859 F.3d 865
United States Court of Appeals,
Tenth Circuit.

SAFE STREETS ALLIANCE; Phillis Windy Hope Reilly; Michael P. Reilly, Plaintiffs–Appellants,
v.
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; James Burack, in his official capacity as Director of the Colorado Marijuana Enforcement Division; The Board of County Commissioners of the County of Pueblo; Pueblo County Liquor & Marijuana Licensing Board, Defendants–Appellees,
and
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 Doe 1, Defendants.
State of Nebraska; State of Oklahoma, Intervenors.
State of Washington; State of Oregon; Robert A. Mikos; Sam Kamin; Douglas A. Berman; Robert J. Watkins; Alex Kreit, Amici Curiae.
Justin E. Smith; Chad Day; Shayne Heap; Ronald B. Bruce; Casey Sheridan; Frederick D. Mckee; John D. Jenson; Mark L. Overman; Burton Pianalto; Charles F. Moser; Paul B. Schaub; Scott DeCoste, Plaintiffs–Appellants,
v.
John W. Hickenlooper, Governor of the State of Colorado, Defendant–Appellee.
State of Washington; State of Oregon; Robert A. Mikos; Sam Kamin; Douglas A. Berman; Robert J. Watkins; Alex Kreit, Amici Curiae.
Safe Streets Alliance; Phillis Windy Hope Reilly; Michael P. Reilly, Plaintiffs–Appellants,
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, Defendants–Appellees,
and
Roger Guzman; Blackhawk Development Corporation; Washington International Insurance Co.; The Board of County Commissioners of the County of Pueblo; Pueblo County Liquor & Marijuana Licensing Board; John Doe 1, Defendants.

No. 16-1048, No. 16-1095, No. 16-1266
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FILED June 7, 2017

BRISCOE, Circuit Judge.

These three appeals arise from two cases that concern the passage, implementation, and alleged effects of Amendment 64 to the Colorado Constitution, Colo. Const. art. XVIII, § 16. Amendment 64 repealed many of the State's criminal and civil proscriptions on "recreational marijuana,"[1] and created a regulatory regime designed to ensure that marijuana is unadulterated and taxed, and that those operating marijuana-related enterprises are, from the State's perspective, licensed and qualified to do so. Of course, what Amendment 64 did not and could not do was amend the United States Constitution or the Controlled Substances Act (CSA), 21 U.S.C. §§ 801–904, under which manufacturing, distributing, selling, and possessing with intent to distribute marijuana *remains illegal* in Colorado. See U.S. Const. art. VI, cl. 2. The three appeals at issue and two related motions to intervene raise four principal disputes stemming from the alleged conflict between the CSA and Colorado's new regime.

Two of the appeals were brought in Safe Streets Alliance v. Alternative Holistic Healing, LLC. First, in No. 16-1266, two Colorado landowners challenge the district court's dismissal of their claims brought under the citizen-suit provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), against certain affiliates of a State- and county-licensed marijuana manufactory that allegedly has injured the landowners' adjacent property. We conclude that the landowners have plausibly alleged at least one § 1964(c) claim against each of those defendants. We therefore reverse, in part, the dismissal of those claims and remand for further proceedings.

Second, in No. 16-1048, those landowners and an interest group to which they belong appeal the district court's dismissal of their purported causes of action "in equity" against Colorado and one of its counties for ostensibly also having injured the landowners' property by licensing that manufactory. The landowners and the interest group allege that Amendment 64's regime is preempted by the CSA, pursuant to the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the CSA's preemption provision, 21 U.S.C. § 903.[2] We conclude that neither the landowners nor the interest group purport to have any *federal substantive*

rights that have been injured by Colorado or the county's actions. And because they have no substantive rights in the CSA to vindicate, it follows inexorably that they cannot enforce § 903 "in equity" to remedy their claimed injuries. We therefore affirm the dismissal of their preemption claims.

The third appeal, No. 16-1095, was filed in Smith v. Hickenlooper. In that case, a group of Colorado, Kansas, and Nebraska sheriffs and county attorneys sued Colorado on similar theories that Amendment 64's regime is preempted by the CSA. The district court dismissed their claims, and we consolidated the appeal with No. 16-1048. Because those plaintiffs also do not claim injuries to their federal substantive rights, we likewise affirm.

Finally, the States of Nebraska and Oklahoma moved to intervene in Safe Streets Alliance and Smith while they were pending on appeal. Those States claim that Amendment 64 injures their sovereign interests and those of their citizens, and that its enforcement is preempted by the CSA. We granted their motion in No. 16-1048 and heard their arguments, which confirmed that their controversy is with Colorado. Given that fact, we must confront 28 U.S.C. § 1251(a), which forbids us from exercising jurisdiction over controversies between the States. We therefore cannot permit Nebraska and Oklahoma to intervene, or even confirm that they have a justiciable controversy that may be sufficient for intervention. Consequently, we vacate the order granting intervention in Safe Streets Alliance and deny the States' motions in both cases.

I. Standards of Review

* * * *

Further, "[w]e review a Rule 12(b)(6) dismissal de novo." George v. Urban Settlement Servs., 833 F.3d 1242, 1247 (10th Cir. 2016) (citation omitted). "A pleading is required to contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' " SEC v. Shields, 744 F.3d 633, 640 (10th Cir. 2014) (quoting Fed. R. Civ. P. 8(a)(2)). "We accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the" plaintiff. Id. (quoting Burnett v. Mortg. Elec. Registration Sys., Inc., 706 F.3d 1231, 1235 (10th Cir. 2013)). We then "determine whether the plaintiff has provided 'enough facts to state a claim to relief that is plausible on its face.' " George, 833 F.3d at 1247 (quoting Hogan v. Winder, 762 F.3d 1096, 1104 (10th Cir. 2014)).

