SUPREME COURT
OF ARIZONA

WHITE MOUNTAIN HEALTH CENTER, INC., an Arizona non-profit corporation, Plaintiff - Appellee, v. COUNTY OF MARICOPA, et al., Defendants - Appellants, _____ STATE OF ARIZONA ex rel. MARK BRNOVICH, Attorney General in his official capacity, Intervenor - Defendant - Appellant.	Arizona Supreme Court No. CV-17-0016-PR Court of Appeals 1 CA-CV 12-0831 1 CA-CV 13-0697 1 CA-CV 14-0372 (Consolidated) Maricopa County Superior Court No. CV2012-053585

PETITION FOR REVIEW

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Statewide importance calls for review of the Court of Appeals' Opinion because it: (1) turns Arizona zoning law on its head and violates Arizona Constitution Article III's Separation of Powers; and (2) calls for reconsideration of *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 347 P.3d 136 (2015).

ISSUES DECIDED BY THE COURT OF APPEALS

1. Can the Arizona Medical Marijuana Act ("AMMA") *sub silentio* transform Maricopa County's zoning authority from a "permissive ordinance" jurisdiction (uses in a zone are prohibited unless an ordinance permits them) into the opposite kind of jurisdiction (all uses in a zone are permissible unless an ordinance specifically prohibits them)?

2. Should *Reed-Kaliher* be reconsidered on these facts because the AMMA is preempted by the Federal Controlled Substances Act?

STATEMENT OF MATERIAL FACTS

The Maricopa County Board of Supervisors exercised its legislative authority when it adopted its Zoning Ordinance ("MCZO") in 1969. (Appendix ("App.") at 65, ¶ 57). It established the County as a "permissive ordinance" jurisdiction: unless a specific use in a County's unincorporated zoning district is listed as permitted, the use is not allowed. (App. at 65–67, ¶¶ 62–72). Thus, for a medical marijuana dispensary to operate, an ordinance must permit it.

The Board's first relevant Text Amendment, TA2010017, made medical

marijuana dispensaries subject to a Special Use Permit procedure requiring public input at a public hearing, and stated such uses would be limited to unincorporated C-2 and C-3 zoning districts of the County. (App. at 68–69, ¶¶ 79, 82–85). It also stated "[t]his provision shall not be construed as permitting any use or act which is otherwise prohibited by law." (App. at 69, ¶ 86).

The Board's second relevant Text Amendment, TA2011001, eliminated the "Special Use Permit" procedure and replaced it with a "permitted use" standard that specifically allows such facilities in "Industrial" zoning districts. (App. at 70, ¶ 97, 77, ¶¶ 159–62). It clarified that industrial uses cannot be in conflict with "any federal law, state law or Maricopa County Ordinance." (App. at 70, ¶ 100).

The AMMA itself says that "counties may enact reasonable zoning restrictions that limit the use of land for registered nonprofit medical marijuana dispensaries to specified areas." A.R.S. § 36-2806.01. The MCZO reasonably permits, and limits, medical marijuana facilities to an "Industrial" zone if such use is not in conflict with "any federal law, state law or Maricopa County Ordinance." Plaintiff wanted to place its marijuana facility in a differently categorized zone. The courts below re-wrote the law of permissive use and allowed Plaintiffs to do so. This judicial legislative act violates Arizona's constitutional separation of powers.

The Federal Controlled Substances Act ("CSA") expressly prohibits growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program. It is a crime to violate it, regardless of state laws that purport to evade it. (App. at 81, ¶ 3). Despite the wishes of its promoters and the voters, the AMMA cannot change marijuana's classification as a federally prohibited Schedule I drug under the CSA, 21 U.S.C. § 812.[1] Federal law preempts AMMA in general, and Maricopa County's MCZO prohibits such use because AMMA itself violates federal law. The Opinion violates both the County's statutorily authorized MCZO and Arizona's Article III constitutional principle of separation of powers. *Reed-Kaliher* must be reconsidered.

REASONS FOR GRANTING REVIEW

I. The Maricopa County Zoning Ordinance Is Valid and Reasonable.

Arizona counties have statutory authority to adopt planning and zoning regulations. Each county may formulate and adopt its own comprehensive plan for development. A.R.S. §§ 11-801 to 11-866. MCZO separates Maricopa County into "the zoning districts designated as appropriate for various classes of residential, business and industrial uses." A.R.S. § 11-811(A)(1).

Within each general class more specific residential, commercial, and

[1] Maricopa County acknowledges that there is ongoing research that may suggest future approval of marijuana for medicinal use. However, the CSA currently does not provide any exemptions and classifies marijuana as a Schedule I drug.

industrial use zoning districts define what may be permitted in each: Industrial zones are IND-1 (Planned Industrial), IND-2 (Light Industrial) and IND-3 (Heavy Industrial). IND-3 is a "catch all" district that permits only "any industrial use not in conflict with any federal law, state law or any Ordinance of Maricopa County." (App. at 67, ¶ 72).

"Permissive" zoning ordinances are common. *See In re Costco Wholesale Corp.*, 49 A.3d 535 (Pa. 2012); *see generally* Am. Planning Ass'n, *The Practice of Local Government Planning* (Charles H. Hoch et al. eds., 3d ed. 2000). Because Maricopa County's MCZO is a permissive use jurisdiction, the absence of a specific authorization for a use means it is prohibited. *Powell v. Washburn*, 211 Ariz. 553, 554–55, 125 P.3d 373, 374–75 (2006); *see also Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 560–61, 81 P.3d 1016, 1019–20 (App. 2003). Because the CSA prohibits medical marijuana facilities—underscoring that prohibition with criminal sanctions—the requirements of IND-3 cannot be met. The Opinion upends the applicable law of permissive zoning by ruling that, in effect, medical marijuana dispensaries may be located anywhere in unincorporated Maricopa County.

Zoning ordinances are constitutionally protected legislative acts. *Pioneer Trust Co. v. Pima Cnty.*, 168 Ariz. 61, 64, 811 P.2d 22, 25 (1991); *Wait v. City of*

Scottsdale, 127 Ariz. 107, 108, 618 P.2d 601, 602 (1980). They will be upheld if they are a reasonable exercise of the power to zone for the purposes of public health, safety, and welfare. *Cardon Oil Co. v. City of Phoenix*, 122 Ariz. 102, 593 P.2d 656 (1979). They are presumed valid, and "can be overcome only by a showing . . . that the classification is clearly arbitrary and unreasonable and without any substantial relation to the public health, safety, morals or general welfare." *Dye v. City of Phoenix*, 25 Ariz. App. 193, 194, 542 P.2d 31, 32 (1975) (citations omitted). When the validity of a zoning ordinance is questioned, a court's role is to determine "whether the record shows a reasonable basis for the action of the zoning authorities, and if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed." *Id*. The CSA's classification of marijuana as a Schedule I drug *ipso facto* shows a reasonable health, safety and welfare basis for the County's MCZO: Congress found that marijuana has a high potential for abuse, lacks any accepted medical use and cannot be used safely even under the supervision of a physician. 21 U.S.C. § 812. That finding remains unchanged—even when, for its own reasons, the federal government elects not to enforce it.

This Court has emphasized that zoning is much more than mere classification of a particular piece of property: "it involves consideration of future

growth and development . . . and many other factors which are within the legislative competence." *Wait*, 127 Ariz. at 109, 618 P.2d at 603.

The Opinion (at ¶ 67) concludes that the AMMA limited local jurisdictions' zoning powers to ensuring that the medical marijuana dispensaries operated in "specified areas." But A.R.S. § 36-2806.01 does not in any way limit the authority to identify which zoning districts will permit medical marijuana dispensaries. Rather, that section refers to Titles 9 and 11 of the Arizona Revised Statutes and these sections, when read in conjunction with the AMMA, allow the County to enact reasonable zoning.

The Opinion ignored the undisputed facts and judicially amended the AMMA so as to make it read that a dispensary must be allowed to operate in any unincorporated area of the County. There is no mandate in the AMMA or within the regulations of the Arizona Department of Health Services that a dispensary must be allowed to operate in some, or any, area. (App. at 63, ¶ 41). Indeed, the AMMA contemplates the possibility that there may not be a licensed dispensary in every community, or within 25 miles of the registry ID card patient's home. A.R.S. § 36-2804.02(f).

In *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 300 P.3d 494 (Cal. 2013), the California Supreme Court ruled that nothing in

the state statutes limited the authority of a local jurisdiction to regulate the use of its land, including the authority to prohibit the distribution of medical marijuana within its borders. *Id*. at 512–13. Similarly under Arizona law, the determination of where, or whether, medical marijuana facilities are permitted in a given area is expressly delegated to the discretion of the local authorities. A.R.S. § 36-2806.01. The Maricopa County Board of Supervisors properly exercised its legislative authority and discretion.

The Court of Appeals recognized at ¶ 63 the MCZO provision that no land use could be in conflict with "any federal law, state law or Maricopa County Ordinance." It wrote that the County had conceded the illegality of this provision by not briefing this issue. This conclusion is simply mistaken. The County Defendants did, in fact, brief the legality of such a provision by citing with approval *City of Riverside* in which the city's ordinance banned any use prohibited by federal or state law. This Court should review the Opinion's erroneous interpretation of the MCZO's permissive zoning scheme.

II. The Arizona Medical Marijuana Act Is Preempted By The Federal Controlled Substances Act

The Opinion, relying in part on *Reed-Kaliher*, erroneously concluded that the AMMA's regulatory scheme did not represent an obstacle to enforcement of the CSA, but rather enhanced it in some unexplained fashion. This conclusion

undermines well-reasoned jurisprudence and the articulated prosecution objectives of federal law enforcement officials. As a result, the AMMA's regulatory scheme conflicts with federal law.

The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "Under this principle, Congress has the power to preempt state law." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (citing *Gibbons v. Ogden*, 22 U.S. 1, 210–11 (1824)).

State laws may be preempted by federal law if (1) the federal statute contains an express preemption; (2) state law would regulate conduct in a framework of regulation that Congress "left no room for the States to supplement it"; or (3) state law conflicts with federal law, including when they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. at 2495.

Actual conflict preemption means that "compliance with both federal and state [law] is a physical impossibility." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963). Federal law also preempts state law when, "under the circumstances of [a] particular case, [state] law stands as an obstacle to

the accomplishment and execution of the full purposes and objectives of Congress." *Wyeth v. Levine*, 555 U.S. 555, 589 (2009). To determine whether state law presents "a sufficient obstacle," courts determine the federal law's "purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 350 U.S. 364, 373 (2000).

Indeed, "the purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). With the CSA, Congress' purpose is plain: "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2); *Gonzales v. Raich*, 545 U.S. 1 (2005). Under the CSA, marijuana is a Schedule I drug, meaning it has a high potential for abuse, lacks any accepted medical use and cannot be used safely even under the supervision of a physician. 21 U.S.C. § 812.

The CSA does not recognize a "medical exception" for marijuana. *See id*.; *United States v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483, 483 (2001) (holding federal agents could enforce the CSA against California residents as "there is no medical necessity exception to the [CSA's] prohibitions on manufacturing and distributing marijuana"); *see also Mont. Caregivers Ass'n*,

L.L.C. v. United States, 841 F. Supp. 2d 1147, 1151 (D. Mont. 2012). As a Schedule I drug, the manufacture, distribution or possession of marijuana is illegal. 21 U.S.C. §§ 823, 841, 844. Accordingly, the CSA prohibits the manufacture, distribution, dispensation, and possession of marijuana even when state law authorizes its use to treat "medical" conditions. *See Raich*, 545 U.S. at 27; *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 486.

The D.C. Circuit has affirmed the Drug Enforcement Administration's denial of a petition to reclassify marijuana as a Schedule III, IV or V drug due to its supposed medicinal qualities. *Americans for Safe Access v. Drug Enforcement Admin.*, 706 F.3d 438 (D.C. Cir. 2013). Scientific evaluation provided by the Department of Health & Human Services concluded that "marijuana lacks a currently accepted medical use in the United States." *Id.* at 442. Specifically, the DEA found, and the Court of Appeals agreed, that there were no "adequate and well-controlled studies proving efficacy" in support of the petition to reclassify marijuana for medical use. *Id.* at 452.

Principles of conflict preemption do not bar all state statutes on the subject. The CSA does not preempt state laws that are consistent with federal law and do not present a "positive conflict" between federal and state law. *Oregon v. Ashcroft*, 368 F.3d 1118, 1126 (9th Cir. 2004) (*citing Oakland Cannabis Buyers' Coop*., 532

U.S. at 502 (Stevens, J., concurring)). But the CSA does not permit states to pass laws that affirmatively authorize conduct prohibited by federal law.

The Oregon Supreme Court concluded that the Oregon Medical Marijuana Act was preempted by the CSA. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d 518 (Or. 2010). The *Emerald Steel* court held that any law that affirmatively authorizes "a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act." *Id.* at 529. The AMMA and Oregon's medical marijuana law establish similar regulatory schemes in conflict with federal law. Like Oregon's medical marijuana law, the AMMA directs state employees to issue marijuana cards to "patients" who receive recommendations from doctors. The card then authorizes the "patient" to engage in using "medical" marijuana and provides an affirmative defense to charges of criminal liability under state statutes. Under this law, the Oregon Supreme Court concluded that an employee's use of "medical" marijuana constituted an "illegal use of drugs" because the authorization to use marijuana was preempted by the CSA. That Court noted that its state law stood "as an obstacle to the accomplishment of the full purposes of the federal law."

Similarly, the provisions of the AMMA authorizing the use by patients of

"medical" marijuana are in direct conflict with the CSA and are null and void. Indeed, the AMMA goes even further than Oregon's medical marijuana law in that it not only authorizes use by patients, but also authorizes cultivation of marijuana by patients, cultivation and distribution by "caregivers" and even large-scale cultivation and distribution of marijuana by dispensary owners. In fact, dispensary owners are authorized to grow and distribute unlimited quantities of marijuana. There could be no more patent obstacle to the accomplishment of the full purpose of the federal law and therefore no more blatant conflict with the CSA.

The Opinion, at ¶¶ 45–47, distinguishes the *Emerald Steel* decision and ultimately declines to follow it. But this Court can, and should, re-examine the basis of *Emerald Steel*'s conclusion that state medical marijuana laws authorizing conduct that violates the CSA stand as an obstacle to federal law. Bolstering the need for this Court to re-examine the AMMA's constitutionality, the Colorado Supreme Court recently ruled that a provision of the state constitution requiring police officials to return medical marijuana to a person acquitted of drug charges was preempted by the CSA. *People v. Crouse*, ___ P.3d ___, 2017 WL 365800 (Colo. Jan. 23, 2017). The Colorado court concluded that this state law "positively conflicts" with the CSA and police officers could not comply with the state law

without violating federal law.[2]

Under the AMMA, County employees are placed in a similar position. The United States Attorney's Office for the District of Arizona has stated that it "will continue to vigorously prosecute individuals and organizations that participate in unlawful manufacturing, distribution and marketing activity involving marijuana, even if such activities are permitted under state law." Importantly, the U.S. Attorney wrote that "compliance with Arizona laws and regulations does not provide a safe harbor, nor immunity from Federal prosecution." (App. at 81–82, ¶¶ 3, 5). And the Ninth Circuit has recently "warn[ed]" that although Congress has abated prosecution for possession of marijuana under the CSA, marijuana manufacture, distribution, and possession remains a federal crime. *See United States v. McIntosh*, 833 F.3d 1163, 1179, n.5 (9th Cir. 2016).

The Opinion below requires County employees to subject themselves to the risk of criminal prosecution by the United States under the CSA. This risk is manifest in the public pronouncements from the U.S. Department of Justice. Employees of Maricopa County would thus be subject to federal prosecution under the CSA in connection with activities they are required to perform in order to implement the AMMA. For example, the Maricopa County Planning and Development Department is charged with approving and issuing building permits

[2] *But see State v. Okun*, 231 Ariz. 462, 296 P.3d 998 (App. 2013).

and special use permits, and generally facilitating the opening and operation of any business seeking to locate within unincorporated Maricopa County.

