IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

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

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

Sarah L. Mayhew, No. 029048
33 N. Stone Ave. #2100
Tucson, Arizona 85701
(520) 724-6800
Sarah.Mayhew@pima.gov

Attorney for **Arizona Attorneys for Criminal Justice**

TABLE OF CONTENTS

Page

INTRODUCTION 1

INTERESTS OF *AMICUS CURIAE* 3

ARGUMENTS.....6

I. Arizona's public policy on medical marijuana was set by voter-passed initiative; courts must liberally construe the AMMA and the voters' intent....6

A. The express purpose of the AMMA is to protect patients and caregivers from prosecution and any other penalty for the medical use or possession of marijuana, which is broadly defined. 9

B. The AMMA provides immunity for the medical use of marijuana, including concentrates, which are prohibited by the criminal code. 11

C. ADHS regulations and instructions to the AMMA participants authorize, regulate, and oversee the use of marijuana concentrates for medicinal purposes. 18

II. The AMMA immunizes the use of marijuana concentrates; any other interpretation violates Constitutional Due Process and amounts to entrapment.....22

CONCLUSION.....28

TABLE OF CASES AND AUTHORITIES

CASES PAGES

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 (App. 1989) 33

Ariz. Early Childhood Dev. & Health Bd. v. Brewer, 221 Ariz. 467 (2009) 9, 11

Barbone v. Superior Court, 11 Ariz.App. 152 (1969).....31

Cave Creek Unified School Dist. v. Ducey, 233 Ariz. 1 (2013) 8, 19

City of Phoenix v. Butler, 110 Ariz. 160 (1973).....19

Connally v. General Constr. Co., 269 U.S. 385 (1926) 29

Dietz v. Gen. Elec. Co., 169 Ariz. 505 (1991).....15

Dobson v. McClennen, 238 Ariz. 389 (2015).....6

Estate of Hernandez v. Ariz. Bd. of Regents, 177 Ariz. 244 (1994).....15

Gersten v. Sun Pain Mgmt., P.L.L.C., 242 Ariz. 301 (App. 2017).....13

Groat v. Equity Am. Ins. Co., 180 Ariz. 342 (App. 1994).....23

Guzman v. Guzman, 175 Ariz. 183 (App. 1993) 23

In re Nickolas S., 226 Ariz. 182 (2011).....18

Kolender v. Lawson, 461 U.S. 352 (1983)..... 29, 30, 34, 35

Kromko v. Superior Court, 168 Ariz. 51 (1991).....10

Lanzetta v. New Jersey, 306 U.S. 451 (1939).....28

Orca Communications Unlimited, LLC v. Noder, 236 Ariz. 180 (2014) 19

Pedersen v. Bennett, 230 Ariz. 556 (2012).....10

Reed-Kaliher v. Hoggatt, 237 Ariz. 119 (2015) 6, 12, 15

Smith v. Goguen, 415 U.S. 566 (1974) 35

State ex rel. Montgomery v. Harris (Shilgevorkyan), 234 Ariz. 343 (2014) 6

State ex rel. Polk v. Hancock, 237 Ariz. 125 (2015) 6

State v. Barr, 183 Ariz. 434 (App. 1995) 17

State v. Carruthers, 837 N.W.2d 16 (Mich. Ct. App. 2013) 20

State v. Fell, 203 Ariz. 186 (App. 2002).....19

State v. Fields, 232 Ariz. 265 (App. 2013) 13, 14

State v. Getz, 189 Ariz. 561(1997).....31

State v. Glissendorf, 235 Ariz. 147 (2014) 5

State v. Gomez, 212 Ariz. 55 (2006)..... 10, 11

State v. Gray, 239 Ariz. 475 (2016).....32

State v. Jones, 235 Ariz. 501 (2014)..... 14, 22

State v. Kerr, 142 Ariz. 426 (App. 1984) 31

State v. Maestas, 242 Ariz. 194 (App. 2017).....6, 12

*State v. McKinne*y, 108 Ariz. 436 (1972) 32

State v. McNair, 141 Ariz. 475 (1984) 29, 31

State v. Noble, 171 Ariz. 171 (1992) 30

State v. Okun, 231 Ariz. 462 (2011) 13

State v. Pena, 140 Ariz. 545 (App. 1983).....30

State v. Pirello, 282 P.3d 662 (Mont. 2012).....20

State v. Sisco II, 239 Ariz. 532 (2016).....6

State v. Tarango, 185 Ariz. 208 (1996) 30

State v. Thompson, 204 Ariz. 471 (2003) 29

State v. Tocco, 156 Ariz. 116 (1988) 29

State v. Wagstaff, 164 Ariz. 485 (1990).....18

Thomas & King, Inc. v. City of Phoenix, 208 Ariz. 203 (App. 2004).....23

United States v. Cohen Grocery Co., 255 U.S. 81 (1921).....28

UNUM Life Ins. Co. v. Craig, 200 Ariz. 327 (2001).....14