"In determining the plausibility of a claim, we look to the elements of the particular cause of action, keeping in mind that the Rule 12(b)(6) standard [does not] require a plaintiff to 'set forth a prima facie case for each element.' " Id. (quoting Khalik v. United Air Lines, 671 F.3d 1188, 1192–93 (10th Cir. 2012)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." Kan. Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1215 (10th Cir. 2011). But "mere 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim." Id. at 1214 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Thus, a "claim is facially plausible if the plaintiff has pled 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " George, 833 F.3d at 1247 (quoting Hogan, 762 F.3d at 1104, which in turn quotes Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

However, "when legal conclusions are involved in the complaint[,] 'the tenet that' " we accept the allegations as true "is inapplicable to [those] conclusions." Shields, 744 F.3d at 640 (second alteration in original) (citation omitted). We likewise "review de novo a district court's determination of state law." Elwell v. Byers, 699 F.3d 1208, 1214 n.4 (10th Cir. 2012) (quoting Salve Regina Coll. v. Russell, 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991)). Finally, in reviewing orders issued under Rules 12(b)(1) and (6), as in other contexts, we of course "can affirm a lower court's ruling on any grounds adequately supported by the record, even grounds not relied upon by the district court." Id. at 1213 (citation omitted).

II. Safe Streets Alliance

In Safe Streets Alliance, the plaintiffs are Michael P. Reilly, Phillis Windy Hope Reilly, and Safe Streets Alliance ("Safe Streets"). Safe Streets is a "nonprofit organization devoted to reducing crime and illegal drug dealing," No. 16-1048, Aplt. App. at 51,[3] "whose members are interested in law enforcement issues, particularly the enforcement of federal law prohibiting the cultivation, distribution, and possession of marijuana." Id. at 52. The Reillys are the only identified members of Safe Streets, and neither they nor their interest group asserted class or other claims on behalf of any other Coloradans. We address their RICO claims first and then turn to their preemption claims.

The RICO claims

The Reillys own a parcel of land in Pueblo County, Colorado that is part "of the Meadows at Legacy Ranch, a development on the south side of Pickney Road." Id. at 80. Safe Streets does not hold any property interest in that land. According to the Reillys, their land is a "beautiful rolling pasture with sweeping mountain vistas that include views of Pike's Peak." Id. The "Reillys do not live on their land," and the only known structures there are "two agricultural buildings" of vague description. Id. However, the Reillys "often visit" the property "on weekends with their children to ride horses, hike, and visit with friends in the closely-knit neighborhood." Id.

The allegations

To the "west and immediately adjacent to the Reillys' property" is 6480 Pickney Road, id., the site of a recreational "marijuana grow" operating out of a newly constructed building located "just a few feet from the Reillys' property line." No. 16-1266, Aplt. App. at 129. The operation of the enterprise and the resultant noxious odors emanating from it are alleged to have caused harms of two general types.

First, the Reillys claim that the "publicly disclosed drug conspiracy" itself has "injured the value of [their] property." Id. at 131. "People buy lots at the Meadows at Legacy Ranch because they want to keep horses or build homes in a pleasant residential area, and the Reillys' land" allegedly "is less suitable for those uses due to the 6480 Pickney Road marijuana grow." Id. For example, "the large quantity of drugs at marijuana grows" purportedly "makes them targets for theft, and a prospective buyer of the Reillys' land would reasonably worry that the 6480 Pickney Road marijuana grow increases crime in the area." Id.

Second, the Reillys aver that "[s]ince construction of the facility was completed, its operation has repeatedly caused a distinctive and unpleasant marijuana smell to waft onto the Reillys' property, with the smell strongest on the portion of [their] property that is closest to [the] marijuana cultivation facility." Id. at 130. "This noxious odor" allegedly "makes the Reillys' property less suitable for recreational and residential purposes, interferes with the Reillys' use and enjoyment of their property, and diminishes the property's value." Id.

The Reillys thus contend that the recreational marijuana facility adjacent to their land has *both* interfered with their present use and enjoyment of the land and caused a diminution in its market value—e.g., by subjecting the land to the operation's noxious emissions and by commencing that criminal enterprise nearby.

In Counts I through VI of their Second Amended Complaint, the Reillys brought civil RICO claims under § 1964(c) against a host of individuals and entities purportedly affiliated with that neighboring marijuana enterprise. On appeal, the remaining defendants to those claims are 6480 Pickney, LLC, Alternative Holistic Healing, LLC, Camp Feel Good, LLC, Jason M. Licata, Joseph R. Licata, and Parker Walton. We refer to them collectively as the "Marijuana Growers."

According to the Reillys, the Marijuana Growers "all understood and agreed that the property" adjacent to the Reillys' land "would be used to grow recreational marijuana for sale at Alternative Holistic Healing's Black Hawk store, among other places." Id. at 119. The Reillys therefore claim that 6480 Pickney, LLC and Alternative Holistic Healing, LLC are each unlawful enterprises. In addition, the Reillys allege that the Marijuana Growers "pooled their resources, knowledge, skills, and labor to achieve through [an] enterprise efficiencies in the cultivation and distribution of marijuana that none of them could have achieved individually." Id. at 126. On that basis, the Reillys claim that the Marijuana Growers also formed a distinct "association-in-fact enterprise for the purpose of cultivating marijuana at 6480 Pickney Road." Id.

