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 ALTERNATIVE HOLISTIC HEALING, LLC, et al., Appellees, __________ State of Nebraska, et al., Movants.	No. 16-1048
JUSTIN E. SMITH, et al., Plaintiffs-Appellants, v. JOHN W. HICKENLOOPER, as Governor of Colorado, et al., Defendant-Appellee. __________ State of Nebraska, et al., Movants.	Consolidated with No. 16-1095

(caption continued on inside cover)

No. 16-1048 - On Appeal from the United States District Court
for the District of Colorado, No. 15-cv-349 (Blackburn, J.)

No. 16-1095 - On Appeal from the United States District Court
for the District of Colorado, No. 15-cv-462 (Daniels, J.)

APPELLEES PUEBLO COUNTY LIQUOR & MARIJUANA LICENSING BOARD AND THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PUEBLO'S ANSWER BRIEF

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Oral Argument is requested.

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PRIOR OR RELATED APPEALS

There are no prior appeals. This appeal has been consolidated with *Smith v. Hickenlooper, et al*., Case No. 16-1095.

JURISDICTIONAL STATEMENT

The Pueblo Appellees agree with the jurisdictional statement of the Safe Streets Appellants.

STATEMENT OF THE ISSUE

Can the Safe Streets Appellants affirmatively bring an action to enjoin local and state officials from operating under state law where the federal Controlled Substances Act does not expressly or impliedly allow for private enforcement?

STATEMENT OF THE CASE AND FACTS

Appellees Board of County Commissioners of the County of Pueblo and the Pueblo County Liquor and Marijuana Licensing Board (the "Pueblo Appellees") adopt and incorporate by reference the Statement of the Case and Facts in the Answer Brief filed by co-Appellees Governor Hickenlooper, the Executive Director of the Colorado Department of Revenue, and the Director of the Colorado Marijuana Enforcement Division (the "Colorado Appellees") (*See* Combined Opening Br. of the State Defs.-Appellees, at 6-15).

The Pueblo Appellees provide this supplemental statement to address facts and proceedings related to the claims brought against them by the Appellants Safe Streets Alliance, Phillis Windy Hope Reilly and Michael P. Reilly (collectively "Safe Streets").

I. Supplemental Statement of Facts.

Colorado's Retail Marijuana Code authorizes local jurisdictions to adopt and impose their own local licensing requirements to restrict the time, place, manner and number of marijuana businesses. Colo. Rev. Stat. § 12-43.4-301(2) (2015). Under that authority, Pueblo County adopted its own licensing requirements for retail marijuana businesses. (Safe Streets App., Vol. 1, at A066, ¶¶ 48-50.)[1]

In 2014, Alternative Holistic Healing, LLC d/b/a Rocky Mountain Organic applied for state and local licenses for a recreational marijuana cultivation business in Pueblo County. (*Id.* at A071-A072.) The Pueblo County Board of County Commissioners approved the license. (*Id.*)

II. Supplemental Course of Proceedings.

Originally Safe Streets brought six claims under the Racketeer Influenced and Corrupt Organizations Act,18 U.S.C. § 1962 (the "RICO claims") against non-

[1] The Pueblo Appellees refer to the appendix submitted by Safe Streets as the "Safe Streets App." to avoid confusion with the appendices filed by other appellants in this consolidated appeal.

governmental defendants and brought two "Federal Preemption" claims against the Pueblo Appellees and the Colorado Appellees. (*See id.* at A039-A040). Safe Streets later filed a First Amended Complaint reasserting their Federal Preemption claims and also bringing multiple RICO claims against the Pueblo Appellees.

The District Court dismissed the RICO claims against the Pueblo Appellees on the grounds that a government cannot be a RICO defendant. (*See* Safe Streets App., Vol. 2, at A369-A371.) As noted by Safe Streets, they do not challenge that holding on appeal. (*See* Opening Br. of Pls.-Appellants Safe Streets Alliance, et al., ("Opening Brief") at 7, n.3.)[2]

SUMMARY OF THE ARGUMENT

As the Supreme Court recently confirmed, Congress has the power "to leave the enforcement of federal law to federal actors." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). The threshold question in this case is whether Congress, when it passed the Controlled Substances Act, 21 U.S.C. §§ 841, *et seq.* ("CSA"), contemplated that private individuals could enforce its