Wagenseller v. Scottsdale Mem'l Hosp., 147 Ariz. 370 (1985) 7, 8

Statutes

A.R.S. § 1-213.....17

A.R.S. § 13–3401..... 15, 23

A.R.S. § 13-3401(19).....2, 18

A.R.S. § 13-3401(39).....22

A.R.S. § 13-3401(4).....2, 18

A.R.S. § 13-3408(G).....15

A.R.S. § 19-102.....8

A.R.S. § 36-2801..... 18, 22

A.R.S. § 36-2801(1).....21

A.R.S. § 36-2801(1)(c) 21

A.R.S. § 36-2801(15).....21

A.R.S. § 36-2801(8).....18

A.R.S. § 36-2803.....23

A.R.S. § 36-2811.....13

A.R.S. § 36-2811(B) 14

A.R.S. §13-101(2).....28

Mich. Comp. Laws § 333.26423(k) (2013) 20

Mont. Code Ann. § 50-46-102(10) (2009) 20

Other Authorities

"Medical Marijuana Verification System Dispensary Handbook." (Last visited 8/28/17)..... 24, 25, 26

ADHS Arizona Medical Marijuana Program January 2013 Monthly Report (last visited August 28, 2017).....32

ADHS Arizona Medical Marijuana Program July 2017 Monthly Report (last visited August 28, 2017).....33

Arguments Filed Against the Regulation and Taxation of Marijuana Act, Proposition 205, General Election 2016, Sheila Polk (last visited August 28, 2017).....1

Ariz. Sec'y of State, Ariz. Ballot Prop. Guide, Gen. Election – Nov. 3, 1996 (last visited August 28, 2017).....9

Ariz. Sec'y of State, Ariz. Ballot Prop. Guide, Gen. Election – Nov. 7, 2010 ("2010 Voter Guide") 11, 12

FAQs - Dispensary (last visited 8/28/17) 26, 27

Howard Fischer, "Yavapai County: No. 1 in medical marijuana," Daily Courier, January 21, 2017 (last visited August 28, 2017) 2

https://twitter.com/YavapaiCntyAtty?lang=en (last visited August 28, 2017). 1

https://unitedpatientsgroup.com/resources/methods-of-consumption (last visited August 28, 2017) 16

Press release of Maricopa County Attorney, "Top Prosecutors Call on Arizona Leaders to Oppose Legal Marijuana," October 30, 2014.....1

Proposition 105 (last visited August 28, 2017).....9, 10

See AMMA Monthly Transactions Report January 2015 (last visited August 28, 2017).....33

Tim Golden, "Medical Use of Marijuana To Stay Illegal in Arizona," New York Times, 4/17/97, p.A14 (last visited August 28, 17) 9

Welton v. Arizona, CV 2013-014852 (Maricopa County 2013).....16

Rules

Ariz. R. Civ. App. P. 16(b)-(c) 7

Ariz. R. Crim. App. P. 31.15 7

R-17-0002, available at http://www.azcourts.gov/Rules-Forum/aft/661 (last visited August 28, 2017) 7

Treatises

Daniel G. Orenstein, *Voter Madness? Voter Intent and the Arizona Medical Marijuana Act*, 47 Ariz. St. L.J. 391 (2015) 14

Regulations

ADHS Facts – Qualifying Patients (last visited August 28, 2017) 28

R9-17-304(C)(8)(b)(vi).....24

R9-17-309(D).....25

R9-17-319 27

R9-17-320(B)(2) 27

R9-17-322(D)(1).....24

Constitutional Provisions

Ariz. Const. art. II, § 1 8

Ariz. Const. art. II, § 2 8

Ariz. Const. art. II, §25 30

Ariz. Const. art. IV, 1 § 1.....8

U.S. Const. amend. V.....28

U.S. Const. amend. XIV 28

US. Const. art. I, §10, cl. 1.....30

INTRODUCTION

The Yavapai County Attorney's Office (YCAO) has never made a secret of her disdain for the relaxation of criminal penalties for any marijuana use. Since the passage of Proposition 203, the Arizona Medical Marijuana Act (AMMA) has been vigorously opposed by many prominent governmental figures,[1] but few have been as vocal as the elected Yavapai County Attorney, who has taken a political position about marijuana's harmfulness and continues to campaign against legalization in every form. The YCAO's Twitter account is dedicated almost exclusively to retweeting propaganda to oppose legalization of marijuana for any purpose,[2] and she recently called for "tightening up" the AMMA's immunities.[3] It is therefore unsurprising that the YCAO once again has decided to bootstrap its political posturing into demands that this Court use the AMMA as a sword against registered patients and undermine the broad, protective purpose of AMMA's immunities.