The current non-enforcement policies of the U.S. Attorney do not create immunity from prosecution. *See id.* Even if no federal prosecution has been initiated thus far against the Maricopa County Defendants, the threat of prosecution is a realistic possibility given statements by law enforcement officials, the fact that there is a new president and administration, and County employees should not be compelled to break the law to see if the federal prosecutors are serious. *See N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000).

The employees of the Maricopa County Defendants would be subject to criminal prosecution if the Opinion is not reversed. The Maricopa County Defendants and their employees would find themselves in a dilemma, forced to choose between (1) complying with the mandamus order and risking federal prosecution under CSA or (2) deliberately defying a state court's order. Federal preemption should act to eliminate this conflict.

CONCLUSION

This Court should grant review of the Court of Appeals Opinion on both the zoning issue and the issue of federal preemption. This Court should reconsider and clarify the scope of *Reed-Kaliher*.

RESPECTFULLY SUBMITTED this 21st day of February, 2017.

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Appendix

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IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

WHITE MOUNTAIN HEALTH CENTER, INC.,
an Arizona non-profit corporation, *Plaintiff/Appellee*,

v.

MARICOPA COUNTY; WILLIAM MONTGOMERY, ESQ.,
Maricopa County Attorney, *Defendants/Appellants,*

STATE OF ARIZONA ex rel. MARK BRNOVICH,[1]
in his official capacity as Attorney General, *Intervenor/Appellant*.

Nos. 1 CA-CV 12-0831
1 CA-CV 13-0697
1 CA-CV 14-0372
(Consolidated)
FILED 12-20-2016

Appeal from the Superior Court in Maricopa County
No. CV2012-053585
The Honorable Michael D. Gordon, Judge

AFFIRMED IN PART, REVERSED IN PART

COUNSEL

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By Steven M. White, Anne M. Brady
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[1] Pursuant to ARCAP 27(c)(2), Arizona Attorney General Mark Brnovich is substituted for former Arizona Attorney General Thomas C. Horne. The caption above should be used for all further proceedings in this matter.

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OPINION

Presiding Judge Donn Kessler delivered the opinion of the Court, in which Judge Peter B. Swann and Chief Judge Michael J. Brown joined.

K E S S L E R, Presiding Judge:

¶1 In 2012, White Mountain Health Center, Inc. ("White Mountain") sought county zoning approval to establish a medical marijuana dispensary ("MMD") pursuant to the Arizona Medical Marijuana Act ("AMMA"), Arizona Revised Statutes ("A.R.S.") sections 36-

2801 to -2819 (2014 and Supp. 2015).[2] Maricopa County refused to issue the necessary zoning documents and White Mountain filed suit. These three consolidated appeals followed. In the first appeal (1 CA-CV 12-0831, the "Preemption Appeal"), Appellants[3] seek reversal of the superior court's partial summary judgment for White Mountain and denial of the Appellants' motions for summary judgment, in which the court held that the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 to 971 (West 2016), does not preempt the AMMA. In the second appeal (1 CA-CV 13-0697, the "Zoning Appeal"), the County challenges the summary judgment in favor of White Mountain, in which the court struck the Maricopa County Zoning Ordinance ("MCZO") "Second Text Amendment"[4] as it applied to MMDs. In the third appeal (1 CA-CV 14-0372, the "Attorneys' Fees Appeal"), the County seeks to reverse the court's $5000 sanction against the County pursuant to A.R.S. § 12-349 (2016).

¶2 For the reasons that follow, we affirm the superior court's rulings except the sanctions imposed against the County. First, the CSA does not preempt the AMMA to the extent the AMMA requires the County to pass reasonable zoning regulations for MMDs and process papers concerning zoning compliance or requires the State to issue documents to allow MMDs to operate. Second, the court did not exceed its authority in striking the Second Text Amendment to the extent the amendment applied to MMDs. Finally, we reverse the award of $5000 in sanctions against the County because the County did not unreasonably expand or delay the proceedings or defend a claim without substantial justification.

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[2] We cite the current version of applicable statutes when no revisions material to our opinion have occurred.

[3] The Appellants are Maricopa County and the Maricopa County Attorney, William Montgomery, in his official capacity (collectively, the "County"), and Intervenor/Appellant State of Arizona ex rel. Arizona Attorney General Mark Brnovich (the "State").

[4] *See infra* ¶ 9.

FACTUAL AND PROCEDURAL HISTORY

I. Background

A. AMMA and Regulations

¶3 In 2010, Arizona voters passed Proposition 203, now codified as the AMMA. Ariz. Sec'y of State, State of Arizona Official Canvass at 15 (2010); *State v. Okun*, 231 Ariz. 462, 464, ¶ 4 (App. 2013). The AMMA decriminalizes and provides protections against discrimination under state law for the medical use and possession, cultivation, and sale of marijuana under the circumstances described in the AMMA. *See, e.g.,* A.R.S. §§ 36-2802, -2811, -2813, -2814; *see also* Ariz. Sec'y of State, Ballot Proposition Guide at § 2(D), (G) (2010). The AMMA granted the Arizona Department of Health Services ("ADHS") rulemaking authority to promulgate regulations in order to implement and administer the AMMA. A.R.S. §§ 36-136(F) (Supp. 2012), -2803. Those regulations are found in the Arizona Administrative Code ("A.A.C.") at sections R9-17-101 to R9-17-323.[5] No party challenges the validity or construction of the ADHS regulations.

¶4 The AMMA also empowers ADHS to establish the system to register MMDs throughout the state and track compliance with statutory requirements. A.R.S. § 36-2803. To this end, ADHS may approve at least one MMD per county, but no more than one MMD for every ten pharmacies in an area. A.R.S. § 36-2804(C). The AMMA also authorizes cities, towns, and counties to "enact reasonable zoning regulations that limit the use of land for [MMDs] to specified areas in the manner provided in title 9, chapter 4, article 6.1, and title 11, chapter 6, article 2." A.R.S. § 36-2806.01 (internal citations omitted).

¶5 Both the AMMA and ADHS regulations require an entity seeking to become an MMD to first register with ADHS by filing an application for a "registration certificate." A.R.S. § 36-2804; A.A.C. R9-17-304. The application must include, among other things, "a sworn statement certifying" that the MMD is in compliance with zoning restrictions "[i]f the city, town or county . . . has enacted zoning restrictions." A.R.S. § 36-2804(B)(1)(d). ADHS regulations also require that an application must include "[d]ocumentation from the local jurisdiction where the [MMD]'s

[5] We refer to the regulations in effect in June 2012. The current regulations, which were amended December 2012, do not affect resolution of these appeals.

proposed physical address is located [stating] that: a. There are no local zoning restrictions for the [MMD's] location, or b. The [MMD's] location is in compliance with any local zoning restrictions." A.A.C. R9-17-304(C)(6).

¶6 Once the application for a registration certificate is filed, ADHS must review and allocate the certificates pursuant to A.A.C. R9-17-303. If ADHS allocates a registration certificate to an applicant and the applicant is compliant with the regulations, ADHS shall issue the applicant a certificate. A.A.C. R9-17-107(F)(1), (2). Only upon ADHS' allocation and issuance of a registration certificate may a proposed MMD apply to operate an MMD. *See* A.A.C. R9-17-305(A). [6]

B. CHAA system

¶7 To allocate MMD certificates, ADHS utilizes the preexisting Community Health Analysis Areas ("CHAA") system. A.A.C. R9-17-101(7). Arizona contains 126 CHAAs, and some CHAAs are in overlapping local jurisdictions such as cities and unincorporated portions of counties. The parties stipulated that nothing explicitly requires an MMD in every CHAA.

C. MCZO

¶8 The MCZO is a permissive zoning ordinance, such that if a particular land use is not explicitly permitted, it is prohibited. In response to the AMMA, the County amended the MCZO in 2010 to create a special use category that permitted MMDs in certain commercially-zoned districts (the "First Text Amendment"). The First Text Amendment also contained a "poison pill" provision instructing: "[t]his provision shall not be construed as permitting any use or act which is otherwise prohibited by law."

¶9 The Maricopa County Attorney publicly opposed the AMMA, opined that county employees who processed applications for MMDs could be subject to federal prosecution, and advised the County to

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[6] Among other things, A.A.C. R9-17-305 requires the entity applying to operate an MMD to provide "documentation issued by the local jurisdiction . . . authorizing occupancy of the building as [an MMD]" and a sworn statement by the proposed MMD's principal officers and board members "certifying that the [MMD] is in compliance with local zoning restrictions."

stop accepting applications for MMDs in unincorporated Maricopa County. The County amended the MCZO again in 2011 (the "Second Text Amendment"). The Second Text Amendment only permitted MMDs in Industrial 3 ("IND-3") zones in unincorporated Maricopa County, precluded special use permits for MMDs, and contained a slightly different poison pill provision. The new provision specified that, as to IND-3 zones, a "building or premise shall be used only for industrial use not in conflict with any federal law, state law or Maricopa County Ordinance." Although IND-3 zoning existed in unincorporated Maricopa County, CHAA 49[7] did not contain any IND-3 zones.[8]

II. **White Mountain's Complaint**

¶10 In May 2012, White Mountain applied for a registration certificate for CHAA 49. In response, ADHS issued a "Notice of Deficiencies" because White Mountain had not submitted the necessary zoning documentation from the County confirming that either no local zoning restrictions existed or that White Mountain was in compliance with applicable restrictions. *See* A.A.C. R9-17-107(G)(4), R9-17-304(C)(6). White Mountain was the only applicant for a registration certificate in CHAA 49. As the State stipulated and the superior court found, ADHS would have issued the registration certificate to White Mountain but for the lack of necessary zoning documentation from the County.

¶11 White Mountain filed a complaint in superior court against the County, ADHS, and its Director in his official capacity,[9] alleging that White Mountain could not obtain the necessary zoning documentation because the County refused to issue it. The State stipulated that "the only deficiency in [White Mountain's] application [was] the lack of documentation from Maricopa County." White Mountain attached to its complaint a copy of a letter from the Maricopa County Attorney's Office that stated:

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[7] CHAA 49 is located in Sun City and is entirely within unincorporated portions of Maricopa County.

[8] The parties stipulated in the superior court that the existence of the CHAA system is irrelevant to zoning.

[9] Former ADHS Director Will Humble has been replaced by Dr. Cara Christ.

> [T]he County is not issuing zoning verification for [MMDs] due to the fact that doing so would potentially subject the County and its employees to prosecution under federal law. . . . the County will not be accepting any further applications for [MMDs] or cultivation sites, further processing any pending applications, or issuing any certificates, permits or other authorizations or justification for [MMDs] or cultivation sites until the threat of federal prosecution is conclusively removed.

¶12 White Mountain sought declaratory relief regarding its compliance and/or need to comply with the zoning verification requirement. In Count 1, White Mountain sought a declaration that: (1) there were no local or county zoning restrictions for MMDs in CHAA 49; (2) the County had not enacted "reasonable" restrictions; or (3) White Mountain had complied with all requirements for obtaining an MMD registration certificate. In its answer, the County "admit[ted] that Maricopa County and its employees [would] not take any action that would be in violation of federal law."

¶13 In Count 2, White Mountain sought injunctive relief to prevent ADHS from withdrawing its application for a registration certificate due to the lack of required documentation from the County. Finally, in Count 3, White Mountain sought mandamus relief to order: (1) the County to provide the necessary documentation stating that there were either no zoning restrictions or that White Mountain was in compliance; and (2) ADHS to issue a registration certificate to White Mountain.

III. The Preliminary Injunction

¶14 In response to White Mountain's request for injunctive relief, the superior court entered a preliminary injunction enjoining ADHS from withdrawing or denying White Mountain's application based on White Mountain's failure to provide the zoning verification. The State did not seek appellate relief from the injunction. *See* A.R.S. § 12-2101(A)(5)(b) (2016) (authorizing an appeal from the grant or denial of injunctive relief).

IV. Motions for Summary Judgment

A. Federal Preemption

¶15 White Mountain then moved for partial summary judgment seeking, among other things, a court order directing the County to issue the

zoning documentation.[10] The County filed a cross-motion for summary judgment, asserting "the relief sought [was] preempted by the laws of the United States" and that the court could not order declaratory relief to "compel" a public lawyer, here the Maricopa County Attorney, to give a "certain legal opinion." It maintained that a mandatory injunction requiring compliance with the AMMA "would require county employees to subject themselves to the risk of criminal prosecution by the United States" and specifically that County employees "could be held liable as aiders or abettors" under the CSA. Ultimately, the County argued that (1) because the County and its employees could not comply with both the AMMA and the CSA, the relief sought was preempted ("impossibility preemption"); and (2) the AMMA was preempted because it created an obstacle to enforcement of the CSA ("obstacle preemption").[11]

¶16 The State intervened, counterclaimed for declaratory relief, and moved for summary judgment, arguing White Mountain's requested relief was preempted by the CSA. It asserted all relevant provisions of the AMMA authorizing the running of MMDs were barred by obstacle preemption.

¶17 The parties agreed the CSA neither expressly preempts state law nor occupies the whole field. The superior court determined neither obstacle preemption nor impossibility preemption applied, but the court limited relief to simply ordering the County to issue zoning documentation stating that either no relevant zoning requirements existed or White Mountain had complied with them. The court entered a final signed judgment pursuant to Arizona Rule of Civil Procedure 54(b), granting White Mountain's motion for partial summary judgment and mandamus relief, denying Appellants' cross-motions for summary judgment, and denying the State's counterclaim for declaratory relief. Thereafter the County filed a document with the court that indicated the County's

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[10] White Mountain also sought mandamus and/or declaratory relief that: (1) it had complied with the MCZO; (2) the MCZO did not contain any restrictions on MMDs; (3) the MCZO did not contain reasonable restrictions; (4) in the alternative, that the only reasonable zoning restrictions were C-2 and C-3 zones and limitations on the exact location of MMDs close to schools and other facilities; (5) White Mountain had complied with all statutory and regulatory requirements for the issuance of a registration certificate; and (6) ADHS issue the registration certificate.

[11] We further discuss impossibility and obstacle preemption *infra* ¶ 34.

compliance with the court's mandamus order. However, on the form it provided to White Mountain to submit to ADHS, rather than checking either box on the ADHS form indicating White Mountain was in compliance with the local zoning regulations or that no such zoning existed, the County responded by indicating "N/A" for each option. The County and the State timely filed separate notices of appeal from the 54(b) judgment, thus beginning the Preemption Appeal.

B. Declaratory Relief and the Second and Third Text Amendments

¶18 While the Preemption Appeal was pending, and after the County's execution of the ADHS zoning form indicating that neither the compliance nor absence of zoning restrictions applied, White Mountain and the County moved for summary judgment on the Second Text Amendment. White Mountain argued the Second Text Amendment violated the AMMA by effectively banning MMDs from CHAA 49, and generally because of the poison pill provision. The County argued the Second Text Amendment was a valid legislative act, the AMMA did not preempt local regulation with respect to land use for MMDs, and permitted uses in particular zoning districts must be consistent county-wide.

¶19 In granting White Mountain's motion and denying the County's motion, the superior court recognized its duty to give broad deference to the County when the County's zoning powers were challenged, but it noted that a county could not use its zoning powers to violate state law. It observed that when state law and a zoning ordinance conflict and the two cannot be harmonized, state law controls. The court declared the Second Text Amendment unreasonable and void because it violated the AMMA both by (1) prohibiting MMDs under the poison pill provision and (2) limiting MMDs to IND-3 districts although no IND-3 district existed in CHAA 49. As the court summarized, a "County zoning ordinance that poses a categorical prohibition of Medical Marijuana violates" the AMMA, which grants local jurisdictions only the limited power to enact "reasonable zoning regulations that limit the land for [MMDs] to specified areas . . . ."

