No. 22O144, Original

In The
Supreme Court of the United States

STATES OF NEBRASKA AND OKLAHOMA,

Plaintiffs,

v.

STATE OF COLORADO,

Defendant.

On Motion For Leave To File Complaint

PLAINTIFFS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

The State of Colorado authorizes, oversees, protects, and profits from a sprawling $100-million-per-month marijuana growing, processing, and retailing organization[1] that exported thousands of pounds of marijuana to some 36 States in 2014.[2] If this entity were based south of our border, the federal government would prosecute it as a drug cartel.

That is why the merits question presented by this case – whether Colorado's actions conflict with the Controlled Substances Act (CSA) – is so straightforward. The Court has already concluded that the CSA precludes States from attempting to create "an exemption for *** a significant segment of the total [marijuana] market," as they "would undermine the orderly enforcement of the entire [CSA] regulatory scheme."[3] The Department of Justice (DOJ) supported that position and still agrees that "State[s] *** that have enacted laws authorizing marijuana-related conduct" may create a "threat *** to public safety,

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[1] See Elizabeth Hernandez, *Colorado monthly marijuana sales eclipse $100 million mark*, Denver Post, Oct. 9, 2015, http://tinyurl.com/j39gbbw.

[2] Kevin Wong & Chelsey Clarke, Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact, Volume 3*, at 102 (2015) (Federal Report), available at http://tinyurl.com/p8tkqpc.

[3] *Gonzales* v. *Raich*, 545 U.S. 1, 28 (2005).

public health, and other law enforcement interests."[4] And DOJ has threatened that, if legalizing States' "enforcement efforts are not sufficiently robust to protect against [such] harms" it "may seek to challenge the regulatory structure itself"[5] – presumably contending, as Nebraska and Oklahoma do here, that the CSA preempts contrary state regulation.

So it is curious that the Solicitor General here maintains that Colorado's marijuana might not harm the citizens of the States to which it is being exported and that, even if such harm is occurring, the Supremacy Clause might not be available as a means to invalidate Amendment 64's conflicts with the CSA. Because the current Administration does not want to take the politically inconvenient position of opposing marijuana legalization, nor is it willing to take the legally untenable position that Amendment 64 can be reconciled with the CSA, the Solicitor General instead recommends that this Court should refrain from hearing this case. Thus, the Solicitor General is forced to argue that a State that has been harmed as a result of a neighboring State's unconstitutional actions has no recourse or remedy for those harms. This anarchic position cannot be harmonized with the original jurisdiction clause.

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[4] Memorandum from Deputy Attorney General James M. Cole to United States Attorneys 2 (Aug. 29, 2013) (Cole Memorandum), available at http://tinyurl.com/nrc9ur8.

[5] *Id.* at 3.

DISCUSSION

I. Colorado's actions have directly caused Nebraska's and Oklahoma's harms.

In the Solicitor General's view, because Colorado law does not explicitly "direct[ ] or authorize[ ]" the transport of Colorado marijuana across state lines, Colorado bears no responsibility for the fact that those harmful border crossings occur.[6] This is plainly wrong.

First, while the Solicitor General is correct that original jurisdiction lies only where one State's harms are traceable to the actions of another State, his claim that this is not that type of case ignores this Court's decision in *Gonzales* v. *Raich*,[7] the positions DOJ took in *Raich*,[8] and the positions DOJ takes daily in prosecutions of criminal conspiracies to violate the CSA. Indeed, targeting distributors and wholesalers, rather than street-level users, has always been the federal enforcement priority, yet here DOJ wants to give the mastermind a pass and blame the whole problem on Joe Blunt. Private conduct that would be criminally punished under federal law does not lose its lawbreaking character if practiced by a State.

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[6] U.S. Br. 11, 14-15.

[7] 545 U.S. 1, 10-24 (2005).

[8] Brief for the Petitioners 22-27, *Gonzalez* v. *Raich*, No. 03-1454, 2004 WL 1799022.

Colorado has created a massive criminal enterprise whose sole purpose is to authorize and facilitate the manufacture, distribution, sale, and use of marijuana. It has granted a property interest in federal contraband and, like any well-run cartel, it protects its distributers' operations. As the Director of the federally-funded task force studying the issue states, "Colorado is the black market for the rest of the country."[9] Colorado created this illicit market for profit,[10] and profit handsomely it does thanks to taxes imposed at every step.

