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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 FEDERAL 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 "Federal

Defendants' Motion to Dismiss and Memorandum of Law in Support Thereof" (Dkt. 38) (hereinafter "Motion to Dismiss" or "Motion").[1]

INTRODUCTION

No one "should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion" when the consequences are severe. *Moore v. City of E. Cleveland*, 431 U.S. 494, 513, 97 S. Ct. 1932, 1942 (1977) (quoting *Doe v. Bolton*, 410 U.S. 179, 208, 93 S. Ct. 755, 755-56 (Burger, C.J., concurring)). Here, the State of Arizona, and its officers and employees and third-parties, risk federal prosecution and asset seizure for simply doing their jobs in implementing the Arizona Medical Marijuana Act ("the Act" or "AMMA"), A.R.S. § 36-2801, *et seq.*, and for acting in strict compliance with the Act. This is the harsh reality of the Damoclean sword hanging over the heads of the Plaintiffs, compelling the Plaintiffs' plea to the Court. To suggest there is no "controversy" in this situation is to turn a blind eye to the predicament faced by the Plaintiffs and others who are in complete compliance with the AMMA, a predicament which the Federal Defendants directly and unilaterally created.

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

[1] Plaintiffs incorporate by reference herein, as if stated verbatim hereinafter, "Plaintiffs' Response in Opposition to [the non-government] Defendants' Motion to Dismiss" filed on August 8, 2011. (Dkt. 41.) As Plaintiffs set forth a comprehensive set of facts in that pleading, a recitation of the facts will not be repeated here. Additionally, Plaintiffs thoroughly addressed the issues of standing and ripeness in their prior briefing, and in the interest of economy, will not repeat those same arguments here as they are incorporated by reference. However, as prudential concerns attendant to standing and ripeness were not previously addressed, they will be discussed herein.

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 Federal Defendants assert a facial Rule 12(b)(1) challenge, the Court must presume Plaintiffs' factual allegations are true and draw all reasonable inferences in Plaintiffs' favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009). Furthermore, 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. THE COURT HAS JURISDICTION OVER THIS CONTROVERSY

A. THIS CONTROVERSY IS BASED UPON A SUBSTANTIAL FEDERAL QUESTION

Pursuant to 28 U.S.C. § 1331, this Court has jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." A case may arise under federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Franchise Tax Bd. of the State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9, 103 S. Ct. 2841, 2846 (1983). Additionally, "[f]ederal question jurisdiction exists in a declaratory judgment action if the plaintiff has alleged facts in a well-pleaded complaint which demonstrate that the defendant *could* file a coercive action arising under federal law." *Stuart Weitzman, LLC v. Microcomputer Res., Inc.*, 542 F.3d 859, 862 (11th Cir. 2008) (emphasis in original) (internal citation and quotations omitted).

Plaintiffs have alleged that the Federal Defendants[2] have refused to provide immunity or safe harbor from federal criminal prosecution to those agents of the State of Arizona implementing the AMMA, and those third-parties who are in complete compliance with the AMMA. (Dkt. 1 at 25-27, 87, 107.) Plaintiffs brought this declaratory judgment action out of great concern and trepidation that the Federal Defendants could file a coercive action arising under federal law at any time against the State or those state officers, employees, and third-parties acting in strict compliance with Arizona law. As declared above by a case cited as authoritative in the Federal Defendants' Motion, this potential threat is sufficient to establish federal question jurisdiction. (*See* Dkt. 38 at 8, citing *Stuart Weitzman*, 542 F.3d at 862.)

Furthermore, contrary to the assertion of the Federal Defendants, Plaintiffs do not seek to have this Court determine whether the AMMA is valid. Rather, Plaintiffs seek to determine *the rights and duties of the Plaintiffs and Defendants* regarding the validity, enforceability and implementation of the AMMA, and whether AMMA provides a safe harbor from federal prosecution for those acts taken in strict compliance with the AMMA. (*See* Dkt. 1 at 30.) Stated differently, in this action, Plaintiffs do not dispute that the AMMA is a validly-enacted initiative; however, Plaintiffs are gravely troubled by the imminent risk of federal prosecution, as well as the risk of asset seizure by the federal government, in the implementation of the AMMA. According to the Supreme Court, without a safe harbor from prosecution, there is absolutely no protection under existing federal criminal laws:

> [b]y classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception

[2] The United States of America, the United States Department of Justice ("DOJ"), Attorney General Eric H. Holder, and now former United States Attorney Dennis K. Burke will collectively be referred to as the "Federal Defendants" throughout this Response.

