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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ZANDER WELTON, as represented by JACOB WELTON and JENNIFER WELTON, Plaintiffs, vs. STATE OF ARIZONA, a governmental entity; JANICE BREWER, Governor of the State of Arizona in her official capacity, ARIZONA DEPARTMENT OF HEALTH SERVICES, an Arizona administrative agency; WILLIAM HUMBLE, Director of Arizona Department of Health Services in his official capacity; and WILLIAM MONTGOMERY, Maricopa County Attorney in his official capacity, Defendants.	No. CV 2013-014852 **PLAINTIFFS' RESPONSE TO DEFENDANT MONTGOMERY'S MOTION FOR JUDGMENT ON THE PLEADINGS** **AND** **REPLY IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION** (The Hon. Katherine Cooper)

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Arizona's voters approved the Arizona Medical Marijuana Act (AMMA) in 2010 to "protect patients with debilitating medical conditions . . . from arrest and prosecution, criminal and other penalties . . . if such patients engage in the medical use of marijuana." Prop. 203 § 2(G). The AMMA protects patients like Zander Welton, whose parents applied for and received State approval to use medical marijuana to treat their son's severe seizure disorder. Like many medicines, medical marijuana comes in different forms, dosages, and delivery methods, including the extracts at issue in this case. Defendant Montgomery claims that the AMMA categorically excludes the forms of medical marijuana that experts have most highly recommended for Zander. Montgomery insists that the Weltons may be criminally prosecuted if they give their son this form of the medicine. And, notwithstanding his strident legal position, Montgomery argues that Zander's parents are not entitled to have this Court resolve the parties' dispute about the scope of the AMMA until the police are at their door.

At bottom, Montgomery's brief reveals his ongoing belief that the citizens of Arizona were mistaken in passing the AMMA. The voters spoke, however, removing the cruel choice some patients used to face between avoiding effective medical treatment and risking criminal prosecution. Despite the AMMA, Montgomery contends that his office should still have the discretion to choose which patients and types of marijuana should be prosecuted and which not. Now that the Weltons brought this case to protect their rights, he insists that although the law allows him to prosecute the Weltons for an extract, he would probably prefer to prosecute someone for a different extract. (*See* Montgomery Br. at 7.) The AMMA took away that discretion; it is not for Montgomery to decide whether Zander and his parents are more or less deserving of punishment than those Montgomery tellingly refers to as the "card carrying stoner and pothead." (*Id*. at 10.)

Montgomery is wrong about the meaning of the AMMA and wrong about the scope of this Court's jurisdiction. The Weltons need and are entitled to declaratory and injunctive relief necessary to clarify the law and end prosecutorial overreach. The Court

should therefore grant the requested injunction and deny Montgomery's meritless motion for judgment on the pleadings.

I. The Weltons Are Entitled to a Declaration That the AMMA Covers the Extracts at Issue and to an Injunction Prohibiting Unlawful Prosecutions.

Montgomery raises two related arguments to urge this Court to avoid the merits. First, he contends that the Court is powerless to issue an injunction against future prosecutions under the Anti-Injunction Act, A.R.S. § 12-1802, and because an injunction would interfere with his office's discretionary powers. Second, he argues that the Weltons' claim for declaratory relief is an impermissible request for an advisory opinion. Both arguments fail. The Weltons need not wait for an indictment or criminal complaint before seeking injunctive and declaratory relief.

A. This Court Has the Power to Issue the Injunction Sought in This Case.

The Weltons seek an injunction "preventing Defendants . . . from taking any adverse action . . . based on Defendants' incorrect allegation that the AMMA's decriminalization of marijuana for medicinal purposes does not include products, such as extracts" derived from marijuana. (Compl. ¶ 88.) The injunction is needed because the Weltons face the very real possibility that Montgomery, through his office, will charge them criminally for their use of marijuana extracts, including CBD oil. Montgomery has very clearly taken the position before this Court that the Weltons' proposed use of extracts violates the AMMA. (Montgomery Br. at 10-12.) Consistent with that misinterpretation of the AMMA, Montgomery's office has not only advised the Phoenix Police Department that the use of marijuana extracts (such as CBD oil) are to be "considered a narcotic" under Arizona's criminal code and "would be prosecuted as such," (Compl. ¶¶ 73-74), it is presently prosecuting at least one other AMMA-covered individual, in part, for possession of an edible "cannabis candy."[1]

