Ezekiel R. Edwards (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor; New York, NY 10004
(212) 549-2610 *edwards@aclu.org*

Daniel J. Pochoda (SBA No. 021979)
ACLU FOUNDATION OF ARIZONA
77 E. Columbus St. Ste. 205; Phoenix, AZ 85012
(602) 650-1854 *dpochoda@acluaz.org*

Lisa T. Hauser (SBA No. 006985)
Cameron C. Artigue (SBA No. 011376)
GAMMAGE & BURNHAM
Two North Central, 15th Fl.; Phoenix, AZ 85004
(602) 256-0566 *lhauser@gblaw.com*

Counsel for Defendant Arizona Medical Marijuana Association

Thomas W. Dean (SBA No. 015700)
Post Office Box J; Flagstaff, AZ 86002
(928) 247-6132 *attydean@gmail.com*

Counsel for Defendant Arizona Association of Dispensary Professionals, Inc.

Ken Frakes (SBA No. 021776)
Rose Law Group, PC
6613 N. Scottsdale Rd., Ste. 200
Scottsdale, AZ 85250
(480) 505-3931
KFrakes@roselawgroup.com

Counsel for Defendants Joshua Levine, Paula Pennypacker, Nicholas Flores, Jane Christensen, Paula Pollack, Serenity Arizona, Inc.; Holistic Health Management, Inc.; and Jeff Silva

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA; JANICE K. BREWER; WILL HUMBLE; ROBERT C. HALLIDAY,
Plaintiffs,
v.
UNITED STATES; U.S. DEP'T OF JUSTICE; ERIC H. HOLDER; DENNIS K. BURKE; ARIZ. ASS'N OF DISPENSARY PROFESSIONALS, INC.; JOSHUA LEVINE; PAULA PENNYPACKER; NICHOLAS FLORES; JANE CHRISTENSEN; PAULA POLLOCK; SERENITY ARIZONA, INC.; HOLISTIC HEALTH MGMT, INC.; JEFF SILVA; ARIZ. MEDICAL MARIJUANA ASS'N; DOES I-XX,
Defendants.

No. CV-11-01072-PHX-SRB
Hon. Susan R. Bolton

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM, WITH MEMORANDUM OF POINTS AND AUTHORITIES

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Other Authorities

Rules

INTRODUCTION AND SUMMARY OF ARGUMENT

More telling than what Arizona's brief says is what it does not say. In response to Defendants' ripeness argument, Arizona noisily protests that its officials face a "real and present danger" of federal prosecution. But this response, even if creditable, leaves the rest of Defendants' jurisdictional and substantive arguments unanswered. Arizona still refuses to take sides in this lawsuit, fails to explain how its claim is anything but a request for an advisory opinion on the validity or invalidity of state law, continues its attempt to use what is, at most, a political controversy as a stand-in for an Article III controversy, and relies on events in another state to hypothesize that a concrete threat of federal prosecution of state officials exists in Arizona – despite contrary evidence.

Even were this Court to have jurisdiction, Arizona fails to respond in any but the most conclusory manner to Defendants' arguments that it has failed to state a cognizable claim. Instead, Arizona continues to ask for either of two legally impossible declarations: that the AMMA provides safe harbor from federal prosecution or that federal law preempts the AMMA. The former is unattainable, as well as unnecessary, given that state officials can enforce the AMMA harmoniously with federal law. The latter is incorrect, as federal law does not preempt the AMMA under either conflict or obstacle preemption. All Arizona says in support of preemption is that because certain conduct permitted under state law is illegal under federal law, the state law must be preempted. The complex and delicate balance between state and federal authority, as well as states' sovereign ability to enact their own criminal codes, cannot be so blithely dismissed. But

beyond its conclusory statement, Arizona makes no further argument on this score, leaving Defendants' substantive analysis unchallenged.

Arizona's silence in the face of Defendants' Article III and Fed. R. Civ. P. 12(b)(6) arguments speaks loudly both to the absence of a genuine and concrete controversy between Plaintiffs and Defendants, as well as to the implausibility of its legal claims. For these reasons, this Court should dismiss this case.

ARGUMENT

I. Arizona Fails To Rebut the Charge That Its Lawsuit Is An Impermissible Request For An Advisory Opinion, Nor Has It Demonstrated The Suit Is Ripe.

A. Contrary To Arizona's Misconception, An Article III Controversy Is Not Created Whenever State And Federal Law Differ In Substance.

