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9

10 UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

11 State of Arizona, et al.,  
12 Plaintiffs,  
13 vs.  
14 United States of America, et al.,  
15 Defendants.  
16

No. 2:11-cv-01072-SRB

**FEDERAL DEFENDANTS’ MOTION  
TO DISMISS AND MEMORANDUM  
OF LAW IN SUPPORT THEREOF**

17 Pursuant to Federal Rule of Civil Procedure 12(b)(1), the United States of  
18 America, the U.S. Department of Justice, Attorney General Eric H. Holder, and United  
19 States Attorney Dennis K. Burke (collectively the “Federal Defendants”) hereby move  
20 this Court to dismiss Plaintiffs’ complaint, for the reasons set forth below.

21 **INTRODUCTION**

22 The Supreme Court has recognized that “[t]he best teaching of this Court’s  
23 experience admonishes us not to entertain constitutional questions in advance of the  
24 strictest necessity.” *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (plurality opinion).  
25 “Federal judicial power is to be exercised to strike down legislation, whether state or  
26 federal, only at the instance of one who is himself immediately harmed, or immediately  
27 threatened with harm, by the challenged action.” *Id.* at 504.  
28

1 By asking this Court for a declaratory judgment as to whether a state law is  
2 consistent with, or preempted by, federal law, Plaintiffs' complaint flies in the face of  
3 that admonition and fails to satisfy the fundamental requirements of Article III of the  
4 Constitution. Their complaint presents no actual controversy, instead asking this Court  
5 for an advisory opinion as to a hypothetical dispute in which Plaintiffs themselves pick  
6 no side but rather resort to a purported disagreement among various fictional Defendants.  
7 Moreover, Plaintiffs lack standing to raise even that claim, because they have not alleged  
8 any actual injury to the interests of the State. The claim they present is not ripe for  
9 review, as they point to no genuine threat that any state employee will face imminent  
10 prosecution under federal law. And they ask this Court to consider whether a state law is  
11 unconstitutional – a question that the Supreme Court cautions should be answered only  
12 when necessary.

13 For these reasons, the Court lacks jurisdiction and this case should be dismissed.

## 14 BACKGROUND

### 15 I. The Controlled Substances Act

16 The federal drug laws, and the penalties associated with their violation, are  
17 contained in the Controlled Substances Act (CSA), as amended, codified at 21 U.S.C.  
18 § 801 *et seq.* Marijuana is designated as a Schedule I controlled substance, *see* 21 U.S.C.  
19 § 812(c), and, as such, Congress has found that it has a high potential for abuse and no  
20 accepted use, medical or otherwise, *see id.* § 812(b)(1). Therefore, its possession, use,  
21 cultivation, manufacture, sale, and distribution are illegal under federal law, with the  
22 singular exception of research studies approved by the FDA. *Gonzales v. Raich*, 545  
23 U.S. 1, 14 (2005).<sup>1</sup> *See id.* at 14 (recognizing that, through 21 U.S.C. §§ 841(a)(1) and

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24 <sup>1</sup> More recently, albeit in a different law, Congress found that “[a]ny attempt to authorize  
25 under State law an activity prohibited under . . . the Controlled Substances Act would  
26 conflict with that . . . Act,” and expressed its sense that “the several States, and the  
27 citizens of such States, should reject the legalization of drugs through legislation, ballot  
28 proposition, constitutional amendment, or any other means.” Omnibus Consolidated and  
Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Div. D, 112 Stat.  
2681, 2681-758 (1998).

1 844(a), Congress “devised a closed regulatory system making it unlawful to manufacture,  
2 distribute, dispense, or possess any controlled substance except in a manner authorized by  
3 the CSA”).<sup>2</sup>

## 4 **II. The Arizona Medical Marijuana Act**

5 In 2010, Arizona enacted Proposition 203, known as the Arizona Medical  
6 Marijuana Act (AMMA). Compl. ¶¶ 1-2. According to Plaintiffs, the AMMA  
7 “envisioned decriminalizing medical marijuana for use by people with certain chronic  
8 and debilitating medical conditions.” *Id.* ¶ 1. As a matter of Arizona state law, the  
9 AMMA provides that “a qualified patient, designated caregiver, or nonprofit medical  
10 marijuana dispensary agent with a registry card is allowed to acquire, possess, cultivate,  
11 manufacture, use, administer, deliver, transfer, and transport marijuana.” *Id.* ¶ 13.

