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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants.	Case No. 11-CV-01072-PHX-SRB **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** (Honorable Susan R. Bolton)

COME NOW the Plaintiffs State of Arizona ("the State"); Janice K. Brewer, Governor of the State of Arizona, in her Official Capacity; Will Humble, Director of Arizona Department of Health Services, in his Official Capacity ("Director Humble"); and Robert C. Halliday, Director of Arizona Department of Public Safety, in his Official Capacity (collectively "Plaintiffs"), through undersigned counsel, and hereby submit their Response in Opposition to the "Defendants' Motion to Dismiss for

Lack of Jurisdiction and Failure to State a Claim, With Memorandum of Points and Authorities" (hereinafter "Motion to Dismiss" or "Motion").

INTRODUCTION

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

STATEMENT OF FACTS

On November 2, 2010, Arizona voters were asked to consider whether the State should decriminalize medical marijuana. Proposition 203, an initiative measure identified as the "Arizona

[1] Defendants recognize this fact in their "Introduction and Summary of Argument" wherein they state that Arizona voters chose to decriminalize medical marijuana, but that "[f]ederal law forbids" its possession, cultivation, transportation, and sale. (Mot. at 1.)

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

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

Under the Act, qualifying patients are able to receive up to 2 ½ ounces of marijuana every two weeks from medical marijuana dispensaries or to cultivate their own plants under certain conditions. Proposition 203 provided that its purpose "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." Proposition 203 § 2(G) (2010).

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

On April 14, 2011, the ADHS began accepting applications from persons who sought to be registered as qualifying patients and designated caregivers. That registration process continues and as of July 28, 2011, the ADHS has registered 8,670 qualifying patients and 347 designated caregivers. The ADHS was scheduled to begin accepting applications for nonprofit medical marijuana

dispensaries and nonprofit medical marijuana dispensary agents on June 1, 2011. However, on May 27, 2011, the ADHS suspended the application process for nonprofit medical marijuana dispensaries and nonprofit medical marijuana dispensary agents. Consequently, there are currently no registered nonprofit medical marijuana dispensaries or nonprofit medical marijuana dispensary agents in the state.

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

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

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

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

- make certain financial transactions designed to promote illegal activities or to conceal or disguise the source of the proceeds of that illegal activity. 18 U.S.C.A. § 1956.

Under these laws, the federal government has the power to seek civil injunctions, civil fines, criminal prosecution, and prison sentences. 21 U.S.C. § 844(a). The federal government may also seek forfeiture of all property used or intended for use in connection with drug trafficking, including real property, motor vehicles, funds, and other property. 21 U.S.C. § 881. The federal government may also initiate criminal proceedings under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. § 1962. *See United States v. Hocking*, 860 F.2d 769 (7th Cir. 1988) ("governmental or public entities fit within the definition of 'enterprise' for purposes of RICO"). All property constituting or derived, directly or indirectly, from the proceeds of racketeering activities is subject to forfeiture. 18 U.S.C. § 1963(a). The RICO statute also gives rise to a civil cause of action which may be brought by a private citizen injured by the racketeering activity where such activity proximately caused the injury. 18 U.S.C. § 1964.

Prior communications by the United States Department of Justice ("DOJ") have made it clear that there are conflicts between the DOJ's interpretations of the CSA, 21 U.S.C.A. § 801, *et seq.*, and the AMMA. Beginning on October 19, 2009, David W. Ogden, Deputy Attorney General for the DOJ, issued to all United States Attorneys a "Memorandum for Selected United States Attorneys" regarding investigations and prosecutions in states authorizing the medical use of marijuana ("Ogden Memo"). (Dkt. 1-2 at 9-11.) The Ogden Memo states, *inter alia*, that "[a]s a general matter, pursuit of these priorities [of prosecuting marijuana traffickers] should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." (*Id.* at 9-10.)

