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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13 STATE OF ARIZONA, et al.,
14
15 Plaintiffs,

16 vs.

17
18 UNITED STATES OF AMERICA, et al.,
19
20 Defendants.

Case No. 11-CV-01072-PHX-SRB

**PLAINTIFFS’ RESPONSE IN
OPPOSITION TO DEFENDANTS’
MOTION TO DISMISS**

(Honorable Susan R. Bolton)

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22 COME NOW the Plaintiffs State of Arizona (“the State”); Janice K. Brewer, Governor of the
23 State of Arizona, in her Official Capacity; Will Humble, Director of Arizona Department of Health
24 Services, in his Official Capacity (“Director Humble”); and Robert C. Halliday, Director of Arizona
25 Department of Public Safety, in his Official Capacity (collectively “Plaintiffs”), through undersigned
26 counsel, and hereby submit their Response in Opposition to the “Defendants’ Motion to Dismiss for
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1 Lack of Jurisdiction and Failure to State a Claim, With Memorandum of Points and Authorities”
2 (hereinafter “Motion to Dismiss” or “Motion”).

3 **INTRODUCTION**

4 The United States Supreme Court has long recognized that “federal law is as much the law of
5 the several States as are the laws passed by their legislatures. Federal and state law ‘together form one
6 system of jurisprudence, which constitutes the law of the land for the State’” *Haywood v. Drown*,
7 129 S. Ct. 2108, 2114 (2009). However, a controversy arises when federal and state laws are in
8 disharmony and expose the citizenry to serious criminal sanction. This is the conflict faced by the
9 Plaintiffs herein.¹ Plaintiffs are duty bound to implement a valid law passed by initiative of the people
10 of the State of Arizona,² but in doing so, without a guaranteed safe harbor from prosecution, Plaintiffs
11 may expose themselves and everyone involved in the implementation of this law to federal
12 prosecution and penalties. Plaintiffs are in an untenable position which begs for the Court’s
13 intervention. The Plaintiffs have alleged an actual case or controversy of sufficient immediacy and
14 reality to warrant the issuance of a declaratory judgment. For this reason, the Court should deny the
15 Defendants’ Motion to Dismiss.

16 **STATEMENT OF FACTS**

17 On November 2, 2010, Arizona voters were asked to consider whether the State should
18 decriminalize medical marijuana. Proposition 203, an initiative measure identified as the “Arizona
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23 ¹ Defendants recognize this fact in their “Introduction and Summary of Argument” wherein they state
24 that Arizona voters chose to decriminalize medical marijuana, but that “[f]ederal law forbids” its
25 possession, cultivation, transportation, and sale. (Mot. at 1.)

26 ² Contrary to the assertion of the Defendants, Plaintiffs do not ask this Court to declare its law valid or
27 invalid in light of federal law. (Mot. at 7.)

1 Medical Marijuana Act” (“the Act” or “AMMA”), envisioned decriminalizing medical marijuana
2 under state law for use by people with certain chronic and debilitating medical conditions. The
3 AMMA only creates exceptions to the criminal statutes for certain individuals and entities: registered
4 qualifying patients, registered designated caregivers, registered dispensary agents working in a
5 registered nonprofit medical marijuana dispensary, and registered nonprofit medical marijuana
6 dispensaries. A.R.S. § 36-2801. Individuals who engage in activities that are not in strict compliance
7 with the AMMA are still subject to prosecution under Arizona’s criminal statutes and federal laws.
8

9 Under the Act, qualifying patients are able to receive up to 2 ½ ounces of marijuana every two
10 weeks from medical marijuana dispensaries or to cultivate their own plants under certain conditions.
11 Proposition 203 provided that its purpose “is to protect patients with debilitating medical conditions,
12 as well as their physicians and providers, from arrest and prosecution, criminal and other penalties and
13 property forfeiture if such patients engage in the medical use of marijuana.” Proposition 203 § 2(G)
14 (2010).
15

16 The Act also requires the Arizona Department of Health Services (the “ADHS”) to be
17 responsible for implementing and overseeing the Act. Specifically, the Act provides for the
18 registration and certification by the ADHS of nonprofit medical marijuana dispensaries, nonprofit
19 medical marijuana dispensary agents, qualifying patients, and designated caregivers. A.R.S. § 36-
20 2801, *et seq.*
21

22 On April 14, 2011, the ADHS began accepting applications from persons who sought to be
23 registered as qualifying patients and designated caregivers. That registration process continues and as
24 of July 28, 2011, the ADHS has registered 8,670 qualifying patients and 347 designated caregivers.
25 The ADHS was scheduled to begin accepting applications for nonprofit medical marijuana
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1 dispensaries and nonprofit medical marijuana dispensary agents on June 1, 2011. However, on May
2 27, 2011, the ADHS suspended the application process for nonprofit medical marijuana dispensaries
3 and nonprofit medical marijuana dispensary agents. Consequently, there are currently no registered
4 nonprofit medical marijuana dispensaries or nonprofit medical marijuana dispensary agents in the
5 state.
6