Arizona bases its defense of federal jurisdiction on an incorrect premise: that "a controversy arises when federal and state laws are in disharmony and expose the citizenry to serious criminal sanction." (Pls.' Resp. 2, hereinafter "Resp."). Arizona's conception of a justiciable controversy differs sharply from the actual Article III definition. Under Arizona's watered-down interpretation, a "controversy" would arise whenever one party raised a constitutional claim involving another party. This would dilute the independent constitutional requirement of a case or controversy to mere abstract "arguments." As Chief Justice Marshall once explained, "[i]f the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision." 4 Papers of John Marshall 95 (C. Cullen ed.1984) (quoted in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)).

Moreover, it is a well-settled principle of our constitutional framework that state and federal laws need not mirror each other. (Defs.' Br. in Supp. of Its Mot. to Dismiss 17, hereinafter "Mot."). Legal acts under state law may "expose the citizenry," Resp. 2, to criminal sanction under federal law. Thus, "[m]uch as the federal government may prefer that [states] keep medical marijuana illegal, it cannot force [them] to do so." *Conant v. Walters*, 309 F.3d 629, 645 (9th Cir. 2002) (Kozinski, J., concurring) (footnote omitted). Arizona claims Defendants "recognize" its "conflict" by acknowledging that federal law forbids what the AMMA allows. Resp. 2 n.1. But recognition that laws differ is not recognition of an Article III controversy. Simply put, "conflicting" state and federal laws do not give rise to a conflict under Article III. Thus, Arizona's decriminalization of what Congress criminalizes does not make federal court adjudication appropriate.

Plaintiffs cite *Haywood v. Drown*, 129 S. Ct. 2108 (2009), a suit brought under 18 U.S.C. § 1983 for damages, for the simple proposition that state citizens are bound by both state and federal laws. Resp. 2. But obligation to two sets of laws does not require such laws to be in concordance, *see Printz v. United States*, 521 U.S. 898 (1997), or that whenever difference exists, an Article III controversy emerges. Plaintiffs also point to *Oregon v. Ashcroft*, 192 F.Supp.2d 1077 (D. Or. 2002), to suggest that a federal-state law conflict that "negatively impacts a state's interest" creates Article III standing. Resp. 14-15. But *Oregon* did not announce, nor does there exist, a "negative impact" test for Article III controversies. Rather, *Oregon* held that the CSA does not prohibit medical practitioners from prescribing and dispensing controlled substances in compliance with

state law. *Id*. at 1092. In that case, in responding to the U.S. Attorney General's clear directive to prosecute physicians complying with Oregon's assisted suicide statute, the State, doctors, and patients sought to enjoin their adversary from enforcing its directive. Unlike here, the conflict in *Oregon* was not merely between laws, but between adverse parties. Plaintiffs were not a neutral party seeking an advisory opinion but antagonists asserting interests diametrically opposed to Defendants and seeking legally permissible relief in the face of Defendants' specific intent to prosecute. Therefore, Plaintiff's reliance on *Oregon* for the proposition that "mere conflict" between state and federal law meets Article III's high threshold is misplaced.

B. Plaintiffs Are Still Not Adverse To Any Other Party In This Suit.

Given another opportunity to stake out a position in its own lawsuit, Arizona has chosen – without explanation – to remain indifferent to the merits outcome of this case. Rather than rebut Defendants' argument that Arizona must pick a side to create a justiciable controversy, Arizona appears content to play sideline spectator. Yet a necessary element of an Article III controversy is opposing parties with adverse legal interests. "[T[he adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict *between antagonistic* demands[.]" *Poe v. Ullman*, 367 U.S. 497, 503 (1961)(emphasis added). Arizona has not assumed an antagonistic stance *towards* any of the Defendants, but rather relies on policy disagreements *amongst* Defendants. Arizona's posture "disclose[s] a want of a truly adversary contest, of a collision of actively asserted and differing claims," *Id*. at 505, making this case exactly the kind that courts "refus[e] to entertain." *Id*. Without a "lively conflict" between

Arizona and any named defendants, this Court should do the same.

C. Plaintiffs Ignore Controlling Case Law And Instead Offer A Conclusory Denial In Response To Defendants' Argument That The State Cannot Use Federal Court Either To Validate Or Invalidate State Law.