## 12 **III. Executive Branch Guidance With Respect to Medical Marijuana**

13 Both before and after the enactment of the AMMA, the Department of Justice has  
14 issued guidance as to how the federal government will allocate its resources to enforce  
15 the CSA. Prior to the enactment of the AMMA, on October 19, 2009, then-Deputy  
16 Attorney General David Ogden issued a memorandum to certain United States Attorneys  
17 for use “solely as a guide to the exercise of investigative and prosecutorial discretion” for  
18 investigations and prosecutions in states authorizing the medical use of marijuana. *See*  
19 Ex. C to Compl. (“Ogden Memorandum”) at 2. The Ogden Memorandum recognized  
20 that “the Department of Justice is committed to the enforcement of the Controlled  
21 Substances Act in all States.” *Id.* at 1. In order to make “efficient and rational use of its  
22 limited investigative and prosecutorial resources,” the Department acknowledged the  
23 need to focus on the prosecution of significant traffickers of illegal drugs and the

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25 <sup>2</sup> The CSA also criminalizes, *inter alia*, knowingly opening, leasing, renting, maintaining,  
26 or using property for the manufacturing, storing, or distribution of controlled substances,  
27 including marijuana, *see* 21 U.S.C. § 856(a); using any communication facility to commit  
28 felony violations of the CSA, *see id.* § 843(b); and conspiring or attempting to commit  
any of the crimes set forth in the CSA, including manufacturing, distributing, or  
possessing marijuana, *see id.* § 846.

1 disruption of illegal drug manufacturing and trafficking networks. *Id.* The memorandum  
2 stated that, “[a]s a general matter, pursuit of these priorities should not focus federal  
3 resources . . . on individuals whose actions are in clear and unambiguous compliance  
4 with existing state laws providing for the medical use of marijuana.” *Id.* at 1-2.

5 However, the Ogden Memorandum recognized that “no State can authorize violations of  
6 federal law,” and made clear that “this memorandum does not alter in any way the  
7 Department’s authority to enforce federal law.” *Id.* at 2. The memorandum reserved the  
8 Department’s right to pursue investigations or prosecutions “even when there is clear and  
9 unambiguous compliance with existing state law, in particular circumstances where  
10 investigation or prosecution otherwise serves important federal interests.” *See id.* at 3.

11 On May 2, 2011, Dennis K. Burke, United States Attorney for the District of  
12 Arizona, directed a letter to Will Humble, Director of the Arizona Department of Health  
13 Services. *See* Ex. B to Compl. (“Burke Letter”). The letter provides guidance, consistent  
14 with the Ogden Memorandum, as to the Department of Justice’s view of the AMMA and  
15 its implementing regulatory scheme. Mr. Burke’s letter reiterated the Department’s view  
16 that “growing, distributing, and possessing marijuana in any capacity, other than as part  
17 of a federally authorized research program, is a violation of federal law regardless of state  
18 laws that purport to permit such activities.” *Id.* at 1. The letter acknowledged that,  
19 consistent with the Ogden Memorandum, the United States Attorney’s Office would “not  
20 focus [its] limited resources on those seriously ill individuals who use marijuana as part  
21 of a medically recommended treatment regimen and are in clear and unambiguous  
22 compliance with . . . state laws.” *Id.* Mr. Burke recognized, however, “that even clear  
23 and unambiguous compliance with AMMA does not render possession or distribution of  
24 marijuana lawful under federal statute.”<sup>3</sup>

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26 <sup>3</sup> Other United States Attorneys have sent similar letters, but each focuses on a different  
27 state regulatory regime and has no bearing on Arizona or its law. Moreover, on June 29,  
28 2011, Deputy Attorney General James M. Cole provided United States Attorneys new  
guidance regarding the Ogden Memorandum. While the Cole Memorandum postdates  
the complaint, it also indicates that “[t]he Department’s view of the efficient use of

(Continued...)

## LEGAL STANDARD

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2 “[I]n all actions before a federal court, the necessary and constitutional predicate  
3 for any decision is a determination that the court has jurisdiction – that is the power – to  
4 adjudicate the dispute.” *Toumajian v. Frailey*, 135 F.3d 648, 652 (9th Cir. 1998).

5 “Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause lies  
6 outside this limited jurisdiction, and the burden of establishing the contrary rests upon the  
7 party asserting jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,  
8 377 (1994) (internal citation omitted). Although Plaintiffs have brought this action  
9 against Attorney General Holder and United States Attorney Burke, in addition to the  
10 United States and the Department of Justice, “any lawsuit against . . . an officer of the  
11 United States in his or her official capacity is considered an action against the United  
12 States.” *Balser v. Dep’t of Justice*, 327 F.3d 903, 907 (9th Cir. 2003). This motion thus  
13 addresses Plaintiffs’ claims against all Federal Defendants.