7 Federal law categorizes marijuana as a Schedule I controlled substance, pursuant to the
8 Controlled Substances Act (“CSA”), 21 U.S.C.A. § 801, *et seq.* United States law enforcement
9 officials are authorized to arrest and prosecute individuals and businesses that grow, possess, transport,
10 or distribute marijuana. 21 U.S.C.A. § 812. The CSA further states that under federal law it is
11 unlawful to:

- 12 • manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or
13 dispense, a controlled substance. 21 U.S.C.A. § 841.
- 14 • use any communication facility to commit felony violations of the CSA. 21 U.S.C.A. §
15 843(b). A “communication facility” is defined as “any and all public and private
16 instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or
17 sounds of all kinds and includes mail, telephone, wire, radio, and all other means of
18 communication.” 21 U.S.C.A. § 843(b).
- 19 • conspire to commit any of the violations set forth in the CSA. 21 U.S.C.A. § 846.
- 20 • knowingly open, lease, rent, use, or maintain property for the manufacturing, storing, or
distribution of controlled substances. 21 U.S.C.A. § 856.

21 Moreover, other applicable federal statutes state that it is unlawful to:

- 22 • aid and abet the commission of a federal crime. 18 U.S.C.A. § 2.
- 23 • conspire to commit an offense against the United States. 18 U.S.C.A. § 371.
- 24 • assist an offender thereby becoming an accessory to a crime. 18 U.S.C.A. § 3.
- 25 • conceal knowledge of a felony from the United States. 18 U.S.C.A. § 4.

1 Since the release of the Ogden Memo, citizens, business entities, and state entities have
2 operated under the guidelines and assumptions of the Ogden Memo in making their business and
3 medical decisions. The principles of the Ogden Memo, however, have been systematically modified
4 by a series of letters from U.S. Attorneys in various states, which has had a negative effect and created
5 uncertainty as to the application of federal law to state medical marijuana programs. One such letter
6 from the U.S. Attorneys for the State of Washington to the Governor of Washington directly
7 commented upon the liability of state workers implementing the state’s proposed medical marijuana
8 laws by stating that “*state employees* who conducted activities mandated by the Washington legislative
9 proposals *would not be immune from liability under the CSA.*” Letter from U.S. Attorney Durkan and
10 U.S. Attorney Ormsby to Christine Gregoire, Governor of Washington (Apr. 14, 2011) (emphasis
11 added) (Dkt. 1-2 at 2-4). As a result, the Governor of Washington vetoed the proposed legislation on
12 medical marijuana, stating that the Washington Bill:
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15 would direct employees of the state departments of Health and Agriculture to
16 authorize and license commercial businesses that produce, process or dispense
17 cannabis. These sections would open public employees to federal prosecution,
18 and the *United States Attorneys have made it clear that state law would not
19 provide these individuals safe harbor from federal prosecution. No state
20 employee should be required to violate federal criminal law in order to fulfill
21 duties under state law.*

22 Governor Gregoire Veto Message Re: S.B. 507, 62d Leg., Reg. Sess. (2011) (attached hereto as
23 Exhibit A) (emphasis added). Thereafter, Governor Gregoire issued the following Press Release:

24 I asked the Legislature to work with me on a bill that does not subject state
25 workers to risk of criminal liability. I am disappointed that the bill as passed does
26 not address those concerns while also meeting the needs of medical marijuana
27 patients. I will review the bill to determine any parts that can assist patients in
need without putting state employees at risk. No state employee should have to
break federal law in order to do their job.

1 See Press Release, Christine Gregoire, Veto of Medical Marijuana Bill (Apr. 21, 2011) (emphasis
2 added) (attached hereto as Exhibit B).

3 The requirements that would have been placed upon Washington state employees to authorize
4 and license business entities to produce, process, and dispense marijuana are substantially similar to
5 the requirements that are currently imposed upon the ADHS' employees.³ During the 2011 Regular
6 Session, the Washington State Legislature passed Senate Bill 5073. See S.B. 5073, 62d Leg., Reg.
7 Sess. (Wash. 2011) (hereinafter "Washington Bill") (attached hereto as Exhibit C). The purpose of the
8 Washington Bill was, *inter alia*, to amend the state's medical marijuana act to license marijuana
9 producers, processors, and dispensaries. Senate Bill Report: E2SSB 5073, 62d Leg., Reg. Sess. 3-4
10 (Wash. Apr. 11, 2011) (attached hereto as Exhibit D). Under the proposed statutory sections,
11 employees at the Washington Department of Agriculture would have been required to license
12 producers and processors of cannabis products while employees of the Washington Department of
13 Health would have been required to license marijuana dispensaries. *Id.* at 3; S.B. 5073 §§ 603, 702.