Calling itself a "major exporter of marijuana,"[11] Colorado knows that a large portion of the demand for its illegal marijuana comes from residents of neighboring states[12] and that as many as half the visitors to Colorado are motivated to visit by marijuana.[13]

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[9] *'Clearing the Haze:' Black market is thriving in Colorado*, The Gazette, Mar. 23, 2015, http://tinyurl.com/hs8b9hb.

[10] Colo. Const. art. XVIII, § 16(1)(a) (stating marijuana legalized for "enhancing revenue for public purposes").

[11] Kirk Siegler, *Colorado's Pot Industry Looks To Move Past Stereotypes*, NPR, Dec. 2, 2014, http://tinyurl.com/q9nzhjm.

[12] A report for the Colorado Department of Revenue notes that retail demand for Colorado marijuana is derived primarily from "out-of-state visitors and from consumers who previously purchased from the Colorado black and gray markets." Miles K. Light et al., Colo. Dep't of Revenue, *Market Size and Demand for Marijuana in Colorado* 3 (2014) (Colorado Report), available at http://tinyurl.com/jx322fs.

[13] Jason Blevins, *Marijuana has huge influence on Colorado tourism, state survey says*, Denver Post, Dec. 9, 2015, http://tinyurl.com/hym8ev8.

Colorado has also facilitated purchase of marijuana by residents of neighboring states by issuing licenses to an unusually high number of marijuana retailers perched on Colorado's borders.[14] And despite doing all this to lure buyers from other states, Colorado has implemented no mechanism to preclude out-of-staters from purchasing large quantities of marijuana to take back to their home states,[15] nor does it have any system in place to track its marijuana once introduced into the interstate market.[16] Worse yet, Colorado allows the sale of marijuana to anyone over the age of 21 – even those with convictions for distribution of marijuana in neighboring States.

Given all this, to deny that Colorado is responsible for the harms its marijuana is causing in neighboring States is like saying that a tavern keeper cannot be held responsible for the drunk who kills a family with his car even though he knowingly sold the drunk ten beers in two hours. The actions of

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[14] Colo. Dep't of Revenue, Marijuana Enforcement Division, *MED Licensed Retail Marijuana Stores as of December 1, 2015*, available at http://tinyurl.com/nfbw3ab (follow link to "Stores (PDF)" or "Stores (Excel)" under "Retail Marijuana Facilities").

[15] Colorado Report at 21 ("[T]here is no record of purchases, so any visitor can make multiple purchases in a single day, if desired.").

[16] Colorado Report at 9 ("[T]he State Marijuana Inventory Tracking System *** does [not] indicate whether the marijuana sold is being diverted to underground markets outside of Colorado.").

third-party interstate traffickers are in no way "independent" of Colorado's marijuana regime.[17]

Second, when the Solicitor General says that this is not a case in which a state-authorized pollutant by "operation of natural forces enters and causes injury in the complaining State's territory," he is not distinguishing this case, he is *describing* it. Colorado authorized the generation of a harmful, illegal substance that by the foreseeable operation of users and abusers inevitably enters and causes injury in Nebraska and Oklahoma.[18] There is no denying that "[l]ocal distribution and possession of [marijuana] contribute[s] to swelling the interstate traffic in such substances."[19] Congress has found it to be so,[20] this Court has found it to be so,[21] and DOJ has (before now) argued that it is so.[22]

Nor do Nebraska and Oklahoma have any more "power[ ] to prohibit" the harms they are suffering than do States harmed by pollution.[23] Nebraska and Oklahoma can no more prevent Colorado's marijuana from crossing its borders than it can prevent its

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[17] *Maryland* v. *Louisiana*, 451 U.S. 725, 736-37 (1981) (concluding injury traceable even though third parties were conduit for inflicting harms).

[18] Cf. *ibid.*

[19] *Raich*, 545 U.S. at 12 n.20 (quoting 21 U.S.C. § 801(4)).

[20] *Ibid.*

[21] *Id.* at 27-33.

[22] Brief for the Petitioners, note 8, *supra*, at 22-23.

[23] U.S. Br. 10.

winds from blowing and rivers from flowing. They can only bear the costs of efforts to *mitigate* the harms.

