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.,
Defendant-Appellee,

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

(caption continued on inside cover)

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

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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

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INTRODUCTION

The Supreme Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), leaves only a narrow question for this Court to answer when deciding whether Plaintiffs may pursue their preemption claims: does the Controlled Substances Act (CSA) implicitly repeal the federal courts' traditional equitable power to enjoin state officers from implementing policies that conflict with federal law? Under *Armstrong*, it clearly does not. The CSA neither (1) expressly enumerates an alternative mechanism for enforcing its preemption of conflicting state laws, nor (2) imposes a judgment-laden, judicially unadministrable standard of conduct on the States, the meaning of which the courts would need to ascertain in order to determine whether the challenged state conduct conflicts with federal law. And under *Armstrong*, *both* elements are required to displace the federal courts' traditional equitable power.

Unable to satisfy either of the requirements set out in *Armstrong* for finding an implicit repeal of the federal courts' traditional equitable powers, Defendants attempt to shoehorn numerous irrelevant factors into the analysis. For example, Defendants emphasize the criminal sanctions that the CSA imposes on individuals who manufacture or distribute controlled substances. But Defendants are unable to cite *any* case that has ever suggested that the fact that a statute imposes legal obligations *on third parties* and provides an express mechanism for enforcing *those*

obligations against the *third parties* somehow suggests that Congress has withdrawn the federal courts' traditional authority to enjoin state officers from implementing policies that conflict with federal law. To be clear, Plaintiffs' preemption claim does not seek to enforce the CSA's criminal prohibitions against individuals or companies in Colorado who manufacture and distribute marijuana. Rather, Plaintiffs seek to enjoin Defendants' conduct that is in positive conflict with the CSA, and is thus preempted. 21 U.S.C. § 903. Unlike enforcement of the CSA's criminal prohibitions, Congress has not vested enforcement of the statute's preemptive effect with the Attorney General. Defendants and their amici likewise make much of the Department of Justice's current drug enforcement priorities. But a federal agency's enforcement policy cannot change the preemptive scope of a duly enacted federal statute.

Defendants also urge the Court to adopt a very narrow reading of the courts' traditional equitable power to enjoin state officers' conduct that conflicts with federal law, arguing that this power is (or should be) limited to cases where the federal law in question itself creates a private right of action or where the individual invoking the courts' power faces an actual or threatened enforcement action based on the challenged state law. But this narrow view of the courts' equitable power cannot be reconciled with an overwhelming body of precedent dating back to the earliest years of the Republic, and it was not embraced by

Armstrong. However much Defendants might wish that *Armstrong* had overruled the many Supreme Court precedents allowing suits like this one to go forward, it did not. Plaintiffs are clearly entitled to invoke the federal courts' traditional equitable authority to enjoin state officers from injuring them by implementing state polices that conflict with federal law.

The State Defendants' arguments for affirmance on alternative grounds fare no better than their defense of the district court's rationale for dismissing this suit. The Safe Streets Plaintiffs challenge Defendants' decision to license a recreational marijuana cultivation facility—the only marijuana cultivation facility currently operating in close proximity to the Reillys' property. Under the relevant redressability precedents, Plaintiffs clearly need not challenge state *medical* marijuana laws that have not and might never injure the Reillys in order to have standing to pursue claims against the only state laws that have so far caused them any harm.

Neither can the Court affirm the district court's decision based on the State Defendants' arguments that the CSA allows them to authorize, facilitate, and promote federal drug crimes. As the Ninth Circuit recently observed, "while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana." *United States v. McIntosh*, -- F.3d --,

2016 WL 4363168, at *11 n.5 (9th Cir. Aug. 16, 2016). Because Defendants' recreational marijuana laws do exactly that, they are preempted.

ARGUMENT

I. Plaintiffs May Sue in Equity To Enjoin Defendants from Implementing Policies that Conflict with the Federal Drug Laws.

A. The CSA Does Not Manifest an Intent To Foreclose Private Suits To Enjoin State Officers from Authorizing, Promoting, and Facilitating Federal Drug Crimes.

