VOTER MADNESS? VOTER INTENT AND THE ARIZONA MEDICAL MARIJUANA ACT

Daniel G. Orenstein*

> "*[T]he new drug menace which is destroying the youth of America in alarmingly-increasing numbers.* Marihuana *is that drug — a violent narcotic — an unspeakable scourge —* The Real Public Enemy Number One!*"*[1]

INTRODUCTION

American marijuana policy is evolving at a breakneck pace, politically speaking.[2] After decades of strict criminal penalties, functional holds on much research, and political and popular demonization (exemplified by the epigraph above from propaganda-film-turned-cult-favorite, "Reefer Madness"), changes are now coming surprisingly quickly. With the leash of federal policy loosening of late, many states are taking bold policy steps to adopt new approaches to marijuana that range from evolutionary (limited medical use) to revolutionary (legalization and taxation of adult recreational use). Medical marijuana laws in particular have spread quickly, with twenty-three states and the District of Columbia now allowing some form of

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* J.D., Sandra Day O'Connor College of Law, Arizona State University. Substantial research and drafting for this article were completed while the author was Fellow and Adjunct Professor of Law, Public Health Law and Policy Program, Sandra Day O'Connor College of Law at Arizona State University and Deputy Director, Network for Public Health Law – Western Region. The views expressed here are the author's own and do not represent the official position of any organization or entity. The author would like to thank his former Network Western Region colleagues, James G. Hodge, Jr., Leila Barraza, Kim Weidenaar, and especially Clifford M. Rees, for their feedback and assistance on research that later inspired this article.

1. Foreword, REEFER MADNESS (Madacy Entertainment Group, Inc. 1998) (1936).

2. Though many commenters rightly note the role of efforts by drug policy reform activists dating back to the 1960s in shaping the foundations for current changes, actual policy reform was sparse or absent for decades until medical marijuana programs began to proliferate and give rise in turn to broader legalization in some states. *See, e.g.*, Joshua Clark Davis, *The Long Marijuana-Rights Movement*, HUFFINGTON POST BLOG, http://www.huffingtonpost.com/joshua-clark-davis/the-long-marijuana-rights_b_6113894.html (last updated Jan. 6, 2015) (arguing that what appears to be sudden policy change is the product of a slow anti-prohibition movement originating in the early 1960s).

lawful medical use.[3] Like many of these states, Arizona's medical marijuana program is experiencing policy growing pains as conflicts arise between the new program's legal framework and other laws. Among other issues, Arizona's medical marijuana law raises difficult interpretive questions regarding statutory prohibitions on (1) possession of marijuana-derived extracts and (2) driving under the influence. Some level of conflict is unsurprising given the genesis of Arizona's program through voter initiative, rather than legislation, but this approach has been common among medical marijuana enacted laws to date.[4] In Arizona, the conflict necessitates especially careful analysis, as voter-enacted laws cannot be altered or overridden by the governor or simple legislative majority.[5]

The most important consideration in interpreting voter-enacted laws is the intent of voters and the individuals and organizations responsible for framing the law. This article analyzes relevant sections of the Arizona Medical Marijuana Act (AMMA) toward an interpretation that best effects voter intent regarding extract possession and driving under the influence. Rather than focus solely on the narrow linguistic issues that have lead some courts to a narrow view of the AMMA's scope, this article addresses multiple definitional questions together with analysis of the AMMA's general intent and context to aid interpretation. Part I provides background information on Arizona's medical marijuana program and current jurisprudence with respect to marijuana extracts and driving under the influence. Part II critiques these approaches, applying relevant resources, including voter materials and model legislation, to elucidate voter intent in the AMMA where the text of the law is arguably ambiguous. Part III expands on this analysis, exploring some of the challenges particular to interpreting voter intent and arguing for a wide interpretive berth for voter-enacted laws including and beyond the AMMA.

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3. *Medical Marijuana Overview*, MARIJUANA POL'Y PROJECT, http://www.mpp.org/reports/medical-marijuana-overview.html (last visited June 18, 2015).

4. *See State-By-State Medical Marijuana Laws: How to Remove the Threat of Arrest*, MARIJUANA POL'Y PROJECT, 1 (2013), *available at* http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2013.pdf (noting that 12 of 21 medical marijuana programs as of 2013 were enacted via ballot initiative).

5. ARIZ. CONST. art. IV, pt. 1, § 1(6)(A)–(B).

I. BACKGROUND

A. Policy History

Medical marijuana has a long and complicated legal history in the United States.[6] In brief, after being recognized as a legitimate medical compound in the mid-nineteenth century, the drug was criminalized in 1937 over objections from the American Medical Association.[7] Since 1970, marijuana has been a Schedule I drug under federal Controlled Substances Act, on par with drugs like heroin and LSD.[8] This designation reflects a determination that the drug has no currently accepted medical value and a high abuse potential, and it makes possession and use illegal for any purpose.[9] Despite these legal barriers, modern state approaches to medical marijuana have sought to navigate a challenging path to provide protection for patients, caregivers, and medical professionals under state law without provoking federal enforcement.[10] This delicate balance is possible largely because drug-related crime is generally the province of state, rather than federal, law enforcement.[11]

Arizona voters approved one of the earliest medical marijuana programs in the country in 1996 by ballot initiative, but the law was rendered inoperative by the state legislature through added prescription and research requirements that were essentially impossible to meet under then-current federal approaches.[12] Arizona voters responded two years later by amending

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6. *See generally* Karen O'Keefe, *State Medical Marijuana Implementation and Federal Policy*, 16 J. HEALTH CARE L. & POL'Y 39 (2013); Laura M. Borgelt et al., *The Pharmacologic and Clinical Effects of Medical Cannabis*, 33 PHARMACOTHERAPY 195, 195 (2013).

7. Borgelt et al., *supra* note 6, at 195.

8. Controlled Substances Act, Pub. L. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. § 801 et seq.).

9. 21 U.S.C. § 812(b)(1) (1970); 21 C.F.R. § 1308.11 (1974). There are, however, two categories of drugs derived from marijuana that may be lawfully prescribed in the U.S., dronabinol and nabilone. Borgelt et al., *supra* note 6, at 196.

10. O'Keefe, *supra* note 6, at 44–47.

11. *E.g.*, Letter from Dennis K. Burke, U.S. Att'y, Dist. of Ariz., to Will Humble, Dir., Ariz. Dep't. of Health Servs. (May 2, 2011), *available at* http://www.justice.gov/usao/az/reports/USAO_Medical_Marijuana_May_2011_Letter.pdf. Issues of medical marijuana policy in Indian Country are beyond the scope of this article. In areas of Tribal jurisdiction, which are substantial in Arizona, state drug laws (including the AMMA) are generally not applicable and federal prosecution is the norm. *See id.* (discussing federal enforcement on Tribal lands).

12. Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pot Hole for Employers?*, 5 PHOENIX L. REV. 415, 430–34 (2012); *see also* Niki D'Andrea, *Prop 203 – the Arizona Medical Marijuana Act – Puts the Chronic in Chronic Pain*, PHOENIX

the state constitution to make voter-enacted laws immune to gubernatorial veto, legislative repeal, or legislative amendment by less than a three-fourths majority.[13] However, another attempt to establish a comprehensive medical marijuana program in the state did not come until 2010.[14] Amid loosening federal policy under the Obama administration,[15] Arizona voters approved Proposition 203 in 2010, establishing the AMMA, which broadly protects qualifying patients, caregivers, physicians, and licensed dispensaries from criminal, civil, and other penalties for participating in the medical use of marijuana consistent with the rules of the program.[16] The measure received a slim majority of the vote (50.1%), passing by less than 4,500 votes out of over 1.6 million cast.[17] Initial implementation was delayed by a lawsuit filed by then-Governor Jan Brewer, who made no secret of her opposition to the AMMA.[18]

Responding to guidance from the Arizona U.S. Attorney's Office threatening federal enforcement and prosecution for cultivation, sale, and distribution of marijuana,[19] Brewer's suit sought to clarify potential federal

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NEW TIMES, Oct. 21, 2010, *available at* http://www.phoenixnewtimes.com/2010-10-21/news/arizona-s-prop-203-medical-marijuana-act-puts-the-chronic-in-chronic-pain/full/.

13. ARIZ. CONST. art. IV, pt. 1, § 1(6).

14. Arizona voters did reject two marijuana-related proposals in the interim. One would have required federal approval for medical marijuana before doctors could prescribe it, and another would have entirely legalized marijuana possession in small quantities and also made it available for free to certain patients. As such, neither of these measures represented an authentic medical marijuana program proposal. *See* Michelle Ye Hee Lee, *Prop. 203: Legalization of Medical Marijuana*, ARIZ. REPUBLIC, Sept. 26, 2010, *available at* http://www.azcentral.com/news/election/azelections/articles/2010/09/26/20100926arizona-medical-marijuana-prop-203.html (recounting the history of marijuana ballot proposals in Arizona as background for the AMMA).

