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Attorneys for Plaintiff White Mountain Health Center, Inc.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

WHITE MOUNTAIN HEALTH CENTER, INC., an Arizona non-profit corporation,

Plaintiff,

v.

COUNTY OF MARICOPA; WILLIAM MONTGOMERY, ESQ., Maricopa County Attorney, in his official capacity; ARIZONA DEPARTMENT OF HEALTH SERVICES, an agency of the State of Arizona; WILL HUMBLE, Director of the Arizona Department of Health Services, in his Official Capacity; and DOES I-X,

Defendants,

STATE OF ARIZONA ex rel.; THOMAS C. HORNE, Attorney General, in his official capacity,

Intervenor-Defendants.

NO. CV2012-053585

PLAINTIFF'S JOINT RESPONSE TO COUNTY DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND INTERVENORS' MOTION FOR SUMMARY JUDGMENT

White Mountain Health Center, Inc. ("White Mountain" or "Plaintiff") seeks to operate a medical marijuana dispensary that would serve senior citizens suffering from debilitating medical conditions in Sun City, a retirement community outside of Phoenix. County Defendants refuse to comply with their statutory and regulatory obligations under the Arizona Medical Marijuana Act ("AMMA"), alleging that the federal Controlled Substances Act ("CSA") preempts the entire AMMA. County Defendants' obstructionism has prevented Plaintiff from completing its dispensary application and provoked this lawsuit. The State and Attorney General ("Intervenors") have intervened and presented similar arguments. Plaintiff hereby responds jointly to the County Defendants' and Intervenors' Motions for Summary Judgment. The Motions should be denied because the AMMA does not require anyone to violate federal law; local officials who merely issue permits for medical marijuana activities decriminalized under state law are not aiding or abetting federal crimes. Neither does the AMMA create a cognizable "obstacle" for federal preemption purposes. As even Intervenors must acknowledge, the 10th Amendment protects the State's ability to decriminalize, under *state* law, all or some marijuana activity, and the distinction Intervenors draw between "authorizing" and "decriminalizing" boils down to a semantic sleight of hand that cannot withstand scrutiny.[1]

"Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). Pursuant to the Supremacy Clause, however, Congress has the power to preempt state law. *See Crosby v.*

[1] County Defendants erroneously claim that Plaintiff has the burden of proving the AMMA's validity. County Defs.' Statement of Facts in Opp. to Pls.' Mot. for Summ. J., 4. The Arizona Supreme Court has explained that validly enacted laws, like the AMMA, "c[o]me to the court cloaked with a presumption of validity." *Home Builders Ass'n. of Central Arizona v. City of Scottsdale,* 187 Ariz. 479, 482, 930 P.2d 993, 996 (1997). "When the people act in their legislative capacity through an initiative measure, their enactments are as much 'law' as those enacted by the legislature." *Iman v. Southern Pacific Co.*, 7 Ariz. App. 16, 20, 435 P.2d 851, 855 (1968).

Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000). Federal preemption of state law occurs in four different contexts, only two of which are relevant here.[2] First, state laws are preempted where "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963). Second, federal law preempts state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In all preemption analyses, courts "should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 132 S. Ct. at 2501, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[3]

Because compliance with the AMMA and the CSA is not "a physical impossibility," Arizona's law is not subject to impossibility preemption. *Florida Lime*, 373 U.S. at 142-143. Arizonans can simply refrain from engaging in conduct that the AMMA decriminalizes, thereby complying with both state and federal law. Moreover, the ministerial acts that the AMMA requires of certain government officials are not CSA violations and therefore do not render dual compliance with state and federal law physically impossible for those officials. Nor does the CSA obstacle preempt the AMMA, which merely decriminalizes under state law certain conduct involving medical marijuana.[4] The 10th Amendment ensures that the federal government cannot compel the

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[2] The types of preemption not implicated here are express and field. "Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *See Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968, 1974-1975 (2011). And, states cannot regulate in fields that Congress has wholly occupied. *See Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88, 115 (1992). Defendants do not suggest that either express or field preemption is applicable here, nor could they: the CSA contains an anti-preemption provision, 21 U.S.C. § 903, which provides that the CSA will preempt state law only if there is, "positive conflict . . . so that the two cannot consistently stand together." *See also Gonzales v. Oregon*, 546 U.S. 243, 251 (2006) (stating, in reference to § 903, that "[t]he CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision.").

[3] The presumption against preemption is particularly strong in areas where "Congress has legislated . . . in a field which the States have traditionally occupied," *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted), such as controlled substances, public health, and medical care.