[1] Montgomery alleges (at 5) that he has not prosecuted any person for mere possession of 2.5 ounces or less of concentrated THC. In fact, Plaintiffs are aware of at

The Anti-Injunction Act states that "[a]n injunction shall not be granted . . . [t]o prevent enforcement of a public statute by officers of the law for the public benefit . . . [or] [t]o prevent the exercise of a public or private office in a lawful manner by the person in possession." A.R.S. § 12-1802(4), (6). Montgomery argues that the statute precludes the Court from granting the Weltons' request for injunctive relief. Montgomery is wrong.

"As our supreme court has made clear, an injunction may be granted when a public official is acting unlawfully." *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 124 ¶ 82 n.22, 290 P.3d 1226, 1247 n.22 (App. 2012). The Arizona Supreme Court "has on several occasions held an injunction to be a proper remedy where it is alleged that the statute is invalid or is being applied in an unauthorized manner." *Bd. of Regents of Universities & State Coll. v. City of Tempe*, 88 Ariz. 299, 302, 356 P.2d 399, 400 (1960). In *Board of Regents v. City of Tempe*, the city tried to stop construction of ASU buildings and "advised the University that criminal sanctions would be strictly enforced if the University failed to comply with the City codes." *Id*. at 301, 356 P.2d at 400. Before any prosecution actually started, the Board of Regents sued for an injunction to stop the city "from threatening or instituting civil or criminal proceedings." *Id*.

As Montgomery does here, the city contended that Section 12-1802 prohibited injunctive relief. *Id*. at 302, 356 P.2d at 400. The Court held that the statute did not apply because if the Board was correct that the city's codes could not lawfully apply to the Board then "clearly" the "injunctive relief" was "warranted." *Id*. at 303, 356 P.2d at 401. The Court also noted that the threats (though not acted on) of "criminal proceedings" caused the plaintiffs irreparable injury by causing the University to delay construction. *Id*. The Court found it "highly undesirable to compel the Board to subject

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least one such active prosecution, *State v. Marckstadt*, CR2013-441005-001. Marckstadt holds a valid AMMA card and is being prosecuted for possession of a "cannabis candy" on the theory that the mere "concentration" of chemicals makes the candy a narcotic not covered by the AMMA.

itself, the University or its employees to the risk of criminal or civil sanctions in order to obtain a judicial determination of the validity of the City's position." *Id.*

The law compels the same outcome in this case. Zander and his parents have changed what medicine he takes—against sound medical advice—because of the threat of criminal prosecution that Montgomery's position on the interpretation of the AMMA poses. If the Weltons' reading of the statute is correct, then surely such a prosecution would be unlawful and subject to an injunction for the same reasons an injunction was warranted in *Board of Regents*. The Court cannot interpret the Anti-Injunction Act to "compel" the Weltons to "subject [themselves] to the risk of criminal or civil sanctions in order to obtain a judicial determination of the validity of [Montgomery's] position." *Id*.

Montgomery raises two meritless counterarguments to this line of cases. First, he contends (at 3) that the Anti-Injunction Act should apply because "Plaintiffs do not attack [the AMMA] as being unconstitutional." Courts have never held that only constitutional challenges qualify for injunctive relief; rather, they have uniformly held that "this statute has been repeatedly held not to prohibit issuance of injunctive relief against public officials ***who exceed their statutory authority***." *Zeigler v. Kirschner*, 162 Ariz. 77, 84, 781 P.2d 54, 61 (App. 1989) (collecting cases) (emphasis added).

Second, Montgomery argues (at 4) that no injunction may issue because "the County Attorney is not proposing to act contrary to law." The County Attorney's argument presumes that his position on the merits of the AMMA is the correct one. In other words, Montgomery tacitly concedes—as he must—that the Court would have authority to issue an injunction to prevent him from exceeding his statutory authority. Montgomery's argument thus fails under its own weight: if Montgomery's prosecution of extracts at issue in this case would be unlawful, then the Anti-Injunction Act does not prohibit the Court from enjoining such a prosecution.

