ARIZONA COURT OF APPEALS

DIVISION ONE

WHITE MOUNTAIN HEALTH CENTER, INC. Plaintiff-Appellee, v. COUNTY OF MARICOPA, et al., Defendants-Appellants, --- STATE OF ARIZONA ex rel. THOMAS C. HORNE, Attorney General in his official capacity, Intervenor-Defendant- Appellant.	1 CA-CV 12-0831 Maricopa County Superior Court Case No. CV2012-053585

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STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee White Mountain Health Center, Inc. ("White Mountain" or "Plaintiff") seeks to operate a medical marijuana dispensary—in compliance with the 2010 voter-approved Arizona Medical Marijuana Act ("AMMA")—that would serve senior citizens suffering from debilitating medical conditions in Sun City, a retirement community outside of Phoenix. Under the AMMA, the first step to opening a dispensary is to apply for a Registration Certificate from the Arizona Department of Health Services ("ADHS"). *See* Arizona Administrative Code §§ R9-17-101 through R R9-17-304. The AMMA's implementing regulations specify that a Registration Certificate application must include a zoning compliance statement signed by a representative of the relevant local jurisdiction stating either that there are no local zoning restrictions for the dispensary's location, or the dispensary's location is in compliance with any local zoning restrictions. Arizona Administrative Code § R9-17-304(C)(6). ADHS has created a standard one-page form for this zoning statement ("Zoning Form"), completion of which satisfies the regulatory requirement. [Index of Record on Appeal "IR" 123, Ex. B] (For ease of reference, a true and correct copy of ADHS's Zoning Form is appended hereto at Appendix A.).

This lawsuit arose because County Defendants-Appellants ("County" or "Defendants") took the unusual action of obstructing and undermining the People's will as expressed by the passage of the AMMA. Unlike its counterparts in other local jurisdictions that willingly complied with state law without consequence, the

County refused to comply with its regulatory obligation to fill out the ADHS-created and approved one-page Zoning Form. The County alleges, with no legal or even anecdotal support, that filling out this form exposes its employees to federal criminal liability for violations of the Controlled Substances Act ("CSA").

Plaintiff White Mountain Health Center therefore filed a mandamus action seeking injunctive relief. [IR 11] The County answered and alleged that its refusal to comply with its obligations under the AMMA was justified because the federal CSA preempts the entire AMMA. [IR 13] The State and Attorney General ("Intervenors") intervened and presented similar arguments. [IR 59 – 63] The parties filed cross motions for summary judgment, and the Trial Court ruled in Plaintiff's favor on December 3, 2012. [IR 120] Based upon the briefing and an extensive summary judgment hearing below, the Trial Court concluded that Plaintiff was entitled to relief in the form of partial summary judgment. In finding no support for the County or Intervenors' claims that federal law preempts the AMMA, the Trial Court rejected the contention that signing a form could expose County employees to federal prosecution.

Accordingly, the Trial Court issued a writ of mandamus ordering the County to comply with its duties under the AMMA. [IR 120] (For ease of reference, a true and correct copy of the Trial Court's ruling is appended hereto at Appendix B, "App. B"). On December 5, 2012, the County filed a Motion to Stay or Suspend the Trial Court's Ruling. [IR 119] The County also filed a Notice of Appeal. [IR 121] The Trial Court held a hearing on December 13, 2012, after which it denied

the County's Motion to Stay. [IR 126]

The County then filed an Expedited Motion to Stay or Suspend the Trial Court's December 3, 2012 Judgment Pending Expedited Appeal with this Court. Oral argument was held on that motion on December 20, 2012, after which this Court denied the County's motion. [IR 132] On December 24, 2012, the County filed a Notice of Compliance with Court Order dated December 3, 2012, stating that it had complied with the Trial Court's writ of mandamus. [IR 130, 131][1]

With the exception of the County's refusal in this case to comply with its duties under the AMMA, the AMMA has been in effect and implemented by all other Arizona state and municipal officials without incident.

[1] The County alleges also that Plaintiff's proposed dispensary site does not comply with local zoning restrictions; the parties continue to litigate that and related questions in the Trial Court.

ISSUES PRESENTED FOR REVIEW

1. Whether Arizona's partial decriminalization of marijuana presents an obstacle to Congress's goals in the CSA of combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances.
2. Whether the County has met its burden to show that it is physically impossible for its employees to comply with both the AMMA and federal law without identifying which provisions of state and federal law are irreconcilable.
3. Whether the Trial Court granted proper mandamus relief as requested by White Mountain.

STANDARD OF REVIEW

This court "review[s] de novo a grant of summary judgment, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Andrews v. Blake*, 205 Ariz. 236, 240, 69 P.3d 7, 11 (2003). The court also "review[s] federal preemption issues de novo." *Hutto v. Francisco*, 210 Ariz. 88, 90, 107 P.3d 934, 936 (App. 2005). However, 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. 16, 20, 435 P.2d 851, 855 (App. 1968). In addition, "[t]he proponent of an affirmative defense has the burden of pleading and proving it." *Grubb & Ellis Management Services, Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 89, 138 P.3d 1210, 1216 (App. 2006).

ARGUMENT

Federal law prohibits the manufacture, distribution, possession with intent to distribute, and possession of marijuana. 21 U.S.C. §§ 841(a)(1), 844(a) (2010). Nonetheless, in 1996, California became the first state to decriminalize the medical use of marijuana for certain people suffering from serious illnesses. CAL. HEALTH & SAFETY CODE § 11362.5 *et seq*. (West 2012). Since then, 18 additional U.S. jurisdictions have enacted medical marijuana laws: Alaska, Arizona, Colorado,

Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.[2] Of these 19 total jurisdictions with medical marijuana laws, all but Washington include provisions for state-issued medical marijuana identification cards,[3] and all but Hawaii either allow and regulate medical marijuana dispensaries or permit registered caregivers to cultivate marijuana for patients.[4]

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[2] ALASKA STAT. § 17.37.010 *et seq.* (West 2010); ARIZ. REV. STAT. ANN. § 36-2801 *et seq.* (2010); COLO. CONST. ART. 18, § 14 (2012); CONN. GEN. STAT. ANN. § 21a-408 *et. seq.* (West 2012); DEL. CODE ANN. tit. 16, § 4901A *et seq.* (West 2011); D.C. CODE § 7-1671.01 *et seq.* (2010); HAW. REV. STAT. § 329-121 *et seq.* (West 2012); ME. REV. STAT. tit. 22, § 2421 *et seq.* (2010); MASS. GEN. LAWS ANN. ch. 94C, App. § 1-1 *et seq.* (West 2012); MICH. COMP. LAWS ANN. § 333.26421 *et seq.* (West 2012); MONT. CODE ANN. § 50-46-301 *et seq.* (2012); NEV. REV. STAT. ANN. § 453A.010 *et seq.* (West 2011); N.J. STAT. ANN. § 24:6I-1 *et seq.* (West 2013); N.M. STAT. ANN. § 26-2B-1 *et seq.* (West 2012); OR. REV. STAT. ANN. § 475.300 *et seq.* (West 2012); R. I. GEN. LAWS ANN. § 21-28.6-1 *et seq.* (West 2012); VT. STAT. ANN. tit. 18, § 4472 *et seq.* (West 2012); WASH. REV. CODE ANN. § 69.51A.005 *et seq.* (West 2012).

[3] ALASKA STAT. § 17.37.010(a) (West 2010); ARIZ. REV. STAT. ANN. §36-2804.04 (2010); CAL. HEALTH & SAFETY CODE § 11362.71 (West 2012); COLO. CONST. ART. 18, § 14(3) (2012); CONN. GEN. STAT. ANN. § 21a-408a(a) (West 2012); DEL. CODE ANN. tit. 16, § 4909A (West 2011); D.C. CODE § 7-1671.05(3) (2010); HAW. REV. STAT. § 329-123 (West 2012); ME. REV. STAT. tit. 22, § 2425 (2012); MASS. GEN. LAWS ANN. ch. 94C, App. § 1-12 (West 2012); MICH. COMP. LAWS ANN. § 333.26426 (West 2012); MONT. CODE ANN. § 50-46-303 (2012); NEV. REV. STAT. ANN. § 453A.210 (West 2011); N.J. STAT. ANN. § 24:6I-4 (West 2013); N.M. STAT. ANN. § 26-2B-7 (West 2012); OR. REV. STAT. ANN. § 475.309(2) (West 2012); R.I. GEN. LAWS ANN. § 21-28.6-5(b) (West 2012); VT. STAT. ANN. tit. 18, § 4473(b)(4) (West 2012).

[4] ALASKA STAT. § 17.37.030(a) (West 2010); ARIZ. REV. STAT. ANN. § 36-2804 (2010); CAL. HEALTH & SAFETY CODE § 11362.768 (West 2012); COLO. REV. STAT. ANN. § 12-43.3-401(2012); CONN. GEN. STAT. ANN. § 21a-408h (West 2012); DEL. CODE ANN. tit. 16, § 4914A (West 2011); D.C. CODE § 7-1671.06

In the 17 years since the first medical marijuana law was passed in California, the United States Department of Justice ("DOJ") has never prosecuted a state official for a violation of the CSA stemming from her compliance with administrative duties under state law (for example, to issue patient identification cards or process dispensary applications). Nor in those 17 years has DOJ ever filed a case claiming that the CSA preempts any provision of a state medical marijuana law.[5]

This Court should affirm the order below because the AMMA does not create a cognizable "obstacle" for federal preemption purposes. The 10th Amendment protects the State's ability to decriminalize, under *state* law, all or some marijuana

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(2010); ME. REV. STAT. tit. 22, § 2428 (2012); MASS. GEN. LAWS ANN. ch. 94C, App. § 1-9 (West 2012); MICH. COMP. LAWS ANN. § 333.26428(8)(a)(3) (West 2012); MONT. CODE ANN. § 50-46-308 (2012); NEV. REV. STAT. ANN. § 453A.200 (West 2011); N.J. STAT. ANN. § 24:6I-7 (West 2013); N.M. STAT. ANN. § 26-2B-4(F) (West 2012); OR. REV. STAT. ANN. § 475.304 (West 2012); R.I. GEN. LAWS ANN. § 21-28.6-12 (West 2012); VT. STAT. ANN. tit. 18, § 4474f (West 2012); WASH. REV. CODE ANN. § 69.51A.005(2)(b) (West 2012).