Consequently, the Reillys allege that the Marijuana Growers are each subject to civil liability under § 1964(c) for the injuries they have caused to the Reillys' property by operating their association-in-fact enterprise, which by definition flouts the CSA, and therefore violates RICO. See 18 U.S.C. § 1962(c). The Reillys note, for example, that "[l]easing or maintaining property for the cultivation of marijuana is a crime under" the CSA "and is racketeering activity" under RICO. No. 16-1266, Aplt. App. at 119. Likewise, "[d]ealing in marijuana is racketeering activity under RICO," as is "conspir[ing] with racketeers by agreeing to assist them" in their unlawful endeavors. Id. at 101. "And because RICO defines most violations of the CSA as 'racketeering activity,' " the Reillys assert, "any business engaged in the commercial cultivation and sale of recreational marijuana is a criminal enterprise for purposes of" RICO. Id. at 108 (citation omitted). They therefore claim that all

those who "conduct or conspire to assist such enterprises" are subject to "civil liability" under § 1964(c), such that the Marijuana Growers are liable for harming the Reillys' property. Id.

In moving to dismiss, the Marijuana Growers argued that the "speculative injury to" the Reillys' "property value" was no "proof of a concrete financial loss," and was therefore insufficient "to allege an existing, concrete, financial injury," which, in their view, is an element of a § 1964(c) claim. Id. at 25. They also vaguely suggested that the Reillys had not plausibly alleged that the Marijuana Growers were engaged in a RICO enterprise. Yet the Marijuana Growers also explicitly conceded that they each "agreed to grow marijuana for sale" at 6480 Pickney Road, adjacent to the Reillys' land. Id. at 28.

The district court dismissed these RICO claims with prejudice, concluding that the Reillys had not pled a plausible injury to their property that was proximately caused by the Marijuana Growers' activities in violation of the CSA. The district court recognized that the Reillys alleged a "noxious order [sic] emanat[es] from the" Marijuana Growers' adjacent enterprise, which "permit[s] a reasonable inference that the value of their property is negatively impacted." Id. at 207. Yet the district court rejected that argument on the basis that the Reillys had "provide[d] no factual support to quantify or otherwise substantiate their inchoate concerns as to the diminution in value of their property." Id.

The district court underscored the Reillys' purported failure to plead that their "land has been appraised for" less "than before the grow operation opened." Id. And the district court remarked that the Reillys had "point[ed] to no concrete evidence (as opposed to mere inchoate fears) that potential purchasers have expressed concern about living near such a facility, much less declined to buy lots ... nearby." Id. Continuing that theme, the district court determined that the complaint was deficient because the Reillys failed to "cite to any study or statistics that might demonstrate a causal relationship between the operation of such businesses and decreased property values" nearby. Id. According to the district court, the Reillys therefore failed to make the "showing of damages that are clear and definite" required for "RICO standing," counseling dismissal of their "wholly speculative" claims. Id. at 207–08.

The Reillys timely appealed, which is before us as No. 16-1266.[4]

Analysis

"RICO is to be read broadly." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). It "created a new civil cause of action for '[a]ny person injured in his business or property by reason of a violation of [its] prohibitions.' " RJR Nabisco, Inc. v. European Cmty., ––– U.S. ––––, 136 S.Ct. 2090, 2096, 195 L.Ed.2d 476 (2016) (alteration in original) (quoting 18 U.S.C. § 1964(c)). That is, RICO vests a private citizen with substantive rights to avoid "injur[ies]" to "his business or property" caused by a pattern of racketeering activity, and it explicitly creates a federal cause of action to vindicate those federal rights. 18 U.S.C. § 1964(c). To maintain a cause of action under § 1964(c), a plaintiff must plead and ultimately prove: (1) that the defendant violated § 1962; (2) that the plaintiff's business or property was injured; and (3) that the defendant's violation is the cause of that injury. Id.; see RJR, 136 S.Ct. at 2096–97.

The Reillys assert several theories under which the Marijuana Growers individually and collectively have violated § 1962, to the injury of the Reillys' adjacent land. Here, we need only address one. The Reillys allege that the Marijuana Growers formed an association-in-fact enterprise that has and will continue to engage in a pattern of contravening the CSA through the manufacture of marijuana for distribution, an organizational mission that is a flagrant violation of § 1962(c). The Reillys also claim, *inter alia*, that neighboring illegal enterprise directly reduces the present value of their land by openly operating a criminal initiative; directly causes noxious odors to infiltrate their property, interfering with their present use and enjoyment of the land; and directly reduces the property's present value by burdening it with those emissions. As we will explain, those alleged violations of § 1962(c) and direct injuries are sufficient for the Reillys to proceed on their RICO claims.

A. *Violation of § 1962(c)*

Congress has determined that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...." 18 U.S.C. § 1962(c). Said more succinctly, § 1962(c) "makes it unlawful for a person employed by or associated with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity." RJR, 136 S.Ct. at 2097. We have held that a plaintiff asserting a § 1964(c) claim for a violation of § 1962(c) "must plausibly allege that"

the defendants "each (1) conducted the affairs (2) of an enterprise (3) through a pattern (4) of racketeering activity." George, 833 F.3d at 1248 (citing 18 U.S.C. § 1962(c); Robbins v. Wilkie, 300 F.3d 1208, 1210 (10th Cir. 2002)).

The Marijuana Growers forfeited any challenge to several of those elements here by failing to raise and argue them in the district court. See Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1127–30 (10th Cir. 2011). We nevertheless address each element because the factual allegations plausibly demonstrating them significantly overlap. See Boyle v. United States, 556 U.S. 938, 947, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009) (explaining that "evidence used to prove" the elements of a RICO claim may "coalesce" (citation omitted)). We also address the elements out of order because it better frames our discussion.

