Nos. 16-1048, -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,
in his official capacity as Governor of Colorado, et al.,
Defendants-Appellees,
and

STATE OF NEBRASKA, et al.,
Movants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE HONORABLE ROBERT E. BLACKBURN
CASE NO. 1:15-CV-00349-REB-CBS

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OPENING BRIEF OF PLAINTIFFS-APPELLANTS
SAFE STREETS ALLIANCE, ET AL.

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JUSTIN E. SMITH, et al.,

Plaintiffs-Appellants,

v.

JOHN W. HICKENLOOPER,
Governor of the State of Colorado,

Defendant-Appellee,

and

STATE OF NEBRASKA, et al.,

Movants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

THE HONORABLE WILEY Y. DANIEL
CASE NO. 1:15-CV-00462-WYD-NYW

CORPORATE DISCLOSURE STATEMENT

Safe Streets Alliance does not have a parent corporation, nor does any publicly held corporation own 10% or more of its stock.

s/ David H. Thompson
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CERTIFICATE OF NEED FOR SEPARATE BRIEF

When the Court consolidated this appeal with the appeal in *Smith v. Hickenlooper*, No. 16-1095, it authorized appellants to file "separate opening briefs, appendices, and optional reply briefs." April 1, 2016 Order. Pursuant to 10th Cir. R. 31.3(B), I certify that the filing of this separate brief is necessary due to differences in the appellants' legal theories. Counsel for the plaintiffs in this case sought to avoid duplication among briefs by sharing a substantially complete draft of this brief with counsel for the *Smith* appellants roughly two months prior to filing.

s/ David H. Thompson
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STATEMENT OF RELATED APPEALS

There are no prior appeals in this case. On April 1, 2016, the Court consolidated this appeal with the appeal in *Smith v. Hickenlooper*, No. 16-1095.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over the preemption claims brought by Plaintiffs-Appellants ("Plaintiffs") under 28 U.S.C. § 1331. Pursuant to Federal Rule of Civil Procedure 21, on July 14, 2015 the district court severed the preemption claims that are the subject of this appeal from the other claims alleged in Plaintiffs' Complaint. Aplt. App. Vol. 2 at A234. The district court issued an opinion granting a motion by Defendants-Appellees ("Defendants") to dismiss Plaintiffs' preemption claims on January 19, 2016, Aplt. App. Vol. 2 at A358, and it entered judgment as to those claims under Federal Rule of Civil Procedure 54(b) on January 26, 2016, Aplt. App. Vol. 2 at A375. Accordingly, the district court's judgment is final and subject to appellate review. *See Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1519 n.8 (10th Cir. 1991) ("[J]udgment on a claim severed under Rule 21 is final for purposes of appeal."). Plaintiffs filed a timely notice of appeal on February 12, 2016, Aplt. App. Vol. 2 at A380, and this Court has jurisdiction to review the district court's final judgment as to Plaintiffs' preemption claims under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Does the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 et seq., implicitly repeal the federal courts' equitable authority to enjoin state and local officers from implementing policies that conflict with a federal statute?

2. Did the district court err in invoking a presumption against implying rights of action to enforce criminal statutes and in relying on cases addressing the rigorous test for implying statutory rights of action when it decided whether the CSA implicitly bars a suit to enjoin state and local officials from implementing policies that are preempted by federal law?

3. Does the CSA preempt state and local marijuana policies that authorize, promote, and facilitate federal drug crimes, including Defendants' policy of issuing licenses to recreational marijuana businesses that authorize them to violate numerous provisions of federal law?

STATEMENT OF FACTS

A. Defendants Adopt Recreational Marijuana Policies That Authorize, Promote, and Facilitate Federal Drug Crimes.

Virtually every aspect of the recreational marijuana business is unlawful under the CSA. *See, e.g.*, 21 U.S.C. § 812(c) (classifying marijuana as Schedule I drug); *id.* §§ 823(f), 841(a)(1), 844(a) (prohibiting, *inter alia*, manufacture, distribution, and possession of Schedule I drugs). Yet in 2012, Colorado voters approved Amendment 64, an amendment to the state constitution that declares it to

be "not unlawful" to possess, use, display, purchase, transport, grow, or process marijuana for personal use in compliance with the State's recreational marijuana regulatory regime. COLO. CONST. art. XVIII, § 16(3). One of Amendment 64's stated aims is to "enhanc[e] revenue for public purposes," *id.* art. XVIII, § 16(1)(a), and it accomplishes this goal by authorizing licensed businesses to cultivate and sell recreational marijuana, which is subject to taxation.

To further the goals of Amendment 64, the Colorado General Assembly passed the Colorado Retail Marijuana Code, which expressly authorizes license holders—who are vetted and monitored by state regulators—to cultivate, distribute, and possess marijuana for recreational use. *See, e.g.*, COLO. REV. STAT. § 12-43.4-103(4) (license holders are "authorized to cultivate, manufacture, distribute, sell, or test retail marijuana and retail marijuana products"); First Amended Complaint ¶¶ 31–32, *Safe Streets All. v. Alternative Holistic Healing, LLC*, No. 15-349 (D. Colo. Apr. 13, 2015), ECF No. 66 ("Compl."), Aplt. App. Vol. 1 at A048, A059–A060. By conferring formal state authorization and support for participants in the recreational marijuana industry, licenses assure marijuana customers and investors that recreational marijuana businesses have been investigated and approved by Colorado regulators despite participating in an industry that remains strictly illegal under federal law. Compl. ¶¶ 37–38, Aplt. App. Vol. 1 at A062–63.

Other elements of Colorado's recreational marijuana regulatory regime further facilitate and assist an industry that is devoted to committing federal drug crimes. State regulators manage licenses in an effort to ensure that demand for recreational marijuana does not outstrip supply. Compl. ¶ 40, Aplt. App. Vol. 1 at A063; COLO. REV. STAT. § 12-43.4-202(4)(b). They oversee a "responsible vendor" program under which licensed recreational marijuana businesses whose employees complete state training programs receive additional favorable treatment. Compl. ¶ 41, Aplt. App. Vol. 1 at A063; COLO. REV. STAT. §§ 12-43.3-1101, -1102; 1 COLO. CODE REGS. § 212-2-R407. And they reinvest a portion of marijuana tax revenues in an advertising campaign designed to destigmatize recreational marijuana use and promote marijuana tourism. Compl. ¶ 42, Aplt. App. Vol. 1 at A064. As Governor Hickenlooper, one of the Defendants in this suit, has explained, Colorado enforces "robust regulations that allow the [marijuana] industry to develop and prosper." *Id.* ¶ 47, Aplt. App. Vol. 1 at A066.

Following the State's lead, Pueblo County, Colorado, welcomed the recreational marijuana industry with open arms by implementing a series of policies that, as one Pueblo County Commissioner has observed, are aimed at attracting the "lion's share of the state's [marijuana] grow facilities" in the hope that the industry will "bring a lot of wealth and income and outside dollars into Pueblo." *Id.* ¶ 52, Aplt. App. Vol. 1 at A068. Accordingly, Pueblo County issues

licenses to recreational marijuana businesses that authorize and endorse those businesses' criminal activity. *Id.* ¶ 49–50, Aplt. App. Vol. 1 at A066. Pueblo County also promotes marijuana tourism by telling prospective visitors that "[t]he cannabis industry in Pueblo County is just like the gaming industry in Las Vegas." *Id.* ¶ 53, Aplt. App. Vol. 1 at A068. Consistent with the County's overall recreational marijuana policy, county officials charged with making land use decisions about where marijuana businesses may locate give scant attention to the interests of property owners who stand to lose when marijuana cultivation facilities locate in residential areas.

Since the passage of Amendment 64, the officially authorized recreational marijuana industry has been "a huge economic boon" to both Pueblo County and Colorado, with the State collecting millions of dollars in tax revenue each month. *Id.* ¶¶ 46, 51–52, Aplt. App. Vol. 1 at A065–66, A067–68.

B. Defendants Injure Plaintiffs by Licensing a Recreational Marijuana Cultivation Facility Next to Plaintiffs' Property.

In 2014, the State of Colorado and Pueblo County licensed a recreational marijuana cultivation facility on property immediately adjacent to land owned by Plaintiffs Phillis Windy Hope Reilly and Michael P. Reilly in southern Pueblo County. The individuals and entities who are responsible for this facility waited until they received State and local authorization before they began constructing it. Compl. ¶ 90, Aplt. App. Vol. 1 at A082. These individuals and entities could not

operate the facility without state and county approval both because doing so would violate state and local law and because their business model involves openly cultivating marijuana on a large scale that is then sold to customers who prefer marijuana that is grown with authorization from state and local officials. *See id.* ¶¶ 35–41, 56–57, 63, 67–69, Aplt. App. Vol. 1 at A061–63, A069, A071–74.

The State- and Pueblo County-authorized marijuana cultivation facility interferes with the Reillys' use and enjoyment of their property and diminishes their property's value. Compl. ¶¶ 84–90, Aplt. App. Vol. 1 at A080–82. In addition, as Plaintiffs alleged in a supplemental complaint that they sought leave to file shortly before the district court dismissed the claims that are the subject of this appeal, the facility produces a recurring, skunk-like marijuana odor that burdens the Reillys' property. First Supplemental Complaint ¶ 85, *Safe Streets All. v. Alternative Holistic Healing, LLC*, No. 15-349 (D. Colo. Jan. 19, 2016), ECF No. 117-1, Aplt. App. Vol. 2 at A280.[1] The Reillys are members of Plaintiff Safe

[1] After granting the motions to dismiss that are the subject of this appeal, the district court authorized Plaintiffs to file their First Supplemental Complaint, styled as a Second Amended Complaint. *See* Courtroom Minutes/Minute Order, *Safe Streets All. v. Alternative Holistic Healing, LLC*, No. 15-349 (D. Colo. Jan. 29, 2016) ECF No. 125, Aplt. App. Vol. 2 at A378. Thus, although Plaintiffs' First Amended Complaint is the operative pleading for purposes of this appeal, on remand Plaintiffs would maintain that they are injured by the recurring unpleasant odor produced by the marijuana facility that Defendants approved.

Streets Alliance, a non-profit membership organization that promotes enforcement of the federal drug laws. Compl. ¶ 8, Aplt. App. Vol. 1 at A052.

C. Plaintiffs File Suit and the District Court Dismisses Plaintiffs' Preemption Claims Without Deciding Whether the CSA Preempts Defendants' Authorization of Federal Drug Crimes.

