



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**

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**KEENAN REED-KALIHHER v. HON. WALLACE R.  
HOGGATT (STATE OF ARIZONA, Real Party in Interest)  
CV-14-0226-PR**

**PARTIES:**

*Petitioner:* State of Arizona.

*Respondent:* Keenan Reed-Kaliher.

*Amicus Curiae:* Arizona Attorneys for Criminal Justice.

**FACTS:**

Keenan Reed-Kaliher pled guilty to possession of marijuana for sale and attempted possession of a narcotic drug for sale. The parties agreed to and the trial judge accepted a 1.5 year sentence for the sale offense followed by probation for three years for the attempt offense. Reed-Kaliher began serving his probation after his release from prison in June 2011. Among the Uniform Conditions of Supervised Probation that he signed were that he “[o]bey all laws” and “[n]ot possess or use illegal drugs, toxic vapors, or controlled substances, or use or possess and prescription drugs without a valid prescription.”

After Reed-Kaliher began serving his probation, he obtained a “registry identification card” from the Arizona Department of Health Services to allow him to use medical marijuana under the Arizona Medical Marijuana Act (the AMMA). In August 2013, his probation officer imposed an additional condition of probation that specifically provided he was not to possess or use marijuana for any reason. The probation officer claimed this provision was necessary to implement the conditions imposed by the court and was not inconsistent with them.

In December 2013, Reed-Kaliher filed a motion to modify the conditions of his probation by rescinding the blanket anti-marijuana use provision. After a hearing, the trial court rejected the request, concluding that Reed-Kaliher had agreed to accept probationary conditions imposed as part of his plea agreement, therefore, the additional condition did not violate the AMMA. It further reasoned that probationers lose many other rights provided to others because of their probationary status. Reed-Kaliher sought special action relief from the court of appeals.

The court of appeals accepted special action jurisdiction of this purely legal issue of first impression and of statewide importance. It also stated that Reed-Kaliher had no adequate remedy by appeal, as a denial of a motion to modify a term of probation is not an appealable order.

Addressing the merits of the case, a majority of the court of appeals described the history and operation of the AMMA and identified its two statutory protections: (1) a rebuttable presumption that the holder’s possession or use of marijuana is for medical purposes if it is consistent with the AMMA’s requirements, and (2) an immunity from state prosecution for

medical use of marijuana so long as the cardholder possesses only a lawful amount. *State v. Fields*, 232 Ariz. 265 ¶¶ 13-14, 304 P.3d 1088, 1092 (App. 2013). But it also recognized that the immunity provided in A.R.S. § 36-2811(B)(1) does not apply to circumstances specified in § 36-2802 – including medical use of marijuana in a correctional facility or in a public place.

The court also discussed the statutory nature of probation and a court’s power to impose conditions that do not violate fundamental rights, or bear a reasonable relationship to the purpose of probation. It found the validity of the condition imposed here turned on the interpretation of the AMMA’s immunity provision, with emphasis on giving effect to the intent of the electorate enacting it.

First, the majority examined the language of the AMMA and found it clear and unambiguous. It reasoned that: (1) Reed-Kaliher was eligible for probation on his attempted possession for sale conviction; and (2) the AMMA immunity provision states a cardholder may not be denied a right or privilege based solely on the protected use or possession of medical marijuana; thus, (3) Reed-Kaliher could not be deprived of the privilege of probation solely based on his medical use of marijuana. It viewed the “clear language of the AMMA” as a limitation on a judge’s authority to prohibit a probationer from using medical marijuana consistent with the act, and concluded “a condition of probation threatening to revoke his privilege for such use cannot be enforced lawfully and is invalid.” *Reed-Kaliher v. Hoggatt*, 235 Ariz. 361, \_\_\_ ¶ 12, 332 P.3d 587, 590 (App. 2014). In a footnote, the appellate court further said that revocation of a cardholder’s probation based on the medical use of marijuana cannot be achieved without subjecting him to arrest and a penalty, which the express language of the AMMA in A.R.S. § 36-2811(B) forbids state actors to do.

The majority disagreed with the trial judge’s conclusion that “obey all laws” as a uniform condition of supervised probation may include strict compliance with federal law governing marijuana. The federal government may choose to prosecute on that basis, but the AMMA creates a shield against state action for medical marijuana use. Then, the majority recognized that the State did not expressly argue that the AMMA is preempted by federal law when making its Supremacy Clause/oath of office argument, but it found that it was required to address preemption to rule on the State’s argument. The court set forth how state law is preempted by federal law in three instances – express preemption, field or implied preemption, and conflict preemption. *Hutto v. Francisco*, 210 Ariz. 88, 90 ¶ 7, 107 P.3d 934, 936 (App. 2005). In the case of the federal Controlled Substances Act, Congress expressly declined to say it was preempting state law or intending to occupy the field to the exclusion of state law on the same subject matter. 21 USC § 903. In a second footnote, the court recognized that the federal government has made clear it does not currently intend to occupy the field of state medical marijuana law. The court of appeals majority found no preemption occurs where the AMMA does not purport to affect federal law, or the power of federal law enforcement agencies or federal courts to enforce that law.

In addressing the remaining points raised by the State, the trial court judge, and the dissenting appellate court judge, the majority concluded:

1. Oath of office. The “ritual” of a state judge taking an oath of office does not alter the traditional jurisdictional boundaries between state and federal courts, or impose any duty on state court judges to exercise and enforce federal regulations. *See New York v. United*

*States*, 505 U.S. 144, 161 (1992).

