IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, ex rel. SHEILA SULLIVAN POLK, Yavapai County Attorney, Petitioner, v. THE HONORABLE CELÉ HANCOCK, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of YAVAPAI, Respondent Judge, JENNIFER LEE FERRELL, Real Party In Interest.	)	S.Ct. No. CV-14-0084-PR Court of Appeals No. 1 CA-SA 13-0292 Department E Yavapai County Superior Court No. P1300CR201300261

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

David J. Euchner, No. 021768
David.Euchner@pima.gov
Sarah L. Mayhew, No. 029048
Sarah.Mayhew@pima.gov
33 N. Stone Ave., 21st Floor
Tucson, Arizona 85701
(520) 724-6800
Attorneys for **Arizona Attorneys for Criminal Justice**

Thomas W. Dean, No. 015700
attydean@gmail.com
13201 N. 35th Ave., Suite B-10
Phoenix, AZ 85029
(602) 635-4990
Attorney for **National Organization for the Reform of Marijuana Laws**

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES

CASES PAGES

ARIZONA REVISED STATUTES

ARIZONA RULES OF CRIMINAL PROCEDURE

ARIZONA CONSTITUTION

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*

Amicus curiae Arizona Attorneys for Criminal Justice ("AACJ") has already been granted leave to appear in this case in briefing and at oral argument.

Amicus curiae National Organization for the Reform of Marijuana Laws ("NORML") is a non-profit educational corporation organized in 1971 under the laws of the District of Columbia, with its primary office located in Washington, D.C. It has approximately 15,000 dues-paying members, 1.3 million internet-based supporters, and more than 154 state-based chapters across the country, including a state chapter and several local chapters in Arizona. NORML is a consumer and law-reform advocacy organization that participates in the national debate over the efficacy and reform of state and federal marijuana prohibition laws. Its interests in this litigation are more fully set out in its Motion for Leave to file an *Amicus Curiae* Brief filed this date.

INTRODUCTION

On November 2, 2010, Arizona voters passed Proposition 203, the Arizona Medical Marijuana Act (AMMA). With the enactment of the initiative, qualified Arizona residents were able to obtain patient registration cards and thereby granted a new civil right to use marijuana medicinally. Marijuana was no longer to be stigmatized, but was embraced as a valid and lawful medication for the treatment of specific medical conditions. The language of the proposition was carefully

constructed to avoid potential pre-emption problems; rather than providing an affirmative authorization to use marijuana, it instead prohibited the state and its agents from taking any action that would restrict patients' use of medical marijuana pursuant to the AMMA.

Of course, Arizona was not alone; rather, Arizona was part of a nationwide movement that continues to grow from coast to coast. At the time of the submission of this brief, 23 states and the District of Columbia have passed laws protecting medical marijuana patients. Momentum continues to build with 12 more states expected to enact medical marijuana programs by 2019. 11 additional states have limited medical marijuana programs that allow use of Cannabidiol, a component of the marijuana plant. Voter initiatives in four states (Colorado and Washington in 2012 and Oregon and Alaska in 2014) have legalized recreational use and sale of marijuana. In the last several years, none of the many state voter initiatives seeking to legalize marijuana use in some form has failed to achieve a majority vote.

In recognition of this nationwide movement, and in deference to democracy and federalism principles, the U.S. Department of Justice has adopted non-enforcement policies that promise not to use the Federal Controlled Substances Act to prosecute medical marijuana patients, caregivers, and dispensaries. First, on August 29, 2013, the Department of Justice, Office of the Deputy Attorney General James M. Cole, issued a "Memorandum for All United States Attorneys – Guidance

Regarding Marijuana Enforcement." The memorandum announced an expansive non-enforcement policy in deference to state medical marijuana programs and declined to interfere with state recreational marijuana programs.

More recently, on December 13, 2014, Congress approved legislation rolling back the federal government's war on medical marijuana patients and providers. The law includes an amendment that prohibits the Department of Justice (including the Drug Enforcement Administration) from using funds to interfere with state medical marijuana laws.[1] Thus, the legality of medical marijuana use has reached its tipping point at both a state and federal level. Penalizing medicinal use of marijuana is fast becoming a thing of the past throughout America. Obstinate government officials like the Yavapai County Attorney are on the wrong side of history.

