SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-053585 12/03/2012

HONORABLE MICHAEL D. GORDON

CLERK OF THE COURT
M. MINKOW
Deputy

WHITE MOUNTAIN HEALTH CENTER INC JEFFREY S KAUFMAN

v.

COUNTY OF MARICOPA, et al. PETER MUTHIG

CHARLES A GRUBE
KEVIN D RAY
KELLY J FLOOD

UNDER ADVISEMENT RULING AND WRIT OF MANDAMUS

A. Introduction

The controversy before the Court arises out of the passage and application of Arizona's Medical Marijuana Act (AMMA). The AMMA, originally known as Proposition 203, was enacted by voter initiative on November 2, 2010 and has been codified under Arizona law. *See* Ariz. Rev. Stat. Ann. §§ 36-280 to 36-2819 (2012). The AMMA decriminalizes, under State law, the possession, use, cultivation and sale of marijuana for medical use. The AMMA provides for highly State-regulated dispensary and cultivation sites. *Id.*

The AMMA grants rule-making authority to the Arizona Department of Health Services (ADHS). *See* Ariz. Rev. Stat. Ann. § 36-136(F) (2012). The regulations subsequently promulgated are embodied in Arizona's Administrative Code. *See* Ariz. Admin. Code R9-17-101 to R9-17-323 (2012). The regulations divide Arizona into 126 separate "Community Health Care Analysis Areas" ("CHAA") and each CHAA may have only one medical marijuana dispensary.

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The regulations also provide that an entity seeking to become a dispensary or cultivation site must first file an application for a Registration Certificate (Registration Certificate) with the ADHS. *See* Ariz. Admin. Code R9-17-305 (2012). Once having obtained a Registration Certificate, the applicant must then submit an application with the certificate to ADHS for approval of the site.

The regulations further provide that the applicant must submit documentation to ADHS stating that its proposed site meets all applicable zoning restrictions or, alternatively, there are none that need to be met. *See* Ariz. Admin. Code. R9-17-304(6) and R9-17-305(A)(2) (2012). It is that requirement that precipitated the extant lawsuit.

B. This lawsuit

Plaintiff White Mountain Health Center Inc. seeks to operate a dispensary under the AMMA, the Sun City CHAA No. 49 and it is the only applicant in this CHAA. On about May 25, 2012, Plaintiff filed an application for a Registration Certificate with ADHS. Plaintiff alleges that it was unable to obtain documentation from Defendants Maricopa County and/or County Attorney William Montgomery (collectively referred to as the "County Defendants") stating that its proposed site either met County zoning restrictions or, alternatively, that there were no such restrictions. Plaintiff further alleges that ADHS issued a "Notice of Deficiencies" advising Plaintiff of the defect with the application. Plaintiff alleges that the County Defendants categorically refused to provide the necessary zoning documentation.

Thus, on June 19, 2012, Plaintiff filed a Complaint followed by a First Amended Complaint, filed on September 7, 2012.[1] Plaintiff seeks the following relief:

- Count 1 (Declaratory Judgment): Declaring, among other things, that there are no local or Maricopa County zoning restrictions for its proposed dispensary in the Sun City CHAA No. 49 and/or, in the alternative, the proposed site is in compliance with the Maricopa County Zoning Ordinance and regulations relating to where a dispensary may be located and/or, in the alternative, Maricopa County has not enacted reasonable restrictions with respect to CHAA No. 49;

- Count 2 (Injunctive Relief): Enjoining the ADHS and its Director Will Humble (Humble) *pendente lite* and permanently from "withdrawing" and/or rejecting Plaintiff's application for a Registration Certificate;

[1] The First Amended Complaint was filed in order to correct technical deficiencies.

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- Count 3 (Mandamus Relief Issuing a Writ of Mandamus): Requiring County Defendants to provide Plaintiff and ADHS with a sworn statement and/or other materials declaring that Maricopa County has not adopted any restrictions upon the location of medical marijuana dispensaries in the CHAA No. 49 and that Plaintiff's proposed location is therefore in compliance with zoning requirements;

- Count 4: Seeking a Writ of Mandamus requiring ADHS to issue a Registration Certificate and to allow Plaintiff to open a medical marijuana dispensary after Plaintiff has constructed improvements regardless of whether Maricopa County has issued the zoning compliance certification; and

- Awarding Plaintiff its attorney's fees.

