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.)

REPLY BRIEF OF INTERVENORS STATES OF NEBRASKA AND OKLAHOMA

E. Scott Pruitt
Attorney General of Oklahoma
Patrick R. Wyrick
Solicitor General
Mithun Mansinghani
Deputy Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
P: (405) 521-3921
E: Patrick.Wyrick@oag.ok.gov

COUNSEL FOR THE STATE OF OKLAHOMA

Douglas J. Peterson
Attorney General Of Nebraska
Ryan S. Post
David A. Lopez
Assistant Attorneys General
Nebraska Office of the Attorney General
2115 State Capitol
Lincoln, NE 68509
P: (402) 471-2682
E: Ryan.Post@nebraska.gov

COUNSEL FOR THE STATE OF NEBRASKA

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INTRODUCTION

Colorado state officials authorize, oversee, and protect a $100-million-per-month marijuana industry that exported thousands of pounds of marijuana to some 36 States in 2014—taking a cut of the profits for the state coffers.[1] Congress's intention in enacting the Controlled Substances Act's near-total ban on marijuana cannot be squared with the reality on the ground in Colorado, affirmatively empowered by Colorado officials, to the detriment of surrounding States. The Colorado officials here thus candidly admit that their actions "depart from the CSA's policy of prohibition" of marijuana.[2] Yet they quite extraordinarily argue that their multi-billion dollar scheme of marijuana legalization is not preempted by the CSA.[3] If the Colorado officials believe what they say about preemption, they are publicly taking the position that not even the federal government can shut down Colorado's marijuana operations with a preemption suit. In their view, the federal government's only option is to spend millions of taxpayer dollars in piecemeal prosecution of Colorado citizens and officials for their criminal conduct.

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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] State Aple. Br. 51.

[3] *Id.* at 59-67.

Given the inherent difficulty of this position, it is little surprise that the Colorado officials first and primarily seek to avoid the merits by arguing that no court can hear a claim against them. Appellees argue that Intervenors Nebraska and Oklahoma lack both standing and a cause of action to address the harms flowing into their States. More audaciously, Colorado officials have argued here and in the Supreme Court that no court should exercise jurisdiction over their claims, but that instead Nebraska and Oklahoma should be barred from the courthouse altogether. For the following reasons, Appellees' arguments should be rejected.

ARGUMENT

Intervenors concur in the arguments made by the Appellants in reply to the briefs of Appellees and their *amici*. In addition, Intervenors offer the following arguments in support of the claims of Intervenors as sovereign States.

I. This Court has jurisdiction to hear Nebraska's and Oklahoma's suit.

The Colorado State Appellees contend that this court does not have jurisdiction to hear any claims brought by Nebraska and Oklahoma against them.[4] Combined with Colorado's arguments to the U.S. Supreme Court also asking that Court to decline jurisdiction over Nebraska's and Oklahoma's claims,[5] the position of

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[4] *Id.* at 50-53.

[5] *See generally Nebraska v. Colorado*, No. 144, Original, Colorado's Brief in Opposition to Motion for Leave to File Complaint (Mar. 27, 2015), *available at*

(Cont'd on next page)

the Colorado Attorney General appears to be that *even if* the intervening States have a cause of action, *even if* they have standing to bring suit, and *even if* they would prevail on the merits of their suit, no court anywhere should hear their claims and the States should be completely deprived of any forum, hearing, due process, and remedy for their injury.

The State Appellees' position is premised on 28 U.S.C. § 1251(a)'s grant of "original and exclusive jurisdiction" to the Supreme Court for "all controversies between two or more *States*." (emphasis added). But unlike the original action Nebraska and Oklahoma brought against the *State* of Colorado in the Supreme Court, this suit does not involve claims against the State of Colorado (or any other State); instead, it is a suit against officers of the State. Thus, this suit does not fall within the express terms of § 1251(a).[6] While the functional results of the two suits might be the same, courts have long recognized the formal distinction between injunctive suits for prospective relief against state officers and suits against the State itself—and that this

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http://coag.gov/sites/default/files/contentuploads/ago/press-releases/2015/03/03-27-15/032715coloradosscotusbriefoppositionneok.pdf.