[5] In 2011, the State of Arizona filed a complaint in federal court against the United States, seeking a declaratory judgment setting forth the respective rights and duties of Arizona and the U.S. regarding the validity, enforceability, and implementation of the AMMA. *State of Arizona v. United States of America, et al*, CV11-1072-PHX-SRB. (A true and correct copy of the District Court's ruling on motions to dismiss is appended hereto at Appendix C, "App. C"). Plaintiff requests that this Court take judicial notice of the District Court's ruling pursuant to *State v. McGuire*, 124 Ariz. 64, 66, 601 P.2d 1348, 1349 (App. 1978), and Ariz.R.Evid. 201, not for precedential effect, but rather for the District Court's discussion of the parties' positions. The U.S. did not argue that the CSA preempts the AMMA. Instead, it urged the court to dismiss Arizona's case for lack of jurisdiction. App. C at 4. Concluding that Arizona had not met either the constitutional or prudential components of ripeness, the District Court dismissed the case. *Id*. at 10.

activity. The County's fixation on the word "authorize" is a red herring—the legal consequences of "authorization" are the same as "decriminalization," which is unquestionably within the State's authority. Moreover, the AMMA does not require anyone to violate federal law and is therefore not subject to impossibility preemption; local officials who merely issue permits for medical marijuana activities decriminalized under state law are not committing any federal crime.

I. THE COUNTY HAS NOT OVERCOME THE STRONG PRESUMPTION AGAINST FEDERAL PREEMPTION OF THE AMMA.

"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. 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.[6] First, federal law preempts state laws that "stand[] as an

[6] 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.").

obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Second, 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). 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). This 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.

The AMMA, which merely decriminalizes certain conduct involving marijuana under state law, does not stand as an obstacle to the CSA.[7] The 10th Amendment ensures that the federal government cannot compel 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

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

authorities can still enforce the CSA if they choose to do so.

In addition, 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 actions 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.

A. 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. As the Trial Court explained, the Supremacy Clause and the principle of preemption "is tempered by the Tenth Amendment." App. B at 5, n.6.

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, Arizona'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 indistinguishable from

the effect of "decriminalization"—both are permitted under the 10th Amendment. The suggestion that provisions which "authorize" conduct that is illegal under federal law are preempted—but those that "decriminalize" the same conduct are not preempted—relies on a formalistic distinction without a substantive difference.

i. 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.

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 v. Oregon*, 546 U.S. 243, 249-250 (2006). Yet it is beyond dispute that Congress neither has nor could require Arizona to enact state criminal penalties for any activities involving controlled substances, including marijuana. Indeed, the Supreme Court's 10th Amendment jurisprudence demarcates axiomatic limitations on Congress's power: "the Constitution has never been understood to confer upon Congress the ability to 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*, 297 Mich. Ct. App. 446, 823 N.W.2d 864, 873 (Mich. App. 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 v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). Thus, "preventing the state from repealing an existing law is no different from forcing it to pass a new one." *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. Indeed, given that Congress is powerless to force Arizona to enact any of its own laws prohibiting marijuana activity, it would be illogical to conclude that if Arizona chooses to enact such laws, Congress is suddenly vested with the authority to prevent Arizona from ever repealing some or all of those laws. Of course, if Arizona withdraws all or some complementary penalties, the Supremacy Clause ensures that federal criminal law still applies within Arizona. *See Gonzales v. Raich*, 545 U.S. 1, 29-30 (2005).[8] 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 Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 761 (Cal. App. 2010) (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

[8] The County cites *Gonzales v. Raich*, 545 U.S. 1 (2005), in support of its obstacle preemption argument. *Raich* stands for the simple and uncontroversial proposition that state medical marijuana laws do not render federal law inapplicable. In relying heavily on *Raich*, the County apparently conflates 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. As the Trial Court noted, "[t]he *Raich* Court did *not* address the issue presented to this Court, that is, whether federal law preempts State law, which permits the use of medical marijuana." App. B at 4.

commandeer that of the state."); *Ter Beek*, 823 N.W.2d at 873-874 ("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 lesser step of removing some criminal penalties for certain marijuana activities by certain individuals. *See* App. B at 7 (explaining that "Arizona's adoption of the Uniform Controlled Substances Act remains intact and unlawful possession and sale remain felonies that carry with them the possibility of long prison terms."); *see also City of Garden Grove v. The Superior Court of Orange County*, 157 Cal. App. 4th 355, 382 (Cal. App. 2007) (cert. denied) (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 *Oregon*, 546 U.S. at 270).[9]

[9] Indeed, Plaintiff and Intervenors agreed below that "State laws that merely decriminalize certain conduct for purposes of State law enforcement are not preempted . . . ." [IR 61, p. 6]

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 and those activities that have been decriminalized are strictly regulated. As the Trial Court concluded, "[i]nstead of frustrating the CSA's purposes, it is sensible to argue that the AMMA furthers the CSA's objectives in combating drug abuse and the illegitimate trafficking of controlled substances." App. B at 6. Consider if Congress had criminalized marijuana before Arizona, and then Arizona decided to criminalize 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 therefore does not stand as an obstacle to the CSA.[10]

ii. Authorization and Decriminalization Are Merely Two Sides of the Same Coin and the County's Implicit Attempt to Distinguish These Concepts is a Red Herring.

State laws that merely decriminalize certain conduct for purposes of State law enforcement are not preempted. This principle is so clear that Plaintiff and Intervenors were in agreement below 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 . . . ." [IR 61, p. 4]

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.

[10] The contract cases the County cites do not bind this court and are not directly relevant. 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. (For this reason, Plaintiff has refrained from citing other memorandum decisions favorable to its position). Moreover, these cases undertake minimal analysis and are unpersuasive. 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. 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 Colorado Medical Marijuana Act poses an obstacle to the CSA. 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.*

Federal law prohibits all of these activities.[11] But it is Arizona's sovereign prerogative to define its own criminal law, 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 below that patient and caregiver identification cards are not subject to obstacle preemption. [IR 61, p. 4]; *see also San Diego NORML*, 165 Cal. App. 4th at 827 (concluding that the CSA does not preempt California's medical marijuana identification laws under the obstacle preemption doctrine 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

[11] 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. The State is obviously powerless to confer such immunity, and the existence of a state statute decriminalizing 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*, 823 N.W.2d at 873 ("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.").

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.

The County, however, argues that the use of the word "authorize" in certain provisions of the AMMA magically renders those provisions preempted—even though if those provisions instead used the word "decriminalize," there would be no preemption because the 10th Amendment categorically precludes the federal government from dictating what conduct a state must criminalize. This alleged distinction has no substantive difference: authorizing and decriminalizing have the same legal effect.[12] For example, ARIZ. REV. STAT. ANN. § 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

[12] Indeed, the *Raich* court equated authorization with decriminalization in its description of California's medical marijuana law: "California became the first State to *authorize* limited use of the drug for medicinal purposes. . . . The Act creates *an exemption from criminal prosecution* for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician." 545 U.S. at 5 (emphasis added) (footnotes omitted).

applicable state criminal law that prohibits marijuana cultivation (and the practical effect is simply to give law enforcement a "clear indication" of whether someone is so exempt). 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. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or. 159, 197, 230 P.3d 518, 539 (Or. 2010) (Walters, J., dissenting) (asserting that "[e]ven if it did not use words of permission, the Oregon Medical Marijuana Act would permit, for purposes of Oregon law, the conduct that it does not punish."). According to the County, however, using the word "authorization" instead of the words "exempting from criminal penalties" requires a finding of preemption. The law does not turn on such superficiality. *Emerald Steel*, 230 P.3d at 538 (Walters, J., dissenting) (explaining that "the words of authorization used in [a section of the Oregon Medical Marijuana Act] and other subsections of the Oregon Medical Marijuana Act serve only to make operable the exceptions to and exemptions from state prosecution provided in the remainder of the act."). Thus, the County's position that the word "authorize" assumes constitutional magnitude is a pretense, and the superficial exercise of simply identifying AMMA provisions containing this word leaves the County far short of its burden of establishing obstacle preemption.

Even the Oregon Supreme Court—whose decision in *Emerald Steel* the County cites 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.").[13] Moreover, as the Trial Court noted, "the *Emerald Steel* Court majority stands virtually alone when it suggested that almost any State statute that affirmatively authorizes federally conflicting conduct is preempted. . . . Most courts, like this Court, more closely examine the purposes of the federal statute and would permit conflicting State law that does not directly undermine federal law." App. B at 8 (citing cases therein).

Indeed, U.S. Supreme Court cases demonstrate that the County cannot carry its burden to overcome the presumption against preemption merely by identifying differences between Arizona and the federal government's approaches to marijuana. This strategy is wholly unsupported by obstacle preemption

[13] The County also cites *Pack v. Superior Court*, 199 Cal. App. 4th 1070 (Cal. App 2011), in support of their argument that "authorization" must be preempted. The County conveniently continues to ignore the fact that 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. Plaintiff addressed the inappropriateness of the County's citation in briefing below, but the County again seems content to disregard California court rules.

jurisprudence, under which difference in policy choice does not by itself render state law preempted. *Wyeth*, 555 U.S. at 581 (holding that Vermont tort law did not present an obstacle to the Federal Food, Drug, and Cosmetic Act, even though the two laws imposed contradictory standards regarding adequate labeling of a prescription drug); *California, et al. v. ARC America Corp. et al.*, 490 U.S. 93, 101-103 (1989) (holding that state laws permitting indirect purchasers to recover damages for state law anti-trust violations did not pose an obstacle to the federal Sherman Act, which only permits direct purchasers to recover damages for federal anti-trust violations); *Silkwood v. Kerr-McGee Corp. et al.*, 464 U.S. 238, 257 (1984) (holding that a state-authorized punitive damages award arising out of the escape of plutonium from a federally-licensed nuclear facility did not pose an obstacle to the federal Atomic Energy Act, which occupied the field of regulating the safety aspects of nuclear energy); *Pacific Gas and Electric Co., et al. v. State Energy Resources Conservation & Development Commission et al.*, 461 U.S. 190, 221-223 (1983) (holding that a California law imposing a moratorium on the certification of new nuclear plants until a state commission concluded that the U.S. had developed an adequate ability to dispose of high-level nuclear waste did not present an obstacle to the federal Atomic Energy Act, even though "[t]hat legislation was carefully drafted . . . to avoid any anti-nuclear sentiment" and reflected a "continuing commitment to nuclear power . . . ."); *Florida Lime*, 373 U.S. at 142 (explaining that "[t]he test of whether both federal and state regulations may operate, or the state regulation must give way [pursuant to obstacle preemption], is whether both regulations can be enforced without impairing the

federal superintendence of the field, not whether they are aimed at similar or different objectives."). Accordingly, the County's oft-repeated and uncontroversial observation that federal and Arizona marijuana policy differ is not sufficient to prove obstacle preemption.

