

## Should New Jersey Be Concerned it will be Sued if it Legalizes Marijuana? - *NJ Cannabis Blog*

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Sale of marijuana for recreational use may soon be legal in New Jersey. Governor Phil Murphy has signaled his support for sensible regulation of marijuana consistent with what many view to be the successful approach implemented in Colorado and Washington. Should legalization occur in New Jersey, it is conceivable that residents of neighboring states, such as New York, Pennsylvania, and Connecticut, will seek to obtain marijuana in New Jersey for enjoyment back in their home state.

In 2014, neighboring states Nevada and Oklahoma sought to sue Colorado for the allegedly increased law-enforcement burden created in their states by Colorado's legalization. The United States Constitution does not permit states to sue each other directly in the state or federal courts, and instead grants original jurisdiction over such claims to the Supreme Court of the United States. Such cases are few and far between and the Supreme Court has determined that it has the authority to decline to exercise such jurisdiction thereby precluding any review of the merits of the action. As the federal government—under the Obama Department of Justice argued, it is the right approach only when one state is the direct cause of harm to another. In the Colorado case, the Court, over two dissents, declined to exercise jurisdiction, effectively ending the challenge.

New Jersey cannot rely that should a similar case come before the Court, as presently constituted and under a different administration, the same decision will be reached. Accordingly, this note seeks to raise awareness of the potential issues that could be raised against New Jersey.

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Nevada and Oklahoma alleged that Colorado's law legalizing marijuana violates the federal Controlled Substances Act of 1970 as well as international treaties, and that their states are harmed by the increased and enabled trafficking in marijuana. Citing a 2005 Court ruling, the anti-legalization suit argued that the Constitution's Supremacy Clause binds states to disallow marijuana sales saying, "This Court has identified congressional amendment of the [Controlled Substances Act] as the only legal mechanism by which a State's legalization of marijuana can avoid the pre-emptive effect of the [act]."

On behalf of the government, the Solicitor General argued that, Colorado is not directly harming either Nebraska or Oklahoma, and any criminal activity inside those states is the result of actions by third parties. In its brief, the federal government argued: "Where a state has alleged that another state permitted — but did not direct or approve — the injurious actions of other parties, this Court has declined to exercise original jurisdiction . . . [t]his Court has continued to enforce the direct-injury requirement, which substantially overlaps with the Article III standing requirement that the injury be fairly traceable to the defendant's actions," arguing further that Colorado has not directed or authorized anyone to carry marijuana across the state border.

The government also suggested that the claims were overstating the problem of cross-border criminal activity, noting that Colorado only allows the purchase of up to one ounce of marijuana. Large-scale trafficking continues to be the focus of direct federal law enforcement and, as a practical matter, remains in place.

Other than a dissent by Justices Thomas and Alito, the motion for leave to file a complaint was denied without comment. The case is *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016).

New Jersey will undoubtedly be mindful of the Colorado experience and, as with all steps taken at the crossroads of progress, will tread lightly, but resolutely. Those hostile to legalization of marijuana are undeterred and, in an upcoming post, we'll be discussing private, civil RICO lawsuits being used to attack businesses engaged in the marijuana industry.

**Pashman Stein Walder Hayden** is carefully monitoring developments in New Jersey and federally with respect to marijuana legislation and will be available to help its clients navigate the sure-to-be complex regulatory framework of this potential business frontier.

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