ARIZONA SUPREME COURT

STATE OF ARIZONA, Petitioner, v. ANDRE LEE J. MAESTAS, Respondent.	CR–[ASC Number] Court of Appeals No. 1 CA–CR 15–0724 Maricopa County Superior Court No. CR–2014–127252–001

THE STATE OF ARIZONA'S

PETITION FOR REVIEW

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I. ISSUE PRESENTED FOR REVIEW.

Did the court of appeals err in holding that A.R.S. § 15–108(A), which adds public colleges and universities to the list of places, where possession or use of marijuana remains unlawful for registered cardholders under the Arizona Medical Marijuana Act ("AMMA"), did not "further the purposes" of the AMMA, as required under the Arizona Constitution?

II. FACTS MATERIAL TO THE ISSUE PRESENTED.

On March 18, 2014, at around 12:30 a.m., an Arizona State University police officer patrolling the intersection at Lemon Street and Forest Avenue in Tempe found Appellant, Andre Lee Juwaun Maestas, seated in the middle of the road. (R.T. 8/28/15, at 8–9, 13.) The officer used his vehicle to block an oncoming car heading toward Appellant. (*Id*. at 14–17.) Appellant was "dazed" and "somewhat slow in answering questions" from the officer. (*Id*. at 17.) Asked where he lived, Appellant initially was not specific, saying "kind of over there." (*Id*.) Appellant "wasn't able to provide any reasoning behind why he was in the road way," telling the officer in a recorded exchange that he was there because he was thinking. (*Id*. at 17, 19; Ex. 2.)

At trial, Appellant explained that he had stepped outside to take a break from watching Game of Thrones. (*Id*. at 71-73.) Appellant had then decided to walk across the street to ASU's Gammage auditorium, whose vending machines "have better food," specifically "small cheese puff things" that are "similar to Cheetos." (*Id*.) He said he had begun crossing the street, but then changed his mind. (*Id*. at

75–76.) It was at that point that he had sat down in the roadway. (*Id*.) He explained that "[he] didn't really have a reason" for doing so. (*Id*. at 76.)

The officer arrested Appellant for "obstructing a public thoroughfare," and took him to the police station. (*Id*. at 20–21.) There, he searched Appellant's wallet, which contained a valid AMMA card. (*Id*. at 21, 40, 82.) The officer asked Appellant "whether or not [he] knew . . . the last time [he] smoked [marijuana]," and Appellant told him he had "short term memory loss," which he testified was a "possible side effect of certain kinds of marijuana." (*Id*. at 90–91.) At trial, however, Appellant denied having used marijuana that night. (*Id*.)

The officer asked Appellant if he had marijuana in his room; Appellant admitted he did. (*Id*. at 23, 91–92.) The officer obtained a warrant, and searched the room, where he found "various drug paraphernalia, baggies, pipes," and two envelopes containing what was determined to be loose marijuana in a cabinet under Appellant's bed. (*Id*. at 24–27, 51.) One of the envelopes was in a box of Rice Krispie treats that had been purchased at a marijuana dispensary. (*Id*. at 40.) Appellant admitted at trial the marijuana was his. (*Id*. at 93.)

The State of Arizona charged Appellant with two counts: obstructing a highway or other public thoroughfare, a class 3 misdemeanor (Count 1); and possession or use of marijuana, a class 6 felony (Count 2). (R.O.A., Item 15.) Prior to trial, Appellant filed a motion to dismiss Count 2, arguing that because he was a

registered patient pursuant to the AMMA, he was immune from prosecution for possessing marijuana. (R.O.A., Item 19, at 5.) Appellant asserted that the protections of the AMMA applied "anywhere in the State of Arizona" except for the following areas enumerated in the statute: (1) on a school bus; (2) on the grounds of any preschool or primary or secondary school; (3) in any correctional facility. (*Id*.)