[2] The Pueblo Appellees focus this Answer Brief on the issues raised in the Safe Streets' Opening Brief rather than those raised in the brief filed by the putative intervenors, the States of Nebraska and Oklahoma. Consistent with the Pueblo Appellees' Response to Motion to Intervene by the States of Nebraska and Oklahoma (the "Response"), the Pueblo Appellees do not consider Nebraska and Oklahoma to be proper parties to this appeal. To avoid unnecessary duplication with the Response, however, the Pueblo Appellees stand on the Response rather than revisit their opposition in this Answer Brief.

provisions by appealing to the equitable power of federal courts—despite the fact that Congress had created a comprehensive criminal statute that expressly delegates exclusive enforcement authority to the Attorney General. The District Court properly answered this question in the negative, finding that Safe Streets could not enforce the CSA against the Pueblo Appellees.

The District Court's dismissal of Safe Streets' preemption claims should be affirmed. The District Court, applying *Armstrong*, correctly found that Congress, by providing a broad range of remedies for violations of the CSA, implicitly precluded private enforcement of the act. The District Court also correctly found that the amount of discretion vested to the Attorney General to pursue violations of the CSA made the act judicially unadministrable. The District Court's decision is consistent with the Supreme Court's *Armstrong* decision as well as the Court's recognition of traditional limitations on a court's equitable powers. For such reasons, this Court should affirm the District Court's decision.

ARGUMENT

I. Standard of appellate review.

The standard of review for a district court's dismissal under Fed. R. Civ. P. 12(b)(6) is *de novo*. *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1144 (10th Cir. 2013). Therefore, like the District Court, this Court accepts the well-pleaded

factual allegations of the complaint as true and views them in a light most favorable to the plaintiff. *Id.* "While factual conclusions are taken as true, legal conclusions are not." *Id.*

II. *Armstrong* provides the framework for this appeal.

The Supreme Court's decision in *Armstrong* provides the framework for evaluating whether Safe Streets can invoke a trial court's equitable powers to enforce a criminal law. In *Armstrong*, the plaintiffs were private in-home medical care providers who worked with patients covered by Idaho's Medicaid plan. *Id.* at 1382. They sued two officials from Idaho's Department of Health and Welfare, alleging that Idaho violated a rate-setting section in the Medicaid Act, 42 U.S.C. §1396a(a)(30)(A), by reimbursing the plaintiffs at lower rates than permitted by that federal law. *Id.* The district court granted summary judgment for the plaintiffs, and the Ninth Circuit affirmed, holding that the plaintiffs "had an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation." *Id.* at 1383 (internal quotation marks omitted).

The Supreme Court reversed. *Id.* at 1388. There are three distinct sections of the analysis in *Armstrong*. The first, set forth in Part II of *Armstrong*, in which a majority of the Court joined, held that there is no private right of action under the

Supremacy Clause. *Id.* at 1383. The Supremacy Clause "creates a rule of decision"—not a private cause of action. *Id.* at 1383. The Court reasoned that the Constitution grants Congress broad discretion to enact laws and to decide how and when they are enforced. *Id.* at 1383–84. Allowing private citizens to enforce every federal law under the Supremacy Clause would infringe on Congress's power: "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." *Id.* at 1384 (emphasis in original). The Court noted that 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.* (emphasis in original).

In Part III, also joined by a majority, the Court addressed whether, in the absence of a cause of action under the Supremacy Clause, the private plaintiffs could enforce federal law simply by invoking the equitable powers of federal courts. *Id.* at 1385. "The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Id.* To determine whether such limitations exist, the Court turned to two factors. First, the Court examined whether the Medicaid Act's remedial scheme limited the type of

relief available for its violation. *Id.* The Court noted that the "sole remedy Congress provided for a State's failure to comply with Medicaid's requirements…is the withholding of Medicaid funds by the Secretary of Health and Human Services.…As we have elsewhere explained, the 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)). Thus, the Court found that "the Medicaid Act implicitly precludes private enforcement of § 30(A), and respondents cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement." *Id.*

Second, the Court analyzed whether Section 30(A) of the act was "judicially unadministrable." Section 30(A) did not specify a rate that states must pay to providers but rather required states to provide methods and procedures relating to the payment for care and services under Medicaid "as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care…. 42 U.S.C. § 1396a(a)(30)(A). The Court found that enforcing this broad and vague standard was more appropriately suited to the expertise of the Secretary, not the

courts, thereby affirming that the act precluded private enforcement of its terms in the courts.[3] *Armstrong*, 135 S. Ct. at 1385.

