

JUN 14 2011

IN THE
Court of Appeals
STATE OF ARIZONA
DIVISION ONE

RUTH WILLINGHAM, CLERK
BY _____

O.F. & C., INC., an Arizona)	Court of Appeals
Non-Profit Corporation, d/b/a)	Division One
THE VIRTUE CENTER; ELEMENTS)	No. 1 CA-SA 11-0161
THERAPEUTIC DISPENSARY, an)	
Arizona Non-Profit Corporation;)	
ARIZONA DISPENSARY SOLUTIONS,)	
L.L.C., an Arizona Limited)	
Liability Company; ARIZONA)	
ALTERNATIVE RELIEF CENTERS, INC.,)	
an Arizona Non-Profit)	
Corporation d/b/a MEDICAL)	
MARIJUANA DISPENSARIES; PROTECT)	
ARIZONA PATIENTS, INC., an)	
Arizona Non-Profit Corporation;)	
CULTIVATION MANAGEMENT SERVICES,)	
an Arizona Limited Liability)	
Company; HEATHER TORGERSON, a)	
married woman; STEPHEN JOHNSON,)	
a single man)	

Petitioners,)

v.)

WILL HUMBLE, Director of the)
Arizona Department of Health)
Services, in his Official)
Capacity; THE ARIZONA DEPARTMENT)
OF HEALTH SERVICES, a political)
subdivision of the State of)
Arizona,)

Respondents.)

**ORDER SETTING DATES
DIRECTING SERVICE and
FIXING TIME FOR RESPONSE**

A petition in a special action having been filed,

IT IS ORDERED that said petition will be considered at conference during the MORNING of July 12, 2011, by Department C (July):

Patricia K Norris, Presiding Judge
Philip Hall, Judge
Donn Kessler, Judge

The parties and their counsel are directed to reserve the MORNING of the above date in the event the court determines that oral argument should be scheduled.

IT IS FURTHER ORDERED that objections to the petition, shall be in the form of a written response and shall be filed and delivered on or before June 24, 2011, unless the court, prior thereto, declines to accept jurisdiction without requiring a response. If a response is filed, petitioner may file and deliver a reply but must do so not later than five business days after the response has been filed with the court. If the reply due date falls on a Saturday, Sunday or legal holiday, the due date shall be the next business day. After the time for filing a response has expired, the parties will be notified if the court has scheduled oral argument. The parties will not receive notification if the court elects to forego oral argument.

IT IS FURTHER ORDERED that the service of the petition shall be on the same day as the filing of the petition with the court of appeals. Service of the order may be effected by the attorney for the petitioner(s) or agent:

- (a) Upon the respondent judge by mailing the same to the judge's official office or by delivering the same to the respondent judge; and
- (b) upon all other respondents, including respondent real parties in interest, by serving the superior court attorney of record for each respondent to be served, in the same manner that a responsive pleading would be served pursuant to the Rules of Civil Procedure. Should it be that any respondent does not have an attorney of record in the superior court, then service may be accomplished by service upon the respondent in person or by ordinary mail.


An original and six copies of the proof of service shall be filed on or before June 17, 2011 in the Court of Appeals, Division One, or the petition may be dismissed.

NOTICE TO RESPONDENTS: In order to avoid scheduling conflicts that might arise because of the time limitations contained in this order, Division One of the Court of Appeals will not entertain cross-petitions in this special action. In the event respondents seek affirmative relief from the order that is the subject matter of the petition for special action, respondents are directed to file a separate special action and seek consolidation with this pending matter.

1 CA-SA 11-0161

Page Three

Regularly updated information about the status of this case may be viewed by visiting <http://apps.supremecourt.az.gov/aacc> and clicking on the "Active Case List" from the Court of Appeals Division One menu. A summary of Division One's policies affecting procedural matters not governed by rules of court may be viewed by clicking on the "Court Policies" link on the home page menu.


~~_____~~
Ruth A. Wilkington, Clerk

JUN 14 2011

RUTH WILLINGHAM, CLERK
BY _____

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9 **COURT OF APPEALS**

10 **FOR THE STATE OF ARIZONA**

11 O.F.&C., INC., an Arizona Non-Profit
12 Corporation, dba The Virtue Center;
13 ELEMENTS THERAPEUTIC DISPENSARY,
14 an Arizona Non-Profit Corporation, ARIZONA
15 DISPENSARY SOLUTIONS, LLC, an Arizona
16 Limited Liability Company; ARIZONA
17 ALTERNATIVE RELIEF CENTERS, INC., an
18 Arizona Non-Profit Corporation dba Medical
19 Marijuana Dispensaries, PROTECT ARIZONA
20 PATIENTS, INC., an Arizona Non-Profit
21 Corporation; CULTIVATION MANAGEMENT
22 SERVICES, an Arizona Limited Liability
23 Company; HEATHER TORGERSON, a
24 married woman; STEPHEN JOHNSON, a
25 single man; JOHN AND JANE DOE I-X; and
26 BLACK CORPORATIONS I-X,

Petitioners,

vs.

