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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-011290 01/17/2012

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
D. Harding
Deputy

COMPASSION FIRST L L C, et al. J TYRRELL TABER

v.

STATE OF ARIZONA, et al. KEVIN D RAY

MINUTE ENTRY

The Court has had under advisement Defendants' Motion to Decline Non-Statutory Special Action Jurisdiction, Motion to Dismiss, or in the Alternative, Motion to Stay,[1] and Plaintiffs' Motion for Summary Judgment. Having read and considered the briefing and having heard oral argument, the Court issues the following rulings.

I.

In November 2010, Arizona voters passed Proposition 203, which enacted the Arizona Medical Marijuana Act (the "Act" or "AMMA"), A.R.S. § 36-2801 *et seq*. (eff. Dec. 14, 2010). DHS was charged with implementing and overseeing the Act, including the registration of nonprofit medical marijuana dispensaries ("NPMMD") and dispensary agents, qualifying patients, and designated caregivers. *Id.* DHS promulgated final regulations on April 13, 2011,[2] and was scheduled to begin accepting applications for dispensaries and dispensary agents on June 1, 2011.[3] DHS suspended that process on May 27, 2011 due to uncertainty whether state

[1] Defendants State of Arizona, Governor Janice K. Brewer, Arizona Department of Health Services ("DHS"), and DHS Director Will Humble will be referred to collectively as the "State" or "Defendants," unless the context otherwise requires.
[2] *See* A.A.C. R9-17-101 *et seq.* (the "regulations").
[3] On April 14, 2011, DHS began accepting applications from persons seeking to be registered as qualifying patients and designated caregivers. That registration process continues.

employees would be exposed to criminal liability under the federal Controlled Substances Act ("CSA") for doing their jobs in complying with the Act.[4] Also on May 27, 2011, the State filed an action in U.S. District Court seeking a declaration of its rights and duties regarding the validity, enforcement, and implementation of the Act and a determination whether compliance and participation in the Act provides a safe harbor from prosecution under the CSA.[5]

Plaintiffs here are aspiring applicants for NPMMD certificates who allege they will be excluded from the selection process based upon specific regulations (the "challenged regulations").[6] Plaintiffs filed this 11-count Complaint for Special Action, essentially asserting that the State is not performing its constitutional duties to enforce the laws, i.e., the AMMA, and that it has acted in excess of its legal authority by promulgating *ultra vires* and unconstitutional regulations. Plaintiffs ask this Court to (i) declare the challenged regulations unconstitutional and/or unlawful under either the U.S. or Arizona Constitutions and enjoin the State from applying them, (ii) order DHS to promulgate regulations that conform to Proposition 203 and the U.S. and Arizona Constitutions, and (iii) direct Defendants to immediately implement the lawful provisions of the Act.

II.

A.

Plaintiffs allege this is a statutory special action pursuant to A.R.S. § 36-2818(A). *See* Ariz. R. P. Spec. Act 1(b).[7] That section provides:

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[4] *See* 21 U.S.C. § 801 *et seq.*

[5] *State of Ariz. v. U.S. of Am.*, Case No. 2:11-cv-01072-SRB (D. Ariz. May 27, 2011).

[6] Plaintiffs challenge the following regulations:

(a) R9-17-322(A)(2): requiring applicant to have been an Arizona resident for three years;
(b) R9-17-322(A)(3): requiring application to comply with state law;
(c) R9-17-302(A)(4): setting criteria that applicant have never filed personal or corporate bankruptcy;
(d) R9-17-302(A)(1): setting criteria that applicant have submitted Arizona personal income tax returns for previous three years;
(e) R9-17-302(A)(2): setting criteria that applicant is current on court-ordered child support; is not delinquent in paying taxes, interest or penalties to the government; does not have an unpaid judgment to the government; and is not in default on a government-issued student loan;
(f) R9-17-302(A)(3): setting criteria that individual with 20% or more interest in dispensary be the applicant or principal officer or board member of dispensary;
(g) R9-17-304(D)(7): requiring documentation of ownership of address of dispensary or permission from owner for applicant to operate dispensary at the address.

(Complaint for Special Action at ¶ 57.) Plaintiffs also challenge R9-17-302(A)(2) on the basis that it excludes "New Residents" from operating a dispensary. (*Id*. at (g).) However, this regulation does not so provide, and the "New Resident" exclusion is covered by other challenges.

[7] This Court must accept jurisdiction of a statutory special action. *Cf. Foster v. Anable*, 199 Ariz. 489, 491, 19 P.3d 630, 632 (App. 2001). Where a special action is authorized by statute, the issues that may be raised are not limited

> If the department fails to adopt regulations to implement this chapter within one hundred twenty days of the effective date of this chapter, any citizen may commence a mandamus action in superior court to compel the department to perform the actions mandated under this chapter.

