No. 144, Original

In the Supreme Court of the United States

STATES OF NEBRASKA AND OKLAHOMA, PLAINTIFFS

v.

STATE OF COLORADO

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
DOUGLAS N. LETTER
MARK B. STERN
ALISA B. KLEIN
SONIA K. MCNEIL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitutions and statutes:

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, establishes "a comprehensive regime to combat the international and interstate traffic in illicit drugs." *Gonzales* v. *Raich*, 545 U.S. 1, 12 (2005). In enacting the CSA, Congress found that the "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 determined that "it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate." 21 U.S.C. 801(5). The CSA's prohibitions and requirements therefore

govern both interstate and intrastate markets in controlled substances.

The CSA places controlled substances into five schedules, with the initial placement subject to modification by the Attorney General if she determines, in consultation with the Secretary of Health and Human Services, that a change is warranted in light of medical, scientific, and other statutory factors. 21 U.S.C. 811(a) and (d), 812. Congress classified marijuana as a Schedule I drug. 21 U.S.C. 812(c), Schedule I(c)(10). Schedule I drugs have a high potential for abuse and lack any accepted medical use. 21 U.S.C. 812(b)(1). Because of marijuana's Schedule I classification, its manufacture, distribution, dispensing, or possession is generally prohibited, and a person who commits those acts (or attempts or conspires to do so) commits a federal criminal offense. 21 U.S.C. 841-846.

The Attorney General can enforce the CSA through criminal prosecutions or through civil suits for injunctive relief. See 21 U.S.C. 841 *et seq.*, 882(a); see, *e.g.*, *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486-487 (2001). The CSA does not contain a private right of action to enforce its prohibitions.

b. States have also enacted laws regulating marijuana and other controlled substances. The CSA provides that "[n]o provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the

two cannot consistently stand together." 21 U.S.C. 903. The CSA further provides that state and local officers "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances" are generally immune from federal civil and criminal liability. 21 U.S.C. 885(d).

2. In recent years, some States, including Colorado, have amended their laws to permit the distribution and sale of marijuana for assertedly medical purposes. In 2009, Deputy Attorney General Ogden issued a memorandum addressing federal prosecution of CSA violations in those States. See Memorandum from Deputy Attorney General David W. Ogden to Selected U.S. Attorneys 1-2 (Oct. 19, 2009).[1] The memorandum affirmed that "[t]he prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks" remain important enforcement priorities for the United States. *Id.* at 1. The memorandum, however, also instructed U.S. Attorneys that "pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." *Id.* at 1-2. In 2011, Deputy Attorney General Cole issued a second memorandum clarifying that the 2009 memorandum "was never intended to shield" activities such as "large-scale, privately-operated industrial marijuana cultivation centers" with "planned cultivation of tens of thousands of cannabis plants" from prosecution under the CSA, "even where those activities purport to comply with state law." Memorandum

[1] http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf.

from Deputy Attorney General James M. Cole to U.S. Attorneys 1-2 (June 29, 2011).[2]

3. In 2012, Colorado voters adopted Amendment 64 to the Colorado Constitution to legalize and regulate the recreational use of marijuana. See Colo. Const. Art. XVIII, § 16 (Amendment 64). Section 3 of Amendment 64 exempts from Colorado's criminal prohibitions persons aged twenty-one or older who consume marijuana in non-public areas in a manner that does not endanger others, or who buy, possess, use, transport, or transfer without remuneration one ounce or less of marijuana. § 3(a), (c) and (d); see Colo. Rev. Stat. § 18-18-433 (2014); see generally Colo. Rev. Stat. §§ 18-18-401 *et seq*. (2014).

Amendment 64 establishes a scheme of licensing, regulation, and taxation for the sale of marijuana. Section 4 exempts from Colorado's criminal prohibitions, in specified circumstances, persons who manufacture, possess, display, transport, buy, or sell marijuana, marijuana products, or marijuana accessories. § 4(a)-(e). Those exemptions generally apply only if "the person conducting the activities * * * has obtained a current, valid license" for the relevant activity or "is acting in his or her capacity as an owner, employee, or agent of a licensed" store or facility. *Id.* § 4(b)-(e). Section 5 directs the Colorado Department of Revenue to promulgate licensing procedures; standards for marijuana production, display, advertising, and labeling; and rules to "prevent the sale or diversion of marijuana and marijuana products to persons under the age of twenty-one." § 5(a)-(c). Section 5 also requires the Colorado General Assem-

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[2] http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf.

bly to enact an excise tax for sales of marijuana from cultivation facilities to manufacturing facilities and retail stores (other than medical-marijuana centers). § 5(d).