15. *See* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* http://www.mpp.org/assets/pdfs/library/DOJmemoAugust2013.pdf (describing federal law enforcement priorities relating to marijuana and continuing to commit the U.S. Department of Justice to specific areas of enforcement while leaving states and localities primarily in charge of enforcing their own drug laws regarding marijuana).

16. ARIZ. REV. STAT. ANN. § 36-2811 (2014).

17. *Arizona Medical Marijuana Question, Proposition 203 (2010)*, BALLOTPEDIA, http://ballotpedia.org/Arizona_Medical_Marijuana_Question,_Proposition_203_%282010%29 (last visited June 18, 2015).

18. *See* Press Release, Janice K. Brewer, Governor, Medical Marijuana (Jan. 13, 2012), *available at* http://www.mpp.org/assets/pdfs/states/PR-marijuana-statement-1-13-11.pdf ("It is well-known that I did not support passage of Proposition 203, and I remain concerned about potential abuses of the law.").

19. Letter from Ann Birmingham Scheel, Acting U.S. Attorney, District of Arizona, to Janice K. Brewer, Governor of Arizona (Feb. 16, 2012), *available at* http://www.keytlaw.com/arizonamedicalmarijuanalaw/scheel-letter-120216.pdf.

preemption of the AMMA and any liability for state employees implementing the law, but the Governor dropped the suit in 2012.[20] While Arizona's medical marijuana program has been finding its footing, other states have already moved beyond medical marijuana laws into recreational use laws, also known as "adult use" provisions.[21] Such laws authorize marijuana possession and use for adults, with various restrictions on public consumption, retail licensure, and other elements.[22] In 2012, Colorado and Washington both passed adult use laws via voter initiative that legalized possession and established frameworks for sale and taxation.

Washington's system remains embryonic, but Colorado's has come online rapidly, resulting in a burgeoning "marijuana tourism" industry[23] and significant tax revenue.[24] Alaska, Oregon, and the District of Columbia followed suit in 2014 with voter-enacted adult use laws of their own.[25] Similar ballot initiatives are expected in additional states in 2016, including

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20. Press Release, Governor Janice K. Brewer, *supra* note 18.

21. ARCVIEW MARKET RESEARCH, EXECUTIVE SUMMARY: THE STATE OF LEGAL MARIJUANA MARKETS 6 (3rd ed., 2015), *available at* http://www.arcviewmarketresearch.com/executive-summary (full report forthcoming).

22. *See, e.g.*, *Know the Laws*, STATE OF COLORADO DEPARTMENT OF PUBLIC HEALTH & ENVIRONMENT, https://sites.google.com/a/state.co.us/marijuana/knowthelaws (last visited June 18, 2015) (providing public information on Colorado's marijuana regulatory regime).

23. John Ingold & Jason Blevins, *Marijuana Tourism Booms in Colorado, Though Officials Remain Skeptical*, DENVER POST, Apr. 20, 2014, *available at* http://www.denverpost.com/marijuana/ci_25601236/marijuana-tourism-booms-colorado-though-officials-remain-skeptical.

24. *See* COLO. DEP'T OF REVENUE, MARIJUANA TAXES, LICENSES, & FEES TRANSFERS & DISTRIBUTION (Jan. 2015), *available at* https://www.colorado.gov/pacific/sites/default/files/1114%20Marijuana%20Tax%2C%20License%2C%20and%20Fees%20Report.pdf (reporting over $44 million in taxes, licenses, and fees).

25. Shelby Sebens, *Voters Give Nod to Legal Marijuana in Oregon, Alaska, and Washington, D.C.*, REUTERS (Nov. 5, 2014), http://www.reuters.com/article/2014/11/05/us-usa-elections-marijuana-idUSKBN0IO13620141105. The D.C. law is less broad, allowing marijuana possession, but not regulating or authorizing retail sales, as other states have done. *Id.* Despite its comfortable margin of victory (greater than 2:1), the D.C. law's implementation will come up against provisions of a recent Congressional spending deal that prohibits any federal or local funds from being spent to implement the referendum. *See* HOUSE APPROPRIATIONS COMMITTEE, FY 2015 OMNIBUS – FINANCIAL SERVICES APPROPRIATIONS, *available at* http://appropriations.house.gov/uploadedfiles/finserv_press_summary.pdf. The path to implementation for the D.C. program thus remains clouded, though it appears it will not be subjected to formal nullification by Congress, as some believed. The medical marijuana program in D.C. suffered similar delays and challenges after approval in 1998. *See* Aaron C. Davis, *Legalization Limbo in D.C.: Republican Congress Will Have Final Say on City Pot Law*, WASH. POST, Nov. 5, 2014, *available at* http://www.washingtonpost.com/local/dc-politics/house-republican-vows-to-upend-dc-ballot-measure-legalizing-marijuana/2014/11/05/10304f2c-6508-11e4-9fdc-d43b053ecb4d_story.html.

Arizona,[26] and at least one marijuana market research group is aggressively predicting as many as eighteen jurisdictions will adopt adult use provisions by 2020.[27] With potential further changes to Arizona marijuana law on the horizon, it is critical to ensure that courts and voters understand what such voter-enacted measures mean and how they should apply when in conflict with other laws.

B. Provisions of the AMMA

The AMMA erected a comprehensive legal framework for medical marijuana in Arizona, authorizing medical use of the drug, providing broad legal protections for patients and those who facilitate medical use, and establishing a core regulatory structure governing the new program from cultivation to use. The AMMA protects caregivers and physicians from criminal and civil penalties and from occupational or professional licensing board discipline for assisting qualifying patients in obtaining and using medical marijuana consistent with the AMMA's limitations and requirements.[28] It also provides the foundational regulatory structure for licensing and overseeing marijuana dispensaries in the state and charges the Arizona Department of Health Services (ADHS) with adopting additional rules governing these entities.[29] Most relevant to this article, however, are the AMMA's provisions and protections relating to possession by qualifying patients.

Qualifying patients must suffer from one of an enumerated list of debilitating medical conditions: cancer, glaucoma, HIV/AIDS, hepatitis C, amylotrophic lateral sclerosis (ALS), Crohn's Disease, or Alzheimer's Disease.[30] ADHS may also add additional conditions pursuant to public petition.[31] ADHS has already considered addition of Post-Traumatic Stress Disorder (PTSD), depression, migraine headaches, and Generalized Anxiety

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26. Lauren Loftus, *Marijuana Policy Project Calls for Legal Recreational Marijuana in Arizona*, ARIZ. REPUBLIC, Nov. 2, 2014, *available at* http://www.azcentral.com/story/news/local/arizona/2014/11/02/arizona-legal-recreational-pot-move-afoot-ballot/18397621.

27. *See* ARCVIEW MARKET RESEARCH, *supra* note 21 (listing as additional states expected to adopt this policy Arizona, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, Rhode Island, and Vermont); *see also* Katy Steinmetz, *Report Predicts 18 States Will Legalize Pot by 2020*, TIME, Jan. 26, 2015, *available at* http://time.com/3682969/pot-legalization-2020.

28. ARIZ. REV. STAT. ANN. § 36-2811(B)–(D) (2014).

29. *Id.* §§ 2803, 2804, 2806.

30. *Id.* § 2801(3)(a).

31. *Id.* §§ 2801(3)(c), 2801.01.

Disorder (GAD), but has rejected all four based on Medical Advisory Committee recommendations citing lack of sufficient scientific evidence.[32]

However, because the AMMA authorizes use for both therapeutic and palliative purposes,[33] patients may also qualify based on specific symptoms of conditions outside the enumerated list. These symptoms include severe and chronic pain, cachexia or wasting syndrome, severe nausea, seizures, and severe and persistent muscle spasms.[34] As a result, ADHS has determined that PTSD sufferers may be eligible to become qualifying patients based on such symptoms, though not for the underlying condition itself.[35]

Qualifying patients must receive written certification from a licensed doctor of medicine, osteopathy, naturopathic medicine, or homeopathy stating the physician's professional opinion that the patient suffers from one of the listed debilitating medical conditions or symptoms and is likely to receive therapeutic or palliative benefit from medical use of marijuana.[36] Qualifying patients must also obtain a registry identification card from ADHS by providing the certification, an application, and payment of the applicable fee.[37] As of the end of 2014, ADHS reports 63,417 registered qualifying patients, with the vast majority (90%) suffering from severe and chronic pain or pain in combination with another condition.[38] ADHS also reports a 41% increase in applications in 2014 compared to 2013.[39]

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32. Memorandum from Cara M. Christ, Chief Medical Officer, Arizona Department of Health Services to Will Humble, Director, Arizona Department of Health Services, Medical Advisory Committee Recommendations to the Agency Director (Jan. 10, 2014), *available at* http://azdhs.gov/documents/preparedness/medical-marijuana/debilitating/2014-january-memorandum.pdf; Memorandum from Laura K. Nelson, Chief Medical Officer, Arizona Department of Health Services to Will Humble, Director, Arizona Department of Health Services, Medical Advisory Committee Recommendations to the Agency Director (July 17, 2012), *available at* http://azdhs.gov/documents/preparedness/medical-marijuana/debilitating/July2012Memorandum.pdf.