In Part IV of *Armstrong's* analysis, which was not joined by a majority, the Court stated, "The last possible source of a cause of action for respondents is the Medicaid Act itself." *Id.* at 1387. The Court held that there was nothing that created a private right to sue under the Medicaid Act, finding again that an "explicitly conferred means of enforcing" precluded other means and that the Act did not unambiguously confer a private right of action. *Id.* at 1387-88.

Having found that the Medicaid Act could not be privately enforced, the Court reversed summary judgment for the providers.

[3] Safe Streets argues that both factors must be met in all circumstances before a court can hold that a statute removed equitable authority. (*See* Opening Brief at 16 ("[T]he 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 unadminstrable' standard."). That is not what *Armstrong* says, however. The case states: "The provision for the Secretary's enforcement by withholding funds *might not*, by itself, preclude the availability of equitable relief." *Armstrong*, 135 S. Ct. at 1385 (emphasis added). The terms "might not" imply that the judicial administrability of a law is just another factor that adds to the decision—and certainly not a requirement that must be met. *See Alexander v. Sandoval*, 536 U.S. 275, 290 (2001) (The suggestion of congressional intent found by an express enforcement provision of a substantive law can be "so strong that it precludes a finding of congressional intent to create a private right of action…."); *Cf. BellSouth Telecomms., LLC v. Louisville/Jefferson Cnty. Metro Gov't*, No. 3:16-CV-124-TBR, 2016 U.S. Dist. LEXIS 97226 (W.D. Ky. July 26, 2016) (concluding without analysis that "The Supreme Court clarified that the combination of both factors was necessary to conclude that Congress intended to 'preclude[] private enforcement of § 30(A) in the courts.'").

III. The District Court Properly Applied *Armstrong*.

Contrary to Safe Streets' contention, the District Court utilized the correct legal framework under *Armstrong* to determine whether it had the equitable power to enjoin the Colorado and Pueblo defendants from using their state and local laws to regulate recreational marijuana. The Court separately reviewed whether there was a right of action under the CSA itself and then whether the court's equitable powers could be invoked to enforce the CSA. (Safe Streets App., Vol. 2, at A364-A365.)

The District Court first addressed whether there is a private right of action under the CSA itself. (*Id.* at A365.) This analysis is tied to Part IV of *Armstrong*. The District Court quickly and properly acknowledged that there is a "strong presumption that criminal statutes…do not create private rights of action." (*Id.*) It further noted that the CSA does not contain any explicit "rights-creating language," and then cited to a litany of cases holding that there are no private rights of action under the CSA. (*See id.* at A365-A366 (collecting cases).) Given this backdrop, it is clear that the CSA does not provide a private right of action by implication, let alone unambiguously confer such right. *See Armstrong*, 135 S. Ct. at 1387-88 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)).

Next, the District Court addressed the entirely separate issue of whether Congress intended to foreclose equitable relief when it passed the CSA. (*Id.* at A366-A369.) In this part of its analysis, which is tied to Part III of *Armstrong*, the District Court examined both of the two factors that the *Armstrong* Court analyzed. First, the District Court examined the remedial scheme that Congress established for enforcing the substantive provisions of the CSA that Safe Streets seeks to enforce – i.e., those that criminalize the possession and distribution of marijuana. (*Id.* at A366 (citing 21 U.S.C. §§ 841, 843, 848, 854, 856).) Those provisions, the District Court correctly noted, may be enforced by the Attorney General criminally, *see* 21 U.S.C. §§ 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." (Safe Streets App., Vol. 2, at A366.)

Second, the District Court examined whether the CSA was judicially administrable. Citing Supreme Court precedent, the District Court noted that Congress granted the United States Attorney General, and by delegation the Department Justice, discretion whether to prosecute or what charges to file for violations of the CSA. (*Id*. at A367-A368 (citing *United States v. Armstrong*, 517

U.S. 456, 464 (1996) and *United States v. Batchelder*, 442 U.S. 114 (1979).) "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." (*Id.* at A368.)

