

1 WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY
2 BAR ID#: 021246

3 THOMAS P. LIDDY
Deputy County Attorney
4 BAR ID#: 019384
CIVIL SERVICES DIVISION
5 222 North Central Avenue, Suite 1100
Phoenix, AZ 85004
6 MCAO Firm #: 00032000
Telephone: (602) 506-8541
7 liddyt@maco.maricopa.gov
ca-civilmailbox@mcao.maricopa.gov

8 Attorneys for Plaintiffs Intervenor
9 Maricopa County and Joy Rich

10 IN THE UNITED STATES DISTRICT COURT

11 FOR THE DISTRICT OF ARIZONA

12 STATE OF ARIZONA; JANICE K.
BREWER, Governor of the State of
13 Arizona, in her Official Capacity; WILL
HUMBLE, Director of the Arizona
14 Department of Health Services, in his
Official Capacity; ROBERT C.
15 HALLIDAY, Director of the Arizona
Department of Public Safety, in his Official
16 Capacity;

17 Plaintiffs,

18 v.

19 UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF
20 JUSTICE; ERIC H. HOLDER, JR.,
Attorney General of the United States of
21 America, in his Official Capacity;
DENNIS K. BURKE, United States
22 Attorney for the District of Arizona, in his

NO. CV 11-01072-PHX-SRB

**MOTION FOR LEAVE TO
INTERVENE AS CO-PLAINTIFFS
BY:**

- A. MARICOPA COUNTY; and**
- B. JOY RICH, in her official capacity as ASSISTANT COUNTY MANAGER AND DIRECTOR OF MARICOPA COUNTY PLANNING AND DEVELOPMENT DEPARTMENT**

1 Official Capacity; ARIZONA
2 ASSOCIATION OF DISPENSARY
3 PROFESSIONALS, INC., an Arizona
4 corporation; JOSHUA LEVINE; PAULA
5 PENNYPACKER; DR. NICHOLAS
6 FLORES; JANE CHRISTENSEN;
7 PAULA POLLOCK; SERENTIY
8 ARIZONA, INC., an Arizona nonprofit
9 corporation; HOLISTIC HEALTH
10 MANAGEMENT, INC., an Arizona
11 nonprofit corporation; JEFF SILVA;
12 ARIZONA MEDICAL MARIJUANA
13 ASSOCIATION; DOES 1-X; DOES XI-
14 XX;

Defendants.

10 Pursuant to Rule 24(b)(1)(B) and 24(b)(2), Fed.R.Civ.P., MARICOPA
11 COUNTY, in its official capacity, and JOY RICH, in her official capacity as Assistant
12 County Manager and Director of Maricopa County Planning and Development
13 Department (collectively “County Intervenors”) move the Court for an Order permitting
14 them to intervene as Co-Plaintiffs in this declaratory judgment action. County
15 Intervenors’ claims share a common question of law and/or fact with the claims set forth
16 by Plaintiffs in the main action. County Intervenors seek this Court’s determination of
17 whether participation by County employees/agents in activities that would serve to
18 implement and facilitate Arizona’s “medical marijuana” law provides a safe harbor from
19 prosecution under applicable, but inconsistent, federal drug enforcement laws or, in the
20 alternative, whether the state statute is preempted by federal law.

21 In addition, because County Intervenors are a government agency and officers,
22 their claims are based on a statute which they must administer and/or requirements they

1 must meet under the statute and, therefore, permissive intervention under Rule 24(b)(2),
2 Fed.R.Civ.P. is available. As such, intervention is particularly appropriate here because
3 County Intervenors satisfy several conditions that militate in favor of allowing
4 intervention in the main action. County Intervenors' request to intervene is timely and
5 intervention will not cause delay or prejudice because the request has been made at the
6 very earliest stages of litigation. A copy of the Proposed Complaint in Intervention is
7 attached hereto as Exhibit A.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. Background**

10 Plaintiffs State of Arizona, Janice K. Brewer, Will Humble and Robert C.
11 Halliday ("State Plaintiffs") have filed an action in this Court seeking a declaratory
12 judgment on a question pertaining to an immediate and serious potential conflict
13 between enforcement of a newly enacted state law and an existing federal law that could
14 render actions taken pursuant to the state law illegal. At issue in this matter is the voter
15 passed Proposition 203, an initiative measure identified as the "Arizona Medical
16 Marijuana Act" ("AMMA"), codified at A.R.S. §§ 36-2801, et seq. The AMMA
17 purports to decriminalize marijuana under certain circumstances pertaining to medical
18 use, and requires Maricopa County officials and employees to perform certain duties to
19 implement the new law. Those duties would have the effect of facilitating the growth,
20 manufacture, dispensation and possession of marijuana by, *e.g.*, approving and
21 permitting medical marijuana distribution centers or allowing marijuana cultivation.