33. Palliative care, as distinguished from therapeutic or curative treatments, is intended to improve patient quality of life and relieve pain and other symptoms, rather than to cure illness or prolong life, though it is often used in conjunction with therapeutic approaches when appropriate. WHO Definition of Palliative Care, WORLD HEALTH ORGANIZATION, http://www.who.int/cancer/palliative/definition/en (last visited June 18, 2015).

34. ARIZ. REV. STAT. ANN. § 36-2801(3)(b) (2014).

35. Yvonne Wingett Sanchez, *Arizona Official: Medical Pot Can Be Used for PTSD*, ARIZ. REPUBLIC, July 10, 2014, *available at* http://www.azcentral.com/story/news/arizona/politics/2014/07/09/medical-marijuana-can-treat-ptsd-arizona-official-decides/12418673/.

36. ARIZ. REV. STAT. ANN. § 36-2801(12), (18) (2014).

37. *Id.* § 36-2804.02.

38. ARIZ. DEP'T OF HEALTH SERVS., ARIZONA MEDICAL MARIJUANA ACT (AMMA) END OF YEAR REPORT 1–2 (2014), *available at*

Registered qualifying patients are not subject to arrest, prosecution, or penalty for possession or use of marijuana within prescribed quantity restrictions.[40] However, the AMMA also provides several categories of activities for which it does not preclude civil or criminal penalty, including negligence or professional malpractice due to marijuana impairment; possession or use of marijuana on primary, secondary, or preschool grounds, on a school bus, or in a correctional facility; and smoking marijuana on public transportation or in any public place.[41] As discussed in Part II, the AMMA also retains penalties for driving under the influence of marijuana.[42]

1. Defining "Marijuana"

One of the first interpretive challenges to face Arizona courts under the AMMA has been its application to marijuana extracts. Marijuana extracts are preparations of the drug that concentrate constituent compounds while allowing removal of spent plant material (*e.g.*, flowers), which is viewed as allowing improved dosage control and considered particularly useful for food and drink preparations.[43]

The AMMA allows qualifying patients to possess up to 2.5 ounces of usable marijuana or up to twelve plants if the patient is authorized to cultivate marijuana.[44] The AMMA defines "marijuana" as "all parts of any plant of the genus cannabis whether growing or not, and the seeds of such plant."[45] "Usable marijuana" is separately defined as "the dried flowers of the marijuana plant, and any mixture or preparation thereof," but does not include seeds, stalks, roots, or "the weight of any non-marijuana ingredients combined with marijuana and prepared for consumption as food or drink."[46] Because the AMMA's quantity restrictions are based on weight, the distinction between marijuana and usable marijuana primarily acts to

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http://www.azdhs.gov/medicalmarijuana/documents/reports/2014/arizona-medical-marijuana-end-of-year-report-2014.pdf.

39. *Id.* at 2.

40. ARIZ. REV. STAT. ANN. § 36-2811(B)(1) (2014).

41. *See id.* § 36-2802(A)–(C).

42. *See id.* § 36-2802(D).

43. *See, e.g.*, Howard Fischer, *Ruling Allows for Use of Medical Marijuana Extracts in Sodas, Candies and Lollipops*, EAST VALLEY TRIBUNE (March 24, 2014 12:17 PM), http://www.eastvalleytribune.com/arizona/politics/article_25312c98-b37e-11e3-b684-0019bb2963f4.html. This case is discussed more fully below.

44. ARIZ. REV. STAT. ANN. § 36-2801(1)(a) (2014).

45. *Id.* § 36-2801(8).

46. *Id.* § 36-2801(15).

differentiate between parts of the plant that can be used for medical purposes and parts that cannot, as well as substances that may be combined with marijuana but do not contain marijuana, such as food or drink. Concentrated extracts contain the active compounds of the drug but weigh far less than the original plant material, meaning 2.5 ounces of marijuana extracts is significantly more potent than 2.5 ounces of dried flowers.

Other sections of Arizona law use different definitions of marijuana related to criminal drug offenses. "Marijuana" under A.R.S. § 13-3401(19) is "all parts of any plant of the genus cannabis, *from which the resin has not been extracted*, whether growing or not, and the seeds of such plant," but not mature stalks or sterilized seeds.[47] "Cannabis" under A.R.S. § 13-3401(4) is "[t]he *resin extracted* from any part of the plant of the genus cannabis, *and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its resin*" or tetrahydrocannabinol (THC), but not certain oils, cakes, fibers, and other products derived from the seeds and stalks (*e.g.*, hemp).[48] This is a common legal distinction in the U.S., where "marijuana" may be used to mean dried leaves and flowers while other plant products, such as resin, may be referred to by a variety of other names, most commonly "hashish."[49] Arizona criminal laws under A.R.S. § 13-3401 thus generally define marijuana as the plant and the seed, and define cannabis as the resin and other derivative substances.[50] This can be a significant distinction. For example, in *State v. Medina*, the Arizona Court of Appeals refused to apply felony murder rules in a case involving marijuana because while cannabis is classified as a narcotic (possession and sale of which is a felony), marijuana is not.[51]

An Arizona superior court in *Welton v. Arizona* held that the AMMA permits consumption of medical marijuana in extract form.[52] While the ruling has not been appealed to date, the lack of a decision from a higher state court still leaves the issue open to future litigation. The *Welton* court

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47. *Id.* § 13-3401(19) (emphasis added).

48. *Id.* § 13-3401(4) (emphasis added).

49. Rosalie Liccardo Pacula et al., *Developing Public Health Regulations for Marijuana: Lessons from Alcohol and Tobacco*, 104 AM. J. PUB. HEALTH 1021, 1021 (2014).

50. *See* State v. Medina, 836 P.2d 997, 999 (Ariz. Ct. App. 1992) ("Basically, marijuana is the plant and cannabis is certain things derived from the plant.").

51. *Id.* Interestingly, the Arizona Supreme Court appeared to collapse the two drug form definitions in a brief footnote to *State ex rel. Montgomery v. Harris*, which is discussed below. *See* State ex rel. Montgomery v. Harris, 322 P.3d 160, 160 ¶ 1, n.1 (Ariz. 2014) ("Cannabis is commonly referred to as marijuana . . . .").

52. Minute Entry for March 21, 2014 at 1–2, Welton v. Arizona, CV 2013-014852 (Ariz. Super. Ct. 2014), *available at* http://www.courtminutes.maricopa.gov/docs/Civil/032014/m6226527.pdf.

addressed plaintiffs' concern that they would be arrested and prosecuted under state law for providing their young son with CBD oil (a low-THC marijuana extract) to treat a seizure disorder, with the state taking the position that the AMMA authorizes lawful medical use only of marijuana in plant form and does not apply to any form of the drug from which plant material has been removed, including extracts.[53] Prior to the *Welton* ruling, other state officials, including then-ADHS Director Will Humble, also expressed concern that marijuana extracts might not be included in the AMMA's protections, potentially exposing patients, caregivers, and dispensaries to criminal liability.[54] Following *Welton*, Director Humble appeared to express continuing doubt as to the finality of the determination.[55]

2. Influence and Impairment

A similar interpretative challenge arising under the AMMA is its intersection with Arizona's driving under the influence laws. While the *Welton* court's ruling on application of the AMMA to extracts took a broad view of the AMMA's intent to change Arizona law, Arizona appellate courts have thus far taken a much narrower view that interprets the AMMA to leave as much of existing law untouched as possible.

Under A.R.S. § 28-1381(A)(1) ("the (A)(1) provision"), Arizona prohibits driving or physical control of a vehicle "[w]hile under the influence of . . . any drug . . . if the person is impaired to the slightest degree."[56] Under A.R.S. § 28-1381(A)(3) ("the (A)(3) provision"), Arizona prohibits driving or physical control of a vehicle "[w]hile there is any drug

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53. *Id.* at 2. Plaintiffs were not required to actually *be* arrested to seek declaratory relief. *Id.* (citing Planned Parenthood Ctr. of Tucson, Inc. v. Marks, 17 Ariz. App. 308, 310, 497 P.2d 534, 536 (1972)).

54. Will Humble, *Marijuana v. Cannabis*, ARIZ. DEP'T HEALTH SERVS. DIRECTOR'S BLOG (Aug. 30, 2013), http://directorsblog.health.azdhs.gov/marijuana-v-cannabis/. Following the *Welton* decision, Director Humble authored a follow-up blog indicating that the court's ruling had provided much needed clarity for ADHS's approach; however, he also appeared to express some skepticism regarding the finality of the ruling. Will Humble, *Court Provides More Clarity Regarding Marijuana Extracts*, ARIZ. DEP'T HEALTH SERVS. DIRECTOR'S BLOG (March 23, 2014), http://directorsblog.health.azdhs.gov/court-provides-clarity-regarding-extracts-of-marijuana/.