Nor can the County prove obstacle preemption—which turns on the intent of Congress—with reference to three non-binding statements made by DOJ employees.[14] The County's claim, based on these statements, that "[t]he United States Justice Department plainly views Arizona's Medical Marijuana Act as an obstacle to federal enforcement," Defs. Opening Brief "OB" at 18-19, is belied by the fact that between 1996 and 2012 a total of 19 U.S. jurisdictions enacted medical marijuana laws and DOJ has *never* filed an affirmative case alleging that the CSA preempts these laws.

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. As the Trial Court concluded, "[c]learly, the mere State authorization of a very limited amount of federally proscribed conduct, under a tight regulatory scheme, provides no meaningful obstacle to federal enforcement." App. B at 6. The AMMA does not stand as an obstacle to the CSA.

B. Because The AMMA Does Not Require Anyone To Violate Federal Law, It Does Not Create An Impossible Conflict With The CSA.

[14] The limited relevance of these statements is discussed in detail in Section (B)(ii), *infra*.

i. After a Careful Analysis Consistent with the U.S. Supreme Court's Established Impossibility Preemption Doctrine, the Trial Court Correctly Held that it is Not Impossible for County Employees to Simultaneously Comply with both the AMMA and 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. Indeed, the court below explained that "physical-impossibility preemption is rarely used and has been described as 'vanishingly narrow.'" App. B at 9 (internal citation omitted).

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.

To determine whether the AMMA is subject to impossibility preemption, the Trial Court undertook an analysis of the federal aiding and abetting statute, 18 U.S.C. § 2—the only statute the County cited in its Motion for Summary Judgment in support of its allegation of impossibility preemption. As the Trial Court held, a

basic review of aiding and abetting liability under 18 U.S.C. § 2 forecloses the 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 take any action that would satisfy all of the elements required to sustain an aiding and abetting conviction. Below, the County alleged 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." [IR 50, p. 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*, 187 Cal. App. 4th at 759-760.

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 potential 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[15] "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*, 309 F.3d at 635-636 (stating "[a] doctor's anticipation of patient conduct," upon receiving the doctor's recommendation for marijuana, "does not translate into aiding and abetting."). Accordingly, the Trial Court concluded that County employees' "specific intent is to perform their administrative tasks. They have no interest in whether the dispensary opens, operates, succeeds or fails. They are wholly unconnected to and separate from the person(s) or entity that will

[15] *See* CAL. HEALTH & SAFETY CODE § 11362.72.

purportedly be completing the substantive offense." App. B at 11.

In a similar vein, courts in Arizona, California and Oregon have even 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. *State v. Okun*, --- P.3d ----, 2013 WL 119672, *3 (Ariz. App. 2013) (concluding that a County Sheriff is immune from federal prosecution, pursuant to 21 U.S.C. § 885(d), for complying with a Superior Court Order to return marijuana seized from a qualified patient); *State v. Kama*, 39 P.3d 866, 868 (Or. App. 2002) (same); *City of Garden Grove v. The Superior Court of Orange County*, 157 Cal. App. 4th 355, 390 (Cal. App. 2007) (cert. denied) (holding that it would be beyond the scope of either conspiracy or aiding and abetting to hold police officers obligated by court order to return marijuana responsible for any violations of federal law that might ensue, and further observing that 21 U.S.C § 885(d) renders nugatory the chance that any such police officer would be subject to liability). 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.

In light of the foregoing authorities, it is clear that the court below correctly held that the AMMA does not require County employees to aid and abet federal controlled substances crimes.

ii. This Court Should Reject the County's Argument Because It Fails To Cite Any Relevant Authority In Support of Its Allegation of Impossibility Preemption.

The County bears the burden of proving its impossibility preemption defense to Plaintiff's lawsuit. *Grubb & Ellis*, 138 P.3d at 1216 (stating that "[t]he proponent of an affirmative defense has the burden of pleading and proving it."). And yet, just as in their briefing before the Trial Court, the County's Opening Brief does not identify a single section of the U.S. Code that its employees cannot comply with while also complying with the AMMA. Criticizing the Trial Court's conclusion that County employees "are not violating federal law" because "they have no interest in whether the dispensary opens, operates, succeeds or fails," the County complains—without supplying any support—that "federal law does not require such personal interest as a prerequisite to potential criminal liability." OB at 21. The County cannot meet its burden with reference to an unidentified "federal law."

Rather than identifying a relevant federal statute and arguing the merits of its claim, the County spends its efforts on two issues which are distinct from the question before this court. First, the County attempts to demonstrate that its employees are at risk of federal prosecution with reference to three non-binding DOJ documents. Upon review, none of these documents support the County's allegation. Second, based on this alleged risk of federal prosecution, the County apparently attempts to show that its preemption defense is justiciable under *federal* standards.

The County cites a letter about the AMMA from former U.S. Attorney Dennis

Burke to ADHS Director Will Humble dated May 2, 2011. In the letter, Burke states the uncontroversial position that "growing, distributing and possessing marijuana in any capacity . . . is a violation of federal law regardless of state laws that purport to permit such activities."[16] *See generally, Raich*, 545 U.S. 1 (holding that the federal government can enforce the CSA via the Commerce Clause in States that have decriminalized the same conduct under state law). Burke's letter then identified "individuals and organizations" whose activities, though not criminal under the AMMA, remain subject to federal prosecution: "property owners, landlords, and financiers . . . ." Conspicuously absent in Burke's letter was any mention of state officials. Indeed, in presenting the letter to this court as evidence of their potential exposure to federal prosecution, the County ignores Burke's subsequent statements. In a later interview with Capitol Media Services, Burke clarified: "It's fair to read into my letter what I included and what I didn't . . . [a]nd if I didn't include state employees, I think that's telling in itself."[17] Further, the very next day Mr. Burke made even clearer that DOJ would not prosecute state workers.[18]

Next, the County cites a memorandum written by Deputy Attorney General

[16] Available at http://www.justice.gov/usao/az/reports/USAO_Medical_Marijuana_May_2011_Letter.pdf (last visited March 4, 2013).
[17] Reported in the East Valley Tribune on May 26, 2011, available at: http://www.eastvalleytribune.com/arizona/politics/article_62e3877a-87ee-11e0-95eb-001cc4c03286.html (last visited March 4, 2013).
[18] Mary K. Reinhart, *Ariz. To Sue Over Medical-pot Law*, Ariz. Republic, May 27, 2011 (quoting Dennis Burke: "We have no intention of targeting or going after people *who are implementing* or who are in compliance with state law." (Emphasis added)). Available at: http://www.azcentral.com/news/election/azelections/articles/2011/05/27/20110527arizona-medical-marijuana-federal-lawsuit.html (last visited March 4, 2013).

James M. Cole dated June 29, 2011. Cole wrote that "persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law." [IR 51, ¶ 5] The AMMA does not require County employees to cultivate, sell, or distribute marijuana. In addition, "facilitation" is not a federal crime, and Cole's use of the word in a memorandum does not make it one. In order for the Cole Memorandum to provide any support for the County's argument, the County must cite a federal statute that prohibits conduct which could fall within the colloquial term "facilita[tion]" and explain how filling out a zoning form meets the elements of that crime. The County has failed to do so.

Finally, the County cites a letter dated February 16, 2012 by former U.S. Attorney Ann Birmingham Scheel written in response to a letter from Governor Brewer seeking guidance about the potential consequences for state employees implementing the AMMA. Birmingham Scheel wrote that "state employees who conduct activities authorized by the AMMA are not immune from liability under the CSA." OB at 18. This letter is the best evidence the County can muster of an actual threat of prosecution. Yet the letter, like the County, fails to cite a federal criminal statute that state employees would be violating by complying with the AMMA. This lack of citation to an actual federal crime, coupled with the fact that there has been no federal prosecution of an Arizona employee who has complied with the AMMA, renders it useless in proving the County's claim.

The County's singular reliance on these documents suggests that it erroneously believes that DOJ employees can somehow create federal crimes by issuing

memoranda and writing letters. Moreover, the County fails to cite a single case that supports its implied proposition that a court can find impossibility preemption based on the statements of DOJ employees.

The County next argues that complying with the Trial Court's order forces its employees to choose between breaking federal law and disobeying a state court order. OB at 23. The dilemma the County constructs puts the cart before the horse. The County assumes, without having first demonstrated, that its employees will be subject to federal prosecution. Having failed to show that compliance with both state and federal law is physically impossible, the County has not established that its employees are actually faced with a dilemma. Furthermore, the citations the County provides in support of this premature argument relate to whether the issue before this *Arizona* court would be justiciable in *federal* court. The County thus appears to conflate the question of whether its preemption defense would be justiciable in federal court and whether it has proven that defense on the merits in this Arizona court.

