

IN THE ARIZONA SUPREME COURT

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

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE 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**

TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	ii
INTRODUCTION	1
INTERESTS OF <i>AMICUS CURIAE</i>	3
ARGUMENTS	4
I. Arizona’s public policy on medical marijuana was set by voter-passed Initiative; no branch of government may impose on the People of Arizona any penalty that is contrary to public policy	4
A. The Voter Protection Act exists to protect medical marijuana voter initiatives from being thwarted by this State’s elected officials	5
B. Voter Initiatives, including the AMMA, must be liberally construed to give effect to the intent of the electorate	8
C. Arizona’s Voters rejected the Yavapai County Attorney’s “philosophy” regarding medical marijuana when they approved Proposition 203 in 2010	9
II. The rules of statutory construction require a finding that the AMMA limits the power of prosecutors and the judiciary to prohibit probationers’ use of marijuana	13
A. The AMMA, when read harmoniously with other statutes and rules, prohibits prosecutors and trial courts from restricting the use of marijuana by registered qualifying patients as a condition of probation	14
B. Arizona government may not ignore the AMMA based on federal law	20
CONCLUSION	24

TABLE OF CASES AND AUTHORITIES

CASES	PAGES
<i>Adams v. Bolin</i> , 74 Ariz. 269, 247 P.2d 617 (1952)	8
<i>Ariz. Early Childhood Dev. & Health Bd. v. Brewer</i> , 221 Ariz. 467, 212 P.3d 805 (2009)	5, 9, 13
<i>Arizona v. United States</i> , 132 S.Ct. 2492 (2012)	20
<i>Baker v. Gardner</i> , 160 Ariz. 98, 770 P.2d 766 (1988)	17
<i>Cave Creek Unified School Dist. v. Ducey</i> , 233 Ariz. 1, 308 P.3d 1152 (2013)	5, 7
<i>Champlin v. Sargeant</i> , 192 Ariz. 371, 965 P.2d 763 (1998)	14
<i>City of Phoenix v. Superior Court</i> , 65 Ariz. 139, 175 P.2d 811 (1946)	8
<i>Dean v. Coughlin</i> , 623 F.Supp. 392 (D.C.N.Y.1985)	18
<i>Egerton v. Earl Brownlow</i> , 4 H.L.Cas. 1, 196 (1853)	4
<i>Estate of Hernandez v. Ariz. Bd. Of Regents</i> , 177 Ariz. 244, 866 P.2d 1330 (1994)	15
<i>Estelle v. Gamble</i> , 429 U.S. 97, 97 S.Ct. 285 (1976)	18
<i>Fairness & Accountability in Ins. Reform v. Greene</i> , 180 Ariz. 582, 886 P.2d 1338 (1994)	4
<i>Feldmeier v. Watson</i> , 211 Ariz. 444, 123 P.3d 180 (2005)	8
<i>Gunter v. State</i> , 153 Ariz. 386, 736 P.2d 1198 (App. 1987)	17
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	20
<i>Kromko v. Superior Court</i> , 168 Ariz. 51, 811 P.3d 12 (1991)	9

<i>Pedersen v. Bennett</i> , 230 Ariz. 556, 288 P.3d 760 (2012)	9
<i>State v. Ault</i> , 157 Ariz. 516, 759 P.2d 1320 (1988).....	14-15
<i>State v. Dickerson</i> , 113 P. 105 (1910)	10
<i>State v. Fields (Chase)</i> , 232 Ariz. 265, 304 P.3d 1088 (App. 2013).....	14
<i>State v. Gomez</i> , 212 Ariz. 55, 127 P.3d 873 (2006)	9
<i>State v. Okun</i> , 231 Ariz. 462, 296 P.3d 998 (App. 2013).....	13, 21-22
<i>State v. Patel</i> , 160 Ariz. 86, 770 P.2d 390 (App. 1989)	12
<i>State v. Roscoe</i> , 185 Ariz. 68, 912 P.2d 1297 (1996).....	14
<i>State v. Sweet</i> , 143 Ariz. 266, 693 P.2d 921 (1985)	16
<i>State ex rel. Larson v. Farley</i> , 106 Ariz. 119, 471 P.2d 731 (1970)	16
<i>State ex rel. Polk v. Hancock (Ferrell)</i> , 2014 WL 685559 (Ariz. Ct. App. 2014)	19, 23
<i>Tilson v. Mofford</i> , 153 Ariz. 468, 737 P.2d 1367 (1987)	4
<i>Van Riper v. Threadgill</i> , 183 Ariz. 580, 905 P.2d 589 (1995)	8
<i>W. Devcor, Inc. v. City of Scottsdale</i> , 168 Ariz. 426, 814 P.2d 767 (1991).....	8
<i>Winkle v. City of Tucson</i> , 190 Ariz. 413, 949 P.2d 502 (1997).....	8
<i>Winsor v. Hunt</i> , 29 Ariz. 504, 243 P. 407 (1926)	10

