IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

KEENAN REED-KALIHER, Petitioner, v. HON. WALLACE HOGGATT, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of COCHISE, Respondent Judge, STATE OF ARIZONA, Real Party In Interest.	)	Arizona Court of Appeals No. 2 CA-SA 2014-0015 Department B Cochise County Superior Court No. CR201000683

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

DAVID J. EUCHNER, State Bar # 21768
SARAH L. MAYHEW, State Bar # 29048
33 N. Stone Ave., 21st Floor
Tucson, AZ 85701
david.euchner@pima.gov; sarah.mayhew@pima.gov
ATTORNEYS FOR ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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INTRODUCTION

¶1 This case raises the questions whether: (1) a sentencing court is free to disregard the will of the electorate by penalizing probationers who lawfully use prescribed medical marijuana in compliance with their registration pursuant to the Arizona Medical Marijuana Act ("AMMA") and doctors' orders, and (2) whether modifying existing probation conditions to prohibit a probationer from using medical marijuana constitutes a violation of the immunity from "penalty" and "disciplinary action by a court" under A.R.S. § 36-2811(B), where the probationer is a registered qualifying patient under the AMMA and is using marijuana in compliance with the AMMA and as prescribed by the probationer's doctors.

¶2 Here, the Cochise County Probation Department modified the Petitioner's original probation conditions to insert a condition prohibiting Petitioner from using medical marijuana as authorized by his lawfully-obtained medical marijuana card and as prescribed by his doctor. There was no indication in the record that Petitioner was in violation of any then-existing condition of probation, and the record shows that Petitioner had a qualifying debilitating condition, a valid prescription, and was medically unable to take opiate prescription painkillers. Petitioner was in compliance with his conditions of probation and had been using medical marijuana to treat his medical condition pursuant to his patient registration card for more than one year when the Cochise County Probation Department

modified Petitioner's probation conditions to prohibit him from using medical marijuana as authorized by the AMMA. In response to Petitioner's motion to set aside the new condition, Respondent ruled that Petitioner had "agreed" to abstain from prescription use of medical marijuana when he entered into a plea agreement, even though conditions of probation are fixed by the judiciary, not by the prosecutor.

¶3 Respondent Judge held that Petitioner has the "option" to reject the conditions of probation, requiring Petitioner's probation to be revoked and Petitioner to be sentenced to imprisonment. Respondent's position places Petitioner in an untenable Hobson's Choice in which he is forced to choose between constant pain and failure to treat a medical condition for the duration of his probation or imprisonment.

¶4 Respondent then held that the standard probation term requiring probationers to "obey all laws" was sufficient to prohibit medical marijuana use, even though Division One of this Court and the U.S. Attorney General have recently rejected this argument. Respondent also exceeded the scope of its authority when it ruled that modification of probation to prohibit medical marijuana use -- without evidence that the probationer was abusing medical marijuana -- did not amount to a violation of the probationer's immunities under the AMMA.

¶5 *Amicus curiae* Arizona Attorneys for Criminal Justice ("AACJ") asks this

Court to accept jurisdiction over this special action, grant the Petitioner's request for relief, and publish an opinion holding that: (1) a trial court must liberally construe the AMMA, a statute of this state enacted through a voter-approved initiative; (2) a trial court cannot unreasonably interfere with a probationer's medical treatment as long as the probationer is in compliance with the AMMA and is using prescribed medications only as prescribed; (3) modifying a registered qualifying patient's probation conditions to require the patient to surrender his medical marijuana license as a condition of probation is a "penalty" and "disciplinary action of a court" within the meaning of the AMMA; and (4) a court or probation department may not require a probationer to surrender his medical marijuana registration card as a condition of probation without considering the probationer's ***medical*** needs as part of the court's duty to consider the particular circumstances of each case. Publication is particularly important in this case because the issue of the authority of probation departments and sentencing courts to deny probationers the right to use medical marijuana in accordance with and pursuant to the Arizona Medical Marijuana Act ("AMMA") is frequently recurring statewide.

INTERESTS OF *AMICUS CURIAE*

¶6 *Amicus curiae* Arizona Attorneys for Criminal Justice is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

¶7 *Amicus* offers this brief in support of the Petitioner because the issues presented are critical to the right of criminal defendants to a fair sentencing hearing with a judge who exercises discretion based on the circumstances of the individual case, in compliance with the court's obligation to fashion probation terms that are rehabilitative and in compliance with state law, including the AMMA.

ARGUMENTS

I. Respondent's Refusal to Give Deference to the AMMA and the Will of the Electorate Violates the Separation of Powers and is an Abuse of Discretion.

¶8 Arizona's constitution ensures the proper distribution of power among three separate, coequal, and distinct branches of government. *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 586, 886 P.2d 1338, 1342 (1994). The Distribution of Powers clause of Article III reads, "The powers of the government

of the state of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial ... and no one of such departments shall exercise the powers properly belonging to either of the others."

¶9 The Arizona Constitution defines the legislative authority of the State as residing not only in a Senate and House of Representatives but also in the people, and it immediately specifies the powers retained by the people through the initiative and referendum processes. Ariz. Const. art. IV, § 1; see also A.R.S. § 19-102. "The legislature and electorate 'share lawmaking power under Arizona's system of government.'" *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, ¶ 8, 308 P.3d 1152, 1155 (2013) (quoting *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, ¶ 7, 212 P.3d 805, 807 (2009)). The legislature is specifically prohibited from repealing, and the governor is specifically prohibited from vetoing, any initiative measure approved by a majority of the votes cast. Ariz. Const. art. IV, § 1(6)(A)-(B). The legislature has the power to amend an initiative only upon a vote of three-fourths of the members of each house of the legislature, and only then if the legislative action "furthers the purposes" of the initiative measure. *Id*. § 1(6)(C), (14) (the "Voter Protection Act").

¶10 The purpose of the Voter Protection Act is simple: control of the sovereignty of the State rests with the people, not with the government. Ariz. Const. art. II, § 2. The people get to challenge the laws enacted by their elected representatives, not

the other way around. The founders of this State recognized that governments tend to promote their own interests rather than those of the people. For that reason, the very first provision of Arizona's declaration of rights, article II, § 1, states that: "a frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." The only manner by which an initiative may be repealed is by another initiative, or by a legislative referral to the electorate. It matters not that the initiative at issue in this case, the AMMA, is statutory rather than constitutional in source. *Cave Creek*, 233 Ariz. 1, ¶ 18, 308 P.3d at 1157. Now that the AMMA is law, Respondent is tasked with upholding the law.