Since the release of the Ogden Memo, citizens, business entities, and state entities have operated under the guidelines and assumptions of the Ogden Memo in making their business and medical decisions. The principles of the Ogden Memo, however, have been systematically modified by a series of letters from U.S. Attorneys in various states, which has had a negative effect and created uncertainty as to the application of federal law to state medical marijuana programs. One such letter from the U.S. Attorneys for the State of Washington to the Governor of Washington directly commented upon the liability of state workers implementing the state's proposed medical marijuana laws by stating that "*state employees* who conducted activities mandated by the Washington legislative proposals *would not be immune from liability under the CSA*." Letter from U.S. Attorney Durkan and U.S. Attorney Ormsby to Christine Gregoire, Governor of Washington (Apr. 14, 2011) (emphasis added) (Dkt. 1-2 at 2-4). As a result, the Governor of Washington vetoed the proposed legislation on medical marijuana, stating that the Washington Bill:

> would direct employees of the state departments of Health and Agriculture to authorize and license commercial businesses that produce, process or dispense cannabis. These sections would open public employees to federal prosecution, and the ***United States Attorneys have made it clear that state law would not provide these individuals safe harbor from federal prosecution. No state employee should be required to violate federal criminal law in order to fulfill duties under state law***.

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

> I asked the Legislature to work with me on a bill that does not subject state workers to risk of criminal liability. I am disappointed that the bill as passed does not address those concerns while also meeting the needs of medical marijuana 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.

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

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

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

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

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

In support of their argument that this Court should not consider the Washington policy regarding federal liability of state employees implementing Washington's medical marijuana laws, Defendants cite an East Valley Tribune article that quotes Washington U.S. Attorney Ormsby as saying "[t]he Washington law had state employees involved in a number of different inspection and grading functions." (Mot. at 10, citing Howard Fischer, *Federal Prosecutor: Brewer, Horne, Twisting Medical Marijuana Memo*, East Valley Tribune.com, May 26, 2011, http://www.eastvalleytribune.com/arizona/polictics/article_62e3877a-87ee-11e0-95eb-001cc4c03286.html) (attached hereto as Exhibit E). The reporter goes on to state that the state employees were required to handle the marijuana. That statement is simply false. The provisions of the Washington Bill that *required* state employee involvement in inspections and grading (Sections 604 and 608) did not require employees to come into possession of marijuana.[4] Additionally, in citing

[4] The Washington Bill, Section 604, stated "[o]n a schedule determined by the department of agriculture, licensed producers and licensed processors must submit representative samples of cannabis grown or processed *to a cannabis analysis laboratory* for grade, condition, cannabinoid profile, THC 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

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

Noting the heightened exposure of state employees to criminal liability under the CSA, Director Humble requested that the U.S. Attorney's Office for Arizona clarify the issue of federal criminal liability of Arizona state employees who, in the process of doing their jobs, potentially would be violating federal laws. The U.S. Attorney for the District of Arizona, Dennis Burke ("U.S. Attorney Burke"), subsequently prepared and directed a letter to Director Humble regarding the U.S. Attorney's position with regard to the enforcement of the CSA and the State's new medical marijuana laws. (Dkt. 1-2 at 6-7.) U.S. Attorney Burke advised Director Humble that the growing, distribution, and possession of marijuana "in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of State laws that purport to legalize such activities." (*Id.* at 6.) He further stated that his office will continue to vigorously prosecute individuals and organizations that participate in unlawful manufacturing, distributing, and marketing activities involving marijuana, even if such activities are permitted under state law. (*Id.*) Importantly, the U.S. Attorney wrote that "compliance with Arizona laws and regulations does not provide a safe harbor, nor immunity from federal prosecution." (*Id.* at 7.) Despite Director Humble's specific prior request

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the director of the department of agriculture to adopt rules "[o]n the inspection or grading and certification of grade, grading factors, condition, cannabinoid profile, THC concentration, or other qualitative measurement of cannabis intended for medical use that must be used *by cannabis analysis laboratories* in section 604 of this act." (emphasis added). Additionally, under section 605, the Washington Department of Agriculture was permitted to *contract* with "a cannabis analysis laboratory to conduct independent inspection and testing of cannabis samples." None of these provisions required state employees to come into possession of marijuana.

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

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

More recently, the United States House of Representatives Committee on the Judiciary asked U.S. Attorney General Holder to respond to its questions regarding "the [DOJ's] inconsistent enforcement of the CSA and its contradictory directives to states with medical marijuana laws." Letter from Lamar Smith, Chairman, House Judiciary Committee and F. James Sensenbrenner, Jr., Chairman, Subcommittee on Crime, Terrorism and Homeland Security to Eric H. Holder, Jr., U.S. Attorney General (June 15, 2011) (attached hereto as Exhibit F). That Committee letter specifically mentioned the State of Arizona's lawsuit against the federal authorities seeking a declaration of rights as to State employees and others acting in compliance under the AMMA.

