Nos. 16-1048, 16-1095
United States Court of Appeals for the Tenth Circuit

SAFE STREETS ALLIANCE, et. al.,
Plaintiffs–Appellants,

v.

JOHN HICKENLOOPER,
in his capacity as Governor of Colorado, et al.,
Defendants–Appellees,

and

STATE OF NEBRASKA, et al.,
Movants.

On Appeal from the U.S. District Court for the District of Colorado, No. 1:15-CV-00349-REB-CBS (Blackburn, J.)
(*caption continued on inside cover*)

Combined Answer Brief of the State Defendants–Appellees

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Filed August 8, 2016

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Plaintiffs–Appellants,

v.

JOHN HICKENLOOPER,
in his capacity as Governor of Colorado,
Defendant–Appellees,

and

STATE OF NEBRASKA, et al.,
Movants.

On Appeal from the U.S. District Court for the District of Colorado, No. 1:15-CV-00462-WYD-NYW (Daniel, J.)

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The State Defendants agree with the jurisdictional statements set forth in the opening briefs, with two exceptions: (1) the State Defendants contend that the Intervenor States' putative claims fall within the exclusive jurisdiction of the United States Supreme Court under 28 U.S.C. § 1251(a); and (2) the State Defendants contend that this Court lacks jurisdiction because the Challengers cannot satisfy the redressability prong of Article III standing. Both of these arguments are set forth in detail below.

INTRODUCTION

Although the Controlled Substances Act criminalizes marijuana-related activity as a matter of federal law, most marijuana-related enforcement occurs at the state level and, over the past two decades, an increasing number of States have chosen to legalize and regulate marijuana rather than adopt a strict policy of criminal prohibition. Medical marijuana is now legal in 25 States. Recreational marijuana is legal in four States and the District of Columbia. Undoubtedly, legalization will continue to expand; voters in at least seven States will vote on legalization measures this fall.

In recent years, federal authorities responsible for enforcing the CSA have adopted policies expressly accommodating this wave of state legalization. In the federal government's view, CSA enforcement can exist alongside state laws that license, regulate, and tax medical and recreational marijuana businesses. The Challengers here—two private landowners, an anti-marijuana group, a coalition of local law enforcement officers, and two States—nonetheless seek to invoke federal law to dismantle a State's marijuana regulatory framework.

This lawsuit targets *only* Colorado's recreational marijuana laws. But, if successful, it will provide a template for plaintiffs across the country to overturn any State legalization effort, be it medical or recreational.

As two district court judges held below, the Challengers lack this authority. Enforcement of the federal drug laws has been centralized in the federal government. Individual litigants across the country do not have the piecemeal power to undo state legislation on the subject of marijuana.

STATEMENT OF THE ISSUES

Can the Challengers in these consolidated appeals sue to affirmatively preempt state laws legalizing and regulating marijuana?

STATEMENT OF THE CASE AND FACTS

I. State policies of marijuana legalization, including Colorado's, developed against a backdrop of federal accommodation.[1]

In 2012, Colorado voters passed Amendment 64, a constitutional provision authorizing adults over the age of 21 to possess, cultivate, and use marijuana for recreational purposes and directing the State to establish a system to license, regulate, and tax recreational marijuana businesses. COLO. CONST., art. XVIII, § 16. Amendment 64 declares that its provisions promote "the efficient use of law enforcement resources," generate "revenue for public purposes," enhance "individual freedom," and further "the health and public safety of our citizenry." COLO. CONST., art. XVIII, §16(1)(a) and (b). The next year, the Colorado General Assembly adopted the state's Retail Marijuana Code, COLO.

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[1] Because this appeal arises in the context of a motion to dismiss, the Court must accept as true the factual allegations in the operative complaints. *SEC v. Shields*, 744 F. 3d 633, 640 (10th Cir. 2014). But this Court need not accept the operative complaints' "mere labels and legal conclusions." *Id.* (internal quotation marks omitted). Further, the Court may take judicial notice of other States' marijuana laws and the federal government's widely disseminated marijuana enforcement policies. *See Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013) (explaining that courts may rely on judicial notice in ruling on motions to dismiss).

REV. STAT. §§ 12-43.4-101 through -1101. Detailed regulations soon followed, including a "seed-to-sale tracking system" for each individual marijuana plant, 1 COLO. CODE REGS. § 212-2 R 309, and security and electronic surveillance requirements for all marijuana businesses, 1 COLO. CODE REGS. 212-2 R 305, R 306. Today, Colorado's marijuana industry generates a billion dollars in annual revenue and hundreds of millions of dollars in taxes. *See* Colo. Dep't of Revenue, *Colorado Marijuana Tax Data*, https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data (last visited August 5, 2016).

Colorado's recreational marijuana policies, and the complicated set of laws and regulations that implement them, did not spring up overnight, nor are they fairly described as a rogue effort to defy federal law. "[N]early all marijuana enforcement in the United States has taken place at the state level," Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 85 (2015), and, over the years, the States' approaches to marijuana enforcement have evolved. Long before Amendment 64 was enacted, States began legalizing marijuana. In 1996, California became the first State to

permit medical marijuana use. *Id.* Other States followed suit, including Colorado in 2000. *Id.*; *see* COLO. CONST. art. XVIII, § 14 ("Amendment 20"). Marijuana remained illegal under federal law, and the Supreme Court made clear that the federal government's power under the CSA extended to even those who engaged in purely intrastate activities authorized by state law. *Gonzales v. Raich*, 545 U.S. 1 (2004). Yet state legalization laws remained on the books and, indeed, expanded over time.

Then, in 2009, the federal government made a major policy decision that ushered in the modern era of state-level legalization. For the first time, the United States indicated a willingness not just to tolerate legalization, but to design an enforcement framework to accommodate it. On October 19, 2009, the United States Department of Justice articulated its medical marijuana policy in the "Ogden Memo," named for Deputy Attorney General David Ogden. David W. Ogden, Memorandum for Selected U.S. Atty's, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), *available at*. http://tinyurl.com/zbgq8jy. The Ogden Memo explained

that federal prosecutions would not target individuals "whose actions are in clear and unambiguous compliance with existing state laws." *Id.* at 1–2. This new federal policy prompted a "swift" expansion in state legalization efforts. Chemerinsky, 62 UCLA L. REV. at 87.

For example, in the wake of the Ogden Memo, the Colorado General Assembly adopted the Medical Marijuana Code, effective July 1, 2010. COLO. REV. STAT., § 12-43.3-101, *et seq.* Previously, medical marijuana in Colorado had been confined to small-scale or personal cultivation and use. *See generally* COLO. CONST. art. XVIII, § 14. The new Medical Marijuana Code, however, established a heavily regulated, commercialized supply chain, authorizing medical marijuana centers (i.e., dispensaries where medical marijuana is sold), cultivation operations, and medical marijuana-infused products (e.g., "edibles") manufacturers. COLO. REV. STAT. §§ 12-43.3-401 through -404. Colorado's Medical Marijuana Code and its implementing regulations provided the template for Colorado's ensuing legalization of recreational marijuana.

In 2012, when Colorado's voters adopted Amendment 64 (and Washington State voters adopted their own initiative to legalize and regulate recreational marijuana), federal guidance did not address whether, or the extent to which, the federal government's policy of accommodation would apply outside the medical marijuana context.[2] But before Colorado's regulatory framework for recreational marijuana went into effect on January 1, 2014, COLO. REV. STAT. § 12-43.4-104(1)(a)(VI)(A) (2013), the federal government gave its answer in a policy that was consistent with the 2009 Ogden Memo but applied equally to recreational and medical marijuana. The United States Attorney General announced that the Department of Justice would not "seek to challenge [the new] state laws [legalizing recreational marijuana]," at least "not at this time." Letter from Eric H. Holder, Jr., U.S. Attorney General, to Governors John Hickenlooper and Jay Inslee

[2] Indeed, after the adoption of Colorado's Medical Marijuana Code, the Department of Justice issued guidance stating that the Ogden Memo "was never intended to shield [commercial marijuana cultivation and sale] from federal enforcement action." James M. Cole, Memorandum for U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, at 2 (June 29, 2011), available at http://tinyurl.com/oqg2owq.

(Aug. 29, 2013), *available at* http://tinyurl.com/oqg2owq. Meanwhile, the Deputy Attorney General (then James Cole) provided updated guidance to federal law enforcement officials in a document known as the "Cole Memo." James M. Cole, Memorandum for all U.S. Att'ys, Guidance Regarding Marijuana Enforcement (August 29, 2013), *available at* http://tinyurl.com/nrc9ur8. This new guidance stated that existing law enforcement priorities would "continue to guide the Department's enforcement of the CSA against marijuana-related conduct." Cole Memo at 2. The memo instructed federal law enforcement "not [to] consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities." *Id*. Since the Cole Memo, the federal government has continued to promulgate guidance that facilitates state legalization efforts. *See* below at 64–65 & n.19.