[6] *See Connecticut v. Cahill*, 217 F.3d 93, 103 (2d Cir. 2000) (holding that in suit brought by the State of Connecticut against New York officials, "since New York has not been sued and has elected not to intervene, the suit on its face is not within the plain meaning of section 1251(a)").

distinction is meaningful. Most prominently, the *Ex Parte Young*[7] doctrine recognizes that "a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State" and therefore not barred by sovereignty immunity.[8] Thus, "[j]ust as a suit between a private citizen and the officials of a State is not barred by the Eleventh Amendment, so a suit between one State and the officials of another for the enforcement of an unconstitutional act . . . is not barred by 28 U.S.C. § 1251(a)."[9]

It is for this reason that the State Appellees' reliance on *Mississippi v. Louisiana*[10] is misguided, since that suit involved two States as opposing parties, not their officers. Indeed, the Supreme Court in that case held that § 1251(a) "speaks not in terms of claims or issues, but in terms of parties."[11] Thus, despite Colorado's contention that, because the issues present in this case could be (and were) raised in a § 1251(a) original action, they cannot be raised here, *parties matter*, and the parties in this case do not meet the express requirements of § 1251(a).

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[7] 209 U.S. 123 (1908).

[8] *Green v. Mansour*, 474 U.S. 64, 68 (1985).

[9] *New York ex rel. Abrams v. Brown*, 721 F. Supp. 629, 634 (D.N.J. 1989).

[10] 506 U.S. 73 (1992).

[11] *Id.* at 78.

The State Appellees rely heavily on the Second Circuit's decision in *Connecticut v. Cahill*,[12] but misapply its holding and reasoning. The *Cahill* Court held that it could exercise jurisdiction over Connecticut's claims against New York officials, and that § 1251(a) did not deprive the Court of jurisdiction. The court reached that conclusion for three principal reasons; each counsel in favor of this Court accepting jurisdiction over Nebraska's and Oklahoma's suit.

First, after examining Supreme Court precedent, the Second Circuit concluded that "the Supreme Court has broadly intimated that a plaintiff-State may generally choose whether or not to name another State as a defendant in litigation challenging some action or statute of the other State."[13] That choice allows the plaintiff state "to enjoy (or suffer) the jurisdictional consequences of that decision,"[14] one of which is that if a state officer, and not that state itself, is sued, "the suit on its face is not within the plain meaning of section 1251(a)."[15] Thus, both *Cahill* and this case, as suits against state officers, begin with the general rule that lower federal courts have

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[12] 217 F.3d at 93.

[13] *Id.* at 98-99.

[14] *Id.* at 98.

[15] *Id.* at 103; *see also Oregon ex rel. Dep't of Transp. v. Heavy Vehicle Elec. License Plate, Inc.*, 157 F. Supp. 2d 1158, 1163 (D. Or. 2001) ("Plaintiffs certainly could have filed an action against one or all of the states . . . , but they chose not to, and will 'enjoy (or suffer) the jurisdictional consequences of that decision.'") (quoting *Cahill*, 217 F.3d at 103)).

jurisdiction. Like any other *Ex Parte Young* suit, federal courts can entertain equitable actions claiming that state officers are acting in contravention of federal law,[16] and "[t]he propriety of naming a State official as a defendant in a district court should not vary with the identity of the plaintiff," even if that plaintiff is another State.[17]

Second, the Second Circuit held that this general rule is subject to a narrow exception for suits in which the State is the "real party in interest," which are those where "(1) the alleged injury was caused by actions specifically authorized by State law, and (2) the suit implicates the State's core sovereign interests."[18] The first prong is met in most suits against State officers, because the complaint—as it is in this case—is that the State law itself is unlawful. Thus, the Second Circuit spent the bulk of its discussion on the second prong, deriving its formulation from the fact that the Supreme Court, when deciding whether to exercise its jurisdiction over an original action, "looks primarily at 'the seriousness and dignity of the claim.'"[19] Examining this line of cases, the Second Circuit explained:

> [T]hey plainly teach that the rationale for the Court's original jurisdiction is strongest where core sovereign interests are at stake. Accordingly, we believe that, in cases implicating these interests, the State itself must be

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[16] *See Cahill*, 217 F.3d at 98.