Armstrong provides the framework for determining whether the CSA forecloses suits in equity to enjoin the implementation of conflicting state laws, and under that framework Defendants can only prevail if they show *both*: (1) that the CSA makes "express provision" for an alternative "method of enforcing [the] substantive rule" that Plaintiffs seek to enforce; and (2) that permitting this case to go forward would require the courts to apply a "judgment-laden standard" that is "judicially unadministrable." 135 S. Ct. at 1385. Despite the Pueblo Defendants' argument to the contrary, Appellees Pueblo Cty. Liquor & Marijuana Licensing Bd. of Cty. Comm'rs of the Cty. of Pueblo's Answer Br. at 8 n.3 (Aug. 10, 2016) ("Pueblo Br."), Supreme Court precedent makes clear that both elements must be present to sustain the conclusion that Congress intended to implicitly foreclose suits to enjoin state officers from implementing policies that conflict with federal law. The Supreme Court in *Virginia Office for Protection and Advocacy v. Stewart* ruled that even when a statute provides for alternative enforcement mechanisms,

that alone "does not demonstrate that Congress has displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*." 563 U.S. 247, 256 n.3 (2011) (quotation marks omitted). Justice Scalia, who wrote for the majority in both *Virginia Office for Protection and Advocacy* and *Armstrong*, nowhere suggested—let alone held—that the latter decision somehow disturbed the holding of the former. *See Armstrong*, 135 S. Ct. at 1385 (favorably citing *Virginia Office for Protection and Advocacy*).[1]

1. The CSA Contains No Express Alternative to Private Suits in Equity for Enforcing Its Preemption of Federal Law.

Plaintiffs explained in their opening brief that the CSA does not satisfy the first *Armstrong* requirement because it contains no express alternative mechanism for vindicating the supremacy of the federal drug laws when state officers implement their own conflicting policies. Opening Brief of Plaintiffs-Appellants Safe Streets Alliance, et al. at 14, 24–25 (June 2, 2016) ("Safe Streets Br."). Defendants attempt to avoid the force of this point by urging the Court to move up a level of generality and ask whether the CSA as a whole "expressly enumerates specific methods of enforcement" against anyone who violates any of its

[1] The Pueblo Defendants cite *Alexander v. Sandoval*, 532 U.S. 275 (2001), to support their argument, but that case is inapposite because it addressed whether a statute *created* a federal right enforceable in a suit for damages under 42 U.S.C. § 1983, *see id.* at 290, an inquiry that is different from that used to determine whether Congress has *restricted* the courts' preexisting equitable authority to enjoin violations of federal law. *See* Safe Streets Br. 20–21; *infra* at 15–16.

provisions. Combined Answer Br. of the State Defendants-Appellees at 33 (Aug. 8, 2016) ("Colo. Br."); Pueblo Br. 12–13. But that is not the approach the Supreme Court took in *Armstrong*, which focused on the enumeration of an alternative method of compelling *States* to comply with *their obligations* under Section 30(A) of the Medicaid Act. *Armstrong*, 135 S. Ct. at 1385; *cf. Guggenberger v. Minnesota*, -- F. Supp. 3d --, 2016 WL 4098562, at *17 (D. Minn. July 28, 2016) ("*Armstrong* does not provide a basis for an across-the-board rejection of all private enforcement actions under the Medicaid Act's numerous varied provisions."). In other words, in *Armstrong* the Court focused on the Medicaid Act's "express provision" for an alternative enforcement mechanism for Section 30(A), the very provision of the statute the State of Idaho's Medicaid plan was alleged to have violated. 135 S. Ct. at 1385. Here, by contrast, Congress has *not* made express provision for any alternative mechanism for enforcing the CSA's preemptive effect.

The State Defendants are wrong when they attempt to distinguish *Armstrong* on the ground that it focused on "enforcement of a substantive federal rule" rather than "a specific preemption provision," Colo. Br. 37, for the "substantive federal rule" at issue in that case was the rule that insufficiently generous Medicaid reimbursement rates are preempted. Here, Plaintiffs seek to enforce the substantive federal rule that States may not authorize, promote, or facilitate

violations of the federal drug laws, and nothing in the CSA suggests that Congress intended for this rule to be enforced by some means other than private suits in equity against state officers. In this context, congressional silence means Congress *has not* displaced this traditional means of enforcing federal law.

Defendants' reliance on provisions of the CSA that authorize criminal prosecutions of individuals who violate their own obligations under the federal drug laws is also at odds with the Supreme Court's decision in *Seminole Tribe*. There the Court looked to Congress's enumeration of an alternative method of enforcing 25 U.S.C. § 2710(d)(3) against the States—not other provisions of the Indian Gaming Regulatory Act that imposed other obligations on other parties. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996) ("Where Congress has created a remedial scheme for the enforcement of *a particular federal right*, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." (emphasis added)). Significantly, Defendants are unable to identify *any* case in which a court has treated a statute's express provision of alternative enforcement mechanisms against *third parties* for violation of *their own* statutory obligations as an indication that Congress intended to implicitly foreclose suits in equity against state officers who implement policies that conflict with federal law.