## ARGUMENT

### I. THE COURT LACKS JURISDICTION BECAUSE PLAINTIFFS’ COMPLAINT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

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16 In their complaint, Plaintiffs ask this Court for a declaratory judgment as to  
17 whether the AMMA is consistent with, or preempted in whole or in part by, federal law –  
18 a question as to which Plaintiffs themselves take no position. Because this complaint  
19 raises no substantial federal question, and presents this Court with a request for an  
20 advisory opinion rather than an actual controversy, the Court lacks jurisdiction.

#### A. Plaintiffs’ Request for a Declaration of the Validity of State Law is Not Within the Original Jurisdiction of this Court

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23 Through 28 U.S.C. § 1331, Congress has given the district courts original  
24 jurisdiction over all civil actions “arising under the Constitution, laws, or treaties of the

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26 \_\_\_\_\_  
(...Continued)

27 limited federal resources as articulated in the Ogden Memorandum has not changed.”  
28 Ex. 1, Cole Memorandum at 1.

1 United States.”<sup>4</sup> “The presence or absence of federal-question jurisdiction is governed by  
2 the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction exists only  
3 when a federal question is presented on the face of the plaintiffs’ properly pleaded  
4 complaint.” *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 (9th  
5 Cir. 2000).

6 By seeking a declaratory judgment as to the validity of its own law, Plaintiffs’  
7 complaint does not present a federal question. The Supreme Court held as much in  
8 *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust*  
9 *of Southern California*, 463 U.S. 1 (1983), where the Court recognized that “[t]he  
10 situation presented by a State’s suit for a declaration of the validity of state law is . . . not  
11 within the original jurisdiction of the United States district courts.” *Id.* at 22. The court  
12 indicated that, despite the availability of the Declaratory Judgment Act, “the federal  
13 courts should not entertain suits by the States to declare the validity of their regulations  
14 despite possibly conflicting federal law.” *Id.* at 21. *See also* Charles Alan Wright et al.,  
15 *Federal Practice & Procedure* § 3566 (3d ed. 2011) (“[T]here is no federal jurisdiction of  
16 a suit by a state to declare the validity of its regulations despite possibly conflicting  
17 federal law”).

18 In recent years, the Ninth Circuit has continued to reject complaints such as  
19 Plaintiffs’. For example, in *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086 (9th  
20 Cir. 2002), the plaintiffs asked the court to determine whether the Guam legislature’s

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21 <sup>4</sup> Plaintiffs cannot show that jurisdiction exists under 28 U.S.C. § 1346, the only other  
22 statutory basis identified in their complaint. *See* Compl. ¶ 58. The only potentially  
23 relevant section of that provision is § 1346(a)(2), known as the Little Tucker Act, which  
24 confers jurisdiction over a “civil action or claim against the United States, not exceeding  
25 \$10,000 in amount, founded upon either the Constitution, or any Act of Congress, or any  
26 regulation of an executive department, or upon any express or implied contract with the  
27 United States, or for liquidated or unliquidated damages in cases not sounding in tort.”  
28 28 U.S.C. § 1346(a)(2). That provision “empowers district courts to award damages but  
not to grant injunctive or declaratory relief.” *Lee v. Thornton*, 420 U.S. 139, 140 (1975)  
(per curiam). *See also Santucci v. U.S. State Dep’t*, No. CV-04-2499-PHX-SRB, 2005  
WL 3113173, at \*4 (D. Ariz. Nov. 21, 2005) (recognizing that § 1346(a)(2) “provides  
jurisdiction over awards of damages but not equitable relief such as injunctive or  
declaratory relief or mandamus”). Plaintiffs seek only declaratory relief in this case.

1 enactment of an election reform statute was permissible under a federal statute, the  
2 Organic Act of Guam. The Ninth Circuit recognized that “[t]his type of declaratory  
3 action cannot support federal question jurisdiction,” and that “the district court lacks  
4 jurisdiction to adjudicate the plaintiffs’ claim that [the Guam law] does not conflict with  
5 the [federal statute].” *Id.* at 1089.

6 The Ninth Circuit reached a similar conclusion in *Opera Plaza Residential Parcel*  
7 *Homeowners Association v. Hoang*, 376 F.3d 831 (9th Cir. 2004), in which a private  
8 condominium association sought a declaratory judgment that its policy prohibiting  
9 satellite dishes was valid under federal law. *Id.* at 832-33. The Ninth Circuit, as the  
10 district court before it, recognized the lack of a federal question:

11 [Plaintiff’s] declaratory judgment claim seeks a determination that its  
12 satellite policy is valid under federal law. Federal law will thus enter the  
13 picture only as a possible basis to invalidate the policy – a claim that  
14 something is consistent, rather than inconsistent, with federal law raises the  
15 specter of a federal question only to rebut the possible defense that it  
conflicts with a federal statute. It will always be possible to claim that a  
policy is *consistent* with federal law, but such a claim is not sufficient to  
confer federal subject matter jurisdiction.