On February 19, 2015, Plaintiffs filed suit in the district court against Defendants John W. Hickenlooper, Barbara J. Brohl, and Lewis Koski[2] (the "State Defendants") and the Pueblo County Commission and the Pueblo County Liquor and Marijuana Licensing Board (the "Pueblo Defendants"), arguing that these Defendants' implementation of a recreational marijuana licensing regime that authorizes federal drug crimes is preempted by the CSA. *See* Compl. ¶¶ 139–52, Aplt. App. Vol. 1 at A095–98. Plaintiffs also sued the individuals and entities who are operating the marijuana cultivation facility next to their property under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq. On July 14, 2015, the district court severed Plaintiffs' preemption claims from their RICO claims under Federal Rule of Civil Procedure 21. Aplt. App. Vol. 2 at A234.[3]

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[2] Mr. Koski, who was the Director of the Marijuana Enforcement Division when Plaintiffs filed the operative complaint, was recently succeeded by James Burack. In accordance with Federal Rule of Appellate Procedure 43(c)(2), Mr. Burack, as Mr. Koski's successor, is "automatically substituted as a party."

[3] Plaintiffs also alleged RICO claims against the Pueblo Defendants. The district court dismissed those claims in a portion of its decision that Plaintiffs do not challenge on appeal.

The district court granted the State and Pueblo Defendants' motions to dismiss Plaintiffs' preemption claims, concluding that the CSA forbids suits in equity against state and local officials who authorize or facilitate federal drug crimes. In reaching that conclusion, the district court did not point to any statutory text that expressly repeals the federal courts' usual equitable authority to enjoin state officers from implementing policies that conflict with a federal statute. Instead, it reasoned that Congress implicitly restricted the federal courts' equitable powers when it enacted the CSA because that statute does not satisfy the demanding standard for creating an implied right of action. Aplt. App. Vol. 2 at A365–66. Citing the Supreme Court's recent decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the district court also emphasized that those who violate the CSA are subject to criminal prosecution, *id.* at A366, and that federal prosecutors have broad discretion when deciding whether to pursue criminal charges for violations of the CSA, *id.* at A367–68. Because the district court dismissed Plaintiffs' preemption claims on that threshold ground, it did not reach the merits of Plaintiffs' argument that the CSA preempts Defendants' practice of authorizing federal drug crimes by licensing recreational marijuana businesses.

Two weeks after Plaintiffs filed the notice of appeal in this case, the district court for Colorado dismissed on substantially the same grounds a second suit that

also challenges Colorado's recreational marijuana regulatory regime. *Smith v. Hickenlooper*, -- F. Supp. 3d --, 2016 WL 759163 (D. Colo. Feb. 26, 2016), *appeal docketed*, No. 16-1095. The *Smith* plaintiffs appealed, and on April 1, 2016, the Court consolidated this case with *Smith*. The States of Nebraska and Oklahoma subsequently moved to intervene in this case, observing that their sovereign interests are implicated because Colorado's recreational marijuana laws interfere with their ability to enforce their own drug policies. On April 26, 2016, the Court authorized the Intervenor States to file principal and reply briefs and referred their motion to the panel that will decide the merits of this appeal.

SUMMARY OF ARGUMENT

Since the earliest days of the Republic, federal courts have exercised their equitable power to enjoin state officers from implementing policies that conflict with federal statutes. And although Congress may by statute withdraw the federal courts' authority to consider such cases, it does so only rarely; the Supreme Court has heard suits to enjoin state officers from frustrating federal statutes dozens of times but only twice has concluded that Congress foreclosed such suits by restricting the federal courts' equitable powers. Unlike the statutes at issue in those cases—*Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015), and *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996)—the CSA does not provide any alternative mechanism through which its mandates may be

enforced against state officers. Neither would reaching the merits in CSA preemption cases, which require nothing more than a straightforward preemption analysis, force the courts to apply a "judicially unadministrable" standard of the sort that Congress does not normally intend for the courts to deploy. *See Armstrong*, 135 S. Ct. at 1385. In short, nothing in the CSA suggests that Congress intended to foreclose suits in equity against state officers—the traditional and default means by which federal statutes are vindicated against conflicting state policies.

The district court's conclusion to the contrary rested in part on its conflation of the question whether the CSA implicitly forbids federal courts to exercise their traditional equitable powers with the question whether the CSA creates an implied right of action. In contrast to the decision below, the Supreme Court's decision in *Armstrong* makes clear that a plaintiff who seeks to invoke the federal courts' equitable power to enjoin state officers from implementing policies that conflict with a federal statute need not satisfy the demanding standard for showing that the statute creates an implied right of action. The district court's apparent assumption to the contrary rests on a serious misreading of Supreme Court precedent.

The district court was also wrong to conclude that Congress's decision to authorize criminal prosecutions of those who violate the federal drug laws suggests that it meant to forbid preemption suits against state officers who implement

policies that conflict with those laws. To the contrary, the availability of alternative enforcement mechanisms against third parties has never been understood to implicitly foreclose suits in equity against state officers. The district court further erred by concluding that suits like this one may not go forward because the Department of Justice has broad discretion to decide when to prosecute federal drug crimes. In this suit Plaintiffs ask the courts to enjoin state and local officials from implementing policies that authorize, facilitate, and assist violations of the CSA, not to compel federal prosecutions.

On the merits, the Colorado and Pueblo County recreational marijuana licensing regime is preempted, and Defendants should be enjoined from implementing it. The aims of the federal and state laws at issue here could not be more different, with Defendants enforcing state and local policies that are designed to promote conduct that federal law forbids. It is well settled that when state law "authorizes [someone] to engage in conduct that [federal law] forbids, it stands as an obstacle to the . . . accomplishment and execution of the full purposes and objectives of Congress," *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984) (quotation marks omitted), and the States may not license conduct that federal law prohibits, *see NCAA v. Governor of New Jersey*, 730 F.3d 208, 236 (3d Cir. 2013). Indeed, it is impossible to operate a recreational marijuana business licensed by Defendants

without violating the federal drug laws. The standards for both obstacle and impossibility preemption are applicable in this case, and under either standard Defendants' recreational marijuana regulatory regime is preempted.

STANDARD OF REVIEW

This Court reviews de novo a decision of the district court to grant a motion to dismiss. *Albers v. Board of Cty. Comm'rs of Jefferson Cty.*, 771 F.3d 697, 700 (10th Cir. 2014). At the motion to dismiss stage, the Court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013).

ARGUMENT

I. The Federal Courts Have Equitable Authority To Enjoin State and Local Officers From Implementing Laws That Conflict with the CSA.

A. The CSA Does Not Implicitly Withdraw the Federal Courts' Traditional Equitable Authority to Enjoin State and Local Officers from Implementing Laws that Conflict with a Federal Statute.

When a plaintiff seeks an injunction against a state or local officer who is injuring him by implementing a law or policy that conflicts with a federal statute, "equitable relief . . . is traditionally available to enforce federal law." *Armstrong*, 135 S. Ct. at 1385–86. Plaintiffs have successfully brought such suits in equity throughout our Nation's history, and they are the traditional and default means by

which the supremacy of federal law is enforced. *See, e.g.*, *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60 (2008); *Foster v. Love*, 522 U.S. 67 (1997); *Parker v. Brown*, 317 U.S. 341 (1943); *Union Pac. Ry. Co. v. McShane*, 89 U.S. (22 Wall.) 444 (1874); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 838–39 (1824); *see also* Appendix to Brief for Dominguez Respondents at 1a, *Douglas v. Independent Living Ctr. of S. Cal.*, 132 S. Ct. 1204 (2012) (No. 09-1158), 2011 WL 3319552 (listing 56 additional such cases decided by the Supreme Court). As the Supreme Court recently confirmed, a plaintiff seeking equitable relief from a state law that he believes is preempted by federal law need not rely on an express or implied statutory right of action. *Armstrong*, 135 S. Ct. at 1385–86. Rather, in such cases "[e]quity . . . provides the basis for relief—the cause of action, so to speak—in appropriate cases within the Court's jurisdiction." *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225, 1232 (10th Cir. 2005) (McConnell, J.); *see also id.* ("Section 1331 thus provides jurisdiction for the exercise of the traditional powers of equity in actions arising under federal law. No more specific statutory basis is required."). Congress legislates against the backdrop of this long established principle, which provides the usual and default mechanism by which federal statutes are vindicated against conflicting state laws.

To be sure, Congress may displace the federal courts' equitable authority to enjoin state and local officers from taking actions that conflict with federal law. It has rarely done so, however. Indeed, the Supreme Court has only identified two such instances—in *Armstrong* and *Seminole Tribe*—despite having exercised this equitable power on dozens of occasions in cases dating back to the early days of the Republic. The Supreme Court's recent decision in *Armstrong* makes clear that a statute should be read " 'to foreclose' equitable relief" in preemption cases only if it *both* contains an "express provision" authorizing some other "method of enforcing [the] substantive rule" at issue *and also* imposes a standard of conduct on state officers that is "judicially unadministrable." 135 S. Ct. at 1385 (quoting *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)) (additional internal quotation marks omitted). Because the CSA satisfies neither of these requirements, this case is governed by the default rule that equitable relief is available.

As an initial matter, there is no "express provision" of an alternative method for enforcing the "substantive rule" at issue here: the CSA's preemption of state laws that conflict with federal regulation of controlled substances. *Armstrong*, 135 S. Ct. at 1385. The text of the CSA makes clear that it preempts state laws that are in "positive conflict" with its mandates, 21 U.S.C. § 903, yet it is silent as to how this restriction on the implementation of preempted state laws is to be enforced.

That makes the CSA very different from both the statute at issue in *Armstrong*, which authorized the Secretary of Health and Human Services to enforce the relevant federal mandate against state Medicaid agencies, 135 S. Ct. at 1385, and the statute at issue in *Seminole Tribe*, which included a provision that outlined specific procedures and remedies for tribal enforcement actions against States that failed to satisfy their obligations under the Indian Gaming Regulatory Act, 517 U.S. at 74.[4] The CSA simply does not speak to how its preemption of conflicting state laws should be enforced, and that is a strong indication that Congress did not intend to foreclose the ordinary means by which States are prevented from implementing policies that conflict with federal law.