This time, the YCAO seeks to replace the AMMA definition of "marijuana" and "usable marijuana" with the definition used in A.R.S. §§ 13-3401(4) and (19),

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1 Press release of Maricopa County Attorney, "Top Prosecutors Call on Arizona Leaders to Oppose Legal Marijuana," October 30, 2014 (last visited August 28, 2017); Arguments Filed Against the Regulation and Taxation of Marijuana Act, Proposition 205, General Election 2016, Sheila Polk (last visited August 28, 2017).

2 *See* https://twitter.com/YavapaiCntyAtty?lang=en (last visited August 28, 2017).

3 Howard Fischer, "Yavapai County: No. 1 in medical marijuana," Daily Courier, January 21, 2017 (last visited August 28, 2017).

which criminalize possession of cannabis for illicit recreational use. Arizona's voters, however, modified the criminal code for registered qualifying patients, caregivers, and dispensaries by making their use of "all parts of any plant of the genus cannabis" and "any mixture or preparation thereof" legal for medical use. As of July 2017, there were 141,449 AMMA cardholders statewide. Through product labeling regulated by Arizona Department of Health Services (ADHS) and its verification system, the State has allowed dispensaries to sell cannabis to registered patients and caregivers. To subject lawful registered patients and dispensaries to criminal liability for conduct that has the imprimatur of the State would violate each cardholder's Constitutional rights to due process under both the U.S. and Arizona constitutions and amount to large-scale entrapment—a result that is so patently absurd as to reject it out of hand. Clearly, such a result also would violate the purpose of the AMMA to protect cardholders from criminal prosecution for the lawful use of medical marijuana.

The principle known as "Occam's razor" should inform this Court's decision. Occam's razor states that the explanation of any phenomenon should make as few assumptions as possible, and that the least complicated of alternative formulations is most likely to be correct. Here, the least complicated alternative is also the least likely to cause widespread constitutional due process violations: when the AMMA defined "marijuana" and "usable marijuana" to mean "all parts" of the "genus

cannabis" and "any mixture or preparation thereof," the AMMA included "cannabis." It is unlikely that 141,449 registered participants and ADHS are all wrong; instead, it is far more likely that this is yet another thinly veiled attempt by the YCAO to "tight[en] up" the AMMA's immunities and expand criminal prosecution of the AMMA's registered participants engaged in the lawful medicinal use of marijuana.

This case bears all the hallmarks of a wrongful prosecution and conviction in violation of Appellant Rodney Jones' statutory immunities. *Amicus curiae* Arizona Attorneys for Criminal Justice ("AACJ") asks for this Court to interpret the AMMA's definitions of marijuana and usable marijuana liberally to give effect to the voters' intent, and to reverse Appellant's conviction.

INTERESTS OF *AMICUS 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.

AACJ offers this brief because the issues presented concern the wrongful prosecution and conviction of citizens engaged in activities the voters have decided is legal. The trial court's decision to hold a registered qualifying patient criminally liable for possession of medical marijuana concentrate in allowable amount creates a constitutional due process crisis for the 141,449 cardholders statewide. In light of the plain language of the AMMA's broad immunities, as well as ADHS's regulation and authorization of dispensaries to prepare, sell, label, and dispense cannabis and other mixtures and marijuana concentrates, the trial court's ruling inserts confusion and risks arbitrary and discriminatory application of the AMMA's immunities.

Arizona law is supportive of Jones' position that the AMMA's purpose is to protect registered qualifying patients who are in possession of an allowable amount of marijuana in all of its usable forms, including concentrates. The VPA requires this Court to give the statutory immunities a broad interpretation to protect patients engaged in the use of medical marijuana. Yet, the Answering Brief insists that the AMMA is to be given a "limited" interpretation. The Opening Brief argues generally that "Both the plain language of the AMMA and the proponents' and voters' broad intent in passing it demonstrate that Appellant Rodney Jones is entitled to dismissal because the AMMA protects patients' ability to treat their debilitating medical conditions with marijuana extracts," and that the trial court's decision results in

disparate application of law, thus creating a "serious Due Process problem." Opening Brief at 7, 12. In its Answering Brief, the State noted that Appellant received the cannabis at a Phoenix medical marijuana dispensary. Answering Brief at 2. On Reply, Appellant argued, "Due Process requires that criminal offenses be defined in terms of sufficient definiteness to give a person of ordinary intelligence notice that his contemplated conduct is forbidden by the statute…" Reply Brief at 8. This general attack on the due process violations created by the prosecution of a lawful cardholder for possessing cannabis he obtained from a State-regulated dispensary is sufficient to preserve the issues challenging the conviction on all grounds. In *State v. Glissendorf*, 235 Ariz. 147, ¶¶ 20-22 (2014), our Supreme Court held that Division Two erred in reversing only one conviction based on an instructional error, because the lack of a specific argument as to reversal of the second conviction had no impact on the general request for "the reversal of both convictions." Moreover, a trial court's interpretation of statutes is reviewed *de novo*.