B. Declaratory Relief Is Needed Here to Protect the Weltons from Having to Wait to Be Prosecuted Before Knowing Their Legal Rights.

Montgomery further argues (at 6-7) that the Weltons are not entitled to declaratory relief because Plaintiffs are really seeking an impermissible "advisory opinion." Montgomery misapprehends the purpose of declaratory judgments and wrongly suggests that the Weltons should wait for an actual prosecution before seeking relief.

The declaratory judgment act is a remedial statute that is intended to "settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310, 497 P.2d 534, 536 (1972). That act is "to be liberally construed and administered." A.R.S. § 12-1842. Nevertheless, "a declaratory judgment must be based on an actual controversy which must be real and not theoretical." *Id.* A "real" controversy "arises where adverse claims are asserted upon present existing facts, which have ripened for judicial determination." *Id.*

A real, justiciable controversy exists here and the Weltons need clarity. Medical experts have advised the Weltons that the most medically beneficial way to use medicinal marijuana to treat Zander (given what is currently available in Arizona) is via plant material combined with extracted CBD in oil form. (*See* Plaintiffs' App. for Prelim. Inj. Ex. 1 (Welton Decl.) at ¶¶ 24-29, 34-35; *id.* Ex. 2 (Troutt Decl.) at ¶¶ 11, 17.) This delivery method allows proper and predictable dosage of the chemical compounds that dramatically helped Zander during the short time he used it. (*Id.*) Montgomery not only argues here that plant extracts as a class are not under the decriminalized umbrella of the AMMA and thus remain unlawful under Arizona's criminal code, (Compl. ¶¶ 70-74; *see also* Montgomery Br. at 12 (arguing that AMMA "does not allow persons to purchase or possess extracts" including CBD oil)), he has directed the state's largest law enforcement agency to arrest persons using extracts and

his office is presently prosecuting at least one such case involving the mere possession of an edible candy.[2]

This is plainly sufficient to qualify as a ripe controversy suitable for declaratory relief. The Weltons need not wait for a criminal prosecution to commence before obtaining relief. Arizona courts long ago rejected the argument that a plaintiff must wait for prosecution before obtaining declaratory relief. It is for this very circumstance that declaratory relief exists. "To require statutory violation and exposure to grave legal sanctions; to force parties down the prosecution path, in effect compelling them to pull the trigger to discover if the gun is loaded, divests them of the forewarning which the law, through the Uniform Declaratory Judgments Act, has promised." *Planned Parenthood Ctr. of Tucson*, 17 Ariz. App. at 312, 497 P.2d at 538. "Violation of a criminal statute as a prerequisite to testing its validity invites disorder and chaos and subverts the very ends of the law." *Id.* at 313, 497 P.2d at 539.

Montgomery's arguments against declaratory relief fail. He argues that the Weltons are asking for relief that goes well beyond the facts of their case.[3] The Weltons seek a declaration that is bound to the concrete facts of Zander's case and will allow him to take the form of medical marijuana that is best for him.[4] The Weltons are hindered in giving their son CBD oil solely because Defendants have taken the position that extracts of any kind are criminal. If the Weltons resume using CBD oil to treat Zander, they will necessarily fall in the same class as what Montgomery calls the "card carrying stoner and pothead" subject to prosecution. (*Id.* at 10.) If a declaratory judgment in this case impacts the County Attorney's ability to prosecute people for other types of extracts, the County Attorney should blame the AMMA, not Zander's case.

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[2] *See* n.1, *supra*.

[3] (*See* Montgomery Br. at 6-7 (sounding alarm that if the court rules that the AMMA includes extracts, people may create hashish).)

[4] *See* n.5, *infra*.

Montgomery also asks hypothetically (at 7), "If there is to be prosecution for extraction, does it not appear more likely that one would occur for a hashish possessor rather than for the Weltons, who seek merely to possess CBD?" Montgomery cites no authority for his suggestion that the Weltons' case cannot be a justiciable controversy unless they are his first priority for prosecution. Moreover, there is no factual basis for the suggestion made here that the Weltons, because they need CBD oil, are less likely to be prosecuted than some unknown third-party with hashish. To the contrary, Montgomery has been clear—in this case, and in his communications with law enforcement and his active prosecutions—that he can prosecute any extract cases that come to his office because that is what the law allows. Short of a judicial declaration to the contrary, the Weltons remain at risk.