1 Under federal law, marijuana is considered a dangerous drug under provisions of
2 the federal Controlled Substances Act (“CSA”), codified at 21 U.S.C. § 801, et seq.
3 Under the CSA, marijuana is a Schedule I drug, meaning it has a high potential for
4 abuse, lacks any accepted medical use and cannot be used safely even under the
5 supervision of a physician. In this regard, the CSA does not recognize a “medical
6 exception” for marijuana. As a Schedule I drug, the manufacture, distribution or
7 possession of marijuana is a criminal offense under the CSA. Penalties for violating the
8 federal statute are severe. For example, the manufacture, distribution or possession with
9 intent to distribute, marijuana each constitute felonies punishable by up to five years in
10 prison and fines up to \$250,000 for individuals and \$1 million for entities. Repeat
11 offenders face more severe penalties. 21 U.S.C. § 841.

12 The tension between the AMMA and the CSA is clear in that the state law seeks
13 to make legal that which the federal law unequivocally makes illegal. The position
14 taken by the federal government is that growing, distributing and possessing marijuana
15 *in any capacity*, other than as part of a federally authorized research program, is a
16 violation of federal law regardless of state laws that purport to permit such activities. In
17 this regard, the United States Attorney’s Office for the District of Arizona has taken the
18 position that it “will continue to vigorously prosecute individuals and organizations that
19 participate in unlawful manufacturing, distribution and marketing activity involving
20 marijuana, even if such activities are permitted under state law.” See May 2, 2011 letter
21 from United States Attorney Dennis K. Burke to DHS Director Will Humble, attached
22 hereto as Exhibit B. Thus, there is no safe harbor from federal criminal prosecution

1 based on legality under state law.¹

2 Under the foregoing circumstances, employees/agents of Maricopa County could
3 be subject to federal prosecution under the CSA in connection with activities they are
4 required to perform in order to implement the AMMA. For example, the Maricopa
5 County Planning and Development Department is charged with approving and issuing
6 building permits and special use permits, and generally facilitating the opening and
7 operation of any business seeking to locate within unincorporated Maricopa County.
8 See Declaration of Joy Rich (“Rich Decl.”), ¶¶ 2-5, attached hereto as Exhibit D. Under
9 the AMMA, this would include the issuance of permits for medical marijuana
10 distribution centers or permits allowing the cultivation of marijuana. Rich Decl., ¶ 6.
11 As such, County employees/agents who, by virtue of actions taken as required by the
12 AMMA, will facilitate the possession, manufacture and distribution of marijuana, all of
13 which are illegal under the CSA, and could be held liable as aiders or abettors under 18
14 U.S.C. § 2. Similarly, County employees/agents could be liable under other theories,
15 including conspiring to commit an offense against the United States (18 U.S.C. § 371),
16 assisting an offender thereby becoming an accessory to the crime (18 U.S.C. § 3), and

17 ¹ To further solidify the point, on June 29, 2011, Deputy Attorney General James M.
18 Cole released a memorandum to United States Attorneys wherein he stated “persons
19 who are in the business of cultivating, selling or distributing marijuana, and those who
20 knowingly facilitate such activities, are in violation of the Controlled Substances Act,
21 regardless of state law. Consistent with resource constraints and the discretion you may
22 exercise in your district, such persons are subject to federal enforcement action,
including potential prosecution. State laws or local ordinances are not a defense to civil
or criminal enforcement of federal law with respect to such conduct, including
enforcement of the CSA” (emphasis added). See June 29, 2011 memorandum from
Deputy Attorney General James M. Cole, attached hereto as Exhibit C.

1 concealing knowledge of a felony from the United States (18 U.S.C. § 4).

2 Because the AMMA has already gone into effect, and applications have been
3 received by the County requesting permitting in connection with marijuana cultivation
4 and distribution, County employees/agents face an immediate threat of prosecution for
5 facilitating the use, possession, manufacture or distribution of marijuana. Rich Decl., ¶¶
6 6-11. County Intervenor Joy Rich, who is the Director of Maricopa County Planning
7 and Development Department, confirms that there are two applications currently
8 pending before her for approval of a Special Use Permit; one to allow a dispensary for
9 medical marijuana and one for cultivation of medical marijuana. Rich Decl., ¶ 6. In
10 addition, there are six more applicants interested in applying for dispensaries for medical
11 marijuana and three more applicants interested in applying for permits for cultivation of
12 medical marijuana. Rich Decl., ¶ 7. Because of the discrepancies between the AMMA
13 and the CSA, Director Rich feels her employees face a dilemma because they can either
14 issue those permits they are required to issue as part of their job duties and face the
15 possibility that they could be prosecuted for violation of federal law, or follow federal
16 law and refuse to enforce state statute. Rich Decl., ¶¶ 8-10. Rich feels that her
17 employees are being asked to make a choice that, in either event, will result in potential
18 exposure to liability. Rich Decl., ¶ 11.

