



**TESTIMONY OF DOUGLAS J. PETERSON  
ATTORNEY GENERAL OF THE STATE OF NEBRASKA**

**BEFORE THE  
UNITED STATES SENATE  
CAUCUS ON INTERNATIONAL NARCOTICS CONTROL**

**IS THE DEPARTMENT OF JUSTICE ADEQUATELY  
PROTECTING THE PUBLIC FROM THE IMPACT OF STATE  
RECREATIONAL MARIJUANA LEGALIZATION?**

**APRIL 5, 2016**

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Good morning, Chairman Grassley, Co-Chairman Feinstein, and distinguished members of the Drug Caucus. I am honored to testify before you today and appreciate your attention to the critically important issue of the growing state-sponsored marijuana industry and how it violates federal law.

There is much to be said about the wisdom – or lack thereof – of state governments undertaking not only to repeal criminal penalties on marijuana possession and distribution, but to affirmatively promote and facilitate “legal” marijuana industrialization. As the chief law enforcement officer of my state – which, given its proximity to Colorado’s legalization experiment, has borne significant spillover effects – I certainly hold strong views on the merits of these policy choices, and I will share several of those views in my testimony today.

But, in truth, the most urgent message I have regarding the state-sponsored marijuana industry does not concern bad policy choices. Rather, it is one of lawlessness. It is about whether America’s drug laws are to have any meaning and effect, or if they can simply be undermined by a few states’ rogue defiance of a national legal framework. It is also about the disturbing precedent set by an Administration unilaterally deciding to abandon the enforcement of key parts of those drug laws, without the approval of the Congress which enacted them.

In describing some of the effects we have seen in Nebraska, particularly from a law enforcement standpoint, I will provide examples of how rather than being an experiment in democracy confined within one state’s borders, Colorado’s marijuana scheme has become a harmful national nuisance, threatening our kids, fueling organized crime, and siphoning limited law enforcement resources. Specifically, I will discuss how several of the primary limits set out in the Cole Memorandum – interstate trafficking, increased gang activity, and public health threats – have been violated.

First, however, it is helpful to briefly review the developments which led to the present inflection point.

*The Controlled Substances Act*

Nearly fifty years ago, a bipartisan majority of your predecessors passed, and President Nixon signed into law, the Controlled Substances Act,<sup>1</sup> marking the establishment of a comprehensive federal scheme to regulate the market in controlled substances. As the Supreme Court later recognized, 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.”<sup>2</sup>

Congress expressly and unambiguously set forth the necessity for the CSA, stating 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.”<sup>3</sup> Critically, Congress further recognized the inherently interstate nature of the drug market, finding and declaring as follows:

(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

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<sup>1</sup> Pub. L. No. 91-513, Title II, 84 Stat. 1249, 21 U.S.C. § 801 *et seq.* (“CSA”).

<sup>2</sup> *Gonzales v. Raich*, 545 U.S. 1, 13 (2005), available at: <https://goo.gl/b2IeWJ> (citing 21 U.S.C. §§ 841(a)(1), 844(a)).

<sup>3</sup> 21 U.S.C. § 801(2).

(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.<sup>4</sup>

Since Congress enacted the CSA in 1970, marijuana and tetrahydrocannabinols have been classified as Schedule I controlled substances.<sup>5</sup> A drug is listed in schedule I if it has “a high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and “a lack of accepted safety for use . . . under medical supervision.”<sup>6</sup> 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.<sup>7</sup>

Marijuana’s status as a Schedule I drug has endured. In the intervening years since the enactment of the CSA – including through periods of Democratic *and* Republican leadership over both the House and the Senate – Congress has

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<sup>4</sup> 21 U.S.C. § 801(3)-(6).

<sup>5</sup> *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)).

<sup>6</sup> 21 U.S.C. § 812(b)(1)(A)-(C).

<sup>7</sup> 21 U.S.C. §§ 823, 841(a)(1), 844(a); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 489-490, 492 (2001).

consistently declined to reschedule marijuana or relax the restrictions imposed on Schedule I drugs.