Even if the CSA did provide for alternative enforcement methods against state officers—and it does not—that alone would not suffice to foreclose the courts' traditional equitable authority to enjoin state actions that conflict with the CSA. As the *Armstrong* Court acknowledged, binding Supreme Court precedent

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[4] In addition to prescribing procedures for tribal enforcement actions, the statute at issue in *Seminole Tribe* included a detailed remedial scheme for such actions that authorized only specific, carefully circumscribed remedies. Allowing the plaintiff tribes to bypass this express statutory remedial scheme in favor of a suit in equity under *Ex parte Young* would have made Congress's enumerated remedies "superfluous" since "more complete and more immediate relief would be available under *Ex parte Young*." 517 U.S. at 75. In contrast, nothing in the CSA expressly authorizes plaintiffs who are injured by state policies that conflict with federal law to seek a narrower set of remedies than those that are traditionally available against state officers in equity, and allowing suits like this one to go forward would not render provisions of the CSA superfluous.

establishes that federal enforcement authority "*by itself*" is not sufficient to "preclude the availability of equitable relief." 135 S. Ct. at 1385 (citing *Virginia Office of Prot. & Advocacy v. Stewart*, 563 U.S. 247, 272 n.3 (2011)). Rather, the CSA could be interpreted to foreclose the courts' traditional equitable powers only if suits to enjoin state actions that conflict with the CSA would also require courts to apply a "judicially unadministrable" standard. *Armstrong*, 135 S. Ct. at 1385; *accord Davis v. Shah*, -- F.3d --, 2016 WL 1138768, at *10 n.6 (2d Cir. Mar. 24, 2016) (*Armstrong* forecloses suit in equity only when plaintiff seeks to enforce statute containing "broad, complex, judgment-laden language").

But there is nothing "judicially unadministrable" about the preemption question this Court will need to decide if it reaches the merits of Plaintiffs' claims. To the contrary, suits in equity to enjoin enforcement of state laws that conflict with the CSA call for nothing more than a standard conflict preemption analysis of the sort that courts routinely undertake in preemption cases. Whether there is a "positive conflict" between the CSA and Defendants' recreational marijuana regulatory regime is the type of legal question that courts are well equipped to answer. *See* 21 U.S.C. § 903. That distinguishes this case from *Seminole Tribe*, in which allowing the claim at issue to go forward would have required courts to assess whether a State had "failed to negotiate in good faith" with an Indian Tribe, 517 U.S. at 74; *see also id.* at 75 n.17, as well as *Armstrong*, in which the statutory

provision the plaintiffs sought to enforce required that state Medicaid plans provide for payments that are "consistent with efficiency, economy, and quality of care," while "safeguard[ing] against unnecessary utilization of . . . care and services." 135 S. Ct. at 1385 (alterations in original) (quoting 42 U.S.C. § 1396a(a)(30)(A)). "It is difficult to imagine a requirement broader and less specific" than the *Armstrong* mandate. *Id.* And as Justice Breyer explained in a concurring opinion that described his rationale for providing the majority's fifth vote, the claims in *Armstrong* would have required federal courts to make ratemaking decisions in the first instance—decisions beyond the core competency of courts that are normally made by expert administrative agencies subject to deferential judicial review. *Id.* at 1388–90 (Breyer, J., concurring in part and concurring in the judgment). Nothing like the difficult Medicaid ratemaking issue in *Armstrong* or the subjective assessment of a State's good faith in negotiating with an Indian Tribe at issue in *Seminole Tribe* is embedded in the merits of Plaintiffs' CSA preemption claims. The CSA thus lacks each of the required features necessary to displace the federal courts' traditional equitable powers.

This case also differs in other important ways from the only two instances where the Supreme Court has found that a statute forecloses the courts' traditional equitable powers to enjoin conflicting state actions. First, the limited nature of the relief that Plaintiffs seek undermines any suggestion that Congress implicitly

narrowed the federal courts' equitable powers when it enacted the CSA. Plaintiffs request an injunction ordering Defendants not to do what the CSA already forbids. The claims here are thus very different from those in *Armstrong*, which sought to compel a State to spend money, and those in *Seminole Tribe*, which sought to compel state officers to negotiate with an Indian Tribe. Suits for negative injunctions against state officers fall within the heartland of *Ex parte Young*, and they do not implicate sovereign state interests in the same way as suits that seek to force States to spend money or take other affirmative actions. *See Ex parte Young*, 209 U.S. 123, 159 (1908); *Virginia Office for Prot. & Advocacy*, 563 U.S. at 262 (Kennedy, J., concurring) (emphasizing that relief ordered in *Ex parte Young* was a "negative injunction"). *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997). The modest burdens that suits like this one would impose on state officers—requiring only that they refrain from facilitating federal drug crimes—is further reason to doubt that Congress intended to implicitly forbid such suits when it enacted the CSA.

Second, the CSA's prohibition on the cultivation and sale of marijuana reflects a valid exercise of Congress's power under the Commerce Clause and does not implicate the considerations of comity and federalism that underlay the decisions in *Armstrong* and *Seminole Tribe*. *See Gonzales v. Raich*, 545 U.S. 1, 5 (2005). When Congress enacts legislation under the Spending Clause that "is

much in the nature of a contract" between the States and the federal government, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), there is particular reason to suspect that it may have intended to give the federal government exclusive responsibility for deciding whether to object to a State's "breach," *Armstrong*, 135 S. Ct. at 1385. Similar considerations of comity for other sovereigns come into play when Congress legislates in the sensitive field of Tribal-State relations. *See Seminole Tribe*, 517 U.S. at 73–76. In contrast to those special circumstances, there is no reason to believe that Congress intended to be unusually solicitous of State interests when it enacted the CSA. Congress does not normally restrict the federal courts' equitable powers over state officers when it passes valid legislation under the Commerce Clause, and nothing in the CSA suggests that Congress meant to deviate from its normal practice.

B. The District Court's Contrary Analysis Is Untenable.

In rejecting this analysis, the district court both misunderstood and misapplied controlling Supreme Court precedent. First, the district court appears to have conflated the question whether a federal statute *withdraws* the federal courts' existing equitable authority to enjoin state and local officers from implementing policies that conflict with federal law with the question whether a federal statute *confers* an implied right of action. Yet under binding Supreme Court precedent, these issues are distinct and subject to very different legal

standards. In addition, to the extent the district court purported to apply the test set out in *Armstrong* for determining whether the CSA withdraws the federal courts' traditional equitable powers, its analysis was deeply flawed.

1. Although Plaintiffs never argued that the CSA creates an implied right of action, the district court began its analysis by applying a "strong presumption that criminal statutes . . . do not create private rights of action" and citing cases in which courts have held that "there are no private rights of action under the CSA." Aplt. App. Vol. 2 at A365.

The district court erred in invoking this presumption and these cases, for as the Supreme Court made clear in *Armstrong*, the standard for determining whether Congress has foreclosed suits in equity against state officers is different and far more forgiving to plaintiffs than the test for determining whether a statute confers an implied right of action—something that Congress will only be understood to have done if it speaks "in clear and unambiguous terms." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002). In marked contrast to the district court's decision in this case, the portion of Justice Scalia's opinion in *Armstrong* that spoke for a majority of the Court does not apply the demanding standard for determining whether a federal statute contains an implied right of action. 135 S. Ct. at 1385. And although Justice Scalia did discuss whether the provision of the Medicaid Act at issue in that case included an implied right of action, he did so in a separate section

of his opinion that only three other Justices joined and that treated the issue as a distinct legal theory that the plaintiffs could have but did not press. *Id.* at 1387.

The *Armstrong* majority's approach accords with earlier Supreme Court precedent. *See Verizon Maryland*, 535 U.S. at 647 (holding that suit in equity against state officers could go forward without considering whether statute created private right of action); *Seminole Tribe*, 517 U.S. at 74 (examining issue without applying test for determining whether statute included private right of action). And unlike the decision below, other courts tasked with applying *Armstrong* have had little trouble distinguishing between the withdrawal of a traditional equitable power and the conferral of an implied right of action. *See, e.g.*, *Davis*, -- F.3d --, 2016 WL 1138768, at *10 & n.6 (2d Cir.); *Exodus Refugee Immigration, Inc. v. Pence*, -- F. Supp. 3d --, 2016 WL 772897, at *5 (S.D. Ind. Feb. 29, 2016), *appeal docketed*, No. 16-1509 (7th Cir. Mar. 8, 2016); *Planned Parenthood S.E., Inc. v. Bentley*, -- F. Supp. 3d --, 2015 WL 6517875, at *6 (M.D. Ala. Oct. 28, 2015); *Tohono O'odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1315–16 (D. Ariz. 2015).

Several considerations justify the Supreme Court's refusal to make the availability of an injunction against a state officer who is frustrating a federal

statute depend on whether the statute creates a private right of action.[5] As Justice Powell explained in a dissent that laid the groundwork for what is now the prevailing approach to implied rights of action, "the creation of private actions is a legislative function," and the federal courts impermissibly intrude on the Legislative Power when they recognize such rights in the absence of affirmative evidence that Congress intended for them to do so. *Cannon v. University of Chicago*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting); *see Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (adopting approach proposed in Powell dissent). In contrast, the federal courts' power to enjoin state officers from thwarting federal law "is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384. Exercise of that equitable authority raises none of the separation of powers concerns implicated by judicial recognition of implied rights

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[5] Prior to *Armstrong*, this Court analyzed suits to enjoin state officers from frustrating a federal statute by asking whether the plaintiffs had "a private cause of action for injunctive relief" under the Supremacy Clause. *Planned Parenthood of Kansas and Mid-Missouri v. Moser*, 747 F.3d 814, 830 (10th Cir. 2014). Although that approach cannot be squared with *Armstrong*, this Court's pre-*Armstrong* precedents do reflect the important insight that suits to enjoin the implementation of state laws that conflict with a federal statute call for a fundamentally different analysis than suits that depend on the existence of an implied right of action. *See The Wilderness Soc'y v. Kane Cty.*, 632 F.3d 1162, 1169 (10th Cir. 2011) (en banc) (observing that earlier panel decisions of this Court had held that in suits for injunctive relief against state officers "it is not necessary to demonstrate that the preemptive federal statute creates a private right of action").

of action, for it is among the powers that were conferred on the federal courts by the Judiciary Act of 1789 and has been successfully invoked by litigants throughout our Nation's history. That venerable pedigree contrasts with judicial creation of implied rights of action—a doctrinal innovation that began in earnest with *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), and that the Supreme Court had largely repudiated within two decades. The Congress that enacted the CSA—like every Congress to legislate since the federal courts were established and given powers analogous to those of the Chancery Court in England—did so mindful of the background principle that federal courts have the equitable authority to enjoin state and local officers from taking actions that conflict with a federal statute.

