

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

State of Arizona; Janice K.)
Brewer, Governor of the State of)
Arizona, in her Official Capacity;)
Will Humble, Director of the)
Arizona Department of Health)
Services, in his Official Capacity;)
Robert C. Halliday, Director of)
the Arizona Department of Public)
Safety, in his Official Capacity;)
Plaintiffs,)

vs.

United States of America; United)
States Department of Justice;)
Eric H. Holder, Jr., Attorney)
General of the United States of)
America, in his Official Capacity;)
Dennis K. Burke, United States)
Attorney for the District of)
Arizona, in his Official Capacity;)
Arizona Association of Dispensary)
Professionals, Inc., an Arizona)
corporation; Joshua Levine; Paula)
Pennypacker; Dr. Nicholas Flores;)
Jane Christensen; Paula Pollock;)
Serenity Arizona, Inc., an Arizona)
nonprofit corporation; Holistic)
Health Management, Inc., an Arizona)
nonprofit corporation; Jeff Silva;)
Arizona Medical Marijuana)
Association; Does I-X, Does XI-XX;)
Defendants,)

) CV11-01072-PHX-SRB
) Phoenix, Arizona
) December 12, 2011
) 11:06 a.m.

BEFORE: THE HONORABLE SUSAN R. BOLTON, JUDGE
REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION HEARING

Official Court Reporter:
Elizabeth A. Lemke, RDR, CRR, CPE
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

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P R O C E E D I N G S

(Called to the order of court at 11:06 a.m.)

THE COURT: Good morning. Please sit down.

THE CLERK: Civil case 11-1072. *State of Arizona and others v. United States of America and others.*

Time set for hearing regarding defendant's motion to dismiss for lack of jurisdiction and failure to state a claim.

Counsel, please announce your presence for the record.

MS. DAVIS: Your Honor, Lori Davis on behalf of the State of Arizona, Governor Brewer, the Director of the Arizona Department of Health Services, Will Humble, and the Director of Arizona Public Safety, Robert Halliday. With me at counsel table is Kevin Ray and Aubrey Joy Corcoran from the Attorney General's Office.

MR. LIDDY: And Your Honor, it's Thomas Liddy on behalf of Maricopa County, Prospective Intervenor, and Joy Rich in her capacity as Assistant County Manager, Planning and Development.

MR. EDWARDS: Good morning, Your Honor. Ezekiel Edwards from the ACLU on behalf of the Arizona Medical Marijuana Association. I'm joined by Haley Horowitz behind me, also of the ACLU. And we're also here representing the Arizona ACLU.

MR. DEAN: Good morning, Your Honor. Thomas Dean

1 here on behalf of the defendant Association of Dispensary
2 Professionals.

3 MS. HAUSER: Good morning, Your Honor. Lisa Hauser
4 appearing for the Arizona Medical Marijuana Association.

5 MR. RISNER: Good morning, Your Honor. Scott Risner
6 from the U.S. Department of Justice representing the United
7 States and the other federal defendants.

8 MR. WEISSMAN: Good morning, Your Honor. David
9 Weissman from Rose Law Group here on behalf of the defendants
10 Joshua Levine, Paula Pennypacker, Dr. Nicholas Flores, Jane
11 Christensen, Paula Pollock, Serenity Arizona Incorporated,
12 Holistic Health Management Incorporated, and Jeff Silva.

13 THE COURT: Thank you. Just to clarify, before we
14 begin argument, while there are several pending motions in
15 this case, there is only one motion set for argument this
16 morning; and that is, the nongovernment defendant's motion to
17 dismiss for lack of jurisdiction and failure to state a claim.

18 The other two motions that are pending are the
19 federal defendant's motion to dismiss and Maricopa County and
20 Joy Rich's motion for leave to intervene. Neither of those
21 motions requested oral argument and so are not noticed for
22 argument.

23 Who will be arguing on behalf of the nonfederal
24 defendants?

25 MR. EDWARDS: I will, Your Honor.

1 THE COURT: You may proceed.

2 MR. EDWARDS: Your Honor, can I approach?

3 THE COURT: Please.

4 MR. EDWARDS: I have a slight cold, Your Honor.

5 Good morning, Your Honor. Your Honor, there are so
6 many jurisdictional defects with this lawsuit that it's
7 difficult to know where to begin, but I would like to focus on
8 three.

9 The first is that Arizona plaintiffs are seeking an
10 advisory opinion in this case. They are refusing to take a
11 coherent position of their own, and instead, are coming into
12 federal court and asking for your advice on two diametrically
13 opposed declarations that they seek, but refuse to take a
14 position on which they prefer or why.

15 Second, they are also coming to court as the State
16 and asking this Court to declare the validity or invalidity of
17 state law, which they cannot do.

18 And third, this is a hypothetical controversy which
19 is not ripe for adjudication. Arizona has not indicated what
20 steps it plans to take with regard to the AMMA, whether or not
21 they think the AMMA is lawful in light of federal law, and
22 there is, indeed, no threat of prosecution by the federal
23 government of state officials.