ARIZONA REVISED STATUTES

A.R.S. § 1-211.....	13
A.R.S. § 13-901.....	16

A.R.S. § 19-102.....5

A.R.S. § 36-2801.....13

A.R.S. § 36-2802.....14

A.R.S. § 36-2811.....14

ARIZONA CONSTITUTION

art. II, § 17

art. II, § 2.....7

art. III.....4

art. IV, § 15

art. XXII, § 14.....8

OTHER AUTHORITIES

Arizona Code of Judicial Administration, Section 6-207..... 16-18

General Canvass of 1996 Election by Secretary of State,
<http://www.azsos.gov/election/1996/General/Canvass1996GE.pdf>
 (last visited May 13, 2014)5

General Canvass of 2002 Election by Secretary of State,
<http://www.azsos.gov/election/2002/General/Canvass2002GE.pdf>
 (last visited May 13, 2014) 15

Publicity Pamphlet for 1998 general election, Proposition 105,
<http://www.azsos.gov/election/1998/info/pubpamphlet/Prop105.html>
 (last visited May 13, 2014)6

Publicity Pamphlet for 2002 general election, Proposition 203,
<http://azsos.gov/election/2010/info/PubPamphlet/english/prop203.pdf>
(last visited May 13, 2014)15

Publicity Pamphlet for 2010 general election, Proposition 203,
<http://azsos.gov/election/2010/info/PubPamphlet/english/prop203.pdf>
(last visited May 13, 2014) 10-13, 21

INTRODUCTION

This case raises the questions of whether the prosecuting agency in a criminal case may dictate every last term of the conditions of probation to the Superior Court, when the Court places a criminal defendant on probation and then has sole responsibility for the supervision of that probationer. Here, the Yavapai County Attorney has taken a political position that marijuana is a harmful drug and has attempted to bootstrap that political posturing into a demand on the Superior Court that probationers must be prohibited from using medical marijuana, notwithstanding state law to the contrary. Substantial, well-settled case law prevents the Yavapai County Attorney's Office ("YCAO") both from enforcing this term of its standard plea agreements and from withdrawing from plea agreements based on the Superior Court's refusal to enforce it.

Although the Court of Appeals correctly acknowledged the inappropriate attempt by the Yavapai County Attorney to bully the judiciary into kowtowing to her demands, it failed to address the core question in this case, which is the separation of powers. Instead, it decided an issue not even addressed by Respondent Judge – whether use of medical marijuana was appropriate for this defendant – and found Respondent Judge abused her discretion in making a decision that actually had not even been made. The opinion clearly failed to understand the record.

Amicus curiae Arizona Attorneys for Criminal Justice (“AACJ”) asks this Court to grant review and hold that the supervision of probationers is properly a function of the judiciary, and that YCAO may not enforce a term of the plea agreement that it had every reason to know was unenforceable. The Court of Appeals’ opinion in this case misstated the record and the law to such an extent that the law is actually *less* settled as a result of its opinion. The issue of the authority of trial courts to permit probationers to use medical marijuana pursuant to the Arizona Medical Marijuana Act (“AMMA”) is clearly an issue of statewide importance. As of the time of the submission of this brief, Division Two of the Court of Appeals has heard oral argument in another case involving medical marijuana for probationers, *Reed-Kaliher v. Hoggatt*, No. 2 CA-SA 2014-0015, and AACJ has similarly appeared as *amicus curiae* in that case. Although that case is orally argued and submitted but not yet decided by Division Two, the issues in that case are slightly different – it was the judge who invoked federal law in addition to the prosecutor – and thus it is likely that there will be multiple published opinions on the issue that conflict in some manner. Judges in other counties also are relying on federal law for imposing blanket prohibitions on probationers using medical marijuana. Review by this Court is urgently needed in order to settle important questions of state law.