*The Supreme Court Upholds the CSA*

Indeed, Congress's authority to regulate marijuana through the CSA has been tested and specifically upheld. In 2005, in *Gonzales v. Raich*, the Supreme Court considered whether prohibiting the local, intrastate cultivation and use of marijuana was a lawful exercise of Congress's Commerce Clause authority.<sup>8</sup> The case arose from federal enforcement action taken against California residents who possessed and cultivated marijuana in compliance with California's medicinal use laws.<sup>9</sup>

The Department of Justice (then in the business of actually enforcing and zealously defending duly enacted federal drug laws, in stark contrast to its current approach) argued that given marijuana's fungibility and the ease with which it is trafficked in interstate commerce, Congress's regulation of intrastate marijuana activity is an essential part of its undoubted authority to regulate the interstate drug market and the goal of achieving a comprehensive and uniform system that guards against drug abuse and diversion.<sup>10</sup>

By a majority opinion written by Justice John Paul Stevens, the Supreme Court agreed, having "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave *a gaping hole in the CSA*."<sup>11</sup> The Court observed, "[o]ne need not have a degree in economics to understand why [an] exemption [from the CSA] for the vast quantity of marijuana (or other drugs) locally cultivated for personal use . . . [would] have a substantial impact on the interstate market for

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<sup>8</sup> *Gonzales*, 545 U.S. at 5.

<sup>9</sup> *Id.* at 6-8.

<sup>10</sup> Brief for Petitioners, *Ashcroft [Gonzales] v. Raich*, 545 U.S. 1 (2005) (No. 13-1454), 2004 WL 1799022, available at: <http://1.usa.gov/1UTXLLt>.

<sup>11</sup> *Gonzales*, 545 U.S. at 22 (emphasis added).

[marijuana].”<sup>12</sup> Thus, the policy judgment Congress made 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 is entitled to a strong presumption of validity.”<sup>13</sup> Nor, said the Court, can “limiting the activity to marijuana possession and cultivation ‘in accordance with state law’ . . . serve to place [California’s law] beyond congressional reach.”<sup>14</sup>

The Court thus soundly rejected the notion that the marijuana growing and use at issue “were not ‘an essential part of a larger regulatory scheme’ because they had been ‘isolated by the State of California, and [are] policed by the State of California,’ and thus remain ‘entirely separated from the market.’”<sup>15</sup> “The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition,” concluded the Court, and one that Congress could have rationally rejected when it enacted the CSA.<sup>16</sup>

In the end, the Court held, if California wished to legalize the growing, possession, and use of marijuana, it would have to seek permission to do so “in the halls of Congress.”<sup>17</sup>

After *Gonzales v. Raich*, the principle that state-sanctioned marijuana activities in violation of the CSA were impermissible appeared settled, at least as long as marijuana remained a Schedule I controlled substance. Over the last several years, however, this principle has been radically disrupted, especially in the recreational marijuana context on which I focus this testimony.

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<sup>12</sup> *Id.* at 28.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 29.

<sup>15</sup> *Id.* at 30.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 33.

### Colorado's "Legalization"

In 2012, Colorado voters adopted Amendment 64 to the Colorado Constitution to legalize and regulate the recreational use of marijuana.<sup>18</sup> Beyond the repeal of certain criminal provisions, the intent and legal effect of Amendment 64 could not be clearer: to place the State of Colorado firmly in the position of monitoring and governing an end-to-end network of participants in the marijuana market, from development, cultivation, and production, through distribution, and ultimately to the point of retail sale.

Amendment 64 not only exempts from Colorado's criminal prohibitions, in specified circumstances, persons who manufacture, possess, display, transport, buy, or sell marijuana, marijuana products, or marijuana accessories, it establishes a scheme of licensing, regulation, and taxation for the sale of marijuana.<sup>19</sup> Amendment 64 directs the Colorado Department of Revenue to promulgate licensing procedures; standards for marijuana production, display, advertising, and labeling; and rules to "prevent the sale or diversion of marijuana and marijuana products to persons under the age of twenty-one."<sup>20</sup> The Colorado General Assembly is required to enact an excise tax for sales of marijuana from cultivation facilities to manufacturing facilities and retail stores (other than medical-marijuana centers).<sup>21</sup> Thus, Amendment 64 authorizes the State of Colorado itself to affirmatively facilitate the cultivation, distribution, and sale of marijuana.

### 2013 Cole Memorandum

After the adoption of Amendment 64 and a similar initiative in Washington State, U.S. Deputy Attorney General Cole issued a memorandum

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<sup>18</sup> Colo. Const. Art. XVIII, § 16.

<sup>19</sup> *Id.* § 4(a)-(e).

<sup>20</sup> *Id.* § 5(a)-(c).

