

IN THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA,) Arizona Supreme Court No.
) CR-18-0370-PR
 Appellee,)
) Court of Appeals No.
 v.) 1 CA-CR 16-0703
)
 RODNEY CHRISTOPHER JONES,) Yavapai County Superior Court
) No. P1300CR201400328
 Appellant.)
)
_____)

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS IN SUPPORT OF PETITIONER

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INTRODUCTION

A divided Court of Appeals (COA) erroneously replaced the Arizona Medical Marijuana Act's (AMMA) more recent, intentionally broad definition of "marijuana" with the criminal code's earlier, narrower definitions of "marijuana" and "cannabis." It acknowledged voter-enacted initiatives must be construed liberally but entirely failed to do so. AMMA's express purpose is to immunize registered cardholders from criminal prosecution or any other penalty for the medical use of marijuana, regardless of the medicine's form. A.R.S. §§13-3401 serves a contrary purpose: to criminalize possession of marijuana and derivatives for illicit recreational use, but Arizona's voters immunized registered cardholders' medical use of "all parts of any plant of the genus cannabis" and "any mixture or preparation thereof," eliminating for AMMA's purposes the criminal code's distinction between "marijuana" and "cannabis."

Although the Arizona Attorney General's office filed an answering brief opposing Rodney Jones' Petition for Review, it recently filed a notice withdrawing its opposition and acknowledged in media statements that AMMA legalized marijuana in concentrate form for registered cardholders.¹ The Yavapai County

¹ The Attorney General's spokesman, Ryan Anderson, told the press that the "Attorney General has a responsibility to uphold the will of Arizona voters," and that the COA's opinion will "deny medicine to legitimate patients that may be ingesting their marijuana [] in extract or a tincture-type of a form." Howard Fischer, [Arizona AG withdraws argument against hashish for medical-marijuana patients](#),

Attorney's Office (YCAO) now seeks to intervene; few opponents of AMMA have been as vehement as the elected Yavapai County Attorney, who has taken a political position about marijuana's harmfulness and campaigns against legalization in every form. It is therefore unsurprising that the YCAO seeks to bootstrap its political posturing into demands that this Court use AMMA as a sword against registered cardholders and undermine AMMA's broad, protective purpose.

Through product labeling regulated by the Arizona Department of Health Services (ADHS) and its verification system, the State has authorized state-regulated dispensaries to sell concentrates in both edible and non-edible forms since AMMA's enactment. To subject Arizona's 186,371 registered cardholders² to criminal liability for conduct that has the State's imprimatur would violate each cardholder's rights to due process under the U.S. and Arizona constitutions and amount to large-scale entrapment—a result so patently absurd warranting summary rejection. *Amici curiae* Arizona Attorneys for Criminal Justice (AACJ) and National Organization for the Reform of Marijuana Laws (NORML) ask this Court to interpret AMMA's definitions of marijuana and usable marijuana liberally to give effect to the voters' intent, and to reverse the COA's Opinion.

Capital Media Services, Ariz. Daily Star, October 22, 2018 (last visited October 26, 2018).

² [Arizona Medical Marijuana Program September 2018 Monthly Report](#), Ariz. Dept. Health Services (last visited October 26, 2018).

INTERESTS OF *AMICI CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ 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.

NORML is a non-profit public-interest advocacy and educational corporation organized in 1971. The oldest and largest marijuana policy reform organization in the country, NORML maintains a professional staff in Washington, DC, and has approximately 15,000 dues paying members, 1.3 million internet-based supporters, 450 attorneys who are members of the NORML Legal Committee, and more than 150 state-based chapters across the country including a state chapter and several local chapters in Arizona. NORML is involved in lobbying, ballot initiatives, and litigation around the country and represents the interests of over 180,000 registered medical marijuana patients in Arizona and over one million patients nationwide.

