4)(f), changed "activites" to "activities"; and, in subsection (5)(b)(10, changed "consistantly" to "consistently" to correct the misspellings in the 2012 initiative (Amendment 64).

(2) In (5)(a)(II), reference to "at the time this section takes effect" refers to the proclamation date of the governor, December 12, 2012. In subsection (9), reference to "shall become effective date upon official proclamation of the vote hereon by proclamation of the governor" is December 12, 2012.

No. _____, Original

In The
Supreme Court of the United States

STATES OF NEBRASKA AND OKLAHOMA,

Plaintiffs,

v.

STATE OF COLORADO,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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In The
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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. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of Article III of the U.S. Constitution provides, in relevant part: "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction."

The Supremacy Clause of Article VI of the U.S. Constitution provides, in relevant part: "This Constitution, and the Laws of the United States . . . shall be

the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

28 U.S.C. § 1251(a) provides: "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."

II. STATEMENT

A. The Controlled Substances Act.

The Controlled Substances Act ("CSA") establishes a comprehensive federal scheme to regulate the market in controlled substances. This "closed regulatory system mak[es] it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Gonzales v. Raich*, 545 U.S. 1, 13 (2005) (citing 21 U.S.C. §§ 841(a)(1), 844(a)).

To effectuate that "closed" system, the CSA "authorizes transactions within 'the legitimate distribution chain' and makes all others illegal." *United States v. Moore*, 423 U.S. 122, 141 (1975) (quoting H.R. Rep. No. 1444, supra, Pt. 1, at 3). Violators of the CSA are subject to criminal and civil penalties, and ongoing or anticipated violations may be enjoined. 21 U.S.C. §§ 841-863, 882(a).

The CSA categorizes all controlled substances into five schedules. *Id.* at § 812. The CSA's restrictions on the manufacture, distribution, and possession of a controlled substance depend upon the

schedule in which the drug has been placed. *Id.* at §§ 821-829. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. *Id.* at §§ 811, 812. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. *Id.* at §§ 821-830.

Since Congress enacted the CSA in 1970, marijuana and tetrahydrocannabinols have been classified as Schedule I controlled substances. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1249 (Schedule I(c)(10) and (17)); 21 U.S.C. § 812(c) (Schedule I(c)(10) and (17)).

A drug is listed in schedule I if it has "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision." 21 U.S.C. § 812(b)(1)(A)-(C). By classifying marijuana as a Schedule I drug, Congress mandated that the manufacture, distribution, or possession of marijuana be a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study. 21 U.S.C. §§ 823, 841(a)(1), 844(a); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489-490, 492 (2001).

In the CSA, Congress included findings and declarations regarding the effects of drug distribution

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

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

Id. at § 801(3). Congress further found that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances," *id.* at § 801(4); that "[c]ontrolled substances manufactured and distributed intrastate

cannot be differentiated from controlled substances manufactured and distributed interstate" and "[t]hus, it is not feasible to distinguish" between such substances "in terms of controls," *id.* at § 801(5); and that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic," *id.* at § 801(6). The federal executive branch confirmed this understanding of the intent and purpose of the CSA in 2004. (Brief for the Petitioners, *Ashcroft v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 1799022, at *11.

Congress has not amended the CSA to remove marijuana from the list of Schedule I drugs, nor have considerable efforts to administratively reschedule marijuana been successful.

B. Colorado's Amendment 64.

Despite Congress's consistent refusal to reschedule marijuana, marijuana activists have sought not only to legalize marijuana – a decision any state may make with respect to its own criminal law – but also to facilitate the creation of a marijuana industry in direct contravention of federal law. These groups market the creation of an industry foreclosed by federal law as a way to raise revenue for a state. *See, e.g.*, *Bolster Colorado's Economy*, Campaign to Regulate Marijuana Like Alcohol, http://www.regulate marijuana.org/economic-impact. These sales tactics succeeded in getting a constitutional amendment on the ballot during Colorado's 2012 general elections: Amendment 64. *Marijuana legalization qualifies for*

Colorado ballot, Reuters (Feb. 27, 2012 4:45 PM), http://www.reuters.com/article/2012/02/27/us-marijuana-colorado-idUSTRE81Q24S20120227.