<sup>21</sup> *Id.* § 5(d).

addressing federal enforcement of the CSA.<sup>22</sup> The 2013 Cole Memorandum represents nothing short of the Government’s abdication of its enforcement responsibilities in the face of States tearing precisely the “gaping hole” in the CSA envisioned by Justice Stevens in *Gonzales v. Raich*.<sup>23</sup>

The memorandum set out the enforcement priorities that *would* receive DOJ’s attention, including, “[p]reventing the diversion of marijuana from States where it is legal under state law in some form to other States”; “[p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels”; and “[p]reventing the distribution of marijuana to minors.”<sup>24</sup> “Outside of these enforcement priorities,” the memorandum explained, “the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”<sup>25</sup>

But the bureaucratic declaration of such “enforcement priorities” has, in reality, become simply a *de-prioritization* of the CSA itself. This enforcement vacuum has produced the results with which we are now well familiar. Several other states have followed Colorado and Washington and sponsored “legalized” recreational marijuana schemes. To characterize the growth of Colorado’s own state-sponsored marijuana industry as rapid would be a significant understatement, with marijuana sales there totaling just under \$1 billion in 2015.<sup>26</sup> The Colorado Department of Revenue, charged with overseeing and regulating

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<sup>22</sup> Memorandum from Deputy Attorney General James M. Cole to U.S. Attorneys (Aug. 29, 2013) (“2013 Cole Memorandum”), available at: <http://1.usa.gov/1Rma2Ho>.

<sup>23</sup> *Gonzales*, 545 U.S. at 22.

<sup>24</sup> 2013 Cole Memorandum at 1-2.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Colorado marijuana sales skyrocket to more than \$996 million in 2015*, Denver Post (Feb. 9, 2016), available at: <http://dpo.st/1SprFVK>.



the marijuana industry, skimmed more than \$135 million in taxes and fees from this cartel-like enterprise in 2015.<sup>27</sup>

With current trends, the future of legalized marijuana looks to be an industry that is too big to fail, and, perhaps, impossible to control. Nationwide, retail sales of marijuana are expected to reach \$6.7 billion in 2016.<sup>28</sup> Some market observers expect the legal pot market to show a compound annual growth rate of nearly 30% over the next few years.<sup>29</sup> Sales may total \$21.8 billion by 2020 which, for perspective, could mean the legal marijuana market would be bigger than that of the National Football League.<sup>30</sup>

But while the marijuana industry and Colorado tax collectors have done well, the citizens of states which remain committed to cooperative enforcement of the CSA have suffered, as an increasing share of their tax dollars and law enforcement resources have been diverted to address the rise of marijuana being produced domestically. This is particularly true in neighboring states like mine, which serve as major trafficking corridors for the distribution of marijuana out of Colorado.

#### *Diversions and Interstate Trafficking*

The diversion of marijuana into my state has been fierce. I have learned from consulting with law enforcement officials in Nebraska's largest urban areas that significant amounts of Colorado marijuana have been diverted into our state. As lower quality marijuana has been displaced by high-potency products from Colorado, the street price has spiked. This, in turn, has contributed to an increase in drug trade-related violence, which law enforcement ascribes to higher prices and increased currency flows. In addition to marijuana being shipped out of

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<sup>27</sup> *Id.*

<sup>28</sup> Tom Huddleston, Jr., *Legal Marijuana Sales could Hit \$6.7 Billion in 2016*, *Fortune* (Feb. 1, 2016), available at: <http://for.tn/1P0pPJw>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Colorado by mail and commercial carrier,<sup>31</sup> Nebraska residents involved in the drug trade are increasingly traveling to Colorado, making large purchases, and returning to arbitrage the higher prices available on the black market at home. Critically, for purposes of this hearing, this clear trafficking of marijuana into Nebraska and other states violates one of the core enforcement priorities set forth in the 2013 Cole Memorandum to prevent the diversion of marijuana into states where it remains illegal under state law.

Law enforcement interdiction data in Nebraska reflects this trend. For example, during the first two months of 2016, in Lancaster County, Nebraska, alone, law enforcement interdictions included:

- 1,517 pounds on Interstate 80, with an estimated value of \$7.5 million;
- 515 pounds, valued at \$2.5 million;
- 100 pounds, valued at half a million dollars;

That adds up to over \$10 million in just over 30 days in just one county in one state.