AACJ and NORML offer this brief because the issues presented concern the wrongful prosecution and conviction of citizens engaged in activities the voters

decided are legal. The COA’s decision to replace AMMA’s definition of “marijuana” with a criminal code definition and to hold a registered qualifying patient criminally liable for possessing medical marijuana concentrate in an allowable amount creates a constitutional due process crisis for Arizona’s 186,371 cardholders. AACJ and NORML consistently appear as *amici* in AMMA-related cases to assist with understanding AMMA’s legal and practical implications.

ARGUMENTS

I. Courts must liberally construe AMMA and the voters’ intent.

Control of the sovereignty of the State rests with the people, not with the government. Ariz. Const. art. II, §2. Our Constitution recognizes that government tends to promote its own interests rather than those of the people. For that reason, Arizona’s declaration of rights, Ariz. Const. art. II, §1, states: “a frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.” The legislative authority therefore resides in the Legislature and the people through the initiative and referendum processes. Ariz. Const. art. IV, 1 §1; A.R.S. §19-102; *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, ¶8 (2013).

AMMA represents the public policy of this state. *State ex rel. Polk v. Hancock*, 237 Ariz. 125, ¶9 (2015). Because AMMA is a voter-enacted initiative, courts must liberally construe AMMA’s terms to “give effect to the intent of the

electorate.” *State v. Jones*, 245 Ariz. 46, ¶4 (App. 2018) (“*Opinion*”). Courts may not interpret a voter-passed initiative in a way that interferes with the people’s right to initiate laws. *Pedersen v. Bennett*, 230 Ariz. 556, ¶7 (2012) (quoting *Kromko v. Superior Court*, 168 Ariz. 51, 58 (1991)) (liberal interpretation of initiatives avoids “destroy[ing] 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.” *State v. Gomez*, 212 Ariz. 55, ¶11 (2006). The initiative must be read liberally with the understanding that drafters and voters may not be well-versed in rules of statutory construction: “we must identify the reasonable interpretation that is most consistent with the intent of the voters in adopting the measure.” *Id.*, ¶19.

A. AMMA’s express purpose is to protect registered cardholders from any penalty for medical use of marijuana, which is broadly defined.

Courts may not depart from a statute’s plain language unless courts “can conjure no plausible legislative logic for the result compelled by that language.” *State v. Green*, 2018 WL 5095136, -- Ariz. --, ¶20 (Ariz. Ct. App., Oct. 19, 2018). “Our role is not to rewrite statutes to conform to our own notions of what they should say.” *Id.* (citing *State ex rel. Polk v. Campbell*, 239 Ariz. 405, ¶12 (2016)).

In 1996, Arizona’s voters resoundingly passed Proposition 200, which provided, in part, treatment in lieu of prison for drug offenders. The purpose of Prop200 “was to change Arizona’s drug control policy by treating drug abuse as a medical problem best handled by treatment and education, not by incarceration.”

State v. Estrada, 201 Ariz. 247, ¶2 (2001) (citing *Foster v. Irwin*, 196 Ariz. 230, ¶3 (2000)). In passing Prop200, “the voters could plausibly have intended a distinction between drug possession for personal use (counting as a strike) and non-possessory drug offenses (not counting as a strike). Multiple convictions for the former offense would necessarily demonstrate prior opportunities for substance-abuse rehabilitation that convictions for the latter offenses would not.” *Green*, 2018 WL 5095136, ¶22.

Like its Prop200 predecessor, in 2010, the voters adopted AMMA through Proposition 203. §2(D) of Prop203 made clear its intent to stop state officials from persecuting patients who use marijuana medicinally. [Ariz. Sec’y of State, Ariz. Ballot Prop. Guide, Gen. Election – Nov. 7, 2010 \(“2010 Voter Guide”\)](#) (last visited October 26, 2018) at 73. §2(G) expressed the voters’ intent to change Arizona’s public policy:

State law should make a distinction between the medical and nonmedical uses of marijuana. Hence, the purpose of this act is 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.

Id. “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 (App. 2013). Thus, AMMA plainly contemplated a clear distinction between illicit recreational drug use and the use of marijuana for medicinal purposes.