2. Waiver of AMMA protection. Reed-Kaliher did not waive the protections of the AMMA by pleading guilty and accepting probation because he has no unilateral right to refuse probation if he finds any condition of probation imposed unacceptable; that is, no statute or judicial holding permits a probationer to elect a potentially lesser sentence of incarceration after finding the terms of his probation too onerous. And, the majority could not say Reed-Kaliher waived the AMMA protections by entering a guilty plea containing a probation component regarding drugs at the outset (even if it could be done without running afoul of the act) because (a) the AMMA did not exist at the time he entered the plea, and (b) he neither knew of his future rights, nor intentionally relinquished them. See *State v. Williams*, 128 Ariz. 415, 416, 626 P.2d 145, 146 (App. 1981).
3. Condition is reasonable. The majority observed that other conditions of probation may deprive defendants of rights enjoyed by law-abiding citizens (like rights to assembly, drink alcohol, or be free from warrantless searches), but no Arizona statute expressly prohibits the State from conditioning the privilege of probation on the waiver of those rights, like the AMMA does for the medical use of marijuana. A.R.S. § 36-2811(B). The AMMA's plain language prohibits Arizona's state trial courts from disregarding its terms, and by finding this condition of probation reasonable, the trial court abused its discretion. The majority recognized the public policy concerns behind prohibiting a probationer with a drug-filled past from using marijuana during probation, but it said the power to debate and resolve questions of public policy is exclusively a legislative one, which the people exercised through initiative and referendum when adopting the AMMA. It also noted that the State has not claimed the prohibition against a probationer "using marijuana or other drugs if convicted of a drug crime" applied to Reed-Kaliher, who was convicted of and placed on probation for an *attempted* possession for sale offense.
4. Dissent's reliance on "obey all laws" uniform condition of probation. The majority rejected the dissenting judge's position, however logical, that the trial court was simply enforcing Reed-Kaliher's plea agreement. In doing so, it recognized that a condition of probation is not enforceable if it violates Arizona's public policy as expressed most clearly in the state's constitution and laws. Probation, being purely a legislative creation, may not circumvent another statutory scheme. *United States v. Abushar*, 761 F.2d 954, 960 (3<sup>rd</sup> Cir. 1985). Thus, while a court may allow a probationer's rights or privileges to be curtailed by conditions that are deemed reasonable, it may not do so when Arizona law prohibits a particular condition.
5. Intent of AMMA. The majority disagreed with the dissent's claim that the statute expresses no clear intent to override either the Uniform Conditions of Probation, or a particular state statute requiring similar probation conditions for narcotic-drug offenders. It found the AMMA clearly announces a new public policy that forbids the state from denying a cardholder "any . . . privilege" based on the use of medical marijuana, and it contains no language suggesting that voters either silently intended to exempt probationers from the benefits of the law, or failed to consider whether to do so. Rather, the majority found the statute comprehensively contemplates and addresses potential friction points between its goals and those of law enforcement by providing exclusions for people convicted of certain felony offenses, and the statute itemizes the circumstances when medical use of marijuana is prohibited. A.R.S. § 36-2802.

The majority concluded:

In sum, the AMMA is a comprehensive scheme that allows state officials to prohibit a person from “[u]sing marijuana except as authorized under” the act. § 36-2802(E). The canon of construction *expressio unius est exclusio alterius* applies with particular force in this context, given that Arizona voters were well aware marijuana would remain criminalized except as specifically provided in the AMMA. Against this backdrop, it is therefore clear that neither state prosecutors nor judges may read exceptions into the law where none exist, thereby contravening the plain terms of the AMMA and usurping the legislative authority exercised by, and ultimately reserved for, the people.

Judge Espinosa, dissenting, disagreed that the trial court erred. He wrote: “[B]ecause Reed-Kaliher stipulated to his probation, which included terms necessarily prohibiting marijuana use, there is no need to address, on these facts, either the question of whether the AMMA prevents a court from imposing a bar on medical marijuana use as a condition of probation, or the issue of federal preemption of state drug laws.” He does not believe a specific waiver is required, or that public policy favoring medical marijuana use conflicts with a probation condition prohibiting its use. Rather, the protections of the AMMA may be waived by plea agreement. He views the AMMA’s silence on the exact treatment of probationers as evidence the voters did not intend to prevent them from agreeing not to use medical marijuana during probation. He would find a reasonable nexus between the condition imposed and the goal to be achieved, forego questions of statutory interpretation, affirm the trial judge’s legitimate and sensible restriction of Reed-Kaliher’s medical marijuana use, and deny relief on the special action petition.

**ISSUE:** “Whether a Superior Court Judge may preclude a probationer from using marijuana, where that probationer has obtained a medical marijuana card permitting use under the Arizona Medical Marijuana Act, hereinafter, the AMMA.”

**DEFINITIONS:** The AMMA provides in relevant part at A.R.S. § 36-2811:

A. There is a presumption that a qualifying patient . . . is engaged in the medical use of marijuana pursuant to this chapter [if he possesses] a registry identification card [and if he possesses] an amount of marijuana that does not exceed the allowable amount of marijuana.

. . .

B. A registered qualifying patient . . . is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege . . . :

1. For the registered qualifying patient's medical use of marijuana pursuant to this chapter, if the registered qualifying patient does not possess more than the allowable amount of marijuana.

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