The County cites *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000) for the proposition that "there ought to be a way to resolve the legal correctness of [the federal government's] position without subjecting an honest businessman to criminal penalties well known for their severity and inflexible administration." OB at 24, quoting *New Hampshire*, 203 F.3d at 5. This quote comes from a paragraph of the court's opinion in which it determined that the case before it was ripe for adjudication. *Id.* (The relevant paragraph begins "[a]s for ripeness, the issue posed by [Plaintiff] is an abstract one of statutory

interpretation . . ."). This language does not bear on the court's ultimate holding on the merits that the federal statutory definition of marijuana, 21 U.S.C. § 802(16), includes cannabis sativa plants even if grown solely for the production of industrial products. *Id.* at 8.[19]

The County's citation to *Mobil Oil Corp. v. Att'y Gen. of Va.*, 940 F.2d 73 (4th Cir. 1991) is similarly irrelevant to the question of impossibility preemption. In *Mobil*, Mobil Oil Corp. filed suit seeking declaratory and injunctive relief based on its allegation that amendments made to the Virginia Petroleum Products Franchise Act were unconstitutional under a variety of theories, including preemption by the federal Petroleum Marketing Practices Act. *Id.* at 74. The district court dismissed the case, concluding that no justiciable controversy had been presented. *Id.* The Fourth Circuit reversed, holding that the dispute between Mobil and the Virginia Attorney General satisfied the federal case or controversy requirement and that the district court had to adjudicate Mobil's claims on the merits. *Id.* at 75. Thus, the issue presented to the court in *Mobil* was one of justiciability—as the court clearly

[19] The plaintiff in *New Hampshire* wanted to manufacture industrial hemp in his personal capacity as a farmer without fear of federal prosecution. 203 F.3 at 3-4. The "the threat of federal prosecution [t]here [wa]s realistic" *id.* at 5, because "the DEA ha[d] made clear, both by its conduct in New Hampshire and elsewhere, that it view[ed] this as unlawful under the federal criminal statutes[,]" *id.*, and because the manufacture of marijuana is identified in the CSA as a criminal offense. 21 U.S.C. §841(a)(1). The differences between *New Hampshire* and the present case are clear and render its reasoning entirely inapplicable. First, there is no analogous evidence here of a realistic threat of prosecution: no federal official has prosecuted an Arizona official for filling out ADHS's zoning form, and no federal official has prosecuted a state official in any of the 19 jurisdictions that have medical marijuana laws for activities comparable to those at issue here. In addition, the CSA specifically identifies the manufacture of marijuana as a criminal offense; by contrast, the County has not even identified for this court the federal crime that will allegedly occur when its employees fill out a form.

stated, "the merits [were] wholly irrelevant to this appeal." *Id.* at 77. Accordingly, *Mobil* provides no support for the County's impossibility preemption claim.

Minnesota Citizens for Life v. Fed. Election Comm'n, 113 F.3d 129 (8th Cir. 1997) is of no greater help to the County. In *Minnesota,* the court held that a non-profit corporation had standing to challenge a federal regulation on First Amendment grounds, that the pre-enforcement challenge was ripe for adjudication, and that the regulation actually violated the First Amendment. *Id.* at 131-133. The County cites page 131 of the *Minnesota* opinion, all of which is devoted to the court's discussion of standing, redressability, and ripeness. OB at 23; *Id.* at 131. *Minnesota* therefore provides no support for the County's allegation that its employees cannot comply with both the AMMA and with federal law.

Finally, the County cites *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 924-25 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 43 (1997). In *Yniguez*, the Ninth Circuit held that an English-Only amendment to the Arizona Constitution violated the First Amendment to U.S. Constitution. *Id.* at 947. The County cites this case in support of its proposition that its employees should not be forced to choose between violating federal law and complying with a court order, supplying the parenthetical: "(State employee who failed to obey an arguably unconstitutional state law could be subject to employment sanctions.)". OB at 23-24. It is true that Arizona employees who fail to obey the Arizona constitution are subject to Arizona-based employment sanctions—it is unclear, however, how this bears on the County's federal impossibility preemption argument. *Yniguez,* 69 F.3d at 924. Indeed, the pages of *Yniguez* that the County cites—924-25—are part

of the "Factual Background" section of the opinion. These pages contribute nothing to the County's argument that the AMMA is subject to impossibility preemption.

Throughout its discussion of impossibility preemption, the County tellingly refuses to directly engage with its own argument. To meet its burden of proving this defense, the County must overcome the presumption against preemption required by the U.S. Supreme Court *and* must overcome the presumption of validity under Arizona law. *Wyeth*, 555 U.S. at 565; *Home Builders Ass'n*, 187 Ariz. at 482, 930 P.2d at 996. By failing to cite a section of the U.S. Code and case law interpreting and applying that section, and then by failing to explain how the AMMA requires County employees to take actions that would make compliance with that section physically impossible, the County has fallen far short of overcoming those presumptions, and this court should reject its impossibility preemption defense.

II. THE TRIAL COURT GRANTED PROPER MANDAMUS RELIEF AS REQUESTED BY WHITE MOUNTAIN.

The County has mischaracterized Plaintiff's request for mandamus relief and the Trial Court's grant thereof. The County argues, incorrectly, that the issue addressed by the Trial Court was whether Mr. Montgomery can be compelled to give certain advice to the Board of Supervisors or can be compelled to change that advice. OB at 25-27. Not so. First, a fair reading of Plaintiff's Complaint, First Amended Complaint, Motion for [Partial] Summary Judgment and other filings clearly reveals that Plaintiff sought a Writ of Mandamus ordering Defendant

Maricopa County to provide the information required by the form entitled "ARIZONA DEPARTMENT OF HEALTH SERVICES MEDICAL MARIJUANA PROGRAM: DOCUMENTATION OF COMPLIANCE WITH LOCAL JURISDICTION ZONING" ("Zoning Form"). [*See, e.g.*, IR 1, p. 14, ¶ 3; IR 72, p. 13, ¶ 41; IR 34, p. 1-3, ¶¶ 2, 5.]

This Zoning Form, attached hereto for reference as Appendix A, simply requires the local jurisdiction to check one of two boxes, and the choices are stated as follows on the form:

____ There are no local zoning restrictions for a proposed dispensary at the above location.

OR

____ The location of the proposed dispensary is in compliance with local zoning restrictions related to where a dispensary may be located.

App. A.

The Trial Court's mandamus ruling merely tracks the language of the form, and orders that the County provide documentation to Plaintiff that:

a. There are no local zoning restrictions for the dispensary's location, or
b. The dispensary's location is in compliance with any local zoning restrictions.

App. B at 12.

It is therefore clear that what the Trial Court properly ordered was what Plaintiff properly requested: that the County do its job and provide the information required in the Zoning Form. Indeed, the Trial Court ordered that the County provide the functional equivalent of the form.

While it is true that Plaintiff disputes the objective accuracy of the advice that Mr. Montgomery provided to his clients—to wit, that to check a box on the Zoning Form would subject County employees to federal prosecution—that goes to the merits of the County's legal arguments regarding preemption. Plaintiff did not ask the Trial Court to order that Mr. Montgomery change or provide certain advice. Rather, Plaintiff asked the Trial Court to order that the County fulfill its duties in providing information required on the Zoning Form, and that is what the Trial Court ordered. Of course, in so doing the Trial Court rejected Mr. Montgomery's stated legal reason for the County's refusal to provide the information on the Zoning Form.

Plaintiff's alternative request for a Declaratory Judgment that Maricopa County has either not adopted any medical marijuana zoning restrictions, or has failed to adopt any reasonable restrictions, as required by ARIZ. REV. STAT. ANN. § 36-2806.01, is not at issue in this appeal.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee respectfully urges this court to affirm the Trial Court's grant of partial summary judgment. Plaintiff requests that this Court award it reasonable attorneys' fees and costs, pursuant to ARIZ. REV. STAT. ANN. §§ 12-2030 and 12-348.

RESPECTFULLY SUBMITTED this 6th day of March, 2013.

By: /s/ *Kelly J. Flood*

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APPENDIX A

ARIZONA DEPARTMENT OF HEALTH SERVICES
MEDICAL MARIJUANA PROGRAM

DOCUMENTATION OF COMPLIANCE WITH LOCAL JURISDICTION ZONING

TO BE COMPLETED BY AN AUTHORIZED REPRESENTATIVE OF THE LOCAL JURISDICTION IN WHICH THE PROPOSED DISPENSARY IS LOCATED.

Name of Individual or Entity Applying for a Dispensary Registration Certificate:			
Physical Address of Proposed Dispensary:			
City:	County:	State:	Zip Code:
Legal Description of the Property:			
Name of Local Jurisdiction:			

☐ There are no local zoning restrictions for a proposed dispensary at the above location.

OR

☐ The location of the proposed dispensary is in compliance with local zoning restrictions related to where a dispensary may be located.

_____
TITLE OF THE AUTHORIZED REPRESENTATIVE OF THE LOCAL JURISDICTION

_____ _____
PRINTED NAME TELEPHONE NUMBER

_____ _____
SIGNATURE DATE SIGNED

APPENDIX B

Michael K. Jeanes, Clerk of Court
*** Filed ***
12/05/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-053585 12/03/2012

HONORABLE MICHAEL D. GORDON

CLERK OF THE COURT
M. MINKOW
Deputy

WHITE MOUNTAIN HEALTH CENTER INC JEFFREY S KAUFMAN

v.

COUNTY OF MARICOPA, et al. PETER MUTHIG

CHARLES A GRUBE
KEVIN D RAY
KELLY J FLOOD

UNDER ADVISEMENT RULING AND WRIT OF MANDAMUS

A. Introduction

The controversy before the Court arises out of the passage and application of Arizona's Medical Marijuana Act (AMMA). The AMMA, originally known as Proposition 203, was enacted by voter initiative on November 2, 2010 and has been codified under Arizona law. *See* Ariz. Rev. Stat. Ann. §§ 36-280 to 36-2819 (2012). The AMMA decriminalizes, under State law, the possession, use, cultivation and sale of marijuana for medical use. The AMMA provides for highly State-regulated dispensary and cultivation sites. *Id*.

The AMMA grants rule-making authority to the Arizona Department of Health Services (ADHS). *See* Ariz. Rev. Stat. Ann. § 36-136(F) (2012). The regulations subsequently promulgated are embodied in Arizona's Administrative Code. *See* Ariz. Admin. Code R9-17-101 to R9-17-323 (2012). The regulations divide Arizona into 126 separate "Community Health Care Analysis Areas" ("CHAA") and each CHAA may have only one medical marijuana dispensary.

The regulations also provide that an entity seeking to become a dispensary or cultivation site must first file an application for a Registration Certificate (Registration Certificate) with the ADHS. *See* Ariz. Admin. Code R9-17-305 (2012). Once having obtained a Registration Certificate, the applicant must then submit an application with the certificate to ADHS for approval of the site.

The regulations further provide that the applicant must submit documentation to ADHS stating that its proposed site meets all applicable zoning restrictions or, alternatively, there are none that need to be met. *See* Ariz. Admin. Code. R9-17-304(6) and R9-17-305(A)(2) (2012). It is that requirement that precipitated the extant lawsuit.