In sum, where state and local officers authorize or facilitate conduct that federal law forbids, "Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378–79 (1982). The district court turned that question on its head by asking whether Congress created a private right of action to enforce the CSA. By invoking the presumption against implied rights of action to enforce criminal statutes and relying on precedents regarding implied rights of action, the district court thus improperly placed a heavy thumb on defendants' side of the scales even as it purported to apply the test set forth in *Armstrong* for determining whether a

statute restricts the courts' traditional equitable power to enjoin state actions that conflict with federal statutes.

2. The district court's application of the *Armstrong* test was deeply flawed in other respects as well. The district court reasoned that the CSA implicitly forecloses suits in equity against state officers by authorizing criminal, civil, and administrative enforcement of its restrictions on the cultivation and distribution of marijuana. Aplt. App. Vol. 2 at A366 (citing 21 U.S.C. §§ 841–52 (criminal enforcement); *id.* § 875 (authorizing Attorney General to issue subpoenas and hold hearings); and *id.* § 881 (civil forfeiture)). The district court also invoked the Department of Justice's prosecutorial discretion in support of its conclusion that suits to enjoin state actions that conflict the CSA would require the courts to apply "judicially unadministrable" standards. Both of these arguments misunderstand the *Armstrong* test.

As for the first argument, the express enforcement provisions of the CSA leave little doubt that they were designed to be used against individuals who *violate* the federal drug laws, not state and local officers who implement laws that *conflict* with them. Indeed, the State Defendants claimed in the district court that they are immune from criminal prosecution when they violate the federal drug laws while acting in their official capacity. *See* State Defs.' Mot. to Dismiss Count VII of Pls.' Compl. Under Rules 12(b)(1) & 12(b)(6) at 23 n.13, *Safe Streets All. v.*

Alternative Holistic Healing, LLC, No. 15-349 (D. Colo. Apr. 30, 2015), ECF No. 83 ("State MTD Br.") (citing 21 U.S.C. § 885(d)), Aplt. App. Vol. 1 at A124. And regardless of the validity of that sweeping claim, it is at least true that state and local officials do not inevitably expose themselves to such enforcement procedures when they implement laws that conflict with the CSA. For example, a state law requiring Coloradans to cultivate marijuana would be preempted even though its implementation would not require state officers *themselves* to violate the CSA's criminal prohibition on marijuana possession.

Congress's decision to authorize criminal prosecutions of individuals who violate the CSA cannot reasonably be understood to signify an intent to foreclose suits in equity against state and local officers who help them. *Armstrong* and *Seminole Tribe* both concerned federal statutes that provided alternative mechanisms for enforcement *against States*, and Plaintiffs are not aware of any case in which a court has said that Congress's decision to expressly authorize enforcement of other statutory requirements against *third parties* implicitly precludes suits in equity against state officers. A provision in the CSA expressly authorizing an alternative means for stopping States from implementing preempted laws might suggest that Congress meant to foreclose suits like this one, but the fact that Congress authorized enforcement mechanisms against private individuals who commit drug crimes does not.

The district court also missed the mark when it concluded that CSA preemption suits would be "judicially unadministrable" because the Department of Justice's exercise of prosecutorial discretion under the CSA is guided by a "judgment-laden standard." Aplt. App. Vol. 2 at A368. Plaintiffs are not suing Defendants—much less the Department of Justice—for their failure to bring criminal prosecutions under the federal drug laws. Rather, Plaintiffs ask only for an injunction against Defendants' actions *affirmatively authorizing, assisting, and facilitating* conduct that the CSA forbids. A ruling in Plaintiffs' favor would not compel the Department of Justice or anyone else to bring a single prosecution under the CSA or in any way require courts to second guess federal prosecutors' decisions about who to charge with federal drug crimes. Accordingly, cases that refuse to allow private suits to compel the filing of criminal charges are inapposite, and the district court erred in relying on those cases.

II. The CSA Preempts State Laws that Authorize, Assist, or Facilitate Federal Drug Crimes.

Defendants' arguments that the CSA allows them to facilitate violations of the federal drug laws do not provide a proper basis for affirming the district court's judgment on other grounds.[6]

[6] This Court has discretion to rule on arguments that were pressed in the district court that could provide an alternative basis for affirmance, *see, e.g.*, *Johnson v. Johnson*, 466 F.3d 1213, 1215 (10th Cir. 2006), and Plaintiffs

When deciding whether Plaintiffs' Complaint states viable preemption claims, the Court must not lose sight of the nature of the state and local laws at issue in this case. The Complaint alleges that Defendants have erected a recreational marijuana regulatory regime that has the purpose and effect of authorizing, assisting, and facilitating federal drug crimes by, among other things, officially endorsing industry participants with licenses that give comfort to marijuana customers and investors. Compl. ¶¶ 29–54, Aplt. App. Vol. 1 at A058–69. The Complaint further alleges that those licenses and Defendants' other official efforts to promote federal drug crimes have resulted directly in the explosive growth of the recreational marijuana industry in Pueblo County and throughout Colorado. *Id.* ¶¶ 44, 51–53, Aplt. App. Vol. 1 at A065, A067–68. This case therefore does not implicate an array of other regulatory approaches the States might take to marijuana—for example, imposing civil rather than criminal penalties for marijuana possession, prohibiting it under some but not all circumstances, or opting not to regulate it at all. Instead, what is at issue here is

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respectfully submit that the Court should proceed to rule on Defendants' arguments that the preemption claims in this case fail as a matter of law. Whether Plaintiffs' Complaint states viable claims that the CSA preempts elements of Defendants' recreational marijuana regulatory regime was fully briefed before the district court, and remanding for further proceedings on that purely legal question would not serve the interests of the parties or judicial economy.

what the States plainly cannot do: adopt a regulatory regime that authorizes, facilitates, and assists conduct that the CSA forbids.

Plaintiffs assert their claims under the doctrine of conflict preemption, which displaces state law in either of two circumstances: (1) where state law "creates an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress"; or (2) where it is "impossible . . . to comply with [a] state-law duty . . . without violating federal law." *Wyeth v. Levine*, 555 U.S. 555, 563–64 (2009) (quotation marks omitted). Defendants' recreational marijuana regulatory regime is preempted under either of those standards, both of which apply in cases that concern preemption under the CSA.

A. Defendants' Marijuana Licensing Regime Poses an Obstacle to the Accomplishment of the CSA's Objectives.

Defendants' efforts to affirmatively authorize and assist the recreational marijuana industry "create[ ] an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives" of the CSA. *Id.* at 563–64 (quotation marks omitted). Accordingly, those efforts are preempted and must be enjoined.

"The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Raich*, 545 U.S. at 12. To achieve those objectives, Congress decided to "prohibit entirely the possession or use of [marijuana]," with one limited exception not relevant here. *Id.* at 24. In diametric opposition to the CSA's objectives and the means Congress

selected to achieve them, the goals of Defendants' recreational marijuana laws are to ensure that "the overall [marijuana] market ha[s] sufficient supply to meet the demand," Compl. ¶ 43, Aplt. App. Vol. 1 at A065 (second alteration in original) (quoting Defendant Brohl); to "enhanc[e] revenue for public purposes" by fostering growth in the recreational marijuana industry, *id.* ¶ 45, Aplt. App. Vol. 1 at A065 (alteration in original) (quoting COLO. CONST. art. XVIII, § 16(1)(a)); and to reap economic benefits from visitors interested in "a tour of the 'Rocky Mountain High,' " *id.* ¶ 53, Aplt. App. Vol. 1 at A068 (quoting Pueblo County tourism website). To those ends, Defendants officially authorize and assist the illegal drug industry by issuing licenses and taking other affirmative steps that "allow the industry to develop and prosper." *Id.* ¶ 47, Aplt. App. Vol. 1 at A066 (quoting Defendant Hickenlooper). The purposes and effects of the federal and state laws at issue here could not be more different. The result is a "collision between the two schemes of regulation," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963), and the state scheme must yield.

The same conclusion is compelled by the rule that when state law "authorizes [someone] to engage in conduct that [federal law] forbids, it stands as an obstacle to the . . . accomplishment and execution of the full purposes and objectives of Congress." *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984) (quotation marks omitted); *see*

also Hernandez-Colon v. Secretary of Labor, 835 F.2d 958, 963–64 (1st Cir. 1988) (explaining that Puerto Rico law is preempted "insofar as Puerto Rico law authorizes [the Governor of Puerto Rico] to engage in conduct that the federal Act forbids") (quotation marks omitted)). A State can no more authorize conduct that federal law prohibits than it can prohibit conduct that federal law authorizes. *See Fidelity Fed. Sav. Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155–59 (1982). When one law authorizes actions that another forbids, the two laws conflict, and the courts must look to the Supremacy Clause to determine which law prevails.

Both Colorado and Pueblo County law make clear that the issuance of recreational marijuana licenses authorizes federal drug crimes. *See* COLO. REV. STAT. § 12-43.4-103(4) (explaining that licensees are "authorized to cultivate, manufacture, distribute, sell, or test retail marijuana"); PUEBLO COUNTY CODE § 5.12.180 ("Any person twenty-one years of age or older is hereby authorized to manufacture, possess, distribute, sell or purchase marijuana accessories in conformance with Section 16 of Article XVIII of the Colorado Constitution, provided they meet all applicable state or local laws."). Reviewing a similar state marijuana statute, the Oregon Supreme Court ruled that the state law was preempted because a State may not authorize conduct that the CSA forbids. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 528–

29 (Or. 2010).[7] The same result obtains here.

A recent Third Circuit decision illustrates that a state regulatory regime that licenses conduct that federal law prohibits is preempted. In *NCAA v. Governor of New Jersey*, 730 F.3d 208, 236 (3d Cir. 2013), a group of sports leagues filed suit challenging New Jersey's decision to license a type of sports betting that is unlawful under 28 U.S.C. § 3702(2). Citing the Supreme Court's decision in *Michigan Canners*, the Third Circuit held that New Jersey's licensing regime was preempted because it posed an obstacle to accomplishment of the purposes of the federal prohibition on private parties engaging in this type of gambling. 730 F.3d at 236.[8] Like the gambling law at issue in *NCAA*, the CSA embodies a federal policy that specified conduct should be prohibited. Defendants cannot use their licensing and regulatory powers to authorize—much less affirmatively facilitate—the very activities that the CSA forbids.