¶20 The superior court then ordered supplemental briefing on the effect of striking the Second Text Amendment. White Mountain argued that by striking the Second Text Amendment, the First Text Amendment would be automatically reinstated or revived, or alternatively, that all MMD zoning restrictions would be eliminated from the MCZO. The County argued that because the MCZO is a permissive ordinance, that is,

unless a use is permitted it is prohibited, and none of the zones other than IND-3 permits MMDs, MMDs are prohibited in those other zones. It also argued that the striking of the Second Text Amendment could not revive or automatically renew the First Text Amendment. According to the County, this resulted in the rest of the Second Text Amendment staying in place and thus, MMDs were prohibited because they were not listed as permitted uses and such a result would not violate the AMMA.

¶21 The superior court held that the doctrine of automatic revival would not revive the First Text Amendment, but it also held that after striking the Second Text Amendment, no zoning restrictions for MMDs in unincorporated Maricopa County existed beyond limitations within the AMMA regarding locations near schools. The court concluded White Mountain "ha[d] otherwise fully complied with local zoning restrictions, because there [were] none," and ordered ADHS to process White Mountain's application for a registration certificate. It further enjoined ADHS from denying the application based on White Mountain's failure to provide evidence of compliance with zoning ordinances because, again, "there [were] none." The court later amended that judgment to provide that it had only struck the Second Text Amendment as it specifically applied to MMDs. The County and the State timely appealed, starting the Zoning Appeal.

¶22 In response to the superior court's judgment that the Second Text Amendment was void, the County amended the MCZO again (the "Third Text Amendment"). The Third Text Amendment restricted MMDs to Commercial 2 and 3 ("C-2," "C-3") and IND-1, -2, and -3 zoning districts. The poison pill provision from the First Text Amendment, directing that the "provision shall not be construed as permitting any use . . . otherwise prohibited or made punishable by law," remained in the Third Text Amendment. Additionally, the County provided that in the event the superior court's ruling on the Second Text Amendment was overturned, the Third Text Amendment would no longer be effective and the MCZO would revert back to the Second Text Amendment.

V. **Attorneys' Fees, Costs, and Sanctions**

¶23 White Mountain sought attorneys' fees and costs from the County. The superior court awarded White Mountain $190,000 in fees, $3700.02 in costs, and $5000 in sanctions against the County pursuant to A.R.S. § 12-349. The court found that White Mountain was entitled to sanctions pursuant to A.R.S. § 12-349 because the County unreasonably expanded and delayed the proceedings and because the court's earlier

ruling on preemption, adverse to the County, rendered the County's opposition to the requested relief "without substantial justification."

¶24 The County timely appealed, starting the Attorneys' Fees Appeal. We consolidated the three appeals, and we have jurisdiction to resolve the appeals from each of the final judgments pursuant to A.R.S. §§ 12-120.21 (2016) and -2101(A)(1) (2016).

DISCUSSION

I. Preemption Appeal

¶25 In the Preemption Appeal, Appellants contend the CSA preempts all provisions of the AMMA. However, the only issue raised in the superior court, and the only issue we will address, is whether the actions the AMMA required the State and the County to take in this case—for the County, approving zoning for specific areas for MMDs, processing zoning documents, and taking action pursuant to zoning laws to ensure MMDs meet other zoning requirements, and for the State, processing White Mountain's application to operate an MMD—are impliedly preempted because such relief allegedly conflicts with the CSA. *See County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 815-18 (2008) (stating county lacks standing to raise constitutional infirmities of state medical marijuana laws except to the extent the laws require it to take specific action).

¶26 The State argues the court erred by requiring it to process White Mountain's applications because such relief thwarts federal public policy and "Arizona courts are bound to deny injunctive aid to unlawful marijuana businesses." The County argues the court erred by: (1) requiring it to issue zoning verification documents required by A.A.C. R9-17-304(C)(6) because such relief is preempted by the CSA; and (2) not dismissing the complaint to the extent the complaint sought an order challenging the Maricopa County Attorney's advice to the County, because he was "performing a discretionary role in providing legal advice to the County. . . . [and] mandamus relief does not lie to challenge his advice to his public client." For the following reasons, we conclude the relief ordered consistent with the AMMA is not preempted by the CSA and the County's

preemption argument based on possible criminal prosecution for issuing the zoning documentation is legally insufficient if not moot.[12]

¶27 Two amicus briefs were filed in support of preemption, neither of which we address. The first, from amicus Judicial Watch, Inc., largely repeats Appellants' arguments regarding preemption but adds that the AMMA is in direct conflict with the CSA and unidentified treaty obligations of the United States. The Arizona Supreme Court rejected the direct conflict argument in *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 124, ¶¶ 19-21 (2015). We are bound by that decision. *Sell v. Gama*, 231 Ariz. 323, 330, ¶ 31 (2013) ("The lower courts are bound by our decisions, and this Court alone is responsible for modifying that precedent."). Moreover, the parties did not brief or contend in the superior court that there was express preemption or a violation of treaty rights, and we will not consider such arguments raised by an amicus for the first time on appeal, especially in light of the amicus' failure to identify any specific treaty obligations allegedly preempting the AMMA. *See Fendler v. Phx. Newspapers Inc.*, 130 Ariz. 475, 478 n.2 (App. 1981) ("On appeal from summary judgment this court will not consider new theories raised in order to secure reversal of the lower court's determination."); *see also Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 502-03 (App. 1992) (clarifying that an argument without citations to legal authority is insufficient to preserve an issue on appeal). Additionally, amici cannot raise issues not raised below or by the parties. *Ruiz v. Hull*, 191 Ariz. 441, 446, ¶ 15 (1998).

¶28 The second amicus brief, from the Yavapai County Attorney, argues the AMMA is preempted by the federal scheme for medicine delivery governed by the federal Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.*, which includes the CSA and the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq. See Gonzales v. Raich*, 545 U.S. 1, 12 n.19 (2005). However, because the parties did not litigate and the superior court did not address the Comprehensive Drug Abuse Prevention and Control Act or the Food, Drug, and Cosmetic Act, we will not consider them on appeal. *Fendler*, 130 Ariz. at 478 n.2; *Ruiz*, 191 Ariz. at 446, ¶ 15. Similarly, we will not address the County's argument that *Reed-Kaliher* should be modified or overruled because the County failed to raise the argument in the trial court, *Fendler*, 130 Ariz. at 478 n.2, and only

[12] During oral argument on appeal, both White Mountain and the County averred that White Mountain had opened its MMD in CHAA 49. We understand that to mean that ADHS took all necessary actions to process and approve White Mountain's application.

the supreme court may modify supreme court precedent, *Sell*, 231 Ariz. at 330, ¶ 31.

A. Standard of Review and Burdens of Proof

¶29 Although we defer to the superior court's factual findings and review grants of injunctive and mandamus relief for an abuse of discretion, the rest of our review is *de novo*. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 47, ¶ 9 (App. 2007) (injunctive relief); *Forszt v. Rodriguez*, 212 Ariz. 263, 265, ¶ 9 (App. 2006) (mandamus relief); *Hill v. Peterson*, 201 Ariz. 363, 365, ¶ 5 (App. 2001) (noting federal preemption is a question of law); *State v. Mathis*, 231 Ariz. 103, 109, ¶¶ 17, 19 (App. 2012) (reviewing the superior court's interpretation of statutes and whether summary judgment was warranted *de novo*).

¶30 Appellants bear a heavy burden to show preemption. "Statutes are presumed constitutional and the burden of proof is on the opponent of the statute to show it infringes upon a constitutional guarantee or violates a constitutional principle." *State v. Wagstaff*, 164 Ariz. 485, 494 (1990); *see US W. Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 201 Ariz. 242, 246, ¶ 23 (2001) (stating that whenever possible, we construe Arizona law "to avoid conflict with the United States Constitution and federal statutes"). Similarly, "[t]he party claiming preemption bears the burden of demonstrating that federal law preempts state law," and "must overcome the assumption that a federal law does not supersede the historic police powers of the states." *E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 206 Ariz. 399, 405, ¶ 18 (App. 2003) (internal quotation marks and citation omitted); *see Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005) (noting that when two plausible readings of a statute are possible, "we would nevertheless have a duty to accept the reading that disfavors pre-emption").

B. General Preemption Principles

¶31 State and federal governments have "elements of sovereignty the other is bound to respect," *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012), and states have "vast residual powers" reserved by the Tenth Amendment to the United States Constitution, *State v. Barragan-Sierra*, 219 Ariz. 276, 286, ¶ 30 (2008) (quoting *United States v. Locke*, 529 U.S. 89, 109 (2000)). One of these is the states' historical police power to provide for the health, safety, and welfare of their citizens, including the power to define criminal offenses and sanctions, prosecute crimes, and regulate land use and medical practices. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (regulating medical practices); *United States v. Lopez*, 514 U.S. 549, 561 n.3

(1995) (defining and enforcing criminal law); *Barnes v. Glen Theater*, 501 U.S. 560, 569 (1991) (stating public indecency statutes are a legitimate use of police power); *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 757 (2010) ("[R]egulation of medical practices and state criminal sanctions for drug possession are historically matters of state police power . . . .").

¶32 Of course, "[f]rom the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes." *Arizona*, 132 S. Ct. at 2500. In such a case, the Supremacy Clause[13] provides that federal law prevails because "state action cannot circumscribe Congress' plenary commerce power." *Raich*, 545 U.S. at 29; *see Arizona*, 132 S. Ct. at 2500. Thus, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *see Barragan-Sierra*, 219 Ariz. at 286, ¶ 30 (explaining that "unless constrained or displaced" states' powers "are often exercised in concurrence with those of the National Government") (internal quotation marks and citation omitted). In line with principles of federalism, the states' police powers "are not superseded unless that was the clear and manifest purpose of Congress." *Reed-Kaliher,* 237 Ariz. at 124, ¶ 19 (internal quotation marks and citations omitted); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (stating court will be reluctant to find preemption when interpreting a federal statute pertaining to a subject traditionally governed by state law). Indeed, federalism is one of the beauties of the American system of government, permitting states to act as laboratories of democracy consistent with the Tenth Amendment and the Supremacy Clause. *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *see also Bond v. United States*, 564 U.S. 211, 221 (2011) (holding that deference to state lawmaking "allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry") (citations and internal quotation marks omitted).

¶33 In general, federal preemption is conceptualized as either express or implied. *See Arizona*, 132 S. Ct. at 2500-01. Express preemption

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[13] U.S. Const. art. VI, cl. 2.

occurs when Congress explicitly defines the extent of preemption. *Mich. Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984). Implied preemption occurs by: (1) federal occupation of the field ("field preemption"); or (2) a conflict between the state and federal law that either (a) creates an obstacle to federal law ("obstacle preemption"), or (b) makes it physically impossible to comply with both state and federal law ("impossibility preemption"). *Arizona*, 132 S. Ct. at 2500-01; *see also Reed-Kaliher,* 237 Ariz. at 124, ¶ 19.

¶34 As an initial matter, Appellants do not and cannot successfully argue that Congress expressly preempted all state drug law or occupied the entire field by enacting the CSA. As our supreme court noted in *Reed-Kaliher*, Congress "specified that the CSA does not expressly preempt state drug laws or exclusively govern the field." 237 Ariz. at 124, ¶ 20. The CSA states: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field . . . unless there is a *positive conflict*" between a provision of the CSA and "State law so that the two *cannot consistently stand together*." 21 U.S.C. § 903 (emphases added); *see also Oregon*, 546 U.S. at 251 ("The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision."). Thus, express preemption and field preemption do not apply. Instead, Appellants argue that conflict preemption applies; the State contends the CSA preempts the AMMA using obstacle analysis, and the County uses both obstacle and impossibility analyses.

C. **Conflict Preemption**

1. Obstacle Preemption

i. *Reed-Kaliher*

¶35 We gain substantial guidance from our supreme court's recent decision, *Reed-Kaliher v. Hoggatt*. Reed-Kaliher was an AMMA patient who sought amendment of a probation condition banning marijuana use or possession "for any reason." *Id.* at 121, ¶ 4. He asserted the AMMA protected him from "arrest, prosecution or penalty in any manner, or denial of any right or privilege . . . [f]or . . . medical use of marijuana pursuant to [AMMA]." *Id.* The State claimed the CSA preempted the AMMA under conflict analysis, but the court rejected its argument, pointedly holding there was "no such conflict here." *Id.* at 141, ¶ 19. Relying on *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 536-41 (2014), the court explained that the AMMA does not prevent the United States

from enforcing federal law, but instead provides a limited state-law immunity. *Reed-Kaliher*, 237 Ariz. at 124, ¶ 22. As such, the AMMA does not stand as an obstacle to the CSA. State law conflicts with federal law on obstacle preemption only if the purpose of the federal law cannot otherwise be accomplished. *Id.* As the court explained:

> The state-law immunity AMMA provides does not frustrate the CSA's goal of conquering drug abuse or controlling drug traffic . . . the people of Arizona chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana. Possession and use of marijuana not in compliance with AMMA remain illegal under Arizona law.

Id. at 124-25, ¶ 23 (internal quotation marks and citations omitted).[14] The court also reasoned that by not including a prohibition of AMMA-compliant marijuana use as a condition of probation, the superior court would not be "authorizing or sanctioning a violation of federal law, but rather would be recognizing that the court's authority to impose probation conditions is limited by statute." *Id.* at 141, ¶ 21. Finally, the court explained that state officials were not being compelled to violate their oath of office by being required to permit medical marijuana use consistent with the AMMA. *Id.* at 125, ¶ 24. Rather, all state officers and employees swore to support Arizona statutes and both the Arizona and federal constitutions, including the Supremacy Clause. *Id.* Because federal law does not require state judges to prohibit probationers from AMMA-sanctioned marijuana use and the AMMA permits such use, no violation occurs by permitting use as a term of probation. *Id*.

¶36 In light of *Reed-Kaliher*, we conclude Appellants have not met their burden to show the AMMA is preempted by the CSA under conflict

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[14] *Reed-Kaliher* also noted that Congress cannot compel states to enact or enforce a federal regulatory program, and the CSA does not require Arizona to enforce federal law. 237 Ariz. at 123-24, ¶ 18.

analyses.[15] In supplemental briefs, Appellants attempt to distinguish *Reed-Kaliher* from this case, arguing: (1) *Reed-Kaliher* does not address the same federal preemption issue or conclusively determine the outcome here because it is limited to its facts; and (2) the AMMA requires the State and County to "affirmatively authorize" violations of the CSA, unlike in *Reed-Kaliher*.[16]

¶37 We disagree with Appellants' argument that *Reed-Kaliher* is limited to its facts for several reasons. First, in applying *Reed-Kaliher*, we must look to what was "central to the [supreme court's] analysis" when interpreting precedent. *State v. Gear*, 239 Ariz. 343, 346, ¶ 18 (2016). The rationale of *Reed-Kaliher* applies to this situation as well as to probationary terms prohibiting use of medical marijuana under the AMMA. The essence of *Reed-Kaliher* is that Arizona voters' approval of medical marijuana under a regulated state law system in no way conflicts as an obstacle with federal enforcement of the CSA. As the court explained, nothing in the AMMA precludes the United States from enforcing the CSA; the AMMA "chose to

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[15] The United States Supreme Court recently denied leave to file a bill of complaint in *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016). In the complaint, Nebraska and Oklahoma had sought to challenge portions of Colorado's recreational marijuana laws as being preempted by the CSA. *Id.* at 1036 (Thomas, J. and Alito, J., dissenting); *cf. Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290-92 (D. Colo. 2016) (dismissing for lack of standing private actions to hold Colorado's recreational marijuana laws preempted under the CSA and other federal laws and treaties).

[16] White Mountain argues the issue of federal preemption is moot because the superior court's rulings have permitted White Mountain to proceed and, White Mountain is therefore no longer seeking mandamus relief and Appellants no longer have standing to assert the affirmative defense of preemption. We will, of course, strive to avoid constitutional issues if the appeal can be resolved on other grounds. *See Fragoso v. Fell*, 210 Ariz. 427, 430, ¶ 6 (App. 2005) (explaining that courts should avoid constitutional issues "when other principles of law are controlling and the case can be decided without ruling on the constitutional questions"). Given the nature of the State's and County's arguments about alleged preemption of the AMMA, however, we cannot in good conscience conclude that the preemption argument is moot simply because White Mountain is currently operating to distribute medical marijuana in conformity with the AMMA.

part ways with congress only regarding the scope of acceptable medical use of marijuana. Possession and use of marijuana not in compliance with AMMA remain illegal under Arizona law." *Reed-Kaliher*, 237 Ariz. at 124-25, ¶ 23 (internal quotation marks and citations omitted). The federal government is free to enforce the CSA in Arizona and cannot require the state to enforce the CSA. *Id.* at 123-24, ¶ 18.