[17] *Id.* at 103.

[18] *Id.* at 99.

[19] *Id.* (quoting *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992)).

> considered the real party in interest regardless of whether its officers or instrumentalities are the nominal defendants. In the absence of such core interests, however, a State's injunction suit against State officers, which the Supreme Court would not regard as a suit against the State requiring the exercise of its original jurisdiction, may properly proceed in a district court.[20]

In this way, the Second Circuit's "core sovereign interests" test essentially created two categories of suits against state officers: (1) those in which the "seriousness and dignity" of a claim meant that the Supreme Court would accept exclusive jurisdiction under § 1251(a), and (2) all other cases where the Supreme Court would not accept jurisdiction and thus the proper forum was the lower courts in suits against State officers.[21]

That the Supreme Court has declined original jurisdiction under § 1251(a) in Nebraska's and Oklahoma's suit is strong evidence that this case is not one which meets the Second Circuit's "core sovereign interests" test.[22] Had the Supreme Court thought that the "seriousness and dignity" of the States' claims implicated core sovereign interests, it would have accepted, not rejected, original jurisdiction.[23] The only other grounds by which the Supreme Court could have declined jurisdiction

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[20] *Id.* at 100.

[21] *See id.* at 102-03.

[22] *See Nebraska v. Colorado*, 136 S. Ct. 1034 (2016).

[23] *Cahill*, 217 F.3d at 99-100 (citing *Mississippi v. Louisiana*, 506 U.S. at 77; *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992)).

would have been to determine that "an alternative forum" existed to resolve the issues[24]—in which case, this Court (or any other lower federal court) is that forum and this Court should exercise jurisdiction.[25] Indeed, when the Supreme Court asked the U.S. Solicitor General whether it should accept jurisdiction,[26] the Solicitor General recommended declining jurisdiction in part because "Nebraska and Oklahoma . . . could file suit in their own names against an appropriate Colorado state official in a district court."[27] By moving to intervene in these appeals from district court actions, Nebraska and Oklahoma have done precisely that.

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[24] *Mississippi v. Louisiana*, 506 U.S. at 77.

[25] Nor can it be said that the Supreme Court declined jurisdiction because the other Plaintiffs/Appellants in this suit can adequately represent Nebraska's and Oklahoma's claims, since they lack both the *parens patriae* interests of the State and the ability to bring a *public* cause of action under the Supremacy Clause. And the Supreme Court did not resolve Nebraska's and Oklahoma's original action based on a lack of cause of action or standing—or on the merits—since the appropriate action in those circumstances would have been to accept jurisdiction and dismiss, not to refuse jurisdiction altogether. *See Nebraska v. Colorado*, 136 S. Ct. at 1036 (Thomas, J., dissenting) ("The plaintiff States have alleged significant harms to their sovereign interests caused by another State. Whatever the merit of the plaintiff States' claims, we should let this complaint proceed further rather than denying leave without so much as a word of explanation.").

[26] *See* Order, *Nebraska v. Colorado*, 135 S. Ct. 2070 (May 4, 2015).

[27] *See Nebraska v. Colorado*, No. 144, Original, Brief of the United States as Amicus Curiae at 21 (Dec. 16, 2015), *available at* http://www.scotusblog.com/wp-content/uploads/2015/12/Original-No.-144-US-CVSG-Br..pdf.