1. Racketeering activity

"RICO is founded on the concept of racketeering activity. The statute defines 'racketeering activity' to encompass dozens of state and federal offenses, known in RICO parlance as predicates. These predicates include any act 'indictable' under specified federal statutes," and among them is "drug-related activity that is 'punishable' under federal law." RJR, 136 S.Ct. at 2096 (quoting 18 U.S.C. § 1961(1)(D)). As relevant here, "racketeering activity" includes "dealing in a controlled substance or listed chemical [ ]as defined in" the CSA. 18 U.S.C. § 1961(1)(A). Racketeering activity also includes "any offense involving ... the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical," as defined in the CSA, that is "punishable under any law of the United States...." Id. § 1961(1)(D).

It follows, therefore, that operating a marijuana cultivation facility of the type the Reillys described in their Second Amended Complaint necessarily would involve *some* racketeering activity. As just one example, cultivating marijuana for sale—which the Marijuana Growers admit they agreed to do and they allegedly began and are continuing to do—is by definition racketeering activity. See id. We conclude the Reillys have adequately alleged that the Marijuana Growers are each engaged in racketeering activity.

2. Association-in-fact enterprise

Turning to the alleged affiliates of the facility at issue here, "RICO broadly defines 'enterprise' as 'any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.' " George, 833 F.3d at 1248 (quoting 18 U.S.C. § 1961(4)). Among other theories, the Reillys relied on "the latter part of this definition, alleging that" the Marijuana Growers "formed an association-in-fact enterprise." Id. (citation omitted). An "association-in-fact enterprise is 'a group of persons associated together for a common purpose of engaging in a course of conduct.' " Boyle, 556 U.S. at 946, 129 S.Ct. 2237 (citation omitted). Such an entity "need not have a hierarchical structure or a 'chain of command....' " Id. at 948, 129 S.Ct. 2237. For it to exist requires only "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." Id. at 946, 129 S.Ct. 2237.

Here, the Reillys alleged that for over a year the Marijuana Growers formed "an association-in-fact enterprise for the purpose of cultivating marijuana at 6480 Pickney Road and selling it at Alternative Holistic Healing's Black Hawk store, among other places." No. 16-1266, Aplt. App. at 126. To advance their aims, the Marijuana Growers purportedly "pooled their resources, knowledge, skills, and labor to achieve through th[at] enterprise efficiencies in the cultivation and distribution of marijuana that none of them could have achieved individually." Id. The Reillys' allegations of purpose, relationship, and longevity are sufficient for them to proceed on the basis that the Marijuana Growers together created an association-in-fact enterprise.

The Marijuana Growers appear to suggest that these allegations are insufficient because the Reillys also alleged that the corporate defendants were separate, smaller RICO enterprises. So far as it goes, they are correct that RICO "requires that the 'person' conducting the enterprise's affairs be distinct from the 'enterprise.' " George, 833 F.3d at 1249 (citing Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 160, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001)). That is, "a single person cannot be both the RICO enterprise and the RICO defendant." RJR, 136 S.Ct. at 2104 (citing Cedric, 533 U.S. at 162, 121 S.Ct. 2087). But that is irrelevant in this instance.

Specifically, the Reillys' alternative enterprise theories do not undermine their well-supported allegations that the Marijuana Growers are each participating in a distinct,

larger, association-in-fact enterprise. See Boyle, 556 U.S. at 946, 129 S.Ct. 2237; George, 833 F.3d at 1250. The Marijuana Growers allegedly have long worked in concert to achieve market efficiencies toward their common aim of cultivating, distributing, and selling marijuana, which undisputedly affects interstate commerce. See RJR, 136 S.Ct. at 2106 (explaining that the enterprise must affect interstate commerce). The Reillys have adequately alleged that the Marijuana Growers formed an association-in-fact enterprise.

3. Conducting the enterprise's affairs

We now turn to each of the Marijuana Growers' conduct in furtherance of their common goals. To maintain a § 1964(c) claim against any particular defendant, the Reillys need only to have alleged facts plausibly demonstrating that the defendant "conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs." 18 U.S.C. § 1962(c). "This, in turn, requires a showing that the defendant 'participate[d] in the operation or management of the enterprise itself.' " George, 833 F.3d at 1251 (quoting Reves v. Ernst & Young, 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993)). "Under Reves' operation or management test, the defendant must have 'some part in directing' the enterprise's affairs." Id. (quoting Reves, 507 U.S. at 179, 113 S.Ct. 1163).

However, "the defendant need not have 'primary responsibility for the enterprise's affairs,' 'a formal position in the enterprise,' or 'significant control over or within [the] enterprise' " to be liable under RICO. Id. (citation omitted). The defendant's actions also need not have advanced an "economic motive." Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 252, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994). "Nevertheless, a defendant must do more than simply provide, through its regular course of business, goods and services that ultimately benefit the enterprise." George, 833 F.3d at 1251 (citation omitted). For example, the Reillys at one time alleged that a contractor violated § 1962 by delivering water to the Marijuana Growers' operation. Without more, that would be insufficient to establish that the contractor was part of the enterprise. See id.

But "a plaintiff can easily satisfy Reves' operation and management test by showing that an enterprise member played some part—even a bit part—in conducting the enterprise's affairs." Id. at 1252. The Marijuana Growers admit that they all "agreed to grow marijuana for sale" at the facility adjacent to the Reillys' property, a facility at which they allegedly have been doing just that. No. 16-1266, Aplt. App. at 28. This plausibly alleges that the Marijuana Growers each conducted the enterprise's affairs.