> being use of the drug as part of a Food and Drug Administration preapproved research study.

Gonzales v. Raich, 545 U.S. 1, 14, 125 S. Ct. 2195, 2204 (2005). This is the crux of the federal question spawning the controversy in which the Plaintiffs and Defendants are actively embroiled. Clearly, a federal question is presented to this Court worthy of adjudication.

B. PLAINTIFFS HAVE PLED A CASE AND CONTROVERSY

Plaintiffs have enunciated a lively conflict establishing a case and controversy more than sufficient to support jurisdiction in this Court. As this Court has recognized:

> [t]he difference between an abstract question and a controversy contemplated by the Declaratory Judgment Act is necessarily one of degree . . . . [T]he 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. If the defendant's actions cause the plaintiff to have a real and reasonable apprehension that he will be subject to liability, the plaintiff has presented a justiciable case or controversy.

Nat'l Union Fire Ins. Co. v. ESI Ergonomic Solutions, LLC, 342 F.Supp.2d 853, 862 (D. Ariz. 2004) (internal quotation marks omitted) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 61 S. Ct. 510 (1941) and *Spokane Indian Tribe v. United States*, 972 F.2d 1090 (9th Cir. 1992)).

There can be a sufficient threat of prosecution if an activity is prohibited on the face of a law, the government has announced that it considers the statute to be effective in the relevant jurisdiction, and the prosecutorial authority has specifically declined to agree not to enforce the statute. *Sable Commc'ns of Cal. v. F.C.C.*, 827 F.2d 640, 643-44 (9th Cir. 1987); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 152-54, 87 S. Ct. 1507, 1517-18 (1967) (pre-enforcement review of agency regulations is appropriate when the regulations force the

challenging party either to make substantial changes in its everyday practices or to risk strong sanctions), *overruled on other grounds by, Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 984 (1977); *see also Poe v. Ullman*, 367 U.S. 497, 507, 81 S. Ct. 1752, 1758 (1961) ("[i]f the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case . . . . ").

Similarly, the Court has also found a credible threat of prosecution based upon whether: 1) the plaintiffs intended to continue with conduct that would almost inevitably result in violating the law; 2) such violation was clearly proscribed by the law on its face; and 3) the State government had "not disavowed any intention of invoking the criminal penalty provision." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302, 99 S. Ct. 2301, 2311 (1979). Where, as in the case s*ub judice*, the government "has not disavowed any intention of invoking the criminal penalty provision," the Plaintiffs are "not without some reason in fearing prosecution for violation" of the provisions. *Id.*

> The defendants might be able to deprive plaintiffs of standing by disavowing any intention to prosecute, but they have not. The 'disavow' language in [*Babbitt*] puts the burden on the governmental entity challenging standing to 'disavow any intention' to enforce the law in the circumstances. Defendants have not disavowed any enforcement intentions; for all we know, they have a case ready to be filed as soon as our mandate issues.

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1149-50 (9th Cir. 2000) (Kleinfeld, J., dissenting).

