No. 16-1048 (consolidated with No. 16-1095)

ORAL ARGUMENT REQUESTED

In the United States Court of Appeals for the Tenth Circuit

SAFE STREETS ALLIANCE, ET AL.,

Plaintiffs-Appellants,

v.

JOHN W. HICKENLOOPER, ET AL.,

Defendants-Appellees.

STATES OF NEBRASKA AND OKLAHOMA,

Movants-Intervenors.

Appeal from the U.S. District Court for the
District of Colorado, No. 15-CV-349 (Blackburn, J.)

BRIEF OF INTERVENORS STATES OF NEBRASKA AND OKLAHOMA

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CERTIFICATE OF NEED FOR SEPARATE BRIEF

Because Intervenors have joined this suit to represent interests unique to Intervenors and not adequately represented by the Appellants, this brief is necessary for the Court to consider all the issues presented by this case. Moreover, by this Court's Order on April 26, 2016, Intervenors are permitted to submit a separate, consolidated brief. Counsel have sought to avoid duplication among briefs by sharing drafts with counsel for the other Appellants.

PRIOR AND RELATED APPEALS

This appeal is consolidated with *Smith, et al., v. Hickenlooper,* No. 16-1095. There are no prior appeals in this case.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because the Plaintiffs' claims arose under the Constitution, laws, or treaties of the United States. The district court dismissed the Plaintiffs' claims with prejudice on January 19, 2016, and entered judgment on January 26, 2016. The Plaintiffs timely filed their Notice of Appeal on February 12, 2016.

STATEMENT OF THE ISSUE PRESENTED

The State of Colorado authorizes, oversees, protects, and profits from a sprawling $100-million-per-month marijuana growing, processing, and retailing scheme[1] that exported at least two tons of marijuana to some 36 States in 2014.[2] Both Nebraska and Oklahoma have as a result seen a spike in interdictions of marijuana from Colorado and have suffered increased law enforcement costs and other harms.

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

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

The primary means available to Nebraska and Oklahoma to prevent their harms is one that they long ago utilized: federal legislation to create a uniform solution to this interstate problem. The enactment of the Controlled Substances Act ("CSA") was the codification of the national agreement that marijuana should be illegal. Colorado's representatives in Congress uniformly voted in favor of the CSA, as did virtually every other representative of every other state. Colorado has now chosen to renege on this legislative bargain.

The federal courts of equity and the Supremacy Clause are the Constitution's mechanisms for dealing with such transgressions by states. The issue presented is whether the district court erred in holding that no cause of action exists whereby any party can seek relief in the form of a declaration that Colorado's scheme is preempted by the CSA.

INTRODUCTION

The merits question presented by this case—whether Colorado's actions conflict with the CSA—is straightforward. The Supreme Court has already concluded that the CSA precludes states from attempting to create "an exemption for . . . a significant segment of the total [marijuana] market," as it "would undermine the orderly enforcement of the entire [CSA] regulatory scheme."[3] The Department of Justice (DOJ)

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

supported that position and still agrees that "State[s] . . . that have enacted laws authorizing marijuana-related conduct" create a "threat . . . to public safety, public health, and other law enforcement interests."[4] And DOJ has threatened that, if legalizing states' "enforcement efforts are not sufficiently robust to protect against [such] harms" it will "seek to challenge the regulatory structure itself"[5]—presumably contending that the CSA preempts contrary state regulation.

The district court held, however, that this merits question was non-justiciable. On its face, the district court's broadly-worded decision forecloses any suit to "challenge Colorado's regulatory structure itself," whether the plaintiff in that suit be DOJ, a sovereign state, or private parties. Nebraska and Colorado seek to intervene in the case for precisely this reason: nothing in the CSA indicates that Congress intended to strip the States of their core sovereign prerogative to seek equity through a declaration that Colorado's scheme is preempted by the CSA and an injunction addressing the harm caused. The judgment of the district courts below should be reversed.

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

[5] *Id.* at 3.

STATEMENT OF THE CASE

A. The Controlled Substances Act.

In 1970, the States' representatives in Congress enacted the Controlled Substances Act, which establishes a comprehensive federal scheme to regulate the market in controlled substances.[6] This "closed regulatory system mak[es] it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA."[7] To effectuate that "closed" system, the CSA "authorizes transactions within 'the legitimate distribution chain' and makes all others illegal."[8] Persons who violate the CSA are subject to criminal and civil penalties.[9]

Since the CSA's enactment, marijuana and tetrahydrocannabinols have been classified as Schedule I controlled substances.[10] They are listed in Schedule I because, in Congress's judgment, they have "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use

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[6] 21 U.S.C. §§ 801, *et seq.*

[7] *Gonzales v. Raich*, 545 U.S. 1, 13 (2005) (citing 21 U.S.C. §§ 841(a)(1), 844(a)).