Even ignoring the Supreme Court's decision to decline jurisdiction, the nature of this suit is not one that implicates Colorado's "core sovereign interests." The *Cahill* Court drew further support for that test from the "underlying principle[s]" of *Ex Parte Young* jurisprudence, which helps in "determining whether a particular suit implicates another State's core sovereign interests, thus requiring that the other State be treated as the real defendant-party in interest."[28] Specifically, "the *Young* cases reflect the principle that a State is the only real defendant-party in interest when damages are sought" because "depletion of the State treasury [is] a crucial instrument of sovereignty," or when a State's sovereign territory is questioned.[29]

This case implicates neither of those interests, or any other interest typically thought of as a "core sovereign interest" for these purposes.[30] It is not the typical core sovereign dispute "requesting adjudication of boundary disputes or water rights."[31] Rather, it is a typical *Young*-type action alleging that state officers' actions conflict with federal law, and in that way they are acting outside their sovereign capacity. Analogous

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[28] *Cahill*, 217 F.3d at 100-01.

[29] *Id.* at 101 (citing, *inter alia*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261(1997)).

[30] *See Heavy Vehicle Elec. License Plate*, 157 F. Supp. 2d at 1164 (core sovereign interests include such concerns as "state contracts, debts, boundaries, interstate escheat, interstate limited fund taxation, and resource allocation").

[31] *Cahill*, 217 F.3d at 97; *cf. Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625, 632 (5th Cir. 2009) (holding that litigation brought by Mississippi that necessarily questioned Tennessee's water rights was within Supreme Court's original jurisdiction).

to *Cahill*, it is a "traditional" preemption claim "against State officers of the sort regularly litigated in district courts."[32]

The State Appellees argue that this implicates their core sovereign rights because it impinges on their ability "to pursue their own marijuana policies."[33] But a State's ability to pursue its own public policy cannot be a "core sovereign interest" for *Young* or *Cahill* purposes, otherwise *every* preemption suit against state officers for performing their duties pursuant to state law would meet the test. In *Cahill* itself, Connecticut was challenging the validity of a New York law restricting commercial lobstering in New York waters.[34] The fact that the suit would potentially infringe on New York's rights to pursue its own policies with respect to its own natural resources did not make it one about "core sovereign interests" that could not be challenged in district court for conflicting with federal law.[35]

Third, the *Cahill* Court justified its ruling based on "the Supreme Court's concern that *some* judicial forum be available for the resolution of conflicts of this

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[32] *Cahill*, 217 F.3d at 103.

[33] State Aple. Br. 51

[34] *Cahill*, 217 F.3d at 96.

[35] *See id.* at 103; *see also Heavy Vehicle Elec. License Plate*, 157 F. Supp. 2d at 1160-61, 1163-64 (ability of state to set policy regulating trucking within its own state not a "core sovereign interest").

nature."[36] Here, because the Supreme Court has already declined jurisdiction over Nebraska's and Oklahoma's claims, suit in a lower federal court such as this is the only forum available. Thus, under *Cahill*, this Court undoubtedly has jurisdiction over the Intervenor States' claims.

II. Nebraska and Oklahoma have both a valid cause of action and standing to challenge Colorado's marijuana regime.

Appellees make various arguments attempting to show that Nebraska and Oklahoma do not present a valid cause of action nor have standing to bring suit, but none have merit.

A. Intervenors may bring an equitable action even absent any explicit authorization by statute.

The State Appellees appear to argue that Intervenors cannot bring an equitable action because no federal statute authorizes such an action or provides them with such a right.[37] If that were the case, there would be no such thing as an action in equity—all actions would have to be pursuant to explicit statutory authorization. But equity has long protected a set of well-established rights, and the merger between law and equity in federal courts "did not alter [these] substantive rights."[38] The Supreme Court has consistently recognized that those rights, which can be vindicated in equity,

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[36] *Cahill*, 217 F.3d at 102 (emphasis added).

[37] State Aple. Br. 26-32.