¶11 The Arizona Supreme Court has long held that Article III requires the judiciary to refrain from meddling in the workings of the legislative process. *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997) (citing *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952); *City of Phoenix v. Superior Court*, 65 Ariz. 139, 175 P.2d 811 (1946)). The separation of powers doctrine dictates judicial deference to legislative functions, and voter initiatives are entitled to equal, if not greater, deference. "The legislative power of the people is as great as that of the legislature." *Tilson v. Mofford*, 153 Ariz. 468, 470, 737 P.2d 1367, 1369 (1987) (citing Ariz. Const. art. XXII, § 14). Voter initiatives are "part and parcel of the legislative process," and therefore "receive the same judicial

deference as proposals before the state legislature." *Winkle*, 190 Ariz. at 415, 949 P.2d at 504. Indeed, our Supreme Court "has characterized the right of initiative and referendum as 'vital,' and one so important to the authors of our constitution that they included sufficient machinery in the constitution to make the right self-executing." *Van Riper v. Threadgill*, 183 Ariz. 580, 582, 905 P.2d 589, 591 (1995); *see also Feldmeier v. Watson*, 211 Ariz. 444, ¶ 11, 123 P.3d 180, 183 (2005) (citing *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 428, 814 P.2d 767, 769 (1991)).

¶12 Courts must liberally construe legislation passed by initiative and may not interfere with the people's right to initiate laws. *Pedersen v. Bennett*, 230 Ariz. 556, ¶ 7, 288 P.3d 760, 762 (2012); *see also* 1989 Ariz. Sess. Laws, ch. 10, § 1 (requiring liberal interpretation of initiatives so as not to "destroy the presumption of validity"). The judiciary's "'primary objective in construing statutes adopted by initiative is to give effect to the intent of the electorate.'" *Brewer*, 221 Ariz. 467, ¶ 10, 212 P.3d at 808 (quoting *State v. Gomez*, 212 Ariz. 55, ¶ 11, 127 P.3d 873, 875 (2006)).

A. The Arizona Electorate Made Marijuana Use and Possession by Registered Qualifying Patients and Registered Designated Caregivers Lawful and Not Criminal.

¶13 The AMMA resulted from a statewide initiative approved by the people in 2010. Statutes such as the AMMA "that are subject to only one reasonable

meaning are ***applied as written***." *Ariz. Early Childhood Dev. & Health Bd.*, 221 Ariz. 467, ¶ 10, 212 P.3d at 808 (emphasis added). Courts therefore must liberally construe the AMMA to give full effect to its objectives, which are clear and unambiguous. A.R.S. § 1-211.

¶14 The AMMA establishes conditions allowing medicinal use of marijuana. As described by the Arizona Legislative Council's ballot measure analysis, "the purpose of [the AMMA] was to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties and property forfeiture if such patients engage in the medical use of marijuana." Ariz. Sec'y of State, Ariz. Ballot Prop. Guide, Gen. Election – Nov. 7, 2010.[1] The AMMA thus allows a patient with a qualifying debilitating medical condition to obtain a registration identification card that permits the patient to possess and use marijuana for medicinal purposes. A.R.S. § 36-2801 *et seq.*

¶15 Section 36-2801 expressly provides two separate protections to registered qualifying patients and caregivers. In subsection (A), "the statute provides a presumption that the cardholder is engaged in medical use of marijuana if he or she has a valid card and does not possess more than the allowable amount of marijuana." *State v. Fields (Chase)*, 232 Ariz. 265, ¶ 13, 304 P.3d 1088, 1092

[1] http://azsos.gov/election/2010/info/PubPamphlet/english/prop203.pdf (last visited March 6, 2014).

(App. 2013). Separate from this presumption, subsection (B) "affords immunity" to registered qualifying patients and designated caregivers. *Id*. Specifically, subsection (B) expressly provides:

> A registered qualifying patient or registered designated caregiver is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court... (1) For the registered qualifying patient's medical use of marijuana pursuant to this chapter, if the registered qualifying patient does not possess more than the allowable amount of marijuana.

A.R.S. § 36-2811(B)(1) (emphasis added).

¶16 Thus, "Arizona voters decided that a qualified patient does not commit a criminal offense by possessing an allowable amount of marijuana." *State v. Okun*, 231 Ariz. 462, ¶ 9, 296 P.3d 998, 1001 (App. 2013). The Arizona electorate did not exclude probationers from the AMMA immunities. The Separation of Powers doctrine requires Respondent to construe the law liberally, regardless whether the court disagrees politically with the majority of Arizona's voters.

¶17 Instead, Respondent ruled that Petitioner violated the conditions of probation that required him to be "law-abiding and to avoid using or possessing illegal drugs." **Ruling**, p. 3. While marijuana use is illegal in Arizona for any individual who does not have a registration card, once Petitioner lawfully obtained his registration card and was prescribed medicinal marijuana for a qualifying debilitating medical condition, marijuana became a prescription drug. There is no

indication in the record that Petitioner abused prescription marijuana or possessed or used more than the allowed amount.[2] Petitioner was legally authorized to use marijuana as a registered qualifying patient for nearly a year before the Cochise County Probation Department decided to modify his probation conditions to prohibit Petitioner from using medical marijuana as prescribed.

¶18 Respondent's order thus ignores completely the will of the Arizona voters, who collectively decided that patients with a qualifying debilitating medical condition who lawfully obtain a valid registration identification card are legally authorized to use marijuana as prescribed by a medical professional. Petitioner here is a registered qualifying patient who was lawfully using marijuana for medicinal reasons, in accordance with a valid prescription from a "physician." In other words, Respondent's finding that Petitioner was not law-abiding and was using "illegal" drugs depends upon Respondent's willful refusal to give due deference to the requirements of the AMMA. Respondent's apparent displeasure with the AMMA does not permit him to disregard the immunities provided there. In ignoring Arizona's laws, Respondent has exceeded the scope of his statutory authority.

[2] A registered qualifying patient who is not authorized to cultivate, is permitted 2.5 ounces of "usable marijuana." A.R.S. § 36-2801(1)(a)(i), (1)(c), (3), (12), (13), (14), and (15).

B. The AMMA Passes the Rational Basis Test, and Respondent's Attempts to Resolve a Political Question in the Courts Must be Rebuffed.