AACJ has taken an active role before this Court regarding the application of the AMMA to criminal law. *State ex rel. Montgomery v. Harris (Shilgevorkyan)*, 234 Ariz. 343 (2014); *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119 (2015); *State ex rel. Polk v. Hancock*, 237 Ariz. 125 (2015); Dobson v. McClennen, 238 Ariz. 389 (2015); *State v. Sisco II*, 239 Ariz. 532 (2016); *State v. Maestas*, 242 Ariz. 194 (2017).

AACJ asks this Court to allow its participation in this matter. Although the current rules do not discuss when is the proper time for an *amicus curiae* to appear in the Court of Appeals, the rule change petition submitted by the Criminal Rules Task Force creates a new proposed Rule 31.15 that governs such participation.[4] This new rule tracks the language of recently modified Arizona Rule of Civil Appellate Procedure 16(b)-(c). This brief is submitted within 21 days of the Reply Brief, which was filed on August 9, 2017.

ARGUMENTS

I. Arizona's public policy on medical marijuana was set by voter-passed initiative; courts must liberally construe the AMMA and the voters' intent.

"Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law." *Wagenseller v. Scottsdale Mem'l Hosp*., 147 Ariz. 370, 379 (1985) (internal quotes omitted). In Arizona, "our state's constitution and statutes embody the public conscience of the people of this state." *Id*. at 378. Control of the sovereignty of the State rests with the people, not with the government. Ariz. Const. art. II, § 2.

[4] R-17-0002, available at http://www.azcourts.gov/Rules-Forum/aft/661 (last visited August 28, 2017).

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 resides in the Legislature and the people through the initiative and referendum processes. Ariz. Const. art. IV, 1 § 1; A.R.S. § 19-102. Historically, "[t]he legislature and electorate [have] share[d] lawmaking power under Arizona's system of government." *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, ¶ 8 (2013) (internal quotes omitted). The "Voter Protection Act altered the balance of power between the electorate and the legislature." *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, ¶ 7 (2009).

In 1996, Arizona's voters resoundingly passed Proposition 200,[5] permitting doctors to prescribe marijuana. The government quickly suspended enactment of Proposition 200 until the FDA formally approved marijuana for medical use.[6]

Angry over government nullification of the voters' passage of the 1996 medical marijuana act, and to stop Arizona's lawmakers and executive branch from overruling them so easily again, in 1998 Arizona's voters passed the Voter

[5] Ariz. Sec'y of State, Ariz. Ballot Prop. Guide, Gen. Election – Nov. 3, 1996 (last visited August 28, 2017).

[6] Tim Golden, "Medical Use of Marijuana To Stay Illegal in Arizona," New York Times, 4/17/97, p.A14 (last visited August 28, 17).

Protection Act ("VPA").[7] Then-Attorney General Grant Woods supported VPA: "There is a disturbing trend in Arizona in which citizens pass initiatives by overwhelming margins, only to watch the legislature turn around within months and gut what the voters passed. This has occurred on numerous issues, including drug policy reform, health care, and the environment." *Id*. at 48-49. Former Secretary of State Richard Mahoney wrote:

> Recently, the legislature repealed Proposition 200 only a few months after it had been approved. The message is clear from the politicians: 'we know better than you.' Let's send a message back…Proposition 105 will prohibit the Legislature from repealing citizen measures approved by voters and prohibit the governor from vetoing ballot measures.

Id. at 47-48. VPA thus resulted from government's undermining public policy established by the voters and the intent of the voters to protect initiatives from government interference—specifically the provisions of Proposition 200 that legalized medical marijuana.

Courts therefore 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 (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

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7 Proposition 105 (last visited August 28, 2017).

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; *see also Ariz. Early Childhood Dev. & Health Bd.*, 221 Ariz. 467, ¶ 16 (refusing to "pars[e] the supporting materials" because to do so would "not square with the measure's obvious aims and structure."). When courts are tasked with "determining the purpose of an initiative, we consider such materials as statements of findings passed with the measure as well as other materials in the Secretary of State's publicity pamphlet available to all voters before a general election." *Id.* ¶ 14.