Appellant acknowledged that A.R.S. § 15–108(A), an amendment to the AMMA, made it unlawful for cardholders to possess or use marijuana on public university campus, but he maintained that this statute violated the Arizona Voter Protection Act ("VPA"), a provision of the Arizona Constitution that limits the Legislature's power to amend an initiative or referendum such as the AMMA, "unless the amending legislation furthers the purposes of such measure." (*Id*. at 5–6, citing Ariz. Const. art. 4, pt. 1, § 6(C).) Appellant argued that the aim of the AMMA was to protect registered patients from arrest, prosecution and penalty for the possession and use of medical marijuana, and that § 15–108(A) did not further that purpose because it exposed cardholders to prosecution. (*Id*. at 8.) The trial court denied the motion to dismiss, and Appellant's requests for special action review were denied. (R.O.A., Items 33, 34, 37, 39, 40, 44, 46.)

Appellant had a two-day bench trial. (R.O.A., Items 58, 59; R.T. 8/28/15, at 4; R.T. 9/4/15, at 3.) The court convicted Appellant on both counts, and placed

Appellant on unsupervised probation for one year. (R.O.A. Items 59, 60; R.T. 9/4/15, at 21; R.T 10/13/15, at 7.)

On appeal, Appellant claimed his marijuana conviction should be overturned because A.R.S. § 15–108(A), which removed the protections of the AMMA on public university campuses, did not further the purposes of the AMMA and was thus an unconstitutional amendment that violated the VPA. The State filed an answering brief, arguing that the Legislature had the authority to pass § 15–108(A), and that the statute furthered the purposes of the AMMA, which authorizes schools to criminalize the possession of marijuana on college campuses by AMMA cardholders to protect federal funding, and eliminates protections for cardholders in elementary and high schools. In an opinion, the Arizona Court of Appeals held that § 15–108(A) was unconstitutional because its re-criminalization of marijuana possession by cardholders in a place otherwise protected under the AMMA did not further the purposes of the statute, and thus violated the VPA. *State v. Maestas*, No. 1 CA–CR 15–0724 (Ariz. App. April 6, 2017).

III. REASONS THIS COURT SHOULD GRANT REVIEW.

This Court should grant review because the court of appeals erred in holding § 15–108(A) was unconstitutional, and the decision will impact future cases involving the application of the VPA. The amendment, which makes it unlawful for registered cardholders to possess or use marijuana on public college campuses,

furthers the purposes of the AMMA. Federal funding for universities is conditioned on compliance with federal law, which continues to outlaw marijuana use and possession. This is acknowledged by a provision in the AMMA specifically allowing universities to restrict and penalize cardholders to protect federal funding. Another subsection provides that cardholders are not protected from prosecution in primary and secondary schools, demonstrating that lifting the protections of the AMMA is an acceptable means of restricting cardholders. The court of appeals' singular focus on the AMMA's general aim of legalizing medical marijuana for registered patients ignores other purposes of the statute served by § 15–108(A), and the presumption that the amendment is constitutional. The court's narrow reading of "purposes" in the VPA is improper given the Legislature's constitutional authority to pass amendments that can be harmonized with the voter initiative.

A. *The AMMA authorizes universities to restrict and penalize cardholders to protect federal funding, and the necessity of such measures in public universities is a political question delegated to the Legislature.*

In 2010, Arizona voters passed the AMMA, setting out the conditions under which marijuana can be legally possessed and used for medical purposes. *See* A.R.S. §§ 36–2801 through 36–2810. The statute provides a defense to prosecution for registered cardholders possessing and using marijuana in compliance with the parameters set out in the statute. A.R.S. § 36–2811(B)(1); A.R.S. § 36–2801(9). There remain places, however, where the protections do not apply. Section 36–

3802(B), for example, provides in part that the AMMA "does not prevent the imposition of any . . . criminal . . . penalties for . . . [p]ossessing or engaging in the medical use of marijuana "[o]n a school bus," or "[o]n the grounds of any preschool or primary or secondary school." In 2013, the Arizona Legislature passed an amendment to the AMMA, adding public colleges and universities to the list of places in § 36–3802(B) where cardholders may not lawfully possess or use marijuana. A.R.S. § 15–108(A).