Amendment 64 permits localities to prohibit the operation of recreational marijuana facilities entirely. § 5(f). It does not change Colorado's preexisting medical-marijuana provisions, which permit similar prohibitions and are codified in a different section of the Constitution and in a statutory code. § 7. Amendment 64 provides that each of its provisions is severable. § 8.

Colorado permitted retail marijuana businesses to begin operating on January 1, 2014, and its regulatory scheme was fully implemented in its current form by October 30, 2014. Compl. ¶ 40. As of December 31, 2014, out of 321 reporting localities, 67 permitted both medical and recreational marijuana facilities; 21 permitted only medical facilities; 5 permitted only recreational facilities; and 228 permitted neither medical nor recreational facilities. See Marijuana Enforcement Div., Colo. Dep't of Revenue, *Annual Update* 6 (Feb. 27, 2015).[3]

4. After the adoption of Amendment 64 and a similar initiative in Washington State, Deputy Attorney General Cole issued a memorandum addressing federal enforcement of the CSA. Memorandum from Deputy Attorney General James M. Cole to U.S. Attorneys (Aug. 29, 2013) (2013 Cole Memorandum).[4] That memorandum explained that the Department of Jus-

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[3] https://www.colorado.gov/pacific/sites/default/files/2014%20MED%20Annual%20Report_1.pdf.

[4] http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

tice "is committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way." *Id.* at 1. To that end, the memorandum stated that U.S. Attorneys should "focus their enforcement resources and efforts" in all States on conduct relating to any of eight "particularly important" federal enforcement priorities, "regardless of state law." *Id.* at 1-2. Those priorities include "[p]reventing the diversion of marijuana from States where it is legal under state law in some form to other States"; "[p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels"; and "[p]reventing the distribution of marijuana to minors." *Id.* at 1-2. "Outside of these enforcement priorities," the memorandum explained, "the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws." *Id.* at 2.

The 2013 memorandum further explained that the Department's guidance rested on the expectation that "state and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests." 2013 Cole Memorandum 2. The memorandum noted that the implementation of "strong and effective regulatory and enforcement systems" in jurisdictions that have "legalized marijuana in some form" may "affirmatively address [federal] priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of

the regulated system and to other states." *Id.* at 3. But the memorandum advised that "[i]f state enforcement efforts are not sufficiently robust to protect against [such] harms," "the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions." *Ibid.*

The 2013 memorandum directed prosecutors to "review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system." 2013 Cole Memorandum 3. It cautioned, however, that "[n]either the guidance herein nor any state or local law provides a legal defense to a violation of federal law." *Id.* at 4.[5]

5. In December 2014, Nebraska and Oklahoma filed a motion in this Court for leave to file a bill of complaint against Colorado. They seek a declaratory judgment that Sections 4 and 5 of Amendment 64 are preempted by the CSA and an injunction against the implementation of those provisions. Compl. 28-29. Nebraska and Oklahoma allege that Amendment 64 has increased the flow of marijuana from Colorado into their territories, requiring them to expend substantial "law enforcement, judicial system, and penal system resources" and harming "the health and wel-

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[5] Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2217, provides that "[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to [specified States,] to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

fare" of their citizens. Compl. ¶¶ 54-65; Br. 11-16. They argue that that Sections 4 and 5 are preempted because "Colorado's affirmative authorization of the manufacture, possession, and distribution of marijuana presents a substantial obstacle to Congress's objectives under the CSA." Br. 15. But they have made clear that they do not contend that "the CSA requires Colorado to criminalize marijuana." *Ibid.* They also do not challenge the provisions of Colorado law allowing the sale of marijuana for medical purposes.

Colorado has filed an opposition to Nebraska and Oklahoma's motion. Colorado argues that this case does not warrant an exercise of this Court's original jurisdiction (Br. 14-24); that Nebraska and Oklahoma lack Article III standing (Br. 24-30); that no cause of action exists to enforce the CSA's purported preemptive effect (Br. 30-32); and that the United States is an indispensable party without which the suit cannot proceed (Br. 33-34).