The only other means available to Nebraska and Oklahoma to prevent their harms is one that they long ago utilized: federal legislation to create a uniform solution to this interstate problem. The enactment of the CSA was the codification of the national agreement that marijuana should be illegal. Colorado's representatives in Congress uniformly voted in favor of the CSA, as did virtually every other representative. Colorado has now, with the tacit approval of the Executive Branch, chosen to renege on this legislative bargain. Fortunately, the Constitution contains mechanisms for dealing with such transgressions by States, including both the Supremacy Clause and the original jurisdiction provision.[24]

Third, *Louisiana* v. *Texas*[25] is inapposite and does not support the *sui generis* view of liability that the United States adopts for purposes of this case (and this case only). There, this Court declined to assume original jurisdiction because it was the Texas health officer's "maladministration" of Texas law that was

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[24] Similarly, for a redressability problem to exist as argued by the Solicitor General, U.S. Br. 17-18, this Court would have to make the unprecedented assumption that, absent Colorado's regulatory regime, the Executive Branch would refuse to enforce the CSA in Colorado, contrary to both its previous pronouncements, Cole Memorandum at 2-3, and its duty to execute the laws.

[25] 176 U.S. 1 (1900).

harming Louisiana. The Texas officer's wholly *ultra vires* deeds could not be said to be the natural or foreseeable result of anything authorized by the State of Texas.[26] Here, the entire purpose of the Colorado law is to "authorize[ ] and confirm[ ]" individuals to purchase marijuana, and it is the nature of such substances that, once sold locally, they will be transported interstate.[27]

II. The Complaint pleads a valid cause of action.

The Solicitor General also argues that original jurisdiction is improper because this case raises "novel questions about whether Nebraska and Oklahoma have invoked any viable cause of action."[28]

First, it takes great chutzpah to make such an argument when, in 2013, DOJ threatened Colorado with a suit "seek[ing] to challenge [Colorado's] regulatory structure itself."[29] Perhaps this is why the Solicitor General merely suggests that "questions" about the validity of the cause of action will need to be resolved without actually arguing that the complaining States do not have a claim.

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[26] *Id.* at 22.

[27] *Id.* at 22-23.

[28] U.S. Br. 19-20.

[29] Cole Memorandum at 3.

Second, *Maryland* v. *Louisiana*[30] establishes that the Supremacy Clause and equity both provide a cause of action when one State sues another alleging that the latter's laws are preempted.[31] While *Armstrong* v. *Exceptional Child*[32] has rejected the notion that the Supremacy Clause creates a private right of action in Medicaid suits, it recognized that this Court has "long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law" and that these causes of action sound in equity.[33] The *Armstrong* Court ultimately concluded that Congress had by statute abrogated the equitable cause at issue there,[34] but no one here suggests that Congress has abrogated Nebraska and Oklahoma's equitable cause of action. And because Nebraska and Oklahoma allege causes of action sounding in equity and in the Constitution rather than in the CSA, the "zone of interest" test – which looks to "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim"[35] – has no application.[36]

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[30] 451 U.S. 725 (1981).

[31] *Id.* at 746-52.

[32] 135 S.Ct. 1378 (2015).

[33] *Id.* at 1384.

[34] *Id.* at 1385.

[35] *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S.Ct. 1377, 1387 (2014).

[36] Contra U.S. Br. 20.

Third, even if an original jurisdiction preemption case were "novel," that is not a basis for declining jurisdiction but rather a reason to allow the case to proceed. Because of the rarity of suits between States, they often present novel questions. That is why this Court has emphasized that its original jurisdiction extends to cases outside the heartland of traditional "water or boundary disputes" or "common-law causes of action for violations of a contract"[37]—indeed, "such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy."[38]

Finally, assumption of original jurisdiction over this case will not open the floodgates to a host of suits from other states on other subject matters. The Solicitor General's firearm example[39] lacks any preemption issue, while the trucking example[40] lacks the one-two punch of a refusal by the Executive Branch to enforce a federal law related to harms caused by a State's violation of that federal law. This suit, on the other hand, is an unprecedented case involving preemption, harms flowing from the preempted state laws, and federal non-enforcement. Whether a state may nullify federal law if it has the acquiescence of the Executive Branch is certainly that

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[37] U.S. Br. 20.

[38] *Missouri* v. *Illinois*, 180 U.S. 208, 240-41 (1901).

[39] U.S. Br. 17.

[40] U.S. Br. 15-16.

type of limited case that presents "unique concerns of federalism"[41] and issues of "federal law and national import"[42] that form an appropriate part of this Court's docket.

III. The presence of issues of fact does not counsel against original jurisdiction.

The Solicitor General speculates that the case might involve "intricate questions" of fact that counsels against original jurisdiction.[43]

All parties to this case agree that the central issues in this suit "are legal questions that may be decided on summary judgment,"[44] because there are sufficient uncontested facts to support it. That additional facts can be developed in support of summary judgment is inherent in most lawsuits. Every day that passes will, unfortunately, provide further facts demonstrating the deleterious consequences of Colorado's unlawful actions.[45] But these factual issues

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[41] *Maryland* v. *Louisiana*, 451 U.S. at 743-44.