14 Both the AMMA and the Washington Bill require state employees to implement and
15 administer the respective laws, A.R.S. § 36-2803; S.B. 5073 §§ 603, 702, to register or license the
16 entities authorized to cultivate and dispense marijuana, A.R.S. § 36-2804; S.B. 5073 §§ 603, 702, to
17 adopt rules regarding safety and security features, A.R.S. § 36-2803; S.B. 5073 §§ 608, 702, to set
18 application and renewal requirements including fees, A.R.S. §§ 36-2803; S.B. 5073 §§ 608, 702, to
19 establish the maximum number of dispensaries permitted, A.R.S. § 36-2804; S.B. 5073 § 702, to

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24 ³ One exception, however, is that the AMMA permits nonprofit medical marijuana dispensaries to
25 produce, process, and dispense medical marijuana, A.R.S. § 36-2801(11); whereas, the Washington
26 State Legislature contemplated a licensing scheme wherein three different types of businesses would be
27 responsible for these activities, S.B. 5073 § 201(12)-(14).

1 establish selection criteria for dispensaries, A.R.S. § 36-2804; S.B. 5073 § 702, to create and maintain
2 a verification system, A.R.S. § 36-2807; S.B. 5073 § 901, and maintain confidential records, A.R.S. §
3 36-2810; S.B. 5073 § 902. In addition to the above requirements, the Washington Bill would have
4 required licensed processors to submit lab reports regarding the grade, condition, cannabinoid profile,
5 and THC concentration of the marijuana grown to the Washington Department of Agriculture. S.B.
6 5073 § 604. The Washington Department of Agriculture would have also been permitted to contract
7 with a cannabis analysis laboratory to conduct independent testing. *Id.* § 605. Like the AMMA, the
8 Washington Bill did not require any state employees to come into possession of marijuana.
9

10 In support of their argument that this Court should not consider the Washington policy
11 regarding federal liability of state employees implementing Washington’s medical marijuana laws,
12 Defendants cite an East Valley Tribune article that quotes Washington U.S. Attorney Ormsby as
13 saying “[t]he Washington law had state employees involved in a number of different inspection and
14 grading functions.” (Mot. at 10, citing Howard Fischer, *Federal Prosecutor: Brewer, Horne, Twisting*
15 *Medical Marijuana Memo*, East Valley Tribune.com, May 26, 2011,
16 [http://www.eastvalleytribune.com/arizona/politics/article_62e3877a-87ee-11e0-95eb-](http://www.eastvalleytribune.com/arizona/politics/article_62e3877a-87ee-11e0-95eb-001cc4c03286.html)
17 [001cc4c03286.html](http://www.eastvalleytribune.com/arizona/politics/article_62e3877a-87ee-11e0-95eb-001cc4c03286.html)) (attached hereto as Exhibit E). The reporter goes on to state that the state
18 employees were required to handle the marijuana. That statement is simply false. The provisions of
19 the Washington Bill that *required* state employee involvement in inspections and grading (Sections
20 604 and 608) did not require employees to come into possession of marijuana.⁴ Additionally, in citing
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24 ⁴ The Washington Bill, Section 604, stated “[o]n a schedule determined by the department of
25 agriculture, licensed producers and licensed processors must submit representative samples of cannabis
26 grown or processed *to a cannabis analysis laboratory* for grade, condition, cannabinoid profile, THC
27 concentration, other qualitative measures of cannabis intended for medical use, and other inspection
standards determined by the department of agriculture.” (emphasis added). Section 608 only required

1 to this quote from the Washington U.S. Attorney, Defendants incorrectly imply that Arizona state
2 employees are not involved in inspection functions when they clearly are. Under the AMMA, the
3 ADHS is tasked with inspecting nonprofit medical marijuana dispensaries. A.R.S. §§ 36-2806(H), 36-
4 2811(E); *see also* A.A.C. R9-17-309.

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6 Noting the heightened exposure of state employees to criminal liability under the CSA,
7 Director Humble requested that the U.S. Attorney’s Office for Arizona clarify the issue of federal
8 criminal liability of Arizona state employees who, in the process of doing their jobs, potentially would
9 be violating federal laws. The U.S. Attorney for the District of Arizona, Dennis Burke (“U.S.
10 Attorney Burke”), subsequently prepared and directed a letter to Director Humble regarding the U.S.
11 Attorney’s position with regard to the enforcement of the CSA and the State’s new medical marijuana
12 laws. (Dkt. 1-2 at 6-7.) U.S. Attorney Burke advised Director Humble that the growing, distribution,
13 and possession of marijuana “in any capacity, other than as part of a federally authorized research
14 program, is a violation of federal law regardless of State laws that purport to legalize such activities.”
15 (*Id.* at 6.) He further stated that his office will continue to vigorously prosecute individuals and
16 organizations that participate in unlawful manufacturing, distributing, and marketing activities
17 involving marijuana, even if such activities are permitted under state law. (*Id.*) Importantly, the U.S.
18 Attorney wrote that “compliance with Arizona laws and regulations does not provide a safe harbor,
19 nor immunity from federal prosecution.” (*Id.* at 7.) Despite Director Humble’s specific prior request
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22 the director of the department of agriculture to adopt rules “[o]n the inspection or grading and
23 certification of grade, grading factors, condition, cannabinoid profile, THC concentration, or other
24 qualitative measurement of cannabis intended for medical use that must be used *by cannabis analysis*
25 *laboratories* in section 604 of this act.” (emphasis added). Additionally, under section 605, the
26 Washington Department of Agriculture was permitted to *contract* with “a cannabis analysis laboratory
27 to conduct independent inspection and testing of cannabis samples.” None of these provisions required
state employees to come into possession of marijuana.