The purpose of the AMMA was made clear from the outset. Section 2(G) of Proposition 203 states quite plainly that:

> 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. (emphasis added).

This purpose is codified in A.R.S. § 36-2811(B)(1), which provides immunity to

[1] Evan Halper, "Congress quietly ends federal government's ban on medical marijuana," *Los Angeles Times*, Dec. 16, 2014, http://www.latimes.com/nation/la-na-medical-pot-20141216-story.html (last visited January 2, 2015).

registered patients as follows:

> A registered qualifying patient… 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… [f]or 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.

Thus, Arizona's new public policy ushered in by the AMMA unequivocally legitimizes marijuana as medicine and shields registered patients from exposure to "criminal and other penalties" that would otherwise result from their marijuana use.

Viewing the AMMA as a whole, the clear intent of the voters was to provide a comprehensive immunity from denial of "any" right or privilege to "any" qualifying registered patient or caregiver, except for limited, enumerated *locations*, without regard to one's status as being convicted of a crime. For example, possession is specifically precluded in a correctional facility. A.R.S. § 36-2802(B)(3). Marijuana may not be smoked in a "public place." A.R.S. § 36-2802(C)(2). Employers are permitted to take adverse action against employees who are found to be in possession or under the influence of medical marijuana while on the job. A.R.S. § 36-2813(B)(2). No such exception is found, however, in the AMMA that would exclude patients from immunity while on probation, and the plain language of the AMMA prohibits any State actor – whether a court or a prosecutor – from interfering with a medical marijuana patient's access to medication.

ARGUMENTS

I. YCAO's position is precluded by the Voter Protection Act and it is wholly unsupported by federal preemption doctrine.

YCAO's preemption argument is wholly meritless for the reasons set out in RPI Ferrell's supplemental brief; *amici* will not rehash those arguments here. *Amici* notes some logical fallacies in YCAO's arguments. First, besides offering a couple of choice quotes from *Arizona v. United States*, 132 S.Ct. 2492 (2012), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), *Response to Amicus*, p.13, YCAO has yet to explain how Congress has expressed or implied an intent to occupy the field of regulating marijuana. Arizona's mere passage of a contrary law does not *per se* cause interference with the federal government's enforcement of its own laws. Second, it is illuminating that YCAO has never tried to reconcile its position with the DOJ memorandum, and it filed no supplemental brief explaining what is left of its preemption argument after the recent Congressional legislation.

At no time has the Yavapai County Attorney's Office ("YCAO") argued in this litigation that the voters had no power to enact the AMMA. Nor has YCAO argued that its desired outcome in this litigation in any way furthers the voters' intent in passing the AMMA. YCAO has made a half-hearted statement, supported by no authority, that YCAO "disagrees with Amicus Curiae that there is any language within the AMMA that indicates the voters considered the impact of the Act on a

trial court's jurisdiction over probationers." *Response to Amicus*, p.2.

YCAO seems to be suggesting that the AMMA is ambiguous on this point, but even a cursory review of this Court's cases on the subject shows the error of such an argument. In *Arizona Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 322 P.3d 139 (2014), both the majority and dissenting opinions agreed that the Citizens Clean Elections Act enacted in 1998 was ambiguous in terms of its fixation of contribution limits for nonparticipating candidates at 80% of the limits in A.R.S. § 16-905 because it did not specify whether it was referring to the limits in place at the time of passage of the CCEA or the limits as modified by the legislature. The AMMA, on the other hand, suffers no such lack of clarity and thus there is no need to resort to the kind of gamesmanship that YCAO seems to be inviting. "Our primary objective in interpreting a voter-enacted law is to effectuate the voters' intent." *Id.* at 324-25 ¶ 11, 322 P.3d at 141-42 (citing *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 470 ¶ 10, 212 P.3d 805, 808 (2009)). "If the statute is subject to only one reasonable interpretation, we apply it as written without further analysis." *Id.*

YCAO relies on California cases for the proposition that trial courts are no more restricted from prohibiting use of medical marijuana than they are any other lawful activity. *Response to Amicus*, p.3 (quoting *People v. Leal*, 210 Cal. App. 4th 829, 848, 149 Cal. Rptr. 3d 9, 23-24 (2012), *quoting in turn People v. Mentch*, 45 Cal. 4th 274, 286 n.7, 85 Cal. Rptr. 3d 480 (2008)).