To further illustrate this point, for the Drug Caucus members' convenience, I have attached the executive summary of the September 2015 report by the Rocky Mountain High Intensity Drug Trafficking Area Program on the impact of Colorado's marijuana legalization. The data contained in this report – gleaned from a broad and diverse array of federal, state, and local agencies – paints a grim picture of the results of Colorado's scheme, results which are wholly inconsistent with the 2013 Cole Memorandum.

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<sup>31</sup> For example, according to a report last fall by the Rocky Mountain High Intensity Drug Trafficking Area Program, U.S. mail parcel interceptions of Colorado marijuana, destined for *38 other states*, increased **2,033 percent** from 2010-2014. Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact* 4 (Vol. 3, Sept. 2015), available at: <http://bit.ly/235dw4Z>. A copy of the executive summary of this report is attached.

### Threats to Public Health and Unprecedented Potency

Regarding another of the 2013 Cole Memorandum's priorities, I believe insufficient consideration has been given to the serious public health threat presented by the strains of marijuana now being developed and mass produced right here in America. Like most things allowed to flourish without government interference, innovation by the impairment industry has been swift and significant, with the potency<sup>32</sup> and sheer variety of marijuana products reaching unprecedented heights. These include edible marijuana products, often flavored and packaged to target our children,<sup>33</sup> whose developing brains are vulnerable to damage from marijuana exposure.<sup>34</sup> This critical health concern<sup>35</sup> has been, at best, overlooked or, at worst, outright ignored. It is particularly troubling given that the most recent data shows youth marijuana use in Colorado has increased 20 percent compared to a similar period prior to legalization.<sup>36</sup>

Sadly, we have anecdotal examples of the impact these edibles have had on young brains, including in Colorado itself, where multiple deaths are linked

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<sup>32</sup> Bill Briggs, *Colorado Marijuana Study Finds Legal Weed Contains Potent THC Levels*, NBC News (Mar. 23, 2015) (report on state-licensed research finding that the average level of THC — the psychoactive chemical that makes people high — in Colorado “legal” marijuana is 18.7 percent, with some retail marijuana containing 30 percent THC or more, whereas historically marijuana THC levels were well below 10 percent.), available at: <http://nbcnews.to/1Ftgkjm>.

<sup>33</sup> Abby Phillip, *More and more little kids are finding mom and dad's (legal) marijuana stash*, Washington Post (Jun. 9, 2015) (on the need for protection measures to address the proliferation of marijuana edibles which, given their high potency and treat-like attractiveness to children, pose a serious potential problem to child safety), available at: <http://wapo.st/1WSp7AC>.

<sup>34</sup> Eliza Gray, *Legal Pot Might Make America's Kids Stupider, Say Researchers*, Time (Jun. 5, 2014), available at: <http://ti.me/1nSJ2Cz> (discussing Nora D. Volkow, et al., *Adverse Health Effects of Marijuana Use*, 370 N. Eng. J. Med. 2219 (2014), available at: <http://bit.ly/1ouKhc4>).

<sup>35</sup> Josh Noel, *Colorado struggles to educate marijuana tourists*, Chicago Tribune (Mar. 15, 2016) (Out-of-state visitors to Colorado emergency rooms for marijuana-related symptoms accounted for 163 per 10,000 visits in 2014, up from 78 per 10,000 visits in 2012, a 109 percent increase.), available at: <http://trib.in/1RmQToO>.

<sup>36</sup> Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact – Latest Results for Colorado Youth and Adult Marijuana Use 2* (Jan. 2016), available at: <http://bit.ly/1SN77Id>.

with marijuana edibles, including that of Luke Goodman, who shot himself after eating 5 infused peach tart candies in short order.<sup>37</sup>

Colorado policymakers themselves appear to have already recognized the public health threat posed by their state's current potency free-for-all. With the average THC content in marijuana edibles reaching 62.1 percent, according to the Colorado Department of Revenue's own research, lawmakers have proposed capping the THC potency of recreational cannabis and marijuana products at 15-16 percent.<sup>38</sup> But given the resources amassed by the marijuana industry, it is hardly difficult to envision such measures being defeated. In any event, the potency-driven health concerns created by Colorado's scheme squarely violate the "adverse public health consequences" enforcement priority set forth in the 2013 Cole Memorandum. In the face of federal inaction, we should not be forced to wait for Colorado to fix a problem that threatens the public well beyond that state's borders.