¶38 Second, although *Reed-Kaliher* addresses the immunity clause of the AMMA, the court found the preemption analysis in *Ter Beek* persuasive and *Ter Beek*'s facts are similar to the facts at hand. *See id.* at 122-25, ¶¶ 7-9, 22-23. *Ter Beek* involved Michigan's medical marijuana act and a local ordinance that, like the MCZO, provided that uses "not expressly permitted . . . [were] prohibited in all districts," and that "uses that [were] contrary to federal law, state law or local ordinance [were] prohibited." 846 N.W.2d at 533-34. Ter Beek was a qualifying patient under Michigan's medical marijuana act who wanted to grow and use medical marijuana pursuant to section 4(a) of that act. *Id.* at 534.[17] He contended that the local ordinance violated section 4(a) of the act because it subjected him to punishment for conduct permitted by the act. *Id.* at 534-35. The city argued in part that the act was preempted by the CSA. *Id.* The Michigan Supreme Court held that the local ordinance was invalid under the act and that the act was not preempted by the CSA. *Id.* at 540-41. Specifically, the court determined no obstacle preemption occurred because: (1) the immunity state law provided did not alter, interfere with, or undermine federal enforcement of the CSA; and (2) the CSA expressly recognized a role for the states in regulating drugs by expressly declining to occupy the field. *Id.* The court concluded that it failed to see how state law providing immunity from state penalties for medical use of marijuana, which would include sale and transfer of such product compliant with state law, would result in "significant and unsolvable obstacles to the enforcement" of the CSA. *Id.* Thus, although *Reed-Kaliher* took place in a probation context, the facts of *Ter Beek* are similar enough to this case to defeat Appellants' argument that *Reed-Kaliher* was limited to a probation violation context. The AMMA's provisions at issue here, like the provisions at issue in *Ter Beek*, do not

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[17] Section 4(a) of the Michigan act provided, in relevant part, that: "A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act." *Ter Beek*, 846 N.W.2d at 535.

amount to "significant and unsolvable obstacles to the enforcement" of the CSA. *See also United States v. Walsh*, 654 Fed. App'x 689, 696 (6th Cir. 2016) (affirming federal convictions of violations of the CSA for manufacturing medical marijuana and holding that compliance with state medical marijuana statutes did not create a defense to a breach of the CSA); *Joe Hemp's First Hemp Bank v. City of Oakland*, No. C 15-05053 WHA, 2016 WL 375082, at *3 (N.D. Cal. Feb. 1, 2016) (holding that city's permit ordinances regulating distribution of medical marijuana were not preempted by the CSA because they did not create an obstacle to federal enforcement of the CSA and merely regulated traffic in controlled substances to a lesser degree than state criminal laws).

¶39 We also find support for our conclusion from *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 815-18 (2008). In *San Diego NORML*, various California counties challenged the state's medical marijuana program. *Id.* at 808. They argued in part that the CSA preempted the program because the program required them to issue identification cards identifying the person as authorized to possess, transport, deliver, or cultivate marijuana under California's medical marijuana laws. *Id.* at 808-11. The court rejected that argument, first concluding that preemption under 21 U.S.C. § 903 of the CSA was limited to positive conflicts between the CSA and state law, meaning impossibility preemption rather than obstacle preemption. *Id*. at 821-25. Alternatively, the court reasoned that even if obstacle preemption applied to the identification card provisions, the cards did not pose a significant obstacle to specific federal objectives under the CSA. *Id.* at 826-27. Instead, the cards merely allowed qualified citizens to obtain identification that would facilitate protection from prosecution under state law. *Id*. at 827. The court also rejected the counties' impossibility preemption argument, concluding the program only required counties to process applications for the cards and the CSA was silent by not banning such cards. *Id*. at 825-26.

ii. Authorization Versus Decriminalization

¶40 Appellants argue *Reed-Kaliher* is distinguishable because the AMMA requires the State and County to "affirmatively authorize" violations of the CSA rather than merely decriminalizing them. Although the State maintains that "[i]dentifying a person who is not subject to arrest or prosecution under state law is certainly within the State's power to decriminalize activities for purposes of its own laws," it cites four provisions of the AMMA to support its argument that the AMMA "expressly authorizes" activities that violate the criminal enforcement provisions in the CSA. Similarly, the County argues the AMMA goes

"beyond mere decriminalization" to "affirmatively authorize" violations of the CSA.

¶41 We disagree with Appellants. As we understand the Appellants' arguments, if the AMMA had merely decriminalized the manufacture, distribution, and sale of medical marijuana, the AMMA would not be preempted by the CSA any more than decriminalization of growth and possession for personal use would have been preempted. However, because the State decided to regulate MMDs, that *regulation* is preempted. The logic of that distinction escapes us.

¶42 We also fail to see a principled basis for the State's distinction between Arizona's identification system to determine whether a patient is exempt from criminal sanction (i.e., for possession) and its system to determine whether an MMD is exempt (i.e., for possession and distribution). The State does not explain why any arguable differences in registering MMDs and patients under Arizona law somehow amount to authorizing federal crimes in one instance but not the other. Appellants have not shown that the AMMA or portions thereof go "beyond decriminalization," or that authorization/decriminalization is even a valid distinction for purposes of Arizona law. However, even assuming the validity of the distinction and its applicability here, Appellants have not shown how the AMMA creates "significant and unsolvable obstacles to the enforcement" of the CSA. *See Ter Beek*, 846 N.W.2d at 538-39.

¶43 Additionally, the AMMA provisions Appellants cite are not implicated by the facts or context of this case. *See* A.R.S. §§ 36-2806(E)-(F), -2806.02. Only one cited provision actually uses the word "authorize," and that provision pertains to patient and caregiver identification cards. *See* A.R.S. §§ 36-2804.04(A)(7) ("Registry identification cards for qualifying patients and designated caregivers shall contain . . . [a] clear indication of whether the cardholder has been *authorized* by this chapter to cultivate . . . for the qualifying patient's medical use.") (emphasis added), -2804.04(C)(7) (ADHS must inform a patient of MMD locations if the patient's or designated caregiver's identification card "does not state that the cardholder is *authorized* to cultivate marijuana . . . .").

¶44 We are unpersuaded by the State's argument based on this "authorization" language. The language that is purportedly fatal to the AMMA's enforcement appears in a section regarding patient and caregiver identification cards—an issue that the State itself maintains does not implicate the CSA because such provisions "merely serve to identify those

individuals for whom the possession or use of marijuana has been authorized" under Arizona law, and are therefore "not 'authorizations' to violate federal law."

¶45 Appellants' argument relies on *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518 (Or. 2010), but this reliance is misplaced.[18] In *Emerald Steel,* the Oregon Supreme Court held that the CSA

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[18] The County also relies on *Pack v. Superior Court*, 199 Cal. App. 4th 1070 (2011). However, the California Supreme Court dismissed the petition for review as moot, *Pack v. S.C.*, 283 P.3d 1159 (Cal. 2012), thus making the court of appeal's decision unpublished pursuant to California Rule of Court 8.528(b)(3). As such, the California Court of Appeal's decision is not citable in Arizona because it is not citable in California. Cal. Rule of Court 8.1115(a); Ariz. R. Sup. Ct. 111(d).

Appellants also cite *Gonzales v. Raich,* 545 U.S. 1 (2005) and *United States v. Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483 (2001), to support their preemption arguments. The State limits its reliance on these cases to note that the CSA regulatory scheme is a closed regulatory system and there is no medical necessity exemption for marijuana. The County argues that under the two cases, the CSA prohibits the manufacture, distribution, dispensation, and possession of marijuana even if permitted for medical uses under state law, and such a prohibition is properly within Congress' authority under the Commerce Clause.

Neither case affects our preemption analysis. *Raich* addressed whether the CSA's criminalization of marijuana, including prohibition of local cultivation and use of marijuana in compliance with California law, was constitutional under the Commerce Clause, not whether state laws permitting medical marijuana were preempted by the CSA. 545 U.S. at 5, 15; *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 381-83 (2007) (clarifying that the sole issue presented in *Raich* was constitutionality of the CSA under the Commerce Clause and not preemption of state medical marijuana laws). Indeed, the only possible discussion of preemption in *Raich* was a general comment discussing the Supremacy Clause and stating that state authorization of medical marijuana cannot limit Congressional authority to criminalize marijuana. 545 U.S. at 29. *Oakland* reversed a lower court ruling that held a medical necessity for use of marijuana authorized under state law was a defense to federal enforcement of the CSA. 532 U.S. at 486-89, 494-95. These cases addressed attacks on CSA enforcement by the federal government, not preemption of state laws authorizing medical marijuana use.

preempted Oregon's medical marijuana act insofar as it authorized marijuana use by a patient in violation of the CSA. *Id.* at 528-29. By construing the terms "may engage" and "authorized to engage" in the Oregon medical marijuana act,[19] the court determined the Oregon act affirmatively authorized marijuana use in violation of the CSA and was thus preempted. *Id.* at 525, 525-26 nn.11-12.

¶46 We fail to see how *Emerald Steel* supports Appellants' positions. The ultimate question is whether the AMMA creates an obstacle so that the CSA cannot otherwise be enforced, *Reed-Kaliher,* 237 Ariz. at 124, ¶ 22, that is, whether the AMMA's requirement that the State and County process MMD applications and permit MMDs under zoning ordinances creates "significant and unsolvable obstacles to the enforcement" of the CSA, *Ter Beek*, 846 N.W.2d at 539. We fail to see how having a state regulatory scheme to permit MMD operation consistent with the AMMA creates significant and unsolvable obstacles to the enforcement of the CSA. See *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1229-30 (D. N.M. 2016) (noting that cases holding state medical marijuana laws are not preempted by the CSA for exempting persons from prosecution under state law are distinguishable from *Emerald Steel*, which dealt with interpretation of state discrimination laws *requiring* employers to accommodate use of medical marijuana under state law).

¶47 We also decline to adopt *Emerald Steel*'s distinction between decriminalization and authorization of medical marijuana use. The authorization/decriminalization distinction itself seems to be primarily semantic and ultimately results in a circular analysis. *See Emerald Steel*, 230 P.3d at 538-39 (Walters, J., dissenting) (stating the state medical marijuana act's words of authorization "serve only to make operable the exceptions to and exemptions from state prosecution . . . [and] do not grant permission that would not exist if those words were eliminated or replaced with words of exception or exclusion"). As stated by the dissent in *Emerald Steel*, even if the state law "did not use words of permission, [it] would permit, for purposes of [state] law, the conduct that it does not punish." *Id.* at 539. Indeed, the AMMA's decriminalization of patients' production, possession, and use of marijuana within the terms of the AMMA is no less an

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[19] The two provisions at issue stated that: "A person who possesses a registry identification card . . . *may engage* in . . . the medical use of marijuana . . . ." O.R.S. § 475.306 (West. 2003) (emphasis added); and defined "registry identification card" as "a document . . . that identifies a person *authorized* to engage in the medical use of marijuana . . . ." O.R.S. § 475.302(9) (West. 2003) (emphasis added).

authorization to produce, possess, and use marijuana than authorizing MMDs to operate by producing, possessing, and selling marijuana within the terms of the AMMA. Authorization, in this context, is merely another term for the absence of penalties or criminal sanctions under state law. *See Reed-Kaliher*, 237 Ariz. at 124, ¶ 21 (holding that by permitting an AMMA-compliant marijuana use for probationers, a court would "not be authorizing or sanctioning a violation of federal law, but rather would be recognizing that the court's authority to impose probation conditions is limited by statute.").

¶48 Finally, the State argues A.R.S. § 36-2811(B)-(G) provides protection from arrest and prosecution for AMMA activities that exceed state authority. It asserts "[t]hese provisions do not limit the prohibition to state tribunals . . . [and] the State cannot stop federal officers or courts from enforcing federal law." We find this argument unpersuasive. Not only are these provisions not at issue in this case, but we read them to be limited to prosecution under state law, particularly since the AMMA does not otherwise purport to shield anyone or any act from federal prosecution. We have a duty to construe our statutes "to avoid conflict with the United States Constitution and federal statutes." *US W. Commc'ns*, 201 Ariz. at 246, ¶ 23. In addition, "when two plausible readings of a statute are possible, we would nevertheless have a duty to accept the reading that disfavors pre-emption." *Bates*, 544 U.S. at 449. Arizona, like all other states, has the power to decriminalize certain acts and exempt certain actors for purposes of state law. *See Reed-Kaliher*, 237 Ariz. at 124-25, ¶¶ 22-23 (clarifying the people of Arizona "chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana"); *Okun*, 231 Ariz. at 465, ¶ 9 (stating that by approving the AMMA, Arizona voters decided to decriminalize possession of an allowable amount of marijuana); *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 388-89 (2007) (determining state law required return of property to medical marijuana user and was not preempted by the CSA).

2. Impossibility Analysis

¶49 In addition to Appellants' other conflict preemption arguments, the County argues the CSA preempts the AMMA using an impossibility analysis. The County asserts it is impossible to comply with both the CSA and the AMMA, and that by issuing the necessary zoning documents pursuant to the AMMA, County officials might face criminal prosecution for aiding and abetting MMDs' violations of the CSA. We find this argument unpersuasive for several reasons.

¶50 First, *Reed-Kaliher* rejected a similar argument as it applied to state court judges. The court held that by permitting an AMMA-compliant marijuana use for probationers, a court would "not be authorizing or sanctioning a violation of federal law, but rather would be recognizing that the court's authority to impose probation conditions is limited by statute." 237 Ariz. at 124, ¶ 21. Similarly, the County by issuing zoning documents would "not be authorizing or sanctioning a violation of federal law," but rather would be recognizing that the County had a duty to issue such documents by statute. Furthermore, the court also held that by allowing use of medical marijuana consistent with the AMMA as part of probation, state officers or employees, including prosecutors, would not violate their oath of office to "support the Constitution of the United States and the Constitution and laws of the State of Arizona" because

> nothing in federal law purports to require state judges to include a prohibition on the use of medical marijuana pursuant to AMMA as a condition of probation. Because AMMA prohibits such a condition and federal law does not require it, a state judge does not violate the oath of office by omitting such a condition.

Id. at 125, ¶ 24. This impliedly rejects an impossibility argument because the CSA does not expressly prohibit a county official from abiding by the AMMA in issuing zoning documents, and the state law requires such conduct.

¶51 Second, we cannot accept the County's aiding and abetting argument. 18 U.S.C. § 2 (West 2016) provides that:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

However, the CSA provides that subject to exceptions relating to search warrants,

> no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, *or upon any duly authorized officer of any State . . . who shall be lawfully*

> *engaged in the enforcement of any law or municipal ordinance relating to controlled substances*.

21 U.S.C. § 885(d) (West 2016) (emphasis added). Our supreme court found that § 885(d) provides immunity from federal prosecution to sheriffs who follow court orders to return medical marijuana to lawful possessors. *Okun,* 231 Ariz. at 465-66, ¶¶ 13-14 (citing 21 U.S.C. § 885(d)). Although the County contends that such a statute is limited to law enforcement personnel, the Ninth Circuit Court of Appeals has held that state or local officials who enforce state medical marijuana statutes are entitled to immunity under that provision. *United States v. Rosenthal*, 454 F.3d 943, 948 (9th Cir. 2006) (contrasting law enforcement officials, who "compel[led] compliance" with state law by vindicating appellant's "state-law right to [the marijuana's] return" and were therefore engaged in "enforcement," with marijuana distribution center operator, who, although appointed by city and encouraged to distribute medical marijuana under state law, was not engaged in "enforcement" because state law did not provide any person with a right to obtain medical marijuana). Here, County officials are "engaged in the enforcement" of state statutes by processing applications for the zoning permits and promulgating reasonable regulations to permit MMDs pursuant to state law.