Today, Colorado is one of 25 states (plus the District of Columbia and Guam) that "allow for comprehensive public medical marijuana and cannabis programs." *See* Nat'l Conf. of State Legs., State Med. Marijuana Laws (July 20, 2016), *available at* http://tinyurl.com/nfoy2gr.

And Colorado is one of four states whose voters passed laws to legalize and regulate recreational marijuana. ALASKA BALLOT MEASURE NO. 2 (2014); OREGON BALLOT MEASURE NO. 91 (2014); Wash. Rev. Code §§ 69.50.325–369 (2014); *see also* D.C. INITIATIVE 71 (2014). The trend toward state legalization continues. This fall, voters in Arkansas, Florida, and Montana will consider medical marijuana measures, while California, Maine, Massachusetts, and Nevada will vote on initiatives to legalize and regulate recreational marijuana. Ballotopedia, *2016 Ballot Measures*, *available at* http://tinyurl.com/jf5aj2d (last visited Aug. 5, 2016); *see also* California Secretary of State, *Qualified Statewide Ballot Measures*, *available at* http://tinyurl.com/glxt872 (last visited Aug. 5, 2016).

II. The Safe Streets Plaintiffs sued to overturn the regulatory provisions of Amendment 64, but not legalization or medical marijuana laws; the district court concluded that they lack a cause of action.

In February 2015, two landowners in Pueblo, Colorado—the Reillys—as well as an anti-marijuana advocacy group called Safe Streets, sued Colorado state officials responsible for implementing Colorado's recreational marijuana laws. They also named private

individuals and entities affiliated with the marijuana industry, claiming that those defendants were violating the Racketeer Influenced and Corrupt Organization Act, as well as the Board of County Commissioners for the County of Pueblo and the Pueblo County Liquor and Marijuana Licensing Board. Safe Streets App. A052–55. The Safe Streets Plaintiffs allege that a recreational marijuana business adjacent to the Reillys' property "mar[s] the mountain views," interferes with the neighborhood's "pleasant, residential character," and "produces a recurring, skunk-like marijuana odor." Safe Streets App. A080; Safe Streets Op. Br. 6. The complaint further alleges that "other Safe Streets members … live near … [recreational] marijuana businesses" and are injured by them. Safe Streets App. A082.

Counts VII and VIII of the Safe Streets complaint, asserted against only the State and Pueblo Defendants, claim that Colorado's and Pueblo's recreational marijuana laws—specifically, those that provide for commercial licensing and supply-side regulation—are preempted by the CSA. Safe Streets App. A095–98. The Safe Streets complaint does not, however, challenge Colorado's authorization of

personal use and cultivation of recreational marijuana. *See* Safe Streets App. A049. Nor does it challenge Colorado's commercial medical marijuana laws. The Safe Streets Plaintiffs claim that while "[t]he people of Colorado are free to advocate for a change in th[e] federal criminal prohibition," the CSA "preempts the practice of state and local officials in Colorado … issuing licenses to operate *recreational* marijuana businesses." Safe Streets App. A050–51 (emphasis added).

The district court severed counts VII and VIII of the complaint so it could adjudicate the preemption claims separately from the claims against the private parties. Safe Streets App. A234. Meanwhile, the State and Pueblo Defendants filed motions to dismiss. Safe Streets App. A103, A130.

Following full briefing, Judge Blackburn granted the motions and entered judgment for the State and Pueblo Defendants. He reasoned that the Safe Streets Plaintiffs had failed to state viable claims for relief because there is no private right of action to preempt state marijuana laws. Safe Streets App. A364-69. Judge Blackburn explained that "the authority to enforce … substantive provisions of the CSA—or *not*—rests

with the United States Attorney General" and "[t]he Department of justice has made a conscious, reasoned decision to allow the states …. to develop strong and effective regulatory and enforcement schemes" for recreational and medical marijuana. Safe Streets App. A367–68.

III. The Smith Plaintiffs sued to overturn Colorado's licensing, regulation, and personal use laws; the district court held that they lack a cause of action.

A month after the Safe Streets Plaintiffs filed their lawsuit, the Smith Plaintiffs filed their own complaint, against Governor John Hickenlooper. Smith App. 15–58. The Smith Plaintiffs comprise three groups: (1) sheriffs from Colorado; (2) sheriffs from Nebraska and Kansas; and (3) county attorneys from Nebraska and Kansas. Smith App. 19–20. The Colorado sheriffs allege that, because of the State's recreational marijuana laws, they "encounter[ ] marijuana on a regular basis" and must "choos[e] between violating [their] oath[s] to uphold the U.S. Constitution and violating [their] oath[s] to uphold the Colorado Constitution." Smith App. 46. The out-of-state sheriffs and county attorneys claim they must divert time and resources away from other

concerns to address "increased Colorado-sourced marijuana being trafficked" into their states. Smith App. 49, 53.

Like the Safe Streets Plaintiffs, the Smith Plaintiffs target only Colorado's recreational marijuana laws, not its medical marijuana laws. Smith App. 55. But in addition to challenging Colorado's licensing and regulatory system, the Smith Plaintiffs also challenge constitutional provisions authorizing personal use. Smith App. 55. Further, they claim that Colorado law contravenes not just the CSA, but also various international treaties and agreements. Smith App. 26–32. The Smith Plaintiffs acknowledge that federal agencies have "the task of enforcing and administering" federal drug laws and that in doing so, they "balance the complex—and often competing—objectives that animate federal drug law and policy." Smith App. 14.

Governor Hickenlooper filed a motion to dismiss. Smith App. 59–86. Following briefing, Judge Daniel granted the motion and entered judgment for Governor Hickenlooper. Smith App. 154–65. Citing Judge Blackburn's ruling in *Safe Streets*, Judge Daniel held that the Smith Plaintiffs lack a cause of action. He reasoned that "the CSA is designed

to be implemented through a system of centralized enforcement" and "[t]his case, if successful, would directly undermine current federal enforcement policy." Smith App. 161 & n.10.

The Smith Plaintiffs appealed and their case was consolidated with the Safe Streets Plaintiffs' appeal in this Court.

IV. After the Supreme Court denied the Nebraska and Oklahoma's original action, they moved to intervene in this appeal.

In December 2014, the States of Nebraska and Oklahoma attempted to sue the State of Colorado in the United States Supreme Court. Complaint, *Nebraska v. Colorado*, No. 144, Orig., 2014 WL 7474136 (Dec. 12, 2014). Their complaint challenged Colorado's recreational marijuana laws, but not its medical marijuana laws, claiming that Amendment 64 created a "dangerous gap" in the CSA and that marijuana from Colorado was being diverted out of State. *Id.* at *4–5. The complaint further alleged that Amendment 64 "undermines express federal priorities in the area of drug control and enforcement." *Id.* at *21. In the complaint, Nebraska and Oklahoma acknowledged that, under 28 U.S.C. § 1251(a), "[t]he [Supreme] Court's jurisdiction in

this case is exclusive" and the Supreme Court "is the sole forum in which Nebraska and Oklahoma may enforce their rights under the Supremacy Clause." *Id.* at *1.

Colorado responded to the complaint, urging the Court to decline jurisdiction in part because the *Safe Streets* and *Smith* cases raised identical legal issues. The Supreme Court requested that the United States Solicitor General file his own brief in the case. He complied, likewise urging the Court not to exercise jurisdiction. In March of this year, the Supreme Court denied the motion for leave to file the complaint and dismissed the lawsuit. *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016).

A month later, Nebraska and Oklahoma filed a motion for leave to intervene in the consolidated Smith and Safe Streets appeals, conceding that because the Supreme Court had dismissed their complaint, "there is no court with jurisdiction to hear Nebraska and Oklahoma's suit directly against the State of Colorado." Mot. Intervene 3 (Apr. 14, 2016). In response, the State Defendants explained that they do not oppose intervention but reserve all defenses to any putative claims that

Nebraska and Oklahoma might assert. Mot. Intervene 2. This Court took the Motion to Intervene under advisement, indicating that a ruling on the motion would be made by the merits panel.

STANDARD OF REVIEW

Below, the State Defendants moved to dismiss the claims against them under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), raising jurisdictional objections and arguing that the complaints fail to state claims upon which relief may be granted. Safe Streets App. A102–28; Smith App. 57–83. Under either subsection of Rule 12, this Court reviews the district court's orders of dismissal *de novo*. *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151, 1171 (10th Cir. 2015) (stating that *de novo* review applies under both Rule 12(b)(1) and Rule 12(b)(6)).

The district courts' orders of dismissal did not address all of the State Defendants' arguments: neither order addressed standing or the merits of the preemption claims. But this Court "can affirm a lower court's ruling on any grounds adequately supported by the record, even grounds not relied upon by the district court." *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012).