24 For all those reasons, Arizona's Complaint fails to
25 meet Article III's case or controversy requirements.

1 In addition, Your Honor, even were they to survive
2 that jurisdictional minefield, they still have not presented a
3 claim upon which this Court could grant relief.

4 I would like to start with really what is, I think,
5 the most glaring problem with Arizona's Complaint, which is
6 that their position that they take no position. They have not
7 come forward with a coherent argument as to whether or not
8 they think that the DOJ would have the authority to prosecute
9 state officials for implementing the AZMMA, or whether or not
10 they think they wouldn't have that authority. So Arizona is
11 saying either it is preempted or it's not preempted. We don't
12 know which, please tell us.

13 That is the essence of an advisory opinion that core
14 Article III principles prohibit this Court from giving. And
15 it matters, Your Honor, what position Arizona takes, because
16 if Arizona were to come to this Court and say that the state
17 law is preempted, that the DOJ could prosecute state
18 officials -- state officials for carrying out their duties
19 under the AMMA, then we wouldn't have a controversy, because
20 then Arizona couldn't under the supremacy clause implement the
21 AMMA. They would be saying: Our position is that it's null
22 and void. It's preempted. It's unlawful under federal law
23 and we can't implement it. There would be no controversy in
24 that case and we wouldn't be here.

25 If Arizona, on the other hand, were to say come into

1 court, which would seem to be the most logical step they would
2 take if they're really interested in defending the rights of
3 state officials and say, Your Honor, the AMMA is not
4 preempted, nothing in it requires state officials to violate
5 federal law, then at least they would have been taking a
6 concrete position defending state law, and then the problem
7 for Arizona would be ripeness, because there is no concrete
8 threat of prosecution of state officials.

9 The fact that Arizona not only in their Complaint and
10 the advisory opinion relief that they seek, but also in their
11 response both to our reply and to the DOJ's reply, they had a
12 chance to take a concrete position on what they think this law
13 means. Whether or not they think it's preempted. Do they
14 think that state law can carve out safe harbor from federal
15 prosecution?

16 And yet they refuse to do that. That reveals the
17 nature of their request, which is coming to this Court and
18 seeking this Court's counsel as to whether or not state law is
19 legal and what they should do.

20 If Arizona isn't sure about their position, they
21 cannot use federal court as their counsel. They should go to
22 whoever it is who analyzes state law, whether it's the
23 Governor's Counsel or the Attorney General, and figure out
24 what their position is on the legality of the AMMA and come to
25 court and take that position. They're not doing that. It's

1 an advisory opinion, and therefore, it's barred under Article
2 III.

3 Secondly, Arizona is coming to this Court and asking
4 for a declaration on the validity or invalidity of state law.
5 Both the Supreme Court and the Ninth Circuit have clearly
6 stated that states can't do that. That does not fall in the
7 original jurisdiction of federal courts. We raised this issue
8 in our motion to dismiss and again in our reply, as did the
9 Department of Justice. And the cases I'm referring to are
10 *Franchise Tax*, that's a Supreme Court case, and *Guam v.*
11 *Gutierrez*, that's a Ninth Circuit case.

12 Arizona ignored those arguments. They have not
13 explained why those cases don't bar them, a state, from coming
14 into federal court and saying we want to know if our law is
15 valid in light of federal law.

16 And that was really the issue in *Guam*. Can a state
17 come running to court and ask federal court: Is our law valid
18 or not because there's possibly conflicting federal law?

19 And the Ninth Circuit was clear, citing *Franchise*
20 *Tax*, that states can't do that. And yet that's what Arizona
21 is doing and they haven't presented any reason why their case
22 is different.

23 So even if they were to take a concrete position,
24 which they haven't, they would still be barred under *Franchise*
25 *Tax*.

1 I would also light to note that both in *Franchise Tax*
2 and in *Guam*, the State was taking a concrete position. They
3 had -- they actually came in defending their rights under
4 state law and put themselves as clear adversaries against the
5 named defendants. That Arizona hasn't done.

6 And I should mention as part of the advisory opinion
7 nature of this by Arizona not saying what their position is,
8 you need a concrete controversy for this Court to decide what
9 are the issues, what are people's respective positions to be
10 able to decide this matter.

11 Arizona has not permitted you to do that because they
12 haven't said what their position is. And so there's
13 actually -- they're not antagonistic to any of the named
14 defendants. Until they say, yes, we're coming in and
15 defending state law, it's not preempted, or we're coming in
16 because we think state law is preempted, there may be other
17 jurisdictional problems, but at least that would crystallize
18 the issues for Your Honor and know where are they antagonistic
19 and where are they adverse to the other parties in this case.

20 Third, Your Honor, this case has a ripeness problem.
21 Under the Ninth Circuit test for ripeness, the Court needs to
22 look at three things.

23 The first is: Does the plaintiff have the intent to
24 carry out the statute or provision or whatever act it is that
25 they fear prosecution?