DISCUSSION

The motion for leave to file a bill of complaint should be denied because this is not an appropriate case for the exercise of this Court's original jurisdiction. Entertaining the type of dispute at issue here—essentially that one State's laws make it more likely that third parties will violate federal and state law in another State—would represent a substantial and unwarranted expansion of this Court's original jurisdiction.

1. Under Article III of the Constitution, this Court's original jurisdiction extends to "all Cases * * * in which a State shall be Party." U.S. Const. Art. III, § 2, Cl. 2. Since the First Judiciary Act, Congress has provided by statute that this Court has

"original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. 1251(a); see Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80; see also Stephen M. Shapiro et al., *Supreme Court Practice* § 10.1, at 620-621 (10th ed. 2013) (*Supreme Court Practice*). But although that jurisdiction is exclusive, the Court has "interpreted the Constitution and [Section] 1251(a) as making [its] original jurisdiction 'obligatory only in appropriate cases,'" *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972)), and therefore "as providing [the Court] 'with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court,'" *ibid.* (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983)).

In exercising that discretion, this Court has "said more than once" that its original jurisdiction should be invoked only "'sparingly,'" observing that original jurisdiction "'is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.'" *Mississippi*, 506 U.S. at 76 (quoting *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992), and *Louisiana* v. *Texas*, 176 U.S. 1, 15 (1900)). The Court has considered both "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim," *id.* at 77 (internal citations omitted), and whether there exists an alternative forum "in which the issues tendered" to the Court "may be litigated," even though it will necessarily be true that no other forum may adjudicate a dispute directly between the States, *ibid.* (citation omitted).

2. This case does not present the type of dispute between sovereigns that warrants an exercise of original jurisdiction.

a. This Court has explained 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." *Mississippi*, 506 U.S. at 77 (quoting *Texas*, 462 U.S. at 571 n.18). It is by no means clear that this case falls in that category. Another sovereign's adoption of a licensing scheme that permits certain conduct within that other sovereign's territory would not ordinarily amount to *casus belli*, at least where, as here, the complaining sovereign retains its full authority to prohibit the same conduct within its own territory and thus to address there the consequences of the other sovereign's different regulatory choice. This is not a case, for example, in which another State has directed or affirmatively authorized the generation of pollution that by operation of natural forces enters and causes injury in the complaining State's territory that it is powerless to prohibit. Cf. *Missouri* v. *Illinois*, 180 U.S. 208, 241 (1901); pp. 11-12, *infra*.

b. In many of the instances in which this Court has exercised its original jurisdiction over a controversy between States, the disputed questions "sound[ed] in sovereignty and property, such as those between states in controversies concerning boundaries, and the manner of use of the waters of interstate lakes and rivers." *Supreme Court Practice* § 10.2, at 622 (citing cases). The Court has also exercised original jurisdiction "in cases sounding in contract, such as suits by one state to enforce bonds or other financial obliga-

tions of another state" or "to construe and enforce an interstate compact." *Id.* § 10.2, at 624.

This Court has confronted more challenging jurisdictional issues in cases in which a State asserts that another State's regulatory actions have inflicted an economic injury on the plaintiff State or has put the health or safety of its citizens at risk. In those cases, the Court has drawn a distinction between claims that the defendant State has itself inflicted an injury on the plaintiff State and claims that the defendant State's actions have merely permitted other persons to inflict such an injury.

Thus, this Court has exercised original jurisdiction over claims that an agent of the defendant State was inflicting an environmental harm on the plaintiff State—claims that resemble common-law nuisance actions. See, *e.g.*, *New York* v. *New Jersey*, 256 U.S. 296, 298 (1921); *Missouri*, 180 U.S. at 240-242. The Court has also exercised original jurisdiction over claims that the defendant State took regulatory action that targeted the plaintiff State or its citizens and of its own force directly inflicted injuries on them. For example, in *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), the Court considered whether West Virginia had unlawfully "curtail[ed] or cut off the supply of natural gas" carried from its territory to neighboring States. *Id.* at 581, 591-593. Similarly, in *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), the Court exercised jurisdiction over a challenge under the Commerce Clause and the Natural Gas Act to a Louisiana tax on natural gas, the incidence of which fell on both the plaintiff States and a wide swath of their populations. See *id.* at 735-745; see also *Wyoming*, 502 U.S. at 448, 450-454 (exercising jurisdiction over

challenge to Oklahoma statute effectively requiring in-state utilities to purchase less coal from Wyoming mines, which "directly affect[ed] Wyoming's ability to collect [certain] tax revenues").