4. Pattern

For the first time on appeal, the Marijuana Growers suggest that the Reillys failed to plead sufficient facts to demonstrate that they engaged in a pattern of racketeering activity. "A predicate offense implicates RICO when it is part of a 'pattern of racketeering activity'—a series of related predicates that together demonstrate the existence or threat of continued criminal activity." RJR, 136 S.Ct. at 2096–97 (quoting 18 U.S.C. § 1961(5), which requires at least two predicate acts committed within ten years of each other). However, "a RICO victim need not have actual knowledge of exactly who committed the RICO predicate act resulting in the injury for a civil RICO claim to accrue." Robert L. Kroenlein Tr. ex rel. Alden v. Kirchhefer, 764 F.3d 1268, 1278 (10th Cir. 2014). "[T]he threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

As discussed, the Marijuana Growers admit that they all agreed to work together to cultivate marijuana for distribution and sale. The Reillys also allege that the Marijuana Growers began cultivating marijuana at their neighboring facility. Marijuana is a controlled substance under the CSA. 21 U.S.C. § 802(16). So the manufacture, distribution, and sale of that substance is, by definition, racketeering activity under RICO. 18 U.S.C. § 1961(1)(A), (D).

We need not decide whether the Marijuana Growers' admitted agreement to take the related steps necessary to grow marijuana for distribution and sale is itself sufficient to establish a pattern of predicates that presents a threat of continuing criminal activity. Rather, we note that the Reillys alleged various actions each of the Marijuana Growers took to establish and operate the enterprise, an entity that is now purportedly pursuing those illegal ends. When coupled with the Reillys' assertion that the Marijuana Growers began cultivating marijuana at their facility, we conclude these allegations plausibly state the requisite pattern of predicate acts that present a threat of ongoing criminal activity. As we will discuss, moreover, this pattern of illegal acts is the direct cause of the Reillys' plausibly alleged injuries to their property.

5. The Reillys plausibly pled that the Marijuana Growers violated § 1962(c)

We conclude that the Reillys plausibly pled that the Marijuana Growers violated § 1962(c). Having reached that conclusion, we must now determine whether the Reillys have plausibly alleged an injury to their property caused by that violation, the issue that the district court thought was dispositive. We therefore need not address the Reillys' other theories regarding how the Marijuana Growers injured their property by violating § 1962, theories the district court also did not specifically discuss. Consequently, the Reillys' § 1964(c) claims against the Marijuana Growers premised on other purported violations of § 1962 remain for adjudication by the district court on remand.

B. *Proximately caused injuries to the Reillys' property*

In light of our conclusion that the Reillys plausibly established that the Marijuana Growers violated § 1962(c), we must now determine whether they plausibly pled (1) injuries to their property (2) that were caused by those violations. Id. § 1964(c); see RJR, 136 S.Ct. at 2096. The district court dismissed all of the Reillys' RICO claims because, in its view, the Reillys failed to plausibly plead either of these elements. Specifically, relying on out-of-circuit authorities, the district court determined that hidden within § 1964(c)'s text is a heightened *pleading* requirement. According to the district court, a plaintiff must submit *evidence* of a "concrete financial loss" (e.g., an appraisal quantifying the diminution in property value or comparator results of attempts to sell predating and postdating a RICO violation) to *plausibly allege* an injury to his property caused by a defendant's § 1962 violation. No. 16-1266, Aplt. App. at 206–07 (citation omitted).

We conclude, however, that neither § 1964(c)'s text nor any ruling by the Supreme Court or this court establishes the novel statistical evidentiary pleading standard that the district court applied. In fact, the statute and applicable precedents compel the opposite conclusion with respect to the Reillys' allegations that their property has been directly injured by their neighbors' odorous and publicly-operating criminal enterprise.

1. Injuries

Section 1964(c)'s "reference to injury to 'business or property' ... cabin[s] RICO's private cause of action to particular kinds of injury—excluding, for example, personal injuries—[by which] Congress signaled that the civil remedy is not coextensive with § 1962's substantive [criminal] prohibitions," which do not require proof of such injuries. RJR, 136 S.Ct. at 2108. The Reillys do not claim to have any business-related rights at issue. So we only need to determine whether the Reillys plausibly alleged injuries to their *property rights*. The district court thought not, describing their claims as based on mere emotional or personal injuries. We disagree.

Among other things, the Reillys alleged that the noxious odors emanating from the Marijuana Growers' criminal enterprise presently interfere with the use and enjoyment of their land. And they claimed that those odors are a direct result of the Marijuana Growers' criminal cultivation of marijuana. They also averred that this ongoing, direct interference with their property diminishes its present market value—that property that smells foul is worth less than property that does not. The Reillys further claimed that their property has declined in value due to the Marijuana Growers' publicly disclosed operation—in short, that when a crime syndicate openly sets up shop adjacent to one's land, it reduces the value of that property. We address the alleged present nuisance and alleged diminished property value separately, though one stems in part from the other.

a. Odorous nuisance injury

We have little difficulty concluding that the Reillys plausibly pled an injury to their property rights caused by the stench that the enterprise's operations allegedly produce. "Congress meant to incorporate common-law principles when it adopted RICO." Beck v. Prupis, 529 U.S. 494, 504, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000). In Colorado, "a property owner whose land is diminished in value by the acquisition and use of adjoining land by a private party" has a cause of action "in the law of nuisance." Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377, 388 (Colo. 2001) (citation omitted). But Colorado also has long recognized that invasion of one's property by noxious odors itself gives rise to a nuisance claim and is a direct injury to property. See Hobbs v. Smith, 177 Colo. 299, 493 P.2d 1352, 1353–54 (1972) (explaining that where the facts evidenced "noxious odors" wafting onto the plaintiffs' adjoining property, they had "suffered a substantial interference with the use and enjoyment of

their property”); Webster v. Boone, 992 P.2d 1183, 1185–86 (Colo. App. 1999) (holding that “damages may be recovered” for “nuisance and trespass” to property, which “generally refers to distress arising out of physical discomfort, irritation, [and] inconvenience caused by *odors*, pests, noise, and the like” (emphasis added)).