In response to Defendants' argument that state officials cannot use federal courts as vehicles to uphold or strike down their own laws, Arizona simply states that it seeks to do neither. Resp. 2, n.2. However, Arizona has asked that "[t]he Court declare the respective rights and duties of the Plaintiffs and the Defendants regarding *the validity,* enforceability, and implementation of the AMMA." Compl., Prayer for Relief ¶ A. Furthermore, Arizona has pitted DOES I-X against DOES XI-XX on the basis that the former "assert that the AMMA is a *valid and enforceable law*" and the latter "assert that the AMMA is … *not a valid and enforceable law . . . .*" Compl. ¶¶ 55-56 (emphases added). Indeed, Arizona appears to have defined its hypothetical parties in this manner in an attempt to manufacture an Article III controversy over the validity of the AMMA.

Conspicuously, Plaintiffs completely avoid Defendants' discussion of two controlling cases, *Republican Party of Guam v. Gutierrez,* 277 F.3d 1086 (9th Cir. 2002), and *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 21 (1983). As the Supreme Court stated in *Franchise Tax Bd.,* "a State's suit for a declaration of the validity of state law is sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction ... that …such a suit is not within the original jurisdiction of the United States district courts." *Id*. at 21-22. *Guam* and *Franchise Tax Bd.* explicitly rejected the type of challenge that Arizona raises here. Arizona, however, ignores these cases.

Moreover, either of the flawed declarations Arizona seeks (preemption or "safe harbor") would bear directly on the validity of state law. No matter how Arizona attempts to characterize its suit, it cannot obscure its objective.

Plaintiffs similarly do not attempt to repair another defect in their lawsuit: state officials lack standing to challenge a state statute's constitutionality when they are not adversely affected and their interest in the litigation is official, rather than personal. Mot. 8-9. Here, Plaintiffs have only official – not personal – interest in the validity or invalidity of state law. Plaintiffs' personal interest is in establishing that the state law's responsibilities do not violate federal law. But this is not the relief Plaintiffs seek. Therefore, Plaintiffs do not have standing.

D. Plaintiffs Cannot Point To A Concrete Threat Of Prosecution For Implementation Of The AMMA, And Therefore This Suit Remains Unripe.

In lieu of responding to each of Defendants' jurisdictional arguments, Arizona focuses almost exclusively on ripeness. Resp. 5-11, 13-15, 17-21. But as evidence that Arizona officials face a real threat of prosecution, Plaintiffs point first not to events in Arizona, but Washington.[1] Resp. 6-9. To establish ripeness, Arizona must do more than substitute another state's laws and circumstances for its own. Indeed, the U.S. Attorney's statements in Arizona demonstrate that the federal government will not prosecute state officials complying with the AMMA.

[1] Arizona also discusses letters sent by U.S. Attorneys to the governors of numerous other medical marijuana states. Compl. ¶¶ 116-162. While those letters name myriad specific targets for prosecution, not one implicates state officials. Similarly, the most recent DOJ memo says nothing about the prosecution of state officials. *See* Memo. of Deputy Att'y Gen. James M. Cole (June 29, 2011), *available at* http://www.aclu.org/files/drugpolicy/june_2011_guidance_regarding_medical_mariju.pdf

As Defendants have already detailed, Mot. 10-11, the U.S. Attorney in Arizona, Dennis Burke, made clear that his omission of state employees from the categories of persons subject to federal prosecution was purposeful. Compl. ¶ 25 & Ex. B. Nonetheless, Arizona stubbornly suggests that the *exclusion* of state officials should be read, in fact, as their *inclusion*.[2] Furthermore, while Arizona acknowledges Burke's clear statement that he will not prosecute anyone "implementing" or "in compliance with" state law, it says state officials cannot have "piece [sic] of mind" because of Burke's refusal to proclaim a "safe haven." Resp. 19, n.7. Putting aside that "peace of mind" is not a measure of Article III ripeness, Burke's reminder that state law cannot immunize federal law violations does not alter or confuse his declaration that he will not prosecute state employees.