INTERESTS OF *AMICUS CURIAE*

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

Amicus offer this brief in support of the Real Party In Interest because the issue presented is critical to the right of criminal defendants to a fair sentencing hearing with a judge who exercises discretion based on the circumstances of the individual case and grounded in Arizona law without threats to the independence of the judiciary. In attempting to enforce an arbitrary provision in a plea agreement related to conditions of probation, which is driven exclusively by politics and not at all by any concern for rehabilitation, YCAO has grossly overstepped its bounds. Its attempts to usurp the judicial function of supervising probationers and the policymaking function of the initiative process must be rejected. YCAO's arguments below improperly seek resolution of political questions in the courts.

ARGUMENT

I. Arizona’s public policy on medical marijuana was set by voter-passed Initiative; no branch of government may impose on the People of Arizona any penalty that is contrary to that public policy.

This Court has held that “[p]ublic 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, 710 P.2d 1025, 1034 (1985) (quoting *Egerton v. Earl Brownlow*, 4 H.L.Cas. 1, 196 (1853)). It is thus well-settled in Arizona that “our state’s constitution and statutes embody the public conscience of the people of this state.” *Id.* at 378, 710 P.2d at 1033.

Arizona’s constitution ensures the proper distribution of power among three separate, coequal, and distinct branches of government. *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 586, 886 P.2d 1338, 1342 (1994). The Distribution of Powers clause of Article III reads, “The powers of the government of the state of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial ... and no one of such departments shall exercise the powers properly belonging to either of the others.”

Importantly, the Arizona Constitution defines the legislative authority of the State as residing not only in a Senate and House of Representatives but also in the

people, and it immediately specifies the powers retained by the people through the initiative and referendum processes. Ariz. Const. art. IV, § 1; *see also* A.R.S. § 19-102. “The legislature and electorate ‘share lawmaking power under Arizona’s system of government.’” *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 4 ¶ 8, 308 P.3d 1152, 1155 (2013) (quoting *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469 ¶ 7, 212 P.3d 805, 807 (2009)).

A. The Voter Protection Act exists to protect medical marijuana voter initiatives from being thwarted by this State’s elected officials.

In 1996, Arizona voters passed one of the first medical marijuana measures in the country as part of Proposition 200. Sections 6 and 7 of that initiative permitted doctors to prescribe marijuana to treat patients if two licensed physicians agreed on the treatment and offered supporting research.¹ Prop 200 won in a landslide, but the Arizona Legislature quickly passed H.B. 2518, and then-Governor Fife Symington signed it into law on April 21, 1997. The effect of this legislation was to suspend enactment of Prop 200’s medical marijuana provisions until the FDA formally approved marijuana for medical use, effectively neutralizing Prop 200’s medical marijuana provisions.²

¹ <http://www.azsos.gov/election/1996/General/Canvass1996GE.pdf> (last visited May 13, 2014) (Prop 200 approved by margin of 872,235 to 461,332 votes).

² Hal Mattern and Kris Mayes, “Legislators Approve Delaying Prop 200, Court Battle Likely Over Pot Law,” *Arizona Republic*, April 16, 1997, p. A1; Tim

Angry over the nullification of that election, and to stop Arizona's lawmakers and executive branch from overruling them so easily in the future, Arizona's voters passed Proposition 105, the "Voter Protection Act" or "VPA," in 1998.³ Former Secretary of State Richard Mahoney wrote in favor of the 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.* Maricopa County Sheriff Joe Arpaio wrote in favor, "The will of the people is the most important element of our government. Once an election takes place, **votes can't be thrown away just because a few politicians don't like the results of an election.**" *Id.* (emphasis added). And outgoing Arizona Attorney General Grant Woods wrote:

A number of citizen measures dealing with campaign reform, health care, and the environment have been under assault by the politicians. 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.

Golden, "Medical Use of Marijuana To Stay Illegal in Arizona," *New York Times*, April 17, 1997, p. A14; "Arizona Lawmakers Neutralize State Medical Marijuana Ballot," *Drug Enforcement Report*, April 23, 1997, p. 1.

³ <http://www.azsos.gov/election/1998/info/pubpamphlet/Prop105.html> (last visited May 13, 2014).