19 **II. Permissive Intervention is Appropriate**

20 Pursuant to Rule 24(b), Fed.R.Civ.P., the Court may allow a party to intervene in
21 a case if that party “has a claim or defense that shares with the main action a common
22 question of law or fact” or, in the case of a government officer or agency, if the

1 government party's claim or defense is based on "a statute administered by the officer or
2 agency" or based on "any regulation, order, requirement, or agreement issued or made
3 under the statute." Here, both bases for intervention apply, and there is a compelling
4 argument for allowing County Intervenors to intervene.

5 County Intervenors' claims are consistent with the allegations being made by
6 State Plaintiffs because Maricopa County officials and employees, including Rich and
7 her employees, could be subject to federal prosecution for violation of the CSA if they
8 participate in actions that would implement the AMMA. Accordingly, permissive
9 intervention by them as Co-Plaintiffs is appropriate because:

- 10 1. They have a claim or defense that shares with the main action a
11 common question of law or fact, *i.e.*, the implementation of the AMMA
12 and the potential criminalization of such implementation under the
13 CSA; and
- 14 2. County Intervenors' claim is based upon a statute administered by the
15 County, as well as requirements and regulations made under the subject
16 statute, *i.e.*, implementation of the AMMA, which is the subject matter
17 of this action.

18 Thus, the fundamental requirement of commonality of claims under Rule
19 24(b)(1)(B) and government interest under Rule 24(b)(2) are met.

20 In addition, requests for permissive intervention must be supported by an
21 independent basis for jurisdiction and must be timely made. *S. Cal. Edison Co. v.*
22 *Lynch*, 307 F.3d 794, 803 (9th Cir. 2002). Here, County Intervenors submit the same

1 bases for jurisdiction as submitted by State Plaintiffs in their Complaint at ¶¶ 57-59.
2 County Intervenors' claims arise under the Constitution and laws of the United States,
3 they present a federal question, the United States and its agencies and officers are
4 Defendants, and County Intervenors are seeking relief pursuant to the Declaratory
5 Judgment Act, 28 U.S.C. § 2201. Further, County Intervenors' request to intervene is
6 timely because it is being submitted at a very early stage in the proceedings. To date, no
7 answers have been filed, and the case is not yet at issue.

8 The Court may also look at other factors in making its decision whether to allow
9 intervention, including whether intervention will unduly delay or prejudice the original
10 parties, whether judicial economy favors intervention and whether the requesting
11 parties' interests are adequately represented by the existing parties. *Venegas v. Skaggs*,
12 867 F.2d 527, 530-31 (9th Cir. 1998). All of these factors weigh in favor of allowing
13 intervention.

14 First, no party will be prejudiced if the Court grants intervention. This case was
15 only very recently filed by the State Plaintiffs and no party has yet answered the
16 Complaint. Aside from the Court's recent rulings on other motions to intervene, the
17 Court has not made any substantive rulings and therefore will not need to re-open or re-
18 litigate any of the issues. Because of the nature of their claims, the County Intervenors
19 will not add any complexity to the case that might prolong the litigation. Further, the
20 presence of the County Intervenors will not draw the focus of the litigation away from
21 the original parties, but will actually augment the State Plaintiffs' position. In short,
22 there is simply no evidence that allowing the County to intervene would result in

1 prejudice. It has been held that a district court abused its discretion in denying
2 permissive intervention where the requirements for permissive intervention had been
3 met and there was no evidence that intervention would prejudice the original parties.
4 *Venegas*, 867 F.2d at 530 (quoting *Crumble v. Blumthal*, 549 F.2d 462, 468-69 (7th
5 Cir.1977)).

6 Second, judicial economy favors intervention in this case. County Intervenors
7 have specific issues pertaining to the actions their employees/agents must take in
8 connection with the implementation of the AMMA, including issuing building and
9 special use permits. Rich Decl., ¶¶ 2-9. These actions by the County are in addition to,
10 and *distinctly separate from*, the actions the State Plaintiffs must take to implement the
11 new law. As such, County Intervenors require a judicial determination of *their specific*
12 *rights and duties* under the inconsistent state and federal laws. Because of this, County
13 Intervenors have a sound basis for filing their own lawsuit based on the County's unique
14 interests and duties in implementing the AMMA. Granting intervention would allow the
15 County Intervenors to present and protect their interests in a common lawsuit rather than
16 in a separate action. This would also avoid the possibility of duplicative litigation and
17 inconsistent rulings.