Under Colorado law, “the elements of a claim of nuisance are an intentional, negligent, or unreasonably dangerous activity resulting in the unreasonable and substantial interference with a plaintiff's use and enjoyment of her property.” Van Wyk, 27 P.3d at 391. Thus, “a plaintiff must establish that the defendant has unreasonably interfered with the use and enjoyment of her property,” which is “an issue of fact” determined by “weigh [ing] the gravity of the harm and the utility of the conduct causing that harm.” Id. (citations omitted). “Generally, to be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient.” Id. (citations omitted).

The Marijuana Growers have not pointed us to any authority suggesting that a landowner's complaints about a neighbor's recurrent emissions of foul odors are conceptually unmoored from the owner's property rights. Nor do they contend that Colorado's recognition of odorous nuisances is any novel departure from the common law of property rights, which Congress incorporated into § 1964(c). See Beck, 529 U.S. at 504, 120 S.Ct. 1608. They instead suggest that we ought to disbelieve the Reillys' claims or recast them as mere emotional injuries, expressions of frustration with either the odors or the enterprise's actions.

The district court adopted that approach. But that was error, *inter alia*, because the Reillys' claims were only at the pleading stage. See George, 833 F.3d at 1247 (requiring that courts accept all factual allegations as true and draw reasonable inferences in a plaintiff's favor at the pleading stage); Shields, 744 F.3d at 640 (same). We conclude that the Reillys have plausibly pled an injury to their property in the form of a present interference with their use and enjoyment of that land, an interference that is caused by the enterprise's recurring emissions of foul odors.

b. Diminished property value

We now turn to the Reillys' allegations that the market value of their property has declined because the Marijuana Growers are publicly operating a criminal enterprise adjacent to their land, a venture that also emits noxious odors. In Gillmor v. Thomas, 490 F.3d 791 (10th Cir. 2007), we held that landowners could proceed on § 1964(c) claims against an extortion racket because they had pled plausible injuries to their property caused by that alleged racket, though we subsequently affirmed summary judgment against the landowners. Id. at 797–98. As relevant here, the landowners pled that the racket's activities “damaged them by reducing the development potential (and thus the value) of their properties.” Id. at 797. We held that the “allegations [we]re not conclusory” and were “sufficient” to proceed under § 1964(c). Id. (referring to “RICO standing” and “jurisdiction”).

Of course, what we once called “RICO standing” or “statutory standing” we now properly characterize as the usual pleading-stage inquiry: whether the plaintiff has plausibly pled a cause of action under RICO. See Lexmark Int'l, Inc. v. Static Control Components, Inc., ––– U.S. ––––, 134 S.Ct. 1377, 1394 n.4, 188 L.Ed.2d 392 (2014) (clarifying that “statutory standing” and “prudential standing” are “misleading” terms because “the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case” (citation omitted)). To answer that question, moreover, we also now adhere to different rules than those in force when we decided Gillmor. See Twombly, 550 U.S. at 555, 127 S.Ct. 1955. But neither of those sea changes even implicates, let alone undermines, our relevant holding in Gillmor: a plausibly alleged diminution in the *present* development potential of land is a property injury under § 1964(c). 490 F.3d at 797. That is also true of our underlying premise—i.e., that plausibly alleging a reduction in land value is one method of pleading a property injury under RICO. Id. Colorado's recognition of that property interest fortifies our conclusion that RICO incorporates this common view of property rights. See Van Wyk, 27 P.3d at 388.

We are therefore puzzled by the district court's suggestion that Gillmor's relevant holding is distinguishable. That is, according to the district court, the Gillmor developers' plans for their land were—in some unspecified fashion—more concrete than are the Reillys' allegations here. But the Reillys aver that *today* their land is worth less than it was before, and that this diminution in value occurred because their new neighbors began their endeavors. Our holding in Gillmor plainly applies here; in fact, it does double duty.

First, as we have discussed, the Reillys pled ample facts to plausibly establish that the enterprise's foul emissions interfere with the use and enjoyment of their property. We

need only draw an eminently reasonable inference to conclude that it is plausible that activities that interfere with one's use and enjoyment of property diminish the value of that property. See George, 833 F.3d at 1247. For example, it is reasonable to think that a potential buyer would be less inclined to purchase land that is burdened by a nuisance—such as recurrent foul odors—than she would be to purchase the identical property if it were unencumbered. See, e.g., Van Wyk, 27 P.3d at 388. Contrary to the district court's suggestion, moreover, the Reillys were not required to allege that they had attempted to sell their land or had appraised it. It remains a commonsense pleading-stage inference that nuisances diminish the value of land, exactly as the Reillys alleged. See George, 833 F.3d at 1247. Consequently, we conclude that the Reillys plausibly pled that their property has declined in value due to the recurrent noxious odors emanating from the Marijuana Growers' facility. See Gillmor, 490 F.3d at 797.

Second, the Reillys claim that the open operation of the Marijuana Growers' criminal enterprise has caused the value of their land to decline, independent of the harms attending the nuisance. Specifically, they allege that, because a crime syndicate is publicly violating federal law adjacent to their property, that land is now less valuable. They suggest, for example, that if they were to attempt to sell their land today, it would be less attractive to a potential buyer—and is therefore presently worth less—because of the crimes being openly committed on the adjoining parcel. We conclude this is plausible.