WILL HUMBLE, Director of the Arizona
Department of Health Services, in his Official
Capacity; THE ARIZONA DEPARTMENT OF
HEALTH SERVICES, a political subdivision of
the State of Arizona; JOHN AND JANE DOE I-
X; and BLACK CORPORATIONS I-X,

Respondents.

Cause No. _____

**EMERGENCY PETITION FOR
SPECIAL ACTION RE: WRIT OF
MANDAMUS**

SA 11-0161

COME NOW the above-named Petitioners in the above-captioned and numbered cause, by and through their attorney undersigned, and respectfully petition this Court for an expedited order, pursuant to Rule 1 of the Arizona Rules of Procedure for Special Actions, as follows:

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JURISDICTION

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This Court has jurisdiction to entertain this petition and to grant relief by virtue of A.R.S. §12-2021, Arizona Revised Statutes, Annotated, as well as A.R.S. §12-120.21(A)(4), where there is an issue of overriding significance to the public which presents constitutional issues of statewide importance involving the doctrine of separation of powers. See State ex rel. Woods v. Block, 189 Ariz. 269, 942 P.2d 428, 247 Ariz. Adv. Rep. 22 (Ariz. Jul 15, 1997). There, the Court held a statute to be unconstitutional because it “violated separation of powers” clause of the State Constitution.

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In addition, this Court’s jurisdiction extends to the issue herein because there is an implication of the authority of a “constitutional body with broad powers,” and involves fundamental rights guaranteed by both the Arizona and federal constitutions. See Arizona Corp. Comm’n. v. State ex rel. Woods, 131 P.U.R.4th 604, 171 Ariz. 286, 830 P.2d 807, Util. L. Rep. P 26,195 (Ariz. Apr 21, 1992). That case turned on issues presented which were “questions of first impression” and “statewide importance.” The Court submitted that those factors made it appropriate for it to exercise its discretion to accept jurisdiction.

Finally, Petitioners herein lack an “equally plain, speedy and adequate remedy to obtain their requested relief.” Western Sun Contractors Co. v. Superior Court, 159 Ariz. 223, 766 P.2d 96 (Ariz.App. Div. 1 Sep 22, 1988) where the Court held that a special action is the appropriate means to adjudicate public contract disputes.

ISSUE

Whether the Arizona Department of Health (AZDHS) should be mandated to issue medical marijuana dispensary licenses pursuant to the full implementation of the AMMA, pending resolution of the Declaratory Judgment (2:11-CV-01072-SRB) action filed in District Court by Thomas C. Horne on behalf of the State of Arizona, Governor Janice K. Brewer, *et al.*

1 **FACTS**

2 Petitioner O.F&C., Inc. dba The Virtue Center, ("Virtue Center") is an Arizona Non-
3 Profit Corporation, organized under the laws of the State of Arizona. It has expended in
4 excess of \$100,000 to set up a medical marijuana dispensary, submitted a business plan
5 and application for a dispensary license, relying upon the representations of the State,
6 only to be rejected, to its detriment.

7 Petitioner Elements Therapeutic Dispensary, Inc. ("Elements") is an Arizona Non-
8 Profit Corporation, organized under the laws of the State of Arizona; it has expended in
9 excess of \$225,000 to develop and market customized software, processes and systems
10 for submission of a dispensary license, relying upon the representations of the State, to its
11 detriment.

12 Petitioner Protect Arizona Patients, Inc. ("Protect Arizona Patients") is an Arizona
13 Non-Profit Corporation, organized under the laws of the State of Arizona. It represents the
14 interests of medical marijuana patients and prospective dispensary owners who will be
15 irreparably harmed by the failure of the State to implement the highly regulated dispensary
16 component of the "Arizona Medical Marijuana Act" ("The Act" or "The AMMA").

17 Petitioner Arizona Dispensary Solutions, LLC ("Arizona Dispensary") is an Arizona
18 Limited Liability Company, organized under the laws of the State of Arizona. It has
19 expended in excess of \$75,000 in preparation of its submission for a dispensary license,
20 relying upon the representations of the State, to its detriment. The core business of
21 Arizona Dispensary is based on compliance with AZDHS Medical Marijuana rules, the
22 Arizona Revised Statutes created by the AMMA and the dispensary application timeline
23 set forth by the AZDHS.
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25 Petitioner Arizona Alternative Relief Centers, Inc. ("AARC") is an Arizona Non-Profit
26 Corporation dba Medical Marijuana Dispensaries, organized under the laws of the State of

1 Arizona. It has expended approximately \$50,000 in preparation of its submission for a
2 dispensary license, relying upon the representations of the State, to its detriment.

3 Petitioner Cultivation Management Services, LLC ("CMS") is an Arizona Limited
4 Liability Company, organized under the laws of the State of Arizona. CMS is an
5 independent inspection, testing and certification service dedicated to ensuring that quality
6 certified Cannabis is distributed to qualified patients and that AZDHS has third party
7 verification of inventory levels. CMS has expended in excess of \$50,000 developing
8 customized inventory control systems and processes designed specifically for the
9 prospective dispensary licensees.