SUMMARY OF THE ARGUMENT

I. The Challengers in these consolidated appeals lack a cause of action to preempt Colorado's marijuana laws.

A. No relevant legal provision grants the Challengers a right to sue: the Supremacy Clause is not "the source of any federal rights," *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383 (2015); the CSA does not leave open additional causes of action beyond those it specifically enumerates; and international treaties and conventions are not enforceable by individual litigants.

B. Equitable principles likewise do not provide a cause of action. Because "equity follows the law," it does not grant a standalone right to preempt state statutes and constitutional provisions. The two-prong analysis set forth in *Armstrong*—which asks whether a statute forecloses suits in equity by (1) enumerating specific methods of enforcement and (2) granting discretion to a centralized enforcement authority—reinforces this conclusion. The CSA's policy of centralized enforcement, at the discretion of the United States Attorney General,

precludes attempts to enforce the CSA through freestanding equitable actions.

C. The Intervenor States claim that they, as sovereigns, have a special right to sue in equity. This is incorrect; the Intervenor States have no unique rights to preempt state law under the CSA.

II. This Court need not address any other arguments in favor of dismissal. There are, however, three additional reasons to uphold the district courts' orders.

A. The United States Supreme Court's jurisdiction over the Intervenor States' putative claims is original and exclusive. 28 U.S.C. § 1251(a). Under Supreme Court precedent and the two jurisdictional approaches adopted by the circuit courts, those putative claims must be dismissed.

B. The Challengers lack standing. This lawsuit, even if successful, will leave Colorado's commercial medical marijuana laws intact. It is therefore unlikely to redress alleged injuries caused by legalized marijuana businesses.

C. Finally, although the Court may not rule on the merits in the Challengers' favor on appeal from a motion to dismiss, it may uphold the order of dismissal because the Challengers' preemption claims fail as a matter of law.

ARGUMENT

I. The Challengers have no cause of action at law or in equity to nullify state marijuana laws through preemption.

Judges Blackburn and Daniel rejected the theory that individual litigants have a standalone federal right to affirmatively preempt state laws regulating marijuana. That dispositive conclusion is correct both as a matter of law and as a matter of equity.

As a matter of law, neither the Supremacy Clause, the CSA, nor any international treaty or convention grants a cause of action to preempt state marijuana laws. As a matter of equity, basic equitable principles—specifically, the longstanding maxim "equity follows the law" and the more recent two-pronged analysis of *Armstrong*—foreclose the Challengers' putative claims.

For their part, the Intervenor States seek to avoid these conclusions by claiming that, as States, they have a privileged status among federal litigants and may sue when others may not. But the Intervenor States have no special right to overturn a neighbor State's marijuana laws.

A. No federal law the Challengers have identified—not the Supremacy Clause, the CSA, nor international treaties—provides a cause of action.

With the exception of the Intervenor States, who assert that they have special rights under the Supremacy Clause, all Challengers agree that the Supremacy Clause does not provide a cause of action for preemption. Likewise, no Challenger has argued in this Court that they may rely on the CSA or international treaties to create a right of action.

The Supremacy Clause. The Safe Streets and Smith Plaintiffs concede that, under *Armstrong*, they cannot look to the Supremacy Clause to grant them a cause of action for preemption. Safe Streets Op. Br. 21 n.5 ("[P]rivate cause[s] of action for injunctive relief under the Supremacy Clause … cannot be squared with *Armstrong*" (internal quotation marks omitted)); Smith Op. Br. 24 ("The Supreme Court held

[in *Armstrong*] that the Supremacy Clause does not confer a private right of action ….”). This is clearly correct. *Armstrong* reaffirmed that the Supremacy Clause is not “the source of any federal rights.” *Id.* In other words, the Supremacy Clause does not, standing alone, afford a cause of action in suits like this one, which seeks to offensively preempt an entire category of state law. *Id.*[3]

The Intervenor States assert that they are exempt from the holding of *Armstrong* and that “states can bring actions under [the Supremacy Clause] against other states or their officials.” Intervenor States’ Op. Br. 28. As explained below in Section I.C., this argument lacks merit.

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[3] The Supremacy Clause remains available to private litigants who, under federal law, have a right to *avoid* state regulation: these litigants may *defensively* raise the Supremacy Clause in both state enforcement actions and preemptive federal actions to restrain state enforcement. *Armstrong*, 135 S. Ct. 1384 (“[A]s we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.”); *see also Planned Parenthood of Kan. v. Moser*, 747 F.3d 814, 829–30 (10th Cir. 2014). But the Challengers here are not raising the Supremacy Clause defensively. They are raising it offensively to prevent Colorado from pursuing its chosen method of regulating third parties.

The CSA. Judges Blackburn and Daniel observed that "federal courts uniformly have held that there are no private rights of action under the CSA." Safe Streets App. A365–66 (citing nine court decisions denying a cause of action under the CSA); *see also* Smith App. 156–57 (citing Judge Blackburn's order and a tenth court decision denying a CSA cause of action). In this Court, the Challengers concede the point. The Safe Streets Plaintiffs state that they "never argued that the CSA creates an implied right of action." Safe Streets Op Br. 20. The Smith Plaintiffs nowhere claim that they have a cause of action under the CSA. *See* Smith Op. Br. 16 ("[T]he CSA does not include a remedial scheme for situations in which a state fails to comply with its terms."). And the Intervenor States agree that the CSA does not provide "the cause of action for [their] claims"; in their view, it provides only "the answer to the merits question." Intervenor States' Op. Br. 24.

International Treaties and Conventions. Below, the Smith Plaintiffs invoked various international treaties and foreign policy agreements as a basis for relief. *See* Smith App. 28–34, 56–57. Here, however, the Smith Plaintiffs do not dispute the district court's

conclusion that those treaties and agreements "impose no duties on Colorado and confer no rights on Plaintiffs" and therefore do not create "a private right of action or remedy." Smith App. 157 (citing *Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008)).

B. Equitable principles do not grant a right to sue in equity to overturn state marijuana laws.

It is clear that the substantive legal provisions governing this case do not, as a matter of law, create a cause of action to enjoin Colorado's marijuana laws. It is equally clear that the Challengers cannot circumvent these laws by invoking a standalone right to sue in equity for the same relief.

1. Because "equity follows the law" and the Challengers have no identifiable legal right to enforce, they cannot bring a standalone suit in equity.

The Challengers' reliance on equity faces a basic conceptual difficulty. While substantive law does not provide them with any enforceable legal rights,[4] the Challengers presume that equity grants

[4] The CSA does grant officials of the Intervenor States two limited legal rights: the right to enforce some provisions of the CSA against online pharmacies and the right to enforce the CSA more generally if

them a right which the law does not: the right to affirmatively displace Colorado's marijuana regulatory laws.

Equity, however, is not a standalone source of legal rights. "[T]he court of equity *does not grant new or unlimited rights* to a claimant, but rather protects the *claimant's established legal rights* by providing a uniquely equitable remedy." *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1540 (Fed. Cir. 1995) (emphasis added), *rev'd on other grounds*, 520 U.S. 17 (1997). As Judge Blackburn observed below, "the right to call on the equity powers of a federal court … must be found in substantive federal law." Safe Streets App. A354. In other words, and as the Supreme Court has long recognized, equitas sequitur legem: "equity follows the law." *Magniac v. Thomson*, 56 U.S. 281, 299 (1854).

These limiting principles of equity are evident in *Armstrong*. There the Court reaffirmed that "[t]he power of federal courts of equity

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the United States Attorney General "designates" them to do so. *See* Smith App. 161 (citing 21 U.S.C. §§ 878(a) and 882(c)). Neither applies here. Nothing in the CSA grants the Intervenor States a right to sue to overturn another State's laws. *See* Smith App. 160–61; Safe Streets App. A366–67 & n.5.

to enjoin unlawful executive action is subject to express and implied statutory limits" and "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." 135 S. Ct. at 1385.

The Challengers ignore these limiting principles and the conceptual difficulty they present for this case. According to the Challengers, because "[p]laintiffs have successfully brought … suits in equity throughout our Nation's history," the Challengers' invocation of equity to undo Colorado's marijuana laws is supported by precedent. Safe Streets Op. Br. 12–13; *see also* Smith Op. Br. 15, 19; Intervenor States Op. Br. 17. The Challengers cite a host of cases in which plaintiffs received injunctive relief against state officials, claiming that those cases provide a template for this one. Every one of those cases, however, differs from this one in critical respects:

- Many of the cited cases are inapposite because the particular substantive law the litigants sought to enforce granted them protectable federal rights[5]—unlike the CSA or international treaties and agreements, which are not rights-granting laws.

