No. 22O144, Original

In the Supreme Court of the United States

STATES OF NEBRASKA AND OKLAHOMA,

PETITIONERS,

v.

STATE OF COLORADO,

RESPONDENT.

AMICUS BRIEF OF THE STATES OF WASHINGTON AND OREGON IN SUPPORT OF RESPONDENT

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I. INTEREST OF AMICI CURIAE

"Our Federalism" is based on "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). States can serve as effective laboratories of democracy only if they take differing approaches to problems. Those differing approaches inevitably lead to disagreement at times. This Court has never used its original jurisdiction to resolve such policy disagreements between States, and it should not start now. The amici States of Washington and Oregon ask this Court to decline original jurisdiction based on its own precedent and to allow States the ability to test new approaches without immediately being haled into this Court.

Though federal law has long prohibited the manufacture, distribution, and use of certain drugs, States have always been on the front lines of making and enforcing drug policy, particularly as to marijuana. And in recent decades, States have been challenged to respond to changing public attitudes towards marijuana. Decades ago, the idea that marijuana had medicinal properties was a fringe view. Even more extreme was the idea of removing criminal prohibitions on marijuana use. Today, these views are commonplace. Twenty-three States now authorize the production, use, and possession of marijuana under prescribed conditions, such as with medical recommendations.[1] A similar number have

[1] The following States have adopted "medical marijuana" laws: Alaska (Ballot Measure 8 (1998)), Arizona (Proposition

reduced or eliminated sanctions related to personal use of marijuana.[2] A handful of States—Colorado, Washington, Alaska, and Oregon—regulate the production and sale of marijuana in a fashion that allows recreational use by adults. These changes in State laws did not occur in a vacuum; they happened in concert with executive and legislative decisions by the federal government. And it is both foreseeable and desirable that States will continue to exercise

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203 (2010)), California (Proposition 215 (1996)), Colorado (Ballot Amendment 20 (2000)), Connecticut (House Bill 5389 (2012)), Delaware (Senate Bill 17 (2011)), Hawaii (Senate Bill 862 (2000)), Illinois (House Bill 1 (2013)), Maine (Ballot Question 2 (1999)), Massachusetts (Ballot Question 3 (2012)), Michigan (Proposal 1 (2008)), Montana (Initiative 148 (2004)), Nevada (Ballot Question 9 (2000)), New Hampshire (House Bill 573 (2013)), New Jersey (Senate Bill 119 (2010)), New Mexico (Senate Bill 523 (2007)), Oregon (Ballot Measure 67 (1998)), Rhode Island (Senate Bill 0710 (2006)), Vermont (Senate Bill 76 (2004)), and Washington (Initiative 692 (1998)). Maryland recently passed two medical marijuana-related laws. HB 1101 (2013) and HB 180 (2013). Nat'l Org. for Reform of Marijuana Laws, State Info, http://norml.org/states (last visited Mar. 25, 2015).

[2] Possession of limited amounts of marijuana intended for personal use is classified as a sub-misdemeanor offense or "decriminalized" offense subject to no jail time in the following States: Alaska, California, Maine, Maryland, Massachusetts, Mississippi (first offense only), Nebraska (first offense only), New Jersey, New York (first and second offenses only), Rhode Island, and Vermont. In addition, the following States do not require jail time for possession of marijuana for personal use, despite continuing to classify the offense as a misdemeanor: Minnesota, Nevada (first and second offenses only), North Carolina, Ohio, and Oregon. See Nat'l Org. for Reform of Marijuana Laws, State Info, http://norml.org/states (last visited Mar. 25, 2015); Marijuana Policy Project, Marijuana Policy in the States, http://www.mpp.org/states/ (last visited Mar. 25, 2015).

their sovereign prerogatives by adjusting their laws in fidelity to the beliefs of their citizens.

The amici States fear that if this Court begins accepting original jurisdiction in cases like this one, it will threaten States' ability to serve as effective laboratories of democracy as to marijuana policy or any other controversial topic. When, as here, neighboring States disagree about controversial topics—e.g., environmental law, tax policy, or labor law—this Court should not serve as the first forum for resolving such disputes. Rather, state and lower federal courts should resolve such disputes in the first instance. This leaves States more leeway to try out different legal regimes because the decisions of such courts are not immediately binding on all States and allow States to see how the law is developing and alter their policies accordingly. This Court would pretermit all that if it began hearing cases like this one under its original jurisdiction. For these reasons, the amici States have a strong interest in ensuring that the Court's original jurisdiction does not become the forum of choice for one State to assert an ordinary preemption claim against another.