Plaintiffs analogize their position to that of drug manufacturers facing federal regulations for all prescription drugs in *Abbott Laboratories v. Gardner*, 387 U. S. 136, 154 (1967), abrogated by *Califano v. Sanders*, 430 U.S. 99, 105 (1977). Resp. 16. But in *Abbott*, "the regulation [wa]s directed at [petitioners] in particular . . . [and] if they fail[ed] to observe the Commissioner's rule they [we]re quite clearly exposed to the imposition of strong sanctions." *Id*. Here federal law could not be invoked against Plaintiffs, nor has the DOJ stated an intention to prosecute Plaintiffs. Plaintiffs also cite *Lake Carriers' Ass'n. v. MacMullan*, 406 U.S. 498 (1972), and *Doe v. Bolton*, 410 U.S. 179 (1973), for the proposition that declaratory judgment need not be preceded by specific threat of or actual prosecution. Resp. 20-21. But in *Lake Carriers' Ass'n.*,

[2] Arizona also ignores Burke's explanation that this omission was intentional and meant to signal that state officials will not be prosecuted. Mot. 10-11.

where plaintiffs operating via federal law challenged burdensome state law requirements, state officials had indicated that noncompliance would result in future prosecution and conceded that a "'concrete confrontation'" had arisen. *Lake Carriers' Ass'n.*, 406 U.S. at 507-508. *Bolton* involved the challenge by doctor-plaintiffs to an abortion statute where doctors had been prosecuted under the predecessor statute. *Bolton*, 410 U.S. at 188-189.

The threat of prosecution of state officials implementing the AMMA remains, at best, speculative. Moreover, even if it concrete, it would not cure Arizona's lawsuit of its other jurisdictional ailments.

II. Arizona Offers Only Conclusory Statements Without Supporting Authority In Support Of Preemption, And Its New Theories Of How AMMA Implementation Might Violate Federal Law Are Incorrect.

A. Arizona's Conclusory Statements Do Not Demonstrate That The AMMA Requires State Officials To Violate Federal Law.

Defendants established that none of the AMMA's requirements conflict with the federal laws cited by Arizona. Mot. 12-15. Thus, it is possible for state officials to comply with both. In response, Arizona ignores Defendants' provision-by-provision analysis, again simply recites federal law and the AMMA, and concludes, without supporting authorities, that AMMA enforcement "may," "arguably," or "could potentially" violate federal law. Resp. at 18, n.6. But a viable preemption claim requires more than listing laws' provisions and concluding sans analysis or supporting authority that compliance with both is impossible. *See Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir.1994).

B. When Performing Their Duties Under The AMMA, State Officials Do Not Violate the Additional Federal Laws Plaintiffs Cite.

Arizona has added to its laundry list of federal statutes that it hypothesizes might criminalize state officials' AMMA obligations. Resp. 5. None of the cited statutes actually does this. Under 21 U.S.C. § 844(a), the federal government can seek civil injunctions and fines, criminal prosecution, and prison sentences against those who knowingly and intentionally *possess* a controlled substance. But the AMMA does not require state officials to possess medical marijuana. Pursuant to 21 U.S.C. § 881(a), the federal government can seek forfeiture of all property used or intended for use in connection with drug trafficking. However, the AMMA does not require state officials to use any type of property to possess, manufacture, use, or distribute marijuana. As for the seizure of AMMA funds, at most the federal government could require the state to relinquish such monies. But this would not subject state officials to prosecution. As the Supreme Court stressed in *U.S. v. Ursery*, 518 U.S. 267, 288-289 (1996)(holding that 21 U.S.C. § 881 and 18 U.S.C. § 981 are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause), Congress intended 21 U.S.C. § 881 proceedings to be civil, not criminal. As such, 21 U.S.C. § 881 actions are in rem proceedings against the property, not against any in personam defendant. *Id*. Simply because the federal government might initiate in rem proceedings against a state fund does not criminalize the creation and administration of the fund pursuant to state law.

Arizona alleges that AMMA implementation would expose state employees to criminal and civil liability under Racketeer Influenced and Corrupt Organizations ("RICO") laws. Specifically, it raises 18 U.S.C. §§ 1962 ("Prohibited acts"), 1963(a)