Despite the District Court's distinct analysis, Safe Streets' Opening Brief mischaracterizes it as "conflat[ing] 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." (*See, e.g.*, Opening Brief at 19.)[4]

The District Court did not "conflate" anything. Rather, as explained above, the District Court based its order on two independent bases. The court's analysis of whether Congress intended to foreclose equitable relief when it passed the CSA

[4] *See also* Opening Brief at 10 (alleging that the District Court's conclusion "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 created an implied right of action"); *Id.* at 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?"); *Id.* at 8 (suggesting that the District Court "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").

was completely separate from (and did not rely on) the "strong presumption that criminal statutes…do not create private rights of action." (*Compare* Safe Streets App., Vol. 2, at A366-A369 with *id*. at A365.) Safe Streets' suggestion otherwise mischaracterizes the District Court's order.

IV. The District Court correctly found that no implied claim in equity exists under the CSA.

Not only did the District Court employ the correct analysis, it reached the correct conclusion when it found that the CSA does not allow Safe Streets an implied private right of action to enjoin the Pueblo Appellees from regulating the sale and distribution of recreational marijuana that was made legal under Amendment 64. First, as the District Court noted, the CSA's remedial scheme limits who can enforce the act and how it can be enforced. The CSA specifically vests the Attorney General with the authority to enforce its provisions and expressly allows the Attorney General to delegate "any of his functions" to the Department of Justice. *See* 21 U.S.C. § 871(a).

Furthermore, the CSA expressly limits who, other than the Attorney General and by designation the Department of Justice, can enforce its terms. For example, the CSA allows the United States Postal Service to seek forfeitures under the CSA by prior agreement, *see* § 881(*l*); allows states to enforce the restrictions against online pharmacies, *see* § 882(c); and allows cooperative enforcement with state,

tribal and local law enforcement by contractual agreement, *see* § 873(a)(7). The express designation of persons who can enforce the CSA evidences Congress's intent to foreclose suits by others.

In addition to limiting who can enforce the CSA, Congress identified the ways by which the act could be enforced. The CSA provides a wide range of criminal, civil, and administrative remedies, and as the Colorado Appellees state in their answer brief, the express provision of a "panoply" of remedies provides an even more compelling case against an implied private right of action in equity than the Medicaid Act in *Armstrong*. (*See* Combined Answer Br. of the State Defs.-Appellees, at 35.) The limits on who can and how to enforce the CSA evidences an intent to foreclose claims in equity by private individuals.

Safe Streets argues that Section 903 of the CSA requires recognition of an implied action in equity, but that overstates the role of Section 903. Section 903 states:

> 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.

21 U.S.C. § 903. The section is a rule of decision designed to eliminate complete field preemption by the CSA and allow states to operate in this area. But much like its constitutional counterpart, the Supremacy Clause, it does not imply a private right of action as a rule of decision. *See Armstrong*, 135 S. Ct. at 1383. In other words, Section 903 can be enforced in the context of prosecutions or other proceedings authorized under the CSA.

Second, as the District Court noted, the prosecutorial discretion to enforce the CSA makes the act judicially unadministrable. Although Safe Streets claims that an implied claim in equity to enjoin state and local officials from regulating marijuana is not a prosecutorial act, and therefore does not affect prosecutorial discretion, this argument is disingenuous. By seeking to dismantle state and local laws regulating marijuana that is legal under state law, Safe Streets effectively seeks to enforce the substantive provisions of the CSA in a way that cannot be harmonized with the policy decisions of the Attorney General to not interfere with states' legalization of recreational marijuana. As a result, the implied action advanced by Safe Streets would be judicially unadministrable, providing another reason for finding no such action exists.

For all these reasons, the District Court correctly concluded that Safe Streets has no implied right of action to enjoin the Pueblo Appellees from regulating the

distribution and sale of marijuana that Colorado voters made legal in Amendment 64.

V. Safe Streets' expansive view of suits in equity runs counter to *Armstrong*.

Safe Streets' construction of the background default rule is that equitable relief is "always" available to enjoin state and local officers from taking actions that conflict with federal law. This construction is built from the following language in *Armstrong*: "The dissent agrees with us that … Congress may displace the equitable relief that is traditionally available to enforce federal law." *Id*. at 1385-186 (cited in part in Opening Brief at 12). Safe Streets reads this statement regarding the traditionally available equitable relief too broadly. Rather than create a default presumption in favor of equitable relief, the statement refers to the recognition of a federal court's equitable authority to enjoin local or state officials in limited settings – both arising in the context of state or local enforcement activities.