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[7] The Michigan Supreme Court has criticized *Emerald Steel Fabricators*, but the state statute at issue there merely declined to prohibit marijuana-related drug crimes. *See Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 540 & n.6 (Mich. 2014). In any event, *Michigan Canners* is clear: a state law that "authorizes . . . conduct that [federal law] forbids" is preempted. 467 U.S. at 478.

[8] Although a provision of the statute at issue in *NCAA* expressly provided that state governments may not "license, or authorize" sports betting, 28 U.S.C. § 3702(1), the Third Circuit ruled that New Jersey's licensing regime would have been preempted "even if [this] provision . . . were excised" from the statute, 730 F.3d at 236.

It makes no difference that, even with Defendants' regulatory regime in place, those who participate in the recreational marijuana industry in Colorado are liable for a variety of federal criminal and civil penalties. State law need not thwart federal drug prosecutions to be in "positive conflict" with the CSA. 21 U.S.C. § 903. As the State Defendants themselves emphasized before the district court, "the federal government lacks resources to prosecute and punish every potential federal offense, especially marijuana crimes." State MTD Br. 21, Aplt. App. Vol. 1 at A122. For this reason, Defendants' openly avowed efforts to increase the overall amount of illegal recreational marijuana activity within their jurisdictions poses a serious obstacle to the accomplishment of the CSA's objectives. No less than permitting the intrastate cultivation and distribution of marijuana, allowing States to facilitate federal marijuana crimes "would leave a gaping hole in the CSA." *Raich*, 545 U.S. at 22.

Neither does it matter that the Department of Justice has not made it a priority in recent years to enforce the federal drug laws against Colorado's recreational marijuana industry. As another district court in this Circuit recently observed, "an enforcement policy of the United States Attorney General is not law, and instead, is merely an ephemeral policy that may change under a different President or different Attorney General." *Garcia v. Tractor Supply Co.*, -- F. Supp. 3d --, 2016 WL 93717, at *3 (D.N.M. Jan. 7, 2016). Even when the Executive

Branch declines to enforce a statute, States still "may not pursue policies that undermine federal law." *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

Whether the CSA's broad goals would be better served by laws that promote marijuana commerce and direct it into licensed channels is also irrelevant to the preemption analysis. "[A] state law also is preempted if it interferes with the *methods* by which the federal statute was designed to reach [its] goal." *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1580 (10th Cir. 1991) (emphasis added) (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). With respect to recreational marijuana, the method Congress selected is clear: a strict criminal prohibition on virtually all marijuana-related conduct. Congress has determined that the best way to achieve the CSA's purposes is through a flat prohibition, and Defendants may not actively undermine the approach Congress chose.

B. It Is Impossible To Comply with Both the CSA and Defendants' Marijuana Licensing Regime.

Defendants' recreational marijuana licensing regime also cannot stand under principles of impossibility preemption, for it is impossible to operate a recreational marijuana business licensed by Defendants without violating the federal drug laws. Defendants argued before the district court that there is no impossibility preemption because their laws do not *require* anyone to cultivate or sell recreational marijuana. But the Supreme Court has rejected this "stop-selling"

theory, explaining that "if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be all but meaningless." *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2477 (2013) (quotation marks omitted); *accord Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1290 (10th Cir. 2013) (applying *Bartlett* and rejecting argument that it was possible for drug manufacturer to comply with both federal and state duties "by simply declining to manufacture" the drug at issue); *see also Florida Lime & Avocado Growers*, 373 U.S. at 142–43 (explaining that under impossibility preemption, a federal law prohibiting the marketing of avocados with more than 7% oil would preempt a state law requiring that avocados sold have at least 8% oil).

In holding that Michigan's medical marijuana law was preempted, the district court in *Forest City Residential Mgmt. ex rel. Plymouth Square Ltd. v. Beasley*, 71 F. Supp. 3d 715, 727 (E.D. Mich. 2014), explained why state laws authorizing drug crimes are preempted: "The test asks whether, theoretically, one could comply with both the federal and state law without violating either of them. Here, the answer is unequivocally 'no.' That is to say, it is impossible for someone to ingest marijuana . . . without violating the CSA." (citation omitted). The same analysis applies here, and Defendants' recreational marijuana licensing regime is therefore preempted.

C. The CSA Does Not Displace Settled Principles of Conflict Preemption.

Relying on two intermediate state appellate court decisions, Defendants argued before the district court that state regulation of marijuana is not subject to obstacle preemption. For the reasons explained above, this issue is ultimately of no moment; Defendants' recreational marijuana licensing regime is preempted under impossibility analysis no less than under obstacle analysis. In any event, there is no basis in the CSA for limiting the Court's analysis to impossibility preemption.

The CSA says that it preempts state law when "there is a positive conflict . . . so that the two cannot consistently stand together." 21 U.S.C. § 903. The preemption provisions of numerous federal statutes use some variation of this text, which appears to have been borrowed from an early Supreme Court opinion that articulated ordinary principles of conflict preemption. *See Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 243 (1859) (federal law preempts state law where "the repugnance or conflict [is] direct and positive, so that the two acts could not be reconciled or consistently stand together"). Despite that history, in *Levine v. Wyeth*, 944 A.2d 179, 190–91 (Vt. 2006), the Vermont Supreme Court held that

materially identical language in the Drug Amendments of 1962[9] foreclosed obstacle preemption. The Supreme Court granted certiorari and disagreed, holding that the state law at issue was not preempted only after considering whether it "posed an obstacle to [the] objectives" of federal law. *Wyeth*, 555 U.S. at 573–81. The Justices in dissent in *Wyeth* took the same approach, explaining that the statute's reference to a "direct and positive conflict" "simply recognizes the background principles of conflict pre-emption." *Id.* at 612 n.4 (Alito, J., dissenting).[10]

Nevertheless, two intermediate state appellate court decisions say that obstacle preemption does not apply in CSA cases. *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 823 (2008); *People v. Crouse*, 2013 WL 6673708, at *4 (Colo. App. Dec. 19, 2013). But *County of San Diego* adopted the interpretation that the Supreme Court later rejected in *Wyeth*, *see* 165 Cal. App. 4th

[9] The preemption provision in *Wyeth* provided that state law is preempted when there is a "direct and positive conflict between [the federal law] and [a] provision of State law." Pub. L. No. 87-781, § 202, 76 Stat. 780, 793 (1962).

[10] This Court anticipated *Wyeth* in *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1204 (10th Cir. 2009), a case that concerned preemption under a federal law that included a provision limiting the displacement of state law to instances in which "there is a direct and positive conflict" between federal and state law "so that the two cannot be reconciled or consistently stand together," 18 U.S.C. § 927; *see ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1302 (N.D. Okla. 2007) (making clear that preemption in this case was governed by 18 U.S.C. § 927). Applying that provision, the Tenth Circuit undertook an ordinary conflict preemption analysis, considering obstacle as well as impossibility preemption. *Ramsey Winch Inc.*, 555 F.3d at 1204–08.

at 823, and *Crouse* embraced the reasoning in *County of San Diego* without considering the effect of the Supreme Court's intervening decision. As two State Supreme Courts have recognized, any reading of Section 903 that does not permit an obstacle preemption analysis is simply untenable after *Wyeth*. *Emerald Steel Fabricators*, 230 P.3d at 527–28 (applying obstacle preemption analysis to CSA preemption claim in light of *Wyeth*'s interpretation of "a comparable preemption provision"); *Ter Beek*, 846 N.W. 2d at 537 (similar); *see also United States Dep't of Justice v. Colorado Bd. of Pharmacy*, 2010 WL 3547898, at *3–*4, *adopted*, 2010 WL 3547896 (D. Colo. Sept. 3, 2010) (applying ordinary conflict preemption analysis in CSA preemption case).

* * * *

The CSA is fundamentally "a statute combating recreational drug abuse," *Gonzales v. Oregon*, 546 U.S. 243, 272 (2006), and its preemptive effect is broadest where state law affirmatively authorizes and promotes what the CSA seeks to combat. Accordingly, the Court should apply ordinary principles of conflict preemption and hold that the district court erred by dismissing Plaintiffs' preemption claims.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs respectfully request oral argument. This appeal raises important questions concerning (i) the scope of the federal courts' equitable authority to enjoin state officers from implementing laws that conflict with the CSA; and (ii) whether state and local officials may implement laws that authorize, promote, and facilitate drug crimes.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 9,109 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times Roman Numeral 14-point font.

s/ David H. Thompson
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify with respect to the foregoing that: (1) all necessary privacy redactions have been made as required by 10th Cir. R. 25.5; (2) all additional hard copies are exact duplicates of that filed by CM/ECF; and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Kaspersky Endpoint Security 10 for Windows, most recently updated on April 29, 2016, and according to the program are free of viruses.

s/ David H. Thompson
David H. Thompson
Counsel for Plaintiffs-Appellants Safe Streets Alliance, et al.

ADDENDUM OF RELEVANT STATUTES AND ORDINANCES

21 U.S.C. § 812

Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated: Schedule I . . . . (c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation: . . . (10) Marihuana . . . .

21 U.S.C. § 841(a)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

21 U.S.C. § 903

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

COLO. CONST. art. XVIII, § 16(1)(a)

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

COLO. CONST. art. XVIII, § 16(3)

Personal use of marijuana. Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older:

(a) Possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.

(b) Possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale.

(c) Transfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.

(d) Consumption of marijuana, provided that nothing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.

(e) Assisting another person who is twenty-one years of age or older in any of the acts described in paragraphs (a) through (d) of this subsection.

COLO. REV. STAT. § 12-43.4-103(4)

"Licensed premises" means the premises specified in an application for a license under this article, which are owned or in possession of the licensee and within which the licensee is authorized to cultivate, manufacture, distribute, sell, or test retail marijuana and retail marijuana products in accordance with this article.

PUEBLO COUNTY CODE § 5.12.180

Any person twenty-one years of age or older is hereby authorized to manufacture, possess, distribute, sell or purchase marijuana accessories in conformance with Section 16 of Article XVIII of the Colorado Constitution, provided they meet all applicable state or local laws.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2016, I electronically filed the foregoing Opening Brief of Plaintiffs-Appellants Safe Streets Alliance, et al. using the court's CM/ECF system. The CM/ECF system will send electronic notification of such filing to all counsel of record.

s/ David H. Thompson
David H. Thompson
Counsel for Plaintiffs-Appellants Safe Streets Alliance, et al.