On July 23, 2012, after a hearing, the Court entered a preliminary injunction that enjoined ADHS and Humble from withdrawing, denying or otherwise rejecting Plaintiff's application for a Registration Certificate based on the Plaintiff's putative failure to comply with Ariz. Admin. Code R9-17-304(6) (regulation requiring the dispensary applicant to provide documentation confirming zoning certification). The Court found that the County Defendants were effectively foreclosing the possibility of Plaintiff's full compliance. The Court also found Plaintiff had applied for a Registration Certificate but Maricopa County refused to examine whether Plaintiff's proposed site met zoning requirements or if there were any zoning requirements at all.

The defendants filed timely Answers to the First Amended Complaint, including the State of Arizona (Intervenor), who intervened.[2] Intervenor also affirmatively counterclaimed for declaratory relief asserting that portions of the AMMA were preempted by federal law under the Controlled Substances Act (CSA). *See* U.S.C. §§801-971 (2012).[3]

Pending before the Court are: (1) Plaintiff's Motion for Partial Summary Judgment (deemed filed 9/7/12);[4] (2) County Defendants' (Maricopa County, William Montgomery) Cross Motion

[2] On August 23, 2012, the State moved to intervene. The Court granted the Motion on September 10, 2012 to the Intervenor.

[3] Intervenor and the County disagree on one point. The County Defendants argue the CSA preempts the AMMA in its entirety and the State argues that the AMMA's provision that directs the ADHS to issue medical marijuana cards is not preempted.

[4] Although denominated a motion for summary judgment, Plaintiff seeks limited relief, either: (i) a court order directing County Defendants to issue its documentation or (ii) a Court order deeming that its application for a permit satisfies Ariz. Admin. Code R9-17-304(6). Therefore, it is a motion for partial summary judgment.

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for Summary Judgment (filed 8/23/12); and (3) The Intervenor's Motion for Summary Judgment (filed 8/23/2012).

Other procedural motions include Plaintiff's Motion for Leave to file Plaintiff's Response to County Defendants' Separate Statement of Facts in Support of Cross Motion for Summary Judgment (filed 10/10/12) (granted by minute entry dated 10/18/12 and on the Record) and Plaintiff's request to strike memorandum decisions cited by County Defendants. *See Plaintiff's Joint Response to County Defendants' Cross Motion for Summary Judgment and Intervenor's Motion for Summary Judgment*, n.7 (9/27/12).[5]

The crux of the parties' dispute lies with the County Defendants and the Intervenor's argument that the United States Constitution preempts the AMMA and, therefore, the AMMA is unconstitutional. The Court turns to this argument first.

C. Preemption

Federal law proscribes the "manufacture, distribution or possession of marijuana" under the CSA. In 2005, the United States Supreme Court held that California's medical marijuana laws do not provide any impediment to federal prosecution of the CSA and previously held there is no exception for medical necessity under the CSA. *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483 (2001). The *Raich* Court did *not* address the issue presented to this Court, that is, whether federal law preempts State law, which permits the use of medical marijuana. *Id.* Rather, the Court addressed Congress' power under the Commerce Clause to prohibit the local cultivation and use of medical marijuana. *Id.*

The question before this Court is the flip side of the *Raich* coin. Does Congressional passage of the CSA preempt Arizona's attempt to authorize, under State law only, the local cultivation, sale and use of medical marijuana? In other words, does the CSA preempt the AMMA?

Early in this preemption analysis, the Court acknowledges two fundamental principles underlying the examination of preemption. First, preemption is a question of Congressional *intent* or *purpose*. *See, e.g., Wyeth v. Levine*, 555 U.S 555, 565-66 (2009); *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88 (1992). Where, as here, Arizona is operating under its historic police powers, this Court is directed to "assume that 'the historic police powers of the States' are *not* superseded unless that was *the clear and manifest purpose* of Congress." *Arizona v. United States*, 132 Ariz. S. Ct. 2492, 2501 (2012) (addressing Arizona's immigration statutes

[5] *See Ariz. R. Sup. Ct.* 111(c) (2012). While the Court reviewed those cases, the Court they did not impact the Court's decision. The request is, therefore, deemed moot.