The State argues that a statutory special action is not available because DHS *did* "adopt regulations to implement this chapter" within 120 days of its effective date. Plaintiffs argue a construction of A.R.S. § 36-2818(A) that contemplates actual implementation "of this chapter" within the 120 days, i.e., registering and certifying NPMMDs under A.R.S. § 36-2804.

In construing a statute adopted by initiative, the Court's primary objective "is to give effect to the intent of the electorate." *Fogliano v. Brain ex rel. Cnty. of Maricopa*, 2011 WL 6056999, at *5 (Ariz. App. Dec. 6, 2011) (quotation and citation omitted). The Court does so by applying the language of the initiative where it is clear and unambiguous, and therefore "subject to only one reasonable meaning." *Id*.; *see also Janson on Behalf of Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991); *Kent K. v. Bobby M.*, 210 Ariz. 279, 283, 110 P.3d 1013, 1017 (2005). The Court must avoid a construction that would render the statute meaningless or of no effect, giving consideration "to both the evil to be remedied and the result which the Legislature desired to reach." *State v. Clifton Lodge No. 1174, Benevolent & Protective Order of Elks of U.S.*, 20 Ariz. App. 512, 513, 514 P.2d 265, 266 (1973). The Court is required to read the statute "as a whole and give meaningful operation to all of its provisions and ensure an interpretation that does not render meaningless other parts of the statute." *Hahn v. Indus. Comm'n of Ariz.*, 227 Ariz. 72, 74, 252 P.3d 1036, 1038 (App. 2011) (quotation and citation omitted).

The State's position that it *has* "adopt[ed] regulations to implement this chapter" within the 120 days gives no effect to and would render meaningless the remedy "to compel the department to perform the actions mandated under this chapter." The Court agrees with Plaintiffs that A.R.S. § 36-2818(A) as a whole references DHS' duties under the entire Act, not merely those under its rulemaking provision.[8] A contrary interpretation would be disingenuous. The voters passed Proposition 203 informed of marijuana's therapeutic value in treating a wide array of debilitating medical conditions. Prop. 203, at § 2(B). The voters intended to protect patients with those debilitating medical conditions (and their physicians and providers) "from arrest and prosecution, criminal and other penalties and property forfeiture if such patients engage in the medical use of marijuana." *Id*. at § 2(G). The voters contemplated this be done

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by the rules. Rule 1(b); *see Primary Consultants, L.L.C. v. Maricopa Cnty. Recorder*, 210 Ariz. 393, 395 n.1, 111 P.3d 435, 437 n.1 (App. 2005).

[8] *See* A.R.S. § 36-2803 (authorizing DHS to adopt rules).

within 120 days of the effective date of the Act; it would be a Pyrrhic victory for the voters were the Court to conclude otherwise.

The Court finds that it has mandatory jurisdiction of this statutory special action pursuant to A.R.S. § 36-2818(A).[9] Therefore, the Court also finds that the State's Motion to Dismiss DHS on the basis it is a nonjural entity is without merit, the Legislature having authorized such action by that section. *Cf. Braillard v. Maricopa Cnty.*, 224 Ariz. 481, 487, 232 P.3d 1263, 1269 (App. 2010); *Schwartz v. Super. Ct.*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996) (powers of state administrative agency limited to those granted by statute).

B.

The State argues Plaintiffs lack standing because they cannot state with certainty that they will be negatively impacted or harmed in the selection process. Plaintiffs argue to the contrary. Although the Arizona Constitution does not require that a plaintiff allege an actual case or controversy, as a matter of sound jurisprudence a plaintiff must establish standing to sue. *See, e.g., Bennett v. Napolitano*, 206 Ariz. 520, 525, 81 P.3d 311, 316 (2003). In addressing the question of standing, the Court is "confronted only with questions of prudential or judicial restraint" imposed to insure that the Court does not issue an advisory opinion, that the case is not moot, and that the issues will be fully developed by true adversaries. *Armory Park Neighborhood Ass'n v. Episcopal Comm. Serv. in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). "[T]hese considerations require at a minimum that each party possess an interest in the outcome." *Id.*

The Court need not belabor analysis of this issue. The State admits that two Plaintiffs are disqualified from consideration by R9-17-322(A)(2), which requires an applicant to have been an Arizona resident for three years. It is a theoretical but unlikely possibility that other Plaintiffs might be randomly selected under R9-17-302 to receive a registration certificate. *Cf. Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (plaintiff challenging statute must demonstrate realistic danger of sustaining direct injury as result of statute's operation or enforcement). The Court finds that Plaintiffs have a legitimate interest in an actual controversy involving implementation of the AMMA and validity and/or constitutionality of the regulations promulgated pursuant thereto.[10]

[9] Alternatively, Plaintiffs argue that DHS in fact has not adopted regulations because the challenged regulations are unconstitutional, and, therefore, invalid. This argument puts the cart before the horse. Unconstitutionality is a legal determination made by a Court having jurisdiction over the question; the asking of the question, however, is not determinative of a Court's jurisdiction.