16 *Id.* at 838 (internal citation omitted).

17 Other courts have repeatedly rejected cases in which states sought to uphold or  
18 determine the validity of their own laws relative to federal law. *See, e.g., Missouri v.*  
19 *Cuffley*, 112 F.3d 1332, 1333 (8th Cir. 1997) (no jurisdiction over state agency’s claim  
20 that regulatory plan to deny application to participate in state program was  
21 constitutional); *City of Greenwood, Mo. v. Martin Marietta Materials, Inc.*, No. 07-157-  
22 CV-W-DW, 2007 WL 1859192, at \*1 (W.D. Mo. June 26, 2007) (no jurisdiction over  
23 city’s request for declaratory judgment that ordinance were valid and enforceable);  
24 *Carlisle Twp. Bd. of Trs. v. Hynolds LLC*, 303 F. Supp. 2d 873, 877 (N.D. Ohio 2004)  
25 (no jurisdiction over township’s request for declaration that zoning resolutions were  
26 constitutional); *Keith v. La. Dep’t of Educ.*, 553 F. Supp. 295, 298 (M.D. La. 1982) (no  
27 jurisdiction over declaratory judgment that Louisiana statute was constitutional).  
28

1                   **B. By Seeking an Advisory Opinion, Plaintiffs Do Not Present an Actual**  
2                   **Controversy For Adjudication Under the Declaratory Judgment Act**

3                   Even if jurisdiction were not foreclosed, as demonstrated above, Plaintiffs'  
4                   complaint presents no actual controversy sufficient to confer jurisdiction.

5                   Plaintiffs bring their claim under the Declaratory Judgment Act, which allows a  
6                   federal court to “declare the rights and other legal relations” of parties to a “case of actual  
7                   controversy.” 28 U.S.C. § 2201. “The Declaratory Judgment Act creates a federal  
8                   remedy, but is not itself a basis for federal jurisdiction.” *Nat’l Union Fire Ins. Co. of*  
9                   *Pittsburgh, PA v. ESI Ergonomic Solutions, LLC*, 342 F. Supp. 2d 853, 861 (D. Ariz.  
10                  2004). *See also Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538,  
11                  543 (9th Cir. 2011) (“[T]he operation of the Declaratory Judgment Act is procedural  
12                  only’ and does not confer arising under jurisdiction.”) (quoting *Skelly Oil Co. v. Phillips*  
13                  *Petroleum Co.*, 339 U.S. 667, 671 (1950)).

14                  A declaratory judgment action is proper only to the extent that, “absent the  
15                  availability of declaratory relief, the . . . case could nonetheless have been brought in  
16                  federal court.” *Stuart Weitzman, LLC v. Microcomputer Resources, Inc.*, 542 F.3d 859,  
17                  862 (11th Cir. 2008) (internal quotation omitted). But Plaintiffs could not maintain this  
18                  suit absent the availability of declaratory relief. With respect to the Federal Defendants,  
19                  the United States cannot be sued without its consent, and the Declaratory Judgment Act  
20                  does not waive sovereign immunity. *See, e.g., Progressive Consumers Fed. Credit Union*  
21                  *v. United States*, 79 F.3d 1228, 1230 (1st Cir. 1996); *Grondal v. United States*, 682 F.  
22                  Supp. 2d 1203, 1218 (E.D. Wash. 2010); *AMCO Ins. Co. v. W. Drug, Inc.*, 2008 WL  
23                  4368929, at \*1 (D. Ariz. Sept. 24, 2008); *see also* Wright et al., *Federal Practice &*  
24                  *Procedure* § 2766 (“If the court would lack jurisdiction of a coercive action against the  
25                  United States because of sovereign immunity, it is equally without jurisdiction of a  
26                  declaratory action against the United States.”). Plaintiffs’ claim against the Federal  
27                  Defendants must therefore be dismissed.

1 Moreover, to establish jurisdiction over a claim brought under the Declaratory  
2 Judgment Act, Plaintiffs must identify an actual, concrete controversy. “The ‘actual  
3 controversy’ requirement of the [Declaratory Judgment] Act is the same as the ‘case or  
4 controversy’ requirement of Article III of the United States Constitution.” *Societe de*  
5 *Conditionnement en Aluminium v. Hunter Eng’g Co.*, 655 F.2d 938, 942 (9th Cir. 1981);  
6 *see also Powell v. McCormack*, 395 U.S. 486, 517-18 (1969) (“The availability of  
7 declaratory relief depends on whether there is a live dispute between parties.”).