55. Humble, *Court Provides More Clarity Regarding Marijuana Extracts*, *supra* note 54 ("*At least for now*, it appears that forms of marijuana that include extracts from the plant are provided the same level of protection . . . as the actual dried marijuana plants under the [AMMA]." (emphasis added)).

56. ARIZ. REV. STAT. ANN. § 28-1381(A)(1) (2014).

defined in [A.R.S. §] 13-3401 or its metabolite in the person's body."[57] Under the (A)(3) provision, actual impairment is not a required element, so the presence of the impairing metabolites of marijuana in the body while driving is illegal regardless of the concentration.[58]

Two panels of the Arizona Court of Appeals have so far addressed the AMMA's application to these statutes, and both have taken an approach limiting the breadth of the AMMA. In *Dobson v. McClennen*, the court first considered whether a written certification for medical marijuana triggers protections that apply to persons taking prescription medications.[59] Under A.R.S. § 28-1381(D), persons "using a drug as prescribed by a medical practitioner" are not guilty of violating the (A)(3) provision.[60] The court concluded that this protection does not apply to AMMA-authorized users because the AMMA does not sanction the "prescription" of marijuana, but rather only a "written certification."[61]The court noted that the AMMA in fact could not authorize prescription of medical marijuana because Schedule I drugs cannot be dispensed under a prescription.[62] The court further stated that AMMA certifications lack many of the elements required for a prescription under Arizona law, such as manufacturer information, dosage, quantity prescribed, and directions for use.[63]

Second, the *Dobson* court considered whether the AMMA itself provides immunity for a charge under the (A)(3) provision.[64] The AMMA "does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal or other penalties for . . . [o]perating, navigating or being in actual physical control of any motor vehicle, aircraft or motorboat while under the influence of marijuana."[65] However, the AMMA also provides that "a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment."[66] The *Dobson* court

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57. *Id.* at (A)(3).

58. Dobson v. McClennen, 337 P.3d 568, 574 (Ariz. Ct. App. 2014) (citing State *ex rel.* Montgomery v. Harris, 322 P.3d 160, 164 (Ariz. 2014)).

59. *Id.* at 572–73.

60. ARIZ. REV. STAT. ANN. § 28-1381(D) (2014).

61. *Dobson*, 337 P.3d at 572–73.

62. *Id.* at 573 (citing United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 492 n. 5 (2001) (internal quotations omitted)).

63. *Id.*

64. *Id.*

65. ARIZ. REV. STAT. ANN. § 36-2802(D) (2014).

66. *Id.*

concluded that, because the AMMA refers to being "under the influence" and to "impairment," its protection applies only to the (A)(1) provision, and not the (A)(3) provision, which does not contain either term and does not require impairment as an element.[67] Additionally, the court held that the AMMA's general authorization of medical use does not provide protection because individuals charged under the (A)(3) provision "[are] not prosecuted or penalized for using or possessing marijuana; they [are] prosecuted and penalized *for driving* after having used marijuana."[68]

Another panel of the Arizona Court of Appeals also addressed the relationship between the AMMA and the (A)(1) and (A)(3) provisions just two weeks prior to *Dobson*.[69] In *Darrah v. McClennen*, the defendant was charged under both the (A)(1) and (A)(3) provisions, but was acquitted on the (A)(1) charge. Similar to the *Dobson* court's reasoning, the *Darrah* court held that the AMMA's protection did not apply to the (A)(3) provision, but rather only to impaired driving under the (A)(1) provision.[70] The court stated that "[i]f Arizona voters had intended to completely bar the State from prosecuting authorized marijuana users under [the (A)(3) provision], they could have easily done so by using specific language to that effect."[71] The court cited examples elsewhere in the AMMA providing immunity from "arrest, prosecution or penalty in any manner" and similar phrases as the type of language that would have provided broader immunity, but absent "such specific wording" declined to find that voters intended such a result with respect to the (A)(3) provision.[72]

II. IMPROVING INTERPRETATION OF THE AMMA

When a statute is clear and unambiguous, Arizona courts give effect to its language without resorting to other rules.[73] Where statutory language is ambiguous, courts apply commonly accepted meanings unless the statute provides its own definition or context indicates a special meaning.[74] In resolving ambiguity, courts look at the statute as a whole, including "context, subject matter, historical background, effects and consequences,

67. *Dobson*, 337 P.3d at 574.
68. *Id.*
69. Darrah v. McClennen, 337 P.3d 550, 551–52 (Ariz. Ct. App. 2014).
70. *Id.*
71. *Id.*
72. *Id.* at 552 (citing ARIZ. REV. STAT. ANN. § 36-2811(B), (C), (D), (F) (2014)).
73. State v. Reynolds, 823 P.2d 681, 682 (Ariz. 1992) (en banc).
74. *See, e.g.*, *id.* (discussing approach to legislative intent in interpreting ambiguous statutory language).

and spirit and purpose."[75] In interpreting voter initiatives, the goal is "to effectuate the intent of those who framed the provision and . . . the intent of the electorate that adopted it."[76]

As presented to voters, the ballot text of Proposition 203 read:

> A "yes" vote shall have the effect of authorizing the use of marijuana for people with debilitating medical conditions who obtain a written certification from a physician and establishing a regulatory system governed by the Arizona Department of Health Services for establishing and licensing medical marijuana dispensaries.
>
> A "no" vote shall have the effect of retaining current law regarding the use of marijuana.[77]

Supplemented by the full text of changes to the statutory code, the simple ballot format here encapsulates the broad intention of the AMMA to allow medical use of marijuana for qualifying patients without fear of prosecution. The Arizona Supreme Court has recently explicitly called attention to the far-reaching nature of the AMMA's protections and its comparatively limited exceptions while addressing the law's application to probationers.[78]

Though not reflected in the statutory amendments, the AMMA also included a brief Findings section that is relevant in interpreting intent because it sets out the law's broad policy goals as presented to Arizona voters. Among other findings, this section proclaims, "State law should make a distinction between the medical and nonmedical uses of marijuana. Hence, the purpose of this act is to protect patients with debilitating medical conditions, as well as their physicians and providers, . . . if such patients engage in the medical use of marijuana."[79] This is broad language,

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75. Calik v. Kongable, 990 P.2d 1055, 1059 (Ariz. 1999) (en banc) (quoting Aros v. Beneficial Ariz., Inc., 977 P.2d 784, 788 (Ariz. 1999)) (internal quotation marks omitted).

76. *Calik*, 990 P.2d at 1057 (quoting Jett v. City of Tucson, 882 P.2d 426, 430 (Ariz. 1994)) (internal quotation marks omitted).

77. Initiative Measure, Proposition 203, approved election Nov. 2, 2010, eff. Dec. 14, 2010, *available at* http://apps.azsos.gov/election/2010/Info/PubPamphlet/english/Prop203.htm.

78. Reed-Kaliher v. Hoggatt, No. CV-14-0226-PR, at ¶ 8 (Ariz., Apr. 7, 2015) ("AMMA broadly immunizes qualified patients, carving out only narrow exceptions from its otherwise sweeping grant of immunity . . . ."). The court in that case held that probation terms that restrict medical marijuana use that otherwise complies with the AMMA are invalid and unenforceable. *Id.* at ¶ 14.

79. Initiative Measure, Proposition 203 § 2(G), approved election Nov. 2, 2010, eff. Dec. 14, 2010, *available at* http://apps.azsos.gov/election/2010/Info/PubPamphlet/english/Prop203.htm.

illustrating an overall spirit and purpose to effect significant change in Arizona law. The intent of the AMMA's drafters is also relevant to its interpretation.[80] Proposition 203 was drafted by the Arizona Medical Marijuana Policy Project (AZMMPP).[81] The AZMMPP, as the name alludes, is a state-level advocacy organization affiliated with the national Marijuana Policy Project (MPP).[82] The MPP's Model State Medical Marijuana Bill was the primary framework in drafting the AMMA.[83]

A. Marijuana Extracts

Turning first to the AMMA's application to marijuana extracts, analysis begins with the plain text of the AMMA and its definition section. If ambiguity remains, analysis turns to the law's "context, subject matter, historical background, effects and consequences, and spirit and purpose."[84] Through all facets of this process, available evidence weighs in favor of broad application of the AMMA's language and thus to incorporation of marijuana extracts into the law's protections for medical use.

1. Statutory Language

The AMMA neither includes nor excludes marijuana extracts explicitly. Accordingly, a court must look first to the text of the law to resolve this apparent ambiguity. The AMMA includes a definition section, codified at A.R.S. § 36-2801, which generally precludes application of other definitions, such as those in A.R.S. § 13-3401.[85] This approach is further supported by interpretive principles favoring application of more recent and

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80. *See Calik*, 990 P.2d at 1057 (noting the judicial purpose is "to effectuate the intent of those who framed the provision and . . . the intent of the electorate that adopted it.") (quoting Jett v. City of Tucson, 882 P.2d 426, 430 (Ariz. 1994)) (internal quotation marks omitted).