Id.

Arizona voters did send a message back. 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.

The purpose of the VPA is simple: control of the sovereignty of the State rests with the people, not with the government. Ariz. Const. art. II, § 2. The people get to challenge the laws enacted by their elected representatives, not the other way around. The founders of this State recognized that governments tend to promote their own interests rather than those of the people. For that reason, the very first provision of Arizona's declaration of rights, article II, § 1, states: "a frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

As a result of the VPA — passed by voters in response to the legislative veto of the medical marijuana provisions of Prop 200 — the only manner by which an initiative may be repealed is by another initiative, or by a legislative referral to the electorate. It matters not that the initiative at issue in this case, the AMMA, is statutory rather than constitutional in source. *Cave Creek*, 233 Ariz. at 4 ¶ 18, 308 P.3d at 1157. Now that the AMMA is law, YCAO and the courts are tasked with upholding the law in accordance with the public policy stated therein.

B. Voter Initiatives, including the AMMA, must be liberally construed to give effect to the intent of the electorate.

The Arizona Supreme Court has long held that Article III requires the judiciary to refrain from meddling in the workings of the legislative process. *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997) (citing *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952); *City of Phoenix v. Superior Court*, 65 Ariz. 139, 175 P.2d 811 (1946)).

The separation of powers doctrine dictates judicial deference to legislative functions, and voter initiatives are entitled to equal, if not greater, deference in light of the Voter Protection Act. “The legislative power of the people is as great as that of the legislature.” *Tilson v. Mofford*, 153 Ariz. 468, 470, 737 P.2d 1367, 1369 (1987) (citing Ariz. Const. art XXII, § 14). Voter initiatives are “part and parcel of the legislative process,” and therefore “receive the same judicial deference as proposals before the state legislature.” *Winkle*, 190 Ariz. at 415, 949 P.2d at 504. This Court “has characterized the right of initiative and referendum as ‘vital,’ and one so important to the authors of our constitution that they included sufficient machinery in the constitution to make the right self-executing.” *Van Riper v. Threadgill*, 183 Ariz. 580, 582, 905 P.2d 589, 591 (1995); *see also Feldmeier v. Watson*, 211 Ariz. 444, 447 ¶ 11, 123 P.3d 180, 183 (2005) (citing *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 428, 814 P.2d 767, 769 (1991)).

The Government 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, 558 ¶ 7, 288 P.3d 760, 762 (2012) (quoting *Kromko v. Superior Court*, 168 Ariz. 51, 58, 811 P.2d 12, 19 (1991)) (requiring liberal interpretation of initiatives so as not to “destroy the presumption of validity”). The judiciary’s “primary objective in construing statutes adopted by initiative is to give effect to the intent of the electorate.” *Ariz. Early Childhood Dev. & Health Bd.*, 221 Ariz. at 470 ¶ 10, 212 P.3d at 808 (quoting *State v. Gomez*, 212 Ariz. 55, 57 ¶ 11, 127 P.3d 873, 875 (2006)).

C. Arizona’s Voters rejected the Yavapai County Attorney’s “philosophy” regarding medical marijuana when they approved Proposition 203 in 2010.

YCAO argues that including in its plea agreements a blanket provision barring all probationers from using medical marijuana is lawful because the County Attorney “has established policies and guidelines to uphold **her philosophy** and to ensure consistency in the treatment of criminal defendants.” *Petition for Review* at 5-6 (emphasis added). A county attorney swears an oath to uphold the laws of Arizona, and she must do so whether she agrees with those laws or not.

The Yavapai County Attorney may disagree that marijuana is useful medicine, but the legislative body of Arizona – the voters – has decided otherwise.

See Proposition 203, Section 2(A)-(E), *supra*. Therefore, YCAO must cease this violation of its oath to uphold state law and focus its efforts instead on ensuring compliance with state law. Nearly a century ago this Court quoted the Nevada Supreme Court with approval on the issue of government officials keeping their oath to obey and enforce the law:

‘Under the Constitution of the United States, which is the supreme law of the land, and the Constitution of Nevada, which we are obligated to obey under oath, we must order enforced any valid law irrespective of sentiment, and against any executive officer enjoined by law to a performance of a ministerial duty if he fails to execute the law. . . . and it is the plain duty of all officers to obey the law which they by oath promised to do, and a writ of mandate should issue to enforce such performance. * * *’

Winsor v. Hunt, 29 Ariz. 504, 511, 243 P. 407, 410 (1926) (quoting *State v. Dickerson*, 113 P. 105 (1910)). The Yavapai County Attorney is not free to ignore the public policies and statutes of this state in favor of her personal “philosophies.” The blanket plea provision she seeks to insert here is nothing more than her overt attempt to circumvent the lawfully enacted AMMA — a law and public policy with which she disagrees politically.