8 The Supreme Court’s cases “have required that the dispute be ‘definite and  
9 concrete, touching the legal relations of parties having adverse legal interests,’ and that it  
10 be ‘real and substantial’ and ‘admi[t] of specific relief through a decree of a conclusive  
11 character, as distinguished from an opinion advising what the law would be upon a  
12 hypothetical state of facts.’” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127  
13 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). The need  
14 for an actual controversy ensures that a court does not go beyond its proper role and issue  
15 an advisory opinion. “The oldest and most consistent thread in the federal law of  
16 justiciability is that federal courts will not give advisory opinions.” Wright et al., *Federal*  
17 *Practice & Procedure* § 3529.1. The courts do not “decide hypothetical issues or [] give  
18 advisory opinions about issues as to which there are not adverse parties.” *Princeton*  
19 *Univ. v. Schmid*, 455 U.S. 100, 102 (1982). Courts regularly find that no case or  
20 controversy exists when a party seeks a declaratory judgment to settle an issue of law that  
21 might be relevant in a future suit. *See, e.g., Calderon v. Ashmus*, 523 U.S. 740, 746-47  
22 (1998).

23 Here, Plaintiffs seek to determine the validity of state law, but Plaintiffs identify  
24 no controversy between the parties on that issue. That is most clear from the fact that  
25 Plaintiffs’ complaint never identifies which side of the supposed dispute Plaintiffs are on.  
26 Indeed, even their prayer for relief does not identify whether they believe the AMMA is  
27 preempted by federal law. Instead, Plaintiffs attempt to manufacture disputes among the  
28 other parties. They name as defendants various individuals and organizations whom

1 Plaintiffs contend support the implementation and enforcement of the AMMA, such as  
2 Defendant AZADP, with respect to whom Plaintiffs contend “AZADP’s standing and  
3 legal position in this action may be adverse to that of the government Defendants.”  
4 Compl. ¶ 44. Plaintiffs even create twenty fictitious defendants – ten who contend that  
5 the AMMA “does violate federal law” and ten who contend that it does not – and then  
6 rely on the purported disagreement “among Defendants.” *See id.* ¶¶ 167-69. But  
7 Plaintiffs cannot rely on a dispute that exists only among Defendants (even accepting that  
8 such a dispute or that such hypothetical defendants existed). Parties cannot have the  
9 “adverse legal interests” necessary to establish a live controversy, *see MedImmune, Inc.*,  
10 549 U.S. at 127, when one party (particularly the plaintiff) professes to take neither side  
11 of the dispute.

12 Moreover, as will be discussed further below, there is no actual controversy here  
13 because Plaintiffs can point to no threat of enforcement against the State’s employees.<sup>5</sup>  
14 In *Muskrat v. United States*, 219 U.S. 346 (1911), the Supreme Court “established the  
15 longstanding precedent that a federal court will not, before the law is applied, declare  
16 laws to be constitutional, because by doing so the court would issue advisory opinions.”  
17 *Int’l Soc’y for Krishna Consciousness v. City of Los Angeles*, 611 F. Supp. 315, 318-19  
18 (C.D. Cal. 1984). *See also Poe v. Ullman*, 367 U.S. 497, 508-09 (1961) (plurality  
19 opinion) (no case or controversy in suit seeking a declaratory judgment on the  
20 constitutionality of a law absent indications that the law would be enforced); *Nat’l Union*  
21 *Fire Ins. Co.*, 342 F. Supp. 2d at 862 (finding no actual controversy when plaintiff did not  
22 “allege that [the defendant] is considering or has threatened legal action against” the  
23 plaintiff). Because Plaintiffs can point to no threat of prosecution by Defendants, no  
24 controversy exists and their claim must be dismissed.

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25  
26 <sup>5</sup> The analysis of whether an actual controversy exists is similar to the separate analysis  
27 of whether Plaintiffs’ claim is ripe for review. *See, e.g., Cuffley*, 112 F.3d at 1337  
28 (finding that state’s suit for declaratory relief presented no federal question *and* was not  
ripe). Federal Defendants separately address below why Plaintiffs’ claim is not ripe.

1 By seeking a declaratory judgment as to a question to which they take no side and  
2 have no legal interest adverse to Defendants', Plaintiffs present no concrete dispute to  
3 this Court. This case thus runs counter to the Supreme Court's admonition that "[t]he  
4 declaratory judgment procedure . . . may not be made the medium for securing an  
5 advisory opinion in a controversy which has not arisen." *Coffman v. Breeze Corps.*, 323  
6 U.S. 316, 324 (1945). Plaintiffs' claim must be dismissed.