18 Third, for reasons stated in the previous paragraph, if County Intervenors are
19 allowed to intervene in the State Plaintiffs action, they could better represent and protect
20 their unique interests in connection with their specific duties in implementing the
21 AMMA. Since the County Planning and Development Department must approve new
22 business uses, and facilitates the opening and operation of any new business seeking to

1 locate within the County, County Intervenors position regarding implementation of the
2 AMMA will necessarily differ from that of the State Plaintiffs. As Director Rich has
3 stated, her Department is “charged with issuing permits under and enforcing the Zoning
4 Ordinance for the Unincorporated Areas of Maricopa County” and “without the approval
5 by [her] Department, no new use can begin within the jurisdiction of unincorporated
6 Maricopa County.” Rich Decl., ¶¶ 2-4. As such, the County’s actions, and interests
7 related thereto, in implementing the AMMA differ markedly from those actions the State
8 Plaintiffs will be required to take.

9 There is no doubt the State Plaintiffs will vigorously and competently pursue
10 *their* case, but the County Intervenors should be allowed to present a case from their
11 own unique perspective and based on the duties their employees/agents are called upon
12 to perform under the AMMA if their interests are to be adequately represented and
13 protected. In this regard, Director Rich should be independently represented so that her
14 unique factual perspective on the County’s and her employees’ duties, and potential
15 liability, can be presented in a manner independent from the interests and duties of the
16 State Plaintiffs. There is no guarantee that the County Intervenors’ interests will be
17 presented or protected if County Intervenors are left out of this lawsuit.

18 Granting permissive intervention is, of course, at the Court’s discretion.
19 However, it has been held that, in exercising their discretion to grant permissive
20 intervention under Rule 24, district courts are encouraged to apply this rule liberally “in
21 allowing a government agency to intervene in cases involving a statute it is required to
22 enforce; indeed, a hospitable attitude is appropriate.” *Meyer v. MacMillan Publishing*

1 Co., Inc., 85 F.R.D.149, 150 (S.D.N.Y.1980)(citing *Blowers v. Lawyers Coop.*
2 *Publishing Co.*, 527 F.2d 333, 334 (2nd Cir.1975)).

3 Finally, this matter is ripe for review by the Court even if no federal prosecution
4 has been initiated against the County Intervenors because the threat of prosecution is
5 realistic and the County Intervenors should not be compelled to break the law in order to
6 see if the federal prosecutors are serious. See *New Hampshire Hemp Council, Inc. v.*
7 *Marshall*, 203 F.3d 1, 5 (1st Cir. 2000). The U.S. Attorney’s Office has made it clear
8 that “growing, distributing and possessing marijuana *in any capacity*, other than as part
9 of a federally authorized research program, is a violation of federal law regardless of
10 state laws that purport to permit such activities” and that they “will continue to
11 vigorously prosecute individuals and organizations that participate in unlawful
12 manufacturing, distribution and marketing activity involving marijuana, even if such
13 activities are permitted under state law.” See Exhibit B. With this threat of prosecution
14 looming, County officers and employees, who clearly have a role in implementing the
15 AMMA, should not be put in a position of having to act pursuant to state law and then
16 waiting to see whether or not federal drug charges will be brought against them. Or, as
17 the court in *New Hampshire Hemp Council* stated “there ought to be a way to resolve the
18 legal correctness of [County Intervenors’] position without subjecting [them] to criminal
19 penalties well known for their severity and inflexible administration.” *Id.*

20 **III. Substantive Reasons for Allowing the County to Intervene**

21 County Intervenors find themselves in the immediate and untenable position of
22 having to decide which of two contradictory laws they are obligated to follow. County

1 Intervenor are tasked with implementing the terms of the AMMA. However, in doing
2 so, they are faced with the dilemma of either following the state law, as they are required
3 to do as part of their job duties, and face the possibility that they could be prosecuted for
4 violations of federal law, or follow federal law and refuse to enforce the state statute.
5 Rich Decl., ¶ 10. Ultimately, County employees are being asked to make a choice that,
6 in either event, will result in potential exposure to liability. Rich Decl., ¶ 11.