81. Application for Initiative or Referendum Petition Serial Number I-04-2010, Arizona Medical Marijuana Policy Project (May 15, 2009), *available at* http://apps.azsos.gov/election/2010/general/ballotmeasuretext/I-04-2010.pdf.

82. *See, e.g.*, Lee, *supra* note 14 (noting that the AZMMPP is "largely funded" by the MPP).

83. Telephone Interview with Karen O'Keefe, Director of State Policies, Marijuana Policy Project (Dec. 15, 2014). Any inaccuracies or inconsistencies with official Marijuana Policy Project statements should be attributed to the author's own error.

84. *Calik*, 990 P.2d at 1059 (quoting Aros v. Beneficial Ariz., Inc., 977 P.2d 784, 788 (Ariz. 1999)) (internal quotation marks omitted).

85. *See* ARIZ. REV. STAT. ANN. §§ 13-3401, 36-2801 (2014).

more specific statutes over older and more general ones.[86] The AMMA is the more recent statute, and, because it addresses only medical uses of marijuana, it is also more specific than criminal law statutes addressing marijuana use generally.

Definition sections are woefully inadequate or absent in many statutes, regardless of whether they originate in voter initiatives or legislatures. This exacerbates difficulties in determining statutory intent. Where legislation does include comprehensive definitions of terms, these definitions should be given full effect. Certainly, the AMMA could have more clearly stated its intention to create a new definition of various forms of marijuana. An ideal statute would include reference to and disambiguation from all other uses of a term in the state code. However, this is not always possible or practical, and the absence of additional language that would more clearly demonstrate voter intent does not require the conclusion that voters lacked such intent.[87] Even the Arizona Supreme Court has muddled the distinction between forms of marijuana, noting recently in a footnote that "[c]annabis is commonly referred to as marijuana,"[88] despite the distinctions between the two in A.R.S. § 13-3401. It is unrealistic to expect the framers of the AMMA to uncover and resolve in advance every conceivable ambiguity that may arise in reconciling the AMMA with all other provisions of Arizona law.

Proposition 203 explicitly indicated its intention to separate the medical marijuana program it sought to create from other, nonmedical marijuana use, stating unequivocally, "State law should make a distinction between the medical and nonmedical uses of marijuana."[89] The text of the proposed law then set out a broad and encompassing definition of "usable marijuana" that includes "*any* mixture or preparation" of the plant's dried flowers, indicating that the AMMA's primary focus is the *use* of marijuana (medical vs. nonmedical) rather than its *form*. The absence of the term "usable marijuana" elsewhere in Arizona law further indicates the intent to create new definitions as applied to medical use.

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86. *E.g.*, In re Estate of Winn, 150 P.3d 236, 239 (Ariz. 2007) (en banc) (citations omitted).

87. *See Calik*, 990 P.2d at 1058–59 (acknowledging that a simple additional phrase would have clarified voter intent, but finding intent supported by application of standard rules of construction).

88. State *ex rel.* Montgomery v. Harris, 322 P.3d 160, 160 n.1 (Ariz. 2014).

89. Initiative Measure, Prop. 203 § (2)(G) (approved by election Nov. 2, 2010, eff. Dec. 14, 2010), *available at* http://apps.azsos.gov/election/2010/general/ballotmeasuretext/I-04-2010.pdf.

The AMMA's divergence from the MPP's Model Bill also supports the conclusion that the definitions supplied in the AMMA are intended to be new and to supersede those in other parts of Arizona law. While much of the AMMA is based on the Model Bill, the definition sections are quite distinct. Among other differences, the Model Bill uses the terms "medical cannabis" and "cannabis," and provides that these terms have "the meaning given to the term 'marijuana' in _____" with the applicable state statute to be inserted.[90] Rather than reference other Arizona laws, the AMMA supplies a new definition that closely tracks A.R.S. § 13-3401(19) but eliminates the clause "from which the resin has not been extracted."[91] It also recalls the definition of "cannabis" (in contrast to "marijuana") under A.R.S. § 13-3401(4) by referencing mixtures and preparations.[92]

This divergence from the Model Bill's approach is meaningful and not accidental. AZMMPP is affiliated with the MPP, and AZMMPP based much of the AMMA on the Model Bill. Deviation from the Model Bill's approach is a reflection of molding the proposal to fit Arizona's existing statutory framework. Here, the Model Bill recommends referencing an existing state law definition.[93] In contrast, the AMMA's use of language nearly identical to that in A.R.S. § 13-3401(19) without referencing that statute strongly indicates an intent to create a new definition as applied to medical marijuana without altering definitions that apply to other, nonmedical uses. If the AMMA's definition were intended to match that in A.R.S. § 13-3401(19), the AMMA would simply reference the statute, as the Model Bill suggests. The most straightforward explanation for not doing so is that the existing Arizona statutory definition was unsuitable for the AMMA's purposes. The Model Bill's definition of marijuana (which it refers to as "cannabis") includes extracts and concentrates,[94] while Arizona's statutes separate marijuana and its extracts into distinct categories. Supplying a new, more encompassing definition brought both categories under the AMMA, which is more consistent with the Model Bill's general approach.

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90. MODEL MEDICAL MARIJUANA BILL, MARIJUANA POLICY PROJECT § 3(n), http://www.mpp.org/legislation/model-medical-marijuana-bill.html (last visited June 18, 2015).

91. *Compare* ARIZ. REV. STAT. ANN. § 36-2801(15) (2014), *with* ARIZ. REV. STAT. ANN. § 13-3401(19) (2014).

92. *Id.* §§ 13-3401(4), 36-2801(15).

93. MODEL MEDICAL MARIJUANA BILL, *supra* note 90 at § 3(c).

94. *Id.*

2. Intended Breadth of the AMMA

The AMMA could have more clearly stated an intention to include extracts. For example, the Model Bill defines "cannabis products" as "concentrated cannabis, cannabis extracts, and products that are infused with cannabis or an extract thereof . . . includ[ing], without limitation, edible cannabis products, beverages, topical products, ointments, oils, and tinctures."[95] It also provides separate weight restrictions for "cannabis" and "cannabis products."[96] Arguably, the AMMA's lack of such separate weight restrictions implies that extracts are not included in the AMMA's definition of "usable marijuana." However, interpreting the AMMA to apply to extracts better reflects both the law's language and larger purpose.

The absence of specific reference to "cannabis products" or an equivalent term in the AMMA does not require the conclusion that such substances are not within its consideration.[97] Rather, the definition of "usable marijuana" simply encompasses both categories of substances. "Usable marijuana" includes "*any* mixture or preparation" of the plant's dried flowers.[98] This broad definition obviates the need for any subcategories of the various methods of preparing the plant's flowers. Interpreting the AMMA's language to distinguish between two otherwise identical marijuana-based products solely based on whether plant matter is included or removed (leaving only extracts) is contrary to the law's purpose of establishing a comprehensive medical marijuana program in Arizona. Contemporary media accounts further support a broad understanding of the AMMA's definition of marijuana.[99]

Disallowing use of extracts under the AMMA may also produce troubling and illogical results, such as emphasizing smoking as the preferred drug delivery method. Many patients prefer to consume the drug in food and drink preparations, which are often considered unpalatable if plant material is not removed. Plaintiffs in the *Welton* case, for example, previously treated their son with dried and ground marijuana mixed with applesauce, which he found unappetizing.[100] Patients who use medical

95. *Id.*

96. *Id.*

97. *See* Calik v. Kongable, 990 P.2d 1055, 1058–59 (Ariz. 1999) (en banc) (acknowledging that a simple additional phrase would have clarified voter intent, but finding intent supported by application of standard rules of construction).

98. ARIZ. REV. STAT. ANN. §§ 36-2801(15) (2014) (emphasis added).

99 . For example, the Arizona Republic's analysis of the ballot proposition, while not specifically addressing extracts, noted that "all parts of a marijuana plant and its seeds would be legal to use." Lee, *supra* note 14.

100. Fischer, *supra* note 43.

marijuana to treat nausea and increase appetite (*e.g.*, to counter side effects of chemotherapy) may be particularly negatively impacted by limitations that require them to consume unappealing preparations. Additionally, while overall the potentially detrimental effects of marijuana use remain subject to further research, smoking marijuana may carry additional health risks not presented by other forms of consumption.[101] Non-smoking methods may also be more appropriate for young patients,[102] who may benefit from extract-based preparations that utilize lower-THC strains of marijuana (reducing psychoactive effects) and allow for better dosage control.[103]

Concerns may remain regarding patients possessing quantities of extracts that far outstrip the active drug content of a similar weight of raw plant material. However, it is critical to remember that the AMMA protects only qualifying patients and not individuals possessing marijuana for recreational use or for sale without appropriate licensure. As such, the number of persons lawfully possessing large quantities of extracts is unlikely to be significant. Additionally, the AMMA presumes that qualifying patients are engaged in medical use, but this presumption may be rebutted by evidence of marijuana-related conduct that is not for medical purposes.[104] If the presumption is rebutted, the AMMA allows punishment under other state laws.[105] Together, these limitations should mediate any negative consequences of applying the AMMA to marijuana extracts.