In 2010, the Yavapai County Attorney, along with elected county attorneys and sheriffs of ten other counties, vocally opposed Proposition 203. The prosecutors and sheriffs argued in their published opposition statement, “This proposition is extremely bad for public safety, for public health and is just plain bad public policy.” Ariz. Sec’y of State, Ariz. Ballot Prop. Guide, Gen. Election —

Nov. 7, 2010, at 86.⁴ Arizona's voters heard what these law enforcement groups had to say, and the voters rejected their view. After clamoring for legalized medical marijuana and sentencing reform for drug offenses since the 1990s, the voters passed the AMMA, creating immunity for registered qualifying patients and their doctors and caregivers. Importantly, the VPA was intended to prevent the legislature and executive bodies of this State from circumventing the will of the people, specifically with regard to medical marijuana and drug enforcement policy after the government's veto of an initiative approved by 65% of the electorate.

The text of Proposition 203 addressed the arguments raised by the Yavapai County Attorney in this case and her desire to continue punishing medical marijuana users despite the AMMA. Proposition 203 made clear its intent to stop state officials from persecuting patients who use marijuana medicinally, as well as their physicians and caregivers:

Data from the Federal Bureau of Investigation's Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marijuana arrests in the U.S. are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill patients who have a medical need to use marijuana.

Prop. 203 at §2(D). Proposition 203 also expressly addressed the voters' intent to *change Arizona's public policy* by ending the war on medical marijuana waged by

⁴ <http://azsos.gov/election/2010/info/PubPamphlet/english/prop203.pdf> (last visited May 13, 2014).

the three branches of State government:

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.

Prop. 203 at §2(G). The initiative was approved by a majority of Arizona voters despite the law enforcement arguments against the change in public policy.⁵

The Yavapai County Attorney clearly does not share the opinion of the will of the electorate, but she lacks authority to replace statewide public policy and statutory immunity with her personal anti-marijuana “philosophy.” YCAO’s attempt to dictate the terms of probation violates the separation of powers doctrine. *State v. Patel*, 160 Ariz. 86, 770 .2d 390 (App. 1989). And the provision YCAO seeks to insert is in violation of both Arizona statute and the public policy expressed and adopted by the people of Arizona that qualifying patients should be protected, not penalized.

⁵ <http://www.azsos.gov/election/2010/General/Canvass2010GE.pdf> (last visited May 13, 2014).

II. The Rules of Statutory Construction Require a Finding that the AMMA Limits the Power of Prosecutors and the Judiciary to Prohibit Probationers' Use of Marijuana.

“Statutes that are subject to only one reasonable meaning are *applied as written*.” *Ariz. Early Childhood Dev. & Health Bd.*, 221 Ariz. at 470 ¶ 10, 212 P.3d at 808 (emphasis added). Courts therefore must liberally construe the AMMA to give full effect to its objectives, which are clear and unambiguous. A.R.S. § 1-211.

The AMMA establishes conditions allowing medicinal use of marijuana. As described by the Arizona Legislative Council’s ballot measure analysis, “the purpose of [the AMMA] was to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties and property forfeiture if such patients engage in the medical use of marijuana.” *Ariz. Sec’y of State, Ariz. Ballot Prop. Guide, Gen. Election — Nov. 7, 2010, supra*, at 73. The AMMA allows a patient with a qualifying debilitating medical condition to obtain a registration identification card that permits the patient to possess and use marijuana for medicinal purposes. A.R.S. § 36-2801 *et seq.* 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, 465 ¶ 9, 296 P.3d 998, 1001 (2013).

A. The AMMA, when read harmoniously with other statutes and rules, prohibits prosecutors and trial courts from restricting the use of marijuana by registered qualifying patients as a condition of probation.