("Forfeiture"), and 1964 ("Civil remedies"). 18 U.S.C. § 1962 outlines the criminal liabilities of RICO based on "racketeering activity" as defined in 18 U.S.C. § 1961(1). The potentially pertinent substantive offenses are 18 U.S.C. § 1961(1)(B) and (D). Under 18 U.S.C. § 1961(1)(B)'s list of Title 18 provisions, potentially relevant are §§ 1956 (laundering of monetary instruments) and 1957 (engaging in monetary transactions in property derived from specified unlawful activity). As Defendants have addressed, Mot. 14-15, 18 U.S.C. § 1956 requires knowledge of the money's unlawful origin and intent to promote or conceal the activity. Similarly, 18 U.S.C. § 1957 requires knowing engagement in a transaction involving criminally derived property. McGuinn, Money Laundering (2006) 43 Am. Crim. L. Rev. 739, 743 (McGuinn). Under the AMMA, state officials will neither know the funds' original source nor intend to promote or conceal an unlawful activity. 18 U.S.C. § 1961(1)(D) in part prohibits "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance." But the AMMA requires none of these acts. 18 U.S.C. § 1963(a) permits the federal government to initiate forfeiture proceedings against "whoever violates any provision of Section 1962," while 18 U.S.C. § 1964 provides a civil cause of action for such violations. But again, the AMMA does not require state officials to violate 18 U.S.C. § 1962. Therefore, there would be no occasion for the government to seek forfeiture under 18 U.S.C. § 1963(a) against state officials (and, again, at most forfeiture would require the relinquishment of AMMA funds) or for a private suit under 18 U.S.C. § 1964.

Arizona reiterates that state officials' establishment and maintenance of AMMA's web-based verification system pursuant to A.R.S. § 36-2801.16 "could implicate[] [them] in using a communication facility" in violation of 21 U.S.C. § 843(b). Resp. 18-19, n.6. But requiring state officials to set up and maintain an on-line database for use by nonprofit medical marijuana dispensary agents to verify and record information does not require state officials to use the database to manufacture, distribute, dispense, or possess a controlled substance.

Lastly, Arizona concedes that the federal crimes of conspiracy and aiding and abetting require specific intent, but asserts that the absence of mens rea is relevant only as a potential defense to criminal charges. Mot. 15. But why would the federal government prosecute state officials whose actions did *not* meet all elements of a federal crime? Lacking the requisite mens rea would be, first and foremost, a shield from prosecution, regardless that it could also be a trial defense. Arizona's suggestion that state officials have a credible fear of bad faith prosecution is unpersuasive.

CONCLUSION

Arizona's response fails to rehabilitate the fundamental jurisdictional flaws in its complaint for declaratory judgment. Consequently, this Court should dismiss this action for lack of jurisdiction or in the alternative for failure to state a claim upon which relief can be granted.

Dated: August 26, 2011

Respectfully Submitted,

/s/ Ezekiel Edwards
Ezekiel R. Edwards (admitted *pro hac vice*)
eedwards@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2610

Daniel J. Pochoda (SBA No. 021979)
dpochoda@acluaz.org
ACLU FOUNDATION OF ARIZONA
77 E. Columbus Street, Suite 205
Phoenix, AZ 85012
(602) 650-1854

Lisa T. Hauser (SBA No. 006985)
lhauser@gblaw.com
Cameron C. Artigue (SBA No. 011376)
cartigue@gblaw.com
GAMMAGE & BURNHAM
Two North Central, 15th Floor
Phoenix, AZ 85004
(602) 256-0566
Counsel for Defendant Arizona Medical Marijuana Association

/s/ Thomas W. Dean
Thomas W. Dean (SBA No. 015700)
attydean@gmail.com
Post Office Box J
Flagstaff, AZ 86002
(928) 247-6132
Counsel for Defendant Arizona Association of Dispensary Professionals, Inc.

/s/ Ken Frakes
Ken Frakes (SBA No. 021776)
KFrakes@roselawgroup.com
Rose Law Group, PC
6613 N. Scottsdale Road, Suite 200
Scottsdale, Arizona 85250
(480) 505-3931
Counsel for Defendants Joshua Levine, Paula Pennypacker, Dr. Nicholas Flores, Jane Christensen, Paula Pollack, Serenity Arizona, Inc.; Holistic Health Management, Inc.; and Jeff Silva

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2011, 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 ECF registrants:

Aubrey Joy Corcoran
Office of the Attorney General – Phoenix
Email: AubreyJoy.Corcoran@azag.gov

Kevin D Ray
Office of the Attorney General
Education and Health Section - Health Unit
Email: Kevin.Ray@azag.gov

Lori Simpson Davis
Office of the Attorney General
Email: Lori.Davis@azag.gov
Counsel for Plaintiffs: State of Arizona, Janice K. Brewer, William Humble, and Robert C. Halliday

Thomas P Liddy
Maricopa County Attorneys Office
Civil Services Division
Email: liddyt@mcao.maricopa.gov
Counsel for Plaintiffs: Maricopa County and Joy Rich

/s/ Ezekiel Edwards
Ezekiel Edwards (admitted *pro hac vice*)
eedwards@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2610