Amendment 64 became a part of Colorado's constitution shortly after election results came out in 2012. *Marijuana smokers get nod to light up in Colorado as pot legalized*, Reuters (Dec. 10, 2012, 9:02 PM), http://www.reuters.com/article/2012/12/11/us-usa-colorado-marijuana-idUSBRE8BA02B20121211. Colorado state officials knew at the time, and made clear to the people of Colorado after the election, that federal law prevented the operation of Amendment 64. *Colorado governor to potheads: 'Don't break out the Cheetos,'* NBC News (Nov. 7, 2012, 11:47 AM), http://usnews.nbcnews.com/_news/2012/11/07/14994670-colorado-governor-to-potheads-dont-break-out-the-cheetos; *Marijuana legalization victories could be short-lived*, Reuters (Nov. 7, 2012, 9:23 PM), http://www.reuters.com/article/2012/11/08/us-usa-marijuana-votes-idUSBRE8A705E20121108. The primary reason Colorado has gone forward so far is, presumably, the series of statements from the present administration concerning its enforcement priorities, *U.S. allows states to legalize recreational marijuana within limits*, Reuters (Aug. 29, 2013, 7:01 PM), http://www.reuters.com/article/2013/08/29/us-usa-crime-marijuana-idUSBRE97S0YW20130829, notwithstanding the fact that marijuana's status under federal law has not changed.

The purpose of Amendment 64 could not be clearer. The first paragraph in its text shows that the amendment exists both to legalize marijuana and ensure that it is "taxed in a manner similar to alcohol."

Colo. Const. art. XVIII, § 16(1)(a). The findings in the amendment also clearly go to the creation of a scheme for regulating and generating revenues for the State of Colorado. *Id.* at § 16(1)(b).

Pursuant to these goals, Amendment 64 authorizes the Colorado Department of Revenue to provide regulations "necessary for implementation" of the amendment's scheme. The amendment specifies several requirements for these regulations to ensure the creation of an effectively illegal marijuana industry in Colorado.

First, Amendment 64 requires the Colorado Department of Revenue to make regulations that do not make the operation of marijuana establishments "unreasonably impracticable." Colo. Const. art. XVIII, § 16(5)(a). "Unreasonably impracticable" means that compliance with the regulations would not cost too much, be too risky, or otherwise discourage a "reasonably prudent businessperson" from opening a marijuana establishment, *id.* at § 16(2)(o), all this despite the operation of federal law rendering such establishments completely illegal.

Second, the amendment requires the Colorado Department of Revenue to create an extensive system of licensure with applications, fees, and suspension and revocation standards. *Id.* at § 16(5)(a)(I)-(III). Third, the regulations must include safety standards for marijuana establishments, regulations against underage purchase, requirements regarding labeling

and health, and other provisions. *Id.* at § 16(5)(a)(IV)-(IX).

Amendment 64 also includes provisions to accomplish the goal of creating revenue for Colorado despite the probable consequences for federal law enforcement policy. The amendment authorizes Colorado's legislature to enact an excise tax on the sale or transfer of marijuana. *Id.* at § 16(5)(d).

The purpose and effect of Amendment 64 could not be clearer. The amendment seeks to facilitate the creation of an industry that can only exist in contravention of federal law and policy as announced in the CSA while reaping the rewards of tax revenues for the State of Colorado.

C. The Effects of Colorado's Legalization Scheme.

Amendment 64 is, at its essence, the State-sponsored authorization of federal contraband. It establishes Colorado as a marijuana source state for the rest of the country. Since Amendment 64 took effect, Plaintiff States' law enforcement have encountered Colorado marijuana on a routine basis, confirming that significant amounts of Colorado-sourced marijuana are being diverted to Plaintiff States.

This significant increase in the trafficking of marijuana has led to the diversion of a substantial amount of personnel time, budget, and resources of the Plaintiff States' law enforcement, judicial, and

penal systems to counteract such trafficking. Plaintiff States have and will continue to incur considerable costs associated with increased incarceration of suspected and convicted felons on charges related to Colorado-sourced marijuana including housing, food, health care, transportation to and from court, counseling, clothing, and maintenance. Unless restrained by this Court, Colorado-sourced marijuana will continue to flow into and through Plaintiff States in violation of the CSA.