10 Petitioner Heather Torgerson ("Torgerson") is an adult resident citizen of the State
11 of Arizona and medical marijuana patient. She has been diagnosed with a malignant
12 brain tumor that is in remission and whose side effects have been greatly relieved and
13 continue to be relieved by the recommended use of Cannabis.

14 Petitioner Stephen Johnson ("Johnson") is an adult resident citizen of the State of
15 Arizona and medical marijuana patient. He is a quadriplegic who has been confined to a
16 wheelchair for the past thirty (30) years and has been greatly relieved and continues to be
17 relieved by the recommended use of Cannabis.

18 Petitioners John Doe and Jane Doe I-X, at all times relevant hereto, are adult
19 citizens of the State of Arizona.

20 Petitioners Black Corporations I-X, at all times relevant hereto, are Arizona
21 corporations, organized under the laws of the State of Arizona.

22 Respondent Will Humble ("Respondent") is the Director of the Arizona Department
23 of Health Services ("AZDHS"), a political subdivision of the State of Arizona, pursuant to
24 A.R.S. §36-102. In that capacity, Respondent is responsible for the AZDHS employees
25 who are implementing and overseeing the AMMA, A.R.S. §§36-2801, *et seq.*, including
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1 but not limited to the issuance of qualified patient, designated caregiver, and not-for-profit
2 medical marijuana dispensary agent registration cards and the registration of not-for-profit
3 medical marijuana dispensary licenses.

4 Respondent The Arizona Department of Health Services ("AZDHS") is a political
5 subdivision of the State of Arizona, pursuant to A.R.S. §36-102. It has been tasked with
6 the responsibility of implementing and overseeing the AMMA, A.R.S. §§36-2801, *et seq.*,
7 including but not limited to the drafting of the Act, establishing the rules and regulations
8 related to the issuance of qualified patient, designated caregiver, and not-for-profit medical
9 marijuana dispensary agent registration cards and the registration of not-for-profit medical
10 marijuana dispensary licenses.

11 Respondents John Doe and Jane Doe I-X are adult citizens of the State of Arizona,
12 and are subject to service of process.

13 Respondents Black Corporations I-X are Arizona corporations, organized under the
14 laws of the State of Arizona, and are subject to service of process by and through their
15 registered agents.

16 On November 2, 2010, Arizona voters passed Proposition 203, an initiative
17 measure now identified as the AMMA, envisioned to decriminalize medical marijuana use
18 by people with certain chronic and debilitating medical conditions. Proposition 203
19 provided that its purpose "is to protect patients with debilitating medical conditions, as well
20 as their physicians and providers, from arrest and prosecution, criminal and other
21 penalties and property forfeiture if such patients engage in the medical use of marijuana."

22 Arizona Governor Jan Brewer ("Brewer") signed Proposition 203 into law on December
23 14, 2010.

24 The Act requires AZDHS to be responsible for implementing and overseeing the
25 Act and provides for the registration and certification of "nonprofit medical marijuana
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1 dispensaries,” “nonprofit medical marijuana dispensary agents”, “qualifying patients” and
2 “designated caregivers.”

3 Under the Act, AZDHS is mandated to adopt rules governing the registration and
4 certification process within 120 days after the effective date of the AMMA and to adopt
5 rules establishing the form and content of applications, the manner in which applications
6 will be considered, the amount of application and renewal fees within certain maximum
7 limits, and specific rules governing dispensaries, a key component of the AMMA.

8 As required by the Act, AZDHS filed its Rules with the Arizona Secretary of State
9 on April 13, 2011.

10 On April 14, 2011, AZDHS began accepting applications from persons who sought
11 to be certified as Qualifying Patients and Designated Caregivers. As of June 1, 2011,
12 4,390 Qualifying Patients and 126 Designated Caregivers had been certified by AZDHS.

13 Under the Act, AZDHS is required to register nonprofit medical marijuana
14 dispensaries and to issue a registration certificate within 90 days after receiving an
15 application.

16 AZDHS is also required to register medical marijuana dispensary agents and to
17 issue registry identification cards to qualifying patients and designated caregivers within
18 certain time frames after receipt of information and documents as set forth in the AMMA.

19 AZDHS was to begin accepting applications for medical marijuana dispensaries
20 and medical marijuana dispensary agents on June 1, 2011. Medical marijuana
21 dispensaries and medical marijuana dispensary agents must be registered by the AZDHS
22 before they can lawfully operate under the Act.

23 Upon information and belief, as early as January 10, 2011, Carolyn Short (“Short”),
24 an attorney who was licensed by the State Bar of Arizona at all times relevant and the
25 Executive Director of Keep AZ Drug Free, participated in a meeting with Arizona Attorney
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1 General Tom Horne ("Horne"), who represented Respondents, and former U.S. Attorney
2 General Paul Charlton ("Charlton") to discuss a legal scheme to file for a declaratory
3 judgment to delay implementation of the state's medical marijuana law. Incredulously, on
4 February 16, 2011, Short, wrote an email to Respondent Humble (SEE Appendix
5 Document 1).