First, preemption can be raised as a defense by a defendant who is federally regulated but faced with liability under state law. *See, e.g., Geier v. Am. Honda Motor Co. Inc.*, 529 U.S. 861 (2000) (addressing a car manufacturer's defense to a plaintiff's common law tort claim for negligent design of a vehicle on the grounds of preemption by federal safety regulations).

Second, a party facing threatened state enforcement of a regulation that may be preempted by federal law may seek to enjoin state or local officials by asserting preemption as an anticipatory defense. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (in response to a state's notice of intent to sue to enforce guidelines regarding airline fare advertising, airlines sought injunctive relief to enforce the preemptive effect of a federal deregulation act); *Shaw v. Delta Airlines*, 463 U.S. 85 (1983) (employer sought declaratory judgment that ERISA preempted state law regarding the substance of benefit plans). Allowing an equitable claim in such circumstances allows a party to avoid injury from having to comply with potentially invalid state law or impending liability for violating a state law. As these cases show, traditionally equitable relief has been available in limited circumstances not present here.

Although Safe Streets argues that a claim in equity is "the usual and default mechanism" by which a plaintiff can seek relief from a state law that he believes is preempted by a federal law, two aspects of *Armstrong* foreclose this argument. First, the respondents in *Armstrong* argued to the Supreme Court that federal courts have unlimited power to issue equitable relief directly under the Supremacy Clause. *See* Br. for Resp'ts in *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378 (2015) (2014 U.S. S. Ct. Briefs LEXIS 4424), at 43-44. The petitioners described

the respondents' argument as "essentially advocat[ing] for a default rule that unless Congress acts to preclude private enforcement of § 30(A), private enforcement is presumptively available." *See* Reply Br. for Pet'rs in *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015) (2014 U.S. S. Ct. Briefs LEXIS 3218), at 8. Rather than adopt such a "default rule" of presumptively available equitable relief, the Supreme Court found that federal courts' equitable power "to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385.

Second, by reversing the Ninth Circuit in *Armstrong*, the Supreme Court implicitly rejected that court's holding in *Independent Living Center of S. California v. Shewry*, 543 F.3d 1050 (9th Cir. 2008), which found that equitable relief was presumptively available under the Supremacy Clause. In *Armstrong* the Ninth Circuit, relying exclusively on *Shewry*, found that home care providers had "an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation." *Exceptional Child Ctr., Inc. v. Armstrong*, 567 Fed. Appx. 496, 497 (9th Cir. 2014) (citing *Shewry*, 543 F.3d at 1065). In *Shewry*, a group of pharmacies, health care providers and beneficiaries of the state's Medicaid program, Medi-Cal, sought to enjoin a state official from implementing legislation that would reduce payments to providers

under Medi-Cal. *Id*. at 1052. Like the plaintiffs in *Armstrong*, the *Shewry* plaintiffs argued that the state's actions violated Section 30(A) of the Medicaid Act and sought an injunction under the Supremacy Clause. *Id*.

The district court found that the *Shewry* plaintiffs had no claim for equitable relief under the Supremacy Clause. The district court reasoned that traditionally parties had been allowed to seek injunctive relief on the ground of preemption only in limited circumstances. *Id.* at 1054. The Ninth Circuit reversed, finding equitable relief was presumptively available under the Supremacy Clause and was not subject to the limits identified by the district court. *Id*. at 1056-57. By reversing the Ninth Circuit's decision in *Armstrong*, which relied on *Shewry*, the Supreme Court effectively rejected the notion that equitable relief is presumptively available by default. The Supreme Court's holding in *Armstrong*, and its implicit rejection of the Ninth Circuit's holding in *Shewry*, forecloses Safe Streets' argument that equitable relief is available by default.

In addition, *Armstrong's* holding regarding the limits on federal courts' equitable power was not restricted to the Medicaid Act. To the contrary, the Supreme Court summarized its prior jurisprudence on the power of federal courts to enjoin executive action and broadly proclaimed that such power was subject to Congress's intent to foreclose equitable relief. *Armstrong*, 135 S. Ct. at 1385. Had

the Court considered Section 30(A) of the Medicaid Act to be an exception from a general "default rule" of presumptively available equitable relief, the Court would have so stated. The absence of such narrowing language shows that the Court did not consider there to be a default rule.