The State Defendants also miss the mark when they rely on an appropriations rider that prevents the Department of Justice from spending money "to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of *medical* marijuana." Consolidated and Further Continuing Appropriations Act 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (emphasis added); *see* Colo. Br. 35–36; Colo. FRAP 28(j) Letter (Aug. 23, 2016). Irrespective of whether that rider forbids the Department of Justice to spend money prosecuting individuals who comply with a state's medical marijuana laws, it has no bearing on the *recreational* marijuana laws that are the subject of this suit. And in any event, under *Armstrong* a law barring the Department of Justice from deploying the alternative enforcement mechanisms on which Defendants rely would support rather than undermine the inference that Congress meant to leave intact the traditional, default rule that the supremacy of federal law may be enforced by a private suit in equity against state officers. As the Ninth Circuit recently emphasized, Congress has not repealed the CSA's prohibition on the manufacture and distribution of marijuana. *United States v. McIntosh*, -- F.3d --, 2016 WL 4363168, at *11 n.5 (9th Cir. Aug. 16, 2016). Unless and until it does so, the Court should reject statutory interpretations that would render its mandates wholly precatory.

Troublingly, one implication of Defendants' position appears to be that there would be no mechanism at all for enforcing the CSA's preemption of state recreational marijuana policies that are in positive conflict with the federal drug laws. Defendants nowhere suggest that they could be criminally prosecuted for their efforts to facilitate conduct that the CSA forbids, *see* Safe Streets Br. 24–25, and the same arguments Defendants make here would apply equally to a suit by the United States seeking the same relief, *cf.* Colo. Br. 45 (arguing that authority of Oklahoma and Nebraska to sue "depends on whether the CSA leaves open the possibility of an injunctive suit" and referencing earlier arguments concerning private plaintiffs' claims). The Congress that preempted state laws that are in "positive conflict" with the CSA surely did not simultaneously foreclose all means by which this preemption provision could be enforced against state officers. *See* 21 U.S.C. § 903.

2. Deciding Plaintiffs' CSA Preemption Claims Would Not Require the Court To Apply a "Judgment-Laden" Standard.

The CSA also fails *Armstrong*'s second requirement for showing that Congress has implicitly withdrawn the federal courts' equitable authority to hear claims against state officers, for determining whether the state conduct challenged here conflicts with the CSA would not require the courts to apply a "judgment-laden standard," *Armstrong*, 135 S. Ct. at 1385, but rather to resolve a pure and relatively straightforward question of law. Like the district court, Defendants

attempt to recast the inquiry in terms of "whether the *enforcement* of a federal statute is 'judgment-laden' and therefore 'judicially unadministrable.' " Colo. Br. 37 (emphasis added); *see* Pueblo Br. 14. But both the majority opinion in *Armstrong* and Justice Breyer's concurrence focused on the hazards of *judicial* attempts to determine and apply a "judgment-laden *standard*" governing the states' substantive legal obligations, not on whether other provisions of the Medicaid Act gave an *administrative agency* "judgment-laden" discretion in deciding whether to bring enforcement actions against third parties. *Armstrong*, 135 S. Ct. at 1385 (emphasis added); *id.* at 1388 (Breyer, J., concurring in part and concurring in the judgment) ("[A]s the majority points out, § 30(A) of the Medicaid Act sets forth a federal mandate that is broad and nonspecific." (citation omitted)). This Court recently applied the second *Armstrong* requirement in exactly the same way, allowing a preemption suit to proceed in a case that concerned a statute that made federal prosecutors subject to state ethical requirements because the statute's "directive is relatively straightforward." *United States v. Supreme Court of New Mexico*, 824 F.3d 1263, 1279 n.9 (10th Cir. 2016). Whether the decision to bring an action enforcing ethics rules against any particular attorney requires "judgment-laden" discretion did not factor into this Court's analysis.