¶19 To the extent that the Respondent is attempting to argue that the AMMA fails to articulate a rational basis, this Court must uphold the AMMA unless it fails to meet the rational basis test. *State v. McPherson*, 228 Ariz. 557, ¶ 18, 269 P.3d 1181, 1187 (App. 2012) (citing *State v. Berger*, 209 Ariz. 386, ¶¶ 6-8, 103 P.3d 298, 300 (App. 2004), *affirmed in part and vacated in part*, 212 Ariz. 473, 134 P.3d 378 (2006)). As this Court explained in *Berger* and re-affirmed in *McPherson*:

> Rational basis review imposes on … the parties challenging the constitutionality of the Act … the burden of establishing that the law is unconstitutional by demonstrating that there is no conceivable basis for the Act. A legislative enactment challenged under the rational basis test will pass constitutional muster unless it is proved beyond a reasonable doubt to be wholly unrelated to any legitimate legislative goal. Moreover, the law "need not be in every report logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and th[at] it might be thought that the particular legislative measure was a rational way to correct it."

McPherson, 228 Ariz. 557, ¶ 18, 269 P.3d at 1187-88 (quoting *Berger*, 209 Ariz. 386, ¶ 8, 103 P.3d at 300) (quoting in turn *Martin v. Reinstein*, 195 Ariz. 293, ¶ 52, 987 P.2d 779, 795-96 (App. 1999)) (alteration in *Berger*, citations omitted in *Berger*). As stated above, in passing Proposition 203 the voters explicitly found that prosecuting patients as criminals for using medicine was an evil that needed to be corrected. Respondent clearly does not share the opinion of the will of the

electorate, but challenges to the constitutionality of the AMMA under the rational basis test are obviously doomed to fail. The insinuations that Arizona voters made an unwise choice when voting for Proposition 203, therefore, must fall on deaf ears in the courts.

¶20 In these proceedings, this Court may not answer political questions related to the wisdom of the AMMA. "'Political questions,' broadly defined, involve decisions that the constitution commits to one of the political branches of the government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, ¶ 7, 143 P.3d 1023, 1026 (2006) (citing *Baker v. Carr*, 369 U.S. 186 (1962)). Where the courts involve themselves in political questions, "at best, we would be substituting our subjective judgment of what is reasonable under all the circumstances for that of … the very branches of government to which our Constitution entrusts this decision." *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, ¶ 21, 165 P.3d 168, 172 (2007).

¶21 The matter is already decided. Respondent's refusal to recognize that in Arizona, marijuana is not an "illegal drug" for registered qualifying patients and designated caregivers is misguided at best and threatens the legislative initiative process at worst. For these reasons, this Court should reverse the Respondent's

arguments below and insinuations before this Court that the AMMA may be challenged through these proceedings.

II. By Forcing Petitioner to Forfeit His Medical Marijuana Registration Card or Face Revocation of Probation and Imprisonment, Respondent Court Necessarily Violates Petitioner's Statutory Immunity from "Any Penalty" and "Disciplinary Action by a Court" under the AMMA.

¶22 Respondent Court ruled that Petitioner voluntarily agreed to waive his statutory right to medical marijuana as a valid registered qualifying patient when Petitioner accepted a plea agreement that provided for the possibility of probation.[3] The court thereafter presents a classic Hobson's Choice: Petitioner could either waive his statutory right to medical marijuana as a patient with a debilitating medical condition, or Petitioner could reject probation and accept incarceration instead during which Petitioner still would be denied the right to prescription marijuana to treat his medical condition.

¶23 In support of this illusory choice, Respondent half-heartedly cites *dicta* from *State v. Montgomery*, 115 Ariz. 583, 584, 566 P.2d 1329, 1330 (1977), while acknowledging that the portion of *Montgomery* the court is relying upon was based

[3] Respondent states that Petitioner "stipulated to probation." However, whether Petitioner was sentenced to probation was solely within Respondent's discretion at the time of sentencing, and the State and Petitioner could not tie the hands of the court by "stipulating" to either the exact term or the conditions of probation. *State v. Patel*, 160 Ariz. 86, 89, 770 P.2d 390, 393 (App. 1989).

on a repealed statute and is not good law. Indeed, "[t]he language in *Montgomery,* although cited and discussed in several cases and articles, has not become the basis for any subsequent Arizona statute or holding permitting a probationer to elect a potentially shorter incarceration sentence *after* finding the terms of his probation too onerous." *Demarce v. Willrich,* 203 Ariz. 502, ¶ 11, 56 P.3d 76, 79 (App. 2002). Rather, under the statute in effect when Respondent accepted Petitioner's plea in this case, Petitioner had no right to withdraw from the plea if he disliked the conditions of probation that were imposed by the Court after the fact. *Id.*

¶24 Although *Montgomery* is not good law, this case is analogous to the impermissible Hobson's Choice presented in *State v. Ott*, 167 Ariz. 420, 427, 808 P.2d 305, 312 (App. 1990). There, the trial court's order forced Ott to choose between surrendering his constitutional privilege and forfeiting property that the state asserted was worth more than $1.8 million. This Court held that by providing that Hobson's choice, the trial court had failed to "transform Ott's decision to respond from compulsory to voluntary." *Cf. Lefkowitz v. Cunningham,* 431 U.S. 801, 805 (1977) (state may not threaten to inflict potent sanctions unless witness surrenders fifth amendment privilege).

¶25 Thus, Respondent's finding that Petitioner was free to accept or reject probation presents an illusory choice: forfeit his statutory immunity from disciplinary action by the court or go to prison. Either way, Respondent is

penalizing Petitioner for possession and use of a prescribed medication. Notably, A.R.S. § 36-2811(B)(1) is broadly written, granting registered qualifying patients immunity from "***any" penalty, prosecution, arrest, or disciplinary action by a court.*** The Hobson's Choice of foregoing medical treatment or foregoing medical treatment while incarcerated is undoubtedly "any" penalty. As such, it is in direct violation of the express and unambiguous immunities provided by A.R.S. § 36-2811(B)(1).

¶26 Respondent's finding that "*this* defendant was free to reject probation because he could have refused the plea agreement," **Ruling**, p. 3, thus misses the point. Petitioner did not knowingly waive his statutory right to use a lawfully prescribed medication as prescribed. In the original conditions of probation, Petitioner was admonished to "not possess" any "illegal drugs" nor to possess or use prescription medications without a valid prescription. Petitioner was not prohibited from lawful use of prescription medications as prescribed to him until the probation department modified his probation conditions to preclude medical marijuana after the fact.