II. The Plain Language of the AMMA, as Well as the Voters' and Proponents' Purpose in Passing the Law, Demonstrate That the Weltons' Statutory Interpretation Is Correct and That They Should Be Able to Give Zander the Medical Marijuana Extract That Is Best for Him.

The Weltons have demonstrated that they are likely to succeed on the merits of their claim and that the balance of equities favors injunctive relief so that they can treat Zander with the form of medical marijuana that has been recommended to him. In addition, the Weltons have stated a claim upon which relief may be granted; accordingly, the Court should deny Montgomery's Rule 12(c) motion for judgment on the pleadings.

A. The AMMA Explicitly Allows Patients to Use Extracts Derived from the Marijuana Plant.

Experts have advised the Weltons that the medical marijuana that would be the most beneficial for Zander is in the form of CBD oil combined with plant material; indeed, Zander experienced significant improvement when he was on this regimen. *See* Plaintiffs' App. for Prelim. Inj. Ex. 1 (Welton Decl.) at ¶¶ 24-30; *id.* Ex. 2 (Troutt Decl.) at ¶¶ 15, 17. Soon, the best form is likely to be an extract from a marijuana plant specially bred to have a 15:1 or 20:1 CBD:THC ratio. *See id.*, Ex. 1 (Welton Decl.) at

¶ 35; *id.*, Ex. 2 (Troutt Decl.) at ¶ 18.[5] The AMMA's plain language allows the Weltons to give Zander either of these forms of medical marijuana. The AMMA defines "[u]sable marijuana" as "the dried flowers of the marijuana plant, ***and any mixture or preparation thereof***, but does not include the seeds, stalks and roots of the plant and does not include the weight of any non-marijuana ingredients combined with marijuana and prepared for consumption as food or drink." A.R.S. § 36-2801(15) (emphasis added). The language "any mixture or preparation thereof" unequivocally means that qualified patients like Zander are not limited to a raw plant delivery method for their medicine.

Conceding, as he must, that this language means that "flowers can be crushed or ground up and added to other foods to be consumed" (Montgomery Br. at 9), Montgomery avers that this language does not permit extracts; rather, he opines, "any mixture or preparation thereof" only allows plant material (apparently physically pulverized in whatever manner) to be mixed with food. The statute nowhere draws the arbitrary lines on which Montgomery hangs his argument. The law says "mixtures or preparations" not "mixtures or preparations created using physical force only and then mixed with food." Applying the statute's express terms, an oil containing cannabinoids extracted from the marijuana plant is no less a "preparation" of the plant than a fine

[5] Montgomery fundamentally misunderstands the situation Zander is in. He complains that the Weltons' request for relief is too broad because it would apply to more than CBD oil. (Montgomery Br. at 7.) Indeed, the Weltons do seek relief that will apply to more than CBD oil—they seek relief that will also apply to the medicine that has the greatest likelihood of providing Zander with maximum benefit. The Weltons can access CBD oil for Zander now, and would were it not for their fear of prosecution. This, combined with plant material, would be the most effective form of medical marijuana currently available to them for Zander's specific needs. However, as explained in the declarations filed with Plaintiffs' Application for Preliminary Injunction, the CBD oil currently available in Arizona is unlikely to be as effective as an oil extract from a marijuana plant specially bred to have a CBD:THC ratio between 15:1 and 20:1. That type of extract is not currently available in Arizona, but when it is, the Weltons want to be able to give it to Zander without fear of criminal prosecution.

powder made using a mortar and pestle. Mixing that oil with apple sauce is no less a "mixture" than is the powder stirred into a liquid.

Furthermore, Montgomery's interpretation ignores the well-established rule of statutory construction that every word in a statute must be given meaning. *See* *Williams v. Thude*,188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997) (when interpreting a statute, courts presume the legislature intended each word and clause to have meaning); *State v. Deddens*,112 Ariz. 425, 429, 542 P.2d 1124, 1128 (1975) ("Statutes are to be given, whenever possible, such an effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant.").