Plaintiffs squarely meet the multi-factoral tests outlined above. The federal criminal laws are valid on their face. Indeed, the Controlled Substances Act ("CSA"), 21 U.S.C. § 812, *et seq.*, has broad reach and authority.[3] The actions to be taken by the State and its officers and

[3] The Supreme Court of the United States has examined the validity of the CSA and the breadth of its scope. *Gonzales*, 545 U.S. at 24, 125 S. Ct. at 2210 (2005). In *Gonzales*, the home-

employees will clearly expose them to federal criminal liability, and the Federal Defendants have provided no safe harbor or immunity for actions taken in strict compliance with the AMMA. If Plaintiffs should have no reasonable fear of prosecution as the Federal Defendants suggest, why did the Federal Defendants direct correspondence to the State of Arizona regarding prosecution for those who *facilitate* the dispensing of marijuana, and why won't the Federal Defendants remove all doubt and simply agree not to prosecute? The Federal Defendants have made no such offer in this case, and instead, have taken several subsequent actions keeping prosecution for violation of the CSA a reality. As such, the adversarial positions of the parties stand firm. Further, this is not a situation in which the laws on the books are stale from years of "prosecutorial paralysis," *see Poe,* 367 U.S. at 502, 81 S. Ct. at 1755, but rather, this is a novel and developing area where state law decriminalizes marijuana for certain medical reasons, while the federal government steadfastly has determined there is no medical value to marijuana and therefore it simultaneously remains illegal under the federal system and federal prosecutors continue to actively enforce the federal laws and threaten prosecution.

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cultivated marijuana plants belonging to two California medical marijuana patients were seized and destroyed by the DEA pursuant to the CSA and despite California law decriminalizing possession of marijuana for medical purposes. *Id.* at 6-7, 125 S. Ct. at 2199-2200. The patients sued for declaratory relief that the federal government could not enforce the CSA to the extent of preventing them from possessing, obtaining, or manufacturing marijuana for their personal medical use, legal under California's Compassionate Use Act of 1996, Cal. Health & Safety Code Ann. § 11362.5. *Id.* at 5-7, 125 S. Ct. at 2198-2200. The Court held that the CSA is a valid exercise of power under the Commerce Clause and that Congress may regulate interstate and local markets that have a substantial effect on interstate markets for medical marijuana. *Id.* at 9, 125 S. Ct. at 2201. The Court further stated that "[t]he regulatory scheme [of the CSA] is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project." *Id.* at 24, 125 S. Ct. at 2210.

Statements made and actions taken by the Federal Defendants have caused the Plaintiffs to have a real and reasonable apprehension of federal criminal liability. Examples of those statements and actions include, but are not necessarily limited to, the following:

- Washington U.S. Attorney Letter – Letter from the U.S. Attorneys for the State of Washington to the Governor of Washington which 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.)

- New Mexico Attorney General Letter – Letter from the Attorney General for the State of New Mexico to New Mexico Cabinet Secretary Designate Dr. Alfredo Vigil concluding that state employees may be subject to federal prosecution under the CSA. (Dkt. 1-2 at 35-37.)

- Arizona U.S. Attorney Burke Letter – Letter in which now former U.S. Attorney for the District of Arizona Dennis 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 permit such activities*." (Dkt. 1-2 at 6) (emphasis added.) U.S. Attorney Burke 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.* at 6-7.) Importantly, U.S. Attorney Burke wrote that "*compliance with Arizona laws and regulations does not provide a safe harbor, nor immunity from federal prosecution*." (*Id*. at 7) (emphasis added.) Despite Director Humble's specific prior request for clarification on the issue of state employee liability, U.S. Attorney Burke's letter was silent on that issue.

- The Cole Memorandum – A memorandum released by Deputy Attorney General James H. Cole of the DOJ ("Cole 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 Cole 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.)

- DEA Letter Denying Rescheduling of Marijuana – In the midst of the prosecution threats by the Federal Defendants, the U.S. Drug Enforcement Agency ("DEA") issued a letter on June 21, 2011, 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) (Dkt. 44-1 at 69.) In that letter, 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.*) This letter denying the rescheduling of marijuana for medical use reaffirms the Federal Defendants' intention to actively enforce the CSA as it pertains to marijuana.

- Continued Raids and Prosecutions Under the CSA – including raids upon dispensaries operated in states which have decriminalized medical marijuana.