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that were preempted by federal law) (emphasis added); *see also Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).

Second, once preemption of State law is clearly demonstrated to be a Congressional purpose, this Court must respect the right of Congress to impose laws that supersede State law. Congress' power to do so arises from the Supremacy Clause of the United States Constitution which provides, in part, that the "[l]aws of the United States. . . shall be the supreme law of the land." U.S. Const. Art. VI, cl. 2.[6]

With that groundwork, the Court must measure whether Congress intended to have the CSA preempt State law. There are four ways to measure congressional purpose in terms of preemption: (1) expressed preemption; (2) field preemption; (3) obstacle preemption; and (4) physical impossibility.

Addressing the first, Congress may expressly set forth its intent to prohibit State involvement in a statutory scheme. *See, e.g., Chamber of Commerce of U. S. v. Whiting*, 131 S. Ct. 1968 (2011) (holding that Arizona's employer sanctions against those who hire undocumented workers were not preempted by federal law). In this case, the parties acknowledge that when Congress enacted the CSA, there was no such expression of purpose.

Addressing the second, Congress may preempt State legislation if Congressional legislation so fully occupies the field that its intent to preempt State law is obvious. *See Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 115 (1992) (Souter, J., dissenting) (acknowledging the doctrine). Often referred to as "field preemption," it is a measure of Congressional intent. Like express preemption, the parties in this case agree that the CSA does not require preemption of the AMMA under this rubric.[7]

Addressing the third, preemption may occur when States enact legislation that stand as an "obstacle" to the full purposes and objectives of Congress. *See Hines v. Davidowitz*, 312 U.S. 52 (1941). This type of preemption is implied. *Id.* at n.20.

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[6] This principle, of course, is tempered by the Tenth Amendment that expressly provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const. Amend. X.

[7] Like the federal government, Arizona expressly regulates and/or criminalizes the unlawful use of and distribution of controlled substances. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 13-3401 to 3461 (2012); *see also* Ariz. Rev. Stat. Ann. §§ 36-2501 to 2611 (Arizona's "Controlled Substance Act").

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Finally, preemption may arise when it is "physically impossible" to comply with both State and Federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).[8] Like obstacle preemption, physical-impossibility preemption is implied. *Id.*

In this case, Intervenor and County Defendants claim that AMMA fails under obstacle preemption and as physical-impossibility preemption. They argue the AMMA is therefore unconstitutional. The Court disagrees.

1. Obstacle Preemption

The Intervenor and County Defendants argue that the AMMA stands as an obstacle to the accomplishment of the full purposes of the CSA. "What is a sufficient obstacle is matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). The Court must determine whether State law "undermines the intended purpose and 'natural effect'" of the CSA. *Id*; *see also Willis v. Winters*, 253 P.3d 1058, 1064 (Or. Sup. Ct. 2011).

The CSA's objectives are: (1) combating drug abuse; and (2) controlling the legitimate and illegitimate traffic in controlled substances. *See Gonzales v. Oregon*, 546 U.S. at 249 (2006); *Gonzales v. Raich*, 545 U.S. at 12. With these objectives in mind, the Court finds that the AMMA, while reflecting a very narrow but different policy choice about medical marijuana, does not undermine the CSA's purposes.

Clearly, the mere State authorization of a very limited amount of federally proscribed conduct, under a tight regulatory scheme, provides no meaningful obstacle to federal enforcement. No one can argue that the federal government's ability to enforce the CSA is impaired to the slightest degree. Indeed, the United States Supreme Court has been unequivocal on this point. *See generally Gonzales v. Raich.*

Instead of frustrating the CSA's purpose, it is sensible to argue that the AMMA furthers the CSA's objectives in combating drug abuse and the illegitimate trafficking of controlled substances. The Arizona statute requires a physician to review a patient's medical circumstances prior to authorization of its use. The statute also provides the ADHS with full regulatory authority. The ADHS, in turn, has exercised that authority with appropriate care to ensure that licensed dispensaries operate only within the confines of the AMMA. The detailed regulations ensure the marijuana is used for medical purposes only. *See, e.g.*, n.13, *infra.*

[8] Courts frequently characterize physical impossibility and obstacle preemption as subsets of "conflict preemption." *See, e.g., Gade v. National Solid Waste Management Ass'n*, 505 U.S. at 115) (Souter, J., dissenting).