B. This lawsuit

Plaintiff White Mountain Health Center Inc. seeks to operate a dispensary under the AMMA, the Sun City CHAA No. 49 and it is the only applicant in this CHAA. On about May 25, 2012, Plaintiff filed an application for a Registration Certificate with ADHS. Plaintiff alleges that it was unable to obtain documentation from Defendants Maricopa County and/or County Attorney William Montgomery (collectively referred to as the "County Defendants") stating that its proposed site either met County zoning restrictions or, alternatively, that there were no such restrictions. Plaintiff further alleges that ADHS issued a "Notice of Deficiencies" advising Plaintiff of the defect with the application. Plaintiff alleges that the County Defendants categorically refused to provide the necessary zoning documentation.

Thus, on June 19, 2012, Plaintiff filed a Complaint followed by a First Amended Complaint, filed on September 7, 2012.[1] Plaintiff seeks the following relief:

- Count 1 (Declaratory Judgment): Declaring, among other things, that there are no local or Maricopa County zoning restrictions for its proposed dispensary in the Sun City CHAA No. 49 and/or, in the alternative, the proposed site is in compliance with the Maricopa County Zoning Ordinance and regulations relating to where a dispensary may be located and/or, in the alternative, Maricopa County has not enacted reasonable restrictions with respect to CHAA No. 49;

- Count 2 (Injunctive Relief): Enjoining the ADHS and its Director Will Humble (Humble) *pendente lite* and permanently from "withdrawing" and/or rejecting Plaintiff's application for a Registration Certificate;

[1] The First Amended Complaint was filed in order to correct technical deficiencies.

- Count 3 (Mandamus Relief Issuing a Writ of Mandamus): Requiring County Defendants to provide Plaintiff and ADHS with a sworn statement and/or other materials declaring that Maricopa County has not adopted any restrictions upon the location of medical marijuana dispensaries in the CHAA No. 49 and that Plaintiff's proposed location is therefore in compliance with zoning requirements;

- Count 4: Seeking a Writ of Mandamus requiring ADHS to issue a Registration Certificate and to allow Plaintiff to open a medical marijuana dispensary after Plaintiff has constructed improvements regardless of whether Maricopa County has issued the zoning compliance certification; and

- Awarding Plaintiff its attorney's fees.

On July 23, 2012, after a hearing, the Court entered a preliminary injunction that enjoined ADHS and Humble from withdrawing, denying or otherwise rejecting Plaintiff's application for a Registration Certificate based on the Plaintiff's putative failure to comply with Ariz. Admin. Code R9-17-304(6) (regulation requiring the dispensary applicant to provide documentation confirming zoning certification). The Court found that the County Defendants were effectively foreclosing the possibility of Plaintiff's full compliance. The Court also found Plaintiff had applied for a Registration Certificate but Maricopa County refused to examine whether Plaintiff's proposed site met zoning requirements or if there were any zoning requirements at all.

The defendants filed timely Answers to the First Amended Complaint, including the State of Arizona (Intervenor), who intervened.[2] Intervenor also affirmatively counterclaimed for declaratory relief asserting that portions of the AMMA were preempted by federal law under the Controlled Substances Act (CSA). *See* U.S.C. §§801-971 (2012).[3]

Pending before the Court are: (1) Plaintiff's Motion for Partial Summary Judgment (deemed filed 9/7/12);[4] (2) County Defendants' (Maricopa County, William Montgomery) Cross Motion

[2] On August 23, 2012, the State moved to intervene. The Court granted the Motion on September 10, 2012 to the Intervenor.

[3] Intervenor and the County disagree on one point. The County Defendants argue the CSA preempts the AMMA in its entirety and the State argues that the AMMA's provision that directs the ADHS to issue medical marijuana cards is not preempted.

[4] Although denominated a motion for summary judgment, Plaintiff seeks limited relief, either: (i) a court order directing County Defendants to issue its documentation or (ii) a Court order deeming that its application for a permit satisfies Ariz. Admin. Code R9-17-304(6). Therefore, it is a motion for partial summary judgment.

for Summary Judgment (filed 8/23/12); and (3) The Intervenor's Motion for Summary Judgment (filed 8/23/2012).

Other procedural motions include Plaintiff's Motion for Leave to file Plaintiff's Response to County Defendants' Separate Statement of Facts in Support of Cross Motion for Summary Judgment (filed 10/10/12) (granted by minute entry dated 10/18/12 and on the Record) and Plaintiff's request to strike memorandum decisions cited by County Defendants. *See Plaintiff's Joint Response to County Defendants' Cross Motion for Summary Judgment and Intervenor's Motion for Summary Judgment*, n.7 (9/27/12).[5]

The crux of the parties' dispute lies with the County Defendants and the Intervenor's argument that the United States Constitution preempts the AMMA and, therefore, the AMMA is unconstitutional. The Court turns to this argument first.

C. Preemption

Federal law proscribes the "manufacture, distribution or possession of marijuana" under the CSA. In 2005, the United States Supreme Court held that California's medical marijuana laws do not provide any impediment to federal prosecution of the CSA and previously held there is no exception for medical necessity under the CSA. *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483 (2001). The *Raich* Court did *not* address the issue presented to this Court, that is, whether federal law preempts State law, which permits the use of medical marijuana. *Id*. Rather, the Court addressed Congress' power under the Commerce Clause to prohibit the local cultivation and use of medical marijuana. *Id*.

The question before this Court is the flip side of the *Raich* coin. Does Congressional passage of the CSA preempt Arizona's attempt to authorize, under State law only, the local cultivation, sale and use of medical marijuana? In other words, does the CSA preempt the AMMA?

Early in this preemption analysis, the Court acknowledges two fundamental principles underlying the examination of preemption. First, preemption is a question of Congressional *intent* or *purpose*. *See, e.g., Wyeth v. Levine*, 555 U.S 555, 565-66 (2009); *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88 (1992). Where, as here, Arizona is operating under its historic police powers, this Court is directed to "assume that 'the historic police powers of the States' are *not* superseded unless that was *the clear and manifest purpose* of Congress." *Arizona v. United States*, 132 Ariz. S. Ct. 2492, 2501 (2012) (addressing Arizona's immigration statutes

[5] *See Ariz. R. Sup. Ct.* 111(c) (2012). While the Court reviewed those cases, the Court they did not impact the Court's decision. The request is, therefore, deemed moot.

that were preempted by federal law) (emphasis added); *see also Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).

Second, once preemption of State law is clearly demonstrated to be a Congressional purpose, this Court must respect the right of Congress to impose laws that supersede State law. Congress' power to do so arises from the Supremacy Clause of the United States Constitution which provides, in part, that the "[l]aws of the United States. . . shall be the supreme law of the land." U.S. Const. Art. VI, cl. 2.[6]

With that groundwork, the Court must measure whether Congress intended to have the CSA preempt State law. There are four ways to measure congressional purpose in terms of preemption: (1) expressed preemption; (2) field preemption; (3) obstacle preemption; and (4) physical impossibility.

Addressing the first, Congress may expressly set forth its intent to prohibit State involvement in a statutory scheme. *See, e.g., Chamber of Commerce of U. S. v. Whiting*, 131 S. Ct. 1968 (2011) (holding that Arizona's employer sanctions against those who hire undocumented workers were not preempted by federal law). In this case, the parties acknowledge that when Congress enacted the CSA, there was no such expression of purpose.

Addressing the second, Congress may preempt State legislation if Congressional legislation so fully occupies the field that its intent to preempt State law is obvious. *See Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 115 (1992) (Souter, J., dissenting) (acknowledging the doctrine). Often referred to as "field preemption," it is a measure of Congressional intent. Like express preemption, the parties in this case agree that the CSA does not require preemption of the AMMA under this rubric.[7]

Addressing the third, preemption may occur when States enact legislation that stand as an "obstacle" to the full purposes and objectives of Congress. *See Hines v. Davidowitz*, 312 U.S. 52 (1941). This type of preemption is implied. *Id*. at n.20.

[6] This principle, of course, is tempered by the Tenth Amendment that expressly provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const. Amend. X.

[7] Like the federal government, Arizona expressly regulates and/or criminalizes the unlawful use of and distribution of controlled substances. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 13-3401 to 3461 (2012); *see also* Ariz. Rev. Stat. Ann. §§ 36-2501 to 2611 (Arizona's "Controlled Substance Act").

Finally, preemption may arise when it is "physically impossible" to comply with both State and Federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).[8] Like obstacle preemption, physical-impossibility preemption is implied. *Id*.

In this case, Intervenor and County Defendants claim that AMMA fails under obstacle preemption and as physical-impossibility preemption. They argue the AMMA is therefore unconstitutional. The Court disagrees.

1. Obstacle Preemption

The Intervenor and County Defendants argue that the AMMA stands as an obstacle to the accomplishment of the full purposes of the CSA. "What is a sufficient obstacle is matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). The Court must determine whether State law "undermines the intended purpose and 'natural effect'" of the CSA. *Id*; *see also Willis v. Winters*, 253 P.3d 1058, 1064 (Or. Sup. Ct. 2011).

The CSA's objectives are: (1) combating drug abuse; and (2) controlling the legitimate and illegitimate traffic in controlled substances. *See Gonzales v. Oregon*, 546 U.S. at 249 (2006); *Gonzales v. Raich*, 545 U.S. at 12. With these objectives in mind, the Court finds that the AMMA, while reflecting a very narrow but different policy choice about medical marijuana, does not undermine the CSA's purposes.

Clearly, the mere State authorization of a very limited amount of federally proscribed conduct, under a tight regulatory scheme, provides no meaningful obstacle to federal enforcement. No one can argue that the federal government's ability to enforce the CSA is impaired to the slightest degree. Indeed, the United States Supreme Court has been unequivocal on this point. *See generally Gonzales v. Raich*.

Instead of frustrating the CSA's purpose, it is sensible to argue that the AMMA furthers the CSA's objectives in combating drug abuse and the illegitimate trafficking of controlled substances. The Arizona statute requires a physician to review a patient's medical circumstances prior to authorization of its use. The statute also provides the ADHS with full regulatory authority. The ADHS, in turn, has exercised that authority with appropriate care to ensure that licensed dispensaries operate only within the confines of the AMMA. The detailed regulations ensure the marijuana is used for medical purposes only. *See, e.g*., n.13, *infra*.

[8] Courts frequently characterize physical impossibility and obstacle preemption as subsets of "conflict preemption." *See, e.g., Gade v. National Solid Waste Management Ass'n*, 505 U.S. at 115) (Souter, J., dissenting).