A.R.S. § 36-2811(B) states that a patient or 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,” so long as the patient or caregiver uses and possesses marijuana in compliance with the AMMA. This provision “affords immunity.” *State v. Fields (Chase)*, 232 Ariz. 265, 269 ¶ 14, 304 P.3d 1088, 1092 (App. 2013) (citing A.R.S. § 36-2811(B)). A.R.S. § 36-2802 provides a definitive list of exclusions from the protections of the AMMA. Specifically, one may not possess or use marijuana on a school bus, on the grounds of any preschool or primary or secondary school, or *in any correctional facility*, and marijuana may not be smoked in any public place or on any form of public transportation. § 36-2802(B)-(C) (emphasis added). By including “any correctional facility” in the list of exclusions, the drafters of the initiative were clearly considering the impact of this legislation on those convicted of crimes.

When a statute enumerates items of a particular class, it is intended that those items that are not enumerated were purposefully excluded. *Champlin v. Sargeant*, 192 Ariz. 371, 374 ¶ 16, 965 P.2d 763, 766 (1998) (citing *State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996)); *State v. Ault*, 157 Ariz.

516, 519, 759 P.2d 1320, 1323 (1988). “It is a familiar if overused rule that a statute’s expression of one or more items of a class indicates legislative intent to exclude unexpressed items of the same class.” *Estate of Hernandez v. Ariz. Bd. Of Regents*, 177 Ariz. 244, 249, 866 P.2d 1330, 1335 (1994). Here, the AMMA specifically withholds its protection from use “in any correctional facility” as well as other enumerated locations; its silence as to probationers requires that it be read to permit probationers to use marijuana in accordance with the AMMA.

This construction makes sense: the drafters did not want to put wardens and county sheriffs in the position of having to dispense marijuana to inmates in jails and prisons. In 2002, a previous ballot initiative, also numbered Proposition 203,⁶ sought to create A.R.S. § 13-3413(D), which would have required the Arizona Department of Public Safety to act as the official state dispensary by giving marijuana that had been seized in conjunction with criminal investigations to patients. This initiative was defeated,⁷ in large part because of the requirement that police officers provide marijuana to citizens. The drafters undoubtedly had this history in mind when deciding to exclude patients from using marijuana while in a correctional facility. Notably, nothing in the AMMA precludes a prisoner-patient

⁶ <http://www.azsos.gov/election/2002/Info/pubpamphlet/english/prop203.htm> (last visited May 13, 2014).

⁷ <http://www.azsos.gov/election/2002/General/Canvass2002GE.pdf> (last visited May 8, 2014), p.14 (initiative failed by vote of 504,607 to 678,446).

from using marijuana while outside a correctional facility on furlough, and the AMMA is silent as to probationers. Instead, the AMMA simply creates broad immunity from the denial of “any” right or privilege to any qualifying patient or caregiver, except for the limited, enumerated *locations*, without regard to one’s status as being convicted of a crime.

The statutory scheme for probation was enacted in 1978, and A.R.S. § 13-901(A) permitted judges to suspend sentences and impose “such terms and conditions as the law requires and the court deems appropriate.” No other provision in Title 13, Chapter 9, A.R.S., discusses use of medication. The Arizona Code of Judicial Administration, Section 6-207 (ACJA § 6-207), sets the Uniform Conditions of Supervised Probation; the first condition states that the probationer “will maintain a crime-free lifestyle by obeying all laws, and not engaging or participating in any criminal activity.” Condition #12 is explicit: “I will not possess or use illegal drugs or controlled substances and will submit to drug and alcohol testing as directed by the APD.”

The AMMA was passed by the voters in November 2010. “If reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent.” *State v. Sweet*, 143 Ariz. 266, 270-71, 693 P.2d 921, 925-26 (1985) (quoting *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970)). “Courts construe seemingly conflicting

statutes in harmony when possible. However, when two statutes truly conflict, either the more recent or the more specific controls.” *Baker v. Gardner*, 160 Ariz. 98, 101, 770 P.2d 766, 769 (1988) (internal cites omitted). Under these rules of construction, the AMMA modifies the ACJA which permits a trial court to impose “such terms and conditions as the law requires and the court deems appropriate.”