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> independent decisions about what conduct to criminalize.

Emerald Steel, 230 P.3d at 544-45.

Notably, the *Emerald* Court majority stands virtually alone when it suggested that almost any State statute that affirmatively authorizes federally conflicting conduct is preempted. *See* n. 9, *supra*. Most courts, like this Court, more closely examine the purposes of the federal statute and would permit conflicting State law that not does directly undermine federal law. *See, e.g., Ter Beek v. City of Wyoming*, __N.W.2d__, 2012 WL 3101758 (Mich. App.) (July 31, 2012); *Willis v. Winters*, 253 P.3d at 1065-66 (holding that the Oregon law that permitted concealed gun permits was not preempted by federal law); *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. (Cal. App. 2008) (California State law permitting marijuana identification cards is not preempted).

Finally, the Court will state the obvious: The AMMA affirmatively provides a roadmap for federal enforcement of the CSA, if it wished to so. Dispensaries are easily identified. They are, in fact, ready targets for federal prosecution under the CSA, should federal authorities deem it appropriate.

For all these reasons, the Court finds that obstacle preemption is inapplicable.

2. Physical Impossibility.

The Intervenors and County Defendants argue that it is physically impossible for its employees and agents to comply with both AMMA and the CSA. *See Wyeth v. Levine*, 444 U.S. 555 (2009). Stated another way, they argue that the State and County employees must violate the CSA by issuing the requested documentation and otherwise complying with the AMMA's regulatory scheme. Specifically, they argue that these workers necessarily commit the federal crime of aiding and abetting the possession and sale of marijuana in violation of 18 U.S.C. § 2.[10]

This precise issue is not well settled. *Compare Pack v. Superior Court*, 132 Cal. Rptr. 3d 633 n.27 (Cal. App. 2012) (*review granted previously but later vacated due to mootness*) *with*

[10] The Intervenor and County Defendants do not argue that others who use or dispense marijuana under State law support their argument for physical-impossibility preemption. There is nothing in the AMMA that requires these persons to engage in the activity. It is not physically impossible to comply with logically inconsistent statutes where a person can simply refrain from doing the activity that one statute purports to permit and that the other statute purports to proscribe. *See Ter Beek, supra* (*citing Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996)).

Garden Grove v. Superior Court, 68 Cal. Rptr. 3d 656 (Cal. App. 2007). Nonetheless, physical-impossibility preemption is rarely used and has been described as "vanishingly narrow." *See* Nelson, *Preemption*, 86 Va. L. Rev. 225, 228 (2000).

Notwithstanding the very limited scope of this type of preemption, the California Court of Appeals in *Pack* held that state employees may well be subject to federal prosecution in support of its decision that the CSA preempted a city ordinance and California's medical marijuana laws. That ordinance required medical marijuana to be analyzed by an independent laboratory and required permits for marijuana collectives. The *Pack* court held that state workers would likely violate the CSA but was equivocal—acknowledging another California court's decision to the contrary. *Pack at id.* (referring to *City of Garden Grove v. Superior Court, supra*). The *Pack* court was concerned that the earlier decision was "too narrow." *Id.*

In *Garden Grove*, the California Court of Appeals arrived at the opposite conclusion. The *Garden Grove* court found that California medical marijuana laws were not preempted under the physical-impossibility doctrine. The *California Grove* court affirmed a lower-court order that directed law enforcement to return a user's medical marijuana after it was determined he lawfully possessed the substance. The *Garden Grove* court expressly rejected the City's argument that compliance with the lower-court order required law enforcement officers to violate federal law.[11] After examining whether such conduct violating the federal aiding and abetting statute, the court found prosecution to be "unlikely." *See Garden Grove*, 60 Cal. Rptr. 3d at 663 - 665. The *Garden Grove* court observed:

> [H]olding the City or individual officers responsible for any violations of federal law that might ensue from the return of [defendant's] marijuana would appear to be beyond the scope of either conspiracy or aiding and abetting. No one would accuse the City of willfully encouraging the violation of federal laws were it merely to comply with the trial court's order. The requisite intent to transgress the law is so clearly absent here that the argument is no more than a straw man.