## 7 **II. PLAINTIFFS LACK STANDING**

8 Even if the Court determines that an actual controversy exists, Plaintiffs lack  
9 standing to raise their claim. As discussed above, Plaintiffs rely on manufactured  
10 disputes between various defendants, even referring to one defendant's "standing and  
11 legal position" relative to other defendants. *See* Compl. ¶ 44. But Plaintiffs cannot  
12 establish standing through such maneuvers. A party "generally must assert his own legal  
13 rights and interests, and cannot rest his claim to relief on the legal rights or interests of  
14 third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

15 Instead, to establish standing, Plaintiffs must identify that they themselves have  
16 "suffered an 'injury in fact' – an invasion of a legally protected interest which is (a)  
17 concrete and particularized, and (b) 'actual or imminent, not conjectural or  
18 hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting  
19 *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). And when the plaintiff is a state, such  
20 as Arizona, standing cannot be based on the state's desire "to protect her citizens from  
21 the operations of federal statutes." *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971 (9th  
22 Cir. 2009) (referencing *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (holding that  
23 Massachusetts lacked standing to enjoin a congressional appropriations act)). Instead,  
24 "the state's interest must be in some way distinguishable from that of its citizens." *Id.*

25 To the extent Plaintiffs attempt to base standing on the allegation that particular  
26 residents disagree with the effect of federal law, such *parens patriae* standing does not  
27 provide a basis for jurisdiction. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S.  
28 592, 607 (1982) (state's claim must be based on "an interest apart from the interests of

1 particular private parties”). The same is true for Plaintiffs’ unspecific suggestions about a  
2 supposed risk that Arizona citizens will lose revenue or property. *See* Compl. ¶ 89. As  
3 in *Legal Services Corp.*, Arizona’s “factual allegations do not rise to the level of a  
4 concrete, particularized, actual or imminent injury against the state itself, that is  
5 independent from alleged harm to private parties.” *Legal Services Corp.*, 552 F.3d at  
6 971-72.

7 At most, Plaintiffs’ complaint may allege the possibility of an injury to state  
8 employees who are responsible for the implementation of the AMMA. But Plaintiffs  
9 have no such injury because at no point in their complaint do Plaintiffs actually allege  
10 that the CSA preempts the AMMA.<sup>6</sup> *See id.* at 973 (finding lack of standing to raise  
11 claim that Oregon was injured by federal regulations because there is “no claim that  
12 Oregon’s laws have been invalidated as a result of the [federal] restrictions”). Because  
13 Plaintiffs’ resort to hypotheticals does not allege that federal law has had any effect on  
14 state law, they have alleged no actual injury, and they lack standing to bring their claim.

### 15 **III. PLAINTIFFS’ CLAIMED INJURY TO STATE EMPLOYEES IS NOT** 16 **RIPE FOR REVIEW**

17 Even assuming that Plaintiffs have standing to raise a claim concerning federal  
18 law’s effect on state employees, the Court still lacks jurisdiction because that claim will  
19 not be ripe for review until Plaintiffs are subjected to a genuine threat of prosecution.

20 Ripeness is designed to “prevent the courts, through avoidance of premature  
21 adjudication, from entangling themselves in abstract disagreements.” *Abbott Labs. v.*  
22 *Gardner*, 387 U.S. 136, 148 (1967). The ripeness inquiry is related to the requirement of  
23 an actual controversy, as the court’s “role is neither to issue advisory opinions nor to  
24 declare rights in hypothetical cases, but to adjudicate live cases or controversies  
25 consistent with the powers granted the judiciary in Article III of the Constitution.”

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26 <sup>6</sup> Even if Plaintiffs were to amend their complaint to allege that the Arizona state law is  
27 preempted in its entirety by federal law, that would not cure the other jurisdictional  
28 defects addressed elsewhere in this motion.

1 *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en  
2 banc). “[T]he ripeness inquiry contains both a constitutional and a prudential  
3 component.” *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993). See  
4 also *Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 808 (2003) (“The  
5 ripeness doctrine is ‘drawn both from Article III limitations on judicial power and from  
6 prudential reasons for refusing to exercise jurisdiction.’” (quoting *Reno v. Catholic Soc.  
7 Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993))). Here, Plaintiffs satisfy neither component.

8 **A. Plaintiffs’ Claim Is Not Ripe Because They Identify No Genuine Threat of  
9 Imminent Prosecution**

10 “The constitutional component of the ripeness inquiry is often treated under the  
11 rubric of standing and, in many cases, ripeness coincides squarely with standing’s injury  
12 in fact prong.” *Thomas*, 220 F.3d at 1138. “In assuring that this jurisdictional  
13 prerequisite is satisfied, we consider whether the plaintiffs face ‘a realistic danger of  
14 sustaining a direct injury as a result of the statute’s operation or enforcement,’ or whether  
15 the alleged injury is too ‘imaginary’ or ‘speculative’ to support jurisdiction.” *Id.* at 1139  
16 (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)).