1 for clarification on the issue of state employee liability, the U.S. Attorney's letter was silent on that
2 issue. That silence, especially when taken in conjunction with the affirmative statements therein, as
3 well as with other federal government pronouncements on marijuana, speaks volumes.

4 Under the CSA, state employees implementing the AMMA and others acting in compliance
5 with the law are at risk of federal criminal prosecution as well as other civil and criminal penalties.
6 Therefore, on May 27, 2011, Plaintiffs filed an action in this Court seeking clarification regarding the
7 interplay and apparent conflict between the newly implemented AMMA and the CSA.
8

9 More recently, the United States House of Representatives Committee on the Judiciary asked
10 U.S. Attorney General Holder to respond to its questions regarding "the [DOJ's] inconsistent
11 enforcement of the CSA and its contradictory directives to states with medical marijuana laws." Letter
12 from Lamar Smith, Chairman, House Judiciary Committee and F. James Sensenbrenner, Jr.,
13 Chairman, Subcommittee on Crime, Terrorism and Homeland Security to Eric H. Holder, Jr., U.S.
14 Attorney General (June 15, 2011) (attached hereto as Exhibit F). That Committee letter specifically
15 mentioned the State of Arizona's lawsuit against the federal authorities seeking a declaration of rights
16 as to State employees and others acting in compliance under the AMMA.
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18 Following the House Judiciary Committee's letter, the DOJ released another memorandum
19 which appears to place the activities of state workers implementing state medical marijuana laws right
20 in the crosshairs of federal prosecutors. (Dkt. 31-2 at 5-6.) Specifically, the DOJ memorandum states:
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22 The Department's view of the efficient use of limited federal resources as
23 articulated in the Ogden Memorandum has not changed. There has, however,
24 been an increase in the scope of commercial cultivation, sale, distribution and use
25 of marijuana for purported medical purposes. For example, within the past 12
26 months, several jurisdictions have considered or enacted legislation to authorize
27 multiple large-scale, privately-operated industrial marijuana cultivation centers.
Some of these planned facilities have revenue projections of millions of dollars
based on the planned cultivation of tens of thousands of cannabis plants.

1 The Ogden Memorandum was never intended to shield such activities from
2 federal enforcement action and prosecution, even where those activities purport to
3 comply with state law. Persons who are in the business of cultivating, selling or
4 distributing marijuana, and those who knowingly facilitate such activities, are in
5 violation of the Controlled Substances Act, regardless of state law. Consistent
6 with resource constraints and the discretion you may exercise in your district,
7 such persons are subject to federal enforcement action, including potential
8 prosecution. State laws or local ordinances are not a defense to civil or criminal
9 enforcement of federal law with respect to such conduct, including enforcement
10 of the CSA.

11 *Id.* (emphasis added).

12 Approximately one week prior to the issuance of DOJ's most recent memo, the U.S. Drug
13 Enforcement Agency ("DEA") issued a letter denying a nine year old petition to reschedule marijuana
14 under the CSA. Federal Register Proposed Rule Regarding the Denial of Petition to Initiate
15 Proceedings to Reschedule Marijuana, at 40,552 (July 8, 2011) (attached hereto as Exhibit G.) In that
16 June 21, 2011 letter, which is contained within the Proposed Rule, the DEA held that marijuana "has
17 no currently accepted medical use in treatment in the United States." *Id.* The letter also affirmed that
18 "marijuana continues to meet the criteria for schedule I control under the CSA." *Id.* Based on the
19 foregoing, to conclude that state employees are not at risk of federal prosecution for their role in
20 implementing the State's medical marijuana laws is simply denying the obvious.

21 LEGAL STANDARD

22 Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for the dismissal of claims for
23 "lack of subject-matter jurisdiction." Challenges to subject matter jurisdiction can be "facial" or
24 "factual." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts
25 that the allegations contained in a complaint are insufficient on their face to invoke federal
26 jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by
27

1 themselves, would otherwise invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d
2 1035, 1039 (9th Cir. 2004). Here, because the defendants assert a facial Rule 12(b)(1) challenge, the
3 Court must presume Arizona’s factual allegations are true and draw all reasonable inferences in
4 Arizona’s favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).

5
6 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a pleading that
7 fails “to state a claim upon which relief can be granted.” An adequately stated legal claim may be
8 supported by showing any set of facts consistent with the allegations in the claim. *Bell Atlantic Corp.*
9 *v. Twombly*, 550 U.S. 544, 561, 127 S. Ct. 1955, 1968 (2007). A Rule 12(b)(6) motion to dismiss
10 must be denied if, taking all factual allegations in the complaint as true and making all reasonable
11 inferences in the plaintiff’s favor, the complaint states a plausible claim for legal relief. *Ashcroft v.*
12 *Iqbal*, 129 S. Ct. 1937, 1949 (2009). Before a complaint is dismissed, “leave to amend should be
13 granted unless the court determines that the allegation of other facts consistent with the challenged
14 pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*,
15 806 F.2d 1393, 1401 (9th Cir. 1986) (citations omitted).

