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10 IN THE UNITED STATES DISTRICT COURT

11 FOR THE DISTRICT OF ARIZONA

12 STATE OF ARIZONA; JANICE K.
BREWER, *et al.*;

13 Plaintiffs,

14 v.

15 UNITED STATES OF AMERICA; *et al.*

16 Defendants.
17

NO. CV 11-01072-PHX-SRB

**PROSPECTIVE INTERVENORS’
REPLY IN SUPPORT OF MOTION
FOR ORAL ARGUMENT ON
MOTION TO INTERVENE
AND LEAVE TO FILE A BRIEF IN
OPPOSITION TO DEFENDANTS’
MOTION TO DISMISS**

18 Prospective Intervenors-Plaintiffs Maricopa County and Joy Rich (“Intervenors”)
19 hereby provide their collective Reply to Non-Government Defendants’ and Federal
20 Defendants’ separate Oppositions to Intervenors’ Motion for Oral Argument on Motion
21 to Intervene and Leave to File a Brief in Opposition to Non-Government Defendants’
22 Motion to Dismiss. Defendants’ Oppositions raise three objections in opposition to

1 Intervenor’s motions: (1) that Intervenor’s request for oral argument on their Motion to
2 Intervene is late, (2) that Intervenor’s request for leave to file a response to Non-
3 Government Defendants’ Motion to Dismiss is late, and (3) that Intervenor’s motions are
4 futile because issues pertaining to the Court’s jurisdiction compel the dismissal of the
5 State of Arizona’s underlying complaint in any event. These objections are fatally flawed
6 because they rely on an incorrect interpretation of the Rules of this Court, and because
7 they completely disregard the Intervenor’s unique position in terms of their ability to
8 fully participate in the pending litigation and have their separate position heard.

9 **A. The Court Has Discretion to Allow Intervenor’s Oral Argument**

10 Under LRCiv 7.2(f), parties typically request oral argument on a motion by
11 including the request in the caption of the motion or response thereto. However, the Rule
12 reads that the standard method for requesting oral argument shall be used, “unless
13 otherwise directed by the Court.” This gives the Court discretion as to whether and when
14 it will allow or direct the parties to present oral argument. Such discretion is necessary
15 because the Court may, for example, find that it wishes to hear oral argument on a motion
16 or legal issue even though the parties themselves have not expressly requested that they
17 be heard.

18 Such discretion is also useful where, as here, the party that initially failed to
19 request oral argument faces changed circumstances in the case, which circumstances
20 present a new and compelling reason to be heard by the Court. That compelling reason
21 arose during the December 12, 2011 hearing on the Non-Government Defendants’
22 Motion to Dismiss when the Court made specific inquiries to Plaintiff State of Arizona

1 about the jurisdictional viability of its case and the position the State was taking on the
2 question of federal preemption. The State's responses to those inquiries did not
3 adequately protect the unique interests of the County's employees for whom Intervenors
4 seek intervention. Certain issues were not addressed, or were not properly addressed, at
5 the December 12, 2011 hearing and Intervenors believe that it would benefit the Court to
6 hear Intervenors' position on those issues. As such, Intervenors are now requesting oral
7 argument on their own motion in order that they may better explain to the Court why
8 jurisdiction is proper, and why the County employees do not need to subject themselves
9 to criminal sanctions by the federal government before this Court may acquire
10 jurisdiction (explained at greater length below).

11 In addition, other reasons militate in favor of the Court granting Intervenors'
12 request for oral argument. The Court has not yet ruled on Intervenors' Motion to
13 Intervene, so Intervenors' request technically is not untimely. If oral argument would aid
14 the Court in a complete understanding of the positions of all of the parties, both actual
15 and prospective, then there is good reason for allowing oral argument before the motion
16 is ruled upon. Further, granting oral argument now will not prejudice any of the existing
17 parties since the Court also has not yet ruled on whether the State of Arizona's complaint
18 will be allowed to proceed. Under the circumstances, it would appear that allowing an as
19 yet unheard party with a substantial interest in the case to be heard could only aid in the
20 Court's decision as to whether the State's case has merit and should proceed. Finally,
21 allowing Intervenors to be heard will likely preserve judicial resources in the long run. If
22 Intervenors are denied the opportunity to be heard and join in the pending legal action,

1 Intervenor would likely be compelled to file a separate action to preserve their rights. In
2 lieu of such an action, which would arise out of substantially the same facts and
3 circumstances, it would be more efficient to simply join Intervenor in the existing case.
4 For these reasons, Intervenor's request for oral argument on their Motion to Intervene
5 should be granted.