More fundamentally, Defendants' argument that a federal agency's prosecutorial discretion to bring enforcement actions against third parties for

violating their own statutory obligations implicitly bars *Ex parte Young* suits against state officers to enjoin state conduct that conflicts with federal law would foreclose preemption suits that federal courts routinely entertain. It is of course very common for preemption claims against state officers to implicate the powers of a federal agency that has broad enforcement discretion. *See*, *e.g.*, *Watters v. Wachovia Bank, NA*, 550 U.S. 1 (2007) (Office of the Comptroller of the Currency); *Verizon Maryland, Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002) (FCC); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (OSHA). Yet the possibility that a private preemption suit might *influence* how agencies choose to exercise their enforcement discretion has never been thought to mean that Congress intended to foreclose such suits. Rather, the critical question under *Armstrong* is whether the merits of Plaintiffs' claims would require the Court to make the kind of judgment-laden decision regarding the substantive obligations imposed by federal law that is normally committed to agency discretion. *See* Safe Streets Br. 15–16. Plaintiffs here ask only that the Court undertake a standard conflict preemption analysis of Defendants' recreational marijuana laws and policies—not that it set rates that are "consistent with efficiency, economy, and quality of care" while "safeguard[ing] against unnecessary utilization of . . . care and services," as in *Armstrong*, 135 S. Ct. at 1385 (alteration in original) (quoting 42 U.S.C. § 1396a(a)(30)(A)), or oversee

State-Tribal bargaining to ensure the State's "good faith," as in *Seminole Tribe*, 517 U.S. at 74. The legal question presented in this case does not require the sort of "judgment-laden" inquiry regarding the substantive meaning of federal law that would suggest that Congress meant to implicitly narrow the federal courts' traditional equitable powers when it enacted the CSA.

B. Congress Seldom Withdraws the Federal Courts' Equitable Power To Enjoin State Officers from Implementing Policies that Conflict with Federal Law.

The conclusion that the CSA does not strip the federal courts of their equitable authority to hear Plaintiffs' claims is confirmed by the fact that Congress rarely exercises its power to foreclose private suits to enjoin state officers from implementing state policies that conflict with federal law. As Plaintiffs explained in their opening brief, private suits against state officers are the usual, default means by which the supremacy of federal law is enforced; federal courts have routinely entertained these types of cases since the early days of the Republic; and the Supreme Court has only twice found that Congress withdrew this equitable power—in *Armstrong* and *Seminole Tribe*. Safe Streets Br. 12–14. Unable to dispute this basic description of our Nation's long tradition of judicial review of unlawful action by state officials, the State Defendants suggest that *Armstrong* overruled an unspecified number of the dozens of cases in which the Supreme Court has exercised its authority to hear suits like this one. Colo. Br. 29 & n.6. But

Armstrong worked no such revolution in the fundamental relationship between state officers and the federal courts; it merely clarified that the courts' long-recognized authority to hear *Ex parte Young* suits derives not from the Supremacy Clause itself, but rather from the courts' traditional equitable powers, and it clarified and applied the standard for determining whether Congress has withdrawn those traditional powers.

The State Defendants only underscore how unusual it is for Congress to forbid the federal courts to enjoin state officers from implementing policies that conflict with federal law when they say they count not merely *two* but *three* relevant examples among the Supreme Court's numerous precedents addressing attempts to enforce state compliance with federal law. Colo. Br. 30–31. And despite the State Defendants' selective quotations from that third case—*INS v. Pangilinan*, 486 U.S. 875, 883–84 (1988)—it did not even involve allegedly unlawful action by *state* officers, and it ruled only that the power to award U.S. citizenship "has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." Plaintiffs here, in contrast, seek a negative injunction that would prevent state officers from implementing laws that conflict with the CSA, and the authority to provide such relief is among the traditional, "generally applicable equitable powers" that the federal courts may exercise absent a contrary congressional command.

The Pueblo Defendants attempt to avoid the significance of *Armstrong*'s recognition that equitable relief "is traditionally available to enforce federal law" by attacking a straw man. *Armstrong*, 135 S. Ct. at 1385–86. Plaintiffs' point is not "that equitable relief is 'always' available to enjoin state and local officers from taking actions that conflict with federal law," Pueblo Br. 15, but only that Congress seldom exercises its authority to foreclose such suits, and that it has not done so here. *Armstrong*'s holding that the Supremacy Clause does not prevent Congress from taking this step does nothing to diminish the fact that it has rarely done so. *See* Pueblo Br. 16–17. Indeed, the mistaken pre-*Armstrong* rulings of a number of lower federal courts that the Supremacy Clause mandates that such suits be allowed to go forward illustrates how rare it is for a federal statute to foreclose suits to enjoin state officers from implementing policies that conflict with federal law. *See id.* at 17–18.