III. SUMMARY OF THE ARGUMENT

A. The complaint presents claims over which this Court has original and *exclusive* jurisdiction. As such, no alternative forum exists where the Plaintiff States could bring this action. And while the issue presented could conceivably be resolved in a suit brought by non-sovereign parties in a district court, that fact does not cut in favor of the Court declining to exercise original jurisdiction over this suit between States seeking to vindicate uniquely sovereign rights. Rather, the complaint presents a suit between States and presenting claims akin to those over which the Court has traditionally exercised its original jurisdiction. Such jurisdiction is particularly appropriate here, where Colorado's commercial marijuana scheme has resulted in the interstate trafficking of drugs into the majority of the States, almost all of

which have exercised their police powers to make the distribution and possession of marijuana illegal, and to enforce their state laws in a manner that complements and undergirds the federal CSA. Colorado's legalization undercuts the efforts of those States – and the efforts of Congress, not just in Plaintiff States, but nationwide.

B. Colorado's commercial marijuana scheme is preempted by the CSA, and is thus null and void. The continued operation of Colorado's scheme, despite its nullity, harms not just the Plaintiff States, but also the dozens of other States who have seen Colorado-grown marijuana cross into their borders despite state and federal law to the contrary. Because the current federal administration seems unwilling to "exercise its right" to sue Colorado, this case presents the best vehicle by which this Court can address this important Supremacy Clause issue.

IV. ARGUMENT

A. The Complaint Presents Claims Between States Implicating Sovereign Interests Unique to the States.

This Court has original and exclusive jurisdiction over cases and controversies between two or more states. *See* U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). The Court has announced two factors that

guide the Court's inquiry into whether a motion for leave to file should be granted. The first is "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim." *Mississippi v. Louisiana,* 506 U.S. 73, 77 (1992) (citation and internal quotation marks omitted). The second is whether there exists "an alternative forum in which the issue tendered can be resolved." *Id.* Applying these factors, the Court should exercise its original jurisdiction in this case, and the Plaintiff States should be granted leave to file their complaint.

1. Plaintiff States, as the Gateway for the Trafficking of Illegal Colorado-sourced Marijuana, Bear the Brunt of the Problems Caused by Colorado's Choice to Circumvent Federal Law.

This case is of a serious and dignified nature. Plaintiff States, as the gateway for the trafficking of illegal Colorado-sourced marijuana, bear the brunt of the problems caused by Colorado's choice to circumvent federal law. Colorado is not merely decriminalizing marijuana or exercising prosecutorial discretion. Colorado law affirmatively authorizes conduct prohibited by federal law to the significant detriment of Plaintiff States. Indeed, Colorado's choice to skirt the comprehensive CSA presents a direct threat to the health and safety of the residents of Plaintiff States, drains Plaintiff States' treasuries, and stresses Plaintiff States' criminal justice systems.

The Court has declared that "[t]he model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983). Given the direct assault on the health and welfare of Plaintiff States' citizenry, Plaintiff States submit Colorado's actions of condoning the intrastate manufacture, distribution, and possession of an illegal drug carries such seriousness.

This is akin to when the Court has exercised original jurisdiction over suits between states involving cross-border nuisances. *E.g., Vermont v. New York*, 402 U.S. 940 (1971) (accused New York of polluting Lake Champlain); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (sought to enjoin off-shore garbage dumping by New York that caused trash to wash ashore on New Jersey beaches); *New York v. New Jersey*, 249 U.S. 202 (1919) (sought to enjoin New Jersey's discharge of sewage into New York Harbor); *Missouri v. Illinois*, 180 U.S. 208 (1901) (alleging Illinois's discharge of untreated sewage into Mississippi River polluted drinking water in Missouri).

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests;

> and the alternative to force is a suit in this court.

Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (poisonous gas emanating from Tennessee plant caused damage in Georgia). Between Colorado and Plaintiff States, Colorado's actions amount to what would be *casus belli* if the states were fully sovereign nations. Not only is Colorado affirmatively authorizing the trafficking of federal contraband, reaping enormous profits from doing so and causing Plaintiff States to incur significant costs, but its violation is substantial and growing. An injury of this kind implicates this Court's jurisdiction.

The adverse effects of Colorado's affirmative authorization of the trafficking of federal contraband are readily illustrated by Plaintiff States' law enforcement encounters with Colorado marijuana as a regular basis as part of their day-to-day duties. *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), http://www.rmhidta.org/html/August%202014%20Legalization%20of%20MJ%20in%20Colorado%20the%20Impact.pdf.