There are many reasons why *Leal* and other California cases are inapposite in Arizona. First, the "delicate tightrope" referenced in *Mentch* and the other California cases is ensuring that people engage in personal use of medical marijuana and not use the law as an "open Sesame" for offenses like transportation for sale. *See, e.g.*, *People v. Trippet*, 56 Cal. App. 4th 1532, 1546, 66 Cal. Rptr. 2d 559, 568 (1997).

Second, California law specifically addresses the use of marijuana by defendants on bail as well as probationers:

> We address next the parties' supplemental briefing on whether a sentencing court may utilize the MMP's section 11362.795, on its own motion, or otherwise inquire into a defendant's right and need to use medical marijuana under the CUA. We inquired about this, in part, because the statute speaks not of a court, but a "probationer," or "defendant" on bail, requesting confirmation of CUA use: "(a)(1) ***Any criminal defendant who is eligible to use marijuana pursuant to Section 11362.5 [(the CUA)] may request that the court confirm that he or she is allowed to use medical marijuana while he or she is on probation or released on bail***. [¶] (2) The court's decision and the reasons for the decision shall be stated on the record and an entry stating those reasons shall be made in the minutes of the court. [¶] (3) ***During the period of probation or release on bail***, if a physician recommends that the ***probationer*** or defendant use medical marijuana, the ***probationer*** or defendant may request a modification of the ***conditions of probation*** or bail to authorize the use of medical marijuana. [¶] (4) The court's consideration on the modification request authorized by this subdivision shall comply with the requirements of this section." (§ 11362.795, subd. (a)(1)–(4).) Parallel language authorizes a *parolee* to request confirmation. (*Id.*, subd. (b)(1)–(4).)

Id. at 846, 149 Cal. Rptr. 3d at 22 (emphasis added). This single section of the statute references probationers no less than five times. The paragraph immediately following that quoted by YCAO states:

> Unlike the CUA, the MMP, which was enacted by the Legislature, expressly contemplates medical marijuana use by a probationer. However, while the MMP provides that a probationer (or bailee) may ask to have his or her CUA status judicially confirmed (§ 11362.795), the MMP does not in any way diminish the court's authority and discretion to limit or proscribe lawful conduct under the *Lent* test. The *Lent* test is a settled judicial measure of which the Legislature is presumed to be aware when it acts; it is therefore expected to specify any intent to limit its application. As the MMP contains no such specification, we have no basis upon which to suspend application of the Lent test in the medical marijuana use context.

Id. at 848, 149 Cal. Rptr. 3d at 24 (internal cites omitted). This section shows that the legislature amended the voter-enacted Compassionate Use Act. Thus, YCAO's statement that "like the CUA, the AMMA does not reference probationers," *Response to Amicus*, p.3, is misleading because California statute, through the MMP, does reference probationers.

Third, the California legislature is permitted to amend voter-approved initiatives, because California does not have a Voter Protection Act as Arizona does. The Arizona Constitution specifically precludes any amendment to a voter-approved initiative that does not "further[] the purposes of such measure." Ariz. Const. art. IV, pt. 1, § 1(6)(C); *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 4 ¶ 8, 308 P.3d 1152, 1155 (2013); *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469 ¶ 7, 212 P.3d 805, 807 (2009). This Court has found even minor modifications to a constitutional provision to be a conflict repugnant to the Arizona Constitution. *Dobson et al. v. State ex rel. Comm'n on Appellate Court*

Appointments, 233 Ariz. 119, 309 P.3d 1289 (2013). The same is no less true for voter-enacted laws. Thus, if the Arizona Legislature attempted to enact amendments similar to those of the California legislature, this Court would be required to strike down such legislation as violating the VPA.