Montgomery's argument collapses the words "mixture" and "preparation" into a single definition, erasing any significance to the AMMA's use of the disjunctive word "or." This is an illogically narrow interpretation. The only way to properly give each word in the statute meaning is to construe the statute exactly as it is written: "usable marijuana" includes "***any*** mixture ***or*** preparation" made from the dried plant flowers. A.R.S. § 36-2801(15). The AMMA's reference to a "mixture" must have an independent meaning from the reference to a "preparation;" otherwise, the phrase would be redundant and superfluous.

The use of the word "preparation" is significant. Webster's Dictionary defines "preparation" as "[t]hat which is prepared, made, or compounded by a certain process or for a particular purpose; a combination" including "any medicinal substance fitted for use."[6] "Prepared," in turn, is defined as "made fit or suitable; adapted."[7] CBD oil and extracts from a whole plant are created using "certain process[es]" to "adapt[]" marijuana "for a particular purpose." Montgomery disputes that the word "preparation" should be read to include extracts derived from the dried flowers of the marijuana plant

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[6] *See* definition of "preparation," http://www.webster-dictionary.net/definition/preparation (last visited December 31, 2013).

[7] *See* definition of "prepared," available at: http://www.webster-dictionary.net/definition/prepare (last visited December 31, 2013).

but he offers no alternative meaning of the word "preparation" and does not explain how the terms "mixture or preparation" can be used interchangeably without violating standard rules of statutory construction. Instead, he asks the Court to read that word out of the statute to suit his preferred interpretation of the law.[8]

B. The AMMA's Protective Purpose Favors a Construction That Includes Extracts.

Beyond the plain language of "useable marijuana," the rest of the AMMA and its ballot materials demonstrate that the proponents and voters intended the law to reduce seriously ill patients' suffering and expand their medical options. (*See* Plaintiffs' App. for Prelim. Inj. at 11-13.) That intent would be undermined if extracts were prohibited because it would leave patients who are limited to edible or drinkable marijuana preparations made from un-manipulated plant material fewer, less precise, and less palatable options. (*See id.* Ex. 2 (Troutt Decl.) at ¶ 13.) Indeed, for Zander to obtain the most effective medical marijuana treatment, he needs to be able to use an extract, not just plant material. (*Id.* at ¶ 17-18; Ex. 1 (Welton Decl.) at ¶ 25, 27-29, 33-35.)

[8] Moreover, the interpretation Montgomery urges leads to absurd results. For example, some patients who cannot or do not want to smoke marijuana take their medicine through food. An easy delivery method for these patients is to eat a food made with marijuana infused butter, commonly called cannabutter. *See* *http://michiganmedicalmarijuana.org/page/articles/health/ingestion-methods* (last visited January 5, 2014). Basic cannabutter is made by simmering crushed dried flowers in butter. That butter is then used to make whatever food product is desired. Montgomery's interpretation of the AMMA would permit this. However, food products made with cannabutter are far more palatable when the solid plant material that remains in the cannabutter after simmering is strained out. This can be done using a common pasta strainer or cheesecloth. Montgomery's interpretation of the AMMA does *not* permit this type of cannabutter because it goes one step beyond mixing dried flowers with food and physically separates the plant material from the cannabinoids. Both methods for making cannabutter extract the cannabinoids from the marijuana plant and infuse them into butter. The latter method just removes the plant material from the cannabinoid-infused butter. There is nothing in the text of the statute that supports a legal distinction between these two types of cannabutter.

Montgomery protests that "Plaintiffs explain that concentrating the cannabinoids allows them to be more easily swallowed and allows for more accurate dosing. Whether that is true is irrelevant: it doesn't mean that such concentration is allowed by the statute." (Montgomery Br. at 9.) To the contrary, the proponents and voters intended specifically for the AMMA to provide access to medicine that can ease the suffering of patients with debilitating medical conditions. If a form of that medicine can better ease those patients' suffering by allowing for easier consumption and more accurate dosing, and that form is not explicitly prohibited by the statute, the AMMA's text and ballot materials indicate that allowing that form of the medicine best effectuates the law's purpose. It is clear that the voters of Arizona did not want seriously ill patients to be criminally prosecuted for using the form of medical marijuana that is best for them. Thus, this Court should interpret any perceived ambiguity in the AMMA to protect the Weltons' ability to treat Zander with the medicine that is most likely to provide him with the greatest relief from his debilitating medical condition.