The significant increase in the trafficking of marijuana has led to the diversion of a substantial amount of personnel time, budget, and resources of the Plaintiff States' law enforcement, judicial system, and penal system to counteract such trafficking. Plaintiff States have and will continue to incur considerable costs associated with the increased level of incarceration of suspected and convicted felons on

charges related to Colorado-sourced marijuana including housing, food, health care, transportation to and from court, counseling, clothing, and maintenance. Unless restrained by this Court, Colorado-sourced marijuana will continue to flow into and through Plaintiff States in violation of the CSA.

Congress enacted the CSA to create a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." In furtherance of this purpose, the CSA comprehensively bans all manufacture, distribution, and possession of any scheduled drug unless explicitly authorized by the Act. 21 U.S.C. §§ 841(a)(1), 844(a). In enacting the CSA, Congress agreed "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2).

Congress has classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). Schedule I drugs are those with a high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. § 812(b)(1). Like heroin, LSD, and ecstasy, marijuana remains a Schedule I drug and remains federal contraband. Congress specifically included marijuana intended for intrastate consumption in the CSA because it recognized the likelihood that high demand in the interstate market would significantly attract such marijuana. *See, e.g.*, 21 U.S.C. § 801(3)-(6). As Justice Scalia observed, "marijuana that is grown at home and possessed for personal use is never more than an

instant from the interstate market – and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State." *Gonzales v. Raich*, 545 U.S. 1, 40 (2005) (Scalia, J., concurring).

An important issue of federalism is at stake here. Whether a state can affirmatively authorize the violation of federal law is an issue which strikes at the heart of the Supremacy Clause proscription against obstructing the purposes and objective of Congress. Plaintiff States are not suggesting the CSA requires Colorado to criminalize marijuana or to strip Colorado authorities of prosecutorial discretion. Just that Colorado's affirmative authorization of the manufacture, possession, and distribution of marijuana presents a substantial obstacle to Congress's objectives under the CSA to establish a national, comprehensive, uniform and closed statutory scheme to control the market in controlled substances in order to prevent the abuse and diversion of those substances. *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985) (state law is nullified when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."). Colorado law embeds state and local government actors with private actors in a state-sanctioned and state-supervised industry which is intended to, and does, cultivate, package, and distribute marijuana for commercial and private possession and use in violation of the

CSA (and therefore in direct contravention of clearly stated Congressional intent).

Colorado's affirmative authorization of marijuana has a significant impact on both the supply and demand sides of the market for marijuana, the very market Congress sought to control through the CSA. It is a fair and reasonable demand on the part of Plaintiff States that their states not become corridors for trafficking federal contraband because of Colorado's choice to evade federal law.

For the reasons outlined above, Plaintiff States' claim is of the type and magnitude deserving of the Court's attention.

2. No Alternative Forum Exists.

Plaintiff States have no adequate alternative remedies at law to enforce their rights other than those which can be provided by this Court. This Court has exclusive jurisdiction over all controversies between two or more States. 28 U.S.C. § 1251(a). There is no "alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana,* 506 U.S. 73, 77 (1992). "[T]he description of our jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court." *Id.* at 77-78.

Under this straightforward framework, Plaintiff States have no adequate alternative remedies to enforce their rights other than this action. After all,

the power of Plaintiff States to regulate the flow of illegal drugs at their borders, in the manner normally available to sovereigns, has been surrendered by the states under the Constitution. *See Torres v. Puerto Rico*, 442 U.S. 465 (1979); *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (reiterating "the longstanding right of the sovereign to protect itself by stopping and examining persons and property" crossing into the country). By surrendering this attribute of sovereignty, Plaintiff States are left with no constitutional remedy to directly curb this threat to the health and safety of their residents, their treasuries, and their criminal justice systems other than this action in this Court.

Because Plaintiff States' claim that Colorado is affirmatively authorizing the violation of federal law is serious and dignified, and there is no alternative forum in which adequate relief may be obtained for Colorado's ongoing and escalating authorizations of violations of federal law, this Court should invoke its original jurisdiction in this case.

B. Colorado's Legalization Scheme Stands as an Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of the Federal Controlled Substances Act, and is Thus Preempted.

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." Art. VI, cl. 2. As a consequence of this constitutional command, "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.'" *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981) (citations omitted).

1. This Court's decision in *Gonzales v. Raich* establishes that commercial schemes like Colorado's are pre-empted by the CSA.