A. The express purpose of the AMMA is to protect patients and caregivers from prosecution and any other penalty for the medical use or possession of marijuana, which is broadly defined.

In 2010, the voters adopted the AMMA through Proposition 203. § 2(D) of Proposition 203 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 August 28, 2017) at 73. And § 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. Thus, it is plain that AMMA-compliant patients should not be prosecuted for criminal offenses, and that the AMMA 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. *Maestas*, 242 Ariz. 194, ¶ 6 ("[t]he purpose of the AMMA is to decriminalize possession and use of marijuana for medicinal purposes.") (citing *Reed-Kaliher*, 237 Ariz. 119, ¶¶ 7, 16). The AMMA allows patients with qualifying debilitating medical conditions to obtain registration identification cards that permit possessing and using marijuana. 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 (App. 2013). The same is necessarily true for the use of an "allowable amount of marijuana."

Under A.R.S. § 36-2811, cardholders are entitled to two different statutory protections: "a rebuttable presumption that the cardholder's possession or use of marijuana is for medical purposes if it is consistent with the AMMA's requirements," and also statutory "immunity from state prosecution for medical use

of marijuana so long as the cardholder possesses a lawful amount." *State v. Fields*, 232 Ariz. 265, ¶¶ 13-14 (App. 2013). The 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)).

A cardholder "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 or occupational or professional licensing board or bureau," as long as the cardholder uses marijuana in compliance with AMMA. A.R.S. § 36-2811(B). This provision "affords immunity." *Fields*, 232 Ariz. 265, ¶ 14.

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

The trial court failed to comport with well-settled rules of statutory construction in several ways that, if allowed to stand, would render the plain language of the AMMA unconstitutionally vague and subject to arbitrary enforcement. When two statutes conflict, courts "adopt a construction that reconciles them whenever possible, giving force and meaning to each." *State v. Jones*, 235 Ariz. 501, ¶ 8 (2014) (citing *UNUM Life Ins. Co. v. Craig*, 200 Ariz. 327,

¶ 28 (2001)). *See also Estate of Hernandez v. Ariz. Bd. of Regents*, 177 Ariz. 244, 249 (1994) (observing that, when possible, we harmonize "apparently conflicting statutes"); *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").

The Arizona Supreme Court has made clear that the AMMA modifies criminal statutes because the purpose of the AMMA, unlike the criminal code, is to provide immunity from prosecution, not to define new crimes. *Reed-Kaliher*, 237 Ariz. 119, ¶ 16. The trial court therefore erred when it failed to harmonize the § 36-2801 with § 13-3401. *Id*. The two statutes are easily harmonized: § 13-3401 bars the illegal recreational use of marijuana concentrates, including hashish and resin, and categorizes these more-potent concentrates differently than dried marijuana flowers, while AMMA nonetheless permits legal medicinal uses of marijuana in all of its various forms, as long as the patient possesses no more than the "allowable amount of marijuana" at any given time.

It is arguably sensible for a criminal statute like § 13-3401 to categorize dried leafy marijuana, which has a lower intoxicating effect than marijuana in a concentrated form, as a lesser offense for purposes of illegal, recreational drug use. However, the AMMA serves a markedly different purpose of protecting patients as

they take medication. Different strains of marijuana treat different medical conditions. While one strain might exacerbate a patient's symptoms, another will provide immediate relief.[8] There also are many methods for taking medical marijuana, such as smoking, vaping, transdermal patches, sublingual tinctures (under the tongue), edibles, teas, concentrates (*e.g.*, resin, wax, and shatter). Recommended methods of consumption differ depending on a patient's age, tolerance for smoke, medical condition, and/or need for high-THC or -CBD content.[9]

The question whether concentrates were protected under AMMA was first raised in *Welton v. Arizona*, CV 2013-014852 (Maricopa County 2013), in the form of a request for declaratory injunction brought by the parents of a young boy who needed medical marijuana in a concentrated extract form in order to deliver the most effective dosage of the medicine, as determined by the boy's doctor. The parents sought a declaratory judgment that they would not be subject to arrest or prosecution for providing their son with concentrate as opposed to dried leaves. Although *Welton* is not controlling authority, it is notable that the State declined to appeal the court's order granting declaratory relief.

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8 Americans for Safe Access, Guide to Using Medical Cannabis (last visited August 28, 2017).

9 *See, e.g.*, https://unitedpatientsgroup.com/resources/methods-of-consumption (last visited August 28, 2017).

When construing a statute, courts "look to the statutory language and give effect to the words and phrases in accordance with their commonly accepted meaning unless the legislature has offered its own definitions or a special meaning is apparent from the context." *State v. Barr*, 183 Ariz. 434, 438 (App. 1995); A.R.S. § 1-213 ("Technical words and phrases and those which have acquired a peculiar and appropriate meaning in the law shall be construed according to such peculiar and appropriate meaning."). The trial court here erred when it substituted AMMA's definition of "marijuana" and "usable marijuana" with the definitions of "marijuana" and "cannabis" from §§ 13-3401(4) and (19). 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." The 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).