7 Issuing permits for marijuana distribution centers or marijuana cultivation could
8 be construed as facilitating the use, possession or distribution of marijuana, which acts
9 are illegal under the CSA, regardless of what is allowed under Arizona law. The
10 Department of Justice has not waived, and has specifically reserved, its authority to
11 prosecute such crimes. *See* Exhibits B and C. Thus, there is a very definite risk that
12 Maricopa County employees who are involved in issuing permits to implement the
13 AMMA, and thereby are facilitating the use, possession or distribution of marijuana,
14 could be subject to federal prosecution under the CSA.

15 The issues presented in this declaratory action are pertinent to the conduct of the
16 County and the performance of duties related to the implementation of the state law.
17 Moreover, the legal threat to county employees is immediate. Prior to receiving a copy
18 of the May 2, 2011 letter from the United States Attorney's Office, the County had
19 received applications pursuant to the AMMA, and employees who were handling those
20 applications were in the process of implementing the law. Rich Decl., ¶¶ 6-9. Thus, the
21 position espoused by United States Attorney Burke poses an immediate threat of
22 prosecution to state and county employees processing the applications already filed with

1 the various state and county agencies. This declaratory action is appropriate because
2 County officers and employees who have a role in implementing the AMMA should not
3 be put in a position of having to wait and see whether or not any federal administration's
4 policies would result in their prosecution under federal law.

5 County Intervenors have the statutory duty to implement and administer the
6 AMMA in Maricopa County as it becomes effective in August 2011. *See* A.R.S. §11-
7 441(a)(2). County Intervenors wish to intervene in this case to seek clarification as to
8 the exposure of Maricopa County officials and employees who, under the AMMA, are
9 required to implement and perform administrative functions such as issuing licenses or
10 permits for marijuana distribution centers. Intervention is proper because Maricopa
11 County and its employees must comply in their own unique ways with the AMMA when
12 it goes into effect.

13 **IV. Conclusion**

14 For the stated reasons, County Intervenors respectfully requests that this Court
15 grant them leave to intervene in the main action under Fed.R.Civ.P. 24(b)(1)(B) and/or

16 ///
17 ///
18 ///
19 ///
20 ///
21 ///
22 ///

1 24(b)(2). County Intervenors' motion is timely, their intervention will not prejudice any
2 parties herein, and their claim shares with the main action a common question of law
3 and/or fact.

4 RESPECTFULLY SUBMITTED this 14th day of July 2011.

5 WILLIAM G. MONTGOMERY
6 MARICOPA COUNTY ATTORNEY

7 BY: /s William G. Montgomery
8 WILLIAM G. MONTGOMERY
9 Attorneys for Plaintiffs Intervenor
10 Maricopa County and Joy Rich

11 CERTIFICATE OF SERVICE

12 I hereby certify that on July 14th 2011, I caused the foregoing document to be
13 electronically transmitted to the Clerk's Office using the CM/ECF System for filing and
14 transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

15 Honorable Susan Bolton
16 United States District Court
17 Sandra Day O'Connor U.S. Courthouse
18 401 West Washington Street, Suite 322, SPC 11
19 Phoenix, Arizona 85003-2120

20 Aubrey Joy Corcoran
21 Kevin D. Ray
22 Lori Simpson Davis
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007
*Attorneys for Plaintiffs State of Arizona,
Janice K. Brewer, William Humble,
Robert C. Halliday*

Scott Michelman
American Civil Liberties Union Foundation
1101 Pacific Avenue, Suite 333
Santa Cruz, CA 95060
Attorney for Defendant Arizona Medical

1 *Marijuana Association*

2 Daniel J. Pochoda
3 ACLU Foundation of Arizona
4 77 E. Columbus Street, Suite 205
5 Phoenix, AZ 85012
6 *Attorney for Defendant Arizona Medical
7 Marijuana Association*

8 Lisa T. Hauser
9 Cameron C. Artigue
10 Gammage & Burnham
11 Two North Central, 15th Floor
12 Phoenix, AZ 85004
13 *Attorney for Defendant Arizona Medical
14 Marijuana Association*

15 Thomas W. Dean
16 P.O. Box J
17 Flagstaff, AZ 86002
18 *Attorney for Defendant Arizona Association
19 Of Dispensary Professionals*

20 Ken Frakes
21 Rose Law Group, PC
22 6613 N. Scottsdale Road, Suite 200
Scottsdale, AZ 85250
*Attorneys for Defendants Serenity Arizona,
Holistic Health Management, Levine,
Pennypacker, Flores, Christensen,
Pollock and Silva*

and copy delivered by U.S. mail and
electronic mail to:

Scott Risner
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20001
21 Email: Scott.Risner@usdoj.gov

22 /s/ _____