When California voters passed Proposition 215 in 1996, they authorized a non-commercial scheme that was modest in comparison to Colorado's commercial scheme. Under California's "Compassionate Use Act," only "seriously ill" California residents were allowed access to marijuana for medical purposes. *Gonzales v. Raich*, 545 U.S. 1, 7 (2005). The Act exempted from criminal prosecution patients and their "primary caregivers" who possessed or cultivated marijuana for medicinal purposes with the recommendation or approval of a physician. *Id.* at 6. The Act required that the marijuana that was being grown by the patient or caregiver be used *only* for the patient's personal use. *Id.* The California scheme was thus a purely non-commercial, compassionate use-based regime.

After DEA agents raided the homes of two seriously ill Californians who were in full compliance with the California Act, those Californians brought suit, seeking injunctive and declaratory relief prohibiting the enforcement of the federal CSA to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. *Id.* at 7.

The case made its way to this Court, where the United States argued that marijuana was a drug with "significant potential for abuse and dependence," and was a "fungible commodity that is regularly bought and sold in an interstate market." Reply Brief for Petitioners, *Ashcroft v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 2652615, at *1. "That market," the United States explained, "like the market for numerous other drugs having a significant potential for abuse and dependence, *is comprehensively regulated by the [CSA].*" *Id.* (emphasis added). Because Congress explicitly found that marijuana has "no currently accepted medical use in treatment in the United States" and had categorized marijuana as a "Schedule I" drug, the CSA was enacted "[i]n order to eradicate the market for such drugs." *Id.* As such, the United States argued, "the CSA makes it unlawful to manufacture, distribute, dispense, or possess *any* Schedule I drug for *any* purpose, medical or otherwise, except as part of a strictly controlled research project." *Id.*

Nor, argued the United States, was it "relevant that respondents' conduct may be lawful under state law" because "[u]nder the Supremacy Clause, state law cannot insulate conduct from the exercise of

Congress's enumerated powers." *Id.* "Here," argued the government, "regulation of intrastate activities is an *essential* part of Congress's regulation of the interstate drug market and Congress's goal of achieving a comprehensive and uniform system that guards against drug abuse and diversion and permits manufacturing and distribution for legitimate medical uses only under carefully prescribed safeguards in the CSA itself." *Id.*

This Court agreed, having "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave *a gaping hole in the CSA*." *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (emphasis added).

"First," the Court said, "the fact that marijuana is used 'for personal medical purposes on the advice of a physician'" is irrelevant, because "the CSA designates marijuana as contraband for *any* purpose." *Id.* at 27. "Moreover," said the Court, "the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner." *Id.* "Thus, even if respondents are correct that marijuana does have accepted medical uses . . . the CSA would still impose controls beyond what is required by California law" because "[t]he CSA requires manufacturers, physicians, pharmacies, and other handlers of controlled substances to comply with statutory and regulatory provisions mandating registration with the DEA, compliance with specific production quotas,

security controls to guard against diversion, record-keeping and reporting obligations, and prescription requirements. *Id.* "Accordingly," the Court concluded, "the mere fact that marijuana – like virtually every other controlled substance regulated by the CSA – is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA." *Id.*

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

The Court thus soundly rejected the notion that the marijuana growing and use at issue "were not 'an essential part of a larger regulatory scheme' because they had been 'isolated by the State of California, and [are] policed by the State of California,' and thus remain 'entirely separated from the market.'" *Id.* "The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious

proposition," concluded the Court, and one that Congress rationally rejected when it enacted the CSA. *Id.*

In the end, concluded the Court, if California wished to legalize the growing, possession, and use of marijuana, it would have to seek permission to do so "in the halls of Congress." *Id.*

2. Congress has not amended the CSA in response to *Gonzales v. Raich*, nor in response to Colorado's legalization scheme.

This Court has identified congressional amendment of the CSA as the only legal mechanism by which a State's legalization of marijuana can avoid the preemptive effect of the CSA. No such amendment has occurred.

The only thing that has changed since *Raich* seems to be the executive branch's willingness to sue a state for violating the CSA. Attorney General Holder "in a move aimed at calming nerves in Washington and Colorado" outlined eight "priority areas" where the Department of Justice intended to now focus its marijuana efforts, and informed the governors of those two states that DOJ would not take action against them under the CSA, but that DOJ "reserve[ed] the right to come in and sue them." *Holder "cautiously optimistic" on legal pot*, CNN (Oct. 21, 2014, 10:28 AM), http://www.cnn.com/2014/10/21/politics/holder-marijuana-optimistic/.