¶52 Additionally, to prove aiding and abetting under federal law, "it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (internal quotation marks and citations omitted); *see also Conant v. Walters*, 309 F.3d 629, 635 (9th Cir. 2002). As the California Court of Appeal held in *Garden Grove*, state law enforcement officials acting pursuant to state law in returning medical marijuana to a person authorized by state law to possess it cannot be liable for violating the CSA as aiders and abettors. 157 Cal. App. 4th at 368. This is because to aid and abet, a person "must associate himself with the venture and participate in it as in something that he wishes to bring about and seeks by his actions to make it succeed." *Id.* (citation omitted). The court in *Garden Grove* reasoned that police officers returning medical marijuana did not fall into that category. If police officers actually returning marijuana to possessors cannot be liable as aiders and abettors, we fail to see how County officials who obey state law in passing a zoning ordinance consistent with the AMMA or processing applications for zoning clearance under the AMMA can be liable as aiders or abettors. *See also Joe Hemp's First Hemp Bank,* 2016 WL 375082 at *3 (holding that city's requirement for medical

marijuana dispensaries to obtain permit was mere regulation and did not require operators to aid and abet violation of or to conspire to violate CSA).

¶53 Third, the County rationalizes its fear of prosecution by relying on past statements of federal prosecutors, who themselves are limited in deciding what cases to prosecute. *See* 28 U.S.C. § 542 ("Each assistant United States attorney is subject to removal by the President."); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (stating the United States Attorney General exercises discretion as to whether to prosecute a particular case); *United States v. Baldwin*, 541 F. Supp. 2d 1184, 1196 (D.N.M. 2008) ("[T]he Attorney General has the power to supervise and direct United States Attorneys and Assistant United States Attorneys in the discharge of their duties."). However, no evidence of a credible threat of prosecution substantiates the County's impossibility preemption argument. *See Okun*, 231 Ariz. at 466-67, ¶¶ 15-17 (refusing to address whether CSA preempts AMMA under impossibility analysis because no actual or threatened prosecution existed, and holding the State lacked standing to argue preemption because it had no stake in the controversy); *Sibley v. Obama*, 819 F. Supp. 2d 45, 49-50 (D.D.C. 2011) (determining plaintiff who asserted he risked prosecution under the CSA did not have standing because even a memorandum from a deputy attorney general stating state law was not a defense to enforcement of federal law did not establish that threat was credible, actual, immediate, or even specific to plaintiff).

¶54 As White Mountain notes, this fear of prosecution has now become even less credible or immediate, if not moot, given acts by Congress since entry of the judgment here. On December 18, 2015, Congress passed the Consolidated Appropriations Act. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015). Pursuant to that act, the Department of Justice may not use any of its funding "with respect to . . . Arizona . . . to prevent [it] from implementing [its] own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Id.* at § 542, 2332-33. The Ninth Circuit Court of Appeals has held that the Appropriations Act prohibits the Department of Justice from interfering with the implementation of such laws not simply by suing states with medical marijuana laws but by prosecuting private individuals under the CSA when those individuals are compliant with the state medical marijuana law in their jurisdiction. *United States v. McIntosh*, 833 F.3d 1163, 1176-78 (9th Cir. 2016). This development vitiates Appellants' argument that at this time they might be subject to federal criminal prosecution under

the CSA for aiding and abetting violations of that act if they acted in compliance with the AMMA.[20]

¶55 In sum, the County does not show how the relief ordered here makes it impossible to comply with the AMMA due to a risk of prosecution under federal law and specifically the CSA. The County's broad contention that any act which is in any way related to fulfilling duties mandated by the AMMA is somehow criminal under federal law, does not persuade us that the AMMA is preempted. "Impossibility pre-emption is a demanding defense," and the County has not carried its burden. *Wyeth v. Levine*, 555 U.S. 555, 573 (2009).

¶56 We heed the Supreme Court's warning that "[p]re-emption analysis should not be a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict." *Id.* at 588 (internal quotation marks and citation omitted). Appellants have not established that the relief granted here relating to the AMMA is an obstacle to effectuating Congress' commerce goals embodied by the CSA or poses a "positive conflict" with the CSA such that state and federal law cannot "consistently stand together." 21 U.S.C. § 903.

D. Interference with County Attorney's Advice to the County

¶57 The County maintains this case also involves a claim against the County Attorney for providing legal advice. According to the County, White Mountain's complaint sought "an order in mandamus compelling Mr. Montgomery to change his advice to the County."

¶58 We do not read the record in this case to support the County's characterization of the claim. Regardless of whether we view the case from the perspective of the complaint or the superior court's order, this is not a case about legal advice, a request to change legal advice, or a discretionary

[20] As applied to the County issuing zoning clearances to White Mountain, the County's argument about potential federal prosecution is moot. The superior court, not the County, ultimately issued the necessary zoning clearance as part of its November 25, 2013, judgment. In that judgment, the court held that White Mountain had "fully complied with local zoning restrictions, because there [were] none," ordered ADHS to process White Mountain's application for a registration certificate, and enjoined ADHS from denying White Mountain's application based on the failure to provide evidence of compliance with local zoning ordinances.

act. The County is the "local jurisdiction" for purposes of A.A.C. R9-17-304(C)(6) and refused to comply with its duties to issue the zoning clearances. The County's refusal to comply with the non-discretionary ministerial act contemplated by A.A.C. R9-17-304(C)(6) is not immune from mandamus just because the County happened to receive advice from the County Attorney along the way. The County's argument, taken to its logical extension, would result in precluding mandamus relief any time a county attorney rendered advice in a matter and allow a county to possibly disobey state or federal law simply because its attorney advised them on the law. This is an untenable result. The advice of a county attorney is just that: advice. It is not a dictate that supersedes the law.

¶59 The superior court did not dictate to the County Attorney how to advise his client. The County Attorney is free to advise his client as he sees fit. However, if a court determines that the County violated state law in acting, the County is bound by that judicial decision. Accordingly, the court did not abuse its discretion in fashioning the mandamus relief based on the County's failure to comply with state law. *See Sines v. Holden*, 89 Ariz. 207, 209 (1961) (stating the writ of mandamus is discretionary).

II. **Zoning Appeal**

¶60 As discussed *supra* at ¶¶ 18-19, in the Zoning Appeal, the superior court determined that the Second Text Amendment violated the AMMA because it limited MMDs to IND-3 zones, none of which existed in CHAA 49, and because it prohibited any land use in violation of federal law. The court also determined that the doctrine of automatic revival did not apply to revive the First Text Amendment. Thus, upon striking the Second Text Amendment, there were briefly no zoning restrictions for MMDs in unincorporated Maricopa County until the County adopted the Third Text Amendment. *See supra* ¶¶ 21-22.

¶61 The County argues the superior court erred because: (1) the record was undisputed that limiting MMDs to IND-3 zones was reasonable; (2) the AMMA did not limit County authority to adopt ordinances restricting where MMDs could exist; and (3) the Court's order was impermissibly broad because it was not limited to CHAA 49, and it

misunderstood that because the MCZO was permissive, no zoning permitted MMDs after the Second Text Amendment was struck.[21]

A. Standard of Review

¶62 We review *de novo* whether summary judgment was warranted. *Mathis*, 231 Ariz. at 109, ¶ 17; *see also City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, 111, ¶ 14 (App. 2001) ("We view the facts de novo and in the light most favorable to the non-moving party."). "We will affirm the superior court if its determination is correct for any reason, even if that reason was not considered by the court." *Mathis*, 231 Ariz. at 109, ¶ 17. We review the superior court's interpretation of statutes and mixed questions of law and fact *de novo*. *Wilmot v. Wilmot*, 203 Ariz. 565, 568-69, ¶ 10 (2002).

B. Striking the Second Text Amendment as It Applied to MMDs

¶63 Two provisions of the Second Text Amendment are at issue in this appeal: first, that no acts may take place in any zone which are in violation of federal law, and second, that MMDs are limited to IND-3 zones. The County does not argue in its briefs that the first provision was valid under the AMMA, thus waiving that issue on appeal. *Ness,* 174 Ariz. at 502-03.

¶64 Regardless of waiver, however, the Second Text Amendment's prohibition of any acts in violation of federal law, as applied to the MMDs operating consistently with the AMMA, conflicts with the AMMA.[22] Accordingly, we affirm the superior court's summary judgment

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[21] The County also listed as an issue that the superior court violated separation of powers by ascribing a motive to the County in adopting the Second Text Amendment. The County waived this issue by not arguing it in its appellate briefs. *Ness,* 174 Ariz. at 502-03.

[22] Our holding would also apply to the poison pill provisions of the First and Third Text Amendments as to MMDs.

based on this provision and do not address whether limiting MMDs to IND-3 zones violates the AMMA.[23]

¶65 Zoning regulation is "based upon the police power of the state" and, generally speaking, "a matter of statewide concern." *Levitz v. State*, 126 Ariz. 203, 204 (1980) (internal quotation marks and citations omitted). The counties' power to zone is delegated by statute and zoning enactments must be in accordance with the authority granted. *Transamerica Title Ins. Co. v. City of Tucson*, 157 Ariz. 346, 350 (1988); *see* Ariz. Const. art. 13, § 2 (requiring city charters to be "consistent with, and subject to, the Constitution and laws of the state"); *see also City of Tucson v. State*, 229 Ariz. 172, 174-76, ¶¶ 10, 19 (2012) (stating adoption of city charter is "effectively, a local constitution . . . without action by the state legislature").

¶66 Contrary to the County's contention, the zoning issue is not whether the AMMA preempts local jurisdictions from regulating or restricting the location of MMDs. Rather, we are called upon to harmonize two statutory provisions, with the goal of giving meaning to both while also construing the AMMA to give effect to the voters' intent. *Gear,* 239 Ariz. at 345-47, ¶¶ 11, 19. Pursuant to counties' general authority to zone, counties "may adopt a zoning ordinance in order to conserve and promote the public health, safety, convenience and general welfare." A.R.S. § 11-811(A) (2012); *see* A.R.S. § 11-802(A) (2012) (stating county, "in order to conserve and promote the public health, safety, convenience and welfare," is under a mandatory duty to "plan and provide for the future growth and improvement of its jurisdiction"). However, pursuant to the AMMA, "counties may enact *reasonable zoning regulations that limit the use of land for [MMDs] to specified areas* in the manner provided in . . . title 11, chapter 6, article 2."[24] A.R.S. § 36-2806.01 (emphasis added). Thus, the issue is whether a local jurisdiction can ban MMDs under the guise of "reasonable zoning" by authorizing MMDs in an area but then adding a poison pill to that use, prohibiting an MMD from conducting business in violation of any law.

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[23] We understand the County to be arguing that the superior court erred in striking the Second Text Amendment and not that the court erred in holding that White Mountain had complied with the zoning requirements if we did not uphold or address the court's ruling on IND-3 zoning.

[24] In 2012, Article 2 consisted of A.R.S. §§ 11-811 to -818 (2012).

¶67 We hold that such a ban is not consistent with the express provision of the AMMA that local jurisdictions "may enact reasonable zoning regulations that limit the use of land for [MMDs] to specified areas in the manner provided in . . . title 11, chapter 6, article 2." A.R.S. § 36-2806.01. If a zoning provision violates the AMMA, it is void. *Jachimek v. Superior Court*, 169 Ariz. 317, 318-19 (1991).

¶68 We interpret statutes to give effect to the legislative intent behind them and, in the case of statutes created pursuant to an initiative, to give effect to the voters' intent. *Calik v. Kongable*, 195 Ariz. 496, 498, ¶ 10 (1999); *see Mathis*, 231 Ariz. at 109, ¶ 19 ("Our primary purpose in construing a constitutional amendment is to effectuate the intent of those who framed it and the electorate that approved it. We first examine the plain language of the provision and, if it is clear and unambiguous, we generally subscribe to that meaning."). The plain meaning of the statute is the best indicator of that intent. *U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 211 (App. 1989) ("An unambiguous statute should be interpreted to mean what it plainly states unless an absurdity results."); *County of Cochise v. Faria*, 221 Ariz. 619, 622, ¶ 9 (App. 2009) ("We look first to the plain language of the statute because that is the best indicator of legislative intent.").

¶69 Section 36-2806.01 is plain on its face. It does not preempt local zoning restrictions on MMDs but authorizes local jurisdictions to enact "*reasonable* zoning regulations that *limit the use of land for [MMDs] to specified areas* in the manner provided in . . . title 11, chapter 6, article 2." (emphasis added). As such, a local jurisdiction cannot adopt a zoning regulation that is self-defeating by banning MMDs. A ban on MMDs cannot be a "reasonable zoning regulation[] . . . limit[ing MMDs] to specified areas . . . ." Such an interpretation of § 36-2806.01 would nullify the basis for the AMMA, to permit use of marijuana for medical purposes consistent with the AMMA's terms and provide for a regulatory system of dispensaries to operate in compliance with the terms of the AMMA. Although § 36-2806.01 references the general authority of counties to establish zoning regulations pursuant to A.R.S. §§ 11-811 to -820, § 36-2806.01 is the more specific of the two statutory schemes. It therefore limits local jurisdictions' zoning powers to ensure those zoning decisions comply with the AMMA. *Baker v. Gardner*, 160 Ariz. 98, 101 (1988) (stating courts "construe seemingly conflicting statutes in harmony when possible," but "when two statutes truly conflict, either the more recent or more specific controls"); *see also Johnson v. Mohave County*, 206 Ariz. 330, 333, ¶ 11 (App. 2003) (stating that in addition to harmonizing seemingly-conflicting statutes when possible, courts should construe statutes in conjunction with other statutes that relate to the same

subject or purpose, giving effect to all statutes involved). Indeed, in *Ter Beek*, the Michigan Supreme Court held that a similar prohibition of acts in violation of federal law as applied to medical marijuana use and cultivation was in violation of state law. 846 N.W.2d at 533-34, 542-43.

¶70 Because the Second Text Amendment's provision barring any conduct in violation of federal law as applied to MMDs was in conflict with the limitation on zoning authority in the AMMA, the superior court did not err in striking that portion of the Second Text Amendment solely as it applied to MMDs.

¶71 We find further support for our conclusion based on rules of statutory construction. Analysis of this issue cannot be based exclusively on the County's broad zoning powers under A.R.S. § 11-811, but whether such authority was limited by the language in the AMMA that "counties may enact reasonable zoning regulations that limit the use of land for [MMDs] . . . to specified areas in the manner provided in . . . title 11, chapter 6, article 2." A.R.S. § 36-2806.01. If the voters had wanted the County to merely exercise its zoning authority under § 11-811, it would have simply stated that counties may provide zoning restrictions pursuant to § 11-811. We therefore must give some meaning to the language of A.R.S. § 36-2806.01 requiring "reasonable zoning regulations that limit the use of land for [MMDs] to specified areas" to give it effect and avoid redundancy. *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, ¶ 8 (2007) (stating courts interpret statutes so no part will be redundant); *County of Cochise,* 221 Ariz. at 622, ¶ 9 ("[E]ach word or phrase of a statute must be given meaning so that no part is rendered void, superfluous, contradictory or insignificant.") (citation omitted).

¶72 Harmonizing these sources of authority clarifies that the AMMA envisioned MMDs would be permitted in specified areas within a county and that the reference to "the manner provided in . . . title 11, chapter 6, article 2" would relate to the procedure for zoning. Banning all MMDs because they violate federal law is inconsistent with the express provisions

of the AMMA limiting local jurisdictions' zoning authority to "reasonable zoning regulation . . . limit[ing MMDs] to specified areas . . . ."[25]

¶73 The County is obviously concerned about medical marijuana and has attempted to ban MMDs if they violate the CSA even if they would be operating within the requirements of the AMMA. However, the voters of Arizona have spoken and want MMDs to operate subject to the conditions of the AMMA, including reasonable zoning restricting MMDs to specified areas. Such a limited role for local jurisdictions does not give them carte blanche to ban private enterprise under the AMMA under the guise of regulation. *Cf. Granholm v. Heald*, 544 U.S. 460, 484-85, 489-90, 493 (2005) (holding that Twenty-First Amendment to the United States Constitution, which grants states broad power to regulate liquor, did not permit States to favor local wineries over out-of-state wineries under guise of tax collection and protecting minors).