[38] *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999)

include the rights of States as *parens patriae* to bring an action against that which "affects the health, morals, or safety of the community."[39]

As Intervenors explained in their opening brief, it is that type of action they bring here.[40] The proliferation of interstate marijuana "may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams," or trade barriers and economic discrimination, and it "may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers."[41] As such, the Intervenor States have a right in equity as *parens patriae* to bring suit to combat its causes.[42] To be sure, equity does not create "new or unlimited rights" and can be curtailed by "express and implied statutory limits,"[43] but as argued elsewhere, the rights the States seek to vindicate are neither new nor foreclosed by statute.[44]

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[39] *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238-39 (1907); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982) ("A State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.").

[40] Intervenors' Br. 16-20.

[41] *Georgia v. Penn. R. Co.*, 324 U.S. 439, 450-51 (1945); *see also* Intervenors' Br. 4-11.

[42] *Id.*

[43] State Aple.. Br. 27-28 (citations omitted).

[44] *See, e.g.*, Intervenors' Br. 22-24.

B. The CSA's provision of other remedies for other violations committed by other persons does not preclude a remedy against official enforcement of state laws preempted by the CSA.

The State Appellees next contend that because the CSA contains various criminal and civil penalties for individuals who violate its strictures, it implicitly precludes any other remedy, including an equitable suit seeking a declaration that conflicting State laws are preempted by the CSA.[45] But as stated by Intervenors and Appellants elsewhere,[46] this argument incorrectly assumes that because Congress has provided a remedy for one type of violation of statute, it has forbidden a remedy for any other type of violation—an assumption unjustified by any case law. Rather, "[t]he fact that the United States may bring criminal prosecutions or suits for injunctions under those laws does not mean that [the States] may not maintain the present suit."[47]

Moreover, the State Appellees' argument proves too much. If the State Appellees were correct, then not even the federal government could bring an action seeking invalidation of Colorado's marijuana regime as preempted, since Appellees admit that the CSA also fails to provide the federal government with any specific

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[45] State Aple. Br. 34-37.

[46] *See, e.g.*, Intervenors' Br. 25-26.

[47] *Penn. R. Co.*, 324 U.S. at 447.

authorization to bring such a suit.[48] But not even the Colorado officials believe that implication of their own argument, since they appear to acknowledge in various places that the federal government *could* bring a suit challenging their creation of a state-sanctioned marijuana market.[49] The federal government certainly believes it can do so.[50] If the federal government can bring such an action absent explicit authorization from the CSA, no reason exists why the States cannot do the same pursuant to a traditional equitable action. Both the States and the federal government have a role in enforcing the CSA, as Appellees acknowledge,[51] and while the States are explicitly given fewer provisions to enforce, neither the States nor the federal government are authorized as parties by any explicit provision to bring a preemption claim challenging conflicting state law. Yet all agree that such a preemption claim exists. Nebraska and Oklahoma are thus each one of the appropriate parties to bring such claims.

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[48] *See* State Aple. Br. 37 (stating that "the CSA's panoply of remedies do not specifically involve preemption")

[49] *See* State Aple. Br. 10, 14-15, 36.

[50] *See* Memorandum from Deputy Attorney General James M. Cole to United States Attorneys 3 (Aug. 29, 2013), *available at* http://tinyurl.com/nrc9ur8 (noting that if state regulatory regimes in States that authorize recreational use of marijuana are not sufficiently robust, "the federal government may seek to challenge the regulatory structure itself *in addition to* continuing to bring individual enforcement actions" (emphasis added)).

[51] State Aple. Br. 34-35 (citing 21 U.S.C. §§ 878(a), 882(c)).