[4] At least one court has concluded that "[t]he phrase 'positive conflict,' particularly as refined by the

states to implement federal regulatory programs through state legislation. As a result, Arizona could decriminalize all marijuana use without creating a cognizable obstacle to the CSA. Since *wholesale* marijuana decriminalization would not be preempted, neither is *partial* marijuana decriminalization. Furthermore, federal authorities can still enforce the CSA if they choose to do so.

I. BECAUSE THE AMMA DOES NOT REQUIRE ANYONE TO VIOLATE FEDERAL LAW, IT DOES NOT CREATE AN IMPOSSIBLE CONFLICT WITH THE CSA.

The AMMA does not compel any action that the CSA prohibits. Compliance with both is therefore possible and there is no irreconcilable conflict between them. A party claiming impossibility preemption has the burden to show that "compliance with both federal and state regulations is a physical impossibility." *Florida Lime*, 373 U.S. at 142-143. There must be an "inevitable collision between the two schemes of regulation . . . [; mere] dissimilarity of the standards" is not sufficient. *Id.* at 143. There is no inevitable collision between the AMMA and the CSA. First, the AMMA does not require any private party to act; thus private parties can choose to refrain from acting pursuant to the AMMA, thereby complying with both state and federal law. Second, the AMMA does not require government employees to engage in activity that would expose them to liability under the CSA. Compliance with a ministerial duty—such as approving and issuing building permits for dispensaries—cannot legitimately expose county employees to federal prosecution for aiding and abetting. Courts have expressly rejected any aiding and abetting theory on which such liability could be based.

A basic review of aiding and abetting liability under 18 U.S.C. § 2 forecloses the

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phrase that 'the two [laws] cannot consistently stand together,' [in 21 U.S.C. § 903], suggests that Congress did not intend to supplant all laws posing some conceivable obstacle to the purposes of the CSA, but instead intended to supplant only state laws that could not be adhered to without violating the CSA."). *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 823 (Cal. App. 2008).

County's argument. To convict an individual of aiding and abetting, the government must prove: "(1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense." *United States v. Gaskins*, 849 F.2d 454, 459 (9th Cir. 1988). Specific intent, in turn, is the equivalent of acting with "purpose[]," meaning a defendant must "consciously desir[e][the] result." *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000). In addition, "[c]onviction as an aider and abettor requires proof the defendant willingly associated himself with the venture and participated therein as something he wished to bring about." *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980). In short, "[a]n abettor is one who, with mens rea . . . commands, counsels or otherwise encourages the perpetrator to commit the crime." *United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982) (internal quotation marks omitted).

The AMMA does not require Arizona employees to perform any act that would satisfy all of the elements required to sustain an aiding and abetting conviction. The County alleges that if its employees approve and issue building permits for dispensary locations, its employees "could be held liable as aiders or abettors under 18 U.S.C. § 2." County Defs.' Cross Mot. for Summ. J., 2. The California Court of Appeal rejected a similar argument, explaining that "a city's compliance with state law in the exercise of its regulatory, licensing, zoning, or other power with respect to the operation of medical marijuana dispensaries that meet state law requirements would not violate conflicting federal law[;] . . . governmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws." *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 759-760 (Cal. App. 2010).

It is clear that neither of the two intent-based requirements of aiding and abetting, as applied to the County's example, could be satisfied. If a government employee processes and issues building permits to a medical marijuana dispensary because state law requires it, the employee's specific intent—that is, the result he would "consciously desir[e]"—would be to fulfill his job responsibilities, *Gracidas-Ulibarry*, 231 F.3d at 1196, not to facilitate the commission of a dispensary's likely federal crimes. Nor would that employee have "willingly associated himself with" the medical marijuana dispensary venture and "participated therein as something he wished to bring about" by doing his job. *Zemek*, 634 F.2d at 1174. Moreover, the County's permitting example—by its very terms—does not involve an employee "command[ing], counsel[ing], or otherwise encourag[ing]" a dispensary "to commit [a] crime." *Barnett*, 667 F.2d at 841 (internal quotation marks omitted). Rather, it is merely the completion of a purely ministerial function. Similarly, a County employee issuing building permits pursuant to his employment duties would not possess the "requisite intent of the underlying substantive [CSA] offense." *Gaskins*, 849 F.2d at 459. Intending to do one's job by filling out paperwork for a medical marijuana dispensary applicant cannot be equated with intending to manufacture or distribute marijuana. *See Qualified Patients*, 187 Cal. App. 4th at 759 (concluding that "nothing in either [California] [medical marijuana] enactment," which include provisions requiring state employees to process medical marijuana identification cards—for example, Cal. Health & Safety Code § 11362.72—"purports to make it impossible to comply simultaneously with both federal and state law"); *San Diego NORML*, 165 Cal. App. 4th at 825 (explaining that California's "identification laws obligate a county only to process applications for, maintain records of, and issue cards to, those individuals entitled to claim the exemption" from otherwise applicable state criminal laws, and stating that "[t]he CSA is entirely silent on the ability of states to