C. Defendants' Attempt To Evade the *Armstrong* Framework Fails.

Apparently recognizing the weakness of their arguments under the standard set out in *Armstrong*, the State Defendants begin their discussion of this issue not with *Armstrong* but with a theory the Court in that case did not accept. Colo. Br. 26–32. According to this theory, a plaintiff may not sue state officers who are injuring him by implementing a policy that conflicts with federal law unless a federal statute confers "enforceable legal rights" or the suit is brought in

anticipation of a state enforcement action. Although the State Defendants do not cite it, this theory is derived from Chief Justice Roberts's dissenting opinion in *Douglas v. Independent Living Center*, 132 S. Ct. 1204, 1211 (2012) (Roberts, C.J., dissenting). For their part, the Pueblo Defendants are more explicit in urging the Court to treat the *Douglas* dissent as a majority opinion. *See* Pueblo Br. 19–22. But this Court is bound by the *Armstrong* majority, not the *Douglas* dissent, and even before *Armstrong* Defendants' alternative theory was foreclosed by precedent.

The State Defendants never explicitly say how a court should go about determining whether a statute creates "enforceable legal rights," but they appear to propose the strict test courts use for determining whether a statute creates an implied right of action. *See* Colo. Br. 31 (citing, *inter alia, Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)); *see also Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) (invoking the Supreme Court's "implied right of action and 42 U.S.C. § 1983 jurisprudence"). But as Plaintiffs explained in a portion of their opening brief to which the State Defendants never directly respond, *Armstrong* applied a standard for determining whether Congress has withdrawn the traditional equitable powers of the federal courts that is different from—and much more forgiving to plaintiffs than—the modern standard for finding an implied right of action. Safe Streets Br. 20–24. There are good reasons for distinguishing between these

scenarios: use of a traditional equitable power the federal courts have exercised throughout our Nation's history raises none of the separation of powers and federalism concerns implicated by a permissive approach to implied rights of action that would expose sovereign States to potential liability for damages.

The State and Pueblo Defendants are on no firmer footing when they propose that suits in equity to enjoin state officers from implementing policies that conflict with a federal statute may only be brought by plaintiffs facing actual or potential state enforcement actions. Colo. Br. 30; Pueblo Br. 15–16; *see also Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) (arguing that plaintiffs could not sue in equity because they were "not subject to or threatened with any enforcement proceeding"). As an initial matter, this argument makes nonsense out of the majority opinion in *Armstrong*, which applied its two-part test without any suggestion that doing so was unnecessary because the plaintiffs were not the potential targets of enforcement under the state policies they sought to challenge. 135 S. Ct. at 1385. Moreover, limiting suits against state officers in equity to cases brought by potential state court defendants would require overruling a host of Supreme Court cases—a step that five Justices in *Armstrong* were clearly not willing to take. *See, e.g.*, *Pharmaceutical Research & Mfrs. of America v. Walsh*, 538 U.S. 644, 662–68 (2003) (plurality); *id.* at 671 (Breyer, J., concurring in part and concurring in judgment); *id.* at 687 (O'Connor, J., dissenting) (suit brought by

prescription drug manufacturers alleging preemption of state prescription drug rebate program); *Foster v. Love*, 522 U.S. 67, 68–70, 74 (1997) (suit brought by voters alleging preemption of state primary law); *Edelman v. Jordan*, 415 U.S. 651, 655–56, 664–66 & n.11 (1974) (suit brought by beneficiaries of federal-state aid program alleging preemption of state policy on benefits payments). Defendants also fail to offer any rationale for limiting suits in equity in the manner that they propose; if the courts should allow a plaintiff to sue "to avoid injury from having to comply with potentially invalid state law," Pueblo Br. 16, then other types of injuries, such as those Plaintiffs allege here, should be an equally valid basis for invoking the federal courts' equitable powers.

The maxim "equity follows the law" is likewise no help to Defendants. *See* Colo. Br. 26–27; Pueblo Br. 20. As the leading treatise explains, to "raise [this maxim] to the position of a general principle," as Defendants attempt to do here, "would be a palpable error." 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 427, at 707 (3d ed. 1905). In other words, the maxim "cannot be generally affirmed" because it is "liable to many exceptions." 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 56, at 59 (2d ed. 1839). One such exception is the rule that permits suits in equity to enjoin unlawful action by state officers, and this exception "reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384. To be

sure, equity follows the law in the sense that "explicit Congressional curtailment of equity powers must be respected." *Guaranty Tr. Co. of N.Y. v. New York*, 326 U.S. 99, 105 (1945). But *Armstrong* supplies the test for determining whether any such curtailment has occurred in the CSA, and as Plaintiffs demonstrate above, it has not.