[5] *See e.g., Arizona v. United States*, 132 S. Ct. 2492, 2506–07 (2012) (enforcing the federal government's statutory and constitutional

- To the extent other cases relied on the Supremacy Clause to provide a cause of action, they all predate, and were overruled by, *Armstrong*.[6]

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right to regulate immigration and set immigration enforcement policy); *Verizon MD, Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642 (2002) (noting that the relevant federal law "reads like the conferral of a private right of action"); *Foster v. Love*, 522 U.S. 67, 68 (1997) (granting relief to voters who sought to enforce a federal statute setting the date for congressional elections); *Printz v. United States*, 521 U.S. 898, 936 (1997) (enforcing the rights of state and local law enforcement officers granted by the Tenth Amendment); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 386–87 (1982) (holding that an amended statute "preserved [a] pre-existing remedy"); *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) (noting that "private parties have a right under [the relevant statute] to bring suit"); *NCAA v. Gov't of N.J.*, 730 F.3d 208, 216 (3d Cir. 2013) (holding that the relevant federal law granted the plaintiff "a private right of action to enjoin a violation" (internal quotation marks omitted)); *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225, 1231 (10th Cir. 2005) (holding that prisoners could sue in equity "to enforce the dictates of the Eighth Amendment"); *Hernandez-Colon v. Sec'y of Labor*, 835 F.2d 958, 960 (1st Cir. 1988) (noting that the relevant statutory language indicated an intent for litigants "to have recourse to the courts").

[6] For example, the Safe Streets Plaintiffs cite an appendix to a brief filed in *Douglas v. Independent Living Center*, 132 S. Ct. 1204 (2012), the predecessor to *Armstrong*. That appendix "list[s] 56 additional [injunctive] cases decided by the Supreme Court." Safe Streets Op. Br. at 13. The Safe Streets Plaintiffs ignore that, even in the face of those "56 additional cases," *Armstrong rejected* the arguments urged by the *Douglas* brief and its appendix—namely that the federal courts' equitable powers extend to preemptive suits under the Supremacy Clause. The Challengers' citations to other pre-*Armstrong* case law is likewise unhelpful. *See Wilderness Soc'y v. Kane County*, 632 F.3d 1162, (10th Cir. 2011) (in a pre-*Armstrong* case,

- In the remaining cases, the litigants, consistent with *Armstrong*, 135 S. Ct. at 1384, raised the Supremacy Clause defensively to avoid state regulation[7]—unlike the Challengers here, who seek not to avoid regulation but to dictate how Colorado should regulate Colorado businesses.

In addition to seeking support from these inapposite cases, the Challengers also dispute the relevance of two leading, controlling decisions: *Armstrong* and *Seminole Tribe*. They claim those decisions are outliers, because they are the "only two" cases in which the Supreme Court has declined to exercise its equitable powers to supplement a federal statute. Safe Streets Op. Br. 14, Smith Op. Br. at 21. That is incorrect; the Court held in other cases that it could not exercise its "generally applicable equitable powers" to augment a

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"assum[ing] without deciding that the Supremacy Clause provides a cause of action"); *cf. Planned Parenthood of Kan. v. Moser*, 747 F.3d 814 (10th Cir. 2014) (denying a cause of action, but based on a pre-*Armstrong* analysis of Medicaid provisions).

[7] *See e.g., Wyeth v.* Levine, 555 U.S. 555, 563 (2009) (seeking to avoid state tort liability based on federal drug labeling requirements); *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 63–67 (2008) (enjoining state laws that regulated employers in conflict with the NLRA, which codified a federal "right of employers to engage in noncoercive speech about unionization"); *Shaw v. Delta Airlines,* 463 U.S. 85, 92 (1983) (seeking to avoid application of two New York laws on grounds that they were preempted by ERISA).

statutory framework. *INS v. Pangilinan*, 486 U.S. 875, 883–84 (1988) (declining to use equity to enforce an outdated statute and holding that "generally applicable equitable powers" must "be performed in strict compliance with the terms of an authorizing statute" (internal quotation marks omitted)). More fundamentally, the Supreme Court has repeatedly recognized that it has no power to create a cause of action if the relevant federal statute does not grant the litigant any rights to enforce. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001); *Cort v. Ash*, 422 U.S. 66, 78 (1975). Thus, *Armstrong* and *Seminole Tribe* are not outliers—they are on-point, binding precedent.

Indeed, this case is even more straightforward than *Armstrong* and *Seminole Tribe*. There, the plaintiffs enjoyed at least some rights under the federal laws at issue and invoked equity merely to vindicate them. *Armstrong*, 135 S. Ct. at 1382 (explaining that plaintiffs sued because federal law required them to be reimbursed through Medicaid at minimum rates set by federal statute); *Seminole Tribe*, 517 U.S. at 49 (explaining that Indian tribes had a statutory right to require a State to

"negotiate with the Indian tribe in good faith" regarding gaming activity). Here, the Challengers invoke equity not to protect existing legal rights, as in *Armstrong* and *Seminole Tribe*, but to invent new ones. The circumstances here are therefore distinguishable from the many examples "throughout our Nation's history" of commonplace invocations of the federal equitable power. Safe Streets Op. Br. 12. Because "equity follows the law," and because under substantive federal law the Challengers have no legal right to displace state marijuana policy, they have no cause of action to sue in equity.

2. *Armstrong*'s two-pronged analysis forecloses a suit in equity for preemption under the CSA.

The Challengers' attempt to invoke the federal equity power fails for another reason. As Judges Blackburn and Daniel concluded below, under *Armstrong* the CSA implicitly forecloses a suit in equity for preemption.

Armstrong adopted a two-pronged approach[8] for determining whether a statute implicitly forecloses equitable relief. First, a court asks whether a statute like the CSA expressly enumerates specific methods of enforcement and therefore demonstrates an intent by Congress to preclude others. 135 S. Ct. at 1385. Second, a court asks whether the statute's enforcement language is "judicially unadministrable" because it is governed by "judgment-laden standard[s]." *Id.* Both are true of the CSA.[9]

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[8] The Smith Plaintiffs urge the Court to apply the four-pronged analysis from *Planned Parenthood of Kansas*, 747 F.3d at 817, rather than *Armstrong*'s two-pronged approach. Smith Op. Br. 31–32. But as the Smith Plaintiffs concede, *Planned Parenthood of Kansas* "predates *Armstrong*." Smith Op. Br. 31. It is therefore inapposite. Judge Blackburn and Judge Daniel both recognized below that the *Armstrong* two-pronged approach applies to, and is dispositive of, the claims in this case. Safe Streets App. A366; Smith App. 159–62.

[9] The following discussion focuses on the CSA, rather than the international treaties and agreements the Smith Plaintiffs cited below, because those treaties and agreements do not affect the *Armstrong* analysis. *See* Smith App. 162. As the Smith complaint concedes, the treaties and agreements are not themselves preemptive of state laws—they instead rely on the CSA. *See* Smith App. 28 ("The United States adopted the Controlled Substances Act in part because the United States had become a party to the Single Convention ….); Smith App. 30 (noting that "the 1971 Convention was not self-executing" and is carried out through the CSA). Thus, if the CSA implicitly forecloses suits in

a. The CSA's specifically enumerated remedies demonstrate an intent to foreclose additional equitable causes of action.

The CSA enumerates a long list of specific remedies. Chief among them are criminal penalties. *E.g.*, 21 U.S.C. §§ 841, 843, 848, 854, 856. But civil forfeiture is available as well, *id.* § 881, as are various administrative mechanisms, *id.* § 875. These provisions are enforceable only at the federal level and only by the United States Attorney General. *Schneller v. Crozer Chester Med. Ctr.*, 387 Fed. App'x 289, 293 (3d Cir. 2010) (citing 28 U.S.C. § 871(a)); *see also Shmatko v. Ariz. CVS Stores LLC*, No. 14-CV-01076, 2014 WL 3809092, at *2 (D. Ariz. Aug. 1, 2014) ("[O]nly the Attorney General or United States authority [may] enforce federal law governing controlled substances ...."). And while this system of centralized federal enforcement is subject to two narrow exceptions, those exceptions merely prove the rule. Only in tightly limited circumstances does the CSA grant other parties enforcement powers. 21 U.S.C. § 878(a) (empowering the Attorney General to

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equity, no treaty or international agreement changes the result under *Armstrong*. No Challenger argues otherwise in the opening briefs.

"designate[ ]" State and local law enforcement officers to enforce the CSA); *id.* § 882(c) (granting States limited authority to enforce the CSA against online pharmacies, but expressly noting that "[n]o private right of action is created under this subsection").