Attachment 1

District Court Order Granting Defendants' Motions to Dismiss

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 1:15-cv-00349-REB-CBS

SAFE STREETS ALLIANCE,
PHILLIS WINDY HOPE REILLY, and
MICHAEL P. REILLY,

Plaintiffs,

v.

ALTERNATIVE HOLISTIC HEALING, LLC, d/b/a Rocky Mountain Organic,
JOSEPH R. LICATA,
JASON M. LICATA,
6480 PICKNEY, LLC,
PARKER WALTON,
CAMP FEEL GOOD, LLC,
ROGER GUZMAN,
BLACKHAWK DEVELOPMENT CORPORATION,
WASHINGTON INTERNATIONAL INSURANCE CO.,
JOHN W. HICKENLOOPER, JR., in his official capacity as Governor of Colorado,
BARBARA J. BROHL, in her official capacity as Executive Director of the Colorado Department of Revenue,
W. LEWIS KOSKI, in his official capacity as Director of the Colorado Marijuana Enforcement Division,
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PUEBLO, and
PUEBLO COUNTY LIQUOR & MARIJUANA LICENSING BOARD,

Defendants.

ORDER RE: MOTIONS TO DISMISS

Blackburn, J.

The matters before me are (1) the **State Defendants' Motion To Dismiss Count VII of Plaintiffs' Complaint Under Rules 12(b)(1) and 12(b)(6)** [#83],[1] filed

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[1] "[#83]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

April 30, 2015; and (2) the **Pueblo Defendants' Motion To Dismiss** [#85], filed April 30, 2015. I grant the motions, dismiss Counts VII and VIII of the First Amended Complaint, enter judgment in favor of both the state and Pueblo defendants as to those severed counts, and also dismiss plaintiffs' RICO claims against the Pueblo defendants.

I. JURISDICTION

I putatively have subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question).

II. STANDARD OF REVIEW

Defendants' motions raise issues under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6). A motion to dismiss under Fed. R. Civ. P. 12(b)(1) may consist of either a facial or a factual attack on the complaint. ***Holt v. United States***, 46 F.3d 1000, 1002 (10th Cir. 1995). Because defendants' motion presents a facial attack, I must accept the allegations of the complaint as true. ***Id***. Plaintiff bears the burden of establishing that subject matter jurisdiction exists. ***Henry v. Office of Thrift Supervision***, 43 F.3d 507, 512 (10th Cir. 1994); ***Fritz v. Colorado***, 223 F.Supp.2d 1197, 1199 (D. Colo. 2002).

When ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), I must determine whether the allegations of the complaint are sufficient to state a claim within the meaning of Fed. R. Civ. P. 8(a). For many years, "courts followed the axiom that dismissal is only appropriate where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" ***Kansas Penn Gaming, LLC v. Collins***, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting ***Conley v. Gibson***, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)). Noting that this

standard "has been questioned, criticized, and explained away long enough," the Supreme Court supplanted it in ***Bell Atlantic Corp. v. Twombly***, 550 U.S. 544, 562, 127 S.Ct. 1955, 1969, 167 L.Ed.2d 929 (2007). Pursuant to the dictates of ***Twombly***, I now review the complaint to determine whether it "'contains enough facts to state a claim to relief that is plausible on its face.'" ***Ridge at Red Hawk, L.L.C. v. Schneider***, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting ***Twombly***, 127 S.Ct. at 1974). "This pleading requirement serves two purposes: to ensure that a defendant is placed on notice of his or her alleged misconduct sufficient to prepare an appropriate defense, and to avoid ginning up the costly machinery associated with our civil discovery regime on the basis of a largely groundless claim." ***Kansas Penn Gaming***, 656 F.3d at 1215 (citation and internal quotation marks omitted).

As previously, I must accept all well-pleaded factual allegations of the complaint as true. ***McDonald v. Kinder-Morgan, Inc.***, 287 F.3d 992, 997 (10th Cir. 2002). Contrastingly, mere "labels and conclusions or a formulaic recitation of the elements of a cause of action" will not be sufficient to defeat a motion to dismiss. ***Ashcroft v. Iqbal***, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citations and internal quotation marks omitted). ***See also Robbins v. Oklahoma***, 519 F.3d 1242, 1247-48 (10th Cir. 2008) ("Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.") (quoting ***Twombly***, 127 S.Ct. at 1974) (internal citations and footnote omitted). Moreover, to meet the plausibility standard, the complaint must suggest "more than a sheer possibility that a defendant

has acted unlawfully." ***Iqbal***, 129 S.Ct. at 1949. ***See also Ridge at Red Hawk***, 493 F.3d at 1177 ("[T]he mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.") (emphases in original). For this reason, the complaint must allege facts sufficient to "raise a right to relief above the speculative level." ***Kansas Penn Gaming***, 656 F.3d at 1214 (quoting ***Twombly***, 127 S.Ct. at 1965). The standard will not be met where the allegations of the complaint are "so general that they encompass a wide swath of conduct, much of it innocent." ***Robbins***, 519 F.3d at 1248. Instead "[t]he allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." ***Id.***

The nature and specificity of the allegations required to state a plausible claim will vary based on context and will "require[] the reviewing court to draw on its judicial experience and common sense." ***Iqbal***, 129 S.Ct. at 1950; ***see also Kansas Penn Gaming***, 656 F.3d at 1215. Nevertheless, the standard remains a liberal one, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." ***Dias v. City and County of Denver***, 567 F.3d 1169, 1178 (10th Cir. 2009) (quoting ***Twombly***, 127 S.Ct. at 1965) (internal quotation marks omitted).

III. ANALYSIS

In 2012, Colorado voters approved Amendment 64, legalizing the cultivation, manufacture, and possession of recreational marijuana in the state. Under the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904, however, marijuana continues to be classified as a Schedule I drug, which makes the manufacture, distribution, or possession of marijuana a crime under federal law. Plaintiff Safe Streets Alliance is "a membership organization whose members are interested in law enforcement issues, particularly the enforcement of federal laws prohibiting the cultivation, distribution, and possession of marijuana." (**Am. Compl.** ¶ 8 at 4.)[2] To that end, they have brought this lawsuit, challenging the legality *vel non* of Amendment 64.

Both motions presently before me implicate Counts VII and VIII of the First Amended Complaint,[3] designated therein as the "Preemption Counts," against Colorado Governor John W. Hickenlooper, Executive Director of the Colorado Department of Revenue Barbara J. Brohl, and Director of the Colorado Marijuana Enforcement Division W. Lewis Koski. (the "state defendants"), as well as the Board of County Commissioners of the County of Pueblo and the Pueblo County Liquor & Marijuana Licensing Board (the "Pueblo defendants"). In addition, the Pueblo defendants' motion also challenges the remaining counts of the operative complaint, which charge the Pueblo defendants and the remaining defendants in this lawsuit with various violations

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[2] The individual plaintiffs are landowners whose property sits adjacent to a recreational marijuana grow operation in Rye, Colorado, and are members of Safe Streets Alliance.

[3] I previously granted these defendants' motions to sever these counts from the remaining counts of the First Amended Complaint. (***See*** **Order Granting Motions To Sever** [#114], filed July 14, 2015.)

of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Because none of these claims ultimately are viable, I grant both motions to dismiss.

As originally pled, Counts VII and VII of the complaint purported to state claims directly under the Supremacy Clause, **U.S. CONST.** Art. IV, cl. 2.[4] (***See*** **Compl.** ¶ 124 at 38 & ¶ 131 at 39 [#1], filed February 19, 2015.) Not long after the complaint was filed, however, the Supreme Court issued its opinion in ***Armstrong v. Exceptional Child Center, Inc.***, – U.S. –, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015), in which it squarely rejected the premise that there exists "an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation." ***Id.***, 135 S.Ct. at 1383 (citation and internal quotation marks omitted). The Supremacy Clause, said the Court, is a rule of decision: "It instructs courts what to do when state and federal law clash[.]" ***Id.*** It is not, however, "the source of any federal rights, and certainly does not create a cause of action." ***Id.*** (internal citations and quotation marks omitted). Such a conclusion was found to be implicit in the history and structure of the Supremacy Clause, as well as in its place within the broader context of the Constitution itself:

> It is unlikely that the Constitution gave Congress such broad discretion [under the Necessary and Proper Clause, Art. I, § 8] with regard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, making it impossible to leave the

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[4] The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

> enforcement of federal law to federal actors. If the Supremacy Clause includes a private right of action, then the Constitution requires Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law. It would be strange indeed to give a clause that makes federal law supreme a reading that limits Congress's power to enforce that law, by imposing mandatory private enforcement.

Id. at 1383-84. Thus, the Court concluded that there is no private right of action under the Supremacy Clause itself.

In so holding, the Court acknowledged that it had "long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law," but concluded that the Supremacy Clause was not the source of that authority. ***Id.*** at 1384. Seizing on that concession, plaintiffs promptly amended their complaint, invoking the power of "[f]ederal courts sitting in equity . . . to set aside actions of state officials that are preempted under the Supremacy Clause." (**First Amended Compl.** ¶ 140 at 48 & ¶ 147 at 49 [#66], filed April 13, 2015.) They thus claim that Counts VII and VIII state viable claims for injunctive relief.

I cannot agree. As ***Armstrong*** makes clear, the right to call on the equity powers of a federal court to enjoin enforcement of an allegedly preempted state law must be found in substantive federal law. ***See Armstrong***, 135 S.Ct. at 1385. Nevertheless, the court must be mindful that its equitable power "to enjoin unlawful executive action is subject to express and implied statutory limitations. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." ***Id.*** (internal citations and quotation marks omitted). Accordingly, there is no room in which equity may operate if the federal statute either does not

provide a private right of action, ***see id***. at 1387, or if the structure of the statute otherwise "implicitly precludes private enforcement," ***id.*** at 1385.