6 In her February 16th email, Short misrepresented the Controlled Substances Act
7 ("CSA") to Respondent Humble. Although the CSA makes no reference to the *facilitation*
8 of any action, and no state employee has been prosecuted for implementation of its state
9 law in any jurisdiction, Short further contended that "there is no question but that AZDHS
10 employees and representatives, by virtue of actions taken as required by Prop 203 will
11 facilitate the possession, manufacture and distribution of marijuana, all of which are illegal
12 under the CSA".

13 Moreover, any prosecution of an Arizona state employee is at the discretion of the
14 US Attorney, Dennis Burke ("Burke") who has indicated he has no intention whatsoever of
15 prosecuting Arizona state officials for implementation of the AMMA.
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17 Although Short apologized "for the threatening tone" of her email, she advised
18 Respondent Humble that "If I don't hear from you, I will assume that you did in fact instruct
19 Tom Horne not to seek declaratory relief. We then will advise your employees of your
20 stance on the matter and the risks associated with implementing this program".

21 Short concluded, "... we are running out of options and it is time for someone to
22 take a stand on this issue." Short ignores the fact that the voters of Arizona had taken a
23 stand on the issue more than two (2) months earlier -- they voted to pass Proposition 203
24 and Respondent Humble was simply performing his legal obligation in good faith as a
25 government official.
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1 Upon information and belief, on or about April 18, 2011, Respondent Humble spoke
2 by telephone with Assistant U.S. Attorney Patrick Cunningham inquiring whether the
3 Arizona United States Attorney's Office would consider sending a letter regarding medical
4 marijuana, and if so, if that letter could address whether state employees would be at risk
5 of federal prosecution for implementation of the AMMA.

6 On May 2, 2011, Burke issued a letter addressed to Respondent Humble, pursuant
7 to Humble's request, regarding the State's implementation and oversight of the Act (SEE
8 Appendix Document 2). The letter addressed the growing, distribution and possession of
9 marijuana, but notably omitted any reference to the prosecution of state employees.
10 Burke's letter cites an October 2009 memorandum from then-Deputy Attorney General
11 Ogden who provided guidance that, "in districts where a state had enacted medical
12 marijuana programs, a U.S. Attorney's Office ("USAO") ought not focus their limited
13 resources on those seriously ill individuals who use marijuana as part of a medically
14 recommended treatment regimen and are in clear and unambiguous compliance with such
15 state laws." Burke continues, "**And, as has been our policy, this USAO will continue to**
16 **follow that guidance,**" (*emphasis added*).

17 On May 27, 2011, five (5) days prior to the date AZDHS was scheduled to begin
18 accepting dispensary applications, Janice Brewer, ("Brewer") in her capacity as the
19 Governor of the State of Arizona, filed a Complaint for Declaratory Judgment in the United
20 States District Court in Arizona (SEE Appendix Document 3). The complaint asked the
21 Court to determine whether strict compliance and participation by citizens and state
22 employees in the AMMA provides a safe harbor from federal prosecution, or in the
23 alternative, whether the AMMA is preempted by the Controlled Substances Act ("CSA")
24 and federal law. Brewer did not seek (or obtain) any injunctive relief enjoining state
25 employees from continuing to issue patient and caregiver cards under the AMMA.
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Because of the May 27, 2011 lawsuit and legal advice from the Attorney General, AZDHS suspended its acceptance of dispensary applications which was to begin on June 1. However, since state employees continue to issue caregiver cards and patient cards, under Brewer's theory, they could be subject to prosecution for implementing any component of the AMMA. Consequently, issuance of one component of the AMMA -- dispensary licenses -- will not create any more or any less liability for state employees.

On June 1, 2011, Petitioner the Virtue Center, attempted to submit an application and business plan for a dispensary license, however, it was unilaterally and publicly rejected by Respondents. Moreover, Respondent AZDHS has unequivocally stated on its website that it won't accept any dispensary applications based upon the filing for declaratory judgment. AZDHS's website specifically states:

"ALERT: The Attorney General filed for declaratory judgment in federal court about the legality of the Arizona Medical Marijuana Act and our Rules. Because of the court filing and legal advice from the Attorney General, AZDHS won't accept dispensary applications in June. However, we will continue to process applications for Patient and Caregiver cards".

(SEE Appendix Document 4).

ARGUMENT

Respondents have willfully, wrongfully, and without cause, failed and refused, and still fail and refuse to accept, process dispensary license applications and issue dispensary licenses.

Horne, as legal representative for Respondents has conspired with others by willfully, wrongfully, and without cause directing his client Respondent Humble to delay the full implementation of the AMMA by refusing to process dispensary license applications and to issue dispensary licenses.