C. Montgomery's Policy Objections Are Irrelevant to the Statutory Interpretation Question Before the Court.

Montgomery insists that the Weltons' interpretation of the AMMA is wrong, but he conspicuously relies on policy objections that are not the province of this Court to resolve. He resorts to fear-mongering, mischaracterizing the Weltons' lawsuit as an attempt "to prevent this Defendant from prosecuting someone who possesses 2 ½ ounces of concentrated THC, i.e., hashish." (Montgomery Br. at 5.) Montgomery calls the Court's attention to hashish repeatedly and gratuitously, despite the fact that the Weltons have no interest in high-THC content products and initiated this lawsuit to protect their son's access to products with low-THC content.[9]

[9] Montgomery's citation to *State v. Bollander*, 110 Ariz. 84, 515 P.2d 329 (Ariz. 1973), does not help his cause. (*See* Montgomery Br. at 11.) The fact that in 1973, the Arizona Supreme Court held that the sale of hashish was punishable under a different statute than the sale of the green leafy form of marijuana does not prevent the more

Moreover, Montgomery's concern about extracts rings hollow: even if extracts were prohibited, patients would not be prevented from possessing high-THC products under his reading of the statute. Regardless of Montgomery's policy concerns about THC v. non-THC cannabinoids, nothing in the AMMA limits the amount of THC that can be in a patient's medical marijuana. As a result, even without access to extracts, patients can simply purchase or cultivate dried flowers from plants that have been specially bred to have very high levels of THC. Thus, Montgomery's repeated references to hashish or other high-THC extracts shed no light on the question of statutory interpretation that this Court has before it.

Ultimately, Montgomery's flag-waving about the availability of extracts boils down to his concern that "[t]here are dangers involved in concentrating parts of the marijuana plant." (Montgomery Br. at 9.) That may be, but the voters of Arizona have already decided how to balance those dangers against the benefits to seriously ill patients.

Montgomery's objections to the AMMA extend beyond extracts. He calls the Court's attention to the fact that there is "disagreement among scientists and professionals" about the efficacy and safety of using marijuana medicinally. (Montgomery Br. at 14.) This case is not an appropriate vehicle for Montgomery to debate the wisdom of the AMMA. The voters of Arizona made a determination based on existing evidence in 2010 that a specific group of patients should not be criminally punished for using marijuana medicinally. The only question at issue in this case is whether that determination extends to extracts derived from marijuana. Montgomery's personal preference that the AMMA not be law in Arizona is irrelevant, as is his dissatisfaction with the voter-approved and state-run process through which patients receive medical marijuana identification cards if they have a qualifying medical condition. (*See* Montgomery Br. at 10, referring to "every card carrying stoner and pot

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recently enacted AMMA from decriminalizing multiple forms of marijuana for qualified patients.

head"; at 10 alleging that Plaintiffs' "Complaint would authorize the possession of hashish by anyone"; at 7 complaining that the Weltons' requested "injunction would allow anyone to make and possess hashish"; at 12 alleging that "allowing [the Weltons] to possess cannabidiol (CBD) oil … would mean that anyone else could possess 21⁄2 ounces of THC concentrate.") Montgomery's personal opposition to the AMMA is long-standing, well known, and entirely unrelated to the merits of this case. The Court should reject his misplaced policy arguments as a substitute for legal arguments.

D. The Equities at Issue—The Possibility of Irreparable Injury, the Balance of Hardships, and Public Policy—All Tilt Entirely in the Weltons' Favor.

The Weltons have demonstrated that they are entitled to a preliminary injunction. In addition to showing a strong likelihood of success on the merits, all of the equitable factors weigh in their favor. *See Arizona Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12 ¶ 12, 219 P.3d 216, 222 (App. 2009) (explaining the moving party's burden to obtain preliminary injunctive relief).

