THE SUPREME COURT OF ARIZONA

State of Arizona, Plaintiff - Appellant,	)	Arizona Supreme Court No. CV-13-0040-PR
v.	)	Arizona Court of Appeals Division I No. 1 CA-CV 12-0094
Valerie Ann Okun, Defendant - Appellee.	)	Yuma County Superior Court No. S1400CR2011-00539

AMICUS CURIAE BRIEF OF THE YAVAPAI COUNTY ATTORNEY IN SUPPORT OF THE APPELLANT'S PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTEREST OF THE YAVAPAI COUNTY ATTORNEY 1

II. ARGUMENT 2

A. Appellate Review of Constitutional Issues 2

B. The Federal Scheme 3

1. Overview 3

2. Marijuana's Place in Federal Law 6

C. The AMMA 7

D. Preemption 9

1. Preemption Law 9

2. The AMMA Is Preempted 10

III. CONCLUSION 13

12

21 U.S.C. § 393 4
21 U.S.C. § 393(b) 11
21 U.S.C. § 801 et seq. 1, 3
21 U.S.C. § 811(a) 5
21 U.S.C. § 812 ..... 4, 5 , 11
21 U.S.C. § 812 (b)(1) 4
21 U.S.C. § 823 ..... 5, 11
21 U.S.C. § 829 ..... 5, 11
21 U.S.C. §§ 811–812 ..... 4, 5, 12
21 U.S.C.A. § 903 10
A.R.S. § 36-2801 ..... 7, 8
A.R.S. § 36-2801 et seq. 1
A.R.S. § 36-2801(1) 9
A.R.S. § 36-2801(9) 7
A.R.S. § 36-2801(13) 7
A.R.S. § 36-2801(18) 8, 11
A.R.S. § 36-2804 8
A.R.S. § 36-2804.01 8
A.R.S. § 36-2804.02 ..... 7, 8
A.R.S. § 36-2806 ..... 9, 11
A.R.S. § 36-2806(D) 9
A.R.S. § 36-2810 ..... 8, 11
A.R.S. § 36-2811 8
A.R.S. § 36-2811(A) 7

Other Authorities

Drug Enforcement Administration, Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 76 Fed. Reg. 40552 (July 8, 2011) 7

I. INTEREST OF THE YAVAPAI COUNTY ATTORNEY

Amicus curiae is the Yavapai County Attorney ("YCA") who files this brief in support of the State of Arizona's Petition for Review dated February 7, 2013. YCA is a state constitutional officer charged with enforcing criminal laws in Yavapai County and providing legal services to county officers. YCA's interest in this case is to protect public health and safety by ensuring the primacy and effectiveness of this nation's comprehensive regulatory system for medicine delivery, which is designed to ensure consumer safety and minimize illicit drug trafficking and substance abuse.

YCA seeks resolution of the constitutional conflict between the Arizona Medical Marijuana Act ("AMMA"), A.R.S. § 36-2801 et seq., and the federal statutes regulating drug distribution, specifically the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et seq., and the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 et seq. YCA has read the relevant briefs and offers an important analysis of the issue beyond the parties' analysis of the preemption issue. Most of the analysis to this point in this case and others has focused strictly on whether the prohibition of marijuana as a Schedule I drug under the CSA preempts the AMMA. The following Brief explains YCA's position that the AMMA's scheme of marijuana cultivation, delivery and use as a medical drug is in direct conflict with the broader federal scheme of statutes, regulations and policies relating to the

production, delivery, and use of medications.

II. ARGUMENT

A. Appellate Review of Constitutional Issues

In the Court of Appeals, the State argued that "the superior court erred by ordering the return of Ms. Okun's marijuana because her possession of it would constitute a federal crime," so the AMMA is preempted. *State v. Okun*, ___ P.3d ___, 651 Ariz. Adv. Rep. 4, ¶ 15 (App. 2013). The Court of Appeals declined to address the preemption issue. *Id.* ¶ 16. Accordingly, the question of preemption of the AMMA was raised before the Court of Appeals and is before this Court.

YCA's argument approaches preemption somewhat differently than the parties. Even though that specific approach has not been fully presented in the courts below, this Court has discretion to consider the constitutional validity of statutes, particularly when the issue is of statewide importance. *E.g. Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987). There is also sufficient time for the parties to fully brief the issue if review is granted. *See Jimenez v. Sears, Roebuck and Co.*, 183 Ariz. 399, 406, 904 P.2d 861, 868 (1995) (considering constitutional issue that was not raised previously but which had been briefed).

Further, the constitutionality of the AMMA is of profound statewide importance, has been presented but not squarely decided in other cases, and does

not turn on any set of facts. *See Id.* at 406 n.9, 904 P.2d at 868 n.9 (reasoning that review of constitutional issue that was not previously presented was appropriate because "[t]he issues raised by the constitutional argument are fundamental, affect an entire body of legislation, and [had] been advanced in other cases but not squarely decided"); *Larsen v. Nissan Motor Corp. in U.S.A.*, 194 Ariz. 142, 147, ¶ 12, 978 P.2d 119, 124 (App. 1998) ("A constitutional issue may be raised and addressed for the first time on appeal, particularly when, as here, the issue is of statewide importance, is raised in the context of a fully developed record, does not turn on resolution of disputed facts, and has been fully briefed by the parties.") (citations omitted). Accordingly, YCA respectfully requests that this Court consider the AMMA's constitutionality in light of the entire federal scheme for medicine delivery as presented throughout this Brief.

B. The Federal Scheme

1. Overview

Fundamentally, Congress regulates the safety of food and drugs in the United States. In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act ("CDAPCA"). CDAPCA includes the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 et seq., and the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq.

"The FDCA's comprehensive scheme of drug regulation is designed to