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101. INSTITUTE OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 4 (Janet E. Joy, et al. eds., 1999), *available at* http://www.nap.edu/catalog/6376/marijuana-and-medicine-assessing-the-science-base ("Scientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC, for pain relief, control of nausea and vomiting, and appetite stimulation; smoked marijuana, however, is a crude THC delivery system that also delivers harmful substances."). Nevertheless, smoking remains the most common method of using medical marijuana, though vaporization is also becoming increasingly common. Borgelt et al., *supra* note 6, at 198.

102. As stated succinctly and directly by an Arizona medical marijuana dispensary owner and parent of a child with a rare genetic disorder being treated with marijuana extract, "It's not like you can give a bong to a 5-year-old." Ken Alltucker, *Arizona Marijuana Dispensaries Applaud Extract Ruling*, ARIZ. REPUBLIC (Apr. 7, 2014), http://www.azcentral.com/story/news/politics/2014/04/05/arizona-marijuana-dispensaries-applaud-extract-ruling/7337875/ (quoting J.P. Holyoke).

103. *See, e.g.*, *id.* (discussing the Weltons' use of medical marijuana for their son). Some states that have not fully legalized medical marijuana have legalized medical use of certain non-smoked forms of the drug, including lower-THC oils. *See, e.g.*, David Beasley, *Georgia Governor Signs Law Legalizing Medical Marijuana*, REUTERS (Apr. 17, 2015), http://www.reuters.com/article/2015/04/17/us-usa-georgia-marijuana-idUSKBN0N72J020150417 (discussing legalization of lower-THC marijuana oils in Georgia and eleven other states).

104. ARIZ. REV. STAT. ANN. § 36-2811(A) (2014).

105. *Id.* § 36-2802(E).

B. Driving Under the Influence

The AMMA generally leaves in place Arizona's driving under the influence prohibitions, but provides that "a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment."[106] The AMMA does not supply an independent definition for driving under the influence, and so ambiguity appears to result when applying this narrow exemption to Arizona's multi-pronged driving under the influence prohibitions under A.R.S. §§ 28-1381(A)(1) and 28-1381(A)(3). As with the AMMA's application to marijuana extracts, resolving this conflict requires analysis not just of the AMMA's text, but also its general purpose and intent. As well, consideration of the context and policy aim of both driving under the influence statutes is enlightening.

1. Text and Purpose of the (A)(1) and (A)(3) Provisions

The (A)(1) provision makes it unlawful to drive or be in physical control of a vehicle "[w]hile under the influence" of any drug if "impaired to the slightest degree."[107] The (A)(3) provision makes it unlawful to drive or be in physical control of a vehicle "[w]hile there is any drug defined in § 13-3401 or its metabolite in the person's body."[108] The *Dobson* court concluded that the (A)(3) provision "does not require that the defendant be under the influence of marijuana . . . or that the State prove impairment."[109] In general, this is correct. Marijuana users violate the (A)(3) provisions if any amount of an impairing metabolite is present in their blood. But the *Dobson* court errs in extending this reasoning to AMMA qualifying patients.

First, the plain text of the (A)(3) provision does not apply when read in the context of the AMMA. The (A)(3) provision applies to "any drug defined in [A.R.S. §]13-3401,"[110] which includes marijuana and cannabis, among many other drugs.[111] However, as discussed in Part II.A above, the AMMA provides a set of new definitions for marijuana as applied to medical users. Marijuana used for medical purposes is thus no longer

106. *Id.* § 36-2802(D).

107. *Id.* § 28-1381(A)(1).

108. *Id.* § 28-1381(A)(3).

109. Dobson v. McClennen, 337 P.3d 568, 574 (citing State *ex rel*. Montgomery v. Harris, 322 P.3d 160, 164 (Ariz. Ct. App. 2014)) (quotations omitted).

110. ARIZ. REV. STAT. ANN. § 28-1381(A)(3) (2014).

111. *Id.* § 13-3401.

defined in A.R.S. § 13-3401, but rather in A.R.S. § 36-2801, and is therefore not among the class of drugs falling under the scope of the (A)(3) provision. Nonmedical users remain subject to the (A)(3) provision, consistent with the AMMA's stated intent to differentiate between medical and nonmedical use of the drug.[112]

Second, the core purposes of the (A)(1) and (A)(3) provisions are distinct, and the latter's purpose is not served by applying it to AMMA qualifying patients. The *Dobson* court held that patients prosecuted under the (A)(3) provision are "not prosecuted or penalized for using or possessing marijuana; they [are] prosecuted and penalized *for driving* after having used marijuana."[113] Arizona law does create separate crimes for impaired driving under the influence of drugs and for driving while drug metabolites are present in the body. This is arguably intended to combat drug-impaired driving while acknowledging difficulties in establishing specific, testable levels of metabolite concentration that may be impairing.[114] In this light, criminalizing driving with any concentration of a prohibited drug in the body echoes impairment presumptions for alcohol, such as the non-rebuttable presumption of impairment for persons with alcohol concentrations above 0.08 within two hours of driving.[115]

However, the (A)(3) provision may serve a different policy goal. While the (A)(1) provision is a clear public health and safety measure aimed unambiguously at prohibiting impaired driving likely to result in motor vehicle accidents, it theoretically covers all relevant aspects of this issue because it prohibits driving if "impaired to the slightest degree." A person who is not impaired at all poses no legitimate threat on the road related to their drug use. The *Dobson* court viewed the (A)(3) provision not as presuming impairment (as for alcohol), but rather as a crime independent of impairment. The *Dobson* court actually held that the (A)(3) provision "does not require that the defendant be 'under the influence of marijuana'" at all.[116] If so, then the (A)(3) provision can better be understood as a means for the state to punish illicit drug use after the fact.

State law authorizes criminal punishment for possessing drugs such as marijuana.[117] It also authorizes punishment for possessing paraphernalia

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112. Initiative Measure, Prop. 203 § 2(G), approved election Nov. 2, 2010, eff. Dec. 14, 2010, *available at* http://apps.azsos.gov/election/2010/general/ballotmeasuretext/I-04-2010.pdf.

113. *Dobson*, 337 P.3d at 574.

114. State ex rel. Montgomery v. Harris, 322 P.3d 160, 164 (Ariz. 2014).

115. ARIZ. REV. STAT. ANN. § 28-1381(A)(2) (2014).

116. *Dobson*, 337 P.3d at 574.

117. ARIZ. REV. STAT. ANN. § 13-3405 (2014).

associated with the use of these drugs,[118] allowing prosecution of those who clearly have used such drugs or plan to, but do not physically possess them when they come to the attention of law enforcement. The (A)(3) provision adds a link to this chain by authorizing punishment when prior use is evident due to presence of metabolites in the body. Setting aside discussion of whether such extensions of drug control measures are wise or justifiable from a policy perspective, they are certainly well established. Critically, however, they are best understood as exactly that: drug control measures and extensions on use prohibitions. In the context of recreational marijuana use, this is permissible, but the AMMA specifically distinguishes medical and nonmedical users. For patients following the requirements set forth by the AMMA, punishment for use or possession is not permitted. As such, if the (A)(3) provision is at its core premised on prior use rather than actual impairment, the AMMA renders it invalid as applied to qualifying patients.

This is further evidenced by the prescription drug exemption in A.R.S. § 28-1381(D), discussed below. If consumption is lawful and the driver is not impaired, there is no punishment under (A)(3). The root of the problem with respect to the AMMA thus appears simply to be that the (A)(3) provision was enacted prior to the AMMA and thus regards all marijuana consumption as unlawful and deserving punishment. Arizona could establish specific impairment benchmarks for medical marijuana, as it has for alcohol, to improve enforcement of the (A)(1) provision, but has not done so to date, instead relying on the (A)(3) provision and failing to account for the new regulatory regime created by the AMMA.[119]

2. Ambiguity and Intent

The *Dobson* court ends its analysis at the language of the AMMA, but any ambiguity that exists is not resolved by a narrow and context-less

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118. *Id.* § 13-3415.