17 Pre-enforcement challenges are generally unripe because courts “possess no  
18 factual record of an actual or imminent application of [the law] sufficient to present the  
19 constitutional issues in ‘clean-cut and concrete form.’” *Renne v. Geary*, 501 U.S. 312,  
20 321-22 (1991). Even when a party alleges injuries that are “real and concrete rather than  
21 speculative and hypothetical,” it must also show a “genuine threat of imminent  
22 prosecution” in order to bring a pre-enforcement challenge. *Stormans, Inc. v. Selecky*,  
23 586 F.3d 1109, 1122 (9th Cir. 2009). It is not enough to show “the mere existence of a  
24 proscriptive statute nor a generalized threat of prosecution.” *Thomas*, 220 F.3d at 1139.

25 To analyze the genuineness of a threat of prosecution, courts consider three  
26 factors: “whether the plaintiffs have articulated a ‘concrete plan’ to violate the law in  
27 question, whether the prosecuting authorities have communicated a specific warning or  
28 threat to initiate proceedings, and the history of past prosecution or enforcement under

1 the challenged statute.” *Thomas*, 220 F.3d at 1139. Plaintiffs’ allegations fail to satisfy  
2 each factor.

3 First, Plaintiffs’ complaint appears to contemplate state employees implementing  
4 the AMMA, but they do not detail any concrete plan to act in violation of the CSA. (If  
5 anything, the State has made plans to avoid such conduct: it determined not to accept  
6 applications from prospective dispensaries in June as contemplated by the AMMA’s  
7 regulatory rules.<sup>7</sup>) The Ninth Circuit requires more than Plaintiffs have offered to satisfy  
8 ripeness: “[a] general intent to violate a statute at some unknown date in the future does  
9 not rise to the level of an articulated, concrete plan.” *Thomas*, 220 F.3d at 1139.

10 Second, as in *Thomas*, “the record is devoid of any threat – generalized or specific  
11 – directed toward” Plaintiffs. *Id.* at 1140. “Significantly, the mere possibility of criminal  
12 sanctions applying does not of itself create a case or controversy.” *San Diego Cnty. Gun*  
13 *Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (internal quotation omitted).  
14 Here, Plaintiffs point to a letter from United States Attorney Burke that emphasizes that  
15 the Department of Justice “will continue to vigorously prosecute individuals and  
16 organizations that participate in unlawful manufacturing, distribution and marketing  
17 activity involving marijuana.” *See* Burke Letter at 1. The letter also explains that “the  
18 CSA may be vigorously enforced against those individuals and entities who operate large  
19 marijuana production facilities,” as well as those “[i]ndividuals and organizations –  
20 including property owners, landlords and financiers – that knowingly facilitate the actions  
21 of traffickers.” *Id.* at 1-2. But nothing in the letter refers to state employees. Plaintiffs  
22 thus resort to citations and discussion of various letters sent by other United States

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23  
24 <sup>7</sup> The rules adopted by the State provided that the Department of Health Services “shall  
25 accept dispensary registration certificate applications for 30 calendar days beginning June  
26 1, 2011.” *See* 17 Ariz. Admin. Reg. 732, 759 (May 6, 2011), § R9-17-303(D), available  
27 at [http://www.azsos.gov/public\\_services/Register/2011/18/exempt.pdf](http://www.azsos.gov/public_services/Register/2011/18/exempt.pdf). The State has  
28 determined not to do so, indicating on the Department’s website that “the Department  
suspended the dispensary and dispensary agent portions [of the program] on May 27,  
2011,” and that the State “won’t accept dispensary applications in June.” *See*  
<http://www.azdhs.gov/medicalmarijuana> (accessed on July 28, 2011).

1 Attorneys around the country, each of which addresses a state regulatory regime distinct  
2 from Arizona's, and none of which genuinely threatens imminent prosecution anyway.  
3 What Mr. Burke's letter and the other cited guidance make clear is that the Department of  
4 Justice retains discretion to determine how to allocate its prosecutorial resources, and it is  
5 mere speculation for Plaintiffs to suggest that Arizona state employees could be subject  
6 to federal prosecution. *See, e.g., Stormans, Inc.*, 586 F.3d at 1125 (“[B]ecause no  
7 enforcement action against plaintiffs is concrete or imminent or even threatened,  
8 Appellee's claims against HRC are not ripe for review”).