Safe Streets' attempt to broaden *Armstrong's* acknowledgment that "in a proper case, relief may be given in a court of equity," also flies in the face of the traditional limitations on a court's equitable powers as recognized by the Supreme Court in *Armstrong* and other cases. As *Armstrong* effectively acknowledges, Justice Roberts laid the groundwork for *Armstrong's* holding that Congress may displace the equitable relief that may be available to enforce federal law in his dissenting opinion in *Douglas v. Independent Living Center of S. California, Inc. See Armstrong*, 135 S. Ct. at 1385 (citing *Douglas v. Indep. Living Ctr.of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (Roberts, C. J., dissenting) ("…[T]he Medicaid Act implicitly precludes private enforcement of §30(A), and respondents cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement.")).[5]

[5] Justices Scalia, Thomas and Alito—all of whom joined in the majority opinion in *Armstrong*—joined in the *Douglas* dissent. Notably, the *Douglas* majority did not reach the Supremacy Clause question, instead remanding for further proceedings. Thus, *Douglas* cannot be read as rejecting the dissent's position on foreclosing equitable relief.

In *Douglas*, the dissent rejected the argument that there was a private right of action based on the "traditional exercise of equity jurisdiction." *Douglas*, 132 S. Ct. at 1213. Indeed, "[i]t is a longstanding maxim that '[e]quity follows the law.'" *Id*. (quoting 1 J. Pomeroy, Treatise on Equity Jurisprudence § 425 (3d ed. 1905)). Consequently, a court of equity may not create a remedy in violation of law, or even without the authority of law. *See id*. (quoting *Rees v. Watertown*, 86 U.S. 107, 19 Wall. 107, 122, 22 L. Ed. 72 (1984)); *see also Armstrong*, 135 S. Ct. at 1385 (quoting *INS v. Pangilinan*, 486 U.S. 875, 883 (1988) (quoting *Hedges v. Dixon Country*, 150 U.S. 182, 192 (1893)) ("'Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'").

Thus, if the law established by Congress is that there is no remedy available to private parties to enforce the federal rules against the State, a court cannot reach a contrary conclusion under its general equitable powers. *See Douglas*, 132 S. Ct. at 1213. To do so

> …would raise the most serious concerns regarding both the separation of powers (Congress not the Judiciary, decides whether there is a private right of action to enforce a federal statute) and federalism (the States under the Spending Clause agree only to conditions clearly specified by Congress, not any implied on an ad hoc basis by the courts).

Id. Safe Streets' theory that it has a right to seek injunctive relief which can be implied from a court's general equitable powers ignores these constraining principles and turns them on their head.[6]

As discussed above, the CSA leaves the enforcement of that federal law to federal actors and forecloses the remedy that Safe Streets seeks here (i.e. an injunction in favor of a private party seeking to enforce the CSA). Thus, since equity must follow the law, a court cannot provide such a remedy to a private party under its general equitable powers. *See Douglas*, 132 S. Ct. at 1213.

The same is true under the Racketeer Influenced and Corrupt Organizations Act ("RICO") which provides private parties with a limited remedy related to certain violations of the CSA as part of racketeering activity. *See* 18 U.S.C. §§ 1961(1), 1962(c), and 1964(c) (providing that "[a]ny person injured in his business or property by reason" of a violation of RICO's substantive provisions may

[6] As the *Douglas* dissent explained, this is not to say that federal courts lack equitable powers to enforce the supremacy of federal law when such action gives effect to the federal rule, rather than contravening it as was the case in *Ex parte Young* and its progeny. *See id*. (citing 209 U.S. 123 (1908).) "Those cases, however, present quite different questions involving 'the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law.'" *Id*. (quoting *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011) (Kennedy J., concurring).) As was the case in *Douglas*, nothing of that sort is at issue here. Safe Streets is not subject to or threatened with any enforcement proceeding like the one in *Ex parte Young*. "They simply seek a private cause of action Congress chose not to provide." *Id*.

"recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee…").[7] Importantly, however, local governments such as Pueblo are not subject to RICO liability. *See, e.g., Rogers v. City of New York*, 359 F. App'x 201, 204 (2d Cir. 2009); *Genty v. RTC*, 937 F.2d 899, 914 (3d Cir. 1991); *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.*, 2015 U.S. App. LEXIS 8171 (5th Cir. May 18, 2015); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991). Thus, Safe Streets' implied remedy—injunctive relief against Pueblo—would circumvent the narrow damages remedy allowed private parties against private parties under RICO in violation of the constraints on the court's general equitable powers. *See Douglas*, 132 S. Ct. at

[7] There is a split of authority over whether RICO allows private plaintiffs to obtain injunctive relief and neither the Tenth Circuit nor the Supreme Court has ruled on the question. *See, e.g., National Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001) (holding that RICO permits private parties to seek injunctive relief), rev'd on other grounds, *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003); *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986) (holding injunctive relief is not available to private parties under RICO). The circuit courts that have addressed the issue in *dicta* are also split. *See, e.g., Johnson v. Collins Entm't Co.*, 199 F.3d 710 (4th Cir. 1999) (expressing substantial doubt that injunctive relief available for private RICO plaintiffs); *In re Fredeman Litig,*. 843 F.2d 821 (5th Cir. 1988) (finding Ninth Circuit's *Wollersheim* opinion persuasive); *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983) (concurring justice stating that injunctive relief should be available to private plaintiffs under RICO); *Trane Co. v. O'Connor Sec.*, 718 F.2d 26 (2d Cir. 1983) (expressing doubt as to the propriety of private party injunctive relief in RICO actions). But even if RICO allows a private party to seek injunctive relief, such a claim cannot be brought against a governmental entity in any event.

1213. Therefore, Safe Streets' arguments must be rejected for these reasons as well.

VI. The Court should not reach the merits of the pre-emption issue.

Alternatively, in the event that the Court does not affirm the District Court's dismissal of Safe Streets' claims against the Pueblo Appellees, the Court should not reach the merits of the pre-emption claims but instead should remand to the District Court to make findings on the merits. This Court adheres to the general rule "that a federal appellate court does not consider an issue not passed upon below." *See In re Mather*, 959 F.2d 894, 896 (10th Cir. 1992) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)); *see also United States v. Kovach*, 208 F.3d 1215, 1220 (10th Cir. 2000) ("Absent extraordinary circumstances this Court will not consider an issue on appeal that was not decided first in the district court.").

Here, the District Court did not reach the merits of Safe Streets' pre-emption claims, having found that the claims were not viable because Safe Streets did not have an implied right to a judicially created equitable remedy. (Safe Streets App., Vol. 2, at A368-A369.) Safe Streets does not articulate any extraordinary circumstance that takes this case out of the general rule. In these circumstances, the Court should decline to reach the merits of Safe Streets' pre-emption claims on appeal, unless the Court will use this ground as an alternative basis to affirm the

dismissal below. (*See* Combined Answer Br. of the State Defs.-Appellees, at 59-67.)

CONCLUSION

For all the foregoing reasons, the Pueblo Appellees respectfully request that the Court affirm the District Court's dismissal of Safe Streets' Federal Preemption claims.

STATEMENT OF COUNSEL IN SUPPORT OF ORAL ARGUMENT

Counsel respectfully requests oral argument. Oral argument is necessary in this appeal because it raises an issue of first impression in this Court: whether private individuals can enjoin local governments under the Controlled Substance Act from regulating the production, sale and distribution of recreational marijuana that was made legal in Colorado under Amendment 64.

CERTIFICATE OF COMPLIANCE

I certify that because this brief does not exceed 30 pages, that a Word count is not required under F.R.A.P. 32(a)(7)(B).

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing Answer Brief, as submitted in digital form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot Secure Anywhere, version 9.0.3.37, Virus Definitions updated daily. According to the program, this machine is free of viruses. In addition, I certify that no privacy redactions were required.

By: *s/ Josh A. Marks*

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Respectfully submitted this 10th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2016, I electronically filed the foregoing **APPELLEES PUEBLO COUNTY LIQUOR & MARIJUANA LICENSING BOARD AND THE BOARD OF COUNTY COMMISSIONERS OF PUEBLO COUNTY'S ANSWER BRIEF** with the Clerk of the Court using the CM/ECF system which will send notification to such filing to the following e-mail addresses,

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