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). "Although courts properly construe statutes to uphold their constitutionality, courts cannot salvage statutes by rewriting them

because doing so would invade the legislature's domain." *In re Nickolas S.*, 226 Ariz. 182, ¶18 (2011). 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)).

In interpreting a voter-approved measure, moreover, courts interpret the words according to "their natural, obvious and ordinary meaning." *Cave Creek Unified Sch. Dist.*, 233 Ariz. 1, ¶21. If the plain meaning of a statute is unclear, then the court will consider factors such as "the statute's context, history, subject matter, effects and consequences, spirit, and purpose." *State v. Fell,* 203 Ariz. 186, ¶ 6 (App. 2002). Here, the purpose of the AMMA is to provide broad protections from prosecution to those who are engaged in the medicinal use of marijuana. The court erred when it applied a definition from a statute that serves the exact opposite purpose: to define a crime and its punishment.

The State likewise errs when it asks this Court to read the AMMA as part of the criminal code based on cases from other jurisdictions. Answering Brief at 9-15. The State concedes that the Montana Medical Marijuana Act "adopted the state criminal code's general definition of marijuana." Answering Brief at 15 (citing *State v. Pirello*, 282 P.3d 662, 664 (Mont. 2012) and Mont. Code Ann. § 50-46-102(10) (2009)). The same cannot be said for the AMMA, which includes its own, distinct

definition. Michigan's statute also is inapposite to the AMMA because the Michigan statutory definition of "marihuana" expressly included "resin" and its definition of "usable marihuana" excluded it. *State v. Carruthers*, 837 N.W.2d 16, 21 (Mich. Ct. App. 2013) (citing Mich. Comp. Laws § 333.26423(k) (2013)).

Each word, phrase, and clause in a statute is to be given meaning so that "no clause, sentence or word is rendered superfluous, void, contradictory or insignificant." *Bilke v. State*, 206 Ariz. 462, ¶11 (2003).

The State's argument that registered patients are only allowed 2.5 ounces of "dried flowers" (Answering Brief at 8) entirely ignores the voters' intent in passing the AMMA. The Answering Brief and the trial court, moreover, err by ignoring the words "allowable amount" in A.R.S. §§ 36-2801 and 36-2811. The term "usable marijuana" appears in sections of the AMMA that explain how much marijuana a cardholder is permitted to have based on weight; it is never used in a manner that limits 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, A.R.S. § 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 A.R.S. § 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." A.R.S. § 36-2801(15).

Nothing in the AMMA specifies that a cardholder has exceeded the scope of the immunity by possessing marijuana in a particular form. Indeed, the statute 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.

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." This means that the State may allege a defendant has exceeded the 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 (for example, wax or brownie mix). The AMMA's definition merely clarifies that these non-medicinal ingredients are not to be used against a cardholder to find that he has exceeded the allowed amount.

To the extent that the AMMA conflicts with the criminal code, *Jones* dictates that AMMA, the legislative body's latest word on immunities for possession of

marijuana and any products prepared from marijuana, must prevail not only because it is more specific but also because it is more recent. *Jones*, 235 Ariz. 501, ¶ 11. The AMMA specifically defines "marijuana" differently than A.R.S. § 13-3401, and serves a different purpose. Therefore, it was error for the trial court to apply the A.R.S. § 13-3401 definition of hashish to the AMMA.

C. ADHS regulations and instructions to the AMMA participants authorize, regulate, and oversee the use of marijuana concentrates for medicinal purposes.

"'[Administrative rules and regulations] and statutes are read in conjunction with each other and harmonized whenever possible.'" *Thomas & King, Inc. v. City of Phoenix*, 208 Ariz. 203, ¶ 9 (App. 2004) (quoting *Groat v. Equity Am. Ins. Co.*, 180 Ariz. 342, 347 (App. 1994)). When harmonizing administrative rules and statutes, courts "must avoid interpretations making any language superfluous or redundant." *Id.* (citing *Guzman v. Guzman*, 175 Ariz. 183, 187 (App. 1993)).