"The availability of such a panoply of remedies to enforce the nation's drug laws strongly suggests that Congress did not intend to provide additional recourse through private actions in equity." Safe Streets App. A366. *Armstrong* held that "the express provision of *one* method of enforcing a substantive rule suggests Congress intended to preclude others." 135 S. Ct. at 1358 (emphasis added; internal quotation marks omitted). Thus, the CSA's express provision of a "*panoply of remedies*," Safe Streets App. A366 (emphasis added), does not just "suggest" an intent to foreclose suits in equity—it compels that conclusion.

Recent legislation confirms this understanding of the CSA. In both the 2015 Bipartisan Budget Act and the Consolidated Appropriations Act of 2016, Congress prohibited "the Department of Justice" from using federal funds "to prevent [Colorado and other States] from

implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Pub. L. No. 114-113, tit. V, § 542, 129 Stat. 2242 (2015); Pub. L. No. 113-235., tit. V, § 538, 128 Stat. 2130 (2014). These congressional acts recognize that only the Department of Justice, not an individual plaintiff or State, has the power to enforce the CSA. If litigants like the Challengers here could sue for preemption under the CSA, these bills—which seek to protect state medical marijuana laws by limiting the authority of the CSA's enforcer—would have been pointless.

The Challengers argue that the CSA's enumerated remedies are beside the point, because those remedies do not include a specific, express avenue of enforcing the CSA's preemption provision. Safe Streets Op. Br. 14; Smith Op Br. 27; Intervenor States Op. Br. 25. According to the Challengers, because "[t]he CSA simply does not speak to how its preemption of conflicting state laws should be enforced," the Act must therefore allow the Challengers to sue in equity. Safe Streets Op. Br. 15.

This argument ignores *Armstrong*. There, the "sole remedy" was not enforcement of a specific preemption provision, but enforcement of a substantive federal rule governing Medicaid reimbursement rates. 135 S.Ct. at 1385. And the remedy did not involve preemption; it involved "withholding [federal] funds." *Id*. Even so, this "sole remedy" precluded a suit in equity to preempt a state law. *Id*. The same holds true here. Although the CSA's panoply of remedies do not specifically involve preemption, they make clear that Congress did not intend to leave open other avenues of enforcement.

b. The federal government's enforcement discretion under the CSA forecloses decentralized equitable lawsuits.

Prong two of *Armstrong* asks whether the enforcement of a federal statute is "judgment-laden" and therefore "judicially unadministrable." 135 S. Ct. at 1385. Judges Blackburn and Daniel correctly concluded that the federal government's centralized enforcement of the CSA fits that description: "There certainly can be no more 'judgment-laden' standard than that which confers almost complete discretion on the Attorney General …." Safe Streets App. A368; Smith App. 161–62; *see*

United States v. Armstrong, 517 U.S. 456, 464 (1996) ("The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws."); *Heckler v. Chaney*, 470 U.S. 821, 835 (1985) (examining a statute that, like the CSA, permitted injunctions, criminal sanctions, and seizures, and holding that the statute "commit[ted] complete discretion to [a single federal official] to decide how and when [those remedies] should be exercised").

The Challengers dispute this holding, asserting that their claims are, in fact, judicially administrable because they "call for nothing more than a standard conflict preemption analysis of the sort that courts routinely undertake." Safe Streets Op. Br. 16; Smith Op. Br. 30–31; Intervenor States Br. 27. This misses the point of Congress's decision to centralize CSA enforcement in a single federal agency. The question is not whether a court would be capable of undertaking a merits analysis in a given case; the question is who should decide which cases to pursue. *Cf. Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (holding that "[i]t is implausible to presume" that Congress would both centralize enforcement of a federal statute and "nonetheless intend[ ]

private suits to be brought before thousands of federal- and state-court judges"). Congress left the complicated question of when to bring an enforcement action—whether criminal, civil, or administrative—to the United States Attorney General.

The nuanced nature of CSA enforcement discretion is borne out by the guidance letters the Department of Justice has promulgated, which detail the federal government's current marijuana enforcement policy. Those letters set forth eight "enforcement priorities" aimed at "address[ing] the most significant threats in the most effective, consistent, and rational way." Cole Memo at 1. As Judges Daniel and Blackburn concluded below, "[t]his case, if successful, would directly undermine [this] current federal enforcement policy," Smith App. 161, and "would create precisely the type of 'risk of inconsistent interpretations and misincentives' which strongly counsel against recognizing an implicit right to a judicially created equitable remedy." Safe Streets App. A368 (quoting *Armstrong*, 135 S. Ct. at 1385). This echoes the federal government's own assessment. The Deputy United States Attorney General has testified that preempting state marijuana

laws would do more to harm federal enforcement objectives than leaving those laws in place.[10]

The Challengers appear to welcome the possibility that this lawsuit will affect federal enforcement discretion. The Smith Plaintiffs object to CSA enforcement being subject "to the whims and discretion of the Attorney General." Smith Op. Br. at 29. And the Intervenor States characterize the federal government's enforcement policies as a "failure to administer the CSA in Colorado" and an "acquiescence to state-level sanctioning of violations of federal law." Intervenor States Op. Br. at 27. If the Challengers wish to contest current federal enforcement policy, they must direct their objections to the entity that enforces the CSA, as the Intervenor States have done in another context. *Cf. United States v.*

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[10] *Conflicts Between State and Federal Marijuana Laws: Hearing Before S. Comm. on the Judiciary*, 113th Cong. (Sept. 10, 2013) (live testimony of James M. Cole, Deputy Attorney General), *available at* http://tinyurl.com/nbm6qq4 (explaining that the Department chose not to attempt to displace state marijuana laws because "[W]hat you'd have is legalized marijuana and no enforcement mechanism within the state to try and regulate it. That's probably not a good situation to have."); *accord* Brief for the U.S. as *Amicus Curiae*, *Nebraska v. Colorado*, No. 144, Orig., at 17–18 (Dec. 16, 2015) (noting that the Intervenor States' theory of harm relies upon "predictions about the probable reaction of numerous third parties to a Colorado regime of legalization without regulation and their subsequent conduct in Nebraska and Oklahoma").

Texas, 136 S. Ct. 2271 (2016) (affirming, by an equally divided court, an injunction against the federal government's use of enforcement priorities in the context of immigration law). They cannot accomplish that same end through this particular lawsuit. Allowing them to do so would violate a basic tenet of *Armstrong*: it would place enforcement of the CSA in the hands of innumerable individual private and state litigants across the country, rather than "leav[ing] federal enforcement of federal law with federal actors," as the governing statute commands. *Id.* at 1384.

C. The Intervenor States have no special right to displace state laws under the CSA.

The Intervenor States argue that *Armstrong* does not apply to them because of their putative "independent sovereign right to seek equitable relief." Intervenor States Op. Br. at 17, 23. They rely on three Supreme Court original jurisdiction cases[11] for this proposition. Intervenor States Op. Br. 19, 16–20. But nothing in those cases

[11] The Intervenor States' reliance on these original jurisdiction cases highlights that, in substance, they seek to re-litigate in this Court a claim that they may bring only in the Supreme Court. For that reason, this Court should dismiss their claims for lack of jurisdiction. *See* Section II.A., below.

suggests that States, alone among federal litigants, have a freestanding right to sue in equity regardless of restrictions in underlying substantive federal law. Indeed, a fourth Supreme Court case, which the Intervenor States overlook, establishes just the opposite.

The first two cases the Intervenor States rely on, *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915), and *Missouri v. Illinois*, 180 U.S. 208 (1901), were nuisance actions. Thus, the cause of action and the remedy were provided by the federal interstate common law of nuisance, not some standalone "sovereign right to seek equitable relief." *See Missouri v. Illinois*, 180 U.S. at 244 (explaining the availability of "equitable remed[ies] in the case of public nuisances"); *see also Illinois v. Milwaukee*, 406 U.S. 91, 103–105 (1972) (holding that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law" and explaining that *Georgia v. Tennessee Copper Co.* was an example of "[t]he application of federal common law to abate a public nuisance").

The Intervenor States' third case, *Maryland v. Louisiana*, 451 U.S. 725 (1981), likewise lends no support to their position. There, the

plaintiffs challenged a state tax under a number of constitutional theories, and the Court focused on whether the tax violated two federal statutes and the Commerce Clause. *Maryland v. Louisiana*, 451 U.S. at 747–48, 752 n.26, 753. In analyzing those three claims, the Court said nothing regarding the source of the plaintiff States' cause of action. Nor did the Court examine whether the two relevant federal statutes demonstrated an intent to foreclose suits in equity, the key inquiry of *Armstrong*. 135 S. Ct. at 1385. Indeed, doing so was unnecessary, given that the plaintiff States could proceed directly under the Commerce Clause, which, unlike the Supremacy Clause, grants individual litigants legal rights enforceable in court. *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (holding that the Commerce Clause "is the source of a right of action," unlike the Supremacy Clause, which "is not a source of any federal rights" (internal quotation marks omitted)). Thus, in *Maryland v. Louisiana*, the Court shed no light on the dispositive issue in this case—whether the CSA forecloses a suit in equity to enforce its preemption provision. Nothing about that decision suggests that States, alone among federal litigants, "have a traditional equitable cause of

action … [that] need not arise out of any federal statute." Intervenor States Br. at 19.