We cannot countenance the district court's digression that the Reillys' claim was "speculative" and based on mere "inchoate fears" because they did not cite statistics, appraisals, attempts to sell, or other "concrete evidence" to "quantify" their "concrete financial loss" with "actual facts." No. 16-1266, Aplt. App. at 206–08 & n.3 (citation omitted). Nor are we at liberty to disbelieve the Reillys by ratifying the Marijuana Growers' speculation that the value of the Reillys' land has, perhaps, increased because of the now-booming market in Colorado for land on which to cultivate marijuana. See George, 833 F.3d at 1247.

Moreover, the district court and the Marijuana Growers were mistaken to rely on Oscar v. University Students Co-operative Association and the cases citing it. 965 F.2d 783 (9th Cir. 1992) (en banc), overruled in part by Diaz v. Gates, 420 F.3d 897 (9th Cir. 2005) (en banc). Among the many reasons we refuse to follow Oscar's unsupported announcement that a plaintiff must plead a "concrete financial loss" to maintain a RICO claim for an injury to her property is that those words do not appear in § 1964(c). Id. at 785. The Supreme Court repeatedly has warned that courts "are not at liberty to rewrite RICO to reflect their ... views of good policy." Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 660, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008); Sedima, 473 U.S. at 499–500, 105 S.Ct. 3275 ("It is not for the judiciary to eliminate the private action in situations where Congress has provided it."). We also easily distinguish Oscar from the present case on its facts. The Oscar plaintiffs were renters, whereas the Reillys are landowners, and Oscar itself explicitly disclaims application to property owners. 965 F.2d at 787 n.2.

At this stage in the litigation, we conclude that it is reasonable to infer that a potential buyer would be less inclined to purchase land abutting an openly operating criminal enterprise than she would be if that adjacent land were empty or occupied by a lawfully-operating retailer. Based on the Reillys' assertion that the Marijuana Growers' operation is anything but clandestine, the Reillys' land plausibly is worth less now than it was before those operations began. Therefore, we conclude that the Reillys pled a plausible diminution in the value of their property caused by the public operation of the Marijuana Growers' enterprise. See Gillmor, 490 F.3d at 797.

c. The Reillys' other alleged "injuries"

In contrast, however, the Reillys claim to have suffered several other injuries that are not cognizable. For example, they claim to be injured each time they look to the west and observe the Marijuana Growers' facility because the structure itself is a constant reminder of the crimes occurring therein. They also speculate that their land might further diminish in value in the future. But a plaintiff cannot recover for emotional, personal, or speculative future injuries under § 1964(c). See RJR, 136 S.Ct. at 2108.

The scope of the Reillys' presently plausible claims under § 1964(c) is therefore limited to the alleged injuries the Reillys have suffered or are suffering to their property rights from the Marijuana Growers' violations of § 1962. See id. at 2096. We therefore conclude that the Reillys can, at most, presently recover only for three types of property injuries that were plausibly pled in their Second Amended Complaint: (1) the interference with the Reillys' use and enjoyment of their land caused by the noxious odors emanating from the Marijuana Growers' operation; (2) the diminution in the land's value presently caused by those odors; and (3) the diminution in the

land's value presently caused by the existence of that publicly disclosed, ongoing criminal enterprise adjacent to the Reillys' land. Consequently, we affirm the district court's order dismissing the Reillys' RICO claims premised on any other type of injury.

2. Proximate cause

We last turn to whether the Reillys plausibly alleged that any of the three classes of property injuries they sufficiently pled occurred or are occurring "by reason of" the Marijuana Growers' purported violations of the CSA, and thus § 1962(c). 18 U.S.C. § 1964(c); see RJR, 136 S.Ct. at 2096. Much of the groundwork for our analysis lies in our discussion of how the Reillys' property plausibly was injured in each of those three ways. We now focus more closely on causation—the nexus between act and injury.

"[T]o establish the requisite element of causation" to maintain a § 1964(c) claim, a plaintiff must plausibly plead "that the defendant's violation not only was a but for cause of his injury, but was the proximate cause as well...." Bridge, 553 U.S. at 654, 128 S.Ct. 2131 (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)). "Proximate cause," Bridge explains, "is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.' " Id. (citation omitted). It is a way of " 'label [ing] generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts,' with a particular emphasis on the 'demand for some direct relation between the injury asserted and the injurious conduct alleged.' " Id. (first quoting Holmes, 503 U.S. at 268, 112 S.Ct. 1311; then citing Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006)).

In turn, "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." Anza, 547 U.S. at 461, 126 S.Ct. 1991. Contrariwise, Anza explains, "[t]here is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly." Id. at 460, 126 S.Ct. 1991. Whether the Reillys alleged any direct or only indirect injuries attributable to the Marijuana Growers' violations of § 1962 was a point of some dispute before the district court. It is easily resolved in the Reillys' favor by the Supreme Court's cases emphasizing the distinctions between direct and indirect injuries.

a. Direct vs. indirect injuries

In Holmes, the Court confronted RICO claims premised on the alleged manipulation of stocks. 503 U.S. at 261, 112 S.Ct. 1311. The plaintiff was an investor protection corporation claiming to have subrogated rights to sue on behalf of the customers of injured broker-dealers. Id. at 270–71, 112 S.Ct. 1311. Discussing the proximate cause element, the Court held that "the link [was] too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers," to sustain a § 1964(c) claim. Id. at 271, 112 S.Ct. 1311. Thus, § 1964(c)'s bar to recovery for "indirect" injuries sometimes is shorthand for a well-recognized principle of proximate causation: "[A] plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [i]s generally said to stand at too remote a distance to recover." Id. at 268–69, 112 S.Ct. 1311 (citation omitted).