[8] *United States v. Moore*, 423 U.S. 122, 141 (1975) (citation omitted).

[9] 21 U.S.C. §§ 841–863, 882(a).

[10] *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1249 (Schedule I(c)(10) and (17)); 21 U.S.C. § 812(c) (Schedule I(c)(10) and (17)).

. . . under medical supervision."[11] By classifying marijuana as a Schedule I drug, Congress mandated that the manufacture, distribution, or possession of marijuana be a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study.[12]

In the CSA, Congress included findings and declarations regarding the effects of drug distribution and use on the public health and welfare and the effects of intrastate drug activity on interstate commerce. Congress found, for example, that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."[13] Congress also found:

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

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[11] 21 U.S.C. § 812(b)(1)(A)-(C).

[12] 21 U.S.C. §§ 841(a)(1), 823, 844(a); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489-490, 492 (2001).

[13] 21 U.S.C. § 801(2).

> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.[14]

Congress further found that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances," that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate," making it "not feasible to distinguish" between such substances "in terms of controls," and that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."[15]

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

B. Colorado's Amendment 64.

Notwithstanding the foregoing provisions of the CSA, in 2012, Colorado voters adopted Amendment 64 to the Colorado Constitution to provide the legal structure for

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[14] *Id.* at § 801(3).

[15] *Id.* at § 801(4)-(6).

the growing, processing, distribution, and sale of marijuana so that the State can profit from its recreational use.[16] The opening provisions of Amendment 64 declare the "Purpose[s]" of the law, which include "enhancing revenue" and having marijuana "taxed in a manner similar to alcohol."[17]

Pursuant to these goals, Amendment 64 authorizes the Colorado Department of Revenue to provide regulations "necessary for implementation" of the Amendment's scheme.[18] The Amendment specifies several requirements for these regulations to ensure the creation of an effective marijuana industry in Colorado. For example, the Amendment requires the Colorado Department of Revenue to create an extensive system of licensure with applications, fees, and suspension and revocation standards.[19] And of course, consistent with its purpose, Amendment 64 requires Colorado's legislature to enact an excise tax on the sale or transfer of marijuana.[20]

C. Colorado's marijuana enterprise goes interstate.

Pursuant to these statutes and regulations Colorado officials have created a massive enterprise whose sole purpose is to authorize and facilitate the manufacture,

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[16] *See* COLO. CONST. art. XVIII, § 16.

[17] *Id.* at § 16(1)(a).

[18] *Id.* at § 16(5)(a).

[19] *Id.* at § 16(5)(a)(I)–(III).

[20] *Id.* at § 16(5)(d).

distribution, sale, and use of marijuana in violation of federal law. All of this is done for profit,[21] and much of that profit is derived from sales to out-of-state residents.[22] As the Director of the federally-funded task force studying the issue states, "Colorado is the black market for the rest of the country."[23]

Unabashedly describing itself as a "major exporter of marijuana,"[24] Colorado has facilitated purchase of marijuana by residents of neighboring states by issuing licenses to an unusually high number of marijuana retailers perched on Colorado's borders.[25] And despite doing all this to lure buyers from other states, Colorado has implemented no mechanism to preclude out-of-staters from purchasing large quantities of marijuana

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[21] COLO. CONST. art. XVIII, § 16(1)(a) (stating marijuana legalized for "enhancing revenue for public purposes").

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

[23] *'Clearing the Haze:' Black market is thriving in Colorado*, The Gazette, Mar. 23, 2015, available at http://tinyurl.com/z679e2b.

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

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

to take back to their home states,[26] nor does it have any system in place to track its marijuana once introduced into the interstate market.[27] Colorado allows the sale of marijuana to anyone over the age of 21—even those with convictions for distribution of marijuana in neighboring States.

As a result, Colorado marijuana has been interdicted in no less than 36 states,[28] including neighboring states Nebraska and Oklahoma. The harms suffered by Oklahoma, Nebraska, and their citizens are significant.[29] For example, in December 2014, just two days after Nebraska and Oklahoma sued Colorado in the Supreme Court, Oklahoma law enforcement arrested two people transporting 85 pounds Colorado-purchased marijuana to Tulsa, Oklahoma for sale on the black market.[30] A few months later, Oklahoma law enforcement arrested a convicted sex offender in possession of Colorado marijuana that he intended to distribute within 2,000 feet of an Oklahoma

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[26] Colorado Report, *supra* note 22, at 21 ("[T]here is no record of purchases, so any visitor can make multiple purchases in a single day, if desired.").