It is possible – and even simple – to read the Uniform Conditions of Probation in ACJA § 6-207 harmoniously with the AMMA. All that is needed is to interpret Condition #1, leading a “crime-free lifestyle,” and Condition #12, not using illegal drugs or controlled substances, as being met when a probationer uses marijuana consistently with the AMMA, just as such a probationer may use any other prescription drug. In fact, it is simple to say that it is not appropriate for a court to deny a probationer doctor-recommended medication when the AMMA requires that a patient be allowed to take her medicine.

Harmonizing the AMMA with the ACJA as described here avoids placing the trial judge in the shoes of a probationer’s doctor and making decisions about medical treatment that a judge is not qualified to make. For example, in Eighth Amendment jurisprudence, interference by the executive or judicial branch with a physician’s medication may rise to a constitutional violation because “[t]he fact that the medicine was prescribed is prima facie evidence that it was needed.” *Gunter v. State*, 153 Ariz. 386, 387-88, 736 P.2d 1198, 1199-1200 (App. 1987)

(citing *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S.Ct. 285, 291 (1976)); *Dean v. Coughlin*, 623 F.Supp. 392 (D.C.N.Y.1985). There is no functional difference, as a matter of law, between a prescription for hydrocodone, a highly-addictive but also highly-effective narcotic drug, and a recommendation for marijuana, which is not addictive and yet is also highly-effective, except for the fact that the AMMA has additional protections that other medications do not.

One legal distinction between medical marijuana and any other prescription medicine is that the AMMA affords special protections to the use or possession of marijuana for medicinal purposes that are not available anywhere else in law for other drugs. The drafters of Proposition 203 were no doubt cognizant of the history of demonizing marijuana, dating at least as far back as the release of the film *Reefer Madness* in 1936. Particularly in light of the recent history of governments at all levels acting to thwart the will of the voters, the drafters sought to prohibit all government actors and agencies from interfering with medical marijuana use and possession because any loophole was bound to be exploited. The Yavapai County Attorney's blanket prohibition based on her desire to enforce her personal anti-marijuana "philosophy" demonstrates that the voters were right to be concerned.

Hence, not only the executive branch but also the judiciary is prohibited from interfering with the legal use of medical marijuana. Any other interpretation of ACJA § 6-207 would result in a judicial nullification of the AMMA. The

judiciary has no greater authority to nullify a voter-enacted law than the state legislature or the executive branch. The AMMA is the law of this State, and all three branches of government must honor it.

The Court of Appeals acknowledged that “the parties to this action come before us seeking authority to make blanket determinations,” but its conclusion that “[n]one of these blankets are [sic] sustainable,” *State ex rel. Polk v. Hancock (Ferrell)*, 2014 WL 685559, ¶ 21 (Ariz. Ct. App. 2014), is unsupported by any reasoning as to Ferrell’s claim. Its belief that “the trial judge erred by automatically rejecting the marijuana provision ... the record supports the County Attorney’s use of this condition as to defendant,” *id.* ¶ 26, not only misreads the record entirely⁸ but fails to address the two issues raised by Ferrell: whether the AMMA permits imposition of this condition, and if so whether the County Attorney may compel the Superior Court to impose it. No authority exists allowing YCAO or the courts to disregard the AMMA, even for probationers.

Any other reading would lead to absurd results. If judges could nullify the AMMA in such a manner, then the executive branch through the governor or any director of an administrative agency could impose regulatory burdens on law-abiding citizens to forgo the right to use medical marijuana in order to continue to

⁸State’s Appendix, Exhibit J, p.35: “I do not believe that this State can bind the court regarding the specific condition ... the State is free to recommend, as part of sentencing ... as to what the sentencing provision should be and the court will take into consideration all of those recommendations...”

use any government service. For example, the director of the Motor Vehicles Department could require, as a condition of obtaining or renewing a driver's license, that the driver agree to surrender his/her registered qualifying patient card. This would defeat the entire purpose of the AMMA and the Voter Protection Act. Just as it is clear that the elected governor cannot contravene the will of the people as enacted through the initiative process, neither may the Yavapai County Attorney.