In contrast, where a State has alleged that another State permitted—but did not direct or approve—the injurious actions of other parties, this Court has declined to exercise original jurisdiction. The foundational decision is *Louisiana* v. *Texas*. In that case, Louisiana alleged that Texas's health officer, under the pretext of implementing Texas's quarantine laws, had imposed a total embargo on commerce with New Orleans designed to benefit Texas commercial interests, in violation of the Commerce Clause. See 176 U.S. at 4-5, 8-10 (Statement of the Case). Louisiana claimed that Texas's "Governor permit[ted] these rules and regulations to stand and be enforced, although he ha[d] the power to modify or change them." *Id.* at 22. After an extensive review of the historical origins of this Court's original jurisdiction, *id.* at 13-16, the Court held that it lacked jurisdiction over the suit, *id.* at 22-23. The Court explained that a prerequisite for the exercise of its exclusive original jurisdiction was that "the controversy to be determined is a controversy arising *directly* between the State of Louisiana and the State of Texas." *Id.* at 16 (emphasis added); see *id.* at 18. The Court concluded that, despite Louisiana's allegation that Texas's governor had unlawfully declined to override the regulations promulgated by the health officer, see *id.* at 5 (quoting bill of complaint), Louisiana had not alleged "facts which show that the State of Texas has so *authorized or confirmed* the alleged action of her health officer as to make it her own, or from which it necessarily follows

that the two States are in controversy within the meaning of the Constitution," *id.* at 22-23 (emphasis added). Accordingly, there was no "direct issue between" the States, *id.* at 18, because "the action complained of" was not "state action," *id.* at 22.

Thus, where the plaintiff State does not allege that the defendant State has "confirmed or authorized" the injury-inflicting action, there does not exist a "controversy" between the States appropriate for initial resolution under this Court's exclusive original jurisdiction. The Court emphasized that principle the Term following *Louisiana* v. *Texas*, in a case in which it exercised jurisdiction over a suit by Missouri, against Illinois and a sanitation district acting as an agent of Illinois, for polluting the Mississippi River. See *Missouri* v. *Illinois*, 180 U.S. at 242. The Court distinguished *Louisiana* v. *Texas* on the ground that the "existence and operations" of the Illinois sanitation district were "wholly within the control of the state," insofar as the district was "an agency of the state to do the very things which * * * will result in the mischief to be apprehended." *Ibid.*

This Court has continued to enforce the direct-injury requirement, which substantially overlaps with the Article III standing requirement that the injury be fairly traceable to the defendant's actions (see pp. 16-17, *infra*). As the Court explained in *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976) (per curiam), "[i]t has long been the rule that in order to engage this Court's original jurisdiction, a plaintiff State must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State," and that "'[t]o constitute such a [justiciable] controversy, it must appear that the complaining

State has suffered a wrong through the action of the other State, furnishing ground for judicial redress.'" *Id.* at 663 (brackets in original) (quoting *Massachusetts* v. *Missouri*, 308 U.S. 1, 15 (1939)). In that case, the plaintiff States alleged that illegal taxes imposed on their citizens by neighboring States had injured the plaintiff States' fiscs because they gave tax credits to their own citizens for out-of-state taxes. See *id.* at 661-663. The Court held, however, that the plaintiff States' alleged decline in tax revenue was not inflicted by the other States' tax laws. Rather, the loss was "self-inflicted" in the sense that it was caused by the plaintiff States' own voluntary choice to award tax credits on the basis of the other sovereign's laws. *Id.* at 664.

This case does not satisfy the direct-injury requirement. Nebraska and Oklahoma essentially contend that Colorado's authorization of licensed intrastate marijuana production and distribution increases the likelihood that third parties will commit criminal offenses in Nebraska and Oklahoma by bringing marijuana purchased from licensed entities in Colorado into those States. Compl. ¶¶ 54-65. But they do not allege that Colorado has directed or authorized any individual to transport marijuana into their territories in violation of their laws. Nor would any such allegation be plausible.