[27] See Colorado Report, *supra* note 22, at 9 ("[T]he State Marijuana Inventory Tracking System . . . does [not] indicate whether the marijuana sold is being diverted to underground markets outside of Colorado.").

[28] Federal Report, *supra* note 2, at 102.

[29] Federal Report, *supra* note 2, at 114.

[30] *Id.*

school.[31] Meanwhile, a Tulsa mother mourned the death of her recent college graduate son who fatally shot himself after inadvertently overdosing on potent Colorado edibles.[32] With Oklahoma as a top five destination for Colorado marijuana, it is little surprise that the number of interdictions and prosecutions of those in possession of Colorado marijuana has "explod[ed]" as a result of Colorado's actions.[33]

Nebraska has fared no better. Border towns have seen a spike in marijuana trafficking from Colorado,[34] and border law enforcement and jail facilities have experienced skyrocketing costs as they struggle to deal with the growing Colorado marijuana influx.[35] In 2014 alone, border counties saw an over 32% increase in

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[31] Dallas Franklin, *Oklahoma man facing multiple life sentences for selling, possessing marijuana,* KFOR, May 8, 2015, available at http://tinyurl.com/jrf8qgm.

[32] *Mother of local man who committed suicide says marijuana candy in Colorado led to his death*, Tulsa World, Mar. 27, 2015, available at http://tinyurl.com/gmtko7f.

[33] *Three Cimarron County lawmen keep watch for pot from Colorado*, The Oklahoman, April 25, 2016, available at http://tinyurl.com/zmwls9y (quoting the district attorney who oversees Oklahoma's panhandle as saying "It is exploding our docket . . . It's just massive . . . Cimarron County has been . . . averaging 37 felony cases per year. That's what they've averaged for the last 11 years. As of today, we've already filed 23 cases, and we're not even to the end of April.").

[34] Federal Report, *supra* note 2, at 118 (describing a 50% increase in trafficking).

[35] *In one Nebraska town near Colorado, 50% of traffic stops end in pot arrest*, The Cannabist, Oct. 12, 2014, available at http://tinyurl.com/ja7ytu3.

possession arrests and marijuana sale arrests more than doubled.[36] Statewide, after remaining somewhat stable for years, possession arrests spiked 11% in 2014.[37] The correlation between Colorado's state-sponsored marijuana industrialization scheme and the harms suffered in Nebraska and Oklahoma is clear.

D. Amendment 64 is challenged in the courts.

Suffering the consequences of Colorado's marijuana regime, on December 18, 2014, Nebraska and Oklahoma challenged Amendment 64 by moving for leave to file an original action directly against the State of Colorado in the U.S. Supreme Court.[38] Nebraska and Oklahoma alleged that Amendment 64 has "increased trafficking and transportation of Colorado sourced marijuana" into their territories, requiring them to expend significant "law enforcement, judicial system, and penal system resources" to combat the increased trafficking and transportation of marijuana.[39] Nebraska and Oklahoma also asserted their sovereign interests as *parens patriae* to protect the health and welfare of their citizens from the contraband promoted by Colorado flowing into

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[36] Nebraska Center for Justice Research, *Marijuana Enforcement in Nebraska (2009-2014)*, University of Nebraska Omaha, *5, May 16, 2016, available at http://tinyurl.com/hohyesu.

[37] *Id.* at *10.

[38] *See Nebraska and Oklahoma v. Colorado,* No. 144, Original, *available at* 2014 WL 7474136 (Motion for Leave to File Original Complaint, Complaint, and Brief in Support).

[39] *Id.*, ¶ 58, 2014 WL 7474136, *12-13; Brief in Support of Motion for Leave to File Complaint 11-16, 2014 WL 7474136, *11-16.

their states.[40] Nebraska and Oklahoma asked for a declaratory judgment that the CSA preempts certain of Amendment 64's licensing, regulation, and taxation provisions, and sought equitable relief barring the implementation of those provisions.[41] The Supreme Court views its jurisdiction on these types of suits as discretionary, and on March 21, 2016, the Court exercised that discretion to decline to assume jurisdiction over the case without addressing the merits.[42]

While Nebraska and Oklahoma's original action was pending, this case was filed February 19, 2015, by individual Colorado residents and a private membership organization whose members are interested in law enforcement issues.[43] None of the plaintiffs in the underlying action were sovereign entities. The plaintiffs sued Colorado officials seeking a declaration that Amendment 64 and its corresponding provisions are

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[40] Brief in Support of Motion for Leave to File Complaint 12, 2014 WL 7474136, *12.