provide identification cards to their citizenry, and an entity that issues identification cards does not engage in conduct banned by the CSA.").

Simply put, Arizona employees would not aid and abet federal crimes by engaging in activity with the intent to do their job as required by state law. *See United States v. Feingold*, 454 F.3d 1001, 1008 (9th Cir. 2006) (explaining that to convict a doctor of distribution under 21 U.S.C. § 841(a), "the jury must make a finding of intent not merely with respect to distribution, but also with respect to the doctor's intent to act as a pusher rather than a medical professional."); *Conant v. Walters*, 309 F.3d 629, 635-636 (9th Cir. 2002) (stating "[a] doctor's anticipation of patient conduct," upon receiving the doctor's recommendation for marijuana, "does not translate into aiding and abetting.").

Indeed, courts in California and Oregon have held that law enforcement officers could not be convicted of illegal distribution of marijuana, in violation of 21 U.S.C. § 841(a), for returning seized marijuana to medical marijuana patients whose possession was not criminal under state law. *City of Garden Grove v. The Superior Court of Orange County*, 157 Cal. App. 4th 355, 390 (Cal. App. 2007) (cert. denied); *State v. Kama*, 39 P.3d 866, 868 (Or. App. 2002). Just as a law enforcement officer is not subject to distribution liability for physically transferring marijuana to another person, Arizona employees would not be subject to aider and abettor liability for processing building permit applications in their capacity as government officials.

The AMMA does not require anyone to commit federal crimes. Accordingly, County Defendants' and Intervenors' allegation that the CSA preempts the AMMA because compliance with both schemes is impossible plainly fails.

II. THE TENTH AMENDMENT EMPOWERS THE STATE TO DECRIMINALIZE ALL, OR ONLY SOME, MARIJUANA ACTIVITIES.

Whether the AMMA "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [the CSA],'" *Arizona*, 132 S. Ct. at 2501, quoting

Hines, 312 U.S. at 67, must begin from the premise that the 10th Amendment prohibits the federal government from requiring Arizona to help accomplish the CSA's goals.[5] The fact that Arizona could remove all criminal penalties for marijuana pursuant to its 10th Amendment powers makes clear that the AMMA—which removes only some marijuana penalties—is merely an exercise of that same 10th Amendment right, not an "obstacle" to the CSA. In addition, the State's rights do not evaporate at the mere statutory presence of the word "authorize." In the context of the AMMA, the legal effect of "authorization" is no different than the effect of "decriminalization"—both are permitted under the 10th Amendment. Intervenors' argument that provisions which "authorize" conduct that is illegal under federal law are obstacle preempted—but those that merely "decriminalize" the same conduct are not preempted—relies on a formalistic distinction without a substantive difference.[6]

A. The AMMA's Limited Decriminalization of Marijuana is Merely an Exercise of Arizona's Tenth Amendment Right to Determine the Contours of Its Own Criminal Law.

It is beyond dispute that Congress neither has nor could require Arizona to enact state criminal penalties for any activities involving marijuana. Indeed, the Supreme Court's 10th Amendment jurisprudence demarcates axiomatic limitations on Congress' power: "the Constitution has never been understood to confer upon Congress the ability to

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[5] The Supreme Court has summarized the CSA's "main objectives [as] combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances." *Gonzales*, 546 U.S. at 250.