1 Right now we don't know if Arizona has any intent of
2 carrying out the AZMMA. In fact, unilaterally, on their own,
3 they suspended implementation of the AMMA -- AZMMA back on
4 May 27th when they stopped the issuance and review of
5 dispensary licenses. So as of now, voluntarily they have
6 stopped implementing it. We don't know what position they're
7 going to take. Certainly they think it's unlawful --

8 THE COURT: But there is a lawsuit in state court
9 trying to get them to go forward --

10 MR. EDWARDS: Yes.

11 THE COURT: -- with implementing the Arizona Medical
12 Marijuana Act. And so they might be ordered to go forward.

13 MR. EDWARDS: They might be ordered. But in this
14 case they're coming forward and saying that there is a
15 controversy. That they fear prosecution.

16 And yet the fact that they have to be potentially
17 ordered by state court certainly suggests that from Arizona's
18 standpoint, they don't want to implement the AMMA and they
19 certainly aren't implementing it. So if there's no intent by
20 Arizona to implement the AZMMA, then there's no fear of
21 prosecution. So under the first prong of the three-part test
22 of looking at ripeness, they fail.

23 The second one is is there a concrete, specific
24 threat of prosecution by the defendants against these
25 plaintiffs? And the answer is: There is not. There has been

1 absolutely no threat of prosecution of state officials in
2 Arizona by the federal government if they are to carry out
3 their ministerial duties under the AZMMA.

4 THE COURT: But Arizona is worried because the
5 federal government won't promise not to.

6 MR. EDWARDS: But there is actually case law, Your
7 Honor, that that is not the test. There is a dissent in the
8 Ninth Circuit, I believe -- I'm forgetting the case name --
9 where they raise that issue. And the majority said the test
10 is not -- the burden is not on the prosecutorial authority to
11 swear in every case that they won't go forward and prosecute,
12 because then states could come into court all the time and
13 say -- suing the Department of Justice and say you have to
14 tell us you're not going to prosecute.

15 They have to establish that there is actually an
16 affirmative threat of prosecution. There has been -- not only
17 has there been no specific threat against state officials,
18 there's actually been reassurance that state officials in
19 Arizona would not be prosecuted. So you have both the
20 absence, and I would say the reassurance, that state officials
21 are not at risk. So they failed the second part of the test.

22 The third part of the test is whether there's been
23 history of prosecution. Well, obviously there has been no
24 prosecution yet, because the AZMMA has not been implemented.
25 But there hasn't been a single prosecution of a state official

1 anywhere in the United States, despite the number of states
2 that have regulated medical marijuana schemes. So without the
3 intent to implement the statute, without the direct threat
4 against these plaintiffs, and without a history here or
5 anywhere of prosecution, this case isn't ripe.

6 I would also -- and I'm close to closing, Your Honor.
7 I would also draw the Court's attention to some of the cases
8 that Arizona cites in support of finding jurisdiction. They
9 rely on *Oregon v. Ashcroft* to support the fact that they're
10 facing a real threat in coming to court.

11 I think that case is actually instructive in a
12 different direction. In *Oregon v. Ashcroft*, first of all, the
13 State was taking a concrete position. They weren't coming to
14 federal court saying: We don't know if the Death With Dignity
15 Act is constitutional or not. We think it might be. We think
16 it might not. Please help us.

17 They were coming to court saying it is
18 constitutional. It is lawful under the Control Substances
19 Act, which, by the way, the court found that it was. And they
20 came in defending their rights under state law and saying that
21 it would be beyond the authority of the Attorney General to
22 prosecute doctors under that act.

23 So the only way that that case would be analogous
24 here is if Arizona came to court, which again would seem to be
25 the logical step, defending state law, arguing that it would

1 be beyond the authority of the DOJ to prosecute state
2 officials for implementing the AMMA.

3 In addition, in Arizona -- in *Oregon* there was a
4 concrete, specific threat by the Attorney General himself to
5 specific doctors, so you also had ripeness.

6 There are a host of other cases which I'm not going
7 to go into detail now unless you want, but just to say that
8 where Arizona will often cite cases getting -- where the
9 plaintiffs have gotten past the jurisdictional threshold. In
10 other words, they look at cases where the issue is: Does this
11 Court have discretion to grant a declaratory judgment act? If
12 it does, how should it use that discretion?

13 But in all of those cases they had already
14 established that there was jurisdiction. But because here
15 Arizona doesn't take a position, because of *Franchise Tax* and
16 *Guam*, Arizona fails those jurisdictional requirements and in
17 addition, it's not ripe.

18 In closing, Your Honor, I would just note that the
19 Supreme Court has made clear many times -- and I'm referring
20 specifically to *Poe v. Ullman* fifty years ago, that it is not
21 for the federal court's job to sit kind of in the abstract and
22 give advice on the constitutionality of state law. There
23 needs to be real adversaries, antagonistic parties, and
24 concrete positions laid out by all the parties.

25 Arizona fails the *Poe* test. They certainly fail the

1 ripeness test. And for those reasons I would ask that you
2 dismiss this for failure to meet subject matter jurisdiction.