But given *Gonzales v. Raich*, and given the text and legislative history of the CSA, there is no doubt that *Congress* intended the CSA to serve the purpose of making *all* manufacture, sale, and possession of regulated drugs illegal, except to the extent explicitly authorized by the CSA. Nothing about the current executive branch's relaxed view of its enforcement obligations under the CSA changes the fact that *Congress* intended the CSA to prohibit the type of legalization effectuated by Colorado here.

Indeed, in the briefing it filed with this Court in *Gonzales v. Raich*, 545 U.S. 1 (2005), the federal executive branch confirmed that it shares this understanding of the intent and purpose of the CSA. Brief for the Petitioners, *Ashcroft v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 1799022, at *11 ("Congress has concluded that regulation of *all* intrastate drug activity 'is *essential* to the effective control' of interstate drug trafficking.") (emphasis added). Congress has taken no action in the decade since to indicate a different intent and purpose. And while the current executive branch has been less willing than its predecessor to sue states under the CSA, in declining to sue states like Colorado, the current administration expressly "reserved the right" to sue those states under the CSA, a clear expression of the executive branch's continued understanding that the CSA in fact preempts Colorado's state law. And if:

> excepting drug activity for personal use or free distribution from the sweep of the CSA would discourage the consumption of lawful

> controlled substances and would undermine Congress's intent to regulate the drug market comprehensively to protect public health and safety

Brief for the Petitioners, *Ashcroft v. Raich*, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 1799022, at *11, then the comprehensive commercial distribution scheme authorized by Colorado law undoubtedly does the same.

This is particularly so given the CSA's provision at 21 U.S.C. § 903 that a state law is preempted when a "positive conflict" exists such that a CSA provision and the state law in question "cannot consistently stand together." Such a positive conflict clearly exists between the CSA and Colorado's Amendment 64.

3. In exercise of its original jurisdiction, this Court has previously declared that a state law that interferes with congressional purposes and objectives is preempted by federal law and of no effect.

This Court last exercised its original jurisdiction over a claim like this in a 1981 case called *Maryland v. Louisiana*. 451 U.S. 725. There, several states sued Louisiana challenging the constitutionality of the "first-use" tax that Louisiana imposed on natural gas imported into the state. The suing states argued that Louisiana's tax was preempted by the federal Natural Gas Act, which gave the Federal Energy Regulatory

Commission ("FERC") the authority to determine pipeline and producer costs.

Louisiana objected to this Court's exercise of original jurisdiction on two grounds. First, Louisiana argued that, because its tax was imposed on pipeline companies rather than on consumers, the challenging states lacked an injury in fact. The Court reasoned, however, that the states had been injured in two respects. First, as purchasers of natural gas whose cost had increased as a direct result of the tax, the states had suffered economic injury. Second, as *parens patriae*, the state had an interest in protecting their citizens from suffering similar economic harm.

Louisiana next argued that the existence of pending state-court actions involving the constitutionality of the tax rendered the exercise of original jurisdiction inappropriate. The Court disagreed, noting that (1) no state was a party to those pending state actions, (2) the case implicated "unique concerns of federalism" affecting over 30 states, and (3) the nature of the preemption claim necessarily implicated the interests of the United States, which cut in favor of exercise of original jurisdiction.

On the merits, 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).

Turning to the Louisiana statute, the Court concluded that "[t]he effect of [Louisiana's law] is to shift the incidence of certain expenses, which the FERC insists are incurred substantially for the benefit of the owners of extractable hydrocarbons, to the ultimate consumer of the processed gas without the prior approval of the FERC." *Id.* at 750. While the Special Master found that in certain instances Louisiana's law would be consistent with FERC policy, the Court concluded that those instances were immaterial to the preemption question before it:

> Under the Gas Act, determining pipeline and producer costs is the task of the FERC in the first instance, subject to judicial review. Hence, the further hearings contemplated by the Special Master to determine whether and how processing costs are to be allocated are as inappropriate as Louisiana's effort to pre-empt those decisions by a statute directing that processing costs be passed on to the consumer. Even if the FERC ultimately determined that such expenses should be passed on *in toto*, this kind of decisionmaking is within the jurisdiction of the FERC; and the Louisiana statute . . . is inconsistent with the federal scheme and must give way. At the very least, there is an "imminent possibility of collision[.]"

Id. at 751. 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.

V. CONCLUSION

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

Respectfully submitted,

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