As described by the Arizona Legislative Council’s analysis, “the purpose of [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.” *Id.* at 83. In *State v. Maestas*, 244 Ariz. 9, ¶¶20-22 (2018), this Court held that a statute that criminalized all marijuana possession on college campuses violated the Voter Protection Act³ because AMMA was intended to remove criminal penalties for registered cardholders.

AMMA is a “comprehensive legal framework for medical marijuana’ which, in addition to establishing a regulatory structure for the management of medical marijuana licensing and production, provides broad legal protection for patients, physicians, and all who facilitate the use of medical marijuana.” *Gersten v. Sun Pain Mgmt., P.L.L.C.*, 242 Ariz. 301, ¶10 (App. 2017) (quoting Daniel G. Orenstein, *Voter Madness? Voter Intent and the Arizona Medical Marijuana Act*, 47 Ariz. St. L.J. 391, 396 (2015)). Because AMMA serves a diametrically opposed purpose from A.R.S. §13-3401, there is clear “legislative logic” for AMMA’s use of a broad definition of marijuana that includes rather than excludes concentrates.

³ Ariz. Const. art. 4, pt. 1, §1(6)(A)–(D), (14).

B. The AMMA provides immunity for the medical use of marijuana, including concentrates, which are prohibited by the criminal code.

The COA ignored AMMA’s plain text, instead construing AMMA “in light of existing understanding,” pretending that AMMA fails to define “resin” as part of its definition of marijuana. *Opinion* ¶¶9, 11. From there, the COA incorrectly held that the criminal code definition controls AMMA’s definition of “marijuana.” In doing so, it failed to comport with well-settled rules of statutory construction.

In contrast to §36-2801, §13-3401(19) defines marijuana to mean “all parts of any plant or genus cannabis, from which the resin has not been extracted.” §13-3401(4) separately defines “cannabis” to mean “[t]he resin extracted from any part of a plant of the genus cannabis.” AMMA’s definition makes no such distinctions, defining marijuana broadly to mean “all parts of any plant of the genus cannabis, whether growing or not, and the seeds of such plant.” §36-2801(8).

When a statute’s meaning is clear and unambiguous, courts “apply the plain meaning and our inquiry ends.” *State v. Burbey*, 243 Ariz. 145, ¶7 (2017). When “two conflicting statutes cannot operate contemporaneously, the more recent, specific statute governs over an older, more general statute.” *State v. Jones*, 235 Ariz. 501, ¶8 (2014). And when two statutes conflict, courts “adopt a construction that reconciles them whenever possible, giving force and meaning to each.” *Id.* (citing *UNUM Life Ins. Co. v. Craig*, 200 Ariz. 327, ¶28 (2001)). *See also Dietz v. Gen. Elec. Co.*, 169 Ariz. 505, 510 (1991) (noting that when “more than one interpretation

[of a statute] is plausible, we ordinarily interpret the statute in such a way as to achieve the general legislative goals that can be adduced from the body of legislation in question”). This Court has made clear that AMMA modifies criminal statutes because its purpose is to provide immunity from prosecution, not to define crimes. *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, ¶16 (2015). Thus, the COA was obligated to interpret AMMA’s definition of marijuana on its own terms, and then look to AMMA’s definition—the latter and more specific—to determine how it modified the criminal code.

As noted in Judge Jones’ dissent, “AMMA does define ‘marijuana’ for purposes of delineating the bounds of its grant of immunity, and a prior understanding of the term, memorialized in a separate section of the code, cannot supplant that definition.” *Opinion*, ¶20. Judge Jones correctly applied the rules of statutory construction, noting that “[t]he drafters of the AMMA chose different words to define ‘marijuana’ than those used within the criminal code, and the court must ‘presume those distinctions are meaningful and evidence an intent to give a different meaning and consequence to the alternate language.’” *Id.* ¶21 (quoting *State v. Harm*, 236 Ariz. 402, ¶19 (App. 2015)). Judge Jones reasoned that “the omission of the phrase ‘from which the resin has not been extracted’ from the definition of ‘marijuana’ in AMMA evidences an intent to abandon—not adopt—the criminal code’s distinction between the marijuana plant and its resin.” *Id.*