1 The refusal of Respondents Humble and AZDHS to process and issue dispensary
2 licenses is arbitrary and capricious, and an abuse of discretion, for alternative reasons,
3 including but not limited to:

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5 The Act has not been declared pre-empted by federal law, nor has the
6 federal court issued any injunction against implementation of the Act;

7 Burke, as the U.S. Attorney has not indicated that Arizona state employees
8 are at a risk of prosecution; to the contrary, Burke has refuted Brewer's and
9 Horne's claims.

10 Horne, Short, *et al.* have conspired since January 2011 to delay the full
11 implementation of the AMMA in total disregard for the passage of the Act.

12 Respondent Humble is refusing to process dispensary applications submitted
13 to AZDHS, while directing AZDHS staff to continue processing patient
14 and caregiver applications.

15 Through numerous press conferences and interviews, Burke has indicated that
16 Brewer and Horne are "intentionally misinterpreting" his May 4th letter addressed to
17 Respondent. Burke has further stated that Arizona state employees are not at risk of being
18 prosecuted.

19 In fact, during an interview with the *Arizona Daily Star* on May 27, 2011, Burke
20 stated that "Gov. Jan Brewer and Attorney General Tom Horne are distorting the facts on
21 the issue of medical marijuana, and the risk of federal prosecution of state workers."

22 The article states in *pertinent part*:

23 "Burke said his letter simply spelled out the priorities his office has in going
24 after those who sell, transport or use marijuana, and never mentioned state
25 workers. The point his letter made is that he would not prioritize going after patients
26 who use medical marijuana under Arizona law, Burke said. . . . Burke said if there
was any confusion, Brewer and Horne could have called him or written back for
clarification instead of grandstanding at a press conference and filing a lawsuit.

 He said a suit asking a judge to rule Arizonans can ignore federal drug laws
is a waste. "A federal judge isn't going to tell a U.S. attorney what he can and can't
enforce," Burke said.

1 Most recently, headlines reveal that a MMJ patient who was issued a patient card
2 by AZDHS on May 25th was involved in a fatal shooting while attempting to "sell" marijuana
3 of questionable origin on June 3rd during an alleged robbery by another "patient". These
4 incidents will continue to evolve unless relief is granted by this Honorable Court as
5 caregivers are able to develop collectives, growing without regulation or supervision.
6 (SEE Appendix Document 6).

7
8 The February 16, 2011 email transmitted by Short to Respondent Humble clearly
9 references the intention of Short, Charlton and Horne to conspire to file for a Declaratory
10 Judgment without basis as early as January 2011. Upon information and belief, Horne did
11 not file a declaratory judgment because, according to Short, at the time, "his client, Will
12 Humble did not want him to do so".

13 Respondent Humble's decision to fully implement the AMMA **seven (7) days** prior
14 to the date scheduled to accept applications, pending the filing of the action for the
15 Declaratory Judgment is a ruse perpetrated by Keep AZ Drug Free Executive Director
16 Carolyn Short, the Attorney General Thomas Horne, and former U.S Attorney Paul
17 Charlton to arbitrarily and without basis to delay the full implementation of the AMMA.
18

19 Pursuant to the Act, Petitioners, the Virtue Center, Elements, Protect Arizona
20 Patients, Arizona Dispensary and AARC have relied upon AZDHS representations that
21 dispensary applications would be accepted beginning on June 1, 2011. By delaying the
22 dispensary application process, Petitioners are suffering significant and irreparable
23 pecuniary harm, losing potential revenue, and/or are subjecting their prospective clients to
24 being put in a disadvantageous competitive position. These Petitioners have collectively
25 expended hundreds of thousands of dollars to prepare for submission of their respective
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1 plans to AZDHS, including, but not limited to payment of fees for zoning verification,
2 nonrefundable lease deposits and/or purchase of buildings, real estate agent
3 commissions, business plan consulting, software development, legal fees, marketing and
4 advertising expenses, education and training fees.

5 Petitioners Torgerson and Johnson, pursuant to the Act, by virtue of their
6 debilitating illnesses, relied and continue to rely upon AZDHS representations that they will
7 have access to quality, inventory-controlled Cannabis dispensed through highly regulated
8 dispensary owners. As the dispensary component of the AMMA is needlessly being
9 placed at risk by the Respondents, irreparable damage could be caused to Petitioners
10 Torgerson and Johnson, whose primary source of Cannabis will be cultivated by highly
11 unregulated caregivers.
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13 CONCLUSION

14 In conclusion, based upon the foregoing, it is in the best interest of the residents of
15 the state of Arizona including the patients with debilitating illnesses and the prospective
16 dispensary licensees who have, in good faith, spent months preparing to submit
17 dispensary licenses, that Respondent Humble direct the AZDHS to accept and process
18 dispensary applications under the stringent regulations of the AMMA.
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20 Time is of the essence, because, in the absence of the issuance of a maximum of
21 one hundred and twenty five (125) dispensary licenses, the AMMA provides for the
22 expansion of a network of thousands of caregivers and patients who are able to cultivate
23 Cannabis without supervision, with no zoning restrictions, and with virtually no AZDHS
24 oversight. Once this caregiver/patient network becomes entrenched in neighborhoods
25 throughout the state, it will be virtually impossible for the Respondents to control, monitor
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1 or most importantly, shut down the network of caregivers and potentially thousands of
2 unregulated cultivation sites.