#### *Increased Organized Crime Activity*

I believe, also, that proponents have given short shrift to the implications the state-sponsored marijuana industry poses for the growth of organized crime. As the Drug Enforcement Administration itself predicted, transnational criminal organizations will increasingly exploit the opportunities for cultivation and trafficking created in states who sponsor marijuana industries.<sup>39</sup> Whereas drug traffickers in the past were forced to smuggle their products into the country over our southern border, now they have the ability to set up production in the

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<sup>37</sup> *Man fatally shoots himself after eating 5 marijuana candies*, CBS News (Mar. 26, 2015), available at: <http://cbsn.ws/1VnnoVe>.

<sup>38</sup> Richard Barca and John Ingold, *Effort to limit pot's THC count raises questions*, Denver Post (Mar. 29, 2016), available at: <http://dpo.st/1RO1zPe>.

<sup>39</sup> *2013 National Drug Threat Assessment Summary*, Drug Enforcement Administration (Nov. 2013), available at: <http://1.usa.gov/1UvYT9N>.

nation's heartland, dramatically reducing their burdens.<sup>40</sup> Indeed, the DEA's own special agent in charge of its Denver field office confirmed that illicit marijuana growers are "hiding in plain sight" in Colorado and "don't even attempt to adhere to the law."<sup>41</sup>

With law enforcement in Colorado now confronting a "wave of illicit marijuana cultivation" on public lands,<sup>42</sup> it is not difficult to envision linkages between a relaxed overall enforcement environment within Colorado and emboldened drug gangs increasing their production activities on public lands. With a portion of this production intended for trafficking to markets in other states,<sup>43</sup> this activity falls within the ambit of yet another of the 2013 Cole Memorandum enforcement priorities.

And I believe that while our society as a whole has increasingly been forced to face the practical reality of state-sanctioned marijuana production and mass distribution within the United States, society has likewise been deprived of the opportunity to weigh in on its merits. Instead, as it currently stands, a minority of the population in only a few states has effectively decided the question for the rest of us. I firmly believe that the ramifications of broadly legalized marijuana – including criminality, underachievement, and a values-

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<sup>40</sup> Sadie Gurman, *Drug traffickers seek safe haven amid legal marijuana*, Denver Post (Jan. 28, 2016) ("Seeking a safe haven in Colorado's legal marijuana marketplace, illegal drug traffickers are growing weed among the state's sanctioned pot warehouses and farms, then covertly shipping it elsewhere and pocketing millions of dollars from the sale, according to law enforcement officials and court records consulted by The Associated Press."), available at: <http://dpo.st/1qa8Xbi>.

<sup>41</sup> *Id.*

<sup>42</sup> U.S. Attorney for the District of Colorado, *Confronting Wave of Illicit Marijuana Cultivation, Federal, State and Local Authorities Discover and Destroy Major Marijuana Grows in Locations Across Colorado: Over 30 Individuals Charged in Federal Court* (Oct. 8, 2015), available at: <http://1.usa.gov/1TtfCZK>.

<sup>43</sup> Keith Coffman, *U.S. agents crack down on illegal marijuana sites on Colorado public lands*, Reuters (Oct. 8, 2015), available at: <http://1.usa.gov/1TtfCZK>.

deprived culture – deserve a national conversation that the impairment industry has been happy to ignore.

*Congress has been Denied the Opportunity to Debate this Radical Change*

But, as I stated at the outset, my primary goal before you today actually has little to do with my strong views on the policy merits of marijuana legalization. Instead, the message I want to deliver to you today concerns the rule of law. As it pertains to the federal government’s stewardship over and enforcement of the Controlled Substances Act, it is rather a message of lawlessness.

This is a message about how the sitting Administration has, by bureaucratic fiat, effectively gutted the prohibition on marijuana contained in the Controlled Substances Act, a duly enacted law which neither the Senate nor your colleagues in the House have yet seen fit to modify or repeal.

In doing so, the Administration has seized for itself power which the Constitution allocated to you, the legislature and the branch most directly accountable to the will of the people. The President’s Department of Justice has unilaterally assumed for itself a supreme role, foreign to our system of separated powers.

The results of this rogue power grab have been profound and numerous. A great institutional harm has been wrought upon the legislative branch and the citizens you represent. This is so because you have been deprived of the opportunity to substantively weigh the pros and cons of marijuana legalization, engage in the cut and thrust of considering specific legislation, or even the ability to consider compromises or studies on the wisdom of such ends.