B. Arizona government may not ignore the AMMA based on federal law.

YCAO is not alone in advocating for a finding that the AMMA is preempted by the federal Controlled Substances Act. The test for finding whether Arizona law is preempted by federal law has recently been addressed in *Arizona v. United States*, 132 S.Ct. 2492 (2012). A finding in favor of preemption requires a determination that: 1) a federal statute contains an express preemption provision; 2) Congress has determined that the federal government should occupy the field and the States should be precluded from regulating such conduct; or 3) state laws conflict with federal law to the extent that they stand "as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Id.* at 2500-01 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

With regard to the AMMA, it is clear that none of these prongs applies. The

fact that Arizona has for years criminally regulated use and possession of marijuana proves that Congress has never intended to occupy the field. As for the last point, the state and federal laws may not agree, but neither do they conflict. There is nothing about the AMMA that restricts the federal government's ability to enforce its laws. To the extent that the federal government wishes to enforce its laws prohibiting use or possession of medical marijuana, however, it simply must do so without the help or support of the State of Arizona and its political subdivisions. As Section 2F of Proposition 203 succinctly states: "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."

Last year in *Okun*, the Yuma County Attorney and Sheriff challenged an order from the Superior Court that the Sheriff return marijuana seized from a lawful patient. Some of the challenges made by YCAO here were made by the Yuma County officials in *Okun*, and the Court of Appeals addressed those challenges and rejected them all in turn. For example, not only did the State allege that Okun could be subjected to federal prosecution for possessing marijuana, but the Yuma County Sheriff also alleged that he would be subjected to federal prosecution for transfer of marijuana. The Court of Appeals found that not only did "the State lack[] standing to argue that federal law prohibits Okun from possessing

the marijuana,” 231 Ariz. at 466-67 ¶ 17, 296 P.3d at 1002-03, but also that as a matter of law the Sheriff is immune from prosecution for complying with a court order. *Id.* at 465-66 ¶¶ 13-14, 296 P.3d at 1001-02. YCAO is even further removed from any fantasized violation of federal law for possessing marijuana, because in this case, none of the government officials would have any role whatsoever in possessing marijuana on behalf of, or transferring marijuana to, the probationer.

YCAO’s continued attempts to argue that the AMMA is pre-empted by federal law ignore not only *Okun* but also the report of the Attorney General answering questions posed by several County Attorneys (including the Yavapai County Attorney) on this very issue. *State’s Appendix, Exhibit F*. In that Attorney General Opinion, Attorney General Horne stated that “the AMMA provisions and related rules that pertain to the issuance of registry identification cards for patients and caregivers are not preempted because they merely serve to identify those individuals for whom the possession or use of marijuana has been decriminalized under state law and, therefore, are not authorizations to violate federal law.” *Id.* This statement also serves to invalidate YCAO’s claim that it is being asked to support the use of marijuana as medicine. To the contrary, the literal truth is no one is asking YCAO for its opinion on this issue; it is the Yavapai County Attorney who is insisting on providing that opinion and using this litigation as part of a political campaign against the legal medicinal use of marijuana.

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

At *Petition for Review* pp. 14-15, YCAO claims there is a difference of opinion in other jurisdictions whether probationers can be prohibited from using medical marijuana. But what YCAO fails to acknowledge is the obvious: ***all other state courts honor their state law***. It is not the rightful position of an Arizona court to strike down a state law in this manner when it is facially valid. YCAO or any other executive branch official can take a case to federal court to argue preemption. In fact, Governor Brewer took such action, and the case was dismissed on motions not only by proponents of Proposition 203 but also by the U.S. Department of Justice.⁹ YCAO cites no authority, nor is AACJ aware of any, that holds that state

⁹http://blogs.phoenixnewtimes.com/valleyfever/2012/01/governor_brewer_to_ponder_medi.php (last visited May 12, 2014) (includes copy of order signed by Judge Susan R. Bolton granting the motions to dismiss).

courts must ignore its own state laws permitting the use of medical marijuana based on the Supremacy Clause. Instead, YCAO's argument shows itself to be nothing more than a stump speech on the campaign trail.

CONCLUSION

The Respondent Judge correctly concluded in this case that YCAO had no authority to compel enforcement of the illegal stipulation and that YCAO had no basis for withdrawing from the plea. This Court should grant review so that there is uniformity in practice among the several courts of the State, and hold that neither prosecutors nor judges have the power to deny probationers access to medical marijuana (provided, of course, that they have a state-issued card).

RESPECTFULLY SUBMITTED this 14th day of May, 2014.

ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE

By /s/ David J. Euchner

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

Attorneys for **Arizona Attorneys for
Criminal Justice**