The majority, however, failed to harmonize §36-2801 with §13-3401 and instead replaced AMMA’s definition of “marijuana” with the criminal code’s definition—which, as Judge Jones noted, AMMA intentionally rejected. *Opinion* ¶¶20-22. The statutes are easily harmonized: §13-3401 bars the illegal recreational use of marijuana concentrates, including hashish and resin, and categorizes more-potent concentrates differently than dried marijuana flowers, while AMMA permits legal medicinal uses of marijuana in all of its various forms, as long as the patient possesses the “allowable amount of marijuana.”

It is reasonable for a criminal statute like §13-3401 to categorize dried leafy marijuana, which the COA previously found to have a lower intoxicating effect than marijuana in a concentrated form, as a lesser offense for purposes of illegal, recreational drug use. *Opinion* ¶10. AMMA serves a markedly different purpose. Courts are not free to insert words or phrases into a statute the legislature did not include, especially when the legislature did use these words elsewhere. “Defining crimes and fixing penalties are legislative, not judicial functions.” *State v. Wagstaff*, 164 Ariz. 485, 490 (1990). The “choice of the appropriate wording rests with the Legislature, and the court may not substitute its judgment for that of the Legislature.” *Orca Communications Unlimited, LLC v. Noder*, 236 Ariz. 180, ¶11 (2014) (quoting *City of Phoenix v. Butler*, 110 Ariz. 160, 162 (1973)).

Even if the COA were correct that AMMA and the criminal code must be read as a single statutory scheme, where “the legislature has specifically used a term in certain places within a statute and excluded it in another place, courts will not read that term into the section from which it was excluded.” *Ariz. Bd. of Regents for & on behalf of Univ. of Ariz. v. State ex. Rel. State of Ariz. Pub. Safety Ret. Fund Mgr Adm’r*, 160 Ariz. 150, 157 (App. 1989). Because the legislative body (AMMA’s drafters) omitted the phrase “from which the resin has not been extracted,” AMMA’s definitions of marijuana and usable marijuana were intended to be broader than those of the criminal code.

The COA ignored the words “allowable amount” in A.R.S. §§36-2801 and 36-2811. The term “usable marijuana” appears in sections of AMMA that explain how much marijuana a cardholder is permitted to have based on weight; it is never used to restrict the form of a patient’s medicine. The adjective “dried” and the exclusion of the “seeds, stalks and roots of the plant” explains how to weigh the products to measure the marijuana content. Thus, §36-2801(1) explains that the “allowable amount of marijuana” means 2.5 ounces of usable marijuana and 12 plants per registered patient for cultivators, but §36-2801(1)(c) clarifies: “Marijuana that is incidental to medical use, but is not usable marijuana as defined in this chapter, shall not be counted toward a qualifying patient’s or designated caregiver’s allowable amount of marijuana.” Similarly, the definition of “usable marijuana” also

“does not include the weight of any non-marijuana ingredients combined with marijuana and prepared for consumption as food or drink.” §36-2801(15).

Nothing in AMMA’s express purpose suggests it protects only against allegations of a certain class of felony or the use of a certain form of marijuana. Instead, the purpose is all-encompassing: “to protect ... from arrest and prosecution, criminal and other penalties and property forfeiture if such patients engage in the medical use of marijuana.” AMMA leaves open the form in which patients may consume their medicine, allowing for “any mixture or preparation thereof.” The “usable marijuana” designation merely limits what parts of the plant the State may weigh to determine whether a cardholder has exceeded the scope of the immunity for purposes of criminal prosecution. This is consistent with a statute intended to immunize the use of marijuana rather than criminalize its use.