The State Defendants are also manifestly wrong when they make the sweeping assertion that equity "is not a standalone source of legal rights." Colo. Br. 27. Equity is in fact the origin of a host of substantive rights not recognized at common law—the law of trusts, for example, was an innovation of the Chancery Court and was "utterly unknown to the common law." 1 POMEROY, *supra*, § 38, at 39–40; *see also* F.W. MAITLAND, EQUITY 237 (1910) (observing that courts of equity were responsible for "inventing certain new rights and obligations, rights and obligations of a substantive kind"); Linda S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1252 (2001) (explaining that substantive rights, including "those arising from trusts, from marriage or parenthood, or from [unwritten] contracts . . . were created by courts of equity, and were unenforceable in common-law courts" (footnotes omitted)); John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173, 209 (1999) ("Like the common-law courts, courts of equity could develop substantive rights and devise procedures to enforce those rights."). Judge Plager's dissent in *Hilton Davis Chemical Co. v. Warner-*

Jenkinson Co., 62 F.3d 1512, 1540 (Fed. Cir. 1995) (en banc), which the State Defendants cite as if it were a majority opinion, does not say otherwise. Rather, Judge Plager's dissent only recognizes the Chancery Court's separate and distinct role in crafting equitable remedies to secure a common law right when a plaintiff's remedy at law is inadequate. "*In such a situation*, the court of equity does not grant new or unlimited rights to a claimant, but rather protects the claimant's established legal rights by providing a uniquely equitable remedy." *Id.* (emphasis added).

Finally, the Court should reject the Mikos amicus brief's invitation to abandon the *Armstrong* framework in favor of arm-chair speculation about congressional intent that is unmoored from statutory text or legislative history. Amicus Curiae Brief of Law Professors Robert A. Mikos et al. in Support of Affirmance (Aug. 15, 2016). The Mikos amicus brief's suggestion that Congress did not mean to allow private individuals injured by federal drug crimes to seek redress through the courts is difficult to reconcile with the fact that when Congress enacted RICO, it created a private right of action against those who operate illegal drug enterprises. *See* Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 649 (2011) (observing that "a typical [marijuana] dispensary almost certainly commits a substantive RICO violation" and that "there are clearly persons who have been injured by dispensaries' racketeering activity"); 18 U.S.C. § 1961(1)(D)

(defining "racketeering activity" to include violations of the CSA); *id.* § 1964(c) (creating private right of action for individuals injured in their business or property by prohibited racketeering activities). Indeed, RICO shows that Congress did not even intend for the enforcement of the CSA's criminal provisions to be the exclusive province of the Department of Justice, much less that Congress meant to upend the traditional rule that plaintiffs may sue state officials who are hurting them by implementing policies that conflict with federal law.

While the Mikos amicus brief contends that Congress would have been wise to leave it to the Department of Justice to decide whether anything should be done when state policies conflict with the federal drug laws, that is not the usual approach Congress takes when enacting valid legislation under the Commerce Clause that preempts state law. *See* Safe Streets Br. 18–19. Whether out of recognition of the Department of Justice's limited resources, worry that the agency might not faithfully enforce federal drug policy in the face of conflicting state laws, or deference to our Nation's long history of permitting private suits to enjoin unlawful action by state officers, a straightforward application of the *Armstrong* test shows that Congress chose not to restrict the federal courts' traditional equitable powers when it enacted the CSA. Neither amici's policy preferences nor the Department of Justice's enforcement priorities may overturn that decision.

II. The Safe Streets Plaintiffs' Injuries Are Redressable.

As the *Smith* Plaintiffs ably demonstrate in their reply brief, an injury is redressable for Article III purposes if "a favorable decision would create 'a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.' " *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1166 (10th Cir. 2012) (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)); *see* Smith Plaintiffs' Reply Br. 8 (Aug. 29, 2016). Under that standard, the State Defendants' arguments do not come close to justifying dismissal of the Safe Streets Plaintiffs' claims on redressability grounds. Colo. Br. 55–56.

As they relate to the Safe Streets Plaintiffs, the State Defendants' redressability arguments boil down to speculation that, in the wake of a ruling in Plaintiffs' favor, the businessmen who are operating a commercial recreational marijuana grow facility immediately next to the Reillys' property might: (1) grow marijuana at the same location for their own personal use; or (2) obtain new licenses from Defendants and use the facility to grow *medical* marijuana.[2] The first