[10] Defendants also argue Plaintiffs' claims are not ripe because no one, including these Plaintiffs, has been issued or denied a dispensary certificate. Ripeness is analogous to standing because it "prevents a court from rendering a

III.

Under the Arizona Constitution, "the ultimate power to legislate is reserved to the people and is at least as great as the power of the legislature." *Salt River Pima-Maricopa Indian Comty. v. Hull*, 190 Ariz. 97, 103, 945 P.2d 818, 824 (1997); Ariz. Const. Art. 4, Pt. 1, § 1. Thus, Plaintiffs argue, the State is constitutionally obligated to implement the AMMA. *See Rios v. Symington*, 172 Ariz. 3, 12, 833 P.2d 20, 29 (1992); *Salt River Pima-Maricopa Indian Comty., id.* at 101-04, 945 P.2d at 822-25. The State does not necessarily disagree, arguing it did not refuse to implement the Act but rather suspended the dispensary and dispensary agent application process to seek relief from the District Court regarding prosecution of state employees and forfeiture of state assets. *See* A.R.S. § 41-101(A); *Ariz. State Land Dep't v. McFate*, 87 Ariz. 139, 148, 348 P.2d 912, 918 (1960).

The Court is not unmindful of the State's dilemma; it is caught between the proverbial rock and hard place, between the AMMA and the CSA. In connection with this dilemma, the State requests this Court stay this action pending resolution of the District Court action.[11] The Court declines to do so, disagreeing that both actions raise the same or similar questions of law. The Court need not determine issues of preemption and federal criminal liability in order to grant Plaintiffs the relief they request. Nor does the Court need reach the issue raised by Plaintiffs whether the State has standing or is otherwise authorized to seek relief in District Court vis-à-vis the AMMA. The sole issue before the Court is whether the State has discretion to put implementation of the AMMA on hold while it pursues the District Court action. Defendants cite no authority for this proposition, and the Court has found none. As discussed above, the voters intended the AMMA be implemented within 120 days. This has not been done.

IV.

Plaintiffs argue DHS exceeded its statutory authority in promulgating the challenged regulations. The State contends the challenged regulations were authorized pursuant to A.R.S. §§ 36-2803(A)(4)[12] and 36-2804(C),[13] specifically via the interplay of the Act's (i) grant of

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premature judgment or opinion on a situation that may never occur." *Town of Gilbert v. Maricopa Cnty.*, 213 Ariz. 241, 244, 141 P.3d 416, 419 (App. 2006) (quotation and citation omitted). DHS has adopted the challenged regulations; it does not deny it intends to consider applications according to these regulations. A.R.S. § 36-2803(A)(4)(a). The Court finds that this matter is ripe for adjudication. *See Town of Gilbert, id.* at 244-45, 141 P.3d at 419-20.

[11] The Court takes judicial notice of the District Court's January 4, 2012 Order dismissing that action.

[12] A.R.S. § 36-2803(A) provides:

> Not later than one hundred twenty days after the effective date of this chapter, the department shall adopt rules:
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> …

authority to DHS to implement rules to protect against "diversion and theft" and (ii) limitation on the number of NPMMD certificates DHS can issue. Plaintiffs contend the Act mandates issuance of a NPMMD certificate if certain statutory criteria are met, and grants no authority to DHS to establish any other conditions or qualifications thereto. *See generally* A.R.S. §§ 36-2804,[14] -2806, -2806.02 (setting forth statutory requirements for NPMMDs).

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4. Governing nonprofit medical marijuana dispensaries, *for the purpose of protecting against diversion and theft* without imposing an undue burden on nonprofit medical marijuana dispensaries or compromising the confidentiality of cardholders, including:

(a) The manner in which the department shall consider applications for and renewals of registration certificates.

(b) Minimum oversight requirements for nonprofit medical marijuana dispensaries.

(c) Minimum recordkeeping requirements for nonprofit medical marijuana dispensaries.

(d) Minimum security requirements for nonprofit medical marijuana dispensaries, including requirements for protection of each registered nonprofit medical marijuana dispensary location by a fully operational security alarm system.

(e) Procedures for suspending or revoking the registration certificate of nonprofit medical marijuana dispensaries that violate the provisions of this chapter or the rules adopted pursuant to this section.

(Emphasis added.)

[13] A.R.S. § 36-2804(C) provides:

The department *may not issue more than one nonprofit medical marijuana dispensary registration certificate for every ten pharmacies* that have registered under § 32-1929, have obtained a pharmacy permit from the Arizona board of pharmacy and operate within the state except that the department may issue nonprofit medical marijuana dispensary registration certificates in excess of this limit if necessary to ensure that the department issues at least one nonprofit medical marijuana dispensary registration certificate in each county in which an application has been approved.