3 The other point after you get through the
4 jurisdictional hurdles is that Arizona has come to court and
5 asked for two diametrically opposite forms of relief. They
6 have said:

7 Tell us whether or not state law is preempted; or, in
8 the alternative, tell us that state law can carve out a safe
9 harbor from federal prosecution.

10 As to the second form of relief, Your Honor, I think
11 we could actually answer that question right now. There's
12 nothing that state law can do that can immunize anyone in the
13 state, state officials or otherwise, who are breaking federal
14 law.

15 So to come to this court and say:

16 Give us safe harbor. We might be violating a federal
17 law. We might not. We're not sure. But we need safe harbor
18 from you or from the AMMA. That's impossible.

19 That's well established in both the Supreme Court and
20 Ninth Circuit precedent. A state law cannot do that. So that
21 form of relief is really frivolous and certainly should not
22 give this court jurisdiction. They haven't stated a claim.

23 The other claim, Your Honor, and I won't repeat
24 myself going back to my earlier arguments, is that state law
25 might be preempted by federal law, but first of all, until we

1 know what Arizona's position is, it's difficult to even
2 entertain that claim.

3 Secondly, if they take the position that it's
4 preempted, they don't have to implement the law and we won't
5 be here.

6 Third, if they take that as not preempted, there's no
7 ripeness.

8 And fourth, if we actually ever got to the merits
9 question here about whether, in fact, the AMMA requires state
10 officials to violate federal law, our position as we laid out
11 in a bit truncated form in our brief is that it doesn't.

12 And so for that reason I would ask not only that you
13 dismiss for failure -- for subject matter jurisdiction under
14 12(b)(1), but also that you dismiss for failure to state a
15 claim under 12(b)(6).

16 THE COURT: Well, if I dismissed under 12(b)(1), I
17 would never be able to reach the 12(b)(6) issues.

18 MR. EDWARDS: That's right. Only in the event that
19 you weren't to dismiss under 12(b)(1), we would ask for
20 dismissal nonetheless for failure to state a claim.

21 THE COURT: Okay. Thank you.

22 MR. EDWARDS: Thank you.

23 THE COURT: Ms. Davis.

24 MS. DAVIS: Thank you, Your Honor.

25 THE COURT: Ms. Davis, I'm used to having the

1 plaintiff opposed to the defendant. And in this case it
2 seems -- well, it reminded me of an interpleader where an
3 insurance company says: Here's all the people that want this
4 money. We take no position. You figure it out. And those
5 defendants fight it out adverse to one another over this pot
6 of money.

7 There is no analogy for interpleader with respect to
8 the Declaratory Judgment Act. The person seeking declaratory
9 judgment can't join all of the sides they think there could be
10 to the issue and say: You fight it out. We'll sit back and
11 wait to find out what the answer is. And then we'll be happy
12 to do whatever you say.

13 Isn't that what the State of Arizona has asked me to
14 do here?

15 MS. DAVIS: No, Your Honor, and I will tell you why.

16 Backing up just a little bit, the State of Arizona
17 finds itself in an impossible position. On the one hand, if
18 we don't enforce the Arizona Medical Marijuana Act with regard
19 to dispensaries, which, by the way, it has been implemented.
20 The Act is in operation. We have patients --

21 THE COURT: Some of it. Some of it --

22 MS. DAVIS: Correct. Correct.

23 THE COURT: -- has been implemented.

24 MS. DAVIS: Not the dispensary portion.

25 If we do not implement the dispensary portion, we are

1 sued in mandamus. We are going against the voter initiative
2 that was passed by the voters of the State of Arizona to
3 implement -- to have this law.

4 If we do implement this law as drafted by the voters
5 in their initiative --

6 THE COURT: And you have already been sued.

7 MS. DAVIS: Three times in mandamus, yes, in Special
8 Action, correct.

9 THE COURT: Saying: Start issuing these dispensary
10 licenses.

11 MS. DAVIS: Correct. Two of the defendants are a
12 part of this federal action, Serenity and Jane Christensen are
13 part of a Special Action trying to make us implement the
14 dispensary portion of the Act, correct.

15 If we do implement that portion as they want us to
16 do, we are exposing our citizenry, and more especially, our
17 state workers, to direct threat of enforcement of federal
18 prosecution.

19 THE COURT: Well, but I realize that the State thinks
20 it's in a tough spot here, but that doesn't mean that you
21 can't take a position and advocate for it.

22 And that's one of a host of problems that the
23 defendants raise and one that I clearly have to acknowledge is
24 you're saying: Do this or do this. We don't care which.

25 But to have a case or controversy, the plaintiff

1 has to be adverse from the defendant. How are you adverse?

2 MS. DAVIS: Your Honor, I will refer specifically to
3 paragraph 166 of our Complaint wherein we state:

4 By virtue of the foregoing, the federal government's
5 position places the AMMA in conflict with the CSA as well as
6 with the policies of the DOJ that have been implemented to
7 enforce the CSA.

8 What we're saying is very clearly there is a
9 conflict. Whether that conflict rises to the level of
10 preemption is a matter which this Court would determine on the
11 merits.