[41] Complaint ¶¶ 28-29, 2014 WL 7474136, *12-13.

[42] *Nebraska v. Colorado*, 577 U. S. ____, 136 S. Ct. 1034 (2016), *available at* 2016 WL 1079468; *see id.* at *1, (Thomas, dissenting) ("Federal law does not, on its face, give this Court discretion to decline to decide cases within its original jurisdiction . . . yet the Court has long exercised such discretion[.]").

[43] Safe Streets Appendix, Vo. I, A008. For references to the record, Intervenors cite to the Appendix filed with the brief of Appellants Safe Streets, *et al.*

preempted by the CSA under an essentially identical legal theory to that advanced by Nebraska and Oklahoma before the Supreme Court.[44]

On motions to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the district court dismissed the plaintiffs' operative complaint on January 19, 2016, holding that Amendment 64 could not be challenged as preempted under an equitable cause of action.[45] This appeal timely followed and was initiated while Nebraska and Oklahoma were still awaiting the Supreme Court's decision on their motion to file an original action. To preserve their ability to participate on the critical threshold question of whether a cause of action exists to challenge Amendment 64, Nebraska and Oklahoma moved to intervene in this Court. That motion remains pending, but by its Order of April 26, 2016, the Court authorized Nebraska and Oklahoma to file this brief on the merits.

SUMMARY OF THE ARGUMENT

The Supreme Court has long recognized the ability of the States to bring equitable actions in federal court against those causing harm from outside its borders, including other states and their officers. These actions include those aimed at enjoining

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[44] *See* Safe Streets App., Vol I, A095-97. The plaintiffs included other claims against a county commission and several individuals and corporations involved in Colorado-licensed industrialized marijuana activities. *Id.* at A083-95. However, Nebraska and Oklahoma's focus is exclusively on the claims against Colorado State officials.

[45] *See* Safe Streets App., Vol II, A358.

harm caused to the health and welfare of the States' citizens protected by the States as *parens patriae*, as well as financial harm to the States themselves, and the Supreme Court has in the past vindicated those interests by enjoining another state's action as in violation of the Supremacy Clause. This is precisely the type of action that Intervenors seek to bring against Colorado officials: An action to enjoin the harm to the Intervenor States and their citizens by the interstate traffic of marijuana created by Colorado's recreational marijuana licensing regime and made illegal by the CSA by operation of the Supremacy Clause.

Yet the district court in this case held that no party has a cause of action to challenge Colorado's marijuana regime as preempted by misapplying the Supreme Court's decision in *Armstrong*. In addition to the arguments offered by Appellants, with which Intervenors concur, that decision does not preclude Intervenor's cause of action for at least three reasons. *First*, *Armstrong* is simply inapplicable to Intervenors' action because the action at issue in *Armstrong* arose solely because of a federal statute, so the Court was required to analyze whether that statute implicitly precluded the plaintiffs equitable action. Here, Intervenors' cause exists independently in equity and would be able to be brought to enjoin harm even absent the federal statute (in this case, the CSA). Thus, it could only be abrogated by an express and clear statement by Congress, which the CSA does not contain.

Second, even if *Armstrong* is applicable, its analysis does not prevent an equitable cause of action by Intervenors because the CSA does not purport to create an exclusive

remedy for the specific type of violation at issue here—a state regulatory regime that conflicts with the CSA—and deciding whether Amendment 64 is preempted is judicially administrable. *Finally*, the *Armstrong* decision only disavowed *private* causes of action under the Supremacy Clause and did not address causes of action by the States, which the structure of the Constitution and purpose of the Supremacy Clause dictate should be allowed in federal courts. For these reasons, the judgment of the district court below should be reversed.

STANDARD OF REVIEW

This Court "review[s] a Rule 12(b)(6) dismissal de novo" and "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff."[46]

ARGUMENT

I. Nebraska and Oklahoma have a cause of action to challenge Colorado's illegal marijuana scheme.

Intervenors concur in the arguments made by the Appellants in this case regarding the errors in the district court's judgment dismissing their suit. In addition to those errors, Intervenors offer the following arguments to protect the interests of Intervenors as sovereign States.

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[46] *Cressman v. Thompson*, 719 F.3d 1139, 1144, 1152 (10th Cir. 2013).

A. The Intervenor States have a traditional cause in equity to bring suits in federal court for harm caused by officials in other States.

Nebraska and Oklahoma, as sovereign States, have an interest in protecting their borders and promoting the health and safety of their citizens. Accordingly, the Supreme Court has long recognized the States' ability to bring equitable actions against others, including other states and their officers, for harm flowing across state borders, even in the absence of any federal statute authorizing that suit.