In fact, a Supreme Court case not cited by the Intervenor States establishes precisely the opposite. In *American Electric Power Co. v. Connecticut*, a group of States sued for "injunctive relief" to address carbon emissions from five power companies. 564 U.S. 410, 418–19 (2011). The Supreme Court dismissed the suit. In doing so, it did not treat the States as favored litigants entitled to a standalone cause of action at equity. It instead looked to restrictions implicit in substantive federal law, holding that any interstate equitable cause of action was "displaced" by the federal Clean Air Act: "We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *Id.* at 424.

American Electric Power therefore rebuts the Intervenor States' claim that they have "an equitable cause of action … *independent* of the CSA." Intervenor States Op. Br. 23 (emphasis in original). When Congress has legislated on a particular subject and specified a federal

enforcement scheme, not even "sovereign states" can undermine its policy choices: "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *Am. Elec. Power Co.*, 564 U.S. at 423–24. The Intervenor States concede that "certain problems of public policy are inherently interstate in nature" and require "national policy." Intervenor States Op. Br. at 28. Under *American Electric Power*, this means that the Intervenor States' ability to sue in equity depends on underlying federal law; that is, it depends on whether the CSA leaves open the possibility of an injunctive suit. As explained above in Section I.B., it does not.

II. This Court may affirm the district court's orders of dismissal for independent reasons.

Judges Blackburn and Daniel dismissed the claims below based solely on the fact that the CSA's centralized enforcement framework forecloses suits in equity. Safe Streets App. A369; Smith App. 163. This Court may do the same and need not reach any remaining issues. There are, however, three additional reasons why the Challengers' claims fail.

First, the Intervenor States' putative claims must be dismissed for lack of jurisdiction because the original and exclusive forum for those

claims is the United States Supreme Court. Second, the claims of all three groups of Challengers fail under the redressability prong of Article III standing. Finally, although the merits of the Challengers' claims are not before this Court, those claims fail as a matter of law.

A. The Intervenor States' putative claims fall within the Supreme Court's exclusive original jurisdiction.

"All controversies between two or more States" fall within the United States Supreme Court's "original *and exclusive* jurisdiction." 28 U.S.C. § 1251(a) (emphasis added). This language means what it says: "the description of [the Supreme Court's] jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court." *Mississippi v. Louisiana*, 506 U.S. 73, 77–78 (1992); *California v. Arizona*, 440 U.S. 59, 63 (1979) ("[A] district court could not hear [California's] claims against Arizona, because this Court has exclusive jurisdiction over such claims ….").

The Intervenor States themselves admit that the Supreme Court's order dismissing their original-action complaint left "no court with jurisdiction to hear Nebraska and Oklahoma's suit directly against the

State of Colorado." Mot. Intervene 3. They nonetheless claim that through artful pleading—seeking to enjoin Colorado *officers* rather than the State of Colorado itself—they may avoid the plain terms of § 1251 and the holding of *Mississippi*. *Id*. The Intervenor States are mistaken. The case law on this issue is sparse, but precedent of the Supreme Court and the circuit courts demonstrate that the Intervenor States may not plead their way into this case when they seek only to revive a state-versus-state controversy that the Supreme Court has already declined to hear.[12]

1. Under Supreme Court precedent, the Intervenor States cannot resurrect claims that the Court has already dismissed.

Although the Supreme Court has not directly addressed the question here—whether artful pleading can avoid the limitations of

[12] This Court should dismiss the Intervenor States' putative claims with prejudice rather than exercising its discretion merely to deny the motion to intervene. The latter course will only prolong this litigation by allowing the Intervenor States to file a complaint in federal district court. There is no need for yet another lawsuit. The dispositive issues in this case are purely legal questions, are already before the Court through the Safe Streets and Smith appeals, and may be finally resolved now.

section 1251—it made clear in *Mississippi v. Louisiana* that when it has dismissed a state-versus-state complaint, lower federal courts cannot step in to fill the jurisdictional void.

The procedural history of *Mississippi v. Louisiana*, a boundary dispute involving land on the Mississippi river, is analogous to the history of this case. The Supreme Court denied Louisiana's motion for leave to file a complaint against Mississippi. *Louisiana v. Mississippi*, 488 U.S. 990 (1988). Louisiana then reasserted the same claims against Mississippi in a federal lawsuit among private landowners. The district court ruled on the merits of both the private claims and the state-versus-state claim. After an appeal to the Fifth Circuit, the case once again came before the Supreme Court. The Court granted certiorari but added its own question: "Did the district court properly assert jurisdiction over respondent [Louisiana]'s third-party complaint against petitioner State of Mississippi[?]" *Mississippi v. Louisiana*, 503 U.S. 935 (1992).

Although the parties had by then spent years litigating to a resolution in the lower courts, the Court held that section 1251(a)

created a bright line, "depriv[ing] the District Court of jurisdiction of Louisiana's third-party complaint against Mississippi." *Mississippi v. Louisiana*, 506 U.S. 73, 74 (1992). It was not until Louisiana filed a *second* original jurisdiction complaint that the Court accepted jurisdiction and ruled on the state-versus-state claim. *See Louisiana v. Mississippi*, 516 U.S. 22, 24 (1995) (recounting the case's long and convoluted procedural history). In doing so, the Court reaffirmed its earlier jurisdictional ruling: "[w]e held that there was no jurisdiction in the District Court, or in the Court of Appeals, to grant any relief … to one State against the other, that authority being reserved for jurisdiction exclusive to this Court." *Id.* at 23–24.

For the same reasons, this Court lacks jurisdiction over the Intervenor States' putative claims. The Supreme Court's order dismissing the Intervenor State's original-action complaint did not grant them leave to proceed in an alternative forum. *Nebraska v. Colorado*, 136 S. Ct. 1034, 1035 (2016) (Thomas, J., dissenting from denial of motion for leave to file complaint) ("If this Court does not

exercise jurisdiction over a controversy between two States, then the complaining State has no judicial forum in which to seek relief.").

2. The Intervenor States' claims fall within the Supreme Court's exclusive jurisdiction under the two approaches that have emerged in the circuit courts.

Even assuming *Mississippi v. Louisiana* is not dispositive, the Intervenor States' claims still must be dismissed under case law developed in the circuit courts. Only a few courts have had occasion to address whether a state may plead around the requirements of section 1251. Two approaches have emerged: a "core sovereign interests" test and a "real party in interest" test. The Intervenor States' claims fail both.

Core Sovereign Interests. The Second Circuit has adopted the "core sovereign interests" test, which asks whether "a plaintiff-State's suit … concerns another State's core sovereign interests." *Connecticut v. Cahill*, 217 F.3d 93, 101–02 (2d Cir. 2000). An example is a suit that "implicate[s] serious and important concerns of federalism." *Id.* at 100. Such suits are "within the original and exclusive jurisdiction of the

Supreme Court." *Id*; *see also Univ. of Utah v. Max-Planck-Gesellschaft*, 734 F.3d 1315, 1323 (Fed Cir. 2013) (holding that a patent inventorship claim does not implicate core sovereign interests because a state cannot be an "inventor" and patent claims do not implicate federalism concerns).

Here, the relative rights of Colorado and the Intervenor States to pursue their own marijuana policies undoubtedly implicate "serious and important concerns of federalism." The very fact that Colorado has chosen to depart from the CSA's policy of prohibition demonstrates that it is acting in its federalism-intended role as a "laboratory of democracy." *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). Under the "core sovereign interests" test, the Intervenor States' challenge to Colorado's democratic experiment may only be adjudicated by the Supreme Court.

Real Party in Interest. In *Cahill*, then-Judge Sotomayor dissented, rejecting the majority's "core sovereign interests" approach in favor of a more restrictive "real party in interest" test. *Cahill*, 217 F.3d at 105. In her view, "[t]he mere fact [that the plaintiff State] declined to

name [another State] as a defendant and instead named two [s]tate officials" did not change the original jurisdiction analysis under section 1251. *Id.* Judge Sotomayor's approach looked to the potential "effect" of a lawsuit: if the suit might ultimately "restrain the [state] Government from acting," it must be brought before the Supreme Court. *Id.* (emphasis added) (internal quotation marks omitted); *see also Hood ex rel. Mississippi v. Memphis*, 570 F.3d 625, 632 (5th Cir. 2009) (holding that Mississippi's claim for conversion of groundwater by a municipality was within the Supreme Court's exclusive jurisdiction because "Tennessee's water rights are clearly implicated, even if Mississippi sued only [the City of] Memphis").