12 THE COURT: But do you think it's preempted or do you
13 think it's a safe harbor? You've got to advocate for one or
14 the other and you're not advocating for either.

15 You're saying the federal government says: Read the
16 Controlled Substance Act. It says marijuana has absolutely no
17 legitimate use whatsoever. So we can't say that Arizona's
18 state law is not in violation of the Controlled Substance Act.

19 That's a given. It's acknowledged by everyone that
20 these medical marijuana acts that have been passed in more
21 than a dozen states conflict with the Controlled Substances
22 Act that makes marijuana a controlled substance in Level I
23 rather than II which says there's no legitimate use
24 whatsoever.

25 And many people obviously in different states think

1 that the federal government has scheduled marijuana in the
2 wrong place and that it should be scheduled as a Schedule II
3 rather than a Schedule I.

4 These are not earthshaking decisions. And you
5 acknowledge it in your papers that the state law legalizing
6 some limited use of marijuana conflicts with the Controlled
7 Substances Act. I don't have to tell you that. You already
8 know it.

9 What can I do for the State of Arizona? I can't tell
10 the Department of Justice to never change a policy. I can't
11 tell the Department of Justice to change a policy. I can't
12 tell them to prosecute someone. I can't tell them not to
13 prosecute someone. That's what the prosecutor decides.
14 That's an Executive Branch function.

15 And with respect to advice, your own department, the
16 Department of Law, the Attorney General's Office, and the
17 State of Arizona, one of your primary functions is to give
18 advice to state agencies about what they should do when
19 they're in a tough spot. It's not the courts that give you
20 that advice. You give advice all the time to your state
21 agencies. They take the advice. They act pursuant to the
22 advice.

23 And then if lawsuits ensue, you defend or you
24 prosecute, but you don't come to court and say: Well, this is
25 our best advice. Why don't you give it a shot too?

1 What can I do?

2 MS. DAVIS: Your Honor -- and I understand the
3 Court's comments and I understand the position. The problem
4 that we are facing, however, is if we move forward without a
5 determination from this Court as to whether or not certain
6 portions of the AMMA are preempted, whether or not employees
7 enjoy immunity under, for example, 21 United States Code
8 885 --

9 THE COURT: Wait. It has to be one or the other,
10 doesn't it?

11 MS. DAVIS: Yes. It does.

12 THE COURT: Which one?

13 MS. DAVIS: That's what we're asking the Court to
14 determine.

15 THE COURT: But you can't ask me -- you're
16 basically -- as I said before -- you're like throwing all of
17 the defendants in a pot and saying: Make them fight it out.
18 We'll sit back. And when you've figured it out, tell us and
19 we'll act accordingly.

20 That's not how lawsuits work.

21 The plaintiff takes a position and doesn't take two
22 diametrically opposed positions. You have to advocate your
23 position. So you either have to litigate that it's preempted,
24 and therefore, Arizona can't implement the -- some portions of
25 the Arizona -- or maybe none of them -- you have to take a

1 position.

2 Or you can take a position that somehow when the
3 State of Arizona amends their drug laws pursuant to voter
4 initiative or pursuant to Arizona legislative enactment to
5 conflict with the Controlled Substances Act, that that somehow
6 creates a safe harbor for certain people who are now violating
7 federal law but in compliance with state law.

8 I mean, I don't know how you make that argument, but
9 you have to pick and make the argument. And the other side
10 makes the other argument. And then I have a case that
11 potentially I can decide.

12 But I can't decide a case when the State of Arizona
13 comes in and says: Could you please figure this out for us
14 because we're in a tough spot?

15 That's what the Attorney General is there for.
16 Figure it out. Give its advice. And the State acts
17 accordingly.

18 MS. DAVIS: And, Your Honor, I understand exactly
19 what you're saying. What I'm saying is the State of Arizona
20 has tried to do everything proper to not go against the will
21 of the people with regard to the voter initiative; while at
22 the same time not exposing its state employees to criminal
23 liability. It's an impossible position that the State of
24 Arizona finds itself in.

25 THE COURT: That you think a federal court can

1 resolve?

2 MS. DAVIS: Your Honor, I think the federal court
3 absolutely can resolve whether or not there is a conflict
4 between the CSA and the Arizona Medical Marijuana Act.

5 THE COURT: But you already know there is. You've
6 acknowledged it in all of your papers.

7 MS. DAVIS: There's a conflict, but whether it rises
8 to the level of preemption and to what extent it is preempted,
9 that is the question that we're asking the Court.

10 THE COURT: If you want to take that position, take
11 that position and we'll see if we have a case or controversy.
12 But don't take the position: Well, if that doesn't work, then
13 tell us that there's a safe harbor.

14 MS. DAVIS: I understand, Your Honor. I believe
15 under the well-pled complaint rule that we have sufficiently
16 alleged facts getting beyond the semantics of the Complaint to
17 support a case or controversy.