Finally, unlike the Compassionate Use Act of California, the AMMA anticipated the full panoply of potential adverse consequences that a medical marijuana user might be made to suffer and prohibits them all:

> 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 or occupational or professional licensing board or bureau…

A.R.S. § 36-2811(B). The only limitations on medical marijuana use are provided within § 36-2802.

As shown in AACJ's brief in support of granting review, the VPA is a direct result of the state's executive and legislative branches' past transgressions against the will of the people by undermining the public policy established by the voters, specifically legalization of medical marijuana. Regardless of the beliefs or suspicions held by government officials that the AMMA is really just cover for recreational use, the plain language of the findings in Section 2 of Proposition 203 show that the voters decided that marijuana is in fact medicine. The Yavapai County Attorney wants people to "think again" about the harmlessness of marijuana, but she cannot usurp the policymaking function of the initiative process.

II. The Oath of Office for Public Officials, when combined with the 2014 voter-enacted amendment to the Supremacy Clause of the Arizona Constitution, expressly forbids State agents from using State personnel and financial resources to uphold federal law when doing so is contrary to the will of the Arizona electorate.

YCAO also asserts that the oath of office for executive and judicial officers to uphold and support the United States Constitution and federal laws as the supreme Law of the Land forecloses any further consideration of the issues herein. This argument is belied by two points that YCAO has implicitly conceded: it has not argued that the voters had no right to enact the AMMA, and it has failed to rebut the argument made throughout this litigation that no court in the country (state or federal) has found removal of state penalties under a state medical marijuana law to be preempted.[2] YCAO cites federal cases upholding federal law, but it fails to grasp that this litigation is about applying state law. YCAO has never addressed Section 2(F) 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."

[2] The Oregon Supreme Court found a portion of that state's act preempted "to the extent that ORS 475.306(1) authorizes the use of medical marijuana… We note that our holding in this regard is limited to ORS 475.306(1); we do not hold that the Controlled Substances Act preempts provisions of the Oregon Medical Marijuana Act that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability." *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518, 536 (Or. 2010).

A.R.S. § 38-231(E) states the language of the oath that each state officer must take before assuming office: "I, [name], do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and ***laws of the State of Arizona*** … and that I will faithfully and impartially discharge the duties of the office…" (emphasis added). Nowhere in this oath can YCAO find support for its desire to uphold federal prohibitions on marijuana. Instead, YCAO is violating the oath by refusing to uphold the AMMA and by undermining it at every turn.

YCAO's position that prosecutors are free to insert into all its plea offers a provision that strips the protections of the AMMA plainly violates the Oath. There is no exception in this Oath that permits a particular county attorney to pick and choose which State laws to uphold based on personal "philosophy." In fact, if YCAO's position were adopted by this Court, Arizona residents in a county where the county attorney has decided to uphold the AMMA would be granted full rights under the AMMA while probationers in Yavapai would be treated markedly differently. Thus defendants in Yavapai would be denied the rights and privileges afforded by the AMMA. This would violate the dictate of article II, § 13 of the Arizona Constitution that "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

YCAO's arguments about the oath and pre-emption are further undermined by the recent passage of Proposition 122, an amendment to the Supremacy Clause of the Arizona Constitution.[3] Previously, Ariz. Const. art. II, § 3 simply read: "The Constitution of the United States is the supreme law of the land." Now it reads:

> Section 3. A. The Constitution of the United States is the supreme law of the land to which all government, state and federal, is subject.
>
> B. To protect the people's freedom and to preserve the checks and balances of the United States constitution, this state may exercise its sovereign authority to restrict the actions of its personnel and the use of its financial resources to purposes that are consistent with the constitution by doing any of the following:
> 1. Passing an initiative or referendum pursuant to article IV, part 1, section 1.
> 2. Passing a bill pursuant to article IV, part 2 and article V, section 7.
> 3. Pursuing any other available legal remedy.
>
> C. If the people or their representatives exercise their authority pursuant to this section, this state and all political subdivisions of this state are prohibited from using any personnel or financial resources to enforce, administer or cooperate with the designated federal action or program.