Moreover, the AMMA provisions should not be viewed in isolation when evaluating whether it frustrates the purposes of the CSA. The AMMA did not remove Arizona's categorical prohibition of marijuana for recreational use or any use other than medical use. Arizona's adoption of the Uniform Controlled Substances Act remains intact and unlawful possession and sale remain felonies that carry with them the possibility of long prison terms. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3405 (2012). It should not be lost on anyone that using the AMMA as a subterfuge for prohibited possession and sale poses serious and meaningful consequences. *Id*. Consistent with the CSA objectives, these criminal provisions act in concert with the AMMA and Arizona's Uniform Controlled Substance Act in controlling the legitimate and illegitimate traffic in controlled substances.

To be sure, there is no universal agreement on this analysis. The Oregon Supreme Court, for example, held that federal law preempted Oregon state law that otherwise would have required accommodation for employees who used medical marijuana. *See Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518 (Or. Sup. Ct. 2010).

The *Emerald Steel* Court held that Oregon's statutory scheme was preempted because it "affirmatively authorized the very conduct that federal law prohibited." *See Emerald Steel*, 230 P.3d at 529. The court found that "to the extent [Oregon law] affirmatively authorizes the use of medical marijuana," it was "without effect." *Id*.[9]

The majority in *Emerald Steel*, however, faced a vigorous dissent. The dissenters, in this Court's view, correctly focused on the objectives and goals of the CSA. The dissenters noted that the Oregon statute did not undermine the accomplishment and execution of the CSA. *Id*. at 542. The only difference between the Oregon statute and the CSA, posited the dissenters, was "Oregon's differing policy choice and the lack of respect it signifies." Concluding that *Emerald Steel* majority incorrectly yielded Oregon's right to make its own decisions that furthered the same goals as the CSA, the dissenters stated that they could not:

> join in a decision by which we, as state court judges, enjoin the policies of our own state and preclude our legislature from making its own

[9] The *Emerald Steel* Court analogized to hypothetical Congressional enactments prohibiting drivers under 21 years old to drive or alcohol sales to those under 21. State laws to the contrary would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (keeping everyone under the age of 21 off the road) and would be preempted. 230 P.3d at 530.

> independent decisions about what conduct to criminalize.

Emerald Steel, 230 P.3d at 544-45.

Notably, the *Emerald* Court majority stands virtually alone when it suggested that almost any State statute that affirmatively authorizes federally conflicting conduct is preempted. *See* n. 9, *supra*. Most courts, like this Court, more closely examine the purposes of the federal statute and would permit conflicting State law that not does directly undermine federal law. *See, e.g.*, *Ter Beek v. City of Wyoming*, __N.W.2d__, 2012 WL 3101758 (Mich. App.) (July 31, 2012); *Willis v. Winters*, 253 P.3d at 1065-66 (holding that the Oregon law that permitted concealed gun permits was not preempted by federal law); *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. (Cal. App. 2008) (California State law permitting marijuana identification cards is not preempted).

Finally, the Court will state the obvious: The AMMA affirmatively provides a roadmap for federal enforcement of the CSA, if it wished to so. Dispensaries are easily identified. They are, in fact, ready targets for federal prosecution under the CSA, should federal authorities deem it appropriate.

For all these reasons, the Court finds that obstacle preemption is inapplicable.

2. Physical Impossibility.

The Intervenors and County Defendants argue that it is physically impossible for its employees and agents to comply with both AMMA and the CSA. *See Wyeth v. Levine*, 444 U.S. 555 (2009). Stated another way, they argue that the State and County employees must violate the CSA by issuing the requested documentation and otherwise complying with the AMMA's regulatory scheme. Specifically, they argue that these workers necessarily commit the federal crime of aiding and abetting the possession and sale of marijuana in violation of 18 U.S.C. § 2.[10]

This precise issue is not well settled. *Compare Pack v. Superior Court*, 132 Cal. Rptr. 3d 633 n.27 (Cal. App. 2012) (*review granted previously but later vacated due to mootness*) *with*

[10] The Intervenor and County Defendants do not argue that others who use or dispense marijuana under State law support their argument for physical-impossibility preemption. There is nothing in the AMMA that requires these persons to engage in the activity. It is not physically impossible to comply with logically inconsistent statutes where a person can simply refrain from doing the activity that one statute purports to permit and that the other statute purports to proscribe. *See Ter Beek, supra* (*citing Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996)).

Garden Grove v. Superior Court, 68 Cal. Rptr. 3d 656 (Cal. App. 2007). Nonetheless, physical-impossibility preemption is rarely used and has been described as "vanishingly narrow." *See* Nelson, *Preemption,* 86 Va. L. Rev. 225, 228 (2000).

Notwithstanding the very limited scope of this type of preemption, the California Court of Appeals in *Pack* held that state employees may well be subject to federal prosecution in support of its decision that the CSA preempted a city ordinance and California's medical marijuana laws. That ordinance required medical marijuana to be analyzed by an independent laboratory and required permits for marijuana collectives. The *Pack* court held that state workers would likely violate the CSA but was equivocal—acknowledging another California court's decision to the contrary. *Pack at id.* (referring to *City of Garden Grove v. Superior Court*, *supra*). The *Pack* court was concerned that the earlier decision was "too narrow." *Id*.

In *Garden Grove,* the California Court of Appeals arrived at the opposite conclusion. The *Garden Grove* court found that California medical marijuana laws were not preempted under the physical-impossibility doctrine. The *California Grove* court affirmed a lower-court order that directed law enforcement to return a user's medical marijuana after it was determined he lawfully possessed the substance. The *Garden Grove* court expressly rejected the City's argument that compliance with the lower-court order required law enforcement officers to violate federal law.[11] After examining whether such conduct violating the federal aiding and abetting statute, the court found prosecution to be "unlikely." *See Garden Grove*, 60 Cal. Rptr. 3d at 663 - 665. The *Garden Grove* court observed:

> [H]olding the City or individual officers responsible for any violations of federal law that might ensue from the return of [defendant's] marijuana would appear to be beyond the scope of either conspiracy or aiding and abetting. No one would accuse the City of willfully encouraging the violation of federal laws were it merely to comply with the trial court's order. The requisite intent to transgress the law is so clearly absent here that the argument is no more than a straw man.

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[11] Construing 21 U.S.C. § 885(d), the court also concluded that the officers likely had federal immunity because they were acting within the official duties. *See Garden Grove*, 157 Calif. Rptr. 3d at 664. *See also State v. Kama*, 39 P.3d 866 (Or. Ct. App. 2001) (noting that federal law immunizes law enforcement officers who possess marijuana in the performance of their official duties).

Garden Grove, 60 Cal. Rptr. 3d at 663.

A similar issue was presented to the Oregon Supreme Court in *Willis v. Winters*, *supra*. In *Winters*, two Oregon county sheriffs refused to issue a concealed-handgun license (CHL) to medical-marijuana users. The *Winters* court rejected the sheriffs' two-pronged preemption argument, including an argument that providing a CHL required the sheriffs to violate federal law.

The sheriffs were positing what was in reality a physical-impossibility preemption argument.[12] Specifically, the sheriffs argued that issuing the CHL would in essence be providing "deceptive" information to gun dealers—and would violate 18 U.S.C. § 922(a)(6) which prohibits persons from providing false information to federally licensed gun dealers. Like the *Garden Grove* court, the *Winters* court juxtaposed the state actor's conduct with federal law and found the conduct did not violate federal law. *See Winters*, 253 P.2d at 1066-68.

Finally, the Ninth Circuit Court of Appeals addressed a similar issue in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) but under First Amendment principles. The *Conant* court rejected the federal government's argument that it could prevent a physician from "recommending" marijuana. That recommendation was a statutory predicate to lawful possession of marijuana under California State law. The federal government contended that the physician's recommendation constituted aiding-and-abetting the violation of CSA or constituted conspiracy.[13] The *Conant* court rejected that argument and held that the doctor's "anticipation" of patient conduct was insufficient to establish liability under either the aiding-and-abetting or the conspiracy statutes.

Turning to the arguments presented here, this Court addresses the limited issue of whether the AMMA requirements that direct the County Defendants to confirm zoning compliance constitutes aiding and abetting thereby creating physically-impossible preemption. Aiding and

[12] The *Winters* court also rejected the obstacle preemption argument as well. *See Winters*, 253 P.2d at 1064-66.

[13] The AMMA, like California law, does not require a "prescription." The AMMA requires a "physician's written certification" attested and signed by a licensed physician that confirms, among other things, diagnosis of a qualifying debilitating condition, an in-person physical examination, a review of the patient's medical records, an explanation of the potential risks of marijuana use, and the physician's opinion that the patient is likely to receive therapeutic or palliative benefit. *See Ariz. Admin. Code* R9-17-202(F)(5)(2012).

abetting requires: (1) these employees have specific intent to facilitate the substantive offense; (2) these employees have the requisite intent of the underlying substantive offense; (3) these employees assist or participate in the commission of the underlying offense; and (4) someone commits the underlying offense. *See Conant*, 309 F.3d at 635.

While the Court does not go so far as calling the argument a "straw man" claim, *Garden Grove, supra*, the Court finds that the employees are not violating federal law. Their specific intent is to perform their administrative tasks. They have no interest in whether the dispensary opens, operates, succeeds or fails. They are wholly unconnected to and separate from the person(s) or entity that will purportedly be completing the substantive offense. Like the physicians in *Conant* and the employees in *Garden Grove*, these employees cannot be held accountable for conduct that they anticipate will occur but could care less if it actually does.

Thus, in the final analysis, the Court finds that federal law does not preempt the AMMA. In so doing, the Court notes that Arizona, if it had wished to do so, could have *fully decriminalized* the possession, use and sale of marijuana under State law. In its wisdom, Arizona took a far narrower and deliberative course opting to allow only the chronically ill access to it and only after a licensed physician certified that it might well relieve its citizens of suffering.

It is of considerable consequence that it is Arizona's attempt at partial decriminalization with strict regulation that makes the AMMA vulnerable under the impossibility-preemption doctrine. This view, if successful, highjacks Arizona drug laws and obligates Arizonans to enforce federal proscriptions that categorically prohibit the use of all marijuana. The Tenth Amendment's "anti-commandeering rule" prohibits Congress from charting that course. *See Printz v. United States*, 521 U.S. 898 (1997); *Tar Beek, supra; Winters, supra.* Because this Court finds that the AMMA is not preempted, it need not decide this 10th Amendment issue but notes other courts have ruled this way. *Id*.