18 THE COURT: What about your fictitious defendants?
19 It's my intention to dismiss them all without prejudice.

20 MS. DAVIS: Those were added simply as a means of --
21 if there were additional folks that wanted a seat at the table
22 for the determination that we discovered at a later date, we
23 could add them in, similar to not knowing a John Doe in any
24 other lawsuit. John Doe defendants were added to -- as a
25 place marker, more or less.

1 THE COURT: Well, we don't keep them in place after
2 the -- if you haven't figured out that any of them have real
3 names yet, so --

4 MS. DAVIS: I understand.

5 THE COURT: So I'm going to order that all of the
6 fictitious defendants be dismissed without prejudice. If you
7 later discover someone that needs to be joined in the case,
8 you can move to amend to join an additional party-defendant,
9 but we do not persist in having any fictitious defendants in
10 federal court. It's a different practice in state court.

11 But I haven't let you launch into your argument, so
12 why don't you take five minutes and say what -- the highlights
13 of what you wanted to address with me in opposition.

14 MS. DAVIS: Well, first, I would like to address the
15 three points of ripeness raised by the defendant ACLU in its
16 argument.

17 The first being: Does the plaintiff intend to carry
18 out the law in question?

19 Absolutely, the State of Arizona is carrying out the
20 law in question. The dispensary portion of that law is simply
21 on hold at this point awaiting a determination regarding the
22 liability of the government employees that will necessarily
23 have to do acts that arguably are in conflict with the CSA.

24 Second, whether or not there's a concrete threat of
25 prosecution by the federal defendants. Certainly, I think

1 it's clear from anybody -- anyone's perspective that the
2 federal government has boots on the ground coming at medical
3 marijuana from all angles from raiding dispensaries to sending
4 letters to the City of Eureka, the City Of Chico warning them
5 that if they implement their laws, that they will proceed with
6 prosecution and forfeiture.

7 THE COURT: But you haven't gotten any such letter
8 from the United States Attorney in Arizona.

9 MS. DAVIS: The United States Attorney in Arizona --
10 former United States Attorney Dennis Burke stated in his
11 letter -- it was completely silent with regard to state
12 employees, despite the specific request of Director Humble to
13 address it.

14 Later in news reports he's reported as saying that
15 the state workers cannot be under the mistaken impression that
16 they are immune from criminal liability or have any kind of
17 safe harbor, which we believe spoke volumes in favor of
18 they're in a real threatening situation, squarely within the
19 crosshairs of the federal government's prosecution.

20 THE COURT: Have you asked the current U.S. Attorney
21 if she has any different view?

22 MS. DAVIS: We are a part of the lawsuit -- at the
23 time of the lawsuit already had commenced we have not had
24 contact directly with them. Our position has always been the
25 same. If they would come forward and give immunity to the

1 state workers that are acting in compliance with the federal
2 laws -- which they have chosen not to do so --

3 THE COURT: Well, I can't do that. I don't have the
4 power to grant immunity without a request from the government
5 to do so.

6 MS. DAVIS: No. I'm saying that they have the power
7 to do that. I'm not asking --

8 THE COURT: I know, but aren't you, in essence,
9 asking as one of your two diametrically-opposed alternatives,
10 to grant immunity from federal prosecution to state workers
11 implementing the AZAMMA?

12 MS. DAVIS: I think a question that could come before
13 Your Honor is similar to that faced in *U.S. v. Rosenthal* in
14 which an agent of the City of Oakland was prosecuted for his
15 acts as an official cultivator. And that -- in that case
16 Mr. Rosenthal claimed immunity under 21 United States
17 Code 885(d) as a person acting in furtherance as a law
18 enforcement person having immunity from the Controlled
19 Substances Act. And in that particular case he was not
20 granted immunity.

21 Now, what the State of Arizona would ask the Court to
22 look at --

23 THE COURT: Well, that's not the kind of immunity
24 we're talking about. That's a statutory grant of immunity to
25 law enforcement officers that permit them in the course of

1 their law enforcement duties to possess controlled substances
2 or to negotiate the purchase of controlled substance or to
3 engage in what, for nonlaw enforcement individuals would be
4 conspiracies, in their undercover work.

5 But that's a statutory grant of immunity and that
6 case basically said: This person doesn't come within that
7 statute.

8 What you're asking me to do is to essentially say to
9 the federal government: You wouldn't promise not to
10 prosecute, so I'm going to say they're immune from
11 prosecution.

12 MS. DAVIS: No, Your Honor. We are asking -- for
13 example, using that case and that statute as an example, does
14 that statute as a matter of law apply to a state worker
15 working in furtherance of processing applications?

16 It didn't apply in that jurisdiction to a cultivator,
17 an official city cultivator of marijuana. Would it apply here
18 for a state worker who was issuing dispensary registration
19 certificates as an immunity? And that would be part of the
20 case that we would ask Your Honor to consider on the merits
21 with regard to immunity of state employees. Whether or not
22 that has applicability.

23 THE COURT: Okay. Please continue.

24 MS. DAVIS: And third, under the ripeness component,
25 on the history of prosecution, Mr. Edwards had mentioned that

1 there were no history of prosecutions in the past.