17 ARGUMENT

18 **I. PLAINTIFFS HAVE ESTABLISHED ARTICLE III STANDING**

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20 Plaintiffs have brought this action pursuant to the Declaratory Judgment Act, 28 U.S.C.A. §
21 2201. The Declaratory Judgment Act provides an additional remedy but does not add to the
22 jurisdiction of the District Courts. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40, 57 S. Ct.
23 461, 463 (1937). Plaintiffs must establish a case or controversy to have standing under Article III of
24 the Constitution before the case may be adjudicated. *Covington v. Jefferson County*, 358 F.3d 626,
25 637 (9th Cir. 2004). “Basically, the question in each case is whether the facts alleged, under all the
26

1 circumstances, show that there is a substantial controversy, between parties having adverse legal
2 interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”
3 *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 127 S. Ct. 764, 771 (2007) (quoting
4 *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512 (1941)). “At
5 the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may
6 suffice, for on a motion to dismiss, [courts] presume that general allegations embrace those specific
7 facts that are necessary to support the claim.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112
8 S. Ct. 2130, 2137 (1992) (internal citation and quotations omitted). “At bottom, ‘the gist of the
9 question of standing’ is whether petitioners have ‘such a personal stake in the outcome of the
10 controversy as to assure that concrete adverseness which sharpens the presentation of issues upon
11 which the court so largely depends for illumination.’” *Massachusetts v. EPA*, 549 U.S. 497, 517, 127
12 S. Ct. 1438, 1453 (2007).⁵

15 The United States Supreme Court has consistently stated that “where threatened action by
16 *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing
17 suit to challenge the basis for the threat.” *MedImmune*, 549 U.S. at 128-29, 127 S. Ct. at 772
18 (emphasis in original). “The rule that a plaintiff must destroy a large building, bet the farm, or . . . risk
19 treble damages and the loss of 80 percent of its business before seeking a declaration of its actively
20 contested legal rights finds no support in Article III.” *Id.*, 549 U.S. at 134, 127 S. Ct. at 775.

24 ⁵ The decision to exercise jurisdiction in a declaratory judgment action is made at the discretion of the
25 district court. *McGraw-Edison Co v. Preformed Line Prods. Co.*, 362 F.2d, 339, 342 (9th Cir. 1966). The
26 Court’s decision must have a “sound basis”. *California v. Oroville-Wyandotte Irrigation Dist.*, 409 F.2d
27 532, 535 (9th Cir. 1969).

1 Where there is a conflict between federal and state law, and this conflict negatively impacts a
2 state’s interests, Article III standing can be conferred. *Oregon v. Ashcroft*, 192 F.Supp.2d 1077, 1087
3 (D. Or. 2002), *aff’d on other grounds*, 368 F.3d 1118 (9th Cir. 2004), *cert. granted*, 543 U.S. 1145,
4 125 S. Ct. 1299 (2005). In *Oregon*, there was a conflict between the Oregon Death with Dignity Act
5 and a directive issued by the then Attorney General, John Ashcroft (the “Ashcroft Directive”). The
6 Oregon Death with Dignity Act provided a detailed procedure by which a mentally competent,
7 terminally ill patient could make a written request for medication to end his or her life. Physicians and
8 pharmacists were immune from civil and criminal liability, or from any adverse disciplinary action for
9 prescribing medication under the Oregon Act. *Oregon*, 192 F. Supp. 2d at 1081-82. In contrast, the
10 Ashcroft Directive declared that controlled substances could not be dispensed to assist suicide,
11 prescribing or administering federal controlled substances to assist suicide violated the Controlled
12 Substances Act, and physicians who prescribed or administered federally controlled substances were
13 subject to suspension or revocation of their registration. *Id.* at 1079. Thus, the Ashcroft Directive
14 essentially nullified the Oregon Act. *Id.* The court concluded that Oregon met the constitutional
15 requirements for standing by showing a sufficient injury to its sovereign and legitimate interest in the
16 continued enforceability of its own statutes. *Id.* at 1087. In reaching this conclusion, the court did not
17 require evidence or allegations of the federal government actually attempting to enforce its laws
18 against the state. The mere conflict between state and federal law, and thus, the state’s consequent
19 inability to enforce its own laws, was sufficient to demonstrate an injury for standing purposes.
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23 Here, there is a very real and present danger of federal prosecution for the State to implement
24 the AMMA which has forced the Plaintiffs to seek declaratory judgment from this Court. Defendants
25 assert that “there is no conflict between state and federal law here, as it is possible to comply with both
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1 state and federal law.” (Mot. at 2-3.) However, without a safe harbor from prosecution for state
2 workers implementing the AMMA, under the existing federal criminal laws as more fully set forth
3 herein, there is no absolute protection from being prosecuted by federal authorities. As such, there is a
4 controversy between the Plaintiffs and Defendants suitable for declaratory judgment.
5