[2] Before the district court, the State Defendants also argued that the Reillys' injuries are not redressable because, even if the authorizing licenses are revoked, the Reillys' neighbors might continue to grow recreational marijuana in defiance of state law. *See* COLO. REV. STAT. § 12-43.4-304(1) ("A license applicant is prohibited from operating a licensed retail marijuana business without state and local jurisdiction approval."). The State Defendants do not renew that argument in their brief to this Court, and for good reason. It is well established that plaintiffs' injuries are redressable where they challenge "government action that permits or

of these suggestions is risible. The focus of the Reillys' suit is a large, commercial recreational marijuana grow facility constructed at the behest of businessmen from elsewhere in the state and specially built to grow hundreds of marijuana plants. *See* First Amended Compl. ¶¶ 10–14, 59, 87, Aplt. App. Vol. 1 at A053–54, A070, A081. The State Defendants' suggestion that these businessmen might in the future use the facility to grow marijuana for their personal use under a state law that permits the possession of no more than six plants per person and that these scaled back operations would continue to emit the same "recurring, skunk-like marijuana odor" onto the Reillys' land is highly implausible. Colo. Br. 55; COLO. CONST. art. XVIII, § 16(3)(b) (limiting personal use right to "no more than six marijuana plants"). Again, Plaintiffs need only allege that a ruling in their favor would lead to "a significant increase in the likelihood" that their injuries will be redressed—absolute certainty is not required. *US Magnesium*, 690 F.3d at 1166.

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authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *National Wrestling Coaches Ass'n v. Department of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004). It beggars belief to suggest that after a decision striking down Colorado's regulatory regime the Reillys' neighbors would persist in activity that would both violate State law and fall outside of the safe harbors established by the Department of Justice. *See* Memorandum from James M. Cole, Deputy Attorney General, to All United States Att'ys, Guidance Regarding Marijuana Enforcement 2–3 (Aug. 29, 2013), *available at* http://goo.gl/PfTsxE.

The State Defendants' speculation that the facility next to the Reillys' property might someday be converted to grow *medical* marijuana likewise depends on a series of highly uncertain future contingencies that do not defeat Plaintiffs' standing. As an initial matter, the Reillys' property, which is not near any current medical marijuana grow facilities, will only be subjected to injuries from such a facility if both the State and Pueblo Defendants license one. It is well established that plaintiffs challenging governmental action have standing when the factor that makes redress uncertain "relates solely to [the defendant's] own conduct in the future." *Telephone and Data Sys., Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994). Thus, in *Federal Election Commission v. Akins*, 524 U.S. 11, 25 (1998), the plaintiff had standing to challenge an FEC decision even though the Supreme Court acknowledged that the agency might be able to exercise its discretion to reach the same result on different grounds. In the same way here, the possibility that the State and Pueblo Defendants might in the future license a medical marijuana grow facility next to the Reillys' property does not prevent the Reillys from suing to challenge the licensing of the only facility that their neighbors are currently operating.

Any injuries the Reillys might suffer in the future from Defendants' medical marijuana laws also depends on their neighbors deciding to apply for a license to grow medical marijuana and to operate the facility in accordance with such a

license. But the business model of the entities that operate the recreational marijuana facility that is next to the Reillys' property is to grow marijuana in Pueblo County and then sell it in Black Hawk, Colorado—a mountain tourist town dominated by out-of-state visitors who under Colorado law may only purchase *recreational* marijuana. First Amended Compl. ¶¶ 72, 82, Aplt. App. Vol. 1 at A074–75, A079; *see* COLO. CONST., art. XVIII, § 14(3)(b) ("In order to be placed on the state's confidential registry for the medical use of marijuana, a patient must reside in Colorado . . . ."). The State Defendants admit that recreational marijuana represents "half of [Colorado's] marijuana industry," Colo. Br. 54, and there is good reason to doubt that, following a ruling in Plaintiffs' favor, it would be economically feasible for the Reillys' neighbors to convert their property to a medical marijuana grow facility.[3]

III. The CSA Preempts State and Local Laws that Authorize, Promote, or Facilitate Federal Drug Crimes.

The Safe Streets Plaintiffs incorporate by reference the preemption arguments offered by the Smith Plaintiffs in their reply brief and in this brief offer

[3] Whether members of Safe Streets other than the Reillys have been injured by Defendants' medical marijuana laws is irrelevant to the redressability analysis. *See Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 905 (10th Cir. 2012) ("[R]edressability is satisfied when a favorable decision relieves *an* injury, not every injury.").

several additional points with respect to the merits of their preemption claims.[4] *See* Smith Plaintiffs' Reply Br. 10–16.