6 **B. The Court Has Discretion to Allow Intervenor's Late Filing of a**
7 **Response to Non-Government Defendants' Motion to Dismiss**

8 In order to adequately protect their interests and the interests of the employees of
9 Maricopa County, Intervenor wish the opportunity to file a response to Non-Government
10 Defendants' Motion to Dismiss. Unfortunately, the pressing need for such a response
11 was not abundantly clear until the December 12, 2011 hearing on the Motion to Dismiss.
12 At that hearing, the Court confronted Plaintiff State of Arizona with questions regarding
13 the ripeness of the case for adjudication and the related question of the Court's
14 jurisdiction. The Court also questioned whether the State was willing to adopt a position
15 on what the Court announced as a self-evident direct conflict between the AMMA and
16 the federal CSA. The State's responses did not adequately address or protect the
17 Intervenor's (County and County employees) position vis a vis the question of
18 implementation of the AMMA in the face of contrary federal law.

19 Intervenor have unequivocal answers to the critical questions posed by the Court
20 and therefore strongly desire the opportunity to be heard. Intervenor agree with the
21 Court that there is a direct conflict between the AMMA and the CSA, and believe that the
22 federal law preempts the state law. That is why Intervenor are loath to advise their

1 employees to comply with the provisions of the AMMA only to risk being criminally
2 liable under the CSA. Intervenors also believe that their employees do not have to be put
3 in the position of facing criminal prosecution in order for this Court to have jurisdiction.
4 In fact, as Intervenors have pointed out, there is case law that holds that individual
5 government officials or employees do not have to violate federal criminal law in order to
6 achieve standing regarding the question of whether implementing a state medical
7 marijuana law will lead to federal prosecution on drug charges. *New Hampshire Hemp,*
8 *Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000). This case was not discussed, and this
9 argument was not even addressed, at the December 12, 2011 hearing, which provides
10 another compelling reason why Intervenors should be heard on Non-Government
11 Defendants' Motion to Dismiss before the Court rules on that motion.

12 Intervenors wish to make clear to the Court that they are not requesting another
13 oral argument on the Motion to Dismiss. Intervenors wish only to file a written
14 opposition for the Court's consideration so that their position can be heard and their
15 employees' interests protected. In this regard, Non-Government Defendants argue in
16 their Opposition that Intervenors are late in their request because they "disregarded the
17 fourteen day deadline applied in this district for oppositions to motions to dismiss."
18 Intervenors point out that the stated deadline applies to *parties*, which Intervenors were
19 not at the time the Motion to Dismiss was filed. Intervenors assumed they had no right to
20 file an opposition until they were granted leave to intervene. Perhaps Intervenors should
21 have requested leave to file an opposition at that time, but again, the pressing need for
22 Intervenors to be able to state their unique position only became obvious in light of the

1 issues raised, and more importantly *not raised*, at the December 12, 2011 hearing. In any
2 event, the fact that the Court has not yet ruled on the Motion to Dismiss, and the further
3 fact that Intervenors' proposed opposition will likely aid the Court in its ruling, makes it
4 entirely appropriate for Intervenors to request leave to file an opposition to the Motion at
5 this time.

6 Contrary to Defendants' assertions, allowing Intervenors to file an opposition to
7 the pending Motion to Dismiss will not prejudice the remaining parties. From a
8 procedural standpoint, this case is still in its very early stages. Indeed, because there is a
9 motion to dismiss pending, the case is not even at issue, and no discovery or scheduling
10 has been undertaken. At worst Defendants would have to reply to Intervenors'
11 opposition, which would delay the Court's ruling by a short time.