The §13-3401 definitions stand in stark contrast. Unlike §36-2801, § 13-3401(39), allows the State to include “the entire weight of any mixture or substance that contains a detectable amount of an unlawful substance.” The State may allege a defendant has exceeded the criminal threshold of two pounds by including wet (not dried) flowers, leaves, stalks, stems, roots, and the weight of any non-plant ingredients added to the marijuana. AMMA’s definition clarifies that these non-medicinal ingredients are not to be counted against a cardholder to find that s/he has exceeded the allowed amount.

To the extent that AMMA conflicts with the criminal code, AMMA, the legislative body's latest word on immunities for possession of marijuana and any products prepared from marijuana, must prevail because it is more specific and more recent. *Jones*, 235 Ariz. 501, ¶11. Even if the majority and dissent demonstrate that AMMA's language may reasonably yield different meanings, in such circumstances, courts consider the statute's "subject matter, its historical background, its effect and consequences, and its spirit and purpose." *Ariz. Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, ¶11 (2014). Because the COA ignored these rules of statutory construction, its reading ultimately fails. This Court should adopt the reasoning in Judge Jones's dissent.

II. AMMA immunizes use of marijuana concentrates; any other interpretation violates Due Process and amounts to entrapment.

Criminal statutes that fail to give notice that an act is criminal before it is done are unconstitutional deprivations of due process. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921); *State v. McNair*, 141 Ariz. 475, 483 (1984); U.S. Const. amends. V, XIV; Ariz. Const. art. II, §4. It is the "public policy of this state and the general purpose" of the Criminal Code "[t]o give fair warning of the nature of the conduct proscribed and the sentences authorized upon conviction." A.R.S. §13-101(2). To satisfy due process, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does

not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A statute “is unconstitutionally vague if it fails to give persons of ordinary intelligence reasonable opportunity to know what is prohibited and fails to provide explicit standards for those who apply it.” *State v. Tocco*, 156 Ariz. 116, 118 (1988) (citations omitted). Courts construe statutes in a way that “not only gives effect to the legislature’s intent, but also in a way that maintains its constitutionality.” *State v. Thompson*, 204 Ariz. 471, ¶27 (2003).

The “primary purpose of the ex post facto clause [is] ‘to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.’” *State v. Noble*, 171 Ariz. 171, 174 (1992); *see also* U.S. Const. art. I, §10, cl. 1; Ariz. Const. art. II, §25. The rule of lenity holds, “When a statute is ‘susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant.’” *State v. Tarango*, 185 Ariz. 208, 210 (1996) (quoting *State v. Pena*, 140 Ariz. 545, 549-50 (App. 1983)). This is especially true here, where 186,371 registrants have relied on statutory language and ADHS’s regulations and oversight in forming the reasonable belief that they may lawfully use marijuana concentrates.

Registered patients have been lawfully purchasing concentrates from regulated dispensaries with ADHS’s oversight. The State has induced reliance by authorizing dispensaries to sell concentrates, and any registered cardholder of

average intelligence would believe AMMA's immunity protects possession of concentrates. A judicial rule removing AMMA immunities for use of State-authorized products creates significant confusion for those who reasonably believe they acted lawfully. If the opinion stands, anyone who purchased concentrates in the last seven years (the statute of limitations for felony offenses, *see* A.R.S. §13-107(B)(1)) is susceptible to prosecution, and each cardholder who obtained concentrates at an ADHS-licensed dispensary has an excellent case for entrapment under §13-206. This is an absurd result that cannot stand.

AMMA clearly contemplated that concentrates could be used by patients and sold by dispensaries. For a two-judge majority to decide otherwise, more than seven years after ADHS guidelines were promulgated regulating concentrates, necessarily leads to a violation of the due process and *ex post facto* clauses of the federal and state constitutions.

CONCLUSION

Amici ask this Court to grant review and hold that AMMA protects medicinal use of marijuana concentrates.

RESPECTFULLY SUBMITTED this 30th day of October, 2018.

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