II. REASONS WHY THE COURT SHOULD DENY LEAVE TO FILE THE COMPLAINT

Accepting original jurisdiction in this case would depart from this Court's longstanding practice and effectively invite States to consider this Court the court of first resort for their high-profile policy disputes. The Court should reject that role, especially

here, where the Plaintiffs are unable to show standing. The amici States respectfully ask the Court to deny the Motion for Leave to File a Complaint.

A. Plaintiffs' Claims Do Not Warrant this Court Using its Original Jurisdiction

The "Court's original jurisdiction should be exercised 'sparingly.'" *Wyoming v. Oklahoma*, 502 U.S. 437, 450-51 (1992), (quoting *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981)). Even when such jurisdiction is exclusive, the Court has "consistently interpreted 28 U.S.C. § 1251(a) as providing [it] with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." *Texas v. New Mexico*, 462 U.S. 554, 570 (1983) (citing *Maryland v. Louisiana*, 451 U.S. at 743; *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 499 (1971)). The Court "exercise[s] that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system." *Id*. The exercise of this discretion involves two inquiries: "the seriousness and dignity of the claim," and "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Wyoming v. Oklahoma*, 502 U.S. at 451 (internal quotations omitted); *see also United States v. Nevada*, 412 U.S. 534, 538 (1973) ("We . . . are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim.").

The proposed Complaint fails both of these inquiries. First, the dispute does not involve competing sovereign powers of States. Rather, it claims that one State's law regarding the rapidly-changing subject of marijuana is preempted—in one part—by federal law. That is, the dispute is a straightforward preemption claim that, subject to threshold requirements such as Article III standing, could be asserted just as readily by non-state parties and is in no way unique to States. Second, a district court can hear this legal issue and provide relief (if any is warranted). But if a district court hears this dispute, it will better protect the interests of other States and this Court. It prevents this particular interstate dispute from serving as a proxy challenge to the variety of marijuana laws in other States. And it allows the issues to percolate and mature through the lower courts before this Court decides if its review is necessary.

1. The Complaint Does Not Involve Competing State Sovereign Interests that Warrant Original Jurisdiction

Evaluating "the nature of the interest of the complaining State" in this case demonstrates that original jurisdiction is inappropriate. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Although Nebraska and Oklahoma assert that their Complaint seeks to vindicate "sovereign interests unique to the States," their legal theory is an ordinary preemption claim, not at all unique to States. Br. in Support of Mot. at 10, 17-18 (right asserted in the Complaint arises from federal power exercised under the

Commerce Clause to enact the Controlled Substances Act). Many other parties could pursue similar claims, and indeed, many have.[3]

The subject matter of this proposed Complaint contrasts sharply with those "sounding in sovereignty and property, such as those between states in controversies concerning boundaries, and the manner of use of the waters of interstate lakes and rivers." Stephen M. Shapiro et al., *Supreme Court Practice 622* (10th ed. 2013). These provide "the paradigm subject matter for original jurisdiction cases." Vincent L. McKusick, *Discretionary Gatekeeping: the Supreme Court's Management of its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185, 198 (1993). In boundary cases, each State relies on a competing but inconsistent claim to territory, reflecting their status as sovereigns in our federalist system. Similarly, when two States litigate over a finite resource in an interstate watercourse, the Court addresses mutually inconsistent sovereign claims to water. *E.g.*, *Kansas v. Colorado*, 185 U.S. 125 (1902) (overruling demurrer to jurisdiction). Cases that involve conflicts *between* competing state sovereign powers are vastly different from this case, where neighboring States have a policy disagreement and the federal government is making discretionary prosecutorial choices in applying federal law.[4]

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[3] *See, e.g.*, *Safe Streets Alliance v. Alternative Holistic Healing, LLC*, No. 15-cv-349 (D. Colo. 2015); *Smith v. Hickenlooper*, No. 15-cv-462 (D. Colo. 2015).

[4] Because the claim is based on federal law, the Court should at the very least call for the views of the Solicitor General before exercising its original jurisdiction.

The Plaintiff States cite only one case where the Court granted original jurisdiction to address a federal preemption issue. Br. at 24 (citing *Maryland v. Louisiana*, 451 U.S. 725 (1981)). That case is readily distinguishable. There, Louisiana imposed a sizable tax on natural gas flowing from offshore land controlled by the federal government through Louisiana and into dozens of other States. Because Louisiana was imposing a "tax on gas extracted from areas that belong to the people at large to the relative detriment of the other States in the Union," the Court concluded that the case "implicate[d] serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction." *Maryland*, 451 U.S. at 744. No such nationwide impacts are at issue here, nor is Colorado seeking to tax a national resource to benefit itself to benefit itself at the expense of other states. On the contrary, Colorado has imposed a regulatory system that seeks to keep the costs and benefits of its program within Colorado and to discourage spillover effects in other states. Thus, none of the "unique concerns" at issue in *Maryland v. Louisiana* are presented here. *Id.* at 743.