In Anza, the Court recognized two additional but related iterations of § 1964(c)'s bar to recovering for indirect injuries. 547 U.S. at 458–59, 126 S.Ct. 1991. The defendants in Anza allegedly defrauded New York's tax authority by committing mail and wire fraud, in violation of § 1962(c). Id. at 457–59, 126 S.Ct. 1991. However, the plaintiff sought to recover for its lost sales, the result of the defendants' distinct scheme of artificially lowering prices by not charging customers required sales taxes. Id. at 458, 126 S.Ct. 1991. The plaintiff's RICO claims first failed to meet the proximate cause element because "[t]he cause of [the] asserted harms" was "a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." Id. "[A] second discontinuity between the RICO violation and the asserted injury" was that the plaintiff's "lost sales could have resulted from factors other than [the] alleged acts of fraud." Id. at 459, 126 S.Ct. 1991. The Court explained: "Businesses lose and gain customers for many reasons, and it would" have "require[d] a complex assessment to establish what portion of" the plaintiff's "lost sales were the product of" the defendant's "decreased prices." Id.

On the other hand, in Bridge, the Court considered whether "a plaintiff asserting a RICO claim predicated on mail fraud must plead and prove that it relied on the defendant's alleged misrepresentations." 553 U.S. at 641–42, 128 S.Ct. 2131. The Court held that the plaintiffs could proceed on their § 1964(c) claims premised on direct injuries from the "los[s of] valuable liens they

otherwise would have been awarded," even though other direct victims of the criminal scheme also could have sued. Id. at 649–50, 128 S.Ct. 2131. The Court relatedly held that a plaintiff is not required to plead that he is a victim of the defendant's underlying crime (e.g., that he relied on the fraudulent mailings) to establish a direct injury. Id. Rather, a plaintiff may establish proximate causation by plausibly pleading that his business or property has been directly injured as a result of the defendant's § 1962 violation. Id. The Court also refused to foreclose a plaintiff's RICO claim even where "traditional state-law remedies" are available, explaining that courts cannot "adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." Id. at 659–60, 128 S.Ct. 2131.

b. The Reillys' injuries plausibly were proximately caused by the § 1962(c) violations

None of the Supreme Court's formulations of the term "indirect injury" bears any resemblance to the Reillys' three plausibly alleged injuries caused by the Marijuana Growers' violations of § 1962(c). The Reillys are suing to recover for injuries to their own land, not harms to third parties. See Holmes, 503 U.S. at 268–69, 112 S.Ct. 1311. No intermediary breaks the causal chain, for example, between the enterprise's foul emissions and the Reillys' nuisance injury. See id. All three plausibly alleged injuries—the nuisance, the resultant decline in property value, and the further decline in property value stemming from the enterprise's open pursuit of its goals—were also caused by the Marijuana Growers' criminal cultivation of marijuana *itself*. See Anza, 547 U.S. at 458, 126 S.Ct. 1991.

Further, no complex, external factors are at play, as the enterprise is the direct source of all of the alleged injuries to the Reillys' land. See id. at 459, 126 S.Ct. 1991. For example, the Reillys have plausibly alleged that the Marijuana Growers' violations of § 1962(c) distinctly affect the land's value, including how prospective buyers would evaluate it today. Moreover, contrary to the district court and the Marijuana Growers' suggestions, whether the Reillys might have pursued separate nuisance claims is irrelevant to whether their § 1964(c) claims are viable. See Bridge, 553 U.S. at 659–60, 128 S.Ct. 2131. It is also of no moment whether the Reillys are victims of the alleged § 1962 violations. See id. at 650, 128 S.Ct. 2131.

Rather, it is sufficient that the property injuries that the Reillys allege are *direct* byproducts of the location and manner in which the Marijuana Growers are conducting their operations that purportedly violate the CSA. Therefore, we conclude that the Reillys have plausibly alleged that the Marijuana Growers' violations of the CSA, and thus § 1962(c), proximately caused each of those three property injuries to the Reillys' land. Consequently, we conclude that the Reillys have plausibly stated § 1964(c) claims against each of the Marijuana Growers for those three types of injuries.

Conclusions

In No. 16-1266, we reverse the district court's order and its judgment dismissing the Reillys' § 1964(c) claims against the Marijuana Growers, as pled in Counts I through VI of their Second Amended Complaint. We remand Safe Streets Alliance to the district court for further proceedings on the Reillys' three plausibly alleged property injuries against each of the Marijuana Growers for conducting their association-in-fact enterprise in a manner that violates the CSA, and thus § 1962(c).

We also remand to the district court the balance of the Reillys' RICO claims against the Marijuana Growers premised on other alleged violations of § 1962, but only to the extent that such violations are alleged to have caused one or more of those three types of injuries. Consequently, we do not decide what remedies are or are not available under RICO. We affirm the district court's order and its judgment dismissing the RICO claims in all other respects.

Finally, we emphasize that our narrow holdings today do no more than apply the heavily fact-dependent standard Congress enumerated in § 1964(c) to the allegations in this case. We are not suggesting that every private citizen purportedly aggrieved by another person, a group, or an enterprise that is manufacturing, distributing, selling, or using marijuana may pursue a claim under RICO. Nor are we implying that every person tangentially injured in his business or property by such activities has a viable RICO claim. Rather, we hold only that the Reillys alleged sufficient facts to plausibly establish the requisite elements of their claims against the Marijuana Growers here. The Reillys therefore must be permitted to attempt to prove their RICO claims.

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