¶74 The County's reliance on *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 300 P.3d 494 (Cal. 2013), is misplaced. In *Riverside*, the California Supreme Court addressed a local zoning regulation that banned all medical marijuana dispensaries from operating in the city and banned any use prohibited by federal law. *Id.* at 496. In holding that the ban was not preempted by California's Compassionate Use Act of 1996 ("CUA")[26] and the more recent Medical Marijuana Program ("MMP"),[27] the court repeatedly emphasized that both the CUA and the MMP were extremely limited, exempting qualified patients and caregivers from criminal prosecution and state nuisance laws while acting in compliance with the two statutes. *Id*. at 500-01, 503, 506-07, 510-11. As the court summarized: "The CUA and the MMP create no all-encompassing

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[25] Moreover, taking the Appellants' argument to its logical conclusion, if a county desired to ban MMDs on unincorporated county land and all incorporated jurisdictions within the county did the same, then MMDs would be effectively banned from the county. This would violate the apparent requirement of the AMMA that there be at least one MMD per county if a party applying to operate an MMD met AMMA requirements. *See* A.R.S. § 36-2804(C) (stating ADHS "may not issue more than one [MMD] registration certificate for every ten pharmacies . . . except . . . to ensure . . . [ADHS] issues at least one [MMD] registration certificate in each county in which an application has been approved").

[26] Cal. Health & Safety Code § 11362.5 *et seq.*

[27] Cal. Health & Safety Code § 11362.7 *et seq.*

scheme for the control and regulation of [medical marijuana]. These statutes, both carefully worded, do no more than exempt certain conduct by certain persons from certain state criminal and nuisance laws against the . . . distribution" of marijuana. *Id*. at 509.

¶75 Indeed, the court in *Riverside* also noted that neither statutory scheme covered areas of zoning, land use planning, or business licensing so as to preclude local jurisdictions from banning dispensaries. *Id*. at 506. It emphasized that no provision within either statutory scheme restricted "the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning . . . or require[d] local zoning and licensing laws to accommodate the cooperative or collective cultivation and distribution of medical marijuana." *Id.* at 506-07. It also noted that the laws only imposed two obligations on local governments: to issue identification cards and to prohibit police from refusing to accept an identification card as a protection against arrest for possession, transportation, delivery, or cultivation of medical marijuana. *Id.* at 507 n.7. Finally, the court also rejected the city's argument that two amendments to the MMP, which authorized local jurisdictions to regulate or restrict the establishment of a dispensary, were intended to grant jurisdictions the right to ban dispensaries. *Id*. at n.8 (declining to resolve the issue but stating court was not convinced the legislature intended the amendments to provide affirmative authority for total bans).[28]

¶76 In contrast, here we have a complex regulatory scheme of MMD operation subject to ADHS regulations. Although the AMMA recognized the role of local jurisdictions, it limited the power of such jurisdictions to "reasonable zoning regulation . . . limit[ing MMDs] to

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[28] The first statute, California Health & Safety Code § 11362.768, limited dispensaries to a certain distance from a school, but also provided that nothing in that section could prohibit a local jurisdiction "from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana . . . dispensary" or "preempt local ordinances, adopted prior to [the amendment], that regulate the location or establishment of a medical marijuana . . . dispensary . . . ." The second statute, California Health & Safety Code § 11362.83, provides that nothing in the MMP shall prevent a local government from adopting "local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective," the civil and criminal enforcement of those ordinances, or enacting "other laws consistent with" the MMP.

specified areas." A.R.S. § 36-2806.01. The nature of a regulated system of MMDs, subject to ADHS oversight, and the express language that local jurisdictions can only pass reasonable zoning regulations limiting dispensaries to specified areas is the exact antithesis of the California system at issue in *Riverside*. We need not reach the possible scope of such zoning restrictions because we conclude that a total ban on MMDs under the poison pill provision violates A.R.S. § 36-2806.01.

¶77 We also reject the County's argument that the superior court erred in striking the Second Text Amendment and in concluding that once the ban on MMDs was struck, there were no prohibitions on MMDs in the unincorporated portions of the County. The County argues that because the MCZO is permissive in nature, that is, use is prohibited unless specifically authorized, and because none of the MCZO zoning categories list MMDs as a permitted use, the absence of MMDs as a permitted use means such use is prohibited. The County's argument ignores that the court struck all provisions of the Second Text Amendment as they specifically related to MMDs. Thus, as applied to MMDs, any permissive nature of the Second Text Amendment was also struck, and the court correctly held that the State should process White Mountain's application because there were no longer any AMMA-compliant zoning regulations.

¶78 Finally, the County also argues that the court's order striking the entire Second Text Amendment as applied to MMDs was too broad**.** To the extent that argument goes to the MCZO being permissive and the court's conclusion that by striking the Second Text Amendment there were no zoning prohibitions for MMDs, we have rejected that argument *supra* ¶ 78. To the extent the County is contending a court cannot substitute its judgment for that of the zoning authority because zoning is a legislative function, that did not occur here. All the court did was strike the zoning provisions as applied to MMDs as violative of the AMMA.

¶79 There is no genuine issue of material fact precluding the superior court's grant of summary judgment. As a matter of law, the Second Text Amendment's bar of any activity prohibited by law as applied

to MMDs that were in compliance with the AMMA was self-defeating and in violation of the AMMA.[29]

III. **Attorneys' Fees Appeal**

¶80 In the Attorneys' Fees Appeal, the County argues that the superior court's $5000 sanction pursuant to A.R.S. § 12-349 was not justified because the County did not act in bad faith and asserted a reasonable defense. The County does not challenge the amount or other statutory bases for the separate fee award. *See* A.R.S. §§ 12-348 (Supp. 2013) and -2030 (2016). Thus, we affirm the award of $190,000 in fees under those statutes and the $3700.02 in costs. We review only whether awarding the separate sanction pursuant to A.R.S. § 12-349 was clearly erroneous. *See Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 422, ¶ 31 (App. 2010) (stating this court views the evidence in light most favorable to affirm award under A.R.S. § 12-349 and reviews superior court factual findings for clear error); *Johnson*, 206 Ariz. at 334, ¶ 18 (stating the supreme court will affirm an award unless clearly erroneous).

¶81 Section 12-349 provides the superior court with discretion to award "double damages of not to exceed five thousand dollars" if a party "brings or defends a claim without substantial justification" or "unreasonably expands or delays the proceeding." "Without substantial justification" means that "the claim or defense is groundless and is not made in good faith." A.R.S. § 12-349(F); *see also Reynolds v. Reynolds*, 231 Ariz. 313, 318, ¶ 16 & n. 5 (App. 2013) (noting that prior to January 1, 2013, the statute required a finding that the claim or defense constituted harassment, is groundless and is not made in good faith, with the element of harassment eliminated after January 1, 2013); *Johnson*, 206 Ariz. at 334, ¶

[29] Additionally, we need not reach the issue of whether that order should result in reviving the First Text Amendment as argued by White Mountain. After the court struck the Second Text Amendment, the County adopted the Third Text Amendment, which permitted a broader range of zoning for MMDs and stated that the Third Text Amendment would be automatically void if the appellate court reversed the superior court's order striking the Second Text Amendment. Since we have affirmed the court on striking the Second Text Amendment, any issue as to revival of the First Text Amendment is moot.

16 (explaining that party requesting fees must prove elements by a preponderance of the evidence).[30]

¶82 Section 12-350 (2016) provides "the court shall set forth the specific reasons" for an attorneys' fees award made pursuant to § 12-349 "and may include certain listed factors, as relevant, in its consideration." *See Bennett,* 223 Ariz. at 421, ¶ 28 (stating purpose of findings is to assist the appellate court on review).

¶83 The superior court determined that the County's opposition to White Mountain's request for a declaration that the Second Text Amendment was unreasonable was "without substantial justification" because the County's position was "clearly unjustified in light of [the superior court's] adverse findings on the preemption." *See* A.R.S. § 12-349(A)(1). The court also determined that "the County's defense of the zoning ordinance unreasonably expanded *and* delayed the proceedings."

¶84 Even interpreting the record in the light most favorable to affirming the sanction award, we cannot conclude that the County acted in bad faith. First, the court expressly found that the County had not acted in bad faith, but only that its defense of the action was unjustified once the court had ruled on preemption. The court's findings assume the County's argument that the Second Text Amendment was consistent with the AMMA was either groundless or not made in good faith. However, the court had already ruled that the County had not acted in bad faith and at a minimum, we cannot say that the County's reasonableness argument for zoning MMDs was groundless, at least as to the IND-3 zone. Although the County's argument was not successful on that issue, it had some evidentiary basis as to the reasonableness of the IND-3 zoning classification in the abstract, simply missing the issue that it was not the reasonableness of the classification, but that such a classification barred MMDs because their acts violated the CSA.

¶85 Nor can we agree that the County's non-preemption arguments unreasonably expanded or delayed the proceedings. White Mountain had alleged and moved for partial summary judgment on the issue of whether the zoning was reasonable regardless of preemption. The County did not unreasonably expand or delay the proceeding by attempting to defend against that claim.

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[30] Our decision as to the sanction under § 12-349 is the same under both versions of the statute.

¶86 Therefore, we reverse the award of a $5000 sanction but otherwise affirm the fee award to White Mountain.

IV. Attorneys' Fees and Costs on Appeal

¶87 White Mountain requests attorneys' fees and costs on appeal pursuant to A.R.S. §§ 12-348, and -2030. Because the State intervened in the superior court proceedings, appealed the court's denial of its counterclaim for declaratory relief, and has been denied such relief on appeal, White Mountain has prevailed in an adjudication of the merits against the State. *See* A.R.S. § 12-348(A)(3) (stating a party is entitled to attorneys' fees if it prevails on an adjudication of the merits in proceeding pursuant to A.R.S. § 41-1034 which involves actions for declaratory judgment filed in accordance with the Uniform Declaratory Judgments Act). Thus, White Mountain is entitled to fees against the State. It is also entitled to its costs on appeal against the State pursuant to A.R.S. § 12-348. Similarly, because the County appealed from the summary judgment on preemption and zoning and we affirm the superior court on those issues, White Mountain is entitled to reasonable attorneys' fees and costs against the County in the Preemption and Zoning Appeals. Any such award will be joint and several against the State and County.

CONCLUSION

¶88 For the reasons stated above, we affirm all of the judgments entered for White Mountain except we reverse the award of sanctions of $5000 against the County. We will also award White Mountain its reasonable attorneys' fees and costs against the State and County on appeal upon timely compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

WHITE MOUNTAIN HEALTH CENTER, INC., An Arizona non-profit corporation, Plaintiff, v. COUNTY OF MARICOPA; WILLIAM MONTGOMERY, ESQ., Maricopa County Attorney, in his official capacity; ARIZONA DEPARTMENT OF HEALTH SERVICES, an agency of the State of Arizona; WILL HUMBLE, Director of the Arizona Department of Health Services, in his Official Capacity; and DOES I-X, Defendants.	NO. CV2012-053585 **WHITE MOUTNAI N'S AND THE COUNTY DEFENDANT'S JOINT STIPULATED STATEMENT OF FACTS** (Assigned to the Honorable Michael Gordon)

The parties hereby submit their Joint Stipulated Statement of Facts to support their respective motions for summary judgment in this matter. By submitting these Stipulated Statements of Fact, the parties are agreeing only that they are not disputed as set forth herein.

However, the parties do not agree that all facts set forth herein are relevant and any arguments regarding the relevancy of any facts will be set forth in the briefs submitted by the parties.

1. Plaintiff White Mountain Health Center, Inc. ("White Mountain") is an Arizona non-profit corporation, in good standing.

2. Defendant William Montgomery is the County Attorney of Maricopa County, Arizona. In that capacity Defendant Montgomery is responsible for advising the Maricopa County Board of Supervisors with regard to applicable law.

3. Defendant Will Humble ("Humble") is the Director of the Arizona Department of Health Services ("AZDHS"). Humble is responsible for the AZDHS, which is charged with implementing and overseeing the Arizona Medical Marijuana Act ("AMMA").

4. The issue presently being litigated in this lawsuit, which was filed by White Mountain, against Maricopa County and William Montgomery, is whether the Maricopa County Zoning Ordinance is reasonable.

5. Previously in this lawsuit, Maricopa County and William Montgomery as a part of their defense, asked this Court to determine whether federal law preempted the AMMA.

6. Maricopa County and William Montgomery, as a part of their defense, asserted their position in Court after AZDHS had adopted its final rules for the medical marijuana program and after AZDHS had begun implementation.

7. On December 3, 2012, this Court ruled that the AMMA is not preempted by federal law.

8. That decision is currently on appeal.

PASSAGE OF THE AMMA AND ADOPTION OF REGULATIONS

9. In November 2012, Arizona voters passed the AMMA by adopting proposition 203, a citizen initiative authorized as a reserved power by the Arizona Constitution at Article 4, Part 1, Section 1(2).

10. The Governor of the State of Arizona signed the Act into law in December 2010, making Arizona the fourteenth state to adopt a medical marijuana program.

11. The AZDHS was required by the Act to, within 120 days after the effective date of AMMA, adopt rules implementing Arizona's medical marijuana program.

12. On December 16, 2010, the Director of the AZDHS issued a call to Arizonans for public comment concerning development of rules for Arizona's medical marijuana program.

13. On December 17, 2010, the AZDHS issued its first set of draft rules for Arizona's medical marijuana program.

14. On or about December 28, 2010, Maricopa County duly adopted a text amendment to its Zoning Ordinance ("2010 Amendment"), adopting Article 1301.1.44, to provide for medical marijuana dispensaries and cultivation sites on properties in Commercial Zoning Districts zoned C-2 and C-3, with specified separation requirements, that obtain a Special Use Permit from the Maricopa County Board of Supervisors.

15. During the initial public comment period between December 17 and January 7, 2011, the AZDHS received comments from the public about its initial draft set of rules and published those comments.

16. On January 29, 2011, the Director of AZDHS issued a second call to Arizonans for public comment concerning development of rules for Arizona's medical marijuana program.

17. On January 31, 2011, the AZDHS issued a second set of draft rules for Arizona's medical marijuana program. In the second set of rules, the AZDHS first introduced the use of

community health analysis areas ("CHAA") to prevent clustering and provide services to as many Arizona citizens as possible.

18. Between January 31, 2011 and February 18, 2011, the AZDHS accepted further public comments on a revised draft of the rules for Arizona's medical marijuana program.

19. Between February 14 and 17, 2011, the AZDHS held four public meetings to receive comments about the draft rules for Arizona's medical marijuana program.

20. On March 28, 2011, the AZDHS published the final rules for the Arizona medical marijuana program, which are embodied in Arizona's Administrative Code at R9-17-101 to R9-17-323.

21. On April 13, 2011, the AZDHS filed its rules implementing Arizona's medical marijuana program with the Arizona Secretary of State.

22. The AMMA specifies the number of Medical Marijuana Dispensary Registration Certificates ("Certificate(s)") the AZDHS may issue based on the calculation provided for in A.R.S. § 36-2804(C).

23. No more than one Certificate could be issued per CHAA.

24. At the time that the initial round of applications were accepted, the AZDHS could issue up to but not more than 126 Certificates.

25. No party has challenged the legality or enforceability of the CHAA system.

26. The medical marijuana program rules promulgated by the AZDHS established a specific time schedule for Arizona non-profit corporations desiring to obtain approval to operate medical marijuana dispensary in the State of Arizona.

27. Specifically, between May 14 and 25, 2012, the AZDHS accepted applications from dispensary license seekers for allocation of a dispensary registration certificate, a document required to operate a MMD within a given CHAA.

28. On August 7, 2012, the AZDHS conducted a random selection process (*i.e.*, lottery) for qualified applicants to receive an allocation of a dispensary registration certificate for each CHAA.