The regulations promulgated by ADHS demonstrate that the AMMA intended to include marijuana concentrates in its protections. A.R.S. § 36-2803 requires ADHS to adopt regulations governing all aspects of the AMMA. As part of its the AMMA regulatory duties, ADHS produces annually a "Medical Marijuana Verification System Dispensary Handbook." (Last visited August 28, 2017). The User Agreement that all dispensaries must sign in order to obtain their AMMA certification requires each cardholder to acknowledge that "[t]he acquisition,

possession, cultivation, manufacturing, delivery, transfer, transportation, supplying, selling, distributing, or dispensing medical marijuana under state law is lawful only if done in strict compliance with the requirements of" the AMMA and Arizona Administrative Code Title 9, Chapter 17. *Id.* at 19. Failure to comply with the AMMA and its regulations "may result in revocation of the registry identification card or registration certificate issued by the Arizona Department of Health Services, and possible arrest, prosecution, imprisonment and fines for violation of state drug laws." *Id.*; R9-17-322(D)(1).

A dispensary seeking AMMA authorization must provide to ADHS a copy of its bylaws, including "[w]hether the dispensary plans to: … vi. Prepare, sell, or dispense marijuana-infused non-edible products…" R9-17-304(C)(8)(b)(vi). Dispensaries agree to submit to random inspections in the event that the ADHS receives an allegation that the dispensary is not in compliance with AMMA or ADHS regulations. R9-17-309(D).

The Dispensary Handbook provides specific instructions regarding how licensed dispensaries must label its products and record the grams or ounces of marijuana sold to a medical marijuana cardholder in the ADHS verification system, including instructions for verifying the medical marijuana content of dried marijuana, edibles, and concentrates:

> If the customer's card is valid, then below you will see a green entry form where you can enter the grams or ounces of:

- Medical Marijuana is the dried flower of the marijuana plant.
- Edibles are any items sold for consumption that contain medical marijuana. The amount of medical marijuana in the edible must be labeled and entered into the system during a transaction.
- Non-edibles are any non-edible items, such as concentrates, sold that contain medical marijuana. The amount of medical marijuana in the non-edible must be labeled and entered into the system during a transaction.

Id. at 11. Notably, the ADHS definition requires that dispensaries label concentrates with the "amount of medical marijuana" the non-edible contains. The ADHS verification system, moreover, "will guide [the dispensary employee] through the rules and warnings (if any) pertaining to your sale." *Id.* In other words, if dispensaries were not permitted to sell concentrates by the AMMA, each sale of a concentrate product would be flagged as an AMMA violation. A dispensary's AMMA authorization is only good for one year and must be renewed. *Id.* at 18-19. These regulations are easily harmonized with the AMMA's definition of marijuana and usable marijuana, which allows any "any mixture or preparation thereof."

The Handbook includes a screen shot image of the sales verification form, which plainly shows that dispensaries are authorized to sell concentrates, as long as the total amount of marijuana for the sale does not exceed the cardholder's allowable amount of marijuana within a 14-day period. *Id.* at 12. ADHS's website also contains a Frequently Asked Questions ("FAQ") page for dispensaries, in which ADHS states

specifically that dispensaries may be authorized to "prepare, sell, or dispense" both "marijuana-infused edible food products" and "marijuana-infused non-edible products" to authorized cardholders with the proper paperwork. FAQs - Dispensary (last visited August 28, 2017). Dispensaries that desire to prepare marijuana-infused edible products must comply with the Infusion Kitchen requirements; a dispensary that dispenses infused products prepared elsewhere "must obtain and maintain a copy of the current written authorization from the dispensary that prepares the products." *Id.*; *see also* R9-17-319.

ADHS provides separate sanitation requirements for the preparation of non-edible marijuana-infused products. R9-17-320(B)(2). ADHS also states, "The Department will conduct a compliance inspection of a dispensary and, if applicable, the dispensary's cultivation site before issuing an approval to operate and periodically thereafter to ensure compliance with state law and Department rules." *Id*. This signals to AMMA participants that ADHS is constantly aware of the products each dispensary prepares and sells, including concentrates. ADHS has thus promulgated regulations that authorize the preparation, sale, and dispensing of concentrates.

ADHS's FAQ also explains to medical marijuana patients that they will know how much marijuana they are purchasing—whether in leaf, edible, or concentrate form—because: "The rules require labels containing specific information about

where the marijuana came from, amount and strain, date of manufacture, a list of chemical additives, and other information to be attached to all products sold by dispensaries, including marijuana or products containing marijuana." ADHS Facts – Qualifying Patients (last visited August 28, 2017). Harmonizing ADHS regulations with the statute, as required, the AMMA plainly protects the use of marijuana concentrates.

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

Criminal statutes that fail to give notice that an act has been made 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); 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). The Arizona supreme court has therefore held:

> That the terms of a penal statute ... must be sufficiently explicit to inform those who are subject to it what conduct on their part will render

> them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

State v. McNair, 141 Ariz. 475, 483 (1984) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). 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 have a duty to 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).

"Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression." *Kolender*, 461 U.S. at 357. 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 thus 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 141,449 registrants have relied on the language of the statute and on ADHS's own regulations and oversight in forming the reasonable belief that they may lawfully use marijuana concentrates. Where, as here, registered patients have been lawfully purchasing concentrates from regulated dispensaries with the oversight of the State, a judicial rule that removes the AMMA immunities for the use of State-authorized products creates significant confusion for those who reasonably believe that they are acting lawfully.

Indeed, to hold that the AMMA does not protect medical marijuana patients for their use or possession of concentrates would result in absurdity because it would amount to large-scale entrapment. Courts will avoid an interpretation that leads to such absurd results. *State v. Kerr*, 142 Ariz. 426, 433 (App. 1984). The rules of statutory construction require courts to give statutes a constitutional interpretation and to consider how "a person of ordinary or average intelligence" who is "subject to" the statute would interpret the statute's language. *State v. Getz*, 189 Ariz. 561, 565 (1997) (citation omitted); *McNair*, 141 Ariz. at 483. Marijuana concentrates are sold at registered dispensaries with the imprimatur of the State, as evidenced by ADHS's knowledge and oversight of the production, labeling, sale, and recording of amounts of concentrates sold. ADHS's verification system flags noncompliant

transactions, but allows sales of concentrates, as long as the amount of marijuana in the non-edible is within the patient's allowable amount. A criminal defendant may raise an entrapment defense if there exists "activity by the State in the nature of inducement to commit a crime which the accused would not have otherwise committed, although providing the mere opportunity to commit the offense is not sufficient." *State v. Gray*, 239 Ariz. 475, ¶ 8 (2016) (quoting *State v. McKinney*, 108 Ariz. 436, 439 (1972)). The trial court's interpretation of the AMMA, promoted by the State here, fails to consider the impact of ADHS's oversight and its instructions on registered cardholders.

Until recently, ADHS did not report either the amount or type of medical marijuana sold by dispensaries in its public reports. *See, e.g.*, ADHS Arizona Medical Marijuana Program January 2013 Monthly Report (last visited August 28, 2017). However, beginning in January 2015, ADHS's monthly reports included a table showing the ounces of dried marijuana, marijuana-infused edibles, and concentrates, respectively, that were sold by registered dispensaries each month. *See* AMMA Monthly Transactions Report January 2015, table 1 (last visited August 28, 2017). As of July 2017, there were 4,109 registered dispensaries throughout Arizona, 136,515 qualified patients, and 895 qualified caregivers. ADHS Arizona Medical Marijuana Program July 2017 Monthly Report, table 1 (last visited August 28,

2017). Dispensaries sold 22,391.67 ounces of marijuana concentrate from January through July 2017, with ADHS's knowledge and oversight. *Id.*, table 7a.

Even if the State were correct that the AMMA and the criminal code must be read as a single statutory scheme, the rules of statutory construction provide that 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 (here, the AMMA's drafters) omitted the phrase "from which the resin has not been extracted," the AMMA definition of marijuana and usable marijuana was intended to be broader than the criminal code. Nothing in the express purpose of the AMMA suggests that it is intended to protect 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."

The trial court's interpretation, approved by the State on appeal, also will subject registrants to arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357. One officer might reasonably decide that concentrates are protected under the AMMA because they are sold and regulated by ADHS, while another could just

as easily decide to place the registrant under arrest based on the conflicting interpretations given by the courts. In this case, Appellant is a registered patient who acquired his medicinal marijuana concentrate from a dispensary in Maricopa County. He was arrested in Yavapai County for possessing the concentrate he lawfully obtained in Maricopa County. A statute is void for vagueness where, as here, the statute (as interpreted by the trial court here) "fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender*, 461 U.S. at 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

This Court can easily avoid the vagueness and ex post facto problems created by the trial court's ruling by holding that the AMMA permits concentrates to be possessed. Alternatively, if this court finds that this portion of the AMMA is subject to conflicting interpretations, the rule of lenity requires that the conflict be resolved in favor of the criminal defendant. But the trial court's ruling creates a constitutional crisis, and it must be reversed.

CONCLUSION

The State has induced reliance by authorizing dispensaries to sell concentrates, and any registered cardholder of average intelligence would believe that possession of concentrates was protected by the AMMA immunity. For this reason, AACJ asks this court to vacate Rodney Jones' conviction in this case and to hold that the AMMA protects the medicinal use of marijuana concentrates.

RESPECTFULLY SUBMITTED this 30th day of August, 2017.

ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE

By /s/ Sarah L. Mayhew

Sarah L. Mayhew
33 N. Stone Ave. 21st Floor
Tucson, AZ 85701

Attorney for **Arizona Attorneys for Criminal Justice**