2 And, of course, as he recognized the Arizona Medical
3 Marijuana Act is in its infancy and the dispensary process has
4 been halted before the point at which we believe there would
5 be exposure for our employees. So certainly there wouldn't
6 have been a prosecution up to this date here.

7 Now, the *U.S. v. Rosenthal* case, I think, is a prime
8 example of the federal government going against a state actor
9 where this individual was cultivating with the authority and
10 permission for the City of Oakland. And he was -- and he was
11 prosecuted under the Controlled Substances Act.

12 So we believe that that coupled with the boots on the
13 ground that's happening with the federal government
14 enforcement of the Controlled Substances Act, starting with
15 the Cole memo which ramped up a little bit of the -- ratcheted
16 up the activity on the part of the federal government to go
17 after those acting in compliance with state law, followed by
18 U.S. Attorney letters specifically in the state of Washington
19 talking about state employees are not immune, talking about
20 the City of Eureka, the City of Chico, the fact that we see it
21 coming towards Arizona, the fact that it's not here yet is of
22 no consequence.

23 At present there is a genuine threat that there is
24 exposure. There is a potential that we should as the
25 *MedImmune* case, the United States Supreme Court case said we

1 should not be required to go to the point of risking federal
2 prosecution of betting the farm, as they said, in order to get
3 a declaratory judgment under Article III.

4 THE COURT: Okay. Anything else?

5 MS. DAVIS: Your Honor, I would just state again that
6 I believe that we have under -- presuming true all allegations
7 with all reasonable inferences in favor of the State, I
8 believe that we have adequately pled a conflict allowing a
9 case or controversy in this matter and we would ask that this
10 Court deny the motion to dismiss and allow the case to be
11 heard on the merits.

12 THE COURT: At a minimum though, don't I have to
13 force you to amend to decide which side of this you're on,
14 because you have to take a side?

15 MS. DAVIS: Well, Your Honor, that certainly could be
16 part of the Court's order and we would consider whatever the
17 Court has -- if the Court --

18 THE COURT: You don't agree you have to take a side?

19 MS. DAVIS: I believe we have taken a side, Your
20 Honor, and I'm going to point out --

21 THE COURT: Which side?

22 MS. DAVIS: We've taken it specifically on paragraph
23 166 of our Complaint. We've stated that the CSA and the AMMA
24 are in conflict. And I believe that --

25 THE COURT: Well, but that's just stating the

1 obviously. They're in conflict because the Arizona Medical
2 Marijuana Act legalizes people possessing and using marijuana
3 under certain circumstances and the federal Controlled
4 Substances Act says there are no circumstances except this
5 limited laboratory exception.

6 There are no circumstances where people can possess
7 and use marijuana. It's always been a violation of federal
8 law no matter what the states have tried to do. So that
9 paragraph doesn't say anything that isn't a given that
10 everyone knows.

11 The question is: With the state and its concern
12 about its -- about the activities of its employees which do
13 not involve the possession or use of marijuana, what is your
14 position? What position does the State of Arizona wish to
15 take?

16 That they're not liable under the Controlled
17 Substances Act? Or that the Controlled Substances Act
18 precludes them from doing what they're doing?

19 It's one or the other. You have to take that
20 position. You can't just ask me to figure it out on my own
21 without one side taking one position and the other side taking
22 a different one.

23 And once you decide which position to take, we're
24 probably going to have to realign the defendants, because some
25 will be with you and some will be against you. I don't know

1 which ones. We could get the federal government with the
2 State of Arizona, which would be refreshing, or we could get
3 all of the medical marijuana people with the State of Arizona
4 against the federal government, which would be more
5 traditional, and go from there possibly.

6 But you have to decide which of these adverse
7 defendants really should be plaintiffs by deciding which side
8 you're on.

9 Good law consistent with federal law and you get the
10 marijuana people with you.

11 Or it's: We can't do this. We're preempted because
12 the Controlled Substances Act is the supreme law of the land
13 and we'll get the federal government helping you out on that.

14 One or the other.

15 MS. DAVIS: Well, Your Honor, we will --

16 THE COURT: You're not prepared today to say whether
17 you want to join the federal government and be aligned with
18 them or whether you want to align yourself with the marijuana
19 folks? You're going to have to pick at some point. I won't
20 make you do it today in front of this whole audience.

21 MS. DAVIS: Thank you, Your Honor.

22 THE COURT: Mr. Edwards.

23 So now that we know the State has to pick one side or
24 the other and we'll realign the defendants, is that going to
25 solve the problem? Will we then have a case or controversy

1 one way or the other?

2 MR. EDWARDS: Your Honor, I think it depends,
3 obviously, which is why we were also urging them to take a
4 position on what that position is.

5 If their position is that the DOJ would be within
6 their authority under the CSA to prosecute state officials,
7 then under the supremacy clause it would be our understanding
8 that they couldn't implement the AMMA and there wouldn't be a
9 case or controversy here.