A. The Arizona Electorate Made Marijuana Use and Possession by Registered Qualifying Patients and Registered Designated Caregivers Lawful and Not Criminal.

¶27 Although "the statutory authority to make probation decisions 'is solidly within the scope of the judiciary's authority,' [citation omitted], the trial judge

does not have unlimited power or discretion in probation proceedings." *State ex rel. Polk v. Hancock (Ferrell)*, __ Ariz. __, ¶ 18, 1 CA-SA 13-0292, 2014 WL 685559, *4 (Ariz. Ct. App. Feb. 18, 2014) (quoting *State v. Lyons*, 167 Ariz. 15, 16, 804 P.2d 744, 745 (1990), and citing *Green v. Superior Court*, 132 Ariz.468, 471, 647 P.2d 166, 169 (1982)). Where, as here, the sentencing court exceeds the scope of the statutory authority granted it in fashioning probation conditions, the court has abused its discretion.

¶28 Respondent posits two theories in its attempt to evade the clear and unequivocal statutory immunities provided by the AMMA to registered qualifying patients and registered designated caregivers.

1. Petitioner Did Not Knowingly Waive His Rights to Medical Marijuana When Petitioner Entered into the Plea Agreement.

¶29 First, Respondent finds that Petitioner somehow waived his right to medicinal marijuana by entering a plea agreement ***before*** the AMMA was enacted and the electorate decided that a qualified patient does not commit a criminal offense by possessing or using an allowable amount of medical marijuana. This finding is wrong as a matter of both fact and law.

a. <u>The Court, Not The Parties, Fixes the Conditions of Probation</u>

¶30 Just as the courts cannot interfere in the legislative process, constitutional Separation of Powers doctrine prohibits the executive branch from interfering or

usurping the courts' jurisdiction. Accordingly, although control of the sentencing process is balanced among the legislative, executive, and judicial branches of government, *State v. Prentiss*, 163 Ariz. 81, 84, 786 P.2d 932, 935 (1989) (citing *State v. Pakula*, 113 Ariz. 122, 125, 547 P.2d 476, 479 (1976)), our Supreme Court has held as a matter of law that *probation is purely a judicial function*. *Lyons*, 167 Ariz. at 17 n.1, 804 P.2d at 746 n.1. "The power to make decisions regarding probation … is solidly within the scope of the judiciary's authority." *Id*. at 16, 804 P.2d at 745; *see also* A.R.S. § 13-901, *et seq*.; Ariz. R. Crim. P. 27; *State v. Stellwagen*, 160 Ariz. 615, 616, 775 P.2d 543, 544 (App. 1989) ("the imposition of probation is clearly within the judiciary's authority").

¶31 The executive branch has the power to decide what criminal charges to file, *State v. Frey*, 141 Ariz. 321, 324, 686 P.2d 1291, 1294 (App. 1984), the power to seek enhanced punishment, *State v. Cummings*, 148 Ariz. 588, 591, 716 P.2d 45, 48 (App. 1985), and the power to decide what evidence of aggravating circumstances to offer at sentencing. *State v. Murphy*, 113 Ariz. 416, 418, 555 P.2d 1110, 1112 (1976). It is the judicial department, however, that has "the integral function of resolving criminal actions: 'when the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility.'" *State v. Ramsey*, 171 Ariz. 409, 413, 831 P.2d 408, 412 (App. 1992) (quoting *State v. Dykes*, 163 Ariz. 581, 583, 789 P.2d 1082,

1084 (App. 1990)). It is the function of the judiciary alone to carry out its duty to impartially administer justice. *Prentiss*, 163 Ariz. at 85, 786 P.2d at 936. Neither the legislature nor the executive can restrict the judiciary from deciding what a sentence should be. *Id*. Once the prosecutor has pursued and obtained a conviction, the executive role in the resolution of the criminal action is limited constitutionally. *Murphy*, 113 Ariz. at 418, 555 P.2d at 1112 (prosecutor may decide whether to present aggravating circumstances at sentencing); *Patel*, 160 Ariz. 86, 770 P.2d 390 (court, not prosecutor, controls the length and conditions of probation).

¶32 Although the legislature may prescribe a range of punishment, it may not empower the prosecutor to veto a court's resolution of a criminal matter within that range. *Ramsey*, 171 Ariz. at 414, 831 P.2d at 413 (citing *State v. Jones*, 142 Ariz. 302, 689 P.2d 561 (App. 1984)) (prosecutor's discretion to make or withhold recommendation of alternative sentencing unconstitutionally encroached on the judicial function); *Prentiss*, 163 Ariz. at 85, 786 P.2d at 936 (conditioning mitigation upon prosecutor "alleging" certain statutory factors unconstitutionally encroached upon the sentencing discretion of the judiciary); *Dykes*, 163 Ariz. at 584, 789 P.2d at 1085 (requiring motion by prosecutor before judge could apply lesser sentence unconstitutionally violates separation of powers doctrine).

¶33 The separation of the powers of the judiciary concerning sentencing from the powers of the executive is so clearly demarcated that our Supreme Court has held

that "it is impermissible for a person to be on probation and under control of the court and at the same time be in prison or on parole and under the control of the executive." *State v. Jones*, 124 Ariz. 24, 26, 601 P.2d 1060, 1062 (1979). This is in part because "the efforts of the executive department in a rehabilitation effort may not be in harmony with the objectives of the court's probation department." *Pakula*, 113 Ariz. at 125, 547 P.2d at 479.

¶34 The importance of the judiciary's proper exercise of its sentencing obligations, free from interference from the other two branches of government, can hardly be overstated. It is a "necessary corollary of our tripartite form of government, 'that the courts must be independent, unfettered, and free from directives, influence or interference from any extraneous source.'" *Broomfield v. Maricopa County*, 112 Ariz. 565, 567, 544 P.2d 1080, 1082 (1975) (quoting *Smith v. Miller*, 384 P.2d 738, 741 (Colo. 1963)); *see also Ferrell*, __ Ariz. __, ¶ 19, 2014 WL 685559 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 760-61 (1982)). Control of probation is clearly a judicial function that must be protected and preserved exclusively for the judiciary.

b. <u>It Was Factually Impossible For Petitioner To Waive Statutory Rights and Immunities That Did Not Yet Exist</u>

¶35 While it is accurate that the AMMA had not been enacted at the time Petitioner entered into the plea on August 18, 2010, Petitioner started probation in 2011, after he completed a prison sentence. By that time, the AMMA was in effect,

and medical marijuana used in compliance with and pursuant to the AMMA was made lawful in Arizona. On October 11, 2012, the Arizona Department of Health Services ("ADHS") issued a valid patient registration card to Petitioner. On August 13, 2013, almost a full year after Petitioner was issued his registration card, the Cochise County Probation Department required Petitioner to sign an "Implementation of Conditions of Probation" that for the first time directed Petitioner to not "possess or use marijuana for any purpose."