Moreover, our system of federalism has been damaged. With the Administration having given what amounted to a legal “green light” to state legalization and promotion of marijuana, several states have eagerly plunged

headlong into the lucrative enterprise of licensing and taxing marijuana production, trafficking, and retail sale on a massive scale. As would have been any reasonable observer's logical guess as to what would happen next, the fruits of these state-sponsored schemes immediately began spilling into other states, the majority of which, like Nebraska, have retained their marijuana restrictions and cooperative approach to enforcement of the federal drug laws.

On this point, I would be remiss if I did not acknowledge that there are differing views among my fellow conservatives as to whether the CSA was, indeed, a lawful exercise of Congress's Commerce Clause power and whether, therefore, Colorado and other states should be bound by its terms. To be sure, I am a fervent believer in the principles of federalism and recognize that we should cast a wary eye on attempts – too common during the present Administration – to disrupt the Constitution's reservation of power to the states. But I simply part company with those who reject the notion that regulating marijuana as a controlled substance is not well within the outer limits of Congress's power, given the inherently interstate and, indeed, international nature of the marijuana market. Simply because the Commerce Clause has been improperly stretched to accommodate any number of federal excesses in other contexts does not mean we should reject its application to the regulation of a truly interstate commodity.

I was obviously disappointed that the Supreme Court declined to take up our challenge to Colorado's marijuana scheme based on these constitutional principles.<sup>44</sup> I was encouraged, however, by the recognition by Justices Thomas and Alito that our lawsuit sufficiently alleged significant harms to Nebraska's sovereign interests caused by Colorado's actions.<sup>45</sup> I was also encouraged by the

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<sup>44</sup> *Nebraska, et al., v. Colorado*, No. 144 Orig., 577 U.S. \_\_\_, 2016 WL 1079468 (Mar. 21, 2016) (order denying motion for leave to file an original bill of complaint), available at: <https://goo.gl/RAQsNk>.

<sup>45</sup> *Id.* at \*2 (Thomas, J., dissenting).

support for our litigation effort, ranging from respected legal scholars<sup>46</sup> to all nine former administrators of the U.S. Drug Enforcement Administration.<sup>47</sup> Given this support, the significance of the issue, and DOJ's own acknowledgement that injured states have other litigation options at their disposal,<sup>48</sup> we will continue to explore ways to subject Colorado's marijuana scheme to review in a court of law.

Given the foregoing, the Government Accountability Office was correct, in the report underlying this hearing,<sup>49</sup> to call on the Department of Justice to actually document its monitoring of state marijuana legalization efforts to determine compliance with its enforcement priorities. To be sure, the GAO's essential finding is astounding: that DOJ has not even implemented a tracking mechanism to *effectively* monitor and determine whether the aspirations set forth in the 2013 Cole Memorandum are being met.

With full respect to the GAO researchers, however, and certainly to the distinguished Senators on the Drug Caucus who requested the GAO report, I submit that no amount of documentation or tracking of compliance with re-ordered enforcement priorities can resolve the fundamental incompatibility of state recreational marijuana schemes with federal law. In today's interconnected, mobile society, it is simply impossible to contain one state's legalization and promotion of a fungible commodity like marijuana. Short of repealing its scheme, Colorado can no more prevent its minimally restricted marijuana sales from

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<sup>46</sup> David Rivkin and Elizabeth Price Foley, *Federal Antidrug Law Goes Up In Smoke*, Wall Street Journal (Dec. 28, 2014), available at: <http://on.wsj.com/1487ub4>.

<sup>47</sup> Brief for All Nine Former Administrators of Drug Enforcement as *Amici Curiae* in Support of Plaintiff States' Motion for Leave to File a Bill of Complaint, *Nebraska, et al., v. Colorado*, No. 144 Orig., available at: <http://bit.ly/1V2pUkG>.

<sup>48</sup> Brief for the United States as *Amicus Curiae* 21, *Nebraska, et al., v. Colorado*, No. 144 Orig., available at: <http://bit.ly/1ZWd0Ew>.

<sup>49</sup> U.S. Gov't Accountability Office, *GAO-16-1, STATE MARIJUANA LEGALIZATION: DOJ Should Document Its Approach to Monitoring the Effects of Legalization* (2016), available at: <http://1.usa.gov/1onspzX>.



reaching Nebraska than it could prevent air pollution from blowing across our shared border. This is why this critical, interstate issue should not and cannot be addressed simply with a statement of enforcement priorities. Either the CSA has meaning, should be robustly enforced, and not openly violated by rogue states, or Congress itself should chart a new path.