[42] *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 498-99 (1971).

[43] U.S. Br. 22.

[44] Br. in Opp. 34-35.

[45] The Federal Report describes dozens of these ongoing harms. See Federal Report at 105-15. Other examples abound, like the convicted sex offender charged with intent to distribute Colorado marijuana within 2,000 feet of a school, Dallas Franklin, *Oklahoma man facing multiple life sentences for selling, possessing marijuana*, KFOR, May 8, 2015, http://tinyurl.com/

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provide no reason to decline to hear the case. This Court routinely hears original cases involving discovery and pretrial proceedings, and it has mechanisms in place to ensure that these cases do not burden its appellate docket, such as the appointment of a special master.[46]

The only case the Solicitor General cites[47] for the counterintuitive notion that factual disputes are a barrier to jurisdiction – *Kansas* v. *Colorado*[48] – undercuts, rather than supports, that proposition. There, in rejecting Colorado's demurrer to Kansas's bill of complaint, this Court said it had "no special difficulty" concluding that the original jurisdiction case should proceed to "ascertainment of all the facts."[49] In other words, the Solicitor General wholly misreads the case: factual issues led the Court to "forbear proceeding" not *on the case*, but *on the demurrer*.[50] *Kansas* thus confirms that the presence of "intricate questions" does not foreclose the assumption of

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jrf8qgm, and the recent college graduate who fatally shot himself after inadvertently overdosing on potent Colorado edibles, *Mother of local man who committed suicide says marijuana candy in Colorado led to his death*, Tulsa World, Mar. 27, 2015, http://tinyurl.com/gmtko7f.

[46] See, *e.g.*, *Kansas* v. *Nebraska*, 135 S.Ct. 1042, 1051 (2015).

[47] U.S. Br. 22.

[48] 185 U.S. 125 (1902).

[49] *Id.* at 144.

[50] *Id.* at 147.

original jurisdiction – it is the *raison d'etre* of original jurisdiction.

IV. This Court is the appropriate forum for Nebraska's and Oklahoma's claims.

The Solicitor General additionally posits that original jurisdiction is unwarranted because "the preemption issue could be raised in a district-court action," pointing to other suits by non-State parties challenging Amendment 64.[51] But even assuming they can reach the merits, those later-filed suits do not now deprive this Court of jurisdiction because the county sheriff plaintiffs will be unable to pursue either the States' sovereign interest in preventing this nuisance or the interests of the States' citizens that Nebraska and Oklahoma represent as *parens patriae*.[52]

Nor is it clear that Nebraska and Oklahoma could, as the Solicitor General suggests,[53] sue a Colorado state official for prospective injunctive relief in district court as an alternative to this original jurisdiction action.[54] Even if possible, the Solicitor General

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[51] U.S. Br. 21.

[52] *Maryland* v. *Louisiana*, 451 U.S. at 742-45.

[53] U.S. Br. 21.

[54] See *Connecticut* v. *Cahill*, 217 F.3d 93, 105-11 (2d Cir. 2000) (Sotomayor, J., dissenting) (rejecting "the proposition that a plaintiff-State may plead around the jurisdictional confines of § 1251(a) by naming State officials as defendants instead of the State itself").

offers no reason to deprive Plaintiff States of control over their suit by forcing them to file a different suit, against different parties, in a different forum when Congress has given them a right to *this* forum. Sending this case down to district court will only perpetuate the legal uncertainties surrounding this pressing national issue and permit Colorado "to benefit from any delay attendant to [those] proceedings even if the [legalization] is ultimately found unconstitutional."[55]

CONCLUSION

The United States here turns its back on Congress's finding in the CSA that "[l]ocal distribution and possession of [marijuana] contribute[s] to swelling the interstate traffic in such substances," on everything it argued in *Raich* in support of the CSA, and on facts reported by a task force it funds showing the havoc being wreaked on Colorado's neighbors by legalization. But with or without the Executive Branch, Nebraska and Oklahoma, as sovereigns, have a duty to protect their citizens from these continuing harms resulting from Colorado's illegal activities, with this Court as their recourse. And as more lives are destroyed, Colorado profits, leading more States to consider fashioning their own marijuana regimes. Accordingly, whether the CSA may be dismantled by piecemeal nullification is a pressing

[55] *Maryland* v. *Louisiana*, 451 U.S. at 743.

national issue that merits swift and final resolution by this Court.

For these reasons, the Motion for Leave to File Complaint should be granted.

Respectfully submitted,

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