Significantly, the possession and use of marijuana remains unlawful under the Controlled Substances Act. 21 U.S.C. §§ 841(a)(1) 844(a); *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001); *Gonzales v. Raich*, 545 U.S. 1 (2005). Under the Safe and Drug-Free Schools and Communities Act, "no institution of higher education shall be eligible to receive funds or any other form of financial assistance under any Federal program, [unless] . . . the institution has adopted and has implemented a program to prevent the use of illicit drugs . . . by students and employees. . ." 20 U.S.C.A. § 1011i(a) (2008). The statute requires schools to certify to the Secretary of Education that they have distributed to students "standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use or distribution of illicit drugs . . . on the institution's property." 20 U.S.C. § 1011i(a)(1)(A). Schools must also notify students "that the institution will impose sanctions on students . . . (consistent with local, State, and Federal law), and a

description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct." 20 U.S.C. § 1011i(a)(1)(E). Failure to implement a program or consistently enforce sanctions can lead to "the termination of any form of Federal financial assistance." 20 U.S.C. § 1011i(C)(1)(B).

When states accept federal funding to which Congress has attached conditions, state laws that are contrary to those conditions are preempted under the Supremacy Clause. *O'Brien v. Massachusetts Bay Transportation Authority*, 162 F.3d 40, 43 (1st Cir. 1998); *see generally Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 269 (1985); *see also United States v. McIntosh*, 833 F.3d 1163, 1179, n.5 (9th Cir. 2016) ("while the [Controlled Substances Act] remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana," because "[s]uch activity remains prohibited by federal law."). The AMMA contains express language authorizing universities to restrict and penalize cardholders to protect federal funding. Section 36–2813(A) provides that "[n]o school . . . may refuse to enroll . . . and may not otherwise penalize a person solely for his status as a cardholder, *unless failing to do so would cause the school . . . to lose a monetary or licensing related benefit under*

federal law or regulations." A.R.S. § 36–2813(A) (emphasis added).[1] The Legislature, along with the Board of Regents, has jurisdiction over public universities in Arizona. *See generally, Kromko v. Arizona Bd. of Regents*, 216 Ariz. 190, 194, ¶¶ 2–3 (2007).

Legislative history confirms that concerns over federal funding motivated the passage of § 15–108(A). The sponsor of the bill that became § 15–108(A) in the Arizona House of Representatives proposed it "in order to be in compliance with federal law." *Hearing on H.B. 2349 before the H. Comm. On Higher Educ. Innovation and Reform 50 Leg. 2nd Sess. 3* (Ariz. February 6, 2012, at 3.) Citing the Safe and Drug-Free Schools and Communities Act, the representative explained that federal funds public universities receive "may be at risk if the use of marijuana is allowed on campuses," and that the bill was intended "to protect federal funding and students." *Hearing on H.B. 2349 Before the H. Comm. On Educ. 50th Leg. 2nd Sess. 6* (February 6, 2012).

Indeed, the legalization of marijuana for cardholders conflicts with the Safe and Drug-Free Schools and Communities Act's requirement that schools prohibit and punish the "unlawful" possession and use of what are presumed to be "illicit

[1] Section 36–2813(A) is primarily aimed at universities and colleges because, under the AMMA, a person generally has to be 18 to be a registered cardholder, and § 36–3802(B) already makes the use or possession of marijuana unlawful in primary and secondary schools.

drugs" on campus. 20 U.S.C. § 1011i(a)(1)(A). Even if there were no direct conflict, whether Arizona's legalization of medical marijuana on public college campuses places federal funds at risk is a political question this Court is ill-equipped to second guess. *See, e.g.*, *Fogliano v. Brain ex. rel. County of Maricopa*, 229 Ariz. 12, 17, ¶ 9 (2011); *Kromko*, 216 Ariz. at 193, ¶12 (2007) (holding that whether tuition at public universities was "as nearly free as possible" under Arizona Constitution was a political question to be left to the Board of Regents).