This power to bring suit to enjoin the harm actions of another state includes suits to halt violations of the Supremacy Clause because the other state's action violates federal law. For instance, in *Maryland v. Louisiana*,[47] several states sued Louisiana challenging the constitutionality of the "first-use" tax that Louisiana imposed on natural gas imported into the State. Though the primary effect of the tax was not on the States directly, but on gas producers from outside Louisiana, the Supreme Court held that the States had standing to bring suit both as consumers of the gas who would incur higher costs and as *parens patriae* of the consuming public.[48] The plaintiff States argued that "that the First-Use Tax violates the Supremacy Clause because it interferes with federal regulation of the transportation and sale of natural gas in interstate commerce"

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[47] 451 U.S. 725 (1981).

[48] *Id.* at 731, 736.

embodied in the Natural Gas Act.[49] The Supreme Court agreed, enjoining enforcement of the tax and holding that, given the "imminent possibility of collision" between the state and federal schemes, the Louisiana law "violate[d] the Supremacy Clause."[50]

This right for states to bring suit in equity is inherent in their sovereignty, as the Supreme Court has recognized for over a hundred years. For example, in *Missouri v. Illinois*, the State of Missouri brought suit against Illinois and a state corporation, the Sanitary District of Chicago, for discharges into the Mississippi river.[51] In addressing the case, the Supreme Court first had to answer the question of "whether the acts of one state in seeking to promote the health and prosperity of its inhabitants by a system of public works, which endangers the health and prosperity of the inhabitants of another and adjacent state, would create a sufficient basis for a controversy" that the Court could adjudicate.[52] The Supreme Court found in the affirmative, reasoning that "if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them." This is because "[i]f Missouri were an independent and sovereign state all must admit that she could seek a remedy by

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[49] *Id.* at 746.

[50] *Id.* at 756-52, 760.

[51] 180 U.S. 208 (1901).

[52] *Id.* at 219.

negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions" allowing the federal courts to resolve cases and controversies.[53]

Similarly, in *Georgia v. Tennessee Copper Company*, the Supreme Court granted an injunction to the State of Georgia in an equitable action alleging that certain copper companies in Tennessee were poisoning their forests with gaseous sulphuric acid blowing into Georgia land and that the State of Tennessee was doing nothing to stop it.[54] The Court noted that, although "[t]he state owns very little of the territory alleged to be affected," the suit was primarily one by "a state for an injury to it in its capacity of quasi-sovereign."[55] The Court explained its equitable jurisdiction in this way: "When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court."[56]

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[53] *Id.* at 241.

[54] 206 U.S. 230 (1907).

[55] *Id.* at 237.

[56] *Id.*

As the Supreme Court held in *Missouri v. Illinois*, the suits in equity brought by a state that can be heard by federal courts are not limited to "cases involving boundaries and jurisdiction over lands" or "cases directly affecting the property rights and interests of a state," for "such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court."[57] Among those causes that can be heard in the Courts of equity are those "where a nuisance affects the health, morals, or safety of the community."[58]

Thus, the States have a traditional equitable cause of action to redress harm caused by the unlawful actions of other states or their officials, and this cause of action need not arise out of any federal statute. This is precisely the type of action Intervenors seek to bring against the Colorado officials. Like in all cases cited above, Intervenor States seek to enjoin the Colorado officials from taking actions that are injurious to the health, welfare, and morals of their people, and are imposing direct costs on the States. That marijuana causes such injury to the public was definitively found by Congress in

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[57] 180 U.S. at 240-41.

[58] *Id.* at 245.

the CSA.[59] Moreover, like the pollutants enjoined in the above cases, Congress has also determined that substances like marijuana by their nature enter into interstate commerce and that their interstate effects cannot be stopped by attempting to limit their production, distribution, or consumption to local markets.[60] The Supreme Court has expressly affirmed this finding.[61] Finally, as in *Maryland v. Louisiana*, Intervenors contend that Colorado's marijuana scheme conflicts with federal law and is thereby preempted. For this reason, this suit falls comfortably within the ability of a state to bring an equitable action in federal court to enjoin the activities of another state's officers.

B. Contrary to the district court's holding, a cause of action of the type Intervenors seek to bring against Colorado officials was not abrogated by the Supreme Court's decision in *Armstrong* or by the CSA.

In holding that no cause of action exists to challenge Amendment 64 as unlawful, the district court relied primarily on the Supreme Court's decision last year in *Armstrong v. Exceptional Child*.[62] But, in addition to the reasons advanced by Appellants detailing why *Armstrong* does not preclude the causes of action in this case, *Armstrong* is also not applicable to equitable causes of action brought by States like the one Intervenors bring

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[59] *See* 21 U.S.C. § 801(2).