The Plaintiff States do not argue that Colorado law impairs their existing sovereign power over marijuana or persons within their States. Instead they claim that they "are left with no constitutional remedy to directly curb" a "threat" created by marijuana in Colorado "other than this action in this Court. Br at 10, 17-18. But Nebraska and Oklahoma retain the constitutional powers of every other sovereign State in the nation. They can investigate and prosecute persons who violate their

laws; neither is powerless to address marijuana within their borders. Their full sovereign power to address the alleged harm within their States distinguishes this case from original jurisdiction cases involving interstate pollution relied on by Plaintiffs. Br. at 12-13. When a State is harmed by air or water pollution, it has no sovereignty to command the winds or waters and must, instead, address the source of pollution.

Finally, unlike *Maryland v. Louisiana* and many other original jurisdiction cases, the proposed Complaint does not address a harm uniquely caused by one State such that it warrants this Court's original jurisdiction. Nebraska and Oklahoma cannot plausibly claim that a decision by this Court will free their States of marijuana or substantially reduce its availability. Marijuana would continue to be widely available through many channels, including sources within the Plaintiff States. And, as explained below, a ruling in Plaintiffs' favor would likely increase marijuana flowing from Colorado by eliminating Colorado's regulatory system for controlling recreational marijuana distribution. The Court should not allow a novel use of its jurisdiction where its intervention would do little or nothing to solve the problem complained of by the Plaintiff States.

2. Lower Federal Courts Are Better Situated to Address the Proposed Complaint

The second consideration in determining whether to exercise original jurisdiction is the availability of an alternative forum "where the issues tendered may be litigated, and where appropriate

relief may be had." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). *Accord Wyoming v. Oklahoma*, 502 U.S. at 451; *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976). If the Plaintiffs satisfy Article III standing requirements and state a viable cause of action, officials from the Plaintiff States could bring an identical claim in federal district court. 28 U.S.C. § 1331(a) ("The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."). Indeed, local officials from Nebraska and Colorado have already raised the same federal preemption claim in district court, *see Smith v. Hickenlooper*, No. 15-cv-462, Compl. ¶ 89, ECF No. 1 (D. Colo. 2015), as have a number of private plaintiffs, *see Safe Streets Alliance v. Alternative Holistic Healing, LLC*, No. 15-cv-349 (D. Colo. 2015).

In exercising its original jurisdiction, the Court also considers the "effective functioning of this Court within the overall federal system." *Texas v. New Mexico*, 462 U.S. at 570. This factor counsels for letting lower federal courts hear this case. There is no difference in the relief a district court could provide to the Plaintiff States, and district courts are better situated to conduct the fact-finding necessary to address Plaintiffs' allegations of harm and redressability. This Court has previously recognized that it would be "anomalous" for it to become the "principal forum for settling" these kinds of disputes, which arise because, "[as] our social system has grown more complex, the States have increasingly

become enmeshed in a multitude of disputes with persons living outside their borders." *Wyandotte Chems.*, 401 U.S. at 497. While *Wyandotte* calls out "state laws concerning taxes, motor vehicles, decedents' estates, business torts, [and] government contracts," accepting this case would add to that list any State's law that another State alleges is preempted by federal law. *Wyandotte Chems.*, 401 U.S. at 497. This would impose a significant cost—reducing this Court's capacity to hear important cases using its certiorari jurisdiction.

The effective functioning of the federal courts is also best served if other States are not forced to attend to this Complaint as if it were a claim challenging their own present or future laws. Unlike a district court proceeding, a ruling by this Court could immediately call into question a wide variety of the other state laws described above. Instead of allowing Plaintiffs to force a premature, nationwide decision by invoking original jurisdiction, the lower federal courts can focus this case on Colorado law. Other States would not be forced to treat this three-State dispute as if it were also challenging their developing marijuana laws or handcuffing their future discretion to address marijuana. For mere policy disputes between States like this one, the federal courts function more effectively by letting legal issues percolate in lower courts, guiding the States incrementally.

Finally, this Court's original jurisdiction must be sensitive to federalism, which invites the States to explore new legal policies and address changes in society. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the

happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Change emerges at different times in different States, and States are entitled to have different preferences. This critical value of federalism is particularly evident in the context of marijuana laws. Whatever preemption might flow from the Controlled Substances Act (CSA), it is clearly not a comprehensive marijuana policy. By its express terms, the CSA does not occupy the field. 21 U.S.C. § 903. As Nebraska and Oklahoma admit, the CSA does not prevent States from decriminalizing marijuana, and they claim no intent to attack medical marijuana statutes. Congress has not funded enforcement for a national marijuana prohibition, and both Congress and the executive branch have expressed a strong willingness to allow States to experiment with different marijuana policies.[5] Given "the actual state of things," *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 520 (1832), the Court should allow these issues to percolate in the lower courts as States adopt new marijuana policies and act as the laboratories of democracy so aptly described by Justice Brandeis.