[6] Intervenors cite *Gonzales v. Raich*, 545 U.S. 1 (2005), in support of their obstacle preemption argument. Intervenors erroneously assert that "the Supreme Court held that the CSA preempted any state law that was in conflict with the federal law . . . ." Intervenors' Mot. for Summ. J., 6, citing *Raich*, 545 U.S. at 29. Contrary to the Intervenors' misleading citation of dicta, *Raich* is a Commerce Clause case, not a preemption case. The Intervenors' characterization of *Raich's* relevance to the present case is both misplaced and distorted. *Raich* stands for the simple and uncontroversial proposition that state medical marijuana laws do not render federal law inapplicable. In relying heavily on *Raich*, Intervenors apparently conflate two separate issues: whether the CSA prevents States from decriminalizing conduct that remains criminal under the federal scheme – which it does not – and whether the federal government can enforce the CSA via the Commerce Clause in States that have decriminalized the same conduct under state law – which it can.

require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992) (holding that Congress cannot compel the States to enact or enforce a federal regulatory program). The Supreme Court has "made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997) (holding that Congress cannot circumvent the prohibition established in *New York* by conscripting a State's officers directly). Thus, there is a line of constitutional magnitude "distinguishing encouragement from coercion" which Congress cannot cross. *New York*, 505 U.S. at 175.

The anti-commandeering rule dictates that Congressional "commands [to the States] are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 521 U.S. at 935. Congress cannot require Arizona to further its CSA objectives by enacting state criminal laws that supplement federal criminal laws. *See Ter Beek v. City of Wyoming*, --- N.W.2d ----, 2012 WL 3101758 (Mich. App. July 31, 2012) (explaining that "while Congress can criminalize all uses of medical marijuana, it cannot require the states to do the same.").

In addition, the anti-commandeering principle operates with equal force regardless of the nature of the federal government's intrusion on a State's sovereignty. "If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal." *Conant*, 309 F.3d at 646 (Kozinski, J., concurring). Thus, "preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Id.* Congress can neither prevent Arizona from decriminalizing all or some activities

involving marijuana, nor require Arizona to criminalize all or some activities involving marijuana without violating the 10th Amendment's anti-commandeering rule.

The CSA therefore cannot be interpreted to set in stone Arizona's pre-AMMA criminalization of all marijuana activity. Any Arizona criminal penalties that complement CSA penalties are optional for Arizona, and it can remove all or some at any time. Of course, if Arizona simply withdraws all or some complementary penalties, the Supremacy Clause ensures that federal criminal law still applies within Arizona. *See Raich*, 545 U.S. at 29-30. The Supremacy Clause cannot, however, be manipulated under the guise of obstacle preemption to create an end-run around Arizona's 10th Amendment right to *not* criminalize activities involving controlled substances. *See Qualified Patients*, 187 Cal. App. 4th at 761 (stating that "[p]reemption theory [] is not a license to commandeer state or local resources to achieve federal objectives."); *Conant*, 309 F.3d at 646 (Kozinski, J., concurring) (observing, "[t]hat patients may be more likely to violate federal law if the additional deterrent of state liability is removed may worry the federal government, but the proper response—according to *New York* and *Printz*—is to ratchet up the federal regulatory regime, *not* to commandeer that of the state."); *Ter Beek*, 2012 WL 3101758 ("conclud[ing] that the immunity provision of [the Michigan Medical Marijuana Act] is not preempted by the CSA because it only grants immunity from state prosecution and, therefore, does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."); *Hyland v. Fukuda*, 580 F.2d 977, 981 (9th Cir. 1978) (ruling that a Hawaii law allowing felons to carry guns was not preempted by a federal law prohibiting such conduct, the court reasoned the state law "has no impact on the legality of the same act under federal law. Simply put, Congress has chosen to prohibit an act which Hawaii has chosen not to prohibit; there is no conflict between [the federal law] and [the state law].").

Consistent with Arizona's 10th Amendment prerogative to define its own controlled substances laws—which includes having none at all—the AMMA took the less drastic step of removing some criminal penalties for certain marijuana activities by certain individuals. Indeed, Plaintiff and Intervenors agree that "State laws that merely decriminalize certain conduct for purposes of State law enforcement are not preempted . . . ." Intervenors' Mot. for Summ. J., 6; *see also Garden Grove*, 157 Cal. App. 4th at 382 (observing that "[t]he fact is [that] . . . 'federalism . . . allow[s] the States great latitude under their police powers. . . .' This includes the power to decide what is criminal and what is not," quoting *Gonzales*, 546 U.S. at 270).

Whether the AMMA's limited decriminalization stands as an obstacle to the CSA cannot depend on whether the AMMA decreases Arizona's assistance in obtaining federal objectives as compared to the pre-AMMA scheme. In light of the limits the 10th Amendment places on Congress, the proper inquiry here is whether limited decriminalization can be preempted if full decriminalization is not. Because Arizona could remove all penalties without creating a cognizable obstacle, it cannot be that a more *limited* removal does create an obstacle. *See Garden Grove*, 157 Cal. App. 4th at 385 (concluding that "a state statutory scheme that limits state prosecution for medical marijuana possession but does not limit enforcement of the federal drug laws . . . simply does not implicate federal supremacy concerns.").