[60] *Id.* at § 801(3)-(6).

[61] *See Raich*, 545 U.S. at 27-33.

[62] 135 S.Ct. 1378 (2015).

against Colorado's officials. Nor do the causes of action provided in the CSA preclude the States from exercising their sovereign power to seek an injunction requiring other state officials from acting in a way that harms the Intervenor States. In fact, because the CSA's regulatory regime preempts Amendment 64, combined with the Supremacy Clause, it provides the reason why Intervenors should prevail on the merits.

In *Armstrong*, the plaintiffs brought suit to challenge a state's Medicaid reimbursement rates, which they alleged to be inadequate under Section 30(A) of the Medicaid Act.[63] The plaintiffs claimed that they had a cause of action both under equity and the Supremacy Clause to challenge the State's action as preempted.[64] In rejecting the plaintiffs' Medicaid Act claim, the Court first rejected the notion that "the Supremacy Clause includes a *private* right of action."[65] At the same time, the Court noted it has "long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law" and that these causes of action sound in equity.[66]

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[63] *Armstrong,* 135 S. Ct. at 1382 (citing 42 U.S.C. § 1396a(a)(30)(A)).

[64] *See id.* at 1385.

[65] *Id.* at 1384; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 749 (2016) (Thomas, J., dissenting) (stating that in *Armstrong*, the Court "explained last Term [that] *private* parties have no 'constitutional . . . right to enforce federal laws against the States.'" (emphasis added)).

[66] *Armstrong*, 135 S. Ct. at 1384.

Nevertheless, the Court held that plaintiffs in *Armstrong* did not have an equitable cause of action because in the Medicaid statute Congress had evinced an implicit "intent to foreclose equitable relief."[67] In so holding, the Supreme Court relied on two factors: *first*, Congress had created a remedy for the very wrong about which the plaintiffs were complaining, since the federal government was authorized to withhold Medicaid funds; and *second*, the text of Section 30(A) was "judicially unadministrable" insofar as the Supreme Court found it "difficult to imagine a requirement broader and less specific than § 30(A)'s mandate."[68]

But the claims in *Armstrong* differ markedly from those of Intervenors, and nothing in *Armstrong* abrogates the sovereign equitable rights States have in obtaining an injunction preventing harm emanating from official actions of other States. Rather, *Armstrong* recognizes the "long history" of the ability to "sue to enjoin unconstitutional actions by state and federal officers."[69]

First and foremost, the plaintiffs' claims in *Armstrong* arose only through the Medicaid Act, so it was necessary for the Court to inquire as to whether that Act envisioned an equitable remedy for its violation. Had the Medicaid Act not existed, no cause of action for the plaintiffs would have been imaginable. In Intervenors' case, by

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[67] *Id.* at 1385.

[68] *Id.*

[69] *Id.* at 1384.

contrast, the States' equitable cause of action to restrain substances injurious to their citizens' health and welfare flowing in from other States exists *independent* of the CSA. Simply put, the *Armstrong* framework and analysis does not apply to this case. Thus, the district court was wrong in characterizing *Armstrong* as creating the blanket proposition that "the right to call on the equity powers of a federal court to enjoin enforcement of an allegedly preempted state law must be found in substantive federal law."[70] Rather, the appropriate question with respect to the States' equitable action and the CSA is not whether the CSA prescribed exclusive remedies for its violation, but whether the CSA clearly and expressly intended to preclude States from addressing the harms of drugs within their borders through their independent sovereign right to seek equitable relief redressing those harms.[71]

It is plain that the CSA does not express a clear intent to preempt a State's preexisting sovereign power to address the harms of drugs within its borders. Section 903 of the CSA says the opposite, disclaiming any "intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State

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[70] Safe Streets App., Vol. II, A364.

[71] *Cf. Bond v. United States*, 134 S. Ct. 2077, 2088-89 (2014) (holding that "it is incumbent upon the federal courts to be *certain* of Congress's intent before finding that federal law overrides the usual constitutional balance of federal and state powers," such that any rule that purports to "affect[] the federal balance" requires a "clear statement" before presuming Congress intended such a result).

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."[72] Thus, "[t]he CSA explicitly contemplates a role for the States in regulating controlled substances."[73]

Rather than providing the cause of action for Intervenors' claims, the CSA provides the answer to the merits question of Intervenors' traditional equitable claim: Are the Colorado officials' actions that result in harm to the Intervenor States *unlawful*? The answer provided by the CSA is clear. The Supreme Court upheld "[t]he congressional judgment" in the CSA "that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme" and is thereby prohibited by federal law.[74] The district court's fundamental error was rooted in its focus on Colorado's *decriminalization* of marijuana, instead of the regulatory regime enforced by the defendant officials which affirmatively promotes, facilitates, licenses, and taxes marijuana industrialization. And to the extent that there is any conflict between the CSA and Colorado law as to what is unlawful, the Supremacy

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[72] 21 U.S.C. § 903.