D. Remedy

Having found the AMMA constitutional, the Court finds that it is appropriate to grant Plaintiff's Motion for Partial Summary Judgment, grant mandamus relief, and deny Intervenor's and County Defendants' cross-motions for summary judgment.

In so doing, the Court rejects the Intervenor and County Defendants' argument that the AMMA violates public policy simply because marijuana use and possession violate federal law. Eighteen States and the District of Columbia have passed legislation permitting the use of marijuana in whole or in part. *See National Conferences of State Legislatures*, http://www.ncsl.org/issues-research/health/state-medical-marijuana-laws.aspx (November 2012).

This Court will not rule that Arizona, having sided with the ever-growing minority of States and having limited it to medical use, has violated public policy.

The Court makes the following conclusions of law:

- Defendants ADHS and its director Will Humble have the lawful authority to withdraw, deny or reject Plaintiff's application for a dispensary registration certification.

- ADHS regulations impose a requirement that the local jurisdiction provide documentation confirming zoning compliance. That requirement falls on the County Defendants.

- County Defendants' categorical refusal to examine whether Plaintiff's proposed site meets zoning requirements and comply with Ariz. Admin. Code R9-17-304(6) is unlawful.

- Plaintiff has no adequate remedy at law and will suffer irreparable harm absent a mandamus requiring the County Defendants to comply with the ADHS regulations. This is because Plaintiff loses the right to continue to pursue a dispensary license during this cycle of applications. This is an important fact given that Plaintiff is the only applicant in CHAA No. 49. Thus, if Plaintiff is otherwise qualified, Plaintiff would be the only applicant for this CHAA.

IT IS THEREFORE ORDERED that the County Defendants shall provide Plaintiff with documentation from the local jurisdiction that:

a. There are no local zoning restrictions for the dispensary's location, or
b. The dispensary's location is in compliance with any local zoning restrictions.

IT IS FURTHER ORDERED that County Defendants shall comply no later than 10 days from the date of this Order.

IT IS FURTHER ORDERED that pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure, no just cause exists to delay entry of judgment and therefore the Court signs this minute entry as a final order.

/s/ Michael D. Gordon

_____

MICHAEL D. GORDON
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-053585 12/03/2012

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

State of Arizona; Janice K. Brewer, Governor of the State of Arizona, in her official capacity; William Humble, Director of the Arizona Department of Health Services, in his official capacity; Robert C. Halliday, Director of the Arizona Department of Public Safety, in his official capacity,

Plaintiffs,

vs.

United States of America; United States Department of Justice; Eric H. Holder, Jr., Attorney General of the United States of America, in his official capacity; Dennis K. Burke, United States Attorney for the District of Arizona, in his official capacity; Arizona Association of Dispensary Professionals, Inc., an Arizona corporation; Joshua Levine; Paula Pennypacker; Nicholas Flores; Jane Christensen; Paula Pollock; Serenity Arizona, Inc., an Arizona corporation; Holistic Health Management, Inc., an Arizona corporation; Jeff Silva; Arizona Medical Marijuana Association; Does I-X and Does XI-XX,

Defendants.

No. CV 11-1072-PHX-SRB

ORDER

The Court now resolves the Motion to Dismiss for Lack of Jurisdiction filed on behalf

of the Arizona Association of Dispensary Professionals, Inc., Joshua Levine, Paula Pennypacker, Nicholas Flores, Jane Christensen, Paula Pollock, Serenity Arizona, Inc., Holistic Health Management, Inc., Jeff Silva, and the Arizona Medical Marijuana Association (collectively, "Non-Government Defendants") by the Arizona Medical Marijuana Association ("NG Defs.' MTD") (Doc. 30) and the Motion to Dismiss for Lack of Jurisdiction filed by Dennis K. Burke, Eric H. Holder, Jr., the United States Department of Justice, and the United States of America ("Gov't Defs.' MTD") (Doc. 38). At this time the Court also rules on Maricopa County and B. Joy Rich's (collectively, "Proposed Intervenors") Motion to Intervene ("Mot. to Intervene") (Doc. 31) and Motion for Hearing on the Motion to Intervene and for Leave to File Brief in Opposition to the NG Defendants' Motion to Dismiss ("Mot. for Hr'g") (Doc. 60) and Plaintiffs' three Motions to Supplement the Record ("Mots. to Supplement") (Docs. 54, 57-58).

I. BACKGROUND

In this case, Plaintiffs seek one of two declaratory judgments: (1) that compliance with the Arizona Medical Marijuana Act ("AMMA") "provides a safe harbor from federal prosecution" under the federal Controlled Substances Act ("CSA") or (2) that "the AMMA does not provide a safe harbor from federal prosecution" because it is preempted by the CSA. (Doc. 1, Compl. ¶ 64.) Arizona voters passed the AMMA, an initiative measure, in November 2010, and it was signed into law by Governor Brewer in December 2010. (*Id.* ¶¶ 1-2.) The AMMA decriminalizes medical marijuana under certain circumstances and requires the Arizona Department of Health Services ("ADHS") to register and certify nonprofit medical marijuana dispensaries, dispensary agents, qualifying patients, and designated caregivers. (*Id.* ¶¶ 1, 3-4.) The AMMA provided time limitations within which the ADHS was to promulgate rules and regulations and begin accepting applications. (*Id.* ¶¶ 5-10.) The ADHS began accepting applications for qualifying patients and designated caregivers on April 14, 2011, and, as of May 24, 2011, had certified 3696 qualifying patients and 69 designated caregivers. (*Id.* ¶ 8.) The ADHS was to begin accepting applications for nonprofit medical marijuana dispensaries and dispensary agents on June 1, 2011. (*Id.* ¶ 11.) This

lawsuit was filed on May 27, 2011. (*Id.* at 30.)

The CSA classifies marijuana as a Schedule I controlled substance and makes it unlawful to grow, possess, transport, or distribute marijuana. (*Id.* ¶ 65); *see also* 21 U.S.C. §§ 812, 841(a), 844(a). Pursuant to the CSA, it is also unlawful to manufacture, dispense, or possess with the intent to manufacture, distribute, or dispense a controlled substance. (Compl. ¶ 66); 21 U.S.C. § 841(a). It is also unlawful to conspire to violate the CSA. (Compl. ¶ 69); 21 U.S.C. § 846. The CSA makes it a crime to knowingly open, lease, rent, use, or maintain property for the purpose of manufacturing, storing, or distributing controlled substances. (Compl. ¶ 70); 21 U.S.C. § 856(a)(1). Federal law also criminalizes aiding and abetting another in committing a federal crime, conspiring to commit a federal crime, assisting in the commission of a federal crime, concealing knowledge of a felony from the United States, or making certain financial transactions designed to promote illegal activity or conceal the source of the proceeds of illegal activity. (Compl. ¶¶ 71-75); 18 U.S.C. §§ 2-4, 371, 1956.

The Complaint alleges that, in other states with medical marijuana laws, the federal government has threatened to enforce the CSA against people who were acting in compliance with the state scheme. (Compl. ¶¶ 22-23, 77, 108-62.) Plaintiffs allege that they sought guidance from the Arizona United States Attorney's Office regarding the interaction between the AMMA and federal criminal law. (*Id.* ¶ 24.) On May 2, 2011, the then-United States Attorney for the District of Arizona, Defendant Burke, sent Plaintiff Humble a letter stating that growing, distributing, and possessing marijuana violates federal law no matter what state law permits. (*Id.* ¶ 25; *id.*, Ex. B ("Burke Letter").) The letter also stated that the federal government would continue to prosecute people who violate federal law and that compliance with state law does not create a "safe harbor." (Compl. ¶ 25; Burke Letter.) The letter did not address potential criminal liability for state employees working to implement the AMMA. (Compl. ¶ 26.)

Plaintiffs allege that "[t]he employees and officers of the State of Arizona have a mandatory duty to implement and oversee the administration of the AMMA." (*Id.* ¶ 81.)

However, Plaintiffs contend, in so doing, state employees "face a very definite and serious risk that they could be subjected to federal prosecution for aiding and abetting the use, possession, or distribution of marijuana under the CSA" or could face liability for failing to report wrongdoing. (*Id.* ¶¶ 82-83.) Plaintiffs seek relief under the Declaratory Judgment Act, requesting that the Court "declare the respective rights and duties of the Plaintiffs and the Defendants regarding the validity, enforceability, and implementation of the AMMA" and that the Court "determine whether strict compliance and participation in the AMMA provides a safe harbor from federal prosecution." (*Id.*, Prayer A-B.)

Both the Government Defendants and the Non-Government Defendants move to dismiss the Complaint in its entirety. (NG Defs.' MTD at 1; Gov't Defs.' MTD at 1.) Both pending Motions to Dismiss challenge whether Plaintiffs have sufficiently alleged a case or controversy (or, instead, whether Plaintiffs seek an improper advisory opinion from the Court) and whether Plaintiffs' claims are ripe for review. (NG Defs.' MTD at 5-7, 9-11; Gov't Defs.' MTD at 8-11, 13-17.) Both Motions also argue that the Court does not have jurisdiction over a request by state officials to declare the validity or invalidity of a state law. (NG Defs.' MTD at 7-9; Gov't Defs.' MTD at 5-7.) The Court heard oral argument on the Non-Government Defendants' Motion on December 12, 2011. (*See* Doc. 59, Minute Entry.) Ruling from the bench at the hearing, the Court dismissed all fictitious Defendants. (*Id.* at 1.)

After the hearing, Plaintiffs filed a Notice of Intent to File a Motion for Leave to Amend Complaint ("Pls.' Notice"). (*See* Doc. 64.) Plaintiffs informed the Court that they "will be seeking to amend their Complaint to refine their position and resolve any case or controversy issues." (*Id.* at 1-2.) Plaintiffs stated in the Notice that they plan to file their Motion to Amend by January 9, 2012, and requested that the Court delay ruling on the pending Motions to Dismiss until after that date. (*Id.* at 2.) For the reasons stated herein, the Court declines to delay resolution of the Motions to Dismiss, which have already been pending for several months. Based on the scant detail in the Notice, the Court is unconvinced that the following defects will be corrected by Plaintiffs' intended amended Complaint.