The court of appeals concluded that the constitutionality of § 15–108(A) was not a political question, citing the fact that the Legislature could ban medical marijuana from public universities without recriminalizing possession and use for cardholders. *Maestas*, at ¶ 10. That the AMMA permits the Legislature to ban marijuana from public college campuses, however, does not mean that Arizona's legalization of medical marijuana—which allows students like Appellant to lawfully possess marijuana on campus—did not jeopardize federal funds conditioned on the prohibition of "unlawful possession." Nor does it somehow *limit* the Legislature's authority to criminalize possession by cardholders on public university campuses to protect federal funding. The court dismissed the language in § 36–2813(A) authorizing penalties for cardholders to protect federal funds as "an affirmative defense to a discrimination claim" that did not authorize the criminalization of marijuana possession on school campuses. *Maestas*, at ¶ 14. The court based this

interpretation on the "plain language" of § 36–2813(A), but the provision says nothing about an affirmative defense. Rather, section 36–2813(A) demonstrates that in passing the AMMA, voters anticipated the possibility of restrictions on and penalties for cardholders in order to protect federal funds, and the Legislature passed § 15–108(A) to accomplish this end.

B. *Section 15–108(A) furthers the purposes of the AMMA, given the AMMA's provisions authorizing penalties on cardholders to protect federal funding and maintaining criminal penalties for cardholders in schools*.

Even if § 36–2813(A) of the AMMA did not explicitly authorize the Legislature to remove its protections for cardholders on public university campuses to protect federal funding, § 15–108(A) does not violate the VPA. The VPA provides that that the Legislature may only amend a referendum measure if "the amending legislation furthers the purposes of such measure." Ariz. Const. art. 4 pt. 1, § (6)(C) & (14). The court of appeals held § 15–108(A) violated the VPA because it exposes registered patients to prosecution for the possession of medical marijuana, when the purpose of the AMMA was to legalize such possession. *Maestas*, at ¶ 6. The court's singular view of the AMMA's purpose is incorrect.

As an initial matter, the VPA refers explicitly to the plural "purposes" of voter initiatives that legislative amendments can further, indicating the inquiry involves more than simply identifying a broad objective and determining whether the new statute advances it. *See Cave Creek Unified School Dist. v. Ducey*,

233 Ariz. 1, 6–7, ¶ 21 (2013) (noting the court interprets a constitutional amendment such as the VPA "fairly interpreting the language used," and "giving words their natural obvious and ordinary meaning"). While the AMMA does generally aim to legalize medical marijuana, it contains 27 different subsections, setting out a regulatory framework that specifically outlines how that objective will and will not be accomplished. Many of these provisions, in fact, explicitly *limit* the protections of "patients from arrest and prosecution . . . [for] engag[ing] in the medical use of marijuana." *See* A.R.S. § 36–3802(B) (making possession or use of marijuana unlawful in correctional facilities, primary and secondary schools); § 36–2802(C) (making it unlawful to smoke marijuana on any form of public transportation or any public space); § 32–2802(D) (criminalizing driving under the influence of marijuana with sufficient metabolites to cause impairment); *see also* § 36–2802(A) (allowing criminal and other penalties for "undertaking any task under the influence of marijuana that would constitute negligence or professional malpractice"). Thus, in passing the AMMA, the voters did not intend for registered patients to be able to possess and use marijuana in every place, at any time, and under every circumstance and still avoid prosecution.