6 Furthermore, while it is true that crimes such as conspiracy and aiding and abetting are specific
7 intent crimes, the fact that a person may not have possessed the requisite *mens rea* for the crime would
8 only be a *defense* to a prosecution. It would not ensure that the person would not be charged and
9 prosecuted. A state employee charged with such crimes would then have to hire their own counsel and
10 defend the charges in the hopes of an acquittal, which also would not be guaranteed. To ask state
11 employees who merely need to do their jobs in implementing the AMMA to risk financial, emotional,
12 and personal devastation based upon the current climate of prosecutorial discretion is unconscionable
13 and unreasonable. As such, the controversy the Plaintiffs find themselves embroiled in begs the Court
14 for a determination of the rights and responsibilities of the parties.
15

16 **II. PLAINTIFFS ARE ENTITLED TO DECLARATORY JUDGMENT WITHOUT** 17 **RISKING FEDERAL PROSECUTION**

18 Federal courts may grant a declaratory judgment to any party seeking clarification of their
19 rights and legal obligations. *See MedImmune*, 549 U.S. at 126, 127 S. Ct. at 771; *N.A.A.C.P., W.*
20 *Region v. City of Richmond*, 743 F.2d 1346, 1351 (9th Cir. 1984). The purpose of declaratory
21 judgment is to provide a remedy to individuals uncertain of their rights, afraid to act in a manner that
22 will incur legal peril, and desirous of adjudication before they may be sued or criminally prosecuted.
23 *McGraw-Edison Co.*, 362 F.2d at 342 (9th Cir. 1966); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739,
24 745 (1973) (noting that “[parties] should not be required to await and undergo a criminal
25 prosecution”). The two principles guiding the Court in rendering a declaratory judgment are: “(1)
26
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1 [w]hen the judgment will serve a useful purpose in clarifying and settling the legal relations in issue,
2 and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving
3 rise to the proceeding.” *McGraw-Edison*, 362 F.2d at 342; *Los Angeles Cnty. Bar Ass’n v. Eu*, 979
4 F.2d 697, 703 (9th Cir. 1992).

5 “Federal courts may declare [the] rights and duties of litigants before a law is violated.”
6 *N.A.A.C.P.*, 743 F.2d at 1351 (citing 10A Wright, Miller & Cooper, *Federal Practice and Procedure* §
7 2757 at 582-83). The legislative history of the Declaratory Judgment Act, 28 U.S.C. § 2201,
8 recognizes that the declaratory judgment procedure is “an alternative to pursuit of the arguably illegal
9 activity.” *Steffel v. Thompson*, 415 U.S. 452, 479-80, 94 S. Ct. 1209, 1226 (1974) (concurring
10 opinion). Specifically, the report accompanying the Senate version of the bill stated:
11

12 The procedure has been especially useful in avoiding the necessity, now so often
13 present, of having to act at one’s peril or to act on one’s own interpretation of his
14 rights, or abandon one’s rights because of a fear of incurring damages. So now it
15 is often necessary, in the absence of the declaratory judgment procedure, to
16 violate or purport to violate a statute in order to obtain a judicial determination of
17 its meaning or validity....Persons now often have to act at their peril, a danger
which could be frequently avoided by the ability to sue for a declaratory judgment
as to their rights or duties.

18 *Id.* at 479-80 n.1 (citing S. Rep. No. 1005, 73d Cong., 2d Sess., 2-3 (1934). Indeed, the dichotomy of
19 abandoning rights or risking prosecution is “a dilemma that it was the very purpose of the Declaratory
20 Judgment Act to ameliorate.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 152, 87 S. Ct. 1507, 1517 (1967)
21 (finding plaintiffs’ issues fit for judicial resolution under the Declaratory Judgment Act, and rejecting
22 the DOJ’s contention that the threat of criminal sanctions for noncompliance with a federal regulation
23 was “unrealistic”).
24

25 A case or controversy justifying declaratory relief exists “when the challenged government
26 activity is not contingent, has not evaporated or disappeared, and, by its continuing and brooding
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1 presence, casts what may well be a substantial adverse effect on the interests of the petitioning
2 parties.” *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008). The plaintiff must show that “he is
3 seriously interested in subjecting himself to, and the defendant [is] seriously intent on enforcing, the
4 challenged measure.” *N.A.A.C.P.*, 743 F.2d at 1351. To evaluate the credibility of a threat of
5 prosecution, the courts consider three factors: (1) “whether the plaintiffs have articulated a ‘concrete
6 plan’ to violate the law in question,” (2) “whether the prosecuting authorities have communicated a
7 specific warning or threat to initiate proceedings,” and (3) “the history of past prosecution or
8 enforcement under the challenged statute.” *Thomas v. Anchorage Equal Rights Comm’n.*, 220 F.3d
9 1134, 1139 (9th Cir. 2000) (en banc) (examining a pre-enforcement challenge to a statute, and the
10 requirement that there be a credible threat of prosecution). “[A] reasonable threat of prosecution, for
11 standing purposes, dispenses with any ripeness problem.” *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1156
12 (9th Cir. 2000).