The new language of section 3 does not interfere with the federal government's supremacy, only with the federal government's ability to obtain support from an unwilling state government in financing the bidding of the federal government.

One of the unanswered questions is whether section 3 will be applied to voter initiatives that were enacted prior to 2014. The VPA applies to all initiatives passed

[3] http://www.azsos.gov/election/2014/General/Canvass2014GE.pdf (last visited December 29, 2014).

at or after the 1998 general election. *Arizona Clean Elections Comm'n*, 233 Ariz. at 323 ¶ 4, 322 P.3d at 140. The language of the competing voter protection acts on the 1998 ballot, Propositions 104[4] (referred by the legislature) and 105[5] (initiated by the voters), demonstrates that both the legislature and the people know how to limit the scope of a law to prospective application. One of the criticisms provided in an argument opposing Proposition 105 and favoring a different voter protection act in Proposition 104 was that Proposition 105 failed to protect existing initiatives. Since the language in Proposition 122 – which was referred by the legislature – does not limit the scope of its applicability to prospective application, and nothing in the analysis by the legislative council suggests only prospective application, the plain language requires application to voter initiatives passed at previous elections, such as the AMMA in 2010.

The plain language of article II, section 3(C) prohibits "this state and all political subdivisions of this state" – which includes YCAO – "from using any personnel or financial resources to enforce, administer or cooperate with the designated federal action or program" that is contrary to state law and state public

[4] http://www.azsos.gov/election/1998/info/pubpamphlet/Prop104.html (last visited January 1, 2015).
[5] http://www.azsos.gov/election/1998/info/pubpamphlet/Prop105.html (last visited January 1, 2015).

policy as determined through a voter initiative. All of the YCAO attorneys engaged in this litigation are violating the Arizona Constitution and their oath to uphold it.

III. The AMMA bars government actors from taking "any" action to deny patients access to medical marijuana. This precludes prosecutors from including, and courts from honoring, special terms in plea agreements coercing a "waiver" of rights under the AMMA, because such plea provisions are illegal and unenforceable.

As a general matter, "the courts have no power to interfere with the discretion of the prosecutor unless he is acting illegally or in excess of his powers." *State v. Murphy*, 113 Ariz. 416, 418, 555 P.2d 1110, 1112 (1976). This broad concept does not mean, as the State suggests, that a prosecutor has unfettered discretion to write into plea agreements provisions that violate the spirit and letter of Arizona law and public policy based on the prosecutor's "personal philosophy."

While it is true that contract principles may be instructive in interpreting plea agreements, blind application of contract principles to plea agreements is not appropriate. Courts are "not always obligated to apply a contract analysis to plea agreements because contract law may not provide a sufficient analogy." *Coy v. Fields*, 200 Ariz. 442, 445 ¶ 9, 27 P.3d 799, 802 (App. 2001) (citing *United States v. Carrillo*, 709 F.2d 35, 36 (9th Cir. 1983) ("…Cases may arise in which the law of contracts will not provide a sufficient analogy and mode of analysis. We do not purport to superimpose contract principles upon all such cases.")).

Because prosecutors have undertaken an oath to apply the spirit and letter of Arizona law and to follow Arizona's public policy, provisions included in a plea agreement that violate law or public policy are unenforceable. Moreover, the State is undeniably in a stronger bargaining position when it comes to plea bargains with defendants facing sentencing under Arizona's mandatory sentencing laws. The fact that the prosecutor takes an oath to uphold the law necessarily means that the State is held to a higher understanding of the law. For this reason, the State may not withdraw from a plea based on an illegal or unenforceable term included in the plea. Rather, "the state bears the risk when, as here, a sentencing or probation provision in one of its plea agreements proves to be illegal and unenforceable." *Coy*, 200 Ariz. at 446 ¶ 13, 27 P.3d at 803.