[73] *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006).

[74] *Raich*, 545 U.S. at 28.

Clause provides the "rule of decision."[75] In this manner, Intervenors' claim is much like the one for which the Supreme Court provided relief in *Maryland v. Louisiana*, discussed above.

Second, even if an *Armstrong* analysis did apply here, the opposite result attaches to this case. In *Armstrong*, the primary reason the Court gave for determining that Congress had precluded an equitable action was that Congress has explicitly provided a different remedy for the precise statutory violation alleged by the plaintiffs.[76] Namely, Congress had provided "the withholding of Medicaid funds by the Secretary of Health and Human Services" as the "sole remedy" for a "State's 'breach' of the Spending Clause contract" memorialized in Section 30(A) of the Medicaid Act.[77] But the same is not true in this case because the CSA is devoid of any specific statutory remedy for State-sponsored marijuana industrialization in violation of the CSA.[78] There is no

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[75] *Armstrong*, 135 S. Ct. at 1383; *see also Raich*, 545 U.S. at 29 ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

[76] *Armstrong*, 135 S. Ct. at 1385.

[77] *Id.*

[78] *Cf. Tohono O'odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1316 (D. Ariz. 2015) (holding that, under *Armstrong*, IGRA did not implicitly preclude an equitable cause of action to challenge a state law as preempted because, although IGRA contained specific remedies for certain violations, it did not contain a remedy for the violation alleged by the plaintiff).

evidence of a congressional "intent to foreclose" equitable relief when a State affirmatively authorizes violations of the CSA. Unlike the Medicaid Act, the CSA does not provide for a specific coercive action to remedy a State law that "positively conflicts" with the CSA.[79] In fact, the Executive branch has specifically contemplated a nonstatutory remedy when it threatened that, if legalizing States' "enforcement efforts are not sufficiently robust to protect against" the harms of marijuana, it will "seek to challenge the regulatory structure itself"[80]—presumably through a nonstatutory equitable action that claims that the CSA preempts contrary state regulation.

The district court erred in concluding otherwise. The district court emphasized the Attorney General's "panoply of remedies" to enforce against *individuals* as strongly suggesting "that Congress did not intend to provide additional recourse through private actions in equity."[81] Had the district court's analysis instead focused on whether the CSA contains a remedy against a state regulatory regime which violates the CSA, consistent with the allegations in Counts VII and VIII and with Intervenors' claims, it could not have concluded under *Armstrong* that Congress had created a remedy for the very wrong about which the plaintiffs complained.

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[79] *See* 21 U.S.C. § 903.

[80] Cole Memorandum, *supra* note 4, at 3.

[81] Safe Streets App., Vol. II, A366.

Under the second *Armstrong* factor the district court erred in determining the CSA was such a "judgment-laden standard" that any equitable relief under the CSA would be "judicially unadministrable."[82] But the district court erred in thinking Appellants' suit asked it to weigh the merits of the Executive's policy choice to cease CSA enforcement rather than addressing the actual question presented: The preemptive effect of the CSA on Colorado's affirmative promotion of marijuana industrialization. The district court drew a false equivalence between the Executive's acquiescence to state-level sanctioning of violations of federal law with dissimilar acts of prosecutorial discretion concerning street-level criminals. However, the Executive's failure to administer the CSA in Colorado does not mean that a straightforward determination of whether there is a positive conflict between state law and the CSA is somehow judicially unadministrable. Courts are well-suited to decide preemption claims, and they do so every day. In fact, nearly every preemption claim brought by a private party involves a decision by the Executive to not actively seek to invalidate a conflicting state law, but that exercise of prosecutorial discretion has never stopped private parties from bringing preemption claims.

Were it not so—and were it true that judges simply are unable to decide the question of whether the CSA preempts Amendment 64—then the Executive branch

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[82] *Id.* at A368.

itself would be unable to bring a suit challenging Amendment 64. It would effectively mean that once the Executive Branch opened the Pandora's box of state-level legalization with its memoranda, the only way to close that box would be to withdraw the memoranda and *then* attempt to unravel a state's regulatory regime through piecemeal criminal prosecutions rather than a single preemption action. Thus, the district court's ruling would prevent the Administration from exercising its discretion to do what it has claimed the power to do if states are inadequately regulating a "legalized" marijuana market—"challenge the [state's] regulatory structure itself."[83]

Third, *Armstrong*'s holding that the Supremacy Clause provides no cause of action for *private* litigants did not decide the question of whether states can bring actions under that provision against other states or their officials. Unlike with private causes of action, a public action under the Supremacy Clause is consistent with our constitutional structure.