¶36 In determining that Petitioner somehow waived his right to lawful, medicinal use of marijuana under a statute that did not yet exist at the time he entered his plea, Respondent cites as analogy the fact that a defendant who enters a plea agreement with a possibility of probation knowingly waives certain constitutional rights. Respondent, however, ignores salient facts. When a court accepts a guilty plea, the court must ensure that the defendant's waiver of these rights is "'an intentional relinquishment or abandonment of a known right or privilege.'" *Boykin v. Alabama,* 395 U.S. 238, 243 n.5 (1969) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)). A plea of guilty, like a waiver of counsel, must be entered voluntarily, intelligently, and knowingly. *Id.* at 242. The "court must take special care 'to make sure [a defendant] has a full understanding of what the plea connotes and of its consequence.'" *State v. Djerf,* 191 Ariz. 583, ¶ 35, 959 P.2d 1274, 1285 (1998) (quoting *Boykin,* 395 U.S. at 243-44).

¶37 Here, the plea did not contemplate that Arizona statute would permit a lawful, non-criminal, medicinal use of marijuana for registered qualifying patients. Nor did the plea require Petitioner waive a statutory right that did not then exist. And Respondent did not inquire at the time the plea was accepted whether Petitioner understood he was waiving his right to lawful, medicinal use of marijuana and immunity from penalty or prosecution for medicinal use of marijuana. Indeed, any such waiver is factually impossible because the AMMA had not yet been approved by voters. Respondent abused its discretion when it found that Petitioner knowingly waived his right to lawful, medicinal use of marijuana in 2010.

2. This Court Has Already Decided that the State Government May Not Ignore the AMMA Based on Federal Law.

¶38 Respondent also presumes a waiver of lawful, medicinal use of marijuana based on the facts that the federal Controlled Substances Act prohibits all uses of marijuana and the original conditions of probation required that Petitioner "obey all laws" and that he not "possess or use ***illegal*** drugs, toxic vapors, or controlled substances, or ***use or possess any prescription drugs without a valid prescription***." **Ruling**, pp. 1-2 (emphasis added).

¶39 Division One of this Court has twice now rejected this same argument. In *State v. Okun*, the Yuma County Attorney and Sheriff challenged an order from the Superior Court that the Sheriff return marijuana seized from a lawful patient. Some

of the challenges raised by Respondent in the order below were made by the Yuma County officials in *Okun*, and this Court addressed those challenges and rejected them all in turn. For example, not only did the State allege that Okun could be subjected to federal prosecution for possessing marijuana, but the Yuma County Sheriff also alleged that he would be subjected to federal prosecution for transfer of marijuana. This Court found that not only did "the State lack[ ] standing to argue that federal law prohibits Okun from possessing the marijuana," 231 Ariz. 462, ¶ 17, 296 P.3d at 1002-03, but also that as a matter of law the Sheriff is immune from prosecution for complying with a court order. *Id*. ¶¶ 13-14, 296 P.3d at 1001-02.

¶40 In *Ferrell*, this Court held that the Controlled Substances Act does not authorize a blanket prohibition of medical marijuana for probationers based on the "obey all laws" probation condition "given the Department of Justice policy on prosecution" of marijuana offenses. *Ferrell*, 2014 WL 685559, *5 n.7. Indeed, the U.S. Department of Justice issued a memorandum called "Guidance Regarding Marijuana Enforcement," which concluded that in jurisdictions with enacted laws legalizing marijuana, "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activities." *Id.*

¶41 All that is happening in this case is Respondent is refusing to acknowledge

Section 2F of Proposition 203: "States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. Therefore, compliance with this act does not put the state of Arizona in violation of federal law."

¶42 Respondent's continued attempts to treat the AMMA as pre-empted by federal law ignore not only *Okun* and *Ferrell,* but also the Department of Justice memorandum and the report of the Arizona Attorney General answering questions posed by several County Attorneys on this very issue. (Exhibit A.) In that Attorney General Opinion, Attorney General Horne stated that "the AMMA provisions and related rules that pertain to 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 and, therefore, are not authorizations to violate federal law." *Id*.

¶43 Respondent may disagree that marijuana is useful medicine, but the legislative body of Arizona – the voters – has decided otherwise. *See* Proposition 203, Section 2(A)-(E), *supra*. Therefore, Respondent must cease this shirking of its responsibilities to uphold state law and focus its efforts instead on ensuring compliance with state law.

3. Respondent's Threat to Revoke Petitioner's Probation and Incarcerate Him For His Lawful Use of Medical Marijuana Is a "Penalty" and "Disciplinary Action by a Court" and Violates Petitioner's Statutory Immunities under the AMMA

¶44 The Arizona Supreme Court's decision in *Green* controls here. In *Green,* the Court held that "the discretionary power given the sentencing court to impose, modify, or revoke probation is limited by several statutory provisions, as well as constitutional due process considerations." *Green,* 132 Ariz. at 471, 647 P.2d at 169 (footnotes omitted).

¶45 In *Green,* the probationer had been sentenced to three years' probation and was required to spend one year in jail. As part of the original term of probation, the probationer was "permitted to be released two hours prior to beginning a (work) shift and returning two hours after completing a shift; that he be allowed to work overtime hours as allowed by his employer who shall notify the jail of the change in the time situation." *Id.* He was also permitted "to travel to Tucson for therapy sessions with a counselor. Green's probation was later modified to allow him to visit the family farm and assist his ailing wife with household chores." *Id.* Approximately five days before the expiration of the one-year jail term, the probation officer "discovered that petitioner had been absent from the jail without express permission of the probation officer" on several occasions. *Id.*

¶46 The sentencing court found that the probationer had not spent a full year in

jail because the probationer had spent time outside the jail during the one-year jail term. The sentencing court then modified the terms of probation to require that the probationer serve an additional 175 days in jail without release of any kind. *Id.* Probationer appealed. The Supreme Court reversed, holding that the sentencing court "acted in excess of its legal authority" because "[t]he original order of probation expressly allowed petitioner to spend part of his jail time outside the prison walls in lawful, authorized activities. While petitioner was 'out' on authorized release, he was in full compliance with the orders and regulations of the court, prison, and probation authorities. Therefore, time petitioner spent in the lawful pursuit of activities he was expressly authorized to conduct outside the jail (to which he was required to return at a specified time each day) was part of the 'period actually spent in confinement' for purposes of A.R.S. § 13-901(F)." *Id.* at 470-71, 647 P.2d at 168-69.