Nebraska and Oklahoma have therefore not sufficiently alleged that Colorado has inflicted the sort of direct injury to their sovereign interests warranting an exercise of original jurisdiction. At most, they have alleged that third-party lawbreakers are inflicting those injuries, and that Colorado's legal regime makes it easier for them to do so. But that is a far less direct

connection between state action and the alleged injury than even the connections that this Court found insufficient in *Louisiana* v. *Texas* and *Pennsylvania* v. *New Jersey*. See pp. 12-14, *supra*.

c. Applying the direct-injury requirement in this context reflects a sound limiting principle on the exercise of this Court's original jurisdiction.

i. The premise of Nebraska and Oklahoma's preemption argument is that Colorado's regulatory regime stands as an obstacle to the CSA's objective of eliminating the interstate market in marijuana. But that sort of allegation could be made in many cases: One State could argue that Congress sought to displace another State's law because of a desire for a uniform national rule or a concern that one State's requirements that differed from federal requirements would cause private persons to take actions that would adversely affect the citizens or interests of other States.

For example, Congress has preempted certain state and local laws relating to the trucking industry, 49 U.S.C. 14501(c)(1), after finding that "the regulation of intrastate transportation of property by the States ha[d] * * * impeded the free flow of trade, traffic, and transportation of interstate commerce" and "placed an unreasonable cost on the American consumers." Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, Tit. VI, § 601(a)(1), 108 Stat. 1605. Under plaintiffs' broad view of the appropriate exercise of this Court's original jurisdiction, a State arguably could file an original action to enjoin another State's law as preempted under that provision so long as it alleged that the law would prompt trucking companies to change prices or

routes in a way that would be harmful to the plaintiff State's economy or that required the State to expend additional resources. Similar arguments could be made under numerous other preemption provisions and doctrines as well.[6]

Such a broad invitation to invoke this Court's original jurisdiction to resolve myriad preemption questions would not comport with the Court's traditional insistence that original jurisdiction be exercised only "sparingly." *Mississippi*, 506 U.S. at 76 (citation omitted). And it "could well pave the way for putting this Court into a quandary whereby" it "must opt either to pick and choose arbitrarily among similarly situated litigants" to preserve the Court's ability to attend to its appellate docket "or to devote truly enormous portions" of the Court's "energies to such matters." *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 504 (1971).

ii. The direct-injury requirement also averts difficult threshold questions that would arise in these types of disputes. For example, this Court has held that an injury is not "fairly traceable" to a defendant's conduct, and thus does not support Article III standing, when it "results from the independent action of

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[6] Of course, certain preemption questions may appropriately be resolved under this Court's original jurisdiction. Where a "substantial and serious injury" to another State or its citizens is the "direct result" of an allegedly preempted law, such as where the defendant State has imposed a tax that "is clearly intended to be passed on" to consumers in other States, the "direct injury" requirement is met. *Maryland*, 451 U.S. at 736, 739. But that narrow category of cases does not support the exercise of original jurisdiction whenever an assertedly preempted state law bears only an indirect causal relation to the complaining State's alleged injuries.

some third party not before the court." *Allen* v. *Wright*, 468 U.S. 737, 757 (1984) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976)). That typically would be so when the asserted claim is that one State's law makes it more likely that third parties will engage in conduct in another State's territory that is detrimental to its sovereign interests—albeit conduct that the other State can continue to prohibit within *its* territory. If standing were upheld in that circumstance, States could challenge any number of laws enacted by neighboring States—for example, licensing laws for firearms that are unlawful in the plaintiff States—on the theory that the laws make it more likely that third parties will enter the plaintiff States' territory and violate their more restrictive regimes.