Therefore, as compared to complete decriminalization, the AMMA actually *furthers* the CSA's objectives insofar as the vast majority of activities involving marijuana remain criminalized. Consider if Congress had criminalized marijuana before Arizona, and then Arizona criminalized all marijuana-related activity except for that which it classified as medical. In that scenario, there would be no claim of obstacle preemption; Arizona would simply be providing some voluntary help to the federal government where

before it had provided none. Thus, "much as the federal government may prefer that [Arizona] keep medical marijuana illegal, it cannot force the state to do so." *Conant*, 309 F.3d at 645 (Kozinski, J., concurring). The AMMA is therefore not obstacle preempted.[7]

B. Intervenors' Position that the AMMA Provisions Involving Patient and Caregiver Identification Cards are Not Preempted Illustrates the False Distinction Between Decriminalization and Authorization.

Intervenors concede that "State laws that merely decriminalize certain conduct for purposes of State law enforcement are not preempted . . . ." Intervenors' Mot. for Summ. J., 6. As such, Plaintiff and Intervenors are in agreement that "the issuance of registry identification cards for patients and caregivers are not preempted because they merely serve to identify those individuals for whom the possession or use of marijuana has been decriminalized under State law . . . ." *Id.* at 4.[8]

There is no meaningful difference between Arizona decriminalizing marijuana *possession* by patients and caregivers, and Arizona decriminalizing marijuana *cultivation and distribution* by patients, caregivers, and dispensaries. Federal law prohibits all of these activities.[9] But it is Arizona's sovereign prerogative to define its own criminal law,

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[7] The contract cases County Defendants and Intervenors cite are not directly relevant and do not bind this court. In *Haile v. Todays Health Care II*, Case No. CV2011-051310, Maricopa County Superior Court, April 17, 2012 , the court merely held that the contract at issue, which involved medical marijuana, was unenforceable; the court did not hold that the CSA preempts any part of the AMMA. Moreover, memorandum decisions, including trial court rulings, have no precedential value. Ariz. Sup. Ct. R. 111(c); *State v. Whipple*, 177 Ariz. 272, 273, 866 P.2d 1358, 1359 (App. 1993). Accordingly, such reference violates Rule 111 of the Arizona Supreme Court and should be stricken. In *Haeberle v. Lowden*, Arapahoe County District Court, August 8, 2012, the Colorado court similarly held that a medical marijuana contract was unenforceable. The court went on, unnecessarily and with minimal analysis, to hold that the CSA obstacle preempts the Colorado Medical Marijuana Act. Neither case is binding here, let alone persuasive, and furthermore, Plaintiff urges this court to undertake a more thoughtful and rigorous analysis than that employed in *Haeberle.*

[8] County Defendants, however, do not appear to agree that decriminalization and identification are permissible, taking a sweeping stance on preemption that conflicts even with Intervenors' position. *See* County Defs.' Answer, 9 (asserting as an affirmative defense to Plaintiff's Complaint that "[t]he Arizona Medical Marijuana Act is preempted by federal law."); County Defs.' Mot. for Summ. J., 10 (stating that "the provisions of the AMMA authorizing the use by patients of 'medical' marijuana are in direct conflict with the CSA and are null and void.").

[9] The word "authorize" as used in the AMMA is not an attempt to immunize anyone from federal criminal liability for conduct that is decriminalized under state law. *See* Intervenors' Mot. for Summ. J., 3-4. The State is obviously powerless to confer such immunity, and the existence of a state statute decriminalizing

which includes providing law enforcement with an efficient way to identify criminal from non-criminal conduct under state law—a particularly important distinction given that most marijuana activity remains criminal in Arizona. Hence Intervenors' position that patient and caregiver identification cards are not obstacle preempted. *See also San Diego NORML*, 165 Cal. App. 4th at 827 (concluding that the CSA does not obstacle preempt California's medical marijuana identification laws because they "merely provide a mechanism allowing [patients] . . . to obtain a form of identification that informs state law enforcement officers . . . that they are medically exempted from the state's criminal sanctions for marijuana possession and use."). The same reasoning applies to the AMMA's dispensary provisions. Since Arizona can decriminalize dispensaries' activities, it can also provide a way for law enforcement to distinguish between marijuana cultivation and distribution that is decriminalized from that which remains criminal. Dispensary licenses are no different than, and serve the same purpose as, patient and caregiver identification cards—both merely delineate the contours of state law.