12 In addition, as explained above, Intervenors have good reason for seeking to file
13 an opposition at this time. Because of their non-party status, filing an opposition during
14 the initial briefing seemed improper, and Intervenors had a reasonable expectation that
15 the Court might rule on their Motion to Intervene before ruling on the Motion to Dismiss.
16 That did not happen. Now, based on what occurred at the December 12, 2011 hearing on
17 Non-Government Defendants' Motion to Dismiss, Intervenors have confirmed that the
18 State of Arizona cannot adequately represent or defend the interests of the County and its
19 employees, and Intervenors realize there is a pressing need to independently brief the
20 Court on their position.

21 Finally, Non-Government Defendants' citation to *Kastl v. Maricopa County*
22 *Community College Dist.*, No., 2006 WL 2460636 at *2 (D. Ariz. Aug. 22, 2006) does

1 not support denial of Intervenor’s request for additional briefing in this case. There, the
2 plaintiff had a history of missing other deadlines in the case, and also had filed her
3 pleading late without seeking leave of the Court. Those factors are not present here so
4 *Kastl* is readily distinguishable. In addition, the other factors considered by the Court in
5 *Kastl* – “length of the delay and its potential impact on judicial proceedings, the reason
6 for the delay, including whether it was within the reasonable control of the movant, and
7 whether the movant acted in good faith” – all favor allowing Intervenor to be heard on
8 the Motion to Dismiss, even though Intervenor’s request comes late and would result in a
9 slight delay. Intervenor seeks additional briefing in good faith in order to protect their
10 unique position as implementer of the AMMA that could face federal criminal liability
11 for simply complying with state law. The Court should hear what Intervenor has to
12 say.

13 **C. Intervenor’s Position is Not Futile**

14 Non-Government Defendants claim that the relief Intervenor seeks “would be
15 futile” even though Defendants have no idea how the Court will rule on their Motion to
16 Dismiss and have not seen the brief Intervenor intends to file. Defendants mistakenly
17 assume that it is a foregone conclusion that the State of Arizona’s case will be dismissed
18 for lack of subject matter jurisdiction. But that is precisely the reason Intervenor wishes to
19 be heard. Intervenor wishes to bring a different, and as yet unargued, perspective to the
20 case. Contrary to Defendants’ assertions, dismissal of the underlying complaint is not
21 appropriate, and the so called “jurisdictional flaws” that Defendants point out are
22 addressed by Intervenor’s proposed arguments.

1 Intervenors have taken the position that the AMMA is preempted by the federal
2 anti-narcotics laws, and this position will be reflected in their proposed complaint in
3 intervention. Because Intervenors have also taken the position (supported by case law)
4 that County employees who are tasked with implementing the AMMA do not have to
5 wait to be prosecuted by the federal government *before* getting an answer as to whether
6 their actions would be legal, the issue of ripeness remains to be determined. In addition,
7 it is Intervenors' position that the circumstances presented by the irreconcilable conflict
8 between the state and federal laws pertaining to marijuana distribution and use require
9 court intervention, and that such intervention would not result in the Court issuing an
10 advisory opinion.

11 Defendants would have Intervenors' employees break the law and suffer
12 consequences before being allowed to litigate the correctness of their actions in federal
13 court. In Intervenors' view, that is unacceptable, and also unnecessary given the clearly
14 established legal precedent that does not require those who are innocently implementing
15 state approved marijuana laws to first be arrested before gaining access to the courts.
16 Further, Defendants cannot credibly argue that Intervenors' efforts will be for naught
17 because they have somehow foreseen that the State of Arizona's case will be dismissed.
18 Defendants, and the Court, should first be able to hear and evaluate the merits of
19 Intervenors' position on these issues in order that a fully informed decision can be made
20 in this important case. All Intervenors ask for is the chance to be heard.

21 RESPECTFULLY SUBMITTED this 23rd day of December 2011.

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2 MARICOPA COUNTY ATTORNEY

3 BY: /s William G. Montgomery
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7 CERTIFICATE OF SERVICE

8 I hereby certify that on December 23, 2011, I caused the foregoing document to be
9 electronically transmitted to the Clerk's Office using the CM/ECF System for filing and
10 transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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