This case exemplifies the difficult threshold questions that could arise. Plaintiffs do not claim that the CSA requires Colorado to prohibit the sale or possession of marijuana (Br. 15), and Amendment 64 contains a severability clause (§ 8). If plaintiffs were to prevail, therefore, the result might be that Colorado's regulatory regime would be enjoined but the sale and possession of marijuana would still be lawful under Colorado's laws. Plaintiffs' standing argument therefore appears to rest on the premise that Colorado's scheme, by assertedly "condoning the intrastate manufacture, distribution, and possession of an illegal drug," Br. 12, gives rise to greater harms than would a regime of legalization with no regulation. Even if that proposition could meet the bare plausibility requirement at this stage in the proceedings, standing could ultimately lie under Article III only on the basis of predictions about the probable reaction of numer-

ous third parties to a Colorado regime of legalization without regulation and their subsequent conduct in Nebraska and Oklahoma.

iii. Absent the direct-injury requirement, this Court would also face novel questions about the types of interests asserted by a plaintiff State that can support original jurisdiction. This Court has generally held that mere injury to a State's citizens is insufficient, but that a State may invoke its "interest as *parens patriae* * * * in original actions where the injury alleged affects the general population of a State in a substantial way." *Maryland*, 451 U.S. at 737. That standard can be difficult to apply in some cases. But at least when a defendant State itself directly inflicts the alleged injury (for example, through a tax, see note 6, *supra*), the Court is immediately presented with the full range of injurious conduct and can make a judgment about whether that conduct affects the plaintiff State's "general population" in a "substantial way." Where the claim is that many private parties could be induced by the defendant State's action to inflict injuries on the general population in the territory of the plaintiff State, however, the analysis could prove extraordinarily complex and could require substantial factual development—if such a suit would be properly cognizable at all.

A plaintiff State may also allege, as here, that the third-party conduct imposes a burden on their governmental resources. But that claim could also pose difficult factual and other questions. Consistent with the respect ordinarily afforded co-sovereigns in our constitutional system, this Court's decisions "definitely establish that not every matter" that may "warrant resort to equity by one person against another would

justify an interference by this Court with the action of a State." *Alabama* v. *Arizona*, 291 U.S. 286, 292 (1934). Rather, only a "threatened invasion of rights * * * of serious magnitude" will justify the Court's "exercise [of] its extraordinary power under the Constitution to control the conduct of one State at the suit of another." *New York*, 256 U.S. at 309. There would be a substantial question whether the actions of third parties that lead a neighboring State to expend more resources on law-enforcement efforts within its own territory could meet that demanding standard.

Here, for instance, Nebraska and Oklahoma allege that their "law enforcement [officers] encounter[] marijuana on a regular basis as part of day-to-day duties" when they "make routine stops of individuals who possess marijuana purchased in Colorado which, at the time of purchase, complied with Amendment 64." Compl. ¶ 55-57, 62. But Amendment 64 permits individuals to possess only "one ounce or less of marijuana," Amendment 64 § 3(a), not quantities that would support, for example, large-scale distribution operations. It is not obvious, at least without further factual development of a potentially sprawling and uncertain nature, that the class of lawbreakers that Nebraska and Oklahoma have identified—*i.e.*, those possessing the small quantities of marijuana permitted by Colorado's scheme who then cross into their territories before consuming it—cause them to "suffer great loss or any serious injury" in terms of law-enforcement funding or other expenditures. *Alabama*, 291 U.S. at 292 (1934).

iv. Finally, exercising jurisdiction over suits like this one would raise novel questions about whether Nebraska and Oklahoma have invoked any viable

cause of action. Most original suits call for the Court to fashion a form of federal common law to resolve water or boundary disputes between States, see *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977), or invoke the equivalent of common-law causes of action for violations of a contract, *e.g.*, *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1052-1053 (2015). This suit, however, urges preemption on the basis of a federal statute. Yet "the Supremacy Clause * * * does not create a cause of action," *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015), and neither does the CSA. There also is no basis for concluding that, even if plaintiffs have invoked a cognizable cause of action, they are within any zone of interests protected by the provisions of the CSA that prohibit the sale and possession of controlled substances and that allegedly preempt Amendment 64.

Nor does a suit simply to enjoin another State's laws as preempted necessarily resemble a traditional suit in equity. While it is possible that some original actions challenging another State's laws as preempted could be analogized to a traditional equitable action to assert a defense that would be available in an action at law brought by the defendant, see *Douglas* v. *Independent Living Ctr.*, 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting), Nebraska and Oklahoma compare this suit to a common-law nuisance action. See Br. 12-15. Even if that analogy were otherwise apt (but see p. 10, *supra*), such actions required that the defendant be the "legal cause" of the injury, *i.e.*, that the defendant's actions proximately cause the plaintiff's injury. 4 Restatement (Second) of Torts § 822 & cmt. e. (1979); see 2 Restatement (Second) of Torts § 431 (1965). It is not clear that such a require-

ment could be met where the injuries result most immediately from the illegal actions of third parties within Nebraska and Oklahoma. Cf. *id.* § 448 (discussing circumstances in which illegal act of third party is a superseding cause of harm).