For example, this Court has held plea agreement provisions that require a defendant to testify "consistently with prior testimony" unenforceable because enforcement would enhance "'the prosecutor's power to persuade an accomplice to disregard his oath of truthfulness in order to obtain penal leniency. This use of the bargaining process by the prosecution perverts the truth-seeking purpose of the judicial system.'" *State v. Fisher*, 176 Ariz. 69, 74, 859 P.2d 179, 184 (1993) (quoting Yvette A. Beeman, *Note, Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L. Rev. 800, 824 (1987)). Such a result is a violation of both law and public policy. *See State v. Sanchez-Equihua*, 235 Ariz. 54, 57 ¶ 12, 326 P.3d

321, 324 (App. 2014) (holding the consistency clauses at issue "taint[ed] the truth-seeking function of the court[ ] by placing undue pressure on [the] witnesses to stick with one version of the facts regardless of its truthfulness") (citing *Fisher*, 176 Ariz. at 74, 859 P.2d at 184).

Similarly, provisions in plea agreements that require imposition of a sentence harsher than allowed by statute are unenforceable. *State v. Corno*, 179 Ariz. 151, 155, 876 P.2d 1186, 1190 (App. 1994) (citing Rule 17.4(d) and *State v. Oatley*, 174 Ariz. 124, 125, 847 P.2d 625, 626 (App. 1993)) ("the trial court is not bound by any sentencing provision in a plea agreement it finds inappropriate."). Likewise, the State may not control the term of probation because probation is solely under the jurisdiction of the court. *State v. Patel*, 160 Ariz. 86, 89, 770 P.2d 390, 393 (App. 1989). *Patel* is particularly applicable here. There, the Court of Appeals held "that the state and a defendant may not bind the trial court to a fixed period of probation" because "[s]uch an effort is prohibited by statute, court rule, and public policy." Moreover, "[i]t infringes on the court's jurisdiction and authority over probationers in general." 160 Ariz. at 89, 770 P.2d at 393.

Regardless of general contract principles that may apply in a civil context, provisions in plea agreements may be deemed unenforceable if the sentencing court finds them "inappropriate." Ariz. R. Crim. P. 17.4(d) (a trial court "shall not be bound by any provision in the plea agreement regarding the sentence or the term and

conditions of probation to be imposed, if, after accepting the agreement and reviewing a presentence report, it rejects the provision as inappropriate."). Even in a civil context, under general contract principles, "[c]ontract provisions are unenforceable if they violate legislation or other identifiable public policy." *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 219 Ariz. 200, 202 ¶ 7, 196 P.3d 222, 224 (2008).

This Court has just reaffirmed this principle. *CSA 13-101 Loop, LLC v. Loop 101, LLC*, CV-14-0029-PR, ¶ 6 (Ariz. S. Ct., Dec. 31, 2014) (citing *Ocotillo* and Restatement (Second) of Contracts § 178 for principle that "if a contractual term is not specifically prohibited by legislation, courts will uphold the term ***unless an otherwise identifiable public policy clearly outweighs the interest in the term's enforcement***." (emphasis added)). "Even when not expressly prohibited, contract terms may be invalidated 'if the legislature makes an adequate declaration of public policy which is inconsistent with [them]." *Id*. ¶ 8 (quoting *Shadis v. Beal*, 685 F.2d 824, 833-34 (3d Cir. 1982)). In the context of civil contracts, this Court decided that "the identifiable public policy served by A.R.S. § 33-814(A) clearly outweighs the interest in enforcing prospective waiver terms" and thus held the contractual terms unenforceable. *Id*. ¶ 24.

The language of the AMMA bars ***the State*** from taking "any" action that will interfere with a registered patient's access to medical marijuana except in certain enumerated locations. In *Reed-Kaliher v. Hoggatt*, the Court of Appeals correctly

held that the express language of A.R.S. § 36-2811(B) prohibits "'***any state actor***' from 'den[ying] . . . any right or privilege' to a 'registered qualifying patient,'" which language necessarily "prevent[s] state actors from conditioning any state benefit on the waiver of AMMA rights." 235 Ariz 361, 366 n.3, 332 P.3d 587, 592 n.3 (App. 2014) (emphasis added). As Division Two noted, allowing prosecutors or courts to exact a "waiver" of AMMA rights to obtain the privilege of probation threatens to open a Pandora's box of "waivers" required to obtain any government benefits, but the voters of Arizona passed a broad, bright-line rule banning any state actors from denying any right or privilege precisely to prevent this erosion of a patient's lawful access to medical marijuana.