10 There may be, as you indicated, a state court issue
11 where there would be state defendants suing them to implement
12 it and they could raise preemption as a defense and that would
13 be appropriate for a state court to figure out, but it
14 wouldn't be appropriate for a federal court.

15 If they come in and say: We're siding with the
16 marijuana folks. We think that this is lawful under federal
17 law and we're defending -- which is what most states usually
18 do when they come into federal court on state law issues --
19 and then we would be faced with the question predominantly of
20 ripeness.

21 And it would still be our position that there is no
22 concrete threat of prosecution of state officials in Arizona
23 either because, as you indicated, there's been no specific
24 threat, no letters, no indication, no state officials
25 prosecuted elsewhere who are implementing medical marijuana.

1 I just had a few very minor comments.

2 THE COURT: Could I just raise a question?

3 Does this make a difference? I was saying that it's
4 a given that the state law with respect to the possession and
5 use of marijuana is in direct conflict with the Controlled
6 Substances Act and it's pretty apparent that there are a lot
7 of people that are going to take the risk --

8 MR. EDWARDS: Right.

9 THE COURT: -- of federal prosecution. They have
10 decided that the risk-benefit ratio is such that whatever
11 benefit they believe they might have from using medical
12 marijuana is worth the risk of violating federal law and so
13 they make that decision on their own.

14 And the State is coming in and saying -- they didn't
15 say it this way. I thought of it this way -- they're saying,
16 well, this isn't a question of our employees getting to decide
17 the risk benefit. They're State employees. They're going to
18 have to do it and won't be able to just say:

19 I'm sorry. I just think the risk that this might be
20 considered facilitation or aiding and abetting to be so high
21 that you're making me a potential federal felon. I'm not
22 going to do it. You may have to discipline me.

23 Does that make it different when they're not
24 voluntarily making the decision to violate federal law?

25 MR. EDWARDS: Well --

1 THE COURT: -- or potentially violate federal law?

2 MR. EDWARDS: Well, just to back up, I mean, our
3 position is that nothing in the AMMA requires state officials
4 to violate federal law, so our position is they are not being
5 required to do that.

6 So our position is that they are in no different
7 position than a citizen in Arizona who is making the choice:
8 Do I take the risk or do I not?

9 Because a dispensary, for instance, is definitely --
10 if they're going to engage in production and distribution --
11 violating federal law, as you said, there's no mystery about
12 that but they don't have to do that. Likewise, our position
13 is there's nothing that's required of state officials.

14 Now, if your question is, you know, if they were
15 required to violate federal law and there was -- there would
16 still have to be an actual imminent threat of prosecution, not
17 just the violation, the DOJ would have to have made clear or
18 however we do the Ninth Circuit ripeness analysis that they
19 would be prosecuted, then, yes, you may have jurisdiction
20 assuming that Arizona were to come into court --

21 Well, Arizona still couldn't come into court in that
22 instance and say: Our law is invalid. But State officials
23 would have a viable claim if they did have to violate the AMMA
24 and that was there position, and in fact, they did and there
25 was an actual threat of prosecution.

1 But I notice that Arizona got up, as I would have if
2 I were them, and talked as much as I could about ripeness,
3 even though I think -- we think -- that their ripeness claim
4 fails for all the reasons I listed. They did not come up
5 before Your Honor made painfully clear and take a position,
6 which was one of the key problems with this complaint.

7 They are seeking an advisory opinion. They don't
8 talk about *Franchise Tax* and *Guam* and why Arizona gets to come
9 into court and ask for a declaration on the validity or
10 invalidity of state law.

11 And what they said was there was a conflict between
12 state and federal law. And as I understood Your Honor to be
13 pointing out that there is nothing unusual about that and that
14 alone does not give federal court jurisdiction.

15 States don't have to walk in lock-step with federal
16 law when it comes to what people criminalize and what they
17 don't. And that's, of course, the *Printz* case.

18 If any kind of conflict meant that state law was
19 invalid, then you would have exactly what the Supreme Court
20 said you shouldn't have, which is states needing to mirror
21 federal law.

22 And the only other thing I would add, and I know Your
23 Honor understands this, but even though we are the moving
24 party here with the motion to dismiss, the burden is on
25 Arizona to establish that this Court has jurisdiction under

1 Article III. And I don't think in their Complaint, in their
2 response, or in their argument today that they have done that.

3 THE COURT: Okay. Thank you.

4 It's ordered taking this matter under advisement.

5 Court is in recess until one o'clock.

6 (Proceedings adjourned at 11:52 a.m.)

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C E R T I F I C A T E

I, ELIZABETH A. LEMKE, do hereby certify that I am
duly appointed and qualified to act as Official Court Reporter
for the United States District Court for the District of
Arizona.

I FURTHER CERTIFY that the foregoing pages constitute
a full, true, and accurate transcript of all of that portion
of the proceedings contained herein, had in the above-entitled
cause on the date specified therein, and that said transcript
was prepared under my direction and control.

DATED at Phoenix, Arizona, this 5th day of January,
2012.

s/Elizabeth A. Lemke
ELIZABETH A. LEMKE, RDR, CRR, CPE