Certainly the Intervenor States' putative lawsuit will, if successful, "restrain" Colorado's government from acting. The Intervenor States seek a judgment against various Colorado officials precisely because those officials are responsible for implementing Colorado's retail marijuana laws. *Cf. Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (explaining that a suit against state officer in the officer's official capacity "is no different from a suit against the State

itself" because it "is not a suit against the official but rather is a suit against the official's office"). The Intervenor States' claims thus fall within the Supreme Court's exclusive original jurisdiction under now-Justice Sotomayor's "real party in interest" test.

B. All Challengers fail the redressability prong of standing.

To satisfy the requirements of Article III standing, each Challenger must establish that (1) they have suffered an injury in fact to a legally protected interest; (2) the State Defendants' actions caused the alleged injury; and (3) it is likely, rather than speculative, that the alleged injury will be redressed by a favorable decision. *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007). Each Challenger fails the redressability prong[13] of this test: even assuming that this suit

[13] Below, in addition to raising redressability objections, the State Defendants reserved objections to the Safe Streets suit based on the injury-in-fact and causation prongs of standing, Safe Streets App. A203, and argued that various individual Smith Plaintiffs lack standing for a number of reasons. Smith App. 60–69, 115–119. Here the State Defendants focus on redressability because it applies equally to all Challengers and is dispositive. But the State Defendants continue to reserve the right to challenge various plaintiffs' standing on other grounds if this case is remanded. *Cf. Kerr v. Hickenlooper*, No. 12-1445, 2016 U.S. App. LEXIS 10120, at *22 (10th Cir. June 3, 2016) (declining

succeeds, it is unlikely to redress the Challengers' alleged injuries because it focuses solely on Colorado's recreational marijuana laws. Relief in the Challengers' favor will leave intact Colorado's medical marijuana laws, along with half of the State's total marijuana industry. Colo. Dep't of Revenue, *Colorado Marijuana Tax Data*, https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data (last visited August 5, 2016) (demonstrating that approximately half of the 2.9% state-level marijuana sales tax comes from medical marijuana and half from recreational or retail marijuana). Colo. Dep't of Revenue, Marijuana Enforcement Division, *Report to the Colorado Joint Budget Committee* at 4 (Apr. 1, 2016), *available at* http://tinyurl.com/gp5xceb (stating that Colorado's medical marijuana industry accounts for 57% of the commercial regulated marijuana licensees operating in Colorado); *see Maverick Media Group, Inc. v. Hillsborough Cnty.*, 528 F.3d 817, 820–22 (11th Cir. 2008) (holding that an injury is not redressable where, if the court were to strike down one challenged law, other unchallenged laws would still cause an alleged injury).

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to reach questions of standing not addressed below and "remand[ing] jurisdictional issues for determination by the district court").

The Safe Streets Plaintiffs. The Safe Streets Plaintiffs seek to invalidate only Colorado's regulatory and licensing regime for recreational marijuana. Safe Streets App. A099. They do not challenge Section 3 of Amendment 64, COLO. CONST. art. XVII, § 16(3), which codifies Colorado's decision to legalize personal use and cultivation of recreational marijuana and the transfer without remuneration of one ounce or less of recreational marijuana. Nor do they challenge Colorado's constitutional, statutory, and regulatory provisions authorizing and regulating the medical marijuana industry.

Thus, even if the Safe Streets claims succeed, nothing would prevent the Reillys' neighbors from growing marijuana for personal use and continuing to "produce[ ] a recurring, skunk-like marijuana odor." Safe Streets Op. Br. 6. Nor would relief in the Reillys' favor prevent neighbors from seeking to license a commercial medical marijuana business in the same area. *See* COLO. REV. STAT. § 12-43.3-403 (governing the issuance of operational premises cultivation licenses to grow and cultivate medical marijuana); Pueblo County Ordinances, Chapter 5.12 (governing activities relating to both recreational and

medical marijuana). Indeed, as the State Defendants explained below, while the Safe Streets complaint alleges that Safe Streets members live near marijuana businesses in Denver, public records show that those businesses hold both retail *and* medical marijuana licenses. Safe Streets App. A204; *Safe Streets*, No. 15-cv-349, Exhibits to State Defendants' Reply in Support of Motion to Dismiss, ECF No. 110-1 and 110-2.

The Smith Plaintiffs. The Smith Plaintiffs seek to invalidate the entirety of Amendment 64 and the statutes and regulations implementing it. But, again, this will leave intact half of Colorado's licensed and regulated marijuana industry. Relief in the Smith Plaintiffs' favor therefore is not likely to prevent "[e]ach of the Colorado Sheriffs [from] encounter[ing] marijuana on a regular basis as part of his day-to-day duties." Smith Op. Br. 10. Nor will it guarantee that Colorado medical marijuana will stay within state lines, preventing the alleged injuries to sheriffs and county attorneys from neighboring states. Smith Op. Br. 12–14; *see Gonzales v. Raich*, 545 U.S. 1, 31–32

(2005) (noting that medical marijuana is vulnerable to out-of-state diversion).

The Intervenor States. Like the Safe Streets Plaintiffs, the Intervenor States target only "Amendment 64's licensing, regulation, and taxation provisions." Intervenor States Op. Br. 12. Thus, the Intervenor States seek to allow Colorado to legalize demand for recreational marijuana but prevent the State from closely regulating its supply. As the United States Deputy Attorney General has testified, that would lead to more illegal diversion of marijuana, not less, *see* above at 40 n.10, and it would be unlikely to redress the Intervenor States' alleged injuries. And, as with the other Challengers, the Intervenor States' claims would not affect Colorado's medical marijuana industry, leaving untouched half of Colorado's licensed and regulated marijuana businesses.

C. Although the merits of the Challengers' preemption claims are not before the Court, those claims nonetheless fail on their merits as a matter of law.

Although this Court need not reach the merits, it has discretion to affirm the district court's dismissal on "any grounds for which there is a

record sufficient to permit conclusions of law." *United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994). It may therefore affirm because, as the State Defendants argued below, the Challengers' preemption claims fail as a matter of law. Safe Streets App. A117–27; Smith App. 75–82.

As an initial matter, however, the Court should reject the Challengers' invitation to stray beyond the scope of this appeal and issue a final judgment enjoining Colorado's marijuana laws.

1. This Court is not a court of first resort and should reject the Challengers' invitation to rule in their favor at the motion to dismiss stage.

The Safe Streets and Smith Plaintiffs both request this Court to rule on the merits in their favor. The Smith Plaintiffs request a remand order directing the district court to enter a permanent injunction and judgment on their behalf. Smith Op. Br. 46. The Safe Streets Plaintiffs appear to go a step further, requesting the same relief *without* remand. Safe Streets Op. Br. at 26–27 n.6 ("[R]emanding for further proceedings on that purely legal question would not serve the interests of the parties or judicial economy.").

While this Court may affirm for any reasons evident in the record, it cannot "affirm a judgment the district court did not enter." *Johnson v. Johnson*, 466 F.3d 1213, 1215 (10th Cir. 2006). It would be quite remarkable for this Court to *reverse* the district court and enter judgment for the Challengers at the motion to dismiss stage, when the State Defendants are prohibited from contesting the Challengers' factual allegations and when no party has briefed or argued the four-factor test for granting a permanent injunction. This Court should reject the invitation to become a court of first resort.

2. The CSA does not entirely displace Colorado's marijuana laws through preemption.

The Challengers' claim for preemption fails on the merits as a matter of law. The CSA does not "occupy the field [of controlled substances] … to the exclusion of any State law on the same subject matter." 21 U.S.C. § 903. Instead, the CSA contains a savings clause under which preemption occurs only if there is "a positive conflict between [a] provision of [the CSA] and [a] State law so that the two cannot consistently stand together." *Id.* The CSA thus "expressly

contemplates a role for the States in regulating controlled substances." *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006). Indeed, States have been legalizing and regulating marijuana for two decades, yet no federal court has done what the Challengers ask this Court to do—prohibit a State from regulating marijuana other than through criminal penalties.

Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Arizona v. Inter Tribal Council of Ariz., Inc.,* 133 S. Ct. 2247, 2256 (2013) (internal quotation marks omitted). That approach is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

The Challengers ignore these principles by seeking to eliminate Colorado's police powers in an area of traditional state authority. This Court should reject the Challengers' expansive theory of CSA preemption. Colorado's marijuana regulatory framework is not

preempted under either of the two relevant preemption analyses: impossibility or obstacle preemption.

Impossibility Preemption. Under impossibility preemption, a state law is invalid only if it is "impossible for [a regulated party] to comply with both federal and state requirements." *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). Here, it is not impossible to comply with both the CSA and state law. Individuals in Colorado are not required to engage in marijuana-related activity or participate in Colorado's regulatory framework. To comply with both sets of laws, they need only refrain from engaging in marijuana-related activities.