Understandably, the statements and actions of the Federal Defendants have caused Plaintiffs to be in reasonable apprehension of federal criminal liability. As such, Plaintiffs have sought relief from this Court because the Declaratory Judgment Act "was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure or never." *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 943 (9th Cir. 1981); *Nat'l Union Fire Ins. Co.*, 342 F.Supp.2d at 862. Particularly now with the recent resignation of U.S. Attorney Burke on August 30, 2011, the purported "prosecutorial discretion" employed under the Burke administration is even more unclear, and may change completely with the appointment of a successor. This further justifies Plaintiffs' position that even if a U.S. Attorney intends to exercise his or her prosecutorial discretion to not pursue those implementing the AMMA, without an official grant of safe harbor or immunity, those intentions are changeable and uncertain, providing no sanctuary to Plaintiffs acting pursuant to state law.

The people of the State of Arizona passed the AMMA thereby decriminalizing and regulating medical marijuana. The AMMA is now in effect, but in order to avoid potential federal criminal penalties, the issuance of dispensary applications has been stayed. Plaintiffs bring this action to determine whether and to what extent the AMMA is preempted and whether and to what extent Plaintiffs and third-parties face federal criminal liability for acting in strict compliance with Arizona law.

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 under the CSA is "far from

hypothetical or abstract." *See N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1351 (9th Cir. 1984). The threat to Plaintiffs is real and imminent. As such, Plaintiffs have clearly presented a case and controversy which begs the Court for determination.

C. FEDERAL SOVEREIGN IMMUNITY DOES NOT BAR PLAINTIFFS' DECLARATORY JUDGMENT ACTION

Federal sovereign immunity does not bar Plaintiffs' claim against the Federal Defendants. Absent a waiver, sovereign immunity shields the federal government and its agencies from suit. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 1000 (1994). However, the 1976 amendment to the Administrative Procedure Act ("APA") waives sovereign immunity as to any "action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof *acted or failed to act* in an official capacity." 5 U.S.C.A. § 702 (emphasis added).

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to non-compliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance. . . .

Abbott Labs., 387 U.S. at 153, 87 S. Ct. at 1518. Avenues of relief available under the APA include declaratory judgments, injunctions, and writs of mandamus. *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 524 (9th Cir. 1989) (citing legislative history).

In *The Presbyterian Church (U.S.A.) v. United States*, federal agents conducted warrantless searches of Arizona churches and surreptitiously recorded religious proceedings in an attempt to uncover evidence of criminal activity. 870 F.2d at 520. The churches then sought declaratory judgment and injunctive relief to prohibit such surveillance in the future without first establishing probable cause or a compelling governmental interest. *Id.* at 521. In determining that sovereign immunity had been waived based on the APA, the Court emphasized Congress'

"clear objective" and how Congress was "explicit about its goals" of removing obstacles to reviewing federal conduct and making the government more accountable to citizens. *Id.* at 524. The legislative history behind the 1976 amendment further shows that the purpose of these statutory changes was to "remove technical barriers to the consideration on the merits of citizens' complaints against the Federal Government, its agencies or employees." Wright, Miller & Cooper, 14A Fed. Prac. & Proc. Juris. § 3659 (3d ed. 2011) (citing legislative history). The present action fits squarely within these parameters. Therefore, federal sovereign immunity does not bar Plaintiffs' declaratory judgment action.

Dismissal of a declaratory judgment action based upon a plaintiff's failure to expressly plead § 702 in the complaint is not appropriate where the factual allegations otherwise support jurisdiction. *See Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil and Gas Conservation*, 792 F.2d 782, 792-93 (9th Cir. 1986) (stating a complaint should not be dismissed for failure to expressly plead waiver of sovereign immunity under the APA); *Adkins v. Rumsfeld*, 450 F. Supp. 2d 440, 446 (D. Del. 2006) (allowing Air Force member to file Second Amended Complaint against the U.S. seeking declaratory relief). Here, Plaintiffs did not specifically plead the waiver of sovereign immunity under the APA in the Complaint for Declaratory Judgment, and seek leave of the Court to amend the Complaint to assert that basis for jurisdiction if the Court deems the same necessary to survive dismissal.