Following the House Judiciary Committee's letter, the DOJ released another memorandum which appears to place the activities of state workers implementing state medical marijuana laws right in the crosshairs of federal prosecutors. (Dkt. 31-2 at 5-6.) Specifically, the DOJ memorandum states:

> The Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. There has, however, been an increase in the scope of commercial cultivation, sale, distribution and use of marijuana for purported medical purposes. For example, within the past 12 months, several jurisdictions have considered or enacted legislation to authorize 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.

> The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may 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.

Id. (emphasis added).

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

LEGAL STANDARD

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

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

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

ARGUMENT

I. PLAINTIFFS HAVE ESTABLISHED ARTICLE III STANDING

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

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

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

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

Where there is a conflict between federal and state law, and this conflict negatively impacts a state's interests, Article III standing can be conferred. *Oregon v. Ashcroft*, 192 F.Supp.2d 1077, 1087 (D. Or. 2002), *aff'd on other grounds*, 368 F.3d 1118 (9th Cir. 2004), *cert. granted*, 543 U.S. 1145, 125 S. Ct. 1299 (2005). In *Oregon*, there was a conflict between the Oregon Death with Dignity Act and a directive issued by the then Attorney General, John Ashcroft (the "Ashcroft Directive"). The Oregon Death with Dignity Act provided a detailed procedure by which a mentally competent, terminally ill patient could make a written request for medication to end his or her life. Physicians and pharmacists were immune from civil and criminal liability, or from any adverse disciplinary action for prescribing medication under the Oregon Act. *Oregon*, 192 F. Supp. 2d at 1081-82. In contrast, the Ashcroft Directive declared that controlled substances could not be dispensed to assist suicide, prescribing or administering federal controlled substances to assist suicide violated the Controlled Substances Act, and physicians who prescribed or administered federally controlled substances were subject to suspension or revocation of their registration. *Id.* at 1079. Thus, the Ashcroft Directive essentially nullified the Oregon Act. *Id.* The court concluded that Oregon met the constitutional requirements for standing by showing a sufficient injury to its sovereign and legitimate interest in the continued enforceability of its own statutes. *Id.* at 1087. In reaching this conclusion, the court did not require evidence or allegations of the federal government actually attempting to enforce its laws against the state. The mere conflict between state and federal law, and thus, the state's consequent inability to enforce its own laws, was sufficient to demonstrate an injury for standing purposes.

Here, there is a very real and present danger of federal prosecution for the State to implement the AMMA which has forced the Plaintiffs to seek declaratory judgment from this Court. Defendants assert that "there is no conflict between state and federal law here, as it is possible to comply with both

state and federal law." (Mot. at 2-3.) However, without a safe harbor from prosecution for state workers implementing the AMMA, under the existing federal criminal laws as more fully set forth herein, there is no absolute protection from being prosecuted by federal authorities. As such, there is a controversy between the Plaintiffs and Defendants suitable for declaratory judgment.

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

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

Federal courts may grant a declaratory judgment to any party seeking clarification of their rights and legal obligations. *See MedImmune*, 549 U.S. at 126, 127 S. Ct. at 771; *N.A.A.C.P., W. Region v. City of Richmond,* 743 F.2d 1346, 1351 (9th Cir. 1984). The purpose of declaratory judgment is to provide a remedy to individuals uncertain of their rights, afraid to act in a manner that will incur legal peril, and desirous of adjudication before they may be sued or criminally prosecuted. *McGraw-Edison Co.*, 362 F.2d at 342 (9th Cir. 1966); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 745 (1973) (noting that "[parties] should not be required to await and undergo a criminal prosecution"). The two principles guiding the Court in rendering a declaratory judgment are: "(1)

[w]hen the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *McGraw-Edison*, 362 F.2d at 342; *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992).

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

> The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of 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.

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

A case or controversy justifying declaratory relief exists "when the challenged government activity is not contingent, has not evaporated or disappeared, and, by its continuing and brooding

presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008). The plaintiff must show that "he is seriously interested in subjecting himself to, and the defendant [is] seriously intent on enforcing, the challenged measure." *N.A.A.C.P.*, 743 F.2d at 1351. To evaluate the credibility of a threat of prosecution, the courts consider three factors: (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n.*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (examining a pre-enforcement challenge to a statute, and the requirement that there be a credible threat of prosecution). "[A] reasonable threat of prosecution, for standing purposes, dispenses with any ripeness problem." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1156 (9th Cir. 2000).