¶47 Like *Green*, the original probation terms admonished Petitioner to "obey all laws" and to "[n]ot possess or use illegal drugs, toxic vapors, or controlled substances, or use or possess any prescription drugs without a valid prescription." **Ruling**, pp. 1-2.

¶48 Although marijuana was not available to patients in Arizona as a prescription medication when Respondent originally sentenced Petitioner to prison followed by a probation term, Petitioner was placed on probation after the AMMA

was enacted. At that time, Petitioner was not prohibited from using prescription drugs with a valid prescription. It is undisputed that Petitioner lawfully registered for a medical marijuana patient card after he was prescribed medicinal marijuana for a qualifying debilitating medical condition, and Petitioner is unable to take other prescription painkillers because he cannot take opiates. There is nothing in the record that suggests that Petitioner was abusing medicinal marijuana either by exceeding his doctor's orders or by violating the AMMA. Petitioner was therefore acting lawfully and taking prescribed medication as prescribed.

¶49 This modification of probation and threat to revoke Petitioner's probation punishes ***lawful*** activity that is subject to statutory immunity from "any penalty ... or disciplinary action by a court." Under *Green*, the sentencing court exceeds its statutory authority to fashion conditions of probation when it punishes lawful activities of a probationer.

¶50 Moreover, the AMMA immunities do not make an exception for probationers, and Arizona law requires courts liberally construe the plain language of the initiative. Under the AMMA, ***any*** "registered qualifying patient or registered designated caregiver" is immune from "any penalty ... or disciplinary action by a court" for the registered patient or caregiver's lawful use or possession of marijuana for medicinal purposes. By the plain language of the statute, the Arizona electorate intended to make marijuana available to patients with a qualifying

debilitating medical condition by prescription. For registered patients, marijuana is thus not an illegal drug, but a prescription medication. The Arizona voters did not exclude probationers from the immunities provided nor did the people of Arizona give courts the option of punishing medical marijuana use in conformance with the statute. In fact, the AMMA was specifically enacted to prevent incarceration for medical marijuana use, regardless of the patient's probation status.

B. Respondent's Prohibition of Prescribed Pain Medication for the Duration of Petitioner's Sentence Constitutes Deliberate Indifference to a Probationer's Serious Medical Needs In Violation of the Eighth Amendment.

¶51 Respondent's order prohibiting Petitioner from using medical marijuana as prescribed by a Physician to treat Petitioner's debilitating medical condition improperly interfered with the doctor-patient relationship and Petitioner's medical needs. In this case, Respondent ignored the fact that Petitioner suffers from a debilitating medical condition that causes severe chronic pain, and that Petitioner cannot take traditional opiate painkillers.

¶52 The United States Supreme Court has held that "[d]eliberate indifference to a prisoner's serious medical needs may constitute the unnecessary and wanton infliction of pain that the eighth amendment proscribes." *Gunter v. State*, 153 Ariz. 386, 387-88, 736 P.2d 1198, 1199-1200 (App. 1987) (citing *Estelle v. Gamble,* 429 U.S. 97, 105 (1976)). This gives rise to a cause of action under 42 U.S.C.A. §

1983. Interference with a prescribed treatment also may rise to a constitutional violation. *Id.; Dean v. Coughlin,* 623 F. Supp. 392 (D.C.N.Y. 1985).

¶53 In *Gunter,* this Court held that "[e]ven if the failure to provide the prescribed medication was not significant enough to constitute deliberate indifference—either in terms of frequency of occurrence or in deviation from the prescription—the appellant has made out a claim for negligence." *Id.* While this Court found that "it is conceivable that it could be shown that the failure to provide prescribed medication did not cause any damage at all to the appellant. There is nothing in this record to suggest that this was the case. ***The fact that the medicine was prescribed is prima facie evidence that it was needed***." *Id.* (emphasis added).

¶54 The Arizona electorate authorized doctors and patients with debilitating medical conditions to use marijuana to treat these conditions. The court exceeds its statutory authority and violates the AMMA when it denies a registered qualifying patient access to prescription medications prescribed to treat a debilitating medical condition. The court also interferes with the patient's medical treatment and improperly places itself in the shoes of the prescribing physician. Furthermore, by denying the probationer access to his prescribed medication, Respondent's interference with medical treatment violates the probationer's Eighth Amendment rights.

III. Respondent's Blanket Prohibition of Medical Marijuana for Probationers Abdicates Its Statutory Responsibility to Make an Individual Determination of Probation Conditions.

¶55 "[R]ehabilitation is an important goal of probation in Arizona." *State v. Christopher*, 133 Ariz. 508, 510, 652 P.2d 1031, 1033 (1982); *see also Montgomery*, 115 Ariz. at 584, 566 P.2d at1330 ("... the court may require that a defendant comply with numerous conditions of probation when, in the opinion of the court, such conditions aid in the rehabilitation process or prove a reasonable alternative to incarceration as punishment for the crime committed."); *State v. Hennessey,* 13 Ariz.App. 546, 547, 479 P.2d 194, 195 (1971) ("Probation is calculated to aid the individual in rehabilitation."). In fact, the first sentence of Ariz. R. Crim. P. 27.1 contemplates rehabilitation: "The sentencing court may impose on a probationer such conditions as will promote rehabilitation."

As the Arizona Supreme Court acknowledges,

> "any society considered civilized by Western standards stresses rehabilitation in its penological system. This is so as a matter of altruism (society should help those people who commit crimes to help themselves to improve their condition and become law-abiding citizens) and pragmatism (rehabilitated criminals will not continue to prey on society by committing more crimes and will cease being economic burdens on the community)."

Christopher, 133 Ariz. at 510. Probation "is a sentencing alternative, which a court may use in its sound judicial discretion when the rehabilitation of the defendant can be accomplished with restrictive freedom rather than imprisonment." *State v.*

Smith, 112 Ariz. 416, 419, 542 P.2d 1115, 1118 (1975).