As sovereigns in our constitutional system, States have the ability to set their own policy to address the social ills that confront their communities. But certain problems of public policy are inherently interstate in nature, and for those problems the Constitution provides a solution: the States' representatives in Congress can vote to pass a law to set national policy on the interstate issue, agreeing to give up a measure of

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[83]Cole Memorandum, *supra* note 4, at 3.

their sovereignty in favor of a uniform system. And if officers of a State attempt to break that bargain by implementing a different policy, thereby imposing externalities on other States, the Constitution provides the States a remedy: they may petition in the federal courts for relief pursuant to the Supremacy Clause. Without such a mechanisms, federal legislation would be of little import.[84]

Here, the States' representatives in Congress agreed to ban marijuana for all uses nationwide because it was a substance injurious to the public's health and heavily trafficked between states.[85] But now, officials in Colorado have chosen to renege on that bargain by taking affirmative steps to create a marijuana market for the express purpose of profiting off that billion-dollar industry.[86] All the while, its marijuana is being trafficked to other States causing precisely the type of interstate harm the States through Congress were trying to prevent.[87]

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[84] The Federalist No. 15, at 31-32 (Alexander Hamilton) (Roy R. Fairfield ed., 2d ed. 1981) (observing that the problem with the Articles of Confederation was that, with respect to the laws enacted by the Continental Congress, "though in theory their resolutions . . . are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option," and that the Supremacy Clause was made to remedy this "great and radical vice").

[85] *See* Statement of the Case, *supra*, Section A.

[86] *See* Statement of the Case, *supra*, Section B.

[87] *See* Statement of the Case, *supra*, Section C.

It is precisely this type of individual State rejection of legitimately-enacted national policy that the Supremacy Clause was intended to prevent. Thus, in *Maryland v. Louisiana*, the Supreme Court invalidated under the Supremacy Clause a Louisiana tax that conflicted with the Natural Gas Act since it undermined the national regulatory scheme to which the States' representatives agreed.[88] To hold otherwise is to permit State nullification of federal law so long as they have an Executive that is willing to go along with it. Thus, while *Armstrong* did away with the idea that the Supremacy Clause provides a private right of action, it did not foreclose the possibility that a public action—like one brought by a state or the federal government[89]—could enforce that Clause's terms.

CONCLUSION

Colorado's marijuana scheme directly conflicts with duly enacted federal law and should not be insulated from challenge by the very parties who bear the brunt of its resulting harm. For the reasons set forth herein, the Court should reverse the district court's dismissal and remand the case for further proceedings.

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[88] *Maryland v. Louisiana*, 451 U.S. at 756-52, 760.

[89] *See Arizona v. United States*, 132 S. Ct. 2492 (2012) (enjoining state law as preempted on challenge from federal government in a Supremacy Clause action)

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case broadly presents the issue whether Colorado's regulatory promotion, facilitation, and licensure of industrialized marijuana is preempted by the CSA's prohibition on the cultivation, possession, and distribution of marijuana. This appeal specifically presents the question whether Nebraska and Oklahoma, as sovereign States which have absorbed the spillover effects of Colorado's marijuana scheme, have a cause of action to challenge the constitutionality of that scheme. Given the national significance of these issues, oral argument is warranted and Nebraska and Oklahoma should be permitted to participate in such argument.

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Respectfully submitted,

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ADDENDUM OF RELEVANT STATUTES AND PROVISIONS

21 U.S.C. § 801

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

(2) 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.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

21 U.S.C. § 903

No 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.

COLORADO CONST. ART. XVII, § 16(1)(a)

(1) Purpose and findings.

(a) In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32 and Tenth Circuit R. 32 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Garamond, 14-point. 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 7,065 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

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ECF CERTIFICATION

Counsel certifies that all required privacy redactions have been made as required by Tenth Circuit Rule 25.5 and the ECF Manual, that seven exact copies of this ECF filing will be mailed to this Court, and that this filing was scanned with Symantec Endpoint Protection antivirus using the latest version (12.1.5), most recently updated on June 1, 2015.

/s/ Ryan S. Post
Ryan S. Post

CERTIFICATE OF SERVICE

I hereby certify that, on June 3, 2016, a true and correct copy of the foregoing Brief of Intervenors was served via the Court's CM/ECF system on counsel of record for all parties.

/s/ Ryan S. Post
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