3 Moreover, contrary to Brewer and Horne's allegations in their Complaint for a
4 Declaratory Judgment, Arizona state employees do not incur any more or less liability by
5 issuing dispensary licenses in addition to caregiver licenses and patients cards.

6 Accordingly, Petitioners pray that this Honorable Court enter an Order as follows:

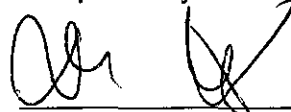
7 A. In the form of an emergency Writ of Mandamus commanding Respondent to
8 fully implement the AMMA by accepting dispensary applications within thirty (30) days of
9 the execution of this Writ, and to process those applications and issue licenses within the
10 timeframes outlined in the AMMA;

11 B. To find that Respondents' action in refusing to accept and process such
12 dispensary applications, and to issue dispensary licenses is arbitrary and capricious and
13 an abuse of discretion;

14 C. Award Petitioners their attorney's fees and costs in bringing this action;
15 pursuant to the provisions of A.R.S. §12-2030;

16 D. For such other and further relief as may be just and proper.
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18 Respectfully submitted,

19 

20 David W. Dow
21 Attorney for Petitioners
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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14(b), I certify that the attached brief:

Uses proportionately spaced type of 14 points or more, is double spaced using a Roman font, and contains 3,962 words; AND

Does not exceed 14,000 words or 50 pages [**if Opening or Answering Brief**]

Does not exceed 28,000 words or 100 pages [**if combined Answering Brief and Opening Brief on Cross-Appeal**]

Does not exceed 21,000 words or 75 pages [**if combined Reply Brief and Answering Brief on Cross-Appeal**]

Does not exceed 7,000 words or 25 pages [**if Reply Brief or Reply Brief on Cross-Appeal**]

JUN 14 2011

RUTH WILLINGHAM, CLERK
BY _____

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9 **COURT OF APPEALS**

10 **FOR THE STATE OF ARIZONA**

11 O.F.&C., INC., an Arizona Non-Profit
12 Corporation, dba The Virtue Center;
13 ELEMENTS THERAPEUTIC DISPENSARY,
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17 ALTERNATIVE RELIEF CENTERS, INC., an
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19 Marijuana Dispensaries, PROTECT ARIZONA
20 PATIENTS, INC., an Arizona Non-Profit
21 Corporation; CULTIVATION MANAGEMENT
22 SERVICES, an Arizona Limited Liability
23 Company; HEATHER TORGERSON, a
24 married woman; STEPHEN JOHNSON, a
25 single man; JOHN AND JANE DOE I-X; and
26 BLACK CORPORATIONS I-X,

Petitioners,

vs.

17 WILL HUMBLE, Director of the Arizona
18 Department of Health Services, in his Official
19 Capacity; THE ARIZONA DEPARTMENT OF
20 HEALTH SERVICES, a political subdivision of
21 the State of Arizona; JOHN AND JANE DOE I-
22 X; and BLACK CORPORATIONS I-X,

23 Respondents.

Cause No. _____

APPENDICES

SA 11-0161

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APPENDICES

1. February 16, 2011 email generated by then Attorney Carolyn Short addressed to AZDHS Executive Director Will Humble.
2. May 2, 2011 Dennis Burke ("Burke"), U.S. Attorney for the District of Arizona, letter addressed to Will Humble.
3. May 27, 2011 Declaratory Judgment filed by Governor Janice Brewer in Federal District Court.
4. June 12, 2011 Screenshot from home page of Department of Health Services website. www.azdhs.gov.
5. May 27, 2011 *Arizona Daily Star* news article quoting U.S. Attorney Dennis Burke.
6. June 6, 2011 *ABC News 15* news article entitled, "*Medical Marijuana Buy Ends in Shooting.*"

APPENDIX 1

From: **Carolyn Short** <carolyn@keepazdrugfree.com>
Date: Wed, Feb 16, 2011 at 1:49 PM
Subject: Prop 203
To: Will Humble <Will.Humble@azdhs.gov>

Hi Will,

On January 10, 2011, Paul Charlton and I met with Attorney General Horne to discuss our conclusion that implementation of Prop 203 would subject you and other ADHS employees to federal prosecution for violating the Controlled Substances Act ("CSA"). AG Horne suggested that he could file a declaratory judgment action, asking a court to determine whether the implementation of Arizona's law would subject you and other ADHS employees to the risk of federal prosecution under the CSA. Two weeks later, AG Horne indicated that he would not file a declaratory judgment action because his "client, Will Humble" did not want him to do so.

Marijuana is a Schedule I drug under the CSA. Schedule I drugs are those that have a high potential for abuse, lack any accepted medical use and can't be used safely even under the supervision of a physician. As a Schedule I drug, the manufacture, distribution or possession of marijuana is a criminal offense under the CSA. Section 841(a) of the CSA provides that "it is unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 844(a) of the CSA provides that it is "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner . . ." (This exception does not apply to Schedule I drugs such as marijuana, which has no accepted medical use.) The consequences of violating the CSA include various fines and terms of imprisonment.