¶56 Because the trial court is "better able" to evaluate a criminal defendant and to determine what is necessary to rehabilitate the particular defendant, Arizona's statutes and rules of criminal procedure have consistently rejected attempts by prosecutors to bind the courts to blanket, overbroad, and over-restrictive probation terms that will prevent the court from tailoring the terms of probation to the needs of justice and rehabilitation of a particular defendant. *Patel*, 160 Ariz. at 89, 770 P.2d at 393; *State v. Oatley*, 174 Ariz. 124, 126, 847 P.2d 625, 627 (App. 1993).

¶57 Indeed, "trial judges are ***required*** to give 'individualized consideration' to plea agreements presented to them" and must "'consider the particular circumstances of the case" in fashioning sentences. *Ferrell*, __ Ariz. __ , ¶ 17, 2014 WL 685559, *3 (quoting *Espinoza v. Martin*, 182 Ariz. 145, 148, 894 P.2d 688, 691 (1995)).

¶58 In Arizona, probation often requires a defendant to not possess or use any controlled substances, inhalants, narcotics or ***prescription drugs***, except those prescribed by a medical professional authorized to prescribe medication. This is how a rehabilitative probationary system is supposed to function. Prescription pain medications are permitted to probationers if they are used as prescribed and not abused. Likewise, the AMMA authorizes the prescription use of marijuana for qualifying "debilitating medical conditions" as long as the patient registers with the

state and obtains a license from the Arizona Department of Health Services for the medical use of marijuana. A.R.S. § 36-2801(3). And the AMMA protects licensed patients from prosecution or penalty based on the possession or use of medical marijuana as long as the patient complies with the AMMA.

¶59 Based on the AMMA, probation departments in Arizona have established policies that follow their existing guidelines regarding prescribed medications; probationer-patients are allowed to use medical marijuana in accordance with the AMMA, subject to the limitations in A.R.S. § 36-2802. This policy is in line with public policy because probation is intended to promote rehabilitation of the defendant and to protect from threats to personal or public safety resulting from ***abuse*** of medical marijuana in the same manner as any other form of prescription drug abuse.

CONCLUSION

¶60 Respondent has impermissibly refused to enforce the laws of this State and in so doing, has exceeded its statutory authority and denied a probationer needed medical treatment in violation. Respondent's attempt to question the validity of the AMMA in the courts should be rejected. This Court should grant jurisdiction and publish an opinion so that the authority of judges to permit probationers to use marijuana as medicine (provided, of course, that they have a state-issued card) is

fully recognized throughout Arizona, and courts are denied the ability to unreasonably interfere with a patient's medical treatment.

DATED: (electronically filed) March 6, 2014.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/ David J. Euchner

David J. Euchner
Sarah Mayhew
33 N. Stone Ave. 21st Floor
Tucson, AZ 85701

Attorneys for **Arizona Attorneys for Criminal Justice**

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13(b)(2), Arizona Rules of Criminal Procedure, undersigned counsel hereby certifies that this Reply Brief complies with Rule 31.13(b) as follows:

1. The brief is proportionately spaced, and uses 14 point Times New Roman typeface, in compliance with Rule 31.13(b)(1);

2. The brief contains 7,253 words, and has an average of no more than 280 words per page, including footnotes and quotations, in compliance with Rule 31.13(b)(2);

3. The brief is double spaced, with top and bottom margins of at least one inch and side margins of at least one inch, in compliance with Rule 31.13(b)(1).

DATED: (electronically filed) March 6, 2014.

By /s/
David J. Euchner
Attorney for Arizona Attorneys for Criminal Justice

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief of *Amicus Curiae* Arizona Attorneys for Criminal Justice in Support of Petitioner and Motion for Leave to File an *Amicus Curiae* Brief, electronically filed with the Court, will be mailed on March 6, 2014, to the following:

Thomas C. Holz
48 Main Street, Suite 13
Bisbee, AZ 85603
thomas.holz@azbar.org

Brian M. McIntyre
Deputy Cochise County Attorney
PO Drawer CA
Bisbee, AZ 85603
BMcIntyre@cochise.az.gov

Hon. Wallace Hoggatt
Cochise County Superior Court, Division 3
PO Box 204
Bisbee, AZ 85603

DATED this 6th day of March, 2014.

By /s/
David J. Euchner
Attorney for Arizona Attorneys for Criminal Justice

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL August 6, 2012	No. I12-001 (R12-008) Re: Preemption of the Arizona Medical Marijuana Act (Proposition 203)

To: The Honorable John Kavanaugh,
State Representative
Sheila Polk,
Yavapai County Attorney
Ken Angle,
Graham County Attorney
Brad Carlyon,
Navajo County Attorney
Daisy Flores,
Gila County Attorney
Barbara LaWall,
Pima County Attorney
Bill Montgomery,
Maricopa County Attorney
Ed Rheinheimer,
Cochise County Attorney
George Silva,
Santa Cruz County Attorney
Jon R. Smith,
Yuma County Attorney
Matt Smith,
Mohave County Attorney
James P. Walsh,
Pinal County Attorney
Michael Whiting,
Apache County Attorney
Derek Rapier,
Greenlee County Attorney

Question Presented

The following question has been presented to this Office by a member of the Legislature and thirteen of Arizona's fifteen county attorneys: Is the Arizona Medical Marijuana Act ("the AMMA") preempted by the federal Controlled Substances Act ("the CSA")?

Summary Answer

Yes, in part. The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. Because of federal prohibitions, those AMMA provisions and related rules that authorize any cultivating, selling, and dispensing of marijuana are preempted. However, the AMMA provisions and related rules that pertain to 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 and, therefore, are not authorizations to violate federal law.

Background

The AMMA was passed narrowly by voters in 2010 as Proposition 203. The purpose of the proposition, as explained by the Arizona Legislative Council's ballot measure analysis provided to all voters, was to "allow a 'qualifying patient' who has a 'debilitating medical condition' to obtain an 'allowable amount of marijuana' from a 'nonprofit medical marijuana dispensary' and to possess and use the marijuana to treat or alleviate the debilitating medical condition or symptoms associated with the condition." Ariz. Sec'y of State, Ariz. Ballot Prop. Guide, Gen. Election—Nov. 2, 2010, at 83 (quoting Ariz. Rev. Stat. ("A.R.S.") § 36-2801), *available at* http://azsos.gov/election/2010/info/PubPamphlet/english/prop203.pdf. In order to

facilitate its implementation, the AMMA requires that "[t]he Arizona Department of Health Services ["DHS"] . . . adopt and enforce a regulatory system for the distribution of marijuana for medical use, including a system for approving, renewing and revoking the registration of qualifying patients, designated caregivers, nonprofit dispensaries and dispensary agents." *Id.*; *see also* A.R.S. § 36-2803. After the Act took effect, DHS promulgated rules related to its implementation. *See* Ariz. Admin. Code §§ R9-17-101 to R9-17-323 (2011).