15 In the case at bar, the people of the State of Arizona passed a law, the AMMA, decriminalizing
16 and regulating medical marijuana, which law is now in effect. In order to avoid potential federal
17 criminal penalties, the issuance of dispensary applications has been stayed. Based upon the federal
18 government’s stated intention to vigorously prosecute even those persons who are operating in
19 compliance with state law, and the raids undertaken in other states, it is clear that the federal
20 government’s threat of enforcement of the CSA is “far from hypothetical or abstract.” *See N.A.A.C.P.*,
21 743 F.2d at 1351.

23 Furthermore, the federal government has refused to provide immunity or safe harbor for those
24 state workers working to implement the AMMA in strict compliance with the AMMA. Because of the
25 requirements placed on the ADHS’ employees by the AMMA, there is a concrete plan under which the
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1 employees are required to act and which may also violate federal law.⁶ Furthermore, it is clear from
2 every letter issued by the DOJ that it is comfortable making proclamations that it will not prosecute
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5 ⁶ For example, as part of the registration process, the ADHS must administer the medical marijuana fund
6 consisting of application and renewal fees paid to the ADHS to cover the cost of implementing and
7 administering the AMMA. A.R.S. §§ 36-2803; 36-2817. Additionally, because the AMMA limits the
8 number of dispensaries that are permitted to operate in the State, the ADHS must also determine which
9 dispensary applicants will be issued registration certificates. A.R.S. § 36-2408. The ADHS is further
10 required to establish and maintain a web-based verification system so that, *inter alia*, nonprofit medical
11 marijuana dispensaries can verify registry identification cards and enter into the system the amount of
12 marijuana being dispensed. A.R.S. §§ 36-2801(16); 36-2806.02; 36-2807. All information obtained by
13 the ADHS in administering the AMMA is considered confidential. A.R.S. § 36-2810. Employees may
14 only notify law enforcement about suspected falsified or fraudulent information or apparent criminal
15 violations, and then they may only notify local or state law enforcement. *Id.* Any ADHS employee or
16 agent who breaches the AMMA’s confidentiality requirement is subject to criminal prosecution. A.R.S.
17 § 36-2816 (“It is a class 1 misdemeanor for any person, including an employee or official of the
18 Department or another state agency or local government, to breach the confidentiality of information
19 obtained pursuant to this chapter.”).

20 Each of these requirements could potentially violate federal law and subject the ADHS’
21 employees to a threat of prosecution. First, because under the AMMA, the ADHS and its employees
22 must register all nonprofit medical marijuana dispensaries, there is a concrete plan to facilitate the
23 nonprofit medical marijuana dispensaries’ handling of medical marijuana, and potentially violate the
24 CSA. The employees are further implicated by the fact that they are not simply registering all applicants
25 that meet minimal criteria, but are instead are involved in selecting which applicants will be permitted to
26 operate. Thus, it is only through the involvement of the ADHS’ employees that nonprofit medical
27 marijuana dispensaries are able to operate and potentially violate the CSA. Consequently, if the ADHS’
employees fulfill their duties under the AMMA, they face the threat of prosecution for aiding and
abetting the nonprofit medical marijuana dispensaries’ unlawful activities. By receiving application and
renewal fees or donations, ADHS’ employees are engaging in financial transactions that arguably
promote illegal activities. All monies received into the medical marijuana fund are intended to promote
the continued administration of the AMMA, including, what the federal government has deemed to be,
the unlawful operations of the nonprofit medical marijuana dispensaries.

Establishing, using, and maintaining the web-based verification system would also potentially
subject the ADHS’ employees to federal prosecution. The web-based verification system is a
communication facility and, under the AMMA, its use is required during the transfer of marijuana.

1 patients. However, when faced with the question of whether state employees could be prosecuted for
2 implementing state medically marijuana laws it has conspicuously kept silent, except when
3 definitively stating that Arizona state employees “*can’t be under the impression that they have*
4 *immunity, amnesty or safe haven,*” Mary K. Reinhart, *Arizona to Sue Over Medical Marijuana Law*,
5 *The Arizona Republic*, May 27, 2011, at B1 *available at*
6 <http://www.azcentral.com/news/election/azelections/articles/2011/05/27/20110527arizona-medical->
7 [marijuana-federal-lawsuit.html](http://www.azcentral.com/news/election/azelections/articles/2011/05/27/20110527arizona-medical-) (emphasis added) (attached hereto as Exhibit H), and that Washington
8 state employees would be subject to prosecution.⁷ With Washington’s medical marijuana laws in
9 congruence with the AMMA, the imminence of the threat of federal prosecution to Arizona workers is
10 palpable. There is clearly a credible threat of prosecution looming over those implementing the
11 AMMA which presents a justiciable case or controversy. *See Holder v. Humanitarian Law Project*,
12 130 S. Ct. 2705, 2717 (2010) (finding plaintiffs’ claims suitable for judicial review, stating that the
13 government “has not argued to this Court that plaintiffs will not be prosecuted if they do what they say
14 they wish to do.”).

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18 Because the transfer of marijuana is considered a felony violation under the CSA, the ADHS’ employees
19 could be implicated in using a communication facility to violate the CSA.

