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September 7, 2016

VIA ELECTRONIC FILING
Elisabeth Shumaker, Clerk
United States Court of Appeals for the Tenth Circuit
The Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257

Re: *Safe Streets Alliance v. Hickenlooper*, No. 16-1048, *Smith v. Hickenlooper*, No. 16-1095

Dear Ms. Shumaker:

The district court in *Carter v. Inslee*, No. 16-0809 (W.D. Wash. Aug. 25, 2016), acknowledged that "[o]nly where Congress has provided express provisions for enforcement of a statute *against a state* should the court refuse to exercise equitable jurisdiction via the doctrine of *Ex parte Young*" and that the CSA "lack[s] . . . a mechanism for enforcement against the states." Op. 13. That should have been the end of the analysis. Under *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015), the absence of an alternative mechanism for enforcing state officers' obligations under a federal statute establishes that Congress did not implicitly foreclose private suits in equity—the traditional, default mechanism by which federal law is vindicated in the face of conflicting state policies. *See* Opening Brief of Plaintiffs-Appellants Safe Streets Alliance at 14, 24–25 (June 2, 2016); Reply Brief of Plaintiffs-Appellants Safe Streets Alliance at 5–9 (Aug. 29, 2016).

In nevertheless dismissing the suit on the ground that the CSA "does not grant rights to individual citizens," Op. 12, the *Carter* court confused the demanding standard for concluding that a statute *confers* a private right of action with the plaintiff-friendly standard set out in *Armstrong* for determining whether Congress has *withdrawn* the federal courts' preexisting equitable powers. The *Armstrong*

Court clearly distinguished between these two standards, and the State Defendants' argument to the contrary would inter Part III of the *Armstrong* majority opinion.

Finally, it should be noted that the *Carter* court appears to have reached the right result for the wrong reason. Unlike the Safe Streets Plaintiffs, who fit squarely within the category of individuals that the CSA was enacted to protect, the plaintiffs in *Carter* advanced a federal preemption argument in an effort to evade regulatory *burdens* imposed by Washington's marijuana laws. But a federal court may not use its equitable powers to issue an order that would facilitate a plaintiff's criminal activity. *See In re Arenas*, 535 B.R. 845, 849–50 (B.A.P. 10th Cir. 2015).

Sincerely,

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

cc: All counsel of record (via CM/ECF)

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) any 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 September 7, 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.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 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.

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