This decision – of such significant national importance – should not be made by one branch of government alone or be effectively ratified by inaction by the courts. It certainly should not be made by one or two states. Indeed, our system of government does not permit such an unaccountable result. If, in spite of its attendant harms, marijuana is to be dismantled from the CSA as a Schedule I drug, Congress and Congress alone should do so. An illegal industry should not be unleashed on society simply by bureaucratic whim. Only here, in hearing rooms like this, can the debate be held and the risks of legalized marijuana weighed.

The people’s representatives saw fit to prohibit marijuana in the CSA, and for good reason. Only you can determine whether that prohibition should be lifted.

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# THE LEGALIZATION OF MARIJUANA IN COLORADO *THE IMPACT*

Volume 3  
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Rocky Mountain High Intensity  
Drug Trafficking Area

[www.rmhidta.org](http://www.rmhidta.org)



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- United States Postal Inspection Service
- Colorado Bureau of Investigation
- Colorado Department of Education
- Colorado Department of Human Services, Office of Behavioral Health
- Colorado Department of Public Health and Environment
- Colorado Department of Transportation
- Colorado Office of State Planning and Budgeting
- Colorado State Patrol
- Colorado Violent Death Reporting System
- Colorado Department of Revenue
- Marijuana Enforcement Division
- Rocky Mountain Poison and Drug Center
- State of Colorado Judicial Branch, Division of Probation Services
- University of Colorado Hospital - Burn Trauma Unit
- Aurora Police Department
- Boulder Police Department
- City and County of Denver
- Denver Epidemiology Working Group
- Denver Police Department
- Larimer County Sheriff's Office
- Arapahoe House Public Communications Office
- ChemaTox Laboratory
- Colorado Association of School Resource Officers
- Colorado Children's Hospital
- Colorado Hospital Association
- Colorado School Counselors Association
- McDonalds Corporate Office
- Starbucks Coffee Company Corporate Office
- The Salvation Army

# Executive Summary

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## Purpose

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Rocky Mountain High Intensity Drug Trafficking Area (RMHIDTA) is tracking the impact of marijuana legalization in the state of Colorado. This report will utilize, whenever possible, a comparison of three different eras in Colorado's legalization history:

- **2006 – 2008:** Early medical marijuana era
- **2009 – Present:** Medical marijuana commercialization and expansion era
- **2013 – Present:** Recreational marijuana era

Rocky Mountain HIDTA will collect and report comparative data in a variety of areas, including but not limited to:

- Impaired driving
- Youth marijuana use
- Adult marijuana use
- Emergency room admissions
- Marijuana-related exposure cases
- Diversion of Colorado marijuana

This is the third annual report on the impact of legalized marijuana in Colorado. It is divided into eleven sections, each providing information on the impact of marijuana legalization. The sections are as follows:

### **Section 1 – Impaired Driving:**

- In 2014, when retail marijuana businesses began operating, there was a **32 percent** increase in marijuana-related traffic deaths in just one year from 2013.
- Colorado marijuana-related traffic deaths increased **92 percent** from 2010 – 2014. During the same time period all traffic deaths only increased **8 percent**.

- Marijuana-related traffic deaths were approximately **20 percent** of all traffic deaths in 2014 compared to half that (**10 percent**) just five years ago.
- In 2014, when retail marijuana businesses began operating, toxicology reports with positive marijuana results of active THC results for primarily driving under the influence have increased **45 percent** in just one year.

### Section 2 – Youth Marijuana Use:

- In 2013, **11.16 percent** of Colorado youth ages 12 to 17 years old were considered current marijuana users compared to **7.15 percent** nationally. Colorado ranked **3<sup>rd</sup>** in the nation and was **56 percent** higher than the national average.
- Drug-related suspensions/expulsions increased **40 percent** from school years 2008/2009 to 2013/2014. The vast majority were for marijuana violations.
- Positive THC urinalyses tests, for probationers ages 12 to 17 years old, increased **20 percent** since marijuana was legalized in 2013.
- A 2015 survey of school resource officers and school counselors revealed similar results about increased school marijuana issues since the legalization of recreational marijuana.