II. LEGAL STANDARDS AND ANALYSIS

A. Motions to Dismiss: Ripeness

The Court turns first to the question of ripeness, which is raised by all Defendants in the two Motions to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(1). (NG Defs.' MTD at 9-11; Gov't Defs.' MTD at 12-17.) It is not clear from Plaintiffs' Notice whether they intend to address ripeness.[1] Even if Plaintiffs were to amend the Complaint as they state they intend to do, "to refine their position and resolve any case or controversy issues," the defects identified herein would remain. (*See* Notice at 1-2); *see also Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010) ("The ripeness doctrine rests, in part, on the Article III requirement that federal courts decide only cases and controversies and in part on prudential concerns.").

"Because . . . ripeness pertain[s] to federal courts' subject matter jurisdiction, [it] is properly raised in a Rule 12(b)(1) motion to dismiss." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). "The district courts of the United States, as we have said many times, are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.'" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court may weigh the evidence to determine whether it has jurisdiction. *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005). The burden of proof is on Plaintiffs to show that this Court has subject matter jurisdiction. *See Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) ("The party asserting jurisdiction has the burden of proving all jurisdictional facts." (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). Unlike a Rule 12(b)(6) motion, there is no presumption of truthfulness attached to Plaintiffs' allegations. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d

[1] Much of the parties' arguments at the hearing were focused on whether Plaintiffs needed to "take a position" on the validity of the AMMA in order to create a live case or controversy for the Court to adjudicate.

730, 733 (9th Cir. 1979).

"The question of ripeness turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Chandler*, 598 F.3d at 1122 (internal alteration, quotation, and citation omitted). The main focus of the ripeness inquiry is "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997) (internal quotation and citation omitted). Courts have no subject matter jurisdiction over unripe claims and must dismiss them. *See S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 502 (9th Cir. 1990).

Ripeness has both constitutional and prudential components. *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993). "The constitutional component of ripeness overlaps with the 'injury in fact' analysis for Article III standing . . . [and] [w]hether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000)). Analysis of the prudential component weighs "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). As explained below, the Court finds that Plaintiffs have not satisfied either element of ripeness.

a. Constitutional Component

Defendants argue that Plaintiffs cannot satisfy the constitutional component of ripeness because they have not shown that a genuine threat of imminent prosecution exists. (NG Defs.' MTD at 9; Gov't Defs.' MTD at 13.) A plaintiff making a pre-enforcement challenge must demonstrate more than the "mere existence of a proscriptive statute" or a "generalized threat of prosecution" to satisfy the case or controversy requirement. *Wolfson*, 616 F.3d at 1058 (internal quotation and citation omitted). While "one does not have to await the consummation of threatened injury to obtain preventive relief," a claim is not ripe unless

the plaintiff is "subject to a *genuine* threat of *imminent* prosecution." *Id.* (internal quotations and citations omitted). To determine whether a claimed threat of prosecution is genuine, courts consider three factors: "(1) whether the plaintiff has articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute." *Id.*

The Government Defendants argue that Plaintiffs have not satisfied the first element of the test because "they do not detail any concrete plan to act in violation of the CSA." (Gov't Defs.' MTD at 14.) Plaintiffs respond that "[t]he actions to be taken by the State and its officers and employees [under the AMMA] will clearly expose them to federal criminal liability, and the Federal Defendants have provided no safe harbor or immunity for actions taken in strict compliance with the AMMA." (Pls.' Resp. to Gov't Defs.' MTD ("Pls.' Gov't Resp.") at 6-7.) Since Plaintiffs have not, as of yet, articulated their position with respect to the validity of the AMMA and their intentions regarding enforcement, the Complaint does not articulate a concrete plan to violate the law in question. (*See* Compl. ¶¶ 81-83 (explaining the obligations of state employees under the AMMA but not expressing a plan to enforce the dispensary provisions to their full extent).) However, even if the Complaint were amended to take a position *and* that position involved enforcement of the AMMA such that state employees might be at risk of violating the CSA, evaluation of the second two factors would still indicate that Plaintiffs' claims are unripe.

The Complaint alleges that "[t]he Government Defendants have communicated a specific warning or threat of criminal prosecution and other legal proceedings to Director Humble." (*Id.* ¶ 87.) However, the allegations in the Complaint that describe the letter sent by Defendant Burke to Director Humble are silent as to state employees.[2] (*See* Compl. ¶¶ 104-07.) Rather, the Complaint states that the United States Attorneys in Washington notified

[2] Plaintiffs assert that they have standing to challenge this law on behalf of the state and on behalf of state employees. (*See* Pls.' Gov't Resp. at 12-13.)

Washington's governor that state employees carrying out activities pursuant to Washington's medical marijuana law would not be immune under the CSA. (*Id.* ¶ 113; *see also id.*, Ex. A.) The Complaint also alleges that the United States Attorney in Vermont warned state lawmakers that expanding Vermont's medical marijuana law to include state-licensed dispensaries would "place the state in violation of federal law." (Compl. ¶ 153.) The actions of federal officials in relation to other states do not substantiate a credible, specific warning or threat to initiate criminal proceedings against state employees in Arizona if they were to enforce the AMMA. Even if the letters from the United States Attorneys, in Arizona or other states, are interpreted as threats or warnings, a "generalized threat" is not sufficient to satisfy this element. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1125 (9th Cir. 2009). Plaintiffs have not shown that any action against state employees in this state is imminent or even threatened. *See id.* ("[B]ecause no enforcement action against plaintiffs is concrete or imminent or even threatened, Appellees' claims against [defendant] are not ripe for review.").

Moreover, the Complaint does not detail any history of prosecution of state employees for participation in state medical marijuana licensing schemes. *See Wolfson*, 616 F.3d at 1058.[3] The Complaint fails to establish that Plaintiffs are subject to a genuine threat of imminent prosecution and consequently, the Complaint does not meet the constitutional requirements for ripeness. Therefore, Plaintiffs' claims are unripe and must be dismissed.

b. Prudential Component

Even if the Complaint had satisfied the constitutional component of ripeness, the Court would still find that the claims are not ripe for review for prudential reasons because the issues, as presented, are not appropriate for judicial review and because Plaintiffs have

[3] The information attached to Plaintiffs' three Motions to Supplement does not alter the Court's conclusions in any way. As Defendants do not oppose these Motions and they are not improper, the Court grants Plaintiffs' Motions to Supplement. However, none of the documents Plaintiffs supply relate to prosecution of state employees or to threatened prosecutions of anyone in Arizona. (*See* Docs. 54, 57-58.)

not shown that they will endure any particular hardship as a result of withholding judicial consideration at this time. *See Stormans*, 586 F.3d at 1126. "'A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *Id.* (quoting *US W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)). Although "pure legal questions that require little factual development are more likely to be ripe, a party bringing a preenforcement challenge must nonetheless present a concrete factual situation . . . to delineate the boundaries of what conduct the government may or may not regulate without running afoul of the Constitution." *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007) (internal quotation and citation omitted). Plaintiffs do not challenge any specific action taken by any Defendant. Plaintiffs also do not describe any actions by state employees that were in violation of the CSA or any threat of prosecution for any reason by federal officials. These issues, as presented, are not appropriate for judicial review.

Furthermore, Plaintiffs have not satisfied the requirement that they demonstrate hardship in the absence of court intervention. "To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *US W. Commc'ns*, 193 F.3d at 1118 (internal quotation and citation omitted). "Although the constitutional and prudential considerations are distinct, the absence of any real or imminent threat of enforcement, particularly criminal enforcement, seriously undermines any claim of hardship." *Thomas*, 220 F.3d at 1142. In fact, the Ninth Circuit Court of Appeals has observed that requiring defendants to defend a law "in a vacuum and in the absence of any particular victims" creates a hardship for the defendant. *Id.* Plaintiffs' claims are not specific enough to satisfy this element of the prudential ripeness test. As explained above, the Complaint details no concrete or imminent threat of enforcement, nor does it describe with any credible detail a state employee at risk of federal prosecution under the CSA. Plaintiffs have not satisfied the prudential component of ripeness.

B. Proposed Intervenors' Motions

Maricopa County and B. Joy Rich seek to intervene in this matter and seek a hearing on their Motion and to oppose Defendants' Motions to Dismiss. (Mot. to Intervene at 1; Mot. for Hr'g at 1.) As the Court dismisses the Complaint in its entirety, both of the Proposed Intervenors' Motions are denied without prejudice at this time. There is currently no active case in which to intervene, and a hearing on this question would not be helpful. Briefing on Defendants' Motions to Dismiss and on the Motion to Intervene closed months ago, and the Proposed Intervenors may not now have an opportunity to respond to Defendants' arguments.

III. CONCLUSION

Because Plaintiffs have not satisfied either the constitutional or prudential components of ripeness, the Complaint must be dismissed. Plaintiffs' stated intention to amend the Complaint by January 9, 2011, in order to attempt to resolve "any case or controversy issues" does not appear likely to remedy this defect. The Court dismisses the Complaint without prejudice, and Plaintiffs may amend within 30 days; however, if they choose to replead their claims, Plaintiffs must resolve the problems described in this Order.

IT IS THEREFORE ORDERED granting the Motion to Dismiss for Lack of Jurisdiction filed on behalf of all named non-government Defendants by the Arizona Medical Marijuana Association (Doc. 30) and the Motion to Dismiss for Lack of Jurisdiction filed by Dennis K. Burke, Eric H. Holder, Jr., the United States Department of Justice, and the United States of America (Doc. 38) and dismissing the Complaint without prejudice.

IT IS FURTHER ORDERED granting Plaintiffs 30 days, including the date of entry of this Order, to file any amended Complaint.

IT IS FURTHER ORDERED denying without prejudice Maricopa County and B. Joy Rich's Motion to Intervene (Doc. 31) and Motion for Hearing on the Motion to Intervene and for Leave to File Brief in Opposition to the NG Defendants' Motion to Dismiss (Doc. 60).

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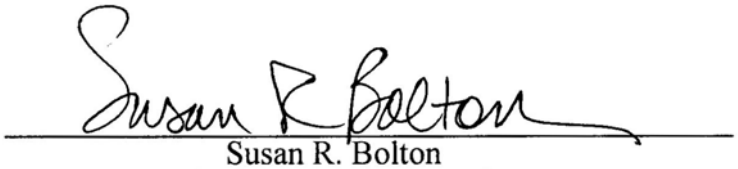
IT IS FURTHER ORDERED granting Plaintiffs' Motions to Supplement the Record (Docs. 54, 57-58).

DATED this 4th day of January, 2012.



Susan R. Bolton
United States District Judge