C. Nebraska and Oklahoma have a public cause of action under the Supremacy Clause.

Appellees contest the Intervenor States' public cause of action under the Supremacy Clause, but they fail to adequately both distinguish the case law cited and address the arguments made. As noted in Intervenors' opening brief,[52] *Arizona v. United States*[53] implicitly recognized the validity of a public cause of action under the Supremacy Clause, yet Appellees do not address this fact. In that case, the United States brought suit against Arizona for a state law that sought to combat illegal immigration, asking the courts "to enjoin [the law] as preempted."[54] The Supreme Court enjoined several sections of that law—but not others—as preempted by federal statutory immigration law.[55] But neither the Supreme Court nor the federal government identified any explicit portion of federal statutes that authorized the United States to bring that suit. Rather, the United States had brought suit "under the Constitution of the United States, Article VI, Clause 2"—declaring "the Laws of the United States" as "the supreme Law of the Land"—and then declared that its first and second causes of action were "violation of the supremacy clause" and

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[52] Intervenors' Br. 30 & n.89.

[53] 132 S. Ct. 2492 (2012).

[54] *Id.* at 2497.

[55] *Id.* at 2510.

"preemption under federal law," respectively.[56] By granting relief, the Court implicitly recognized the propriety of those causes of action.

Appellees do address *Maryland v. Louisiana*, attempting to distinguish it as a case brought solely under the Commerce Clause,[57] but fail to appreciate that the Court invalidated Louisiana's law *both* under the Supremacy Clause *and* under the Commerce Clause separately.[58] Appellees' argument that the Court invalidated the Louisiana statute using the Supremacy Clause under a Commerce Clause cause of action makes little sense. Under Appellee's theory, for example, the plaintiffs in *Armstrong* could have successfully invalidated Idaho's Medicaid plan had they only bootstrapped their Supremacy Clause claim onto an unrelated cause of action such as a breach of contract claim or a § 1983 action. Rather than take this improbable route, the better reading of *Maryland v. Louisiana* is an implicit recognition of a public cause of action under both the Supremacy Clause and the Commerce Clause.

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[56] *U.S. v. Arizona*, No. 2:10CV1413, Complaint at ¶¶ 6, 61-65, 2010 WL 2653363 (D.Ariz. June 6, 2010). The Complaint also identifies the suit as arising under Article I, § 8 of the Constitution and the Immigration and Nationality Act as well, but points to no specific provision in either of those laws that provide a cause of action. *Id.* at ¶ 6. Because the Arizona law was primarily invalidated not through violation of Congress's latent or dormant Article I, § 8 powers, but rather because of its conflicts with federal statute, the Supremacy Clause is the cause of action under which the Supreme Court made its decision.

[57] State Aple. Br. 42-44.

[58] 451 U.S. 725, 746-60 (1981).

Instead of being able to distinguish these cases, Appellees cite their own,[59] claiming that *American Electric Power Company, Inc. v. Connecticut*[60] demonstrates that Intervenors do not have a cause of action. But *American Electric* adds nothing new. Rather, it merely states the principle that *Armstrong* reaffirms, which is that when Congress has explicitly provided a remedy against a particular person for a particular violation, there is some support for concluding that other remedies are impliedly excluded.

In *American Electric*, several public and private entities brought suit against private companies alleging federal common law public nuisance claims for the companies' carbon dioxide emissions.[61] They asked the federal court to enjoin the companies by setting emission standards, even though the Clean Air Act explicitly gave authority to the EPA to set carbon dioxide emission standards and to enforce criminal and civil penalties on carbon dioxide polluters.[62] The Supreme Court rejected the plaintiffs' federal common law claims because "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of

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[59] State Aple. Br. 44-45.

[60] 564 U.S. 410 (2011).

[61] *Id.* at 415.

[62] *Id.* at 416, 425, 428.

carbon-dioxide emissions from fossil-fuel fired power plants."[63] The Act "speaks directly to the question at issue," namely "emissions of carbon dioxide from the defendants' plants."[64] Specifically, the Act addressed the purported harm (emission of pollutants dangerous to public health), empowered the EPA to address that harm through regulation and through enforcement action against individuals (including the defendants), and allowed private parties to petition the EPA for specific regulations and then challenge the EPA's subsequent determination in court.[65] "The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track."[66]

The same is not true here: the CSA does not provide an explicit avenue for the same relief against the same defendants as Appellants and Intervenors seek here, namely, enjoining enforcement of a state law preempted by the CSA. Thus, unlike the Medicaid Act in *Armstrong* or the Clean Air Act in *American Electric*, the CSA does not preclude or displace Nebraska's and Oklahoma's equitable action. Moreover, *American*

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[63] *Id.* at 424.