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

Furthermore, the federal government has refused to provide immunity or safe harbor for those state workers working to implement the AMMA in strict compliance with the AMMA. Because of the requirements placed on the ADHS' employees by the AMMA, there is a concrete plan under which the

employees are required to act and which may also violate federal law.[6] Furthermore, it is clear from every letter issued by the DOJ that it is comfortable making proclamations that it will not prosecute

[6] For example, as part of the registration process, the ADHS must administer the medical marijuana fund consisting of application and renewal fees paid to the ADHS to cover the cost of implementing and administering the AMMA. A.R.S. §§ 36-2803; 36-2817. Additionally, because the AMMA limits the number of dispensaries that are permitted to operate in the State, the ADHS must also determine which dispensary applicants will be issued registration certificates. A.R.S. § 36-2408. The ADHS is further required to establish and maintain a web-based verification system so that, *inter alia*, nonprofit medical marijuana dispensaries can verify registry identification cards and enter into the system the amount of marijuana being dispensed. A.R.S. §§ 36-2801(16); 36-2806.02; 36-2807. All information obtained by the ADHS in administering the AMMA is considered confidential. A.R.S. § 36-2810. Employees may only notify law enforcement about suspected falsified or fraudulent information or apparent criminal violations, and then they may only notify local or state law enforcement. *Id.* Any ADHS employee or agent who breaches the AMMA's confidentiality requirement is subject to criminal prosecution. A.R.S. § 36-2816 ("It is a class 1 misdemeanor for any person, including an employee or official of the Department or another state agency or local government, to breach the confidentiality of information obtained pursuant to this chapter.").

Each of these requirements could potentially violate federal law and subject the ADHS' employees to a threat of prosecution. First, because under the AMMA, the ADHS and its employees must register all nonprofit medical marijuana dispensaries, there is a concrete plan to facilitate the nonprofit medical marijuana dispensaries' handling of medical marijuana, and potentially violate the CSA. The employees are further implicated by the fact that they are not simply registering all applicants that meet minimal criteria, but are instead are involved in selecting which applicants will be permitted to operate. Thus, it is only through the involvement of the ADHS' employees that nonprofit medical 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.

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

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

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

[7] Citing news articles, Defendants assert that U.S. Attorney Burke has expressed his office's position that state employees are safe from prosecution. (Mot. at 11.) However, they fail to state United States Attorney Burke's full comments. While United States Attorney Burke is quoted as saying "[w]e have no intention of targeting or going after people who are implementing or who are in compliance with state 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.

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

Even if there were no threat of prosecution under the CSA, declaratory judgment nevertheless could be granted by this Court. *See, e.g.*, *Lake Carriers' Ass'n. v. MacMullan,* 406 U.S. 498, 506-08, 92 S. Ct. 1749, 1755-56 (1972); *Bolton*, 410 U.S. at 188-89, 93 S. Ct. at 745-76. In *Lake Carriers' Association*, there was no specific threat or actual prosecution. 410 U.S. at 506-07, 92 S. Ct. at 1755. There, the plaintiffs were challenging a state law that mandated the installation of sewage storage devices. *Id.* The petitioners requested relief from the obligation since the requirement might be preempted by federal regulations. *Id.* 410 U.S. at 507, 92 S. Ct. at 1755. The defendants argued, and the District Court agreed, that the plaintiffs were seeking an advisory opinion, and that no case or controversy existed because the Michigan authorities had not threatened criminal prosecutions. *Id.*, 410 U.S. at 505, 92 S. Ct. at 1754. However, the United States Supreme Court disagreed with the District Court. *Id.*, 410 U.S. at 506, 92 S. Ct. at 1755. The Court explained that "if appellants are now under such an obligation [to install sewage storage devices pursuant to state law], that in and of itself

makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion." *Id.*, U.S. 410 at 507, 92 S. Ct. at 1755. "[T]he absence of an immediate threat of prosecution does not argue against reaching the merits of [plaintiffs'] complaint." *Id.*, U.S. at 509, 92 S. Ct. at 1757.

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

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

CONCLUSION

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

Dated this 8th day of August, 2011.

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CERTIFICATE OF SERVICE

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

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