119. To illustrate the drug control, rather than public safety, focus of the (A)(3) provision, comparison to Colorado's new framework is also enlightening. As discussed in Part I, Colorado authorized recreational use of marijuana in 2012 by voter initiative. The Colorado Department of Public Health & Environment notes that the state's driving under the influence laws have not changed with respect to driving while impaired by marijuana, but explains that now "[s]imilar to alcohol, there is an established impairment level for marijuana in Colorado." *Driving*, STATE OF COLO. DEP'T OF PUB. HEALTH & ENV'T, https://sites.google.com/a/state.co.us/marijuana/getthefacts/driving (last visited June 18, 2015). The Department goes so far as to recommend specific wait-times after smoking or ingesting marijuana in various quantities before one should engage in safety-sensitive activities, including driving a car. *Id.*

interpretation of other statutes that the AMMA supersedes. It is therefore appropriate to turn to the history, context, spirit, and purpose of the AMMA for interpretive guidance.

a. Influence and Impairment

The AMMA's broad immunity language supports an interpretation disallowing penalties under the (A)(3) provision. So, too, does the AMMA's careful carve-out for driving under the influence penalties with respect to metabolite presence. True, the AMMA could have directly referenced Arizona's driving under the influence statutes and likely should have, but the absence of such reference does not require the conclusion adopted by the *Dobson* and *Darrah* courts that AMMA qualifying patients are exposed to criminal liability for non-impaired driving based on the presence of any level of metabolite concentration in their bodies.

The *Darrah* court correctly notes that the protection in A.R.S. § 36-2802(D) is narrower than that provided elsewhere in the AMMA.[120] However, the court takes too much from this fact. There is no indication that the AMMA's authors intended to authorize impaired driving (nor would such a law have passed), and the law explicitly leaves intact prohibitions on this behavior.[121] As the court notes, protections for medical professionals, caregivers, and qualifying patients in the AMMA are generally written in broad, sweeping terms.[122] But such terms would be entirely out of place in the driving under the influence provision due to its narrower scope. The AMMA's language here should still be given full effect.

The AMMA provides that it does not prohibit penalties for:

> [o]perating, navigating or being in actual physical control of any motor vehicle . . . while under the influence of marijuana, except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolities or components of marijuana that appear in insufficient concentration to cause impairment.[123]

Reading this protection to apply only to prosecutions under (A)(1) gives effect to the first clause but not the second, contradicting the interpretive

120. Darrah v. McClennen, 337 P.3d 550, 551 (Ariz. Ct. App. 2014).

121. ARIZ. REV. STAT. ANN. § 36-2801(D) (2014).

122. *Darrah*, 337 P.3d at 551–52; *accord* ARIZ. REV. STAT. ANN. §§ 36-2811(B), (C), (D), (F) (2014).

123. ARIZ. REV. STAT. ANN. § 36-2802(D) (2014).

principle that all words and phrases in a statute be given meaning.[124] The (A)(1) provision applies only to persons under the influence and impaired, albeit "impaired to the slightest degree."[125] The second clause of the AMMA protection (beginning at "except") provides that a person is not "under the influence" solely based on the presence non-impairing concentrations of metabolites. Absent impairment, (A)(1) does not apply. The AMMA's second clause thus more appropriately refers to the (A)(3) provision, which criminalizes driving with presence of any quantity of metabolites but does not require impairment. Reading the AMMA to apply instead only to (A)(1) renders it meaningless.

Both the *Dobson* and *Darrah* courts emphasize that the words "under the influence" appear in (A)(1) and not in (A)(3), using this to conclude that the AMMA's use of that phrase therefore applies only to (A)(1). However, this overlooks the statutory title heading for both provisions, "Driving or actual physical control *while under the influence* . . . ."[126] The title heading is not considered part of the law, but can aid in interpretation of included provisions.[127] The Arizona Supreme Court's opinion in *State ex rel. Montogmery v. Harris*, relied on in both *Dobson* and *Darrah*, considered (A)(3)'s placement in the state's statutory framework evidence of legislative intent with respect to impairing versus non-impairing drug metabolites.[128] Additionally, the legislative history of (A)(3) supports the contention that it addresses "driving under the influence." As explained by the *Harris* court, the (A)(3) provision was added in 1990, and the accompanying Senate fact sheet stated its purpose was to "make numerous substantive and conforming changes to the provisions relating to the offense of *driving under the influence* of liquor or drugs."[129]

The *Harris* court's reading of (A)(3) is consistent with an approach giving effect to both clauses of A.R.S. § 36-2802(D). The *Harris* court explained that (A)(3) "establishes that a driver who tests positive for any amount of an impairing drug is legally and irrefutably presumed to be *under the influence*."[130] However, the AMMA explicitly provides that qualifying

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124. *E.g.*, Williams v. Thude, 934 P.2d 1349, 1351 (Ariz. 1997).

125. ARIZ. REV. STAT. ANN. § 28-1381(A)(1) (2014).

126. *Id.* § 28-1381.

127. State ex rel. Montgomery v. Harris, 322 P.3d 160, 162 (Ariz. 2014) (citing State v. Barnett, 691 P.2d 683, 688 (Ariz. 1984)).

128. *Id.* at 163.

129. *Id.* (citing STAFF OF ARIZ. S., 39TH LEGIS.2D SESS., H.B. 2433 FACT SHEET, at 1 (June 21, 1990)) (emphasis added).

130. *Id.* at 164 (emphasis added). *But see* discussion *supra* Part II.B.1 (regarding the purpose of the (A)(3) provision).

patients are not considered "under the influence" based solely on the presence of non-impairing levels of marijuana metabolites.[131] The AMMA thus carves out a narrow exception to the (A)(3) provision for authorized medical users while leaving in place (A)(1)'s prohibitions on marijuana-*impaired* driving. Additionally, *Dobson* and *Darrah*'s reliance on *Harris* is broader than justified in the context of that case. The defendant in *Harris* was not a qualifying patient under the AMMA and did not raise that defense.[132] Moreover, even Justice Timmer's dissent in *Harris* (which would have upheld application of (A)(3) even to *non*-impairing metabolites) noted that (A)(3) "might not apply if the detected metabolites –active or inactive– emanated from medically authorized marijuana use."[133]

b. Prescription and Certification

The *Dobson* court, as discussed above, correctly notes that the AMMA does not authorize "prescription" of medical marijuana; rather, it provides for "written certification" by physicians. Arizona law provides an exemption to the (A)(3) provision for non-impaired drivers "using a drug as prescribed by a medical practitioner."[134] The AMMA does not reference this safe harbor specifically, but nevertheless may bring qualifying patients under its protection, as alluded to in Justice Timmer's dissent in *Harris*.[135] The AMMA presumably uses "certification" because this term applies specifically to medical marijuana authorizations in lieu of "prescription" (for exactly the reason the *Dobson* court notes relating to marijuana's Schedule I classification[136]). While the *Dobson* court states that "the drafters of the AMMA could have used 'as prescribed,'"[137] the fact is they could not, as "prescriptions" would potentially have exposed medical professionals to criminal liability and were fatal to Arizona's 1996 attempt to authorize medical marijuana use.[138]

The AMMA recognizes marijuana as medicine, akin to other medications and used by many individuals for whom prescription drugs may be ineffective.[139] As such, it is reasonable to think that voters approving

131. ARIZ. REV. STAT. ANN. § 36-2802(D) (2014).

132. State ex rel. Montgomery v. Harris, 322 P.3d 160, 165–66 (Ariz. 2014) (Timmer, J., dissenting).

133. *Id.* at 166.

134. ARIZ. REV. STAT. ANN. § 28-1381(D) (2014).

135. *Harris*, 322 P.3d at 165–66 (Timmer, J., dissenting).

136. *See* Dobson v. McClennen, 337 P.3d 568, 573 (Ariz. Ct. App. 2014).

137. *Id.*

138. Moberly & Hartsig, *supra* note 12.

139. Interview with Karen O'Keefe, *supra* note 83.

the AMMA intended protections associated with other medical drug use to apply to medical marijuana use. The Arizona Supreme Court, addressing marijuana use prohibitions for probationers, recently recognized that the AMMA generally brought marijuana into the realm of lawful medicines in Arizona, making the key distinction between licit and illicit uses, rather than between marijuana and prescription drugs.[140]

As the *Dobson* court notes, many elements of a formal prescription are lacking in an AMMA certification. Nevertheless, the two are similar. Written certifications must be signed and dated by a physician in the context of a physician-patient relationship, must specify the patient's condition, and must be preceded by a full medical history assessment.[141] Prescriptions similarly require a physical or mental health examination or an established doctor-patient relationship.[142] Prescriptions in some respects are less burdensome than written certifications. Examination requirements for prescriptions may be met utilizing real-time telemedicine "unless the examination is for the purpose of obtaining a written certification from the physician for the purposes of [the AMMA]."[143] Both prescriptions and written certifications provide a physician's endorsement of a treatment for the patient's ailment that is not lawfully available to the patient without this endorsement. While the AMMA declines to use the term "prescription" in order to protect physicians, written certifications are fundamentally prescriptions by another name and should receive the protections appropriate to this status.