Intervenors, however, attempt to avoid the logical application of their own reasoning. They argue that the insertion of the word "authorize" in certain provisions of the AMMA magically renders those provisions preempted, while maintaining that if those provisions instead used the word "decriminalize," there would be no preemption. This distinction has no substantive difference: authorizing and decriminalizing have the same

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certain conduct does not provide a "safe harbor" from federal laws criminalizing that conduct. *See* U.S. Const. art. VI, cl. 2; *United States v. Rosenthal*, 454 F.3d 943, 948 (9th Cir. 2006); *Garden Grove*, 157 Cal. App. 4th at 382 (explaining that "[t]he upshot of *Raich* is that the federal government and its agencies have the authority to enforce the federal drug laws, even in a state like California that has sanctioned the use of marijuana for medicinal purposes."); *Qualified Patients*, 187 Cal. App. 4th at 757 (explaining that "California's decision . . . to decriminalize *for purposes of state law* certain conduct related to medical marijuana does nothing to 'override' or attempt to override federal law, which remains in force."). To the extent that the court perceives some ambiguity as to whether the word "authorize" as used in the AMMA attempts to confer immunity from federal prosecution, Plaintiff urges the court to interpret the statute so as to avoid such a glaring constitutional defect. *Ter Beek*, --- N.W.2d ----, 2012 WL 3101758 ("construing [Michigan's Medical Marijuana law] to grant immunity only from state prosecution and other penalties avoids the absurd result that the MMMA purportedly preempts federal prosecutions, and avoids conflict with the CSA.").

legal effect. For example, A.R.S. § 36-2804.04(A)(7) provides that "[r]egistry identification cards for qualifying patients and caregivers shall contain . . . [a] clear indication of whether the cardholder has been authorized . . . to cultivate marijuana plants . . . ." The legal effect of the "authorization" in this provision is simply to exempt patients and caregivers from otherwise applicable state criminal law that prohibits marijuana cultivation. Indeed, "authorizing" a patient to cultivate marijuana under state law is functionally equivalent to "decriminalizing" a patient's cultivation of marijuana under state law. In this context, both words merely indicate that the State cannot arrest or prosecute such patients. According to Intervenors, however, the "authorized" version is preempted while the "decriminalized" version is not. The law does not turn on such superficiality.[10] Thus, Intervenors cannot prove preemption simply by identifying AMMA provisions containing the word "authorize." Intervenors' position that "authorize" assumes constitutional magnitude is a pretense. The AMMA is merely a scheme of limited state decriminalization that provides a way for law enforcement officers to readily distinguish between criminal and non-criminal activities under state law. The CSA does not obstacle preempt the AMMA.

For the foregoing reasons, Plaintiff respectfully urges the court to deny County Defendants' and Intervenors' Motions for Summary Judgment.

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[10] Even the Oregon Supreme Court—which Defendants' cite in support of the proposition that the AMMA's use of the word "authorize" requires a finding of preemption—has retreated from this shallow analysis. *Willis v. Winters*, 253 P.3d 1058, 1064 n.6 (Or. 2011) (explaining that "*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted."). Defendants also cite *Pack v. Superior Court*, 199 Cal. App. 4th 1070 (Cal. App. 2011), in support of their argument that "authorization" must be preempted. On January 18, 2012, the California Supreme Court granted review in *Pack*, which had the effect of de-publishing the case and rendering it non-citable. *Pack v. S.C.*, 136 Cal. Rptr. 3d 665 (Cal. 2012) (granting review of the appellate court opinion); Cal. Sup. Ct. R. 8.1105(e)(1) ("Unless otherwise ordered . . . an opinion is no longer considered published if the Supreme Court grants review . . ."); Cal. Sup. Ct. R. 8.1115(a) ("[A]n opinion of a California Court of Appeal . . . that is not certified for publication . . . must not be cited or relied on by a court or a party in any other action."). Further, on August 22, 2012, the California Supreme Court dismissed the case as moot, leaving the appellate court decision de-published and therefore unsuitable for citation. Order available at: http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1994201&doc_no=S197169.

RESPECTFULLY SUBMITTED this 27th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 27th 2012 I caused the foregoing document to be electronically transmitted to the Clerk's Office.

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