II. PLAINTIFFS HAVE STANDING

Plaintiffs have established standing, both constitutionally (in prior briefing) and prudentially. "[P]rudential standing concerns require that [the Court] consider . . . whether the alleged injury is more than a mere generalized grievance, whether [Plaintiffs] are asserting [their] own rights or the rights of third parties, and whether the claim falls within the zone of interests to be protected or regulated . . . . " *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009). The "zone of interest" test is "not meant to be especially demanding." *Id.*

Additionally, a state has standing when it raises claims that implicate its sovereign or quasi-sovereign interests, and lacks standing under the *parens patriae* doctrine only when it is a nominal party without a real interest on its own. *Dep't of Fair Employment & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 752 (9th Cir. 2011) (internal quotations and citations omitted). "A political body may also uniquely sue to protect its own proprietary interests that might be congruent with those of its citizens, including responsibilities, powers, and assets." *Sierra Forest Legacy v. Sherman*, Nos. 09-17796, 10-15026, 2011 WL 2041149, at *10 (9th Cir. May 26, 2011) (internal quotations and citations omitted). States have been granted standing to represent both the economic interests of their residents, as well as the health and well-being of their residents. *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970-71 (9th Cir. 2009). In the present case, all of these interests are implicated.

Here, Plaintiffs' alleged injury is more than a mere generalized grievance. Plaintiffs' complaint for declaratory judgment specifies an imminent threat of federal prosecution and asset forfeiture faced by the State and those officers and employees of the State, including Plaintiff Director Humble, acting in compliance with state law. Clearly, the concerns of prudential standing are satisfied in this case, and the State of Arizona, as *parens patriae*, has standing to represent the rights of third-parties acting in compliance with the AMMA.

III. PLAINTIFFS' CLAIMS ARE RIPE

Like standing, ripeness has a constitutional component (addressed in prior briefing) and a prudential component. *Portman v. County of Santa Clara*, 995 F.2d 898, 902-03 (9th Cir. 1993). The constitutional aspect of ripeness "focuses on whether there is sufficient injury, and thus is closely tied to the standing requirement." *Id.* On the other hand, the prudential aspect of ripeness "focuses on whether there is an adequate record upon which to base effective review." *Id.* at 903.

"In evaluating the prudential aspects of ripeness, our analysis is guided by two overarching considerations: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Thomas*, 220 F.3d at 1141 (quoting *Abbott Labs.*, 387 U.S. at 149, 87 S. Ct. at 1515). "With regard to the first inquiry, pure legal questions that require little factual development are more likely to be ripe." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996). "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989); *see also Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200-02, 103 S. Ct. 1713, 1720-21 (1983) (finding ripe a pre-enforcement challenge to statute that was purely legal, required no further factual development, and the resulting legal uncertainty placed millions of dollars in investment at risk).

"To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *US W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999). "A threat of criminal penalty is considered hardship." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1435 (9th Cir. 1996); *see also San Diego County Gun Rights Comm.*, 98 F.3d at 1132 (recognizing a threat of criminal penalty as a hardship).

In the present case, there is no further factual development necessary in order for the Court to reach a judicial determination. Indeed, the Federal Defendants raise the issue but then fail to specify exactly what additional factual development would be necessary for the Court's adjudication of the matter, arguing instead against the imminence of prosecution. (*See* Dkt. 38 at 15-17.) The specific acts to be undertaken by state workers operating in compliance with the AMMA are specifically delineated by the AMMA. The lawful conduct of third-parties in

complete compliance with the AMMA is also specific and detailed. Likewise, the federal criminal laws are well-settled. Therefore, no further factual development is necessary to make these issues fit for judicial decision, and there is no need to resort to hypothetical situations or speculation in order to reach a decision on the merits.

Further, the Plaintiffs would suffer extreme hardship if the Court were to withhold its consideration of the issues in the case. The threat of criminal penalty creates a hardship on Plaintiffs. Plaintiffs, their officers and employees, and third-parties acting in compliance with the AMMA need certainty with regard to the exposure and risk faced in implementing the AMMA. As such, the matter is ripe, both constitutionally and prudentially.

CONCLUSION

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

Dated this 31st 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 31st day of August, 2011 to:

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