### Section 3 – Adult Marijuana Use:

- In 2013, **29 percent** of college age students (ages 18 to 25 years old) were considered current marijuana users compared to **18.91 percent** nationally. Colorado, ranked **2<sup>nd</sup>** in the nation, was **54 percent** higher than the national average.
- In 2013, **10.13 percent** of adults ages 26 years old and over were considered current marijuana users compared to **5.45 percent** nationally. Colorado, ranked **5<sup>th</sup>** in the nation, was **86 percent** higher than the national average.
- Positive THC urinalyses tests, for probationers age 18 to 25 and 26+ years old, increased **49 and 87 percent** respectively since marijuana was legalized in 2013.

#### **Section 4 – Emergency Room Marijuana and Hospital Marijuana-Related Admissions:**

- In 2014, when retail marijuana businesses began operating, there was a **29 percent** increase in the number of marijuana-related emergency room visits in only one year.
- In 2014, when retail marijuana businesses began operating, there was a **38 percent** increase in the number of marijuana-related hospitalizations in only one year.
- In the three years after medical marijuana was commercialized, compared to the three years prior, there was a **46 percent** increase in hospitalizations related to marijuana.
- Children’s Hospital Colorado reported **2** marijuana ingestions among children under 12 in 2009 compared to **16** in 2014.

#### **Section 5 – Marijuana-Related Exposure:**

- In 2014, when retail marijuana businesses began operating, marijuana-only related exposures increased **72 percent** in only one year.
- In the years medical marijuana was commercialized (2009 – 2012), marijuana-related exposures averaged a **42 percent** increase from pre-commercialization years (2006 – 2008) average.
- During the years 2013 – 2014, the average number of all age exposures was 175 per year. Exposures have doubled since marijuana was legalized in Colorado.
- Young children (ages 0 to 5) marijuana-related exposures in Colorado:
  - During the years 2013 – 2014, the average number of children exposed was **31** per year.
    - This is a **138 percent** increase from the medical marijuana commercialization years (2009 – 2012) average which was a **225 percent** increase from pre-commercialization years (2006 – 2008).

### Section 6 – Treatment:

- Over the last ten years, the top three drugs involved in treatment admissions, in descending order, were alcohol (average **12,943**), marijuana (average **6,491**) and methamphetamine (average **5,044**).
- Marijuana treatment data from Colorado in years 2005 – 2014 does not appear to demonstrate a definite trend. Colorado averages approximately **6,500** treatment admissions annual for marijuana abuse.

### Section 7 – Diversion of Colorado Marijuana:

- During 2009 – 2012, when medical marijuana was commercialized, the yearly average number interdiction seizures of Colorado marijuana increased **365 percent** from **52** to **242** per year.
- During 2013 – 2014, when recreational marijuana was legalized, the yearly average interdiction seizures of Colorado marijuana increased another **34 percent** from **242** to **324**.
- The average pounds of Colorado marijuana seized, destined for 36 other states, increased **33 percent** from 2005 – 2008 compared to 2009 – 2014.

### Section 8 – Diversion by Parcel:

- U.S. mail parcel interceptions of Colorado marijuana, destined for 38 other states, increased **2,033 percent** from 2010 – 2014.
- Pounds of Colorado marijuana seized in the U.S. mail, destined for 38 other states, increased **722 percent** from 2010 – 2014.
- From 2006 – 2008, compared to 2013 – 2014, the average number of seized parcels containing Colorado marijuana, that were destined outside the United States, increased over **7,750 percent** and pounds of marijuana seized in those parcels increased over **1,079 percent**.



**Section 9 – THC Extraction Labs:**

- In 2013, there were **12** THC extraction lab explosions compared to **32** in 2014.
- In 2013, there were **18** injuries from THC extraction lab explosions compared to **30** in 2014.

**Section 10 – Related Data:**

- Overall, crime in Denver increased 12.3 percent from 2012 to 2014.
- Colorado annual tax revenue from the sale of recreational marijuana was **52.5** million (CY2014) or about **0.7 percent** of total general fund revenue (FY2015).
- The majority of cities and counties in Colorado have banned recreational marijuana businesses.
- National THC potency has risen from an average of **3.96 percent** in 1995 to an average of **12.55 percent** in 2013. The average potency in Colorado was **17.1 percent**.
- Homelessness increased with the appeal of legal marijuana being a factor.
- Denver has more licensed medical marijuana centers (**198**) than pharmacies (**117**).

**Section 11 – Related Material:**

- This section lists various studies and reports.

There is much more data in each of the eleven sections, which can be used as a standalone document. All of the sections are on the Rocky Mountain HIDTA website and can be printed individually; go to [www.rmhidta.org/Reports](http://www.rmhidta.org/Reports).