9 Third, Plaintiffs identify no prior instances in which the federal government has  
10 sought to prosecute state employees for the conduct vaguely described in Plaintiffs'  
11 complaint. Without evidence of such prior prosecutions, Plaintiffs cannot credibly show  
12 a genuine threat of imminent prosecution in this case. *See, e.g., id.* (finding lack of  
13 ripeness because “HRC has never initiated an action against any pharmacist refusing to  
14 provide Plan B”); *Thomas*, 220 F.3d at 1140 (finding lack of ripeness because, “[i]n the  
15 twenty-five years that these housing laws have been on the books, the record does not  
16 indicate even a single criminal prosecution, and of the two reported instances of civil  
17 enforcement, only one raised the freedom of religion issue presented here”).

18 Plaintiffs thus cannot identify a genuine threat of imminent prosecution under the  
19 law. “[A]ny threat of enforcement or prosecution against [state employees] in this case –  
20 though theoretically possible – is not reasonable or imminent.” *Thomas*, 220 F.3d at  
21 1141. Accordingly, Plaintiffs do not face a realistic danger of imminent injury, and their  
22 claim is thus not ripe for review.

### 23 **B. Plaintiffs Cannot Satisfy the Prudential Component of Ripeness**

24 Even if the Court determines that Plaintiffs have satisfied the constitutional  
25 component of ripeness, the prudential component still warrants dismissal for lack of  
26 jurisdiction. Prudential standing looks to “the fitness of the issues for judicial decision  
27 and the hardship to the parties of withholding court consideration,” *Abbott Labs.*, 387  
28 U.S. at 149, both of which demonstrate that Plaintiffs' claim is not ripe.

## 1. Plaintiffs' Claim is Not Fit for Review

1 First, the issues presented in Plaintiffs' complaint are not fit for judicial decision at  
2 this time. "A claim is fit for decision if the issues raised are primarily legal, do not  
3 require further factual development, and the challenged action is final." *Standard Alaska*  
4 *Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). A party bringing a pre-  
5 enforcement challenge must "present a 'concrete factual situation . . . to delineate the  
6 boundaries of what conduct the government may or may not regulate without running  
7 afoul' of the Constitution." *Alaska Right to Life Political Action Comm. v. Feldman*, 504  
8 F.3d 840, 849 (9th Cir. 2007) (quoting *San Diego County Gun Rights Comm.*, 98 F.3d at  
9 1132). "[T]o resolve an issue lacking factual development simply to avoid a threatened  
10 harm would be to favor expedition over just resolution." *Neb. Pub. Power Dist. v.*  
11 *MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000).

12 As discussed above, Plaintiffs' presentation is "devoid of any specific factual  
13 context." *Thomas*, 220 F.3d at 1141; *see also id.* ("The record before us is remarkably  
14 thin and sketchy, consisting only of a few conclusory affidavits."). Plaintiffs ask this  
15 Court for a declaratory judgment as to "whether the AMMA complies with federal law"  
16 or whether it "is preempted by the CSA and therefore void." Compl. ¶ 165. But  
17 Plaintiffs are not challenging any specific application of the CSA or its regulations.  
18 Plaintiffs do not cite to any particular actions taken in violation of the CSA, any  
19 particular governmental action taken to enforce the CSA, or even any threat of imminent  
20 prosecution by federal law enforcement agencies.

## 2. Withholding Review at This Time Would Not Harm Plaintiffs

22 Furthermore, to satisfy the requirement of hardship, Plaintiffs must show "that  
23 withholding review would result in direct and immediate hardship." *US West Commc'ns*  
24 *v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999). The question of hardship  
25 "dovetails, in part, with the constitutional consideration of injury. Although the  
26 constitutional and prudential considerations are distinct, the absence of any real or  
27 imminent threat of enforcement, particularly criminal enforcement, seriously undermines  
28

1 any claim of hardship.” *Thomas*, 220 F.3d at 1142. In fact, the Ninth Circuit has  
2 recognized that forcing a defendant to defend certain laws “in a vacuum” imposes a  
3 hardship on the defendant. *Id.*

4 As discussed above, Plaintiffs point to no individual who has been charged with  
5 violating the CSA, or even threatened with prosecution. And the State can identify no  
6 real hardship in deferring resolution of the issues raised in the complaint to a time when a  
7 concrete factual scenario has been developed. The Court should decline jurisdiction over  
8 this hypothetical dispute.

### 9 CONCLUSION

10 For the reasons stated herein, the Court should grant Federal Defendants’ motion  
11 and dismiss Plaintiffs’ complaint.

12 Dated: August 1, 2011.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

1  
2 I hereby certify that on August 1, 2011, I electronically transmitted the attached  
3 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
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