Most adults drive, and so the interpretation offered by the *Dobson* and *Darrah* courts effectively either prohibits medical marijuana patients from driving for the most part or at all (because metabolites remain may in the body for considerable periods of time even after impairment has abated) or criminalizes use by these individuals in direct contravention of the explicitly stated intention of the AMMA.[144] Whether based on the protections afforded to users of prescription medications or on

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140. *See* Reed-Kaliher v. Hoggatt, No. CV-14-0226-PR, at ¶¶ 14, 17 (Ariz., Apr. 7, 2015)(holding that probation terms that prohibit medical marijuana use consistent with provisions of the AMMA are unenforceable and noting that state law "prohibits the use of marijuana or narcotic or prescription drugs except as 'lawfully administered by a health care provider,' a phrase that suggests that the legislature intended to distinguish between illicit use and lawful medicinal use of such drugs").

141. ARIZ. REV. STAT. ANN. § 36-2801(18) (2014).

142. *See* ARIZ. REV. STAT. ANN. § 32-1401(27)(ss) (2014) (defining "unprofessional conduct" for physicians overseen by the Arizona Medical Board).

143. *Id.*

144. Interview with Karen O'Keefe, *supra* note 83

disambiguation between Arizona's different driving under the influence statutes, the goals of the AMMA and the intentions of those who framed and voted for it are better served by interpreting its provisions to protect qualifying patients who drive but are not impaired.

III. INTERPRETATIVE CHALLENGES UNDER THE AMMA AND BEYOND

Establishing statutory intent is murky business. The problem of divining voter intent is perhaps even more replete with pitfalls than the much-maligned process of establishing legislative intent. Voters are not legislators, nor are they generally attorneys or policy analysts. They do not have staff to research and explain proposed initiatives and must generally rely on the documentation and summaries provided by the Arizona Secretary of State and legislative council.[145] They are often subject to reductive and even misleading advertising campaigns supported by interest groups with which they have little to no familiarity.[146] Voters are also much more numerous than legislators, and may not intend much of anything collectively, casting the same vote with wildly different understandings of the result.

When the legislature speaks, the courts have every reason to hold them accountable for clarity of language and to limit the scope of legislation to the unambiguous text or a reasonable interpretation on the basis of established canons of construction. The Arizona legislature enacts statutes that are reviewed and discussed by multiple committees, voted on by members of the state house and state senate, debated on the floors of these bodies, and reviewed and signed by the Governor. There is thus every opportunity to iron out discrepancies and correct drafting errors or ambiguities.[147] If a court nevertheless determines it must limit a statute in a way the legislature did not intend, the next legislative session offers a prompt opportunity for clarification and correction.

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145. *See* ARIZ. REV. STAT. ANN. §§ 19-123, 19-124(B) (2014).

146. This is not to say that legislators are immune from reductive or misleading arguments by interest groups or their lobbying arms. However, legislators, unlike most of their constituents, are significantly more attuned to the perspectives and reputations of these groups because they are more familiar with the "players in the game" and with the lobbying process, warts and all.

147. *See* Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487, 490 (1998) ("I think it is certainly true that initiated enactments are, by and large, not subject to the refiner's fire that legislatively enacted bills are often required to endure.").

Voter initiatives are more problematic. One approach is to interpret voter initiatives like the AMMA so as to leave other statutes intact unless another result is abundantly clear from the text. However, this approach may often be at odds with the intent of a broad voter initiative. Voter initiatives take a considerable amount of time, effort, and financing to reach the ballot.[148] If a court interprets a statute too narrowly and voters wish to correct it, these hurdles do not disappear and may impede realization of voters' intent. Moreover, initatives limited by a court after taking effect may severely complicate an interconnected statutory framework while a new initiative is prepared and brought before the voters. Arizona voters are empowered to make decisions through initiative and referendum, both of which have been part of Arizona's lawmaking framework for its entire history as a state. Voters made their determinations even weightier in 1998 by amending the state constitution to immunize such laws against legislative and gubernatorial interference.[149]

Voter initiatives, for better or worse, represent an opportunity for voters to have their voices heard when political challenges prevent or discourage their elected representatives from taking action. The process has been with Arizona for its entire history of statehood and is afforded considerable respect and authority under the state constitution. Those responsible for putting forward voter initiatives have a responsibility to make their intentions plain and clearly draft provisions to include necessary statutory references and indicate to the furthest extent possible how they should be read in light of other existing law. However, perfection in this regard is unrealistic, and there will doubtlessly be instances where inconsistencies and ambiguities require the courts to intervene and provide definitive answers. Courts in such cases have a responsibility to allow voters to speak to the greatest extent possible.

In light of both the power and obstacles of voter initiatives, courts should give them a wide interpretive berth. This is particularly true with respect to the AMMA because Arizona voters have now weighed in multiple times on marijuana-related issues. The AMMA is a broad statute, but it is more

148. *See, e.g.*, Justin Henderson, *The Tyranny of the Minority: Is It Time to Jettison Ballot Initiatives in Arizona?*, 39 ARIZ. ST. L.J. 963, 965–74 (2007) (discussing challenges in the initiative process).

149. ARIZ. CONST. art. IV, pt. 1, § 1; Arizona Voter Protection, Proposition 105 (1998), *available at* http://www.azleg.gov/alisPDFs/council/Proposition%20105%20Requirements%20-%20November%202013.pdf; *see also* Henderson, *supra* note 148, at 963–64 (recounting historical roots and conflicts of Arizona's direct democracy provisions).

targeted and refined than Arizona's 1996 medical marijuana law.[150] In this context the refinements presented by the AMMA unequivocally reiterate voters' intent to authorize a comprehensive and workable framework for the legal use of medical marijuana in the state. Moreover, the nearly unassailable status of voter-enacted laws in Arizona stems from the state legislature blocking the 1996 measure. Voters have very clearly expressed the view that their initiatives and referenda should not be impeded or limited by the governor or the legislature. Consequently, Arizona courts should also be reticent to limit the reach and impact of voter-enacted measures.

This justifies a broad reading of the AMMA's provisions as they intersect with other state laws. The plain text of the AMMA remains the best evidence of its intent, but where the sometimes-unpolished nature of the voter initiative process results in ambiguity, courts should read the AMMA's protections in the context of the law's background and spirit. As a whole, the AMMA unambiguously stands for allowing qualifying individuals in Arizona to use marijuana for medical purposes without fear of prosecution or other penalty so long as they abide by established restrictions. The sweeping language of the AMMA and its accompanying voter materials and evidence of the intent of the authors and their affiliate organizations all support a broad interpretation of the AMMA's provisions.

At least one key principle limits the application of this broad approach to voter-enacted laws in Arizona. Where such laws may offend constitutional principles and protections, courts have the authority and obligation to strike them down in whole or in part. For example, in 2014 an Arizona District Court struck down a provision of Arizona's constitution limiting marriage to heterosexual couples (the product of a 2008 voter referendum)[151] because it violated the equal protection rights of same-sex couples under the federal constitution.[152] Arizona voters, like their legislators, are capable of passing unconstitutional laws. In such instances, the courts must curtail them. Where constitutional protections are not implicated, however, Arizona voters have the right and the authority to enact any laws they see fit, irrespective of whether such laws may be unwise or challenging to

150. *See* Moberly & Hartsig, *supra* note 12, at 430–37 (discussing both initiatives and outlining limitations in the AMMA that were legally problematic in Arizona's earlier 1996 initiative).

151. S. Con. Res. 1042, 48th Leg., 2d Reg. Sess. (Ariz. 2008), *available at* http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/48leg/2r/bills/scr1042h.htm&Session_ID=86.

152. Connolly v. Jeanes, No. 2:14-CV-00024-JWS, 2014 WL 5320642, at *1 n.1 (D. Ariz. Oct. 16, 2014) (relying on Latta v. Otter, 771 F.3d 456 (9th Cir. 2014)).

implement or may in some respect undermine other statutory priorities. Where provisions of valid voter-enacted laws conflict with other state laws, the latter should yield. The AMMA threatens no constitutional liberties and so deserves a broad interpretation so as to fulfill the purpose of those that voted to enact it.

CONCLUSION

The AMMA dramatically changed Arizona's legal approach to marijuana, at least as applied to medical use. Additional changes to other prohibitions have already been proposed and may reach the Arizona ballot as soon as 2016. For current and potential future voter-enacted measures in this policy area, courts will adopt either a broad or narrow view of their intent. The narrow view, represented by existing Arizona Court of Appeals rulings on driving under the influence, unduly restricts the impact of voter initiatives. The broader approach, represented by the *Welton* decision regarding use of marijuana extracts, better reflects a respect for the will of the voters by allowing their actions to have maximum impact. More limited measures could have been adopted by the state legislature in the fourteen years since Arizona voters last spoke on medical marijuana in 1996. Instead, voters were moved to speak again in 2010 and adopted the AMMA. The major changes this law brought by its plain language should not be restricted through myopic emphasis on the language of other statutes. The AMMA means what it says, and it says unambiguously that its aim is to authorize medical use of marijuana consistent with the requirements and restrictions set forth in the body of the new law. To the extent any ambiguity presents in reconciling the AMMA and other Arizona laws, it should be resolved to reflect the intent of Arizona voters to craft a new legal framework with respect to medical marijuana, rather than continued application of an approach Arizona voters have now twice rejected.