[64] *Id.* (internal marks and citation omitted).

[65] *Id.* at 424-25.

[66] *Id.* at 425.

Electric addressed only the displacement of federal common law, and does not affect Intervenors' public cause of action under the Supremacy Clause.

Nor have the Appellees contested Intervenors' arguments that, unlike a private right of action, an implied public right of action is consistent with the origin and purposes of the Supremacy Clause and our constitutional structure more generally.[67] Even the Justices of the Supreme Court who have historically been most skeptical of implied private rights of action acknowledge that implied public causes of action pose a "significantly different" issue.[68] For example, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, the Court permitted Puerto Rico to bring suit as *parens patriae* of its workers to enforce federal laws requiring preference towards domestic over foreign workers, even though those federal laws did not explicitly provide a cause of action.[69] The States, the Court held, have "an interest in securing observance of the terms under which it participates in the federal system," and they "need not wait for the Federal Government to vindicate the State's interest," but rather "may [] seek to assure its residents that they will have the full benefit of federal laws designed to address this

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[67] Intervenors' Br. 28-30; *see also generally* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 22-28, 48-49, 72-84(2014).

[68] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 733 n.3 (1979) (Powell, J., dissenting).

[69] 458 U.S. at 594-99.

problem."[70] Here, Nebraska and Oklahoma, no less than Puerto Rico, must be able to assure their people that they will receive the public benefits of nationwide marijuana prohibition through an implied public right of action.

Nowhere is an implied public right of action for a State more important than in cases such as this, where States seek to preserve the Union of federal law from departures by other States. The Supremacy Clause and the federal courts were created in large part to solve the collective action problems created by thirteen (now fifty) State sovereigns attempting to coordinate national policy.[71] Without the Supremacy Clause, the Constitution "would have been evidently and radically defective,"[72]

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[70] *Id.* at 608-610.

[71] *See* THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("What . . . would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention are prohibited from doing a variety of things; some of which are incompatible with the interests of the union," and the power to enforce those prohibitions is "in the federal courts, to over-rule such as might be in manifest contravention of the articles of union."); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 532 (Jonathan Elliot ed., 1836) (remarks of James Madison) ("That causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions."); s*ee also* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 589-90 (1994); Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1346-53 (2001).

[72] THE FEDERALIST NO. 44, at 286 (James Madison) (Clinton Rossiter ed., 1961); *see also id.* ("[A]ll of the authorities contained in the proposed Constitution, so far as they exceed those enumerated in the Confederation, would have been annulled, and the

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amounting to "a mere treaty, dependent on the good faith of the parties, and not a government."[73] It was aimed at preventing situations exactly like this where, without the Supremacy Clause, "it might happen that a treaty or national law, of great and equal importance to the States, would interfere with some and not with other [State] constitutions, and would consequently be valid in some of the States, at the same time that it would have no effect in others."[74] The involvement of states and their representatives in creating federal law reveals a "bargain reflected by the original constitutional structure: the states recognized the supremacy of federal law (and the corresponding displacement of state law) in exchange for the right to participate, at least indirectly, in the adoption of all forms of supreme federal law."[75] And when one State's officials, like those in Colorado, attempt to renege on that bargain, it is primarily up to the parties to the bargain (the other States and the Union as a whole) to enforce its terms using the Supremacy Clause in the national courts. For these reasons, this Court should hold that the Supremacy Clause implies a public cause of action for the States to ensure official compliance with federal law.

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new Congress would have been reduced to the same impotent condition with their predecessors.").