It is true that a State cannot avoid preemption by asserting that individuals may comply with state and federal laws by declining to engage in commercial activity. *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2477 (2013). Here, however, the CSA entirely prohibits marijuana-related activity rather than subjecting it to different authorizing regulations. In these circumstances, it is appropriate for states to retain traditional police power while recognizing the federal government's authority to regulate through criminal sanctions.

Chemerinsky, 62 UCLA L. REV. at 112 ("If the state can remove all its marijuana prohibitions … despite the CSA's prohibition and despite the Supremacy Clause—and it clearly can—the state can certainly add some prohibitions back … without running afoul of the CSA.").

Obstacle Preemption. A number of courts have held that state marijuana regulatory regimes are not preempted under an obstacle preemption theory. *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 140–42 (Ariz. 2015); *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 539 (Mich. 2014); *Qualified Patients Assoc. v. City of Anaheim,* 115 Cal. Rptr. 3d 89, 108 (Cal. App. 2013). For four reasons, these courts are correct that wholesale preemption of state marijuana regulations under an obstacle theory is inappropriate.

First, the federal government's CSA enforcement priorities exist alongside the many state laws, including Colorado's, that authorize and closely regulate medical and recreational marijuana. *See* Cole Memo at 1–3. These state laws do not interfere with any of the tools the federal government may use to deter marijuana-related conduct: federal

criminal liability, loss of public benefits,[14] loss of the right to own firearms,[15] potential loss of employment and employment protections,[16] inability to claim or assert bankruptcy protection,[17] and possible loss of contractual rights.[18] "Of course, the federal government can and does enforce the stricter CSA provisions even in states …. where … suppliers are in compliance with state medical and recreational marijuana laws." Chemerinsky, 62 UCLA L. REV. at 110. "The federal government has never argued, however—nor has any court ever held—that the CSA

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[14] *See* 21 U.S.C. § 862 (denying federal benefits to for certain drug-related convictions); *see Assenberg v. Anacortes Housing Auth.*, 2006 U.S. Dist. LEXIS 34002, at *14 (W.D. Wash. May 25, 2006) (noting possible eviction and disqualification from federally-subsidized housing for marijuana use).

[15] U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Open Letter to All Federal Firearm Licensees (Sept. 21, 2011), available at http://tinyurl.com/ogtz9ew; *see also* 18 U.S.C. § 922(g)(3); 27 C.F.R. § 478.11.

[16] *See Washburn v. Columbia Forest Prods.*, 134 P.3d 161, 167–168 (Or. 2006) (Kistler, J., concurring); *see also* 41 U.S.C. § 8102 (setting forth drug-free workplace requirements for Federal contractors).

[17] *See In re Arenas,* 535 B.R. 845 (B.A.P. 10th Cir. 2015); *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 805 (Bankr. D. Colo. 2012); *In re Medpoint Mgmt. LLC*, 528 B.R. 178, 184-86 (Bankr. D. Ariz. 2015).

[18] *See Tracy v. USAA Cas. Ins. Co.*, Civ. No. 11-00487, 2012 U.S. Dist. LEXIS 35913, at *39 (D. Haw. Mar. 16, 2012).

completely preempts state marijuana laws that are more permissive than federal law." *Id.*

Second, courts have long recognized that regulation of marijuana businesses—for example, through taxation—is permissible despite the federal policy of prohibition. *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 777 (1994) ("[A]s a general matter, the unlawfulness of an activity does not prevent its taxation…."); *Simpson v. Bouker*, 249 F.3d 1204, 1210–13 (10th Cir. 2001) (analyzing Kansas's stamp tax on marijuana and noting that the purpose of the tax is "raising revenue and a concern that the 'flourishing underground economy not operate on a tax-free basis'") (citation omitted). Indeed, distribution of marijuana under Amendment 64 is subject to federal income tax. *See* 28 U.S.C. § 280E; *Californians Helping to Alleviate Medical Problems, Inc. v. Comm'r*, 128 T.C. 173 (2007). And in order to pay these federal taxes, marijuana businesses must subject themselves to additional federal regulation, including obtaining a Tax Identification Number from the IRS. The

CSA's criminal penalties against marijuana-related activity do not preclude other forms of regulation.[19]

Third, contrary to Plaintiffs' assertions, Safe Streets Op. Br. 29–31; Smith Op. Br. 37–38, the Supreme Court's decision in *Michigan*

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[19] In many areas, the federal government accommodates various aspects of state-level marijuana regulation. For example, the Internal Revenue Service issues tax identification numbers to the very same marijuana businesses the State of Colorado has licensed, *see* 26 U.S.C. § 6109, and issues guidance to assist marijuana businesses in complying with federal tax law. I.R.S. Interim Guidance on the Failure to Deposit Penalty, Control No. SBSE-04-0615-0045 (June 9, 2015) (abating the "failure to deposit penalty … for taxpayers who are unable to get a bank account") available at http://www.kiplinger.com/members/links/ktl/150703/SBSE_04-0615-0045.pdf (last visited August 8, 2016); I.R.S. Office of Chief Counsel Mem. No. 201504011 (Dec. 10, 2014), available at www.irs.gov/pub/irs-wd/201504011.pdf (last visited August 5, 2016) (explaining that "a taxpayer trafficking in a Schedule I … controlled substance" must use "inventory-costing regulations" to determine the cost of goods sold for tax purposes). Similarly, the Treasury Department has provided public guidance explaining "how financial institutions can provide services to marijuana-related businesses consistent with their [Bank Secrecy Act] obligations." Dep't of Treasury Fin. Crimes Enforcement Network, FIN-2014-G001, BSA Expectations Regarding Marijuana-Related Businesses at 1 (2014), available at www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf (last visited August 5, 2016). And the Environmental Protection Agency has outlined the steps states could take to register pesticides for use in cultivating marijuana. U.S. EPA Office of Chemical Safety and Pollution Prevention, Special Local Needs Registration for Pesticide Uses for Legal Marijuana Production in Colorado (May 19, 2015), available at www.colorado.gov/pacific/agplants/atom/21236 (last visited August 5, 2016).

Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461 (1984), does not compel a finding of preemption in this case. The state statute at issue in *Michigan Canners* went beyond "authorizing" conduct that federal law prohibited—it "forced [producers] to pay fees to [a producers'] association," it bound nonmembers of the association to the contracts that the association negotiated with processors, and it "precluded [a producer] from marketing his goods himself." *Id.* at 478. Thus, the state law actually *required* conduct that the federal law forbade. The same is not true of Colorado's regulation of marijuana.[20]

Finally, preempting state efforts to regulate marijuana would violate a basic assumption of the Supremacy Clause: "that the historic police powers of the States [a]re not to be superseded." *Inter Tribal Council of Ariz., Inc.,* 133 S. Ct. at 2256 (internal quotation marks

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[20] Plaintiffs also rely on dicta in the Third Circuit's decision in *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013), for the proposition that "[a] state regulatory regime that licenses conduct that federal criminal law prohibits is preempted." Safe Streets Op. Br. 31; Smith Op. Br. 38. Unlike the statute in *NCAA*, however, the CSA expressly disavows a preemptive intent, and it says nothing regarding state regulatory systems that rely in part on licensure. 21 U.S.C. § 903. The state law in *NCAA* did "precisely what the [federal statute] says the states may not do." 730 F.3d at 226–27. The same is not true here.

omitted). Under the Challengers' theory of preemption, Congress may commandeer the States by hamstringing their regulatory power and effectively requiring them to criminalize marijuana-related activity. *Cf. Qualified Patients Assoc.*, 115 Cal. Rptr. 3d at 108 ("Preemption theory . . . is not a license to commandeer state or local resources to achieve federal objectives."). This violates basic notions of federalism. *New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions.").

CONCLUSION

The Court should affirm the district court's orders of dismissal.

Respectfully submitted on August 8, 2016.

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ORAL ARGUMENT STATEMENT

These consolidated appeals present issues of statewide and nationwide significance. Oral argument will assist the Court in understanding why the district court's orders of dismissal correctly interpreted Supreme Court precedent. Oral argument will also assist the Court in understanding why the Intervenor States' putative claims should be dismissed.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32 and Tenth Circuit R. 32 because it uses 14-point Century Schoolbook font, a proportionally spaced typeface.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's briefing order because it contains 12,139 words, excluding the parts exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Frederick R. Yarger

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/s/ Frederick R. Yarger
Dated: August 8, 2016

CERTIFICATE OF SERVICE

I have duly served this **COMBINED ANSWER BRIEF OF THE STATE DEFENDANTS-APPELLEES** upon all parties through ECF file and serve at Denver, Colorado, this 8th day of August, 2016.

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