Because the AMMA bars "any" action by the State to interfere with the rights, privileges, and immunities afforded by the AMMA, these rights afforded by the AMMA differ substantively from other waiver provisions in plea agreements. For example, a defendant may waive constitutional rights to a jury trial or a restitution hearing, both of which are rights that belong to a defendant that the defendant may choose to invoke. In contrast, the AMMA bars ***state actors*** from taking "any" action to deny the defendant his or her rights and immunities. This bar is akin to a restriction on the subject matter jurisdiction of the prosecutor and the court. Requiring a defendant to waive AMMA immunities and rights for the privilege of a probation-available plea constitutes an affirmative act by a state actor to deny the privileges

and rights under the AMMA, and this violates both the spirit and plain language of A.R.S. § 36-2811(B), and as such, also violates Arizona's public policy as set forth by the voters.

Given that a high number of public officials with authority over defendants have made clear their desire to ban marijuana use in all forms, any decision by this Court that permits regulation of medical use of marijuana via provisions in plea agreements or conditions of probation will inevitably result in some officials creating a framework for disallowing medication for all but the smallest number of people in their respective jurisdictions. In this case, YCAO has stated an unmistakable position that the number of people who should be permitted to use medical marijuana is zero.

CONCLUSION

Courts are not accustomed to holding that trial judges lack discretion to impose conditions of probation that might otherwise appear reasonably related to the rehabilitation of the probationer. *Reed-Kaliher*, 235 Ariz. at 367 ¶ 23, 332 P.3d at 593 (quoting *United States v. Knights*, 534 U.S. 112, 119 (2001)). Division Two rightly recognized that medical marijuana is set apart from all other otherwise lawful activity that may be prohibited as a condition of probation because there is no statute that expressly protects those other activities. *Id*. This Court should affirm the well-reasoned opinion in *Reed-Kaliher*. In so doing, trial judges will understand the limits

of their jurisdiction when crafting a sentence.

Also needed is a signal to trial judges not to consider a defendant's medical use of marijuana when deciding upon a sentence. In many cases, the sentencing judge has discretion whether to impose a prison sentence or suspend the sentence and grant probation; and even when granting probation, the judge has discretion to impose up to one year in the county jail as a condition of probation. *Amici* are aware of cases in this state where judges have imposed prison sentences where probation would otherwise be appropriate based solely on a remark in the pre-sentence report that the defendant is a medical marijuana user. Such a decision can only be construed as a "penalty" for using marijuana consistently with the AMMA, a practice that is prohibited within the plain language of A.R.S. § 36-2811(B). In other cases, judges have required that patients with severe chronic pain should use opiates (regardless of potential addiction issues) rather than marijuana to treat their ailments. These decisions also undermine the public policy purpose of the AMMA.

Amici ask this Court to honor the will of the voters, as Division Two did in *Reed-Kaliher*, and hold that patients may not be penalized for their medicinal use of marijuana. The opinion in this case should be vacated.

RESPECTFULLY SUBMITTED this 2d day of January, 2015.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

BY: /s/ David J. Euchner

David J. Euchner, No. 021768
David.Euchner@pima.gov
Sarah L. Mayhew, No. 029048
Sarah.Mayhew@pima.gov
33 N. Stone Ave., 21st Floor
Tucson, Arizona 85701
(520) 724-6800
Attorneys for **Arizona Attorneys for Criminal Justice**

NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS

BY: /s/ David J. Euchner, for

Thomas W. Dean, No. 015700
attydean@gmail.com
13201 N. 35th Ave., Suite B-10
Phoenix, AZ 85029
(602) 635-4990
Attorney for **National Organization for the Reform of Marijuana Laws**