As explained fully in the Weltons' Application for Preliminary Injunction, Zander experienced unprecedented improvement in his physical and emotional development during the short time that he took CBD oil along with dried marijuana plant. (*See* Plaintiffs' App. for Prelim. Inj. Ex. 1 (Welton Decl.) at ¶¶ 27-28.) Zander's current medical marijuana treatment contains less CBD and will likely be less beneficial to him. (*Id.* at ¶¶ 33-34; Ex. 2 (Troutt Decl.) at ¶¶ 15-17.) For Zander and his parents, the possibility that progress during his developmental years may be lost or stunted constitutes irreparable harm. Having demonstrated a strong likelihood of success on the merits and the possibility of irreparable harm, the Weltons have met their burden to obtain a preliminary injunction. *See Arizona Ass'n of Providers*, 223 Ariz. at 12 ¶ 12, 219 P.3d at 222 (stating that a party showing "probable success on the merits and the possibility of irreparable injury" is entitled to relief) (internal quotations omitted).

The Weltons have exceeded the necessary showing to obtain relief because the balance of hardships and public policy also favor their position. Montgomery argues

that "[t]here is no showing that the balancing of hardships favors granting an injunction" because "[a]ll that has been shown by Plaintiffs is that they *prefer* to give Zander CBD in oil form rather than in a mixture of marijuana flowers" and that "there is no proof and not even an allegation that the alternative delivery method that the parents have moved to is any less effective that [sic] the CBD oil." (Montgomery Br. at 15) (emphasis in original).) It is difficult to think of a situation involving greater hardship than the one in which the Weltons find themselves. Zander has suffered from intractable seizures for most of his five years and has undergone two surgeries in which significant parts of his brain were removed. (*See* Plaintiffs' App. for Prelim. Inj. Ex. 1 (Welton Decl.) at ¶¶ 4-5, 11, 13-14.) Zander and his parents face the possibility of a third brain surgery during which even more of his brain would be removed. (*See id.* at ¶ 18.) It is striking that Montgomery would use the word "prefer" to describe the Weltons' urgent desire to treat Zander with the medicine that has been the most effective for him and promises the greatest hope of improving his quality of life. Moreover, the Weltons *have* asserted that the alternative delivery method is likely to be less effective because Zander is unable to get the recommended amount of CBD. (*See id.* at ¶¶ 33-34; Ex. 2 (Troutt Decl.) at ¶¶ 15-17.) Montgomery may think it is enough for Zander to experience *some* alleviation of his suffering. Zander's parents, however, want to *maximize* his quality of life and being unable to do so is a considerable hardship. In contrast, it is unclear what hardship—if any—is at stake for Montgomery, and he asserts none. Thus, the balance of hardships tilts entirely in the Weltons' favor.

Public policy also favors the Weltons' requested relief. The voters passed the AMMA to protect "patients with debilitating medical conditions . . . from arrest and prosecution, criminal and other penalties . . . if such patients engage in the medical use of marijuana." Prop. 203 § 2(G). The State has determined that Zander is a qualifying patient who may use medical marijuana. Full implementation of the voters' public policy determination requires that he be able to use the form of that medicine that is most beneficial to him. This Court should reject Montgomery's version of public

policy, which thwarts the will of the voters and threatens Zander's well-being. (*See* Montgomery Br. at 15.)

E. Montgomery Has Failed to Show That He Is Entitled to Judgment on the Pleadings.

As Montgomery must concede, his Rule 12(c) motion for judgment on the pleadings requires the Court to accept the allegations in the Complaint as true. *Shaw v. CTVT Motors, Inc.*, 232 Ariz. 30, 31 ¶ 8, 300 P.3d 907, 908 (App. 2013). As detailed above, there are no jurisdictional barriers to the Weltons' request for injunctive and declaratory relief and they have demonstrated a strong likelihood of success on the merits of their statutory interpretation argument. Accordingly, accepting all allegations in the Complaint as true and drawing all inferences in the Weltons' favor, this Court should deny Montgomery's motion for judgment on the pleadings.

Conclusion

For the foregoing reasons, this Court should grant Plaintiffs' Application for Preliminary Injunction and deny Defendant's Motion for Judgment on the Pleadings.

DATED this 7th day of January, 2014.

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THE FOREGOING has been electronically
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