Based on current case law, there is no question but that ADHS employees and representatives, by virtue of actions taken as required by Prop 203, will facilitate the possession, manufacture and distribution of marijuana, all of which are illegal under the CSA. Anyone who possesses, cultivates or distributes marijuana, even if such acts are legal under state law, is subject to federal sanctions. See *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), and *United States v. Oakland Cannabis Buyers' Cooperative*, 121 S.Ct. 1711 (2001), and *United States v. Rosenthal*, 454 F.3d 943 (2006).

The federal ban on marijuana makes anyone who possesses, cultivates, or distributes marijuana pursuant to state law, including those state officials who implement such state law, guilty of a federal crime, and subject to

federal prosecution. This is not mere speculation. In a press release dated August 17, 2007, New Mexico Governor Richardson stated that "The Bush Administration earlier this year threatened to target New Mexico state officials with federal prosecution if the Legislature passed a bill making medical marijuana legal for the most seriously ill patients." http://www.allamericanpatriots.com/48729141_medical_marijuana_new_mexico_governor_bill_richardson_urges_bush_administration_end_heartle ADHS employees or agents facilitating or implementing Prop 203 could be subject to federal prosecution under the CSA, which could result in substantial fines and terms of imprisonment.

I am mindful of the current federal administration's policy of prioritization with respect to enforcing the CSA. In his October 19, 2009 Memorandum, David Ogden, Deputy Attorney General, states that "as a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." Mr. Ogden goes on to say, however, that this guidance for prosecutors does not provide a legal defense to violations of federal law "nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act." The fact is that the current administration's philosophy concerning prosecution of those acting under state "medical" marijuana laws (a) does not change federal law; (b) sets priorities which allow a U.S. Attorney to exercise discretion and charge a low priority case where appropriate; (c) could change at any time; and (d) is inconsistent with the policies of the Drug Enforcement Administration, which continues to pursue those acting under state "medical" marijuana laws.

Any ambiguity raised by Ogden's memorandum recently was clarified by the U.S. Attorney for the Northern District of California, Melinda Haag, in her February 1, 2011 letter (attached) to Oakland city officials who were accepting "applications for permits to operate 'industrial cannabis cultivation and manufacturing facilities'" pursuant to an Oakland city ordinance. U.S. Attorney Haag specifically refers to Ogden's memorandum, acknowledging that federal resources should not be focused on "seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law," but stating that federal authorities "will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law." Not only did U.S. Attorney Haag make crystal clear that individuals directly involved in growing and distributing marijuana will be prosecuted under federal law, she also warned that

"others who knowingly facilitate the actions of the licensees, including property owners, landlords, and financiers should also know that their conduct violates federal law." Those who "facilitate," in the meaning of case law, would include State officials. City officials in Oakland apparently have been told by the County Attorney that they, too, could face federal prosecution. <http://www.ajc.com/news/nation-world/feds-to-oakland-pot-827270.html> By the way, note that U.S. Attorney Haag states she consulted the Attorney General, Eric Holder, about the Oakland ordinance, making crystal clear the current federal administration's position with respect to the growing and distribution, as opposed to mere use by seriously ill people, of marijuana.

If I don't hear from you, I will assume that you did in fact instruct Tom Horne not to seek declaratory relief. We then will advise your employees of your stance on the matter and the risks associated with implementing this program. You and I have had a great relationship, Will, and I apologize for the threatening tone, but we are running out of options and it is time for someone to take a stand on this issue.

If you have any doubts about the accuracy of this summary, you should consult with Attorney General Horne (who has been given a more detailed analysis of the law on this subject, including descriptions of criminal sanctions) or your own personal attorney.

Carolyn

APPENDIX 2



U.S. Department of Justice

United States Attorney
District of Arizona

Two Renaissance Square
40 North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408

Main: (602) 514-7500
Main FAX: (602) 514-7693

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,

Letter to Director Will Humble

May 2, 2011

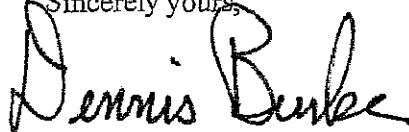
Page 2

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,

A handwritten signature in black ink that reads "Dennis Burke". The signature is written in a cursive, flowing style.

DENNIS K. BURKE
United States Attorney
District of Arizona

Appendix 3 is the Complaint filed in Governor Brewer's lawsuit called Arizona vs. United States et al. Read the Complaint here: www.keytlaw.com/arizonamedicalmarijuanalaw/wp-content/uploads/2011/05/brewer_v_us.pdf

APPENDIX 3

APPENDIX 4

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The Attorney General filed for [declaratory judgment](#) in federal court about the legality of the [Arizona Medical Marijuana Act](#) and our [Rules](#). Because of the court filing and legal advice from the Attorney General, ADHS won't accept dispensary applications in June. However, we will continue to process applications for [Patient](#) and [Caregiver](#) cards.