[11] Construing 21 U.S.C. § 885(d), the court also concluded that the officers likely had federal immunity because they were acting within the official duties. *See Garden Grove*, 157 Calif. Rptr. 3d at 664. *See also State v. Kama*, 39 P.3d 866 (Or. Ct. App. 2001) (noting that federal law immunizes law enforcement officers who possess marijuana in the performance of their official duties).

Garden Grove, 60 Cal. Rptr. 3d at 663.

A similar issue was presented to the Oregon Supreme Court in *Willis v. Winters*, *supra*. In *Winters*, two Oregon county sheriffs refused to issue a concealed-handgun license (CHL) to medical-marijuana users. The *Winters* court rejected the sheriffs' two-pronged preemption argument, including an argument that providing a CHL required the sheriffs to violate federal law.

The sheriffs were positing what was in reality a physical-impossibility preemption argument.[12] Specifically, the sheriffs argued that issuing the CHL would in essence be providing "deceptive" information to gun dealers—and would violate 18 U.S.C. § 922(a)(6) which prohibits persons from providing false information to federally licensed gun dealers. Like the *Garden Grove* court, the *Winters* court juxtaposed the state actor's conduct with federal law and found the conduct did not violate federal law. *See Winters*, 253 P.2d at 1066-68.

Finally, the Ninth Circuit Court of Appeals addressed a similar issue in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) but under First Amendment principles. The *Conant* court rejected the federal government's argument that it could prevent a physician from "recommending" marijuana. That recommendation was a statutory predicate to lawful possession of marijuana under California State law. The federal government contended that the physician's recommendation constituted aiding-and-abetting the violation of CSA or constituted conspiracy.[13] The *Conant* court rejected that argument and held that the doctor's "anticipation" of patient conduct was insufficient to establish liability under either the aiding-and-abetting or the conspiracy statutes.

Turning to the arguments presented here, this Court addresses the limited issue of whether the AMMA requirements that direct the County Defendants to confirm zoning compliance constitutes aiding and abetting thereby creating physically-impossible preemption. Aiding and

[12] The *Winters* court also rejected the obstacle preemption argument as well. *See Winters*, 253 P.2d at 1064-66.

[13] The AMMA, like California law, does not require a "prescription." The AMMA requires a "physician's written certification" attested and signed by a licensed physician that confirms, among other things, diagnosis of a qualifying debilitating condition, an in-person physical examination, a review of the patient's medical records, an explanation of the potential risks of marijuana use, and the physician's opinion that the patient is likely to receive therapeutic or palliative benefit. *See Ariz. Admin. Code* R9-17-202(F)(5)(2012).

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This Court will not rule that Arizona, having sided with the ever-growing minority of States and having limited it to medical use, has violated public policy.

The Court makes the following conclusions of law:

- Defendants ADHS and its director Will Humble have the lawful authority to withdraw, deny or reject Plaintiff's application for a dispensary registration certification.
- ADHS regulations impose a requirement that the local jurisdiction provide documentation confirming zoning compliance. That requirement falls on the County Defendants.
- County Defendants' categorical refusal to examine whether Plaintiff's proposed site meets zoning requirements and comply with Ariz. Admin. Code R9-17-304(6) is unlawful.
- Plaintiff has no adequate remedy at law and will suffer irreparable harm absent a mandamus requiring the County Defendants to comply with the ADHS regulations. This is because Plaintiff loses the right to continue to pursue a dispensary license during this cycle of applications. This is an important fact given that Plaintiff is the only applicant in CHAA No. 49. Thus, if Plaintiff is otherwise qualified, Plaintiff would be the only applicant for this CHAA.

IT IS THEREFORE ORDERED that the County Defendants shall provide Plaintiff with documentation from the local jurisdiction that:

a. There are no local zoning restrictions for the dispensary's location, or
b. The dispensary's location is in compliance with any local zoning restrictions.

IT IS FURTHER ORDERED that County Defendants shall comply no later than 10 days from the date of this Order.

IT IS FURTHER ORDERED that pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure, no just cause exists to delay entry of judgment and therefore the Court signs this minute entry as a final order.

/s/ Michael D. Gordon

MICHAEL D. GORDON
JUDGE OF THE SUPERIOR COURT

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