Following the AMMA's passage, the State brought questions relating to preemption to two different courts. In *Arizona v. United States*, No. 2:11-cv-01072-SRB (D. Ariz. 2011), the State expressed concern that while the "employees and officers of the State of Arizona have a mandatory duty to implement" the AMMA (subject to a legal action in mandamus), state officials "risk prosecution and penalties under federal criminal statutes if they faithfully comply with Arizona law." *See* Compl. at 15, ¶ 81. The Complaint sought declaratory relief and asked the federal court to determine whether the AMMA was preempted by federal law or whether implementation of the AMMA was subject to a "safe harbor" by virtue of certain actions of the federal government. *See generally id.* The district court judge, however, concluded that the State had not met "the constitutional or prudential components of ripeness" and dismissed its complaint. Order, *Arizona v. United States*, No. 2:11-cv-01072-SRB at 10 (D. Ariz. January 4, 2012). Similar issues were raised in a mandamus action against DHS in Superior Court for Maricopa County. *See* Minute Entry, *Compassion First LLC v. State*, No CV 2011-011290 at 5 (January 17, 2012). In that case the superior court judge recognized "the State's dilemma" explaining that "it is caught between the proverbial rock and hard place, between the AMMA and the CSA." *Id.* Nevertheless, the court declined to "determine issues of preemption and federal criminal liability," instead concluding that the "sole issue before [it was] whether the

State has discretion to put the implementation of the AMMA on hold while it" sought relief on those issues in federal court.[1] *Id.*

Analysis

The Supremacy Clause of the United States Constitution declares that the "Constitution, and the Laws of the United States . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. "Under this principle, Congress has the power to preempt state law." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). In passing the CSA, Congress recognized that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Furthermore, Congress found that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate" and concluded that "it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate." *Id.* § 801(5). "The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug [under the Act], Congress expressly found that the drug has no acceptable medical uses." *Gonzales v. Raich*, 545 U.S. 1, 27 (2005). Consequently, although the CSA "expressly contemplates that many drugs 'have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people' . . . it includes no exception at all for any medical use of marijuana." *United States v. Oakland Cannabis Buyers'*

[1] Subsequent litigation in other matters has raised similar issues. *See, e.g., State v. Okun*, No. 1 CA-CV 12-0094 (App. Feb. 9, 2012), docket *available at* http://apps.supremecourt.az.gov/aacc/appella/1CA%5CCV%5CCV120094.PDF; Answer of County Defendants, *White Mountain Health Cntr., Inc. v. Cnty. of Maricopa,* CV2012-053585 (Ariz. Sup. Ct. June 19, 2012).

Coop., 532 U.S. 483, 493 (2001) (internal citation omitted) (rejecting medical necessity argument as defense to criminal prosecution).

This issue has been ruled on in two (2010, 2011) appellate court cases, one in California and one in Oregon. The legal analysis in these cases controls this opinion. *See* Mich. Op. Att'y Gen. No. 7262, 2011 WL 5848600, at *4 n.11 (2011) (concluding that the recent Oregon and California decisions render prior decisions related to medical marijuana "of questionable value").

First, the Oregon Supreme Court concluded, in analyzing Oregon's similar medical marijuana program, that those provisions of the Oregon law that authorized "a use that federal law prohibits stand[] as an obstacle to the implementation and execution of the full purposes and objectives of the [CSA]." *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010). That court explained that under U.S. Supreme Court precedent, where a state law authorizes "conduct that the federal Act forbids, 'it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984)).

Similarly, the California Court of Appeals has held that where an ordinance creates an application process that permits it to operate a medical marijuana collective, the ordinance's authorization "stands as an obstacle to the accomplishment of [the] purpose [of the CSA]." *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 651 (App. 2011), *rev. granted*, 268 P.3d 1063 (2012).[2]

In contrast, a state's decision concerning the decriminalization of certain conduct stands on a different footing because "[w]hen an act is prohibited by federal law, but neither prohibited

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[2] In addition, "Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration." Act of Oct. 21, 1998, Pub. L. No. 105-277, Div. F., 112 Stat. 2681-2761.

nor authorized by state law, there is no obstacle preemption." *Id.*; *accord Emerald Steel*, 230 P.3d at 530 ("Congress lacks authority to require states to criminalize conduct that the states choose to leave unregulated, no matter how explicitly Congress directs the states to do so."). Here, the AMMA decriminalizes the possession and use of marijuana of up to 2.5 ounces for those individuals (patients and caregivers) who have been issued certain identification cards. A.R.S. § 36-2811. But the language of the statute does not authorize anything. This provision, by the terms of the statute, is not preempted because it is beyond Congress's power to dictate the parameters of state criminal conduct. However, to the extent that an identification card *purports to authorize* an individual to cultivate marijuana or otherwise violate federal law, such language is preempted.[3]

[3] You have also asked whether state and other government employees face federal criminal sanctions for administering, implementing, or complying with the AMMA. I am unable to answer this question as it lies in the discretion of the U.S. Department of Justice. Under federal law it appears that state and other government employees could be subject to prosecution for actions required by the AMMA. For example, the most recent statement of the then-Acting U.S. Attorney for Arizona stated that "[c]ompliance with the AMMA and Arizona regulations will not provide a safe harbor or immunity from federal prosecution for anyone involved in the cultivation and distribution of marijuana . . . [a]s such, state employees who conduct activities authorized by the AMMA are not immune from liability under the CSA." Letter of Acting U.S. Attorney Ann Birmingham Scheel to Governor Janice K. Brewer (Feb. 16, 2012).

Conclusion

In light of the legal principles outlined above, and the continuing concerns raised by the chief law enforcement officers of thirteen of Arizona's fifteen counties throughout the state, I must issue this opinion concluding that those provisions of the AMMA and related rules authorizing any cultivating, selling, and dispensing of marijuana are preempted. However, the AMMA provisions and related rules that pertain to 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 and, therefore, are not authorizations to violate federal law.

Thomas C. Horne

Thomas C. Horne
Attorney General