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[5] *See, e.g.*, James M. Cole, *Memorandum for U.S. Att'ys, Guidance Regarding Marijuana Enforcement*, at 2 (Aug. 29, 2013), *available at* http://tinyurl.com/nrc9ur8 (last visited Mar. 24, 2015); Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538 ("None of the funds made available in this Act to the Department of Justice may be used . . . to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.").

B. Original Jurisdiction Is Unwarranted Because Plaintiffs Lack Standing

In this Court, as in any other federal court, a plaintiff must prove standing. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *Maryland v. Louisiana*, 451 U.S. 725 (1981). Plaintiffs here cannot.

To prove a case or controversy under Article III, a plaintiff State must show that it has suffered a wrong caused by the defendant State that is capable of judicial redress. *Wyoming v. Oklahoma*, 502 U.S. at 447 (quoting *Maryland v. Louisiana*, 451 U.S. at 735-36); *accord Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976) (quoting *Massachusetts v. Missouri*, U.S. 1, 15 (1939)). Nebraska and Oklahoma have not identified a remedy this Court could provide that would redress the harm they allege. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Nebraska and Oklahoma allege that the amount of marijuana entering their States from Colorado has increased since the approval of Amendment 64 by Colorado voters and the enactment of statutes and regulations implementing the Amendment. The harms they allege are increased costs of criminal enforcement. Compl. at 25-28.

But the remedy they seek does not redress those harms. Nebraska and Oklahoma ask for a declaration that sections §§16(4) and (5) of article XVIII of the Colorado Constitution are preempted and unenforceable, and for an injunction barring enforcement of all state statutes and regulations

implementing those constitutional provisions. Compl. at 27-28. But that remedy would leave Colorado with no state laws regulating its recreational marijuana market. And the anti-commandeering doctrine would preclude the Court or Congress from mandating that Colorado adopt or enforce the federal CSA or that it enact laws criminalizing marijuana.[6]

Without state regulation of marijuana in Colorado, the federal government would lose an important partner in addressing the production and use of marijuana in Colorado, because nearly all marijuana enforcement in the United States—more than ninety-nine percent—takes place at the state

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[6] Under the Tenth Amendment's anti-commandeering doctrine, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 425 U.S. 264, 288 (1981)). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162. "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *Id.* at 178.

See also Printz v. United States, 521 U.S. 898, 919-20 (1997) (The Framers "rejected the concept of a central government that would act upon and through the States"; instead the Constitution "contemplates that a State's government will represent and remain accountable to its own citizens.").

and local level.[7] In 2010, for example, there were 889,133 marijuana arrests at the local level,[8] compared to only 8,117 at the federal level.[9] The complete deregulation of recreational marijuana in Colorado logically would exacerbate, not ameliorate, the harms Nebraska and Oklahoma allege. They have identified no available remedy that would redress the alleged harms.

Having failed to allege a harm caused by Colorado that can be redressed by the Court, Nebraska and Oklahoma have failed to present a case or controversy under Article III of the United State Constitution over which the Court should exercise original jurisdiction. The Court should deny their Motion for Leave to File Complaint.

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[7] Marijuana Policy Project, State-by-State Medical Marijuana Laws, at 13 (2013), http://www.mpp.org/legislation/state-by-state-medical-marijuana-laws.html (last visited Mar. 25, 2015).

[8] *See* American Civil Liberties Union, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests*, at 8, 37 (June 2013), *available at* https://www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report (citing FBI/Uniform Crime Reporting Program Data: County-Level Detailed Arrest and Offense Data, 1995-2010) (last visited Mar. 25, 2015).

[9] *See* "Table 4, Characteristics of suspects arrested by the Drug Enforcement Administration, by type of drug, 2010," in United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Federal Justice Statistics, 2010* (Dec. 2013), *available at* http://www.bjs.gov/content/pub/pdf/fjs10.pdf (last visited Mar. 25, 2015).

III. CONCLUSION

States have a strong interest in being allowed to pursue their citizens' policy preferences without unnecessary or premature federal court intervention. The Court should respect that interest here, apply its longstanding rules for exercising original jurisdiction, and deny Plaintiffs' request for leave to file their Complaint.

RESPECTFULLY SUBMITTED.

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