[73] THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[74] THE FEDERALIST NO. 44, at 286 (James Madison) (Clinton Rossiter ed., 1961).

[75] Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. at 1339.

D. Intervenors have standing to bring suit.

Finally, the State Appellees claim that all parties lack standing to bring suit because an injunction against them will not redress their harms since (1) no challenge is brought to Colorado's medical marijuana regime, which will pose the same type of harms; and (2) if Colorado's regulatory scheme is dismantled, marijuana will be completely unregulated and the harms would increase.[76] Neither of these arguments are sufficient to contest standing.

As to the first, even if the same *type* of harm will occur if Colorado's medical marijuana regime is left in place, because recreational marijuana constitutes half of marijuana sales in Colorado,[77] the *level* and *amount* of harm will decrease if Intervenors prevail. This is certainly enough for standing.[78] If, for example, the States sue a factory for dumping pollutants into a river, the States are not deprived of standing merely because another factory is doing the same thing (and could also be subject to future suit).

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[76] State Aple. Br. 53-57.

[77] *See* State Aple. Br. 54.

[78] *See Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 905 (10th Cir. 2012) (rejecting the argument that, in order for a litigant to have standing, "the injury must be completely redressable by the requested relief," but instead acknowledging standing even where a "favorable decision[] against the state defendants could only partially relieve the plaintiff's injury" because "a favorable decision would relieve 'some extent' of an injury" (quoting *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007)).

Nor is it the case that, if Colorado's licensing of marijuana is enjoined, the result will inevitably lead to more marijuana trafficking because the substance will be unregulated. Federal law still prohibits every aspect of the marijuana industry, and the Executive Branch has committed itself to enforcing those laws if the State does not (or cannot) regulate.[79] In other words, Appellees urge this Court to make the unprecedented ruling that standing is lacking based on the assumption that if Colorado does not regulate, the President will default on his constitutional duty to "take Care that the Laws be faithfully executed."[80] Ultimately, even if Appellees are correct that a ruling in Intervenors' favor is "unlikely" to redress their harms as a matter of *fact*,[81] both Appellants and Intervenors have sufficiently *alleged* standing to proceed at this stage of the case.

CONCLUSION

Nebraska and Oklahoma are in agreement with the Colorado State Appellees in at least one respect: rather than deny Intervenors' motion to intervene, in the interests of judicial economy, this Court should decide the purely legal issues presented by

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[79] *See* Memorandum from Deputy Attorney General James M. Cole to United States Attorneys 2-3 (Aug. 29, 2013), *available at* http://tinyurl.com/nrc9ur8.

[80] U.S. CONST. Art. II, § 3.

[81] State Aple. Br. 57.

Intervenors in this appeal.[82] Intervenors ask that this Court reverse the decisions of the district courts below.

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Respectfully submitted,

/s/ Ryan S. Post

E. Scott Pruitt
Attorney General of Oklahoma
Patrick R. Wyrick
Solicitor General
Mithun Mansinghani
Deputy Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
P: (405) 521-3921
E: Patrick.Wyrick@oag.ok.gov

COUNSEL FOR THE STATE OF OKLAHOMA

Douglas J. Peterson
Attorney General Of Nebraska
Ryan S. Post
David A. Lopez
Assistant Attorneys General
Nebraska Office of the Attorney General
2115 State Capitol
Lincoln, NE 68509
P: (402) 471-2682
E: Ryan.Post@nebraska.gov

COUNSEL FOR THE STATE OF NEBRASKA

[82] State Aple. Br. 47 n.12.

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 5,754 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Ryan S. Post
Ryan S. Post

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 (12.1.6), most recently updated on August 29, 2016.

/s/ Ryan S. Post
Ryan S. Post

CERTIFICATE OF SERVICE

I hereby certify that, on August 29, 2016, a true and correct copy of the foregoing Reply Brief of Intervenors was served via the Court's CM/ECF system on counsel of record for all parties.

/s/ Ryan S. Post
Ryan S. Post