By focusing exclusively on the general purpose set out in Proposition 203, the court also failed to apply the presumption that § 15–108(A) is constitutional if it can be harmonized with the AMMA. *Cf. Cave Creek*, 233 Ariz. at 5, 7–8, ¶¶ 11, 15

(concluding that because new statute and voter initiative "cannot be harmonized" VPA limitations on legislative changes to voter-approved laws were violated). When determining whether two statutes can be harmonized, the first duty of the Court is to "adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333 ¶ 28 (2001); *see also Cave Creek*, 233 Ariz. at 7, ¶ 25 (citing *UNUM* in determining whether a legislative act violated VPA).

The court of appeals concluded that the absence of public colleges or universities from the list of places in § 36–3802(B) where cardholders could still be prosecuted for possession, meant the State could not add them to the list, noting that "[g]enerally when the [L]egislature expresses a list, we assume the exclusion of the items not listed." *Maestas*, at ¶ 12. The Legislature, however, retains constitutional authority to amend laws passed by the voters, so long as the amendments further the purposes of the voter measure. *See* Ariz. Const. art. 4, pt. 1, § 1(1); Ariz. Const. art. 4 pt. 1, § (6)(C). Any amendment of a voter initiative by the Legislature will necessarily accomplish something the original law does not—otherwise the amendment would be redundant and unnecessary. While the rule regarding the exclusivity of a legislative list could be applied to determine whether the AMMA itself criminalizes marijuana on college campuses, it does not answer whether the addition of public universities to the list in § 36–3802(B) can be read to "further[]

the purposes" of the AMMA. *See, e.g., Arizona Citizens Clean Elections Comn'n v. Brain*, 234 Ariz. 322, 328, ¶ 27 (2014) (declining to apply statutory cannon "because the canon does not help ascertain the voters' intent and in light of the evidence the voters intended" a different result than suggested by the canon); *see also State v. Cornish*, 192 Ariz. 533, 537 (App. 1998) ("Courts should avoid hypertechnical constructions that frustrate legislative intent.").

If the AMMA had explicitly required that medical marijuana be allowed on college campuses, or even stated the list in § 36–3802(B) could not be amended, it would be difficult to harmonize § 15–108(A) with the AMMA. The AMMA, however, does not say this, and Appellant cannot overcome the presumption § 15–108(A) is constitutional by assuming the list immune from addition. *See, e.g., Ariz. Citizens,* 234 Ariz. at 328, ¶ 24 (language in voter initiative stating inflationary adjustment applied to contribution limits did not mean the limits were a fixed sum that could not be amended under the VPA because the initiative "neither states that inflationary adjustments are the only changes that may be made to contribution limits or forecloses calculations of new limits if the legislature amends [the inflation statute]"); *see also Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 272 (1994) ("[W]e are reluctant to interpret a statute in favor of . . . preemption . . . if there is any reasonable doubt about the legislature's intent.").

Here, the Legislature's amendment can be harmonized with the AMMA. As noted, § 36–2813 authorizes restrictions on cardholders on public colleges and universities to protect federal funding. The Legislature added public universities and colleges to the list of places in § 36–3802(B) where the protections of the AMMA do not apply—a list that already included primary and secondary schools—to protect federal funding. Section 36–3802(B) demonstrates that lifting the protections of the AMMA was an acceptable way to restrict or penalize cardholders under the statute.

Given the various restrictions on cardholders in and authorized by the AMMA, adding public colleges and universities to the list on § 36–3802(B) does not somehow deprive the voter initiative of "force and meaning," *UNUM*, 200 Ariz. at 333 ¶ 28, but rather gives effect to the provision permitting restrictions by public universities and colleges to protect federal funds. Thus, in passing § 15–108(A), the Legislature acted well within the authority it retains under the VPA to amend the AMMA in ways that further its purposes. Appellant did not meet his burden of establishing that § 15–108(A) is unconstitutional, and this Court should reverse the court of appeals and uphold the statute.

IV. CONCLUSION.

For all the foregoing reasons, this Court should grant review.

RESPECTFULLY SUBMITTED this 8th day of June, 2017.

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