Neither of those circumstances pertains with respect to the CSA. There is a strong presumption that criminal statutes, enacted for the protection of the general public, do not create private rights of action. ***See Cannon v. University of Chicago***, 441 U.S. 677, 690, 99 S.Ct. 1946, 1954, 60 L.Ed.2d 560 (1979); ***Love v. Delta Air Lines***, 310 F.3d 1347, 1352 (11th Cir. 2002); ***University of Colorado Hospital v. Denver Publishing Co.***, 340 F.Supp.2d 1142, 1144 (D. Colo. 2004). Plaintiffs point to nothing in the text of the CSA that includes the type of "rights-creating language" which "explicitly confer[s] a right directly on a class of persons that includes the plaintiff" or "identif[ies] the class for whose especial benefit the statute was enacted." ***Love***, 310 F.3d at 1352. ***See also Alexander v. Sandoval***, 532 U.S. 275, 289, 121 S.Ct. 1511, 1521, 149 L.Ed.2d 517 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.") (citation and internal quotation marks omitted). Thus, federal courts uniformly have held that there are no private rights of action under the CSA. ***See, e.g.***, ***Durr v. Strickland***, 602 F.3d 788, 789 (6th Cir.), ***cert. denied***, 130 S.Ct. 2147 (2010); ***Schneller v. Crozer Chester Medical Center***, 387 Fed. Appx. 289, 293 (3rd Cir. 2010), ***cert. denied***, 131 S.Ct. 1684 (2011); ***Felmlee v. Oklahoma***, 2014 WL 4597724 at *6 (N.D. Okla. Sept. 15, 2014), ***aff'd***, 620 Fed. Appx. 648 (10th Cir. July 14, 2015); ***United States v. Real Property & Improvements Located at 1840 Embarcadero, Oakland, California***, 932 F.Supp.2d 1064, 1072 (N.D. Cal. 2013); ***Jones v. Hobbs***, 745

F.Supp.2d 886, 893 (E.D. Ark. 2010), ***aff'd***, 658 F.3d 842 (8th Cir. 2011), ***cert. dismissed***, 133 S.Ct. 97 (2012); ***Bowling v. Haas***, 2010 WL 3825467 at *3 (E.D. Ky. Sept. 23, 2010); ***West v. Ray***, 2010 WL 3825672 at *3 (M.D. Tenn. Sept. 24, 2010), ***aff'd***, 401 Fed. Appx. 72 (6th Cir. Nov. 4, 2010), ***cert. denied***, 131 S.Ct. 941 (2011); ***Ringo v. Lombardi***, 2010 WL 3310240 at *2 (W.D. Mo. Aug. 19, 2010); ***McCallister v. Purdue Pharma L.P.***, 164 F.Supp.2d 783, 793 & n.16 (S.D. W. Va. 2001).

Plaintiffs nevertheless insist that the structure of the CSA does not preclude private enforcement. I am not persuaded. The ***Armstrong*** Court identified two factors which it found demonstrated Congress's "intent to foreclose" equitable relief in that case. Both are at play in this instance as well.

First, the ***Armstrong*** Court noted that "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." ***Armstrong***, 135 S.Ct. at 1385 (citation and internal quotation marks omitted). Plaintiffs' suggestion that there is no such enforcement mechanism in the CSA's preemption clause, ***see*** 21 U.S.C. § 903, misses the mark. For the proper focus is not on the rule of decision embodied in the preemption provision, but on those specific substantive provisions of the CSA plaintiffs would seek to enforce by this lawsuit – that is, those that criminalize the possession and distribution of marijuana. ***See, e.g.***, 21 U.S.C. §§ 841, 843, 848, 854, 856. Those provisions may be enforced criminally, ***see id.*** §§ 841-852, civilly, ***see id.*** § 881, or administratively, ***see id.*** § 875. The availability of such a panoply of remedies to enforce the nation's drug laws strongly suggests that Congress did not intend to provide additional recourse through private actions in equity.

More importantly, the authority to enforce these (and most other[5]) substantive provisions of the CSA – *or not* – rests entirely with the United States Attorney General and, by her delegation, the Department of Justice. ***See*** 21 U.S.C. § 871(a). ***See also Schneller***, 387 Fed. Appx. at 293; ***Shmatko v. Arizona CVS Stores LLC***, 2014 WL 3809092 at *2 (D. Ariz. Aug. 1, 2014). Her charging discretion is the "special province" of the Executive Branch:

> The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to take Care that the Laws be faithfully executed. . . . In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

United States v. Armstrong, 517 U.S. 456, 464, 116 S.Ct. 1480, 1486, 134 L.Ed.2d 687 (1996) (citations and internal quotation marks omitted). ***See also United States v. Batchelder***, 442 U.S. 114, 124, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.").[6]

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[5] There a limited number of instances in which states may be granted authority to enforce the CSA. ***See*** 21 U.S.C. §§ 878(a) (Attorney General may designate state or local law enforcement officers to perform specified duties under the CSA), 882(c)(1) (state may bring civil action to enforce provisions of CSA against online pharmacies). There are no provisions of the CSA which expressly create private rights of action, however. ***See id.*** § 882(c)(5) ("No private right of action is created under this subsection.")

[6] Although there are constitutional limits on this discretion, these principally implicate the mandates of the Equal Protection Clause to prohibit the exercise of prosecutorial discretion "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." ***Batchelder***, 99 S.Ct. at 2205 n.9 (citation and internal quotation marks omitted)). In the absence of any suggestion that such improper factors are implicated here, the government's "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." ***Oyler v. Boles***, 368 U.S. 448, 456, 82 S.Ct.

The recognition of this sweeping prosecutorial discretion addresses directly the second factor identified in ***Armstrong*** as suggesting an intent to foreclose equitable relief: the "judicially unadministrable nature" of the CSA. ***Armstrong***, 135 S.Ct. at 1385. There certainly can be no more "judgment-laden standard" than that which confers almost complete discretion on the Attorney General to determine whether to assert the supremacy of federal law to challenge arguably conflicting state marijuana laws. ***See id***. The Department of Justice has made a conscious, reasoned decision to allow the states which have enacted laws permitting the cultivation and sale of medical and recreational marijuana to develop strong and effective regulatory and enforcement schemes. ***See*** James M. Cole, **Guidance Regarding Marijuana Enforcement**, United States Department of Justice, Office of the Deputy Attorney General (August 29, 2013) [hereinafter "**Guidance**"] (available at http://www.justice.gov/iso/opa/resources/ 3052013829132756857467.pdf) (last accessed January 19, 2016).[7] Allowing private litigants to interfere with that discretionary decision would create precisely the type of "risk of inconsistent interpretations and misincentives" which strongly counsel against recognizing an implicit right to a judicially created equitable remedy. ***See Armstrong***,

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501, 506, 7 L.Ed.2d 446 (1962).

[7] DOJ has elected to focus its resources and efforts, including prosecution, on eight enforcement priorities in relation to the manufacture, sale, and possession of marijuana. ***See*** **Guidance**. Noting that "[o]utside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws," DOJ has determined to allow the states to develop and implement "strong and effective regulatory and enforcement systems" consistent with federal enforcement priorities, and has advised federal prosecutors to exercise their charging discretion in light of those same priorities. ***Id. See also*** Ryan Grim, "Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect," ***Huffington Post, Politics*** (Aug. 29, 2013) (characterizing DOJ's approach to state marijuana legalization as "trust but verify") (available at http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html) (last accessed January 19, 2016).

135 S.Ct. at 1385.

Accordingly, I find and conclude that Counts VII and VIII of the First Amended Complaint fail to state viable claims for relief. Defendants' motions to dismiss those claims therefore will be granted on that basis, obviating the need to address defendants' remaining arguments regarding these Counts.

This decision leaves only the question whether Counts I though VI of the First Amended Complaint state viable claims under RICO against the Pueblo defendants. Every federal appellate court to consider the issue has held that government entities are not subject to RICO, either because they are incapable of forming a specific criminal intent, ***see Gil Ramirez Group, L.L.C. v. Houston Independent School District***, 786 F.3d 400, 412 (5th Cir. 2015); ***Rogers v. City of New York***, 359 Fed. Appx. 201, 204 (2nd Cir. Dec. 31, 2009); ***Lancaster Community Hospital v. Antelope Valley Hospital District***, 940 F.2d 397, 404 (9th Cir. 1991), ***cert. denied***, 112 S.Ct. 1168 (1992), and/or because exemplary damages are not available against municipal corporations, ***see Gil Ramirez Group***, 786 F.3d at 412-13; ***Lancaster Community Hospital***, 940 F.2d at 404-05; ***Genty v. Resolution Trust Corp.***, 937 F.2d 899, 914 (3rd Cir. 1991). Likewise, federal district courts which have confronted this issue unanimously have refused to impose RICO liability on government entities. ***See, e.g.***, ***Melcher v. Wiggins***, 2014 WL 1600511 at *2 (S.D. Tex. April 21. 2014); ***Reyes v. City of Chicago***, 585 F.Supp.2d 1010, 1014 (N.D. Ill. 2008); ***Frooks v. Town of Cortlandt***, 997 F.Supp. 438, 457 (S.D.N.Y. 1998), ***aff'd***, 182 F.3d 899 (2nd Cir. 1999); ***County of Oakland by Kuhn v. City of Detroit***, 784 F.Supp. 1275, 1283 (E.D. Mich. 1992); ***Biondolillo v. City of***

Sunrise, 736 F. Supp. 258, 260-61 (S.D. Fla. 1990); ***Smallwood v. Jefferson County Government***, 743 F.Supp. 502, 504 (W.D. Ky 1990); ***Jade Aircraft Sales, Inc. v. City of Bridgeport***, 1990 WL 128573 at *1 (D. Conn. July 9, 1990); ***Victor v. White***, 1989 WL 108276 at *5-6 (N.D. Cal. July 26, 1989); ***Albanese v. City Federal Savings and Loan Association***, 710 F.Supp. 563, 565 (D.N.J. 1989); ***Massey v. City of Oklahoma***, 643 F.Supp. 81, 84-85 (W.D. Okla. 1986).

Plaintiffs' arguments in contravention of this solid body of authority are unpersuasive. The fact that government entities may be found to act with recklessness or deliberate indifference in civil matters does not translate neatly to the issue of criminal *mens rea*, such as is required to state a claim under RICO:

> [R]acketeering activity is defined to mean various *criminal* acts, requiring *mens rea*. In other words, a finding of racketeering activity requires *indictable criminal* conduct. Therefore, because only criminal violations suffice as predicate acts under RICO, plaintiff must allege that defendants committed the acts willfully or with actual knowledge of the illegal activities.