29. A total of 98 Dispensary Registration Certificates were allocated by AZDHS on or about August 7, 2012.

COUNTY ATTORNEY AND OPPOSITION TO THE AMMA

30. County Attorney William Montgomery publicly opposed the AMMA when it was on the ballot.

31. Maricopa County moved to intervene in the State of Arizona's declaratory judgment lawsuit seeking a determination of whether the CSA preempted the AMMA.

32. Maricopa County Attorney William Montgomery has made public statements indicating that it is his legal opinion that the CSA preempts the AMMA.

33. Maricopa County Attorney William Montgomery has opined that Maricopa County employees could be subject to prosecution for facilitating a violation of the federal CSA for processing applications with the County.

34. Maricopa County Attorney William Montgomery advised the County to stop accepting applications for medical marijuana facilities in unincorporated Maricopa County.

35. Maricopa County Attorney William Montgomery has publicly argued that the AMMA puts children at risk and will lead to increased crime.

36. Maricopa County Attorney William Montgomery has publicly argued that the AMMA is not working because it is permitting unauthorized persons to receive marijuana from qualifying patients.

AZDHS USES THE CHAA SYSTEM TO ALLOCATE DISPENSARIES

37. The AZDHS employed the CHAA system to spread out the medical marijuana dispensaries throughout the State.

38. The CHAA system was in place prior to the passage of the AMMA and well before the text amendments were adopted by Maricopa County.

39. Under the AZDHS rules and regulations, no more than one MMD could be operated in any CHAA.

40. There are a total of 126 CHAAs in the State of Arizona.

41. It is not a requirement under either the AMMA or the rules and regulations created by the AZDHS that there be a medical marijuana dispensary in every CHAA.

42. The CHAA system was used by AZDHS in connection with, but not for the purpose of, limiting the number of medical marijuana dispensaries in Arizona.

43. A single CHAA can overlap multiple local governmental jurisdictions (e.g. cities, towns and/or counties).

AZDHS PROCESS FOR ALLOCATING CERTIFICATES

44. A Dispensary Registration Certificate, by its express terms, does not by itself allow an applicant to open and operate a MMD.

45. Applicants that received a Dispensary Registration Certificate from the AZDHS have approximately one year from receipt of the certificate to qualify for, further apply for, and then obtain from the AZDHS an "Approval to Operate" in their assigned CHAA.

46. To obtain "Approval to Operate," Certificate holders must pass an inspection from the AZDHS.

47. Before the AZDHS will schedule the inspection, a Certificate holder must present to the AZDHS a Certificate of Occupancy or the equivalent from the local jurisdiction.

48. During the inspection, the AZDHS determines whether the Certificate holder's location and policies and procedures comply with the AMMA statutes – A.R.S. § 36-2801 *et. seq.* -- and AZDHS rules and regulations – A.A.C. R9-17-101 *et.seq.*

49. The AZDHS uses a checklist for the inspection. A copy of the checklist is attached in the Parties Separate List of Exhibit as Exhibit 1.

50. If a Certificate holder does not get approval from its local jurisdiction and from the AZDHS, it cannot open its MMD.

STATE OF ARIZONA LAWSUIT REGARDING PREEMPTION

51. On May 27, 2011, the State of Arizona filed a Complaint for Declaratory Judgment in the United States District Court for the District of Arizona seeking a declaration whether the Act should be deemed preempted because of an irreconcilable conflict with federal law.

52. More specifically, the State of Arizona's Complaint for Declaratory Judgment embodied the concern that state employees might be subjected to potential criminal prosecution under federal law, namely the Controlled Substance Act ("CSA").

53. Maricopa County moved to intervene as a plaintiff in that lawsuit on July 14, 2011.

54. On January 4, 2012 the United States District Court denied Maricopa County's Motion to Intervene.

55. On January 4, 2012, United States District Court Judge Susan R. Bolton dismissed the State of Arizona's Complaint for Declaratory Judgment as unripe.

56. On January 13, 2012, Arizona Governor Jan Brewer advised the acting United States Attorney for the District of Arizona, Ann Birmingham Scheel, in writing that Arizona would implement the Act.

THE UNINCOPRORATED MARICOPA COUNTY ZONING ORDINANCE

57. The current Maricopa County Zoning Ordinance ("MCZO") for the Unincorporated Areas of Maricopa County was initially adopted by the Maricopa County Board of Supervisors in 1969. A copy of the current MCZO as it relates to medical marijuana is attached in the Parties Separate List of Exhibit as Exhibit 2.

58. That ordinance provided that any zoning existing on the date of adoption would be the applicable zoning for that property.

59. Unincorporated Maricopa County is that part of Maricopa County that is not a part of an incorporated city or town. These unincorporated areas of Maricopa County co-exist with those cities and towns often until the areas are annexed by cities and towns.

60. Joy Rich testified that there is a significant difference in the development of land within a city or town and the land in unincorporated Maricopa County. Incorporated cities and towns provide services like police, fire, trash, sewer and water. Unincorporated Maricopa County does not provides some (e.g. the Maricopa County Sheriff's Office) but not all of these services. Much of unincorporated Maricopa County is zoned low density residential.

61. As are zoning ordinances generally, the MCZO is a permissive ordinance. Unless a specific use is listed as permitted, the use is not allowed.

62. Article 802.2 of the MCZO lists those commercial uses that are the only uses permitted in the C-O (Commercial Office Zoning District).

63. Article 803.2 lists those commercial uses that are the only uses permitted in the C-1 (Neighborhood Commercial Zoning District).

64. Article 804.2 lists those commercial uses that are the only uses permitted in the C-2 (Intermediate Commercial Zoning District).

65. Article 805.2 lists those commercial uses that are the only uses permitted in the C-

3 (General Commercial Zoning District).

66. According to Joy Rich, a review of the Commercial Zoning Districts reveals that the higher the number of the District (C-2 as compared to C-1), the greater the intensity of the use and wider the range of customers the uses will attract.

67. Pursuant to Article 803.1 of MCZO, the purpose of the C-1 District is "to provide for smaller shops and services in convenient locations to meet the daily needs of families in the immediate residential neighborhoods…." However, pursuant to Article 804.1 of the MCZO, the purpose of the C-2 District "is to provide for the sale of commodities and the performance of services and other activities in locations for which the market area extends beyond the immediate residential neighborhoods…." Finally, pursuant to Article 805.1 of the MCZO, the purpose of the C-3 Zoning District "is to provide for commercial uses concerned with wholesale or distribution activities in locations where there is adequate access to major streets or highways…."

68. The Industrial Zoning Districts set forth in Chapter 9 of the MCZO follows a similar pattern as the Commercial Districts. IND-1 (Planned Industrial Zoning District), Section 901, lists specific uses that are the only uses permitted on property within the District and has as its principal purpose "to provide sufficient space in appropriate locations for certain types of business and manufacturing uses that are quiet, attractive and well-designed including appropriate screening and/or landscape buffers to afford locations close to existing residential uses, so that people can live and work in the same neighborhood." Article 901.1 of the MCZO.

69. IND-2 (Light Industrial Zoning District), Section 902, also lists specific uses that are the only uses permitted on property within the District and has as its principal purpose "to provide for light industrial uses in locations which are suitable and appropriate taking into consideration the land uses on adjacent or nearby properties, access to a major street or highway,

rail service or other means of transportation, and the availability of public utilities…." Article 902.1 of the MCZO.

70. IND-3 (Heavy Industrial Zoning District), Section 903, has as its principal purpose "to provide for heavy industrial uses in locations which are suitable and appropriate, taking into consideration land uses on adjacent or nearby properties, access to a major street or highway, rail service or other means of transportation, and the availability of public utilities…." Article 903.1 of the MCZO.

71. The Use Regulations of Article 903.2 provide: "A building or premise shall be used only for any industrial use not in conflict with any federal law, state law or any Ordinance of Maricopa County, and subject to procedural regulations as listed in Chapter 3, Section 306."

72. The IND-3 District is a "catch-all" industrial district which permits "industrial uses that are not permitted in any other zoning district." Article 903.1 of the MCZO.

73. The MCZO, Section 201 specifically provides: "A Medical Marijuana Dispensary shall be considered an industrial use."

74. The MCZO, Section 201 specifically provides: "A Medical Marijuana Dispensary Offsite Cultivation Location shall be considered an industrial use."

75. Neither IND-1 nor IND-2 lists either medical marijuana dispensary or medical marijuana dispensary offsite cultivation location as a permitted use in any zone.

76. Because medical marijuana dispensaries and medical marijuana dispensary offsite cultivation locations are industrial uses that are not specifically permitted in IND-1 or IND-2, they are "industrial uses that are not permitted in any other zoning district" and, are therefore, permitted industrial uses in the IND-3 District provided they meet all other applicable requirements.

MARICOPA COUNTY'S ADOPTION OF TEXT AMENDMENTS TO THE MCZO REGARDING MEDICAL MARIJUANA FACILITIES

77. A.R.S. § 36-2806.01, which is a part of the AMMA, provides that, "[c]ities, towns and counties may enact reasonable zoning regulations that limit the use of land for registered nonprofit medical marijuana dispensaries to specified areas in the manner provided in title 9, chapter 4, article 6.1, and title 11, chapter 6, article 2."

78. In October 2010, in preparation for the potential of Proposition 203 passing, Maricopa County Planning and Development Department began drafting zoning regulations to address where medical marijuana dispensaries could be located in Maricopa County.

79. In staff reports for the Board of Supervisors to consider when making a decision to enact zoning for medical marijuana dispensaries, the Maricopa County Planning and Development Department recommended that medical marijuana dispensaries be subject to a Special Use Permit which requires public input at a public hearing prior to approval and that the uses would be limited to the C-2 and C-3 commercial zoning districts.

80. This staff recommended change in the zoning ordinance was to take place through a Text Amendment ("TA") and was designated TA2010017. (For the purposes of the Statement of Facts the parties have agreed to refer to this text amendment as the "First Text Amendment") A copy of TA2010017 is attached in the Parties Separate List of Exhibits as Exhibit 3.

81. A Text Amendment ("TA") is an amendment to the words of the zoning ordinance that can be initiated by the planning and zoning commission (MCZO Article 304.3) or by an applicant (MCZO Article 304.2).

82. This First Text Amendment was initiated by the Planning and Zoning Commission ("Commission").

83. Pursuant to A.R.S. § 11-813 and MCZO Section 304, all text amendments are subject to the legislative process that is open to the public: it must go through a public meeting,

is reviewed by a number of stakeholders for comment and then subject to a public hearing before the planning and zoning commission, before finally being heard and voted on by the Maricopa County Board of Supervisors in a public hearing.

84. On November 17, 2010 the Maricopa County Board of Supervisors held a public hearing to consider the First Text Amendment.

85. The Board of Supervisors adopted the First Text Amendment.

86. The First Text Amendment stated that "[t]his provision shall not be construed as permitting any use or act which is otherwise prohibited by law."

87. The First Text Amendment authorized the granting of a Special Use Permit for medical marijuana dispensaries and associated cultivation facilities in the C-2 and C-3 zoning districts.

88. The First Text Amendment created a 1,500 foot separation requirement from another MMD, church, public or private elementary or secondary school, public or private day care center, preschool, nursery, kindergarten, or similar use.

89. On March 17, 2011, the Commission initiated TA2011001 ("Second Text Amendment") to make changes to the MCZO regarding medical marijuana. A copy of TA2010017 is attached in the Parties Separate List of Exhibits as Exhibit 4.

90. On May 26, 2011 Maricopa County Attorney William Montgomery authored a legal opinion to the Maricopa County Board of Supervisors entitled "Advice Concerning Potential Liability for County Employees Under the Federal Controlled Substances Act in Connection With Implementation of Arizona's Medical Marijuana Act."

91. Based on a number of factors, including, but not limited to, a letter from United States Attorney for Arizona Burke, County Attorney William Montgomery determined that there was "an immediate threat of prosecution to state and county employees currently processing

applications filed to the various state and county agencies pursuant to the AMMA."

92. On August 4, 2011 the Second Text Amendment was considered and recommended for approval by the Commission.

93. According to a staff report for the August 4, 2011 meeting, the Second Text Amendment was initiated on March 17, 2011 because "[a]t that time staff wished to be prepared to handle any housekeeping items due to medical marijuana rules promulgated by the Arizona Department of Health Services."

94. The staff report points out that "[s]ince then [March 17, 2011] legal determination has been made by the Maricopa County Attorney's Office (MCAO) that state law offers no protection to regulatory staff, who in the processing of permits that approve medical marijuana facilities, can be prosecuted for facilitating a federal crime."

95. The staff report then states "[t]herefore, staff recommends a revision to the county's medical marijuana regulations to relegate dispensaries and associated cultivation facilities to the IND-3 zoning district."

96. The Commission recommended approval of the Second Text Amendment.

97. On August 31, 2011 the Maricopa County Board of Supervisors held a public hearing and adopted the Second Text Amendment and that currently represents the applicable zoning related to medical marijuana facilities in all of Unincorporated Maricopa County.

98. The Second Text Amendment re-designated a medical marijuana dispensary as an industrial use under Section 2 of the MCZO.

99. It also deleted medical marijuana dispensary as a Special Use category and made it a permitted use in the IND-3 zoning district.

100. Rather than use general language that uses were permitted unless otherwise prohibited by law, the Second Text Amendment, MCZO Article 902.3, clarified that all

industrial uses cannot be in conflict with "any federal law, state law or Maricopa County Ordinance."

101. The Second Text Amendment, as well as the First Text Amendment, went through the same process as every text amendment. Public meetings and hearings were held where any support or opposition to the text amendment could have been heard and considered.

102. No opposition to Second Text Amendment was presented at any time.

103. An attorney from the Maricopa County Attorney's office reviewed both Text Amendments before they were adopted.

104. Usually, a representative from the County Attorney's office attends public hearings and hearings before the Board of Adjustment, Planning and Zoning Commission, and Board of Supervisors.

105. Tom Salow from AZDHS testified that the AZDHS does not take a position on the zoning ordinances of local jurisdictions, including counties, as it pertains to medical marijuana dispensaries. Instead, AZDHS leaves it up to the local jurisdictions to determine the reasonableness of their zoning ordinances.

106. Tom Salow also testified that AZDHS anticipated that there would be local restrictions on zoning as it pertains to medical marijuana dispensaries.

107. Joy Rich testified that the MCZO covers all of the approximate 7,000 square miles of unincorporated Maricopa County.

108. She and Darren Gerard also testified that when zoning, Maricopa County does not and did not consider CHAAs or the CHAA system.

109. Joy Rich further testified that zoning districts must be the same throughout all of the unincorporated areas of Maricopa County and noted that Maricopa County "cannot spot zone or customize zoning to a very specific area of the County. One size does fit all in this instance."

110. The existence of CHAAs is wholly irrelevant to zoning.

WHITE MOUNTAIN AND CHAA #49

111. White Mountain originally attempted to submit an application with AZDHS to open a medical marijuana dispensary in CHAA #49, and White Mountain was the only applicant for that CHAA.

112. Presently, the only claimed deficiency by AZDHS in Plaintiff's application is the lack of written confirmation from Maricopa County that Plaintiff's proposed dispensary and/or off-site cultivation location complies with local zoning restrictions related to where a dispensary and/or off-site cultivation location may be located in Maricopa County or confirmation of the absence of medical marijuana restrictions in Maricopa County.

113. The AZDHS rejected the application because it did not contain the Documentation of Compliance with Local Jurisdiction Zoning.

114. After AZDHS rejected the application, White Mountain filed the present action.

115. After this Court ordered the County to execute the Documentation of Compliance with Local Jurisdiction Zoning, White Mountain presented the County with five or six different Documentation of Compliance with Local Jurisdiction Zoning forms, each with a different address.

116. Darren Gerard, Maricopa County's Deputy Director of the Planning and Development Department, executed each letter, but he indicated "N/A" for each option. The first option provided that "[t]here are no local zoning restrictions for a proposed dispensary at the above location." The second option provided that "[t]he location of the proposed dispensary is in compliance with local zoning restrictions related to where a dispensary may be located." See A copy of the letters are attached to the Parties Separate List of Exhibits as Exhibit 5.