3. a. The Court's exercise of original jurisdiction is also unwarranted in this case because the preemption issue could be raised in a district-court action. As Nebraska and Oklahoma acknowledge (Br. 9), "the issue presented" to this Court in their complaint "could conceivably be resolved in a suit brought by non-sovereign parties in a district court." See Pls' Reply Br. 3-4. Indeed, two suits raising the issue are currently pending in the District of Colorado. See *Safe Streets Alliance* v. *Alternative Holistic Healing, LLC*, No. 15-cv-349 (D. Colo. filed Feb. 19, 2015); *Smith* v. *Hickenlooper*, No. 15-cv-462 (D. Colo. filed Mar. 5, 2015). This Court recognized in *Arizona* v. *New Mexico*, 425 U.S. 794 (1976) (per curiam), that the pendency of actions raising the same legal issue can militate against an exercise of original jurisdiction. *Id.* at 796-798; see *Mississippi*, 506 U.S. at 76-77. Although the individual plaintiffs in the pending suits are not state officials, they have law-enforcement interests similar to those asserted by Nebraska and Oklahoma. Cf. *Maryland*, 451 U.S. at 740-741. Moreover, Nebraska and Oklahoma do not dispute that they could file suit in their own names against an appropriate Colorado state official in a district court. Although such a suit might be dismissed at the threshold for failure to establish Article III standing or to identify a viable cause of action, the same questions arise here. See pp. 16-21, *supra*.

b. The nature of the merits question underlying plaintiffs' request for declaratory and injunctive relief also disfavors review by this Court in the first instance. Even when this Court, "speaking broadly, has jurisdiction" over an original action, the Court may "forbear proceeding until all the facts are before [the Court] on the evidence." *Kansas* v. *Colorado*, 185 U.S. 125, 145-147 (1902). Forbearance is particularly appropriate in original cases involving "intricate questions" of "grave and far-reaching importance." *Id.* at 145, 147. In this case, the merits of the preemption issue that Nebraska and Oklahoma raise could conceivably turn on factual determinations that would be better resolved through actions initiated in district courts and ultimately subject to this Court's certiorari jurisdiction after appellate review.

The CSA does not preempt a "State law on the same subject matter" as the CSA's control and enforcement provisions "unless there is a positive conflict" between federal and state law "so that the two cannot consistently stand together." 21 U.S.C. 903. Such a positive conflict could be clear on the face of the state law, or it could become apparent in practice. Cf. *Arizona* v. *United States*, 132 S. Ct. 2492, 2509-2510 (2012). Here, for example, it is conceivable that the Court could conclude that whether Colorado's scheme creates a "positive conflict" with the CSA ultimately turns on, among other factors, the practical efficacy of Colorado's regulatory system in preventing or deterring interstate marijuana trafficking. The Colorado regulatory scheme, however, went into full effect in its current form only in October 2014. Accordingly, even if it were ultimately determined that there are no Article III or other threshold barriers to

judicial resolution of the preemption question here (but see pp. 10-21, *supra*), it would be a prudent exercise of this Court's discretion to decline to take up that question at this time.

4. The United States is not an indispensable party to this suit because, if other threshold requirements were met, "complete relief" could be awarded Nebraska and Oklahoma without joining the United States. Cf. Fed. R. Civ. P. 19(a); see *California* v. *Arizona*, 440 U.S. 59, 62 & n.3 (1979). This is not a case where the relief sought "could not be framed without the adjudication of the superior rights asserted by the United States," or where a party's asserted right is "dependent upon the rights and the exercise of an authority asserted by the United States [such] that no final determination of the one can be made without a determination of the extent of the other." *Arizona* v. *California*, 298 U.S. 558, 571 (1936). There is no dispute about the United States' authority to enforce the CSA, and the relief requested by Nebraska and Oklahoma would not require any adjudication of the rights of the United States or any exercise of authority by the United States.

CONCLUSION

For the foregoing reasons, the motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
DOUGLAS N. LETTER
MARK B. STERN
ALISA B. KLEIN
SONIA K. MCNEIL
Attorneys

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