Friedlob v. Trustees of Alpine Mutual Fund Trust, 905 F.Supp. 843, 859 (D. Colo. 1995) (internal citation omitted; emphases in original). The weight of persuasive authority supports a conclusion that government entities cannot form specific criminal intent. ***See Gil Ramirez Group***, 786 F.3dat 412; ***Rogers***, 359 Fed. Appx. at 204; ***Lancaster Community Hospital***, 940 F.2d at 404. ***See also City of Newport v. Fact Concerts, Inc.***, 453 U.S. 247, 261, 101 S. Ct. 2748, 2757, 69 L. Ed. 2d 616 (1981) (noting "respectable authority to the effect that municipal corporations can not, as such, do a criminal act or a willful and malicious wrong") (citation and internal quotation

marks omitted).[8]

Nor am I convinced by plaintiffs' suggestion that ***PacifiCare Health System, Inc. v. Book***, 538 U.S. 401, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003), undermines the well-reasoned authority to the effect that government entities cannot be liable under RICO because they are immune from punitive damages.[9] This argument has been soundly rejected by at least two federal appellate courts. ***See Gil Ramirez Group***, 786 F.3d at 412-13; ***Tengood v. City of Philadelphia***, 529 Fed. Appx. 204, 209 n.4 (3rd Cir. June 17, 2013). As the Fifth Circuit cogently explained:

> . . . . [T]o overcome municipal immunity from punitive damages, Congress must clearly express its intention. No such clear intent to overcome governmental immunity appears in the RICO provision for treble damages.
>
> . . . .
>
> The [***PacifiCare***] Court's ambivalence about punitive damages complicates analysis here, but we believe ***PacifiCare*** cannot salvage a claim against [the government entity defendant]. First, the Supreme Court's characterization of RICO treble damages as "remedial" in ***PacifiCare*** cannot substitute for an express Congressional

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[8] In dicta, the Third Circuit has taken issue with this rationale, noting that "[c]ourts long have held ordinary corporations civilly and criminally liable for the malicious torts or crimes of their high officers, particularly when the corporation benefits from the officers' offensive conduct." ***Genty***, 937 F.2d at 909. In this case, however, plaintiffs have not sued the individual members of the Pueblo Board of County Commissioners or the Pueblo County Liquor & Marijuana Licensing Board. Instead, the Pueblo defendants are sued as government entities. In that form, they have no capacity to form a criminal *mens rea*, a fact which even the ***Genty*** court acknowledged. ***See id.*** (noting that "absent express statutory authorization, the common law ordinarily did not allow criminal indictments against municipal corporations for certain serious offenses").

[9] The Court in ***PacifiCare*** considered whether provisions contained in contracts between the parties compelled arbitration of the plaintiff's RICO claims where the arbitration provisions precluded an award of punitive damages. ***PacifiCare***, 123 S.Ct. at 1533. In addressing that question, the Court noted that statutory treble damages provisions exist along a continuum, "serving remedial purposes in addition to punitive objectives," and that RICO's provision is not entirely punitive but also serves remedial purposes. ***Id.*** at 1535.

> abrogation of municipal immunity from treble damages, which, whatever the characterization, exceed actual provable damages. . . . Second, nothing in ***PacifiCare*** contravenes the Court's earlier holdings that treble-damages provisions serve both compensatory and punitive functions. Third, the narrow question posed in ***PacifiCare*** was whether an arbitration agreement's ban on punitive damages included RICO treble damages. The Court refused to interpret the private parties' agreement, holding that threshold duty for an arbitrator. ***PacifiCare*** has no bearing on the liability of governmental entity defendants for treble damages under RICO.
>
> For these reasons, we conclude that [plaintiff] cannot proceed against [the government entity defendant] under RICO's mandatory treble damage provision. Because Congress wrote no single-damage alternative, and we lack power to revise federal statutes, Appellants fail to state a cognizable RICO claim against [the government entity defendant).

Gil Ramirez Group, 786 F.3d at 412-13 (other citations, internal quotation marks, and footnotes omitted). ***See also Tengood***, 529 Fed. Appx. at 209 n.4 ("Although . . . language in ***PacifiCare*** explains that RICO's mandatory treble damages award is both compensatory and punitive in nature, this fact was recognized in ***Genty*** [***v. Resolution Trust Corp.***, 937 F.2d at 910], and did not affect our holding in that case.").

Accordingly, I find that plaintiffs cannot state viable claims under RICO against the Pueblo defendants. The motion to dismiss those claims therefore must be granted.

IV. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That the **State Defendants' Motion To Dismiss Count VII of Plaintiffs'**

Complaint Under Rules 12(b)(1) and 12(b)(6) [#83], filed April 30, 2015, is granted;

2. That the **Pueblo Defendants' Motion To Dismiss** [#85], filed April 30, 2015, is granted;

3. That Counts VII and VIII of the **First Amended Complaint** [#66], filed April 13, 2015, are dismissed with prejudice;

4. That Counts I through VI, inclusive, of the **First Amended Complaint** [#66], filed April 13, 2015, are dismissed with prejudice as to the Pueblo defendants only;

5. That as to Counts VII and VIII of the **First Amended Complaint** [#66], filed April 13, 2015, judgment with prejudice shall enter on behalf of defendants, John W. Hickenlooper, in his official capacity as Governor of Colorado; Barbara J. Brohl, in her official capacity as Executive Director of the Colorado Department of Revenue; W. Lewis Koski, in his official capacity as Director of the Colorado Marijuana Enforcement Division; The Board of County Commissioners of the County of Pueblo; and Pueblo County Liquor & Marijuana Licensing Board, and against plaintiffs, Safe Streets Alliance; Phillis Windy Hope Reilly; and Michael P. Reilly;

6. That as to Counts I through VI, inclusive, of the **First Amended Complaint** [#66], filed April 13, 2015, at the time judgment enters, judgment with prejudice shall enter on behalf of defendants, The Board of County Commissioners of the County of Pueblo; and Pueblo County Liquor & Marijuana Licensing Board, and against plaintiffs, Safe Streets Alliance; Phillis Windy Hope Reilly; and Michael P. Reilly;

7. That defendants are awarded their costs associated with Counts VII and VIII (***see*** **Order Granting Motion To Sever** [#114], filed July 14, 2015), to be taxed by the

clerk of the court in the time and manner specified in Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1;

8. That at the time judgment enters, the Pueblo defendants are to be awarded any additional costs associated with Counts I through VI, inclusive, to be taxed by the clerk of the court in the time and manner specified in Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1; and

9. That defendants, John W. Hickenlooper, in his official capacity as Governor of Colorado; Barbara J. Brohl, in her official capacity as Executive Director of the Colorado Department of Revenue; W. Lewis Koski, in his official capacity as Director of the Colorado Marijuana Enforcement Division; The Board of County Commissioners of the County of Pueblo; and Pueblo County Liquor & Marijuana Licensing Board, are dismissed as named parties to this action, and the case caption amended accordingly.

Dated January 19, 2016, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge

Attachment 2

District Court Judgment as to Plaintiffs' Preemption Claims

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-00349-REB-CBS

SAFE STREETS ALLIANCE,
PHILLIS WINDY HOPE REILLY, and
MICHAEL P. REILLY,

Plaintiffs,

v.

ALTERNATIVE HOLISTIC HEALING, LLC, d/b/a Rocky Mountain Organic,
JOSEPH R. LICATA,
JASON M. LICATA,
6480 PICKNEY, LLC,
PARKER WALTON,
CAMP FEEL GOOD, LLC,
ROGER GUZMAN,
BLACKHAWK DEVELOPMENT CORPORATION,
WASHINGTON INTERNATIONAL INSURANCE CO.,
JOHN W. HICKENLOOPER, Jr., in His Official Capacity as Governor of Colorado,
BARBARA J. BROHL, in Her Official Capacity as Executive Director of the Colorado Department of Revenue,
W. LEWIS KOSKI, in His Official Capacity as Director of the Colorado Marijuana Enforcement Division,
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PUEBLO, and
PUEBLO COUNTY LIQUOR & MARIJUANA LICENSING BOARD,

Defendants.

JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b)

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 54(b), the following Judgment is hereby entered.

Pursuant to the **Order Re: Motions to Dismiss** [#118] of Judge Robert E. Blackburn entered on January 19, 2016, it is

ORDERED that Counts VII and VIII of the **First Amended Complaint** [#66], filed April 13, 2015, are dismissed with prejudice; it is

ORDERED that Counts I through VI, inclusive, of the **First Amended Complaint** [#66], filed April 13, 2015, are dismissed with prejudice as to the Pueblo defendants only; it is

ORDERED that as to Counts VII and VIII of the **First Amended Complaint** [#66], filed April 13, 2015, judgment with prejudice enters on behalf of defendants, John W. Hickenlooper, in his official capacity as Governor of Colorado; Barbara J. Brohl, in her official capacity as Executive Director of the Colorado Department of Revenue; W. Lewis Koski, in his official capacity as Director of the Colorado Marijuana Enforcement Division; The Board of County Commissioners of the County of Pueblo; and Pueblo County Liquor & Marijuana Licensing Board, and against plaintiffs, Safe Streets Alliance; Phillis Windy Hope Reilly; and Michael P. Reilly; it is

ORDERED that as to Counts I through VI, inclusive, of the **First Amended Complaint** [#66], filed April 13, 2015, at the time judgment enters, judgment with prejudice enters on behalf of defendants, The Board of County Commissioners of the County of Pueblo; and Pueblo County Liquor & Marijuana Licensing Board, and against plaintiffs, Safe Streets Alliance; Phillis Windy Hope Reilly; and Michael P. Reilly; it is

ORDERED that defendants are awarded their costs associated with Counts VII and VIII (***see* Order Granting Motion To Sever** [#114], filed July 14, 2015), to be taxed by the clerk of the court in the time and manner specified in Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1; it is

ORDERED that at the time judgment enters, the Pueblo defendants are to be awarded any additional costs associated with Counts I through VI, inclusive, to be taxed by the clerk of the court in the time and manner specified in Fed. R. Civ. P. 54(d)(1) and

D.C.COLO.LCivR 54.1; and it is

ORDERED that defendants, John W. Hickenlooper, in his official capacity as Governor of Colorado; Barbara J. Brohl, in her official capacity as Executive Director of the Colorado Department of Revenue; W. Lewis Koski, in his official capacity as Director of the Colorado Marijuana Enforcement Division; The Board of County Commissioners of the County of Pueblo; and Pueblo County Liquor & Marijuana Licensing Board, are dismissed as named parties to this action.

Dated at Denver, Colorado this 26th day of January, 2016.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ K. Finney

K. Finney
Deputy Clerk