117. Under the two options, because each of the locations proposed by White

Mountain was zoned C-2 Commercial, Mr. Gerard wrote "[z]oning is C-2 which does not permit medical marijuana facilities." Mr. Gerard underlined the "not."

118. Darren Gerard proposed drafts of both Text Amendments, but does not recall doing any research as it pertained to criminality before drafting either of these proposed text amendments.

119. Darren Gerard testified that he did not consider patient access in drafting either of the proposed text amendments.

120. Darren Gerard testified that he personally considered the possibility of crime when proposing a draft for TA2010017, the First Text Amendment. He further indicated that he patterned separation distances for medical marijuana facilities after those for adult businesses.

121. Darren Gerard, when asked why "you [Darren] initiated the change or ultimately did change the zoning ordinance?" testified that "under the original amendment the facilities were looked at similar to pharmacies to be placed in Community Commercial." Darren Gerard also pointed out that he did not want to "overemphasize pharmacy because that has not been an overriding thought process in the change."

122. Darren Gerard testified that the only writing that indicates a reason for the Second Text Amendment is the staff report which states that Second Text Amendment was being drafted and proposed because of the opinion of the Maricopa County Attorney that the AMMA offers no protection to regulatory staff who process permits from being prosecuted for facilitating a federal crime. Darren Gerard further testified that he did not remember that being an issue with staff, but it may have been an issue with the County Attorney's Office.

123. Maricopa County did not make any request pursuant to R9-17-303(C).

124. At this time, CHAA #49 contains no property zoned IND-3.

125. CHAA #49 is largely comprised of the area in unincorporated Maricopa County

commonly referred to as Sun City, AZ.

126. Darren Gerard testified that he believed the closest IND-3 zoned property is two miles away from CHAA #49.

127. Unincorporated Maricopa County is comprised of 4,242,370 acres of property.

128. Unincorporated Maricopa County contains 1,382 acres of IND-3 zoned property.

129. Unincorporated Maricopa County contains 1 acre of C-0 (Commercial Office), 7.5 acres of C-1 (Neighborhood Commercial), 287.4 acres of C-2 (Intermediate Commercial), and 44.6 acres of C-3 (General Commercial).

130. Pharmacies locating in unincorporated Maricopa County are permitted in C-2 and C-3 zones.

131. Darren Gerard testified that at some point during this particular lawsuit, that a customer came into the Planning and Development Department and wanted to file some type of variance application to allow for a medical marijuana facility in a C-2 zoning district. Darren Gerard further testified that Arizona Revised Statutes do not permit use variances.

132. Darren Gerard confirmed that a Special Use Permit may not be obtained by a party seeking to locate on IND-3 zoned property.

MCZO REGULATIONS REGARDING CHANGE IN LAND USE

133. If a landowner or a tenant wants to use his land for a specific use and that use is not permitted under the current ordinance, there are two different avenues for the applicant.

134. The applicant can seek to change the list of uses permitted within the applicable zoning district by a text amendment. This would then allow that particular use in that zoning district in all of unincorporated Maricopa County. See Article 304.2 of the MCZO.

135. In the alternative, the applicant could apply to have the land rezoned to a zoning district that could accommodate the use he is seeking. This would affect only that parcel or those

parcels rezoned.

136. White Mountain has never attempted to initiate a text amendment to change the ordinance of unincorporated Maricopa County as it pertains to medical marijuana.

137. White Mountain has never attempted to have any land within unincorporated Maricopa County rezoned to IND-3 zoned property.

QUALIFICATIONS, TESTIMONY AND OPINIONS OF JOY RICH

138. Joy Rich has been named as an expert in this case by the Defendants.

139. Ms. Rich is currently employed by Maricopa County as the Deputy County Manager where she is responsible for overseeing a number of departments, including planning and development.

140. Ms. Rich is a member of the American Planning Association as well as the American Institute of Certified Planners, an organization that provides professional certification by examination to professional planners.

141. Ms. Rich has been a certified planner for over 15 years. To maintain this certification she has been required to complete 32 hours of continuing education every two years. These 32 hours must include one and a half credit hours of ethics and one and a half credit hours in law.

142. Ms. Rich was the professional development officer for the state planning organization for at least two years, as well as the ethics officer for that same organization. As a part of her duties, Ms. Rich instructed on ethics and various other topics related to planning, zoning and other land use law issues.

143. Ms. Rich personally believes that marijuana should be available for medicinal purposes and she voted in favor of Proposition 203.

144. Ms. Rich was not involved in the preparation of either text amendment or any of

the staff reports related to those text amendments.

145. The primary goal of zoning, pursuant to A.R.S. § 11-802, is to protect the public health, safety and welfare and the way that generally occurs is to make sure compatible uses are adjacent to one another and incompatible uses are separated from one another.

146. When looking at compatible uses there are a number of factors that a professional planner would take into consideration including, traffic, site plan, adjacency, trade radius, detrimental impact and crime.

147. Prior to the adoption of the AMMA, a text amendment had never been proposed in Maricopa County pertaining to medical marijuana.

148. Upon adoption of the AMMA the staff of the Maricopa County Planning and Development proposed for the first time a text amendment for a new use – medical marijuana.

149. In preparing the Second Text Amendment, staff for Maricopa County Planning and Development determined that medical marijuana dispensaries are an industrial use.

150. A medical marijuana facility offers products and services to a limited clientele – individuals who possess valid medical marijuana patient or caregiver cards.

151. Many commercial retail businesses are open to and offer their services to the general public.

152. Medical marijuana can only be possessed by a valid card holder. Otherwise, it is illegal to possess under Arizona law.

153. Medical marijuana facilities offer products that are not (or may not be) insurable.

154. Many, in fact most, commercial retail uses are appropriately located adjacent to residential uses.

155. Industrial uses, including medical marijuana facilities, are not appropriately located adjacent to residential uses.

156. Medical marijuana facilities have the potential for increased risks of crime. Ms. Rich bases this assertion on her review of the California Association of Chiefs of Policy Task Force Report and a workshop she attended on planning for medical marijuana facilities.

157. Uses that have the potential for an increase in crime are appropriately segregated from residentially zoned properties.

158. Classifying medical marijuana dispensaries as an industrial use under the MCZO is not unreasonable.

159. Before the MCZO was amended, a medical marijuana facility could only be approved by Special Use Permit.

160. Each application for a Special Use Permit is a legislative process which the Board of Supervisors may adopt or reject as that legislative body deems appropriate.

161. The current MCZO provides that medical marijuana dispensaries are a permitted use in the IND-3 zoning district.

162. The current zoning provides for more definite zoning for anyone seeking to open a medical marijuana facility.

163. Under the current zoning ordinance where medical marijuana dispensaries are zoned IND-3, if a person or entity who wanted to open a medical marijuana dispensary found a piece of property zoned IND-3 in Maricopa County, any application submitted to Maricopa County would be accepted and processed as is any other application for development.

164. The MCZO treatment of medical marijuana dispensaries is reasonable zoning.

165. It is possible that if a medical marijuana dispensary were zoned in a commercial zone, that the zoning would also be reasonable.

166. Just because one zoning is reasonable, it does not make another unreasonable. Both can be reasonable.

167. Anyone can make an application either to change the MCZO to allow a medical marijuana dispensary as permitted in additional zoning districts or to have a piece of property rezoned.

168. An unreasonable zoning ordinance is one that seeks to impose regulations unrelated to land use considerations, or one that fails to promote the health, safety and general welfare of the community. A.R.S. §11-802.

RESPECTFULLY SUBMITTED this 3rd day of September, 2013.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY
BY: /s/ Thomas P. Liddy
THOMAS P. LIDDY
BRUCE P. WHITE
JOSEPH I. VIGIL
Deputy County Attorneys
Attorney for Defendants Maricopa County and William Montgomery

WHITE BERBERIAN

By: /s/ Steven White
STEVEN WHITE
Co-Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2013, I caused the foregoing document to be electronically transmitted to the Clerk's Office:

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S:\COUNSEL\Civil\Matters\GN\2012\GN12-0286 White Mtn Health Ctr v. MC\Pleadings\MSJ3\Stipulated Statement of Facts 9-3-13.doc

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Attorneys for Defendants Maricopa County and William Montgomery

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

WHITE MOUNTAIN HEALTH CENTER, INC., An Arizona non-profit corporation, Plaintiff, v. COUNTY OF MARICOPA; WILLIAM MONTGOMERY, ESQ., Maricopa County Attorney, in his official capacity; ARIZONA DEPARTMENT OF HEALTH SERVICES, an agency of the State of Arizona; WILL HUMBLE, Director of the Arizona Department of Health Services, in his Official Capacity; and DOES I-X, Defendants.	NO. CV2012-053585 **COUNTY DEFENDANTS' SEPARATE STATEMENT OF FACTS IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Michael Gordon) Oral Argument Requested

Defendants Maricopa County and William Montgomery, Esq. ("County Defendant"), by and through undersigned counsel, provide this Separate Statement of

Facts in support of County Defendants' Motion for Summary Judgment.

1. White Mountain wishes to own and operate a non-profit medical marijuana dispensary and cultivation site in the area of Sun City, Maricopa County, Arizona, pursuant to the terms of Arizona's Medical Marijuana Act ("AMMA"), A.R.S. §§ 36-2801, *et seq*. *See* Plaintiff's Complaint at ¶ 2.

2. The AMMA purports to decriminalize marijuana under certain circumstances pertaining to medical use, and also authorizes, and thereby facilitates, the growth, manufacture, dispensation and possession of marijuana by, *e.g.*, approving and permitting medical marijuana distribution centers or allowing marijuana cultivation. *See* A.R.S. §§ 36-2801 – 2819.

3. The federal government's position regarding state medical marijuana laws is that growing, distributing and possessing 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. *See* Letter dated May 2, 2011 from Dennis Burke to Will Humble Re: Arizona Medical Marijuana Program, attached hereto as Exhibit 1. *See also* June 29, 2011 memorandum from Deputy Attorney General James M. Cole, attached hereto as Exhibit 2.

4. The United States Attorney's Office for the District of Arizona has taken the position that it "will continue to vigorously prosecute individuals and organizations that participate in unlawful manufacturing, distribution and marketing activity involving marijuana, even if such activities are permitted under state law." *Id.*

5. Deputy Attorney General James M. Cole released a memorandum to United

States Attorneys wherein he stated "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.*

6. A recent state court decision in Arizona denied civil relief to a private litigant on the ground that a loan agreement for the operation of a medical marijuana sales and cultivation center could not be enforced because it was illegal under the CSA and therefore void. *See Haile v. Todays Health Care II*, Case No. CV2011-051310, a copy of which is attached hereto as Exhibit 3.

7. The plaintiff in that case was denied any recovery of the monies loaned to defendant, including restitution. *Id.*

8. Thus, a private party who relied on state law to lend money to a medical marijuana business suffered considerable financial loss because its contract was void under the preemptive federal law. *Id.*

9. The District Court for Arapahoe County, Colorado came to the same conclusion in a case involving the sale of $40,000 worth of medical marijuana. *See* Haeberle v. Lowden, attached hereto as Exhibit 4.

10. Colorado has enacted medical marijuana laws similar to those under the AMMA. *Id.*

List of Exhibits

1. Letter dated May 2, 2011 from Dennis Burke to Will Humble Re: Arizona Medical Marijuana Program.

2. June 29, 2011 memorandum from Deputy Attorney General James M. Cole.

3. Order, *Haile v. Todays Health Care II*, Case No. CV2011-051310

4. Order, *Haeberle v. Lowden*

5. Arizona Attorney General Opinion No. I12-001

6. Letter dated June 13, 2012 from William Montgomery to Jeffrey Kaufman

U.S. Department of Justice

United States Attorney
District of Arizona

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May 2, 2011

Will Humble
Director
Arizona Department of Health Services
150 N. 18th Avenue
Phoenix, Arizona 85007

Re: Arizona Medical Marijuana Program

Dear Mr. Humble:

I understand that on April 13, 2011, the Arizona Department of Health Services filed rules implementing the Arizona Medical Marijuana Act (AMMA), passed by Arizona voters on November 2, 2010. The Department of Health Services rules create a regulatory scheme for the distribution of marijuana for medical use, including a system for approving, renewing, and revoking registration for qualifying patients, care givers, nonprofit dispensaries, and dispensary agents. I am writing this letter in response to numerous inquiries and to ensure there is no confusion regarding the Department of Justice's view of such a regulatory scheme.

The Department has advised consistently that Congress has determined that marijuana is a controlled substance, placing it in Schedule I of the Controlled Substances Act (CSA). That means growing, distributing, and possessing 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. As has been the case for decades, the prosecution of individuals and organizations involved in the trade of illegal drugs and the disruption of illegal drug manufacturing and trafficking networks, is a core priority of the Department of Justice. The United States Attorney's Office for the District of Arizona ("the USAO") will continue to vigorously prosecute individuals and organizations that participate in unlawful manufacturing, distribution and marketing activity involving marijuana, even if such activities are permitted under state law.

An October, 2009, memorandum from then-Deputy Attorney General Ogden provided guidance that, in districts where a state had enacted medical marijuana programs, USAOs ought not focus their limited resources on those seriously ill individuals who use marijuana as part of a medically recommended treatment regimen and are in clear and unambiguous compliance with such state laws. And, as has been our policy, this USAO will continue to follow that guidance. The public should understand, however, that even clear and unambiguous compliance with AMMA does not render possession or distribution of marijuana lawful under federal statute.

Moreover, the CSA may be vigorously enforced against those individuals and entities who operate large marijuana production facilities. Individuals and organizations – including property owners, landlords,

and financiers – that knowingly facilitate the actions of traffickers also should know that compliance with AMMA will not protect them from federal criminal prosecution, asset forfeiture and other civil penalties. This compliance with Arizona laws and regulations does not provide a safe harbor, nor immunity from federal prosecution.

The USAO also has received inquiries about our approach to AMMA in Indian Country, which comprises nearly one third of the land and five percent of the population of Arizona, and in which state law – including AMMA – is largely inapplicable. The USAO currently has exclusive felony jurisdiction over drug trafficking offenses in Indian Country. Individuals or organizations that grow, distribute or possess marijuana on federal or tribal lands will do so in violation of federal law, and may be subject to federal prosecution, no matter what the quantity of marijuana. The USAO will continue to evaluate marijuana prosecutions in Indian Country and on federal lands on a case-by-case basis. Individuals possessing or trafficking marijuana in Indian Country also may be subject to tribal penalties.

I hope that this letter assists the Department of Health Services and potential registrants in making informed choices regarding the possession, cultivation, manufacturing, and distribution of medical marijuana.

Sincerely yours,

Dennis Burke

DENNIS K. BURKE
United States Attorney
District of Arizona

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

June 29, 2011

MEMORANDUM FOR UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use

Over the last several months some of you have requested the Department's assistance in responding to inquiries from State and local governments seeking guidance about the Department's position on enforcement of the Controlled Substances Act (CSA) in jurisdictions that have under consideration, or have implemented, legislation that would sanction and regulate the commercial cultivation and distribution of marijuana purportedly for medical use. Some of these jurisdictions have considered approving the cultivation of large quantities of marijuana, or broadening the regulation and taxation of the substance. You may have seen letters responding to these inquiries by several United States Attorneys. Those letters are entirely consistent with the October 2009 memorandum issued by Deputy Attorney General David Ogden to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana (the "Ogden Memo").

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large scale criminal enterprises, gangs, and cartels. The Ogden Memorandum provides guidance to you in deploying your resources to enforce the CSA as part of the exercise of the broad discretion you are given to address federal criminal matters within your districts.

A number of states have enacted some form of legislation relating to the medical use of marijuana. Accordingly, the Ogden Memo reiterated to you that prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority, but advised that it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers. The term "caregiver" as used in the memorandum meant just that: individuals providing care to individuals with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana.

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. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.

The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority.

cc: Lanny A. Breuer
Assistant Attorney General, Criminal Division

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United States Attorney
District of Minnesota
Chair, AGAC

Michele M. Leonhart
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