20 Finally, because the ADHS’ employees are required to keep confidential all information
21 pertaining the implementation and administration of the AMMA, the employees potentially could be
22 subject to federal prosecution for concealing from the United States, knowledge of felony offenses.

23 ⁷ Citing news articles, Defendants assert that U.S. Attorney Burke has expressed his office’s position that
24 state employees are safe from prosecution. (Mot. at 11.) However, they fail to state United States
25 Attorney Burke’s full comments. While United States Attorney Burke is quoted as saying “[w]e have no
26 intention of targeting or going after people who are implementing or who are in compliance with state
27 law,” he goes on to say “[b]ut at the same time, *they can’t be under the impression that they have*
immunity, amnesty or safe haven.” (Exhibit H) (emphasis added). Clearly, his comments can offer no
piece of mind to state employees fearing federal prosecution.

1 Given the limited number of states with licensed dispensaries, the fact that state employees
2 have not *yet* been prosecuted is certainly no reliable predictor of future inaction by the federal
3 government. Of the sixteen states that have adopted some type of medical marijuana law (Alaska,
4 Arizona, California, Colorado, Delaware, Hawaii, Maine, Maryland, Michigan, Montana, Nevada,
5 New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington) only half have statutory
6 schemes that permit the operation of dispensaries (California, Colorado, Delaware, Maine, New
7 Mexico, New Jersey, and Rhode Island). And of those that allow dispensaries to operate, California
8 does not require registration at the state level, and Arizona, Delaware, New Jersey, and Rhode Island
9 do not yet have active dispensaries. Obviously, this area is novel and developing, and as such, the
10 Plaintiffs need the Court to provide certainty and predictability through declaratory judgment.
11

12 Even if there were no threat of prosecution under the CSA, declaratory judgment nevertheless
13 could be granted by this Court. *See, e.g., Lake Carriers' Ass'n. v. MacMullan*, 406 U.S. 498, 506-08,
14 92 S. Ct. 1749, 1755-56 (1972); *Bolton*, 410 U.S. at 188-89, 93 S. Ct. at 745-76. In *Lake Carriers'*
15 *Association*, there was no specific threat or actual prosecution. 410 U.S. at 506-07, 92 S. Ct. at 1755.
16 There, the plaintiffs were challenging a state law that mandated the installation of sewage storage
17 devices. *Id.* The petitioners requested relief from the obligation since the requirement might be
18 preempted by federal regulations. *Id.* 410 U.S. at 507, 92 S. Ct. at 1755. The defendants argued, and
19 the District Court agreed, that the plaintiffs were seeking an advisory opinion, and that no case or
20 controversy existed because the Michigan authorities had not threatened criminal prosecutions. *Id.*,
21 410 U.S. at 505, 92 S. Ct. at 1754. However, the United States Supreme Court disagreed with the
22 District Court. *Id.*, 410 U.S. at 506, 92 S. Ct. at 1755. The Court explained that “if appellants are now
23 under such an obligation [to install sewage storage devices pursuant to state law], that in and of itself
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1 makes their attack on the validity of the law a live controversy, and not an attempt to obtain an
2 advisory opinion.” *Id.*, U.S. 410 at 507, 92 S. Ct. at 1755. “[T]he absence of an immediate threat of
3 prosecution does not argue against reaching the merits of [plaintiffs’] complaint.” *Id.*, U.S. at 509, 92
4 S. Ct. at 1757.

5
6 Similarly, in *Bolton*, physicians performing certain types of abortion were at risk of
7 prosecution pursuant to a Georgia criminal statute. 410 U.S. at 188, 93 S. Ct. at 745-46. This statute
8 was the successor of an earlier law under which doctors had been prosecuted. *Id.* However, no doctors
9 had been prosecuted, nor had any been threatened, under the newer statute. *Id.*, 410 U.S. at 189, 93 S.
10 Ct. at 746. The United States Supreme Court held that the looming peril of prosecution was sufficient
11 to confer standing and a justiciable case or controversy by the physicians seeking declaratory
12 judgment. *Id.*

13
14 Here, the DOJ has had multiple opportunities to clearly state its position regarding prosecution
15 of state employees for performing their duties under state medical marijuana laws. Yet, at nearly
16 every opportunity, the federal government has left the door to prosecution open, leaving states to
17 implement their laws at their, and their employees’, own peril. This kind of cat and mouse game
18 should not be tolerated in a sovereign society operating under “one system of jurisprudence.” *See*
19 *Haywood*, 129 S. Ct. at 2114.

20 21 **CONCLUSION**

22 Based upon the foregoing, the Court should deny the Defendants’ Motion to Dismiss and
23 thereby allow this case to be heard on the merits.

1 Dated this 8th day of August, 2011.

2 THOMAS C. HORNE
3 Attorney General

4 /s Lori S. Davis

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6 Lori S. Davis
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1 **CERTIFICATE OF SERVICE**

2 I certify that I electronically transmitted the attached document to the Clerk's Office
3 using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the
4 following, if CM/ECF registrants, and mailed a copy of same to any non-registrants, this 8th
5 day of August, 2011 to:

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