The requirements and instructions for obtaining an identification card.

[Qualifying Patients](#)



Fill out the necessary paperwork to assist a qualifying patient.

[Caregivers](#)



Get info on dispensary certificate and approval to operate applications.

[Dispensaries](#)



Learn how to become a dispensary agent and the required documentation.

[Dispensary Agents](#)



How to recommend medical marijuana to a qualifying patient.

[Physicians](#)



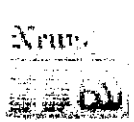
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In November 2010, voters passed the Arizona Medical Marijuana Act. The citizen initiative (Proposition 203) called on the Arizona Department of Health Services to create a medical marijuana program within 120 days from the official election results. Qualifying patients can start applying for identification cards on April 14, 2011, and the Department suspended the dispensary and dispensary agent portions on May 27, 2011. All information will be made available on this website as soon as it is ready. You can also find [historical documents](#) from the development of the program.

APPENDIX 5



Horne says suit seeking guidance on prosecution risks is only logical

Pot letter misread, says US attorney

By Howard Fischer Capitol Media Services | Posted: Friday, May 27, 2011 12:00 am

PHOENIX - The top federal prosecutor in Arizona said Gov. Jan Brewer and Attorney General Tom Horne are distorting the facts on the issue of medical marijuana, and the risk of federal prosecution of state workers.

Brewer and Horne announced earlier this week they will file suit, based on concerns about a letter from Dennis Burke, the U.S. attorney for Arizona, which they say suggests state employees who process permits under the voter-approved law could be charged with violating the federal Controlled Substances Act.

The pair said their concern is protecting state workers and others involved with medical marijuana, and is not a reflection of their opposition to the initiative.

Brewer said Burke's letter to Health Director Will Humble earlier this month warned that compliance with Arizona's new medical marijuana law does not immunize anyone from federal prosecution.

The yet-to-be-filed lawsuit is expected to ask a federal judge to determine what legal protections, if any, Arizona's voter-approved law provides.

Burke said his letter simply spelled out the priorities his office has in going after those who sell, transport or use marijuana, and never mentioned state workers. The point his letter made is that he would not prioritize going after patients who use medical marijuana under Arizona law, Burke said.

Gubernatorial press aide Matthew Benson conceded that Burke never mentions state workers, but said just because Burke didn't say it doesn't mean state workers have nothing to fear.

Horne likewise responded that Burke's not specifically mentioning state employees did not mean they are not at that risk.

Burke's position that compliance with the state medical marijuana law is no protection from federal prosecution, Horne said, leads to the logical conclusion that state employees could be at risk by issuing permits to let people grow, sell or possess marijuana, which could be seen as "facilitating" the distribution of the drug.

Burke said if there was any confusion, Brewer and Horne could have called him or written back for clarification instead of grandstanding at a press conference and filing a lawsuit.

He said a suit asking a judge to rule Arizonans can ignore federal drug laws is a waste. "A federal judge isn't going to tell a U.S. attorney what he can and can't enforce," Burke said.

And Burke pointed out that Humble, whose department is charged with implementing the law, was not alarmed by the May 2 letter, or worried about how it would affect his staffers who are processing the permits for those who want to use marijuana as well as those who want to operate dispensaries or even cultivate the drug.

Humble continues to have his employees issue permits for marijuana users.

In a separate development Thursday, Maricopa County Attorney Bill Montgomery advised county supervisors to stop doing anything to implement the law until the conflict with federal laws is resolved. The county must approve zoning and use permits for marijuana facilities.

Amelia Cramer, the chief deputy Pima County attorney, said her office has not been asked for an opinion on the law and how it affects county workers.

APPENDIX 6

Medical marijuana buy ends in shooting

Posted: 06/03/2011

• By: Deborah Stocks

PHOENIX - Police have identified a man shot and killed while trying to rob a medical marijuana grower at gunpoint Thursday.

Phoenix police said in a Friday news release that 38-year-old Larry Miller died at a local hospital.



advertisement

Police said the 30-year-old shooter had been issued an Arizona Medical Marijuana Identification card allowing him to grow and possess marijuana. He apparently advertised medical marijuana for sale to people who could show him their own medical marijuana identification card.

Police said just before 4 p.m. Thursday Miller and another man met the 30-year-old grower at an apartment complex near 17th and Missouri avenues to make a purchase. When the grower, who was not identified, asked for their medical marijuana identification cards, Miller said his card was in his apartment and lured the seller to the back of the apartment complex, police said.

Miller then pulled out a weapon and tried to rob the grower of the marijuana. Police said a struggle took place and the marijuana grower grabbed his own gun and shot Miller.

When police arrived, they found the grower doing CPR on Miller.

Police said the man who was with Miller grabbed the grower's backpack, believed to contain marijuana, and fled the area.

The grower was questioned and released by police.

Police said no arrest was made but that the Maricopa County Attorney's Office will determine whether charges should be filed against the grower.

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