First, while the State Defendants are desperate to cast this suit as seeking to "commandeer the States" by "effectively requiring them to criminalize marijuana-related activity," Colo. Br. 67, Plaintiffs' reading of the CSA would do no such thing. Congress has the power to preempt state laws that affirmatively authorize, promote, or facilitate conduct that federal law prohibits, and it is only those features of Defendants' recreational marijuana policies that Plaintiffs challenge. *See* Safe Streets Br. 27–28. The CSA is a valid exercise of Congress's power under the Commerce Clause, *Gonzales v. Raich*, 545 U.S. 1, 22 (2005), and neither the anti-commandeering doctrine nor general principles of federalism give the States license "to obstruct the free course of a power given to Congress." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827) (Marshall, C.J.).

Second, the State Defendants attempt to distinguish *Michigan Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984), and *NCAA*

[4] The State Defendants misread Safe Streets' opening brief when they say that our position is that the Court should enter judgment in Plaintiffs' favor without remand. Colo. Br. 58. Rather, Plaintiffs' position is that if the Court resolves the *Armstrong* and standing issues in their favor, it should proceed to decide whether the merits arguments Defendants pressed below provide an alternative basis for affirming the district court's decision. If the Court concludes that they do not, it should explain the basis for that conclusion in an opinion that would guide further proceedings on remand.

v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013), on the ground that the state laws held preempted in those cases "went beyond 'authorizing' conduct that federal law prohibited." Colo. Br. 65–66 & n.20. But regardless of whether the outcomes in those cases were overdetermined, both opinions make clear that a state law's authorization of conduct that a federal statute prohibits is sufficient to render that state law preempted. *Michigan Canners*, 467 U.S. at 478 (explaining 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" (quotation marks omitted)); *NCAA*, 730 F.3d at 236 (state licensing of conduct that violated federal statute would have been preempted "even if" express provision of federal law forbidding state licensing "were excised" from the statute).

The Ninth Circuit recently expressed support for applying the approach to preemption found in *Michigan Canners* and *NCAA* to state laws that authorize the cultivation and sale of marijuana:

> Nor does any state law "legalize" possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art. VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.

United States v. McIntosh, -- F.3d --, 2016 WL 4363168, at *11 n.5 (9th Cir. Aug. 16, 2016). The State Defendants candidly acknowledge that they are implementing

laws that purport to "authorize . . . recreational marijuana," Colo. Br. 62, but under the Supremacy Clause "states cannot actually authorize" such conduct, *McIntosh*, 2016 WL 4363168, at *11 n.5.

Third, as the State Defendants acknowledge, under *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466, 2477 (2013), "a State cannot avoid preemption by asserting that individuals may comply with state and federal laws by declining to engage in commercial activity." Colo. Br. 61. The State Defendants are wrong when they argue that this tenet of impossibility preemption is inapplicable because "the CSA entirely prohibits marijuana-related activity rather than subjecting it to different authorizing regulations." Colo. Br. 61–62. As an initial matter, the State Defendants offer no rationale for limiting *Bartlett* in this way, and it would be extremely odd for the courts to take a *narrower* view of impossibility preemption when Congress concludes that certain conduct is so harmful that it must be entirely prohibited rather than regulated to a lesser degree. In any event, the State Defendants' argument is foreclosed by the Supreme Court's decision in *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142–43 (1963), which explained that 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. It makes no difference if federal law prohibits rather than regulates the sale of

avocados with more than 7% oil—impossibility preemption displaces the contrary state law.

Finally, the Washington State amici's argument that there is no obstacle preemption under 21 U.S.C. § 903 is foreclosed by the Supreme Court's interpretation of a materially identical statute in *Wyeth v. Levine*, 555 U.S. 555 (2009). *See* Safe Streets Br. 35–36. The Washington State amici's theory was presented to the Court in *Wyeth*, but rather than endorsing it the majority devoted nine pages of its opinion to analyzing whether the state law at issue posed an obstacle to the accomplishment of the relevant federal statute's goals. *Wyeth*, 555 U.S. at 573–81; *see also United States v. Zadeh*, 820 F.3d 746, 751–52 (5th Cir. 2016). And even setting *Wyeth* aside, the text of Section 903 and other similar preemption provisions is drawn from an early Supreme Court opinion that articulated standard principles of obstacle preemption. *See Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 243 (1859). In enacting Section 903, Congress plainly did not intend to allow the States to erect obstacles to the accomplishment of the CSA's purposes.

CONCLUSION

The district court's decision dismissing Plaintiffs' preemption claims should be reversed.

Date: August 29, 2016

Respectfully submitted,

s/ David H. Thompson

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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 6,825 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 New Roman 14-point font.

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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 August 29, 2016, and according to the program are free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2016, I electronically filed the foregoing using the court's CM/ECF system. The CM/ECF system will send electronic notification of such filing to all counsel of record.

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