(Emphasis added.) Based on the number of pharmacies in the state, DHS may issue 124 dispensary certificates. (Response at 7 n.4.)

[14] A.R.S. § 36-2804 provides, in relevant part:

A. Nonprofit medical marijuana dispensaries shall register with the department.

B. Not later than ninety days after receiving an application for a nonprofit medical marijuana dispensary, the department *shall register* the nonprofit medical marijuana dispensary and issue a registration certificate and a random 20-digit alphanumeric identification number *if*:

1. The prospective nonprofit medical marijuana dispensary has submitted the following:

(a) The application fee.

(b) An application, including:

(i) The legal name of the nonprofit medical marijuana dispensary.

(ii) The physical address of the nonprofit medical marijuana dispensary and the physical address of one additional location, if any, where marijuana will be cultivated, neither of which may be within five hundred feet of a public or private school existing before the date of the nonprofit medical marijuana dispensary application.

(iii) The name, address and date of birth of each principal officer and board member of the nonprofit medical marijuana dispensary.

(iv) The name, address and date of birth of each nonprofit medical marijuana dispensary agent.

(c) Operating procedures consistent with department rules for oversight of the nonprofit medical marijuana dispensary, including procedures to ensure accurate record-keeping and adequate security

"When authorized to do so by the legislature, administrative bodies may make supplementary rules for the complete operation and enforcement of legislation." *Boyce v. City of Scottsdale*, 157 Ariz. 265, 268, 756 P.2d 934, 937 (App. 1988). Although the Court gives weight to an agency's interpretation of statute, such interpretation is invalid if it is not consistent with the enabling legislation. *Sharpe v. Ariz. Health Care Cost Containment Sys.*, 220 Ariz. 488, 494, 207 P.3d 741, 747 (App. 2009). In determining whether a regulation exceeds a statutory grant of authority, the focus is on the language of the statute. *Id.* at 495, 207 P.3d at 748. The scope of an agency's power to promulgate regulations "is measured by the statute and may not be expanded by agency fiat." *Id.* (quotation and citation omitted).

The Act clearly specifies those persons who may not be considered for registration and certification (i.e., persons under 21, felons, persons whose certificates have been previously revoked). The Court finds the following challenged regulations specify *other* persons who may not be considered:

> R9-17-322(A)(2): requiring applicant to have been an Arizona resident for three years;
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> R9-17-302(A)(4): setting criteria that applicant have never filed personal or corporate bankruptcy;
>
> R9-17-302(A)(1): setting criteria that applicant have submitted Arizona personal income tax returns for previous three years;
>
> R9-17-302(A)(2): setting criteria that applicant is current on court-ordered child support; is not delinquent in paying taxes, interest or penalties to the government; does not have an unpaid judgment to the government; and is not in default on a government-issued student loan.

As such, these challenged regulations are far more onerous and substantively alter the requirements of the Act. *Cf. In re Pima Cnty. Mental Health No. MH-2010-0047*, 228 Ariz. 94,

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measures.

(d) If the city, town or county in which the nonprofit medical marijuana dispensary would be located has enacted zoning restrictions, a sworn statement certifying that the registered nonprofit medical marijuana dispensary is in compliance with the restrictions.

2. None of the principal officers or board members has been convicted of an excluded felony offense.

3. None of the principal officers or board members has served as a principal officer or board member for a registered nonprofit medical marijuana dispensary that has had its registration certificate revoked.

4. None of the principal officers or board members is under twenty-one years of age.

(Emphasis added.)

99, 263 P.3d 643, 648 (App. 2011). DHS cannot bootstrap substantive regulations of who may apply onto its mandate that it consider such applications in a manner as to protect against diversion and theft. Nor is the Court persuaded that the challenged regulations are authorized by virtue of the 1:10 ratio on NPMMDs to licensed pharmacies. There are other ways of selecting the "winning" applicant, including random drawing. Indeed, current DHS regulations contemplate use of a random drawing of the "winners" among equal applicants for a particular NPMMD certificate. *See* R9-17-302. The Court finds that DHS exceeded its statutory authority in promulgating these challenged regulations, and therefore they are invalid. *See Sharpe,* 220 Ariz. at 499, 207 P.3d at 752. Accordingly, the Court need not reach the constitutional challenges raised by Plaintiffs.

However, the Court agrees with the State that the following challenged regulations are supplementary rules to protect against diversion and theft, and thus fall within DHS' mandate under § 36-2803(4):

> R9-17-302(A)(3): setting criteria that individual with 20% or more interest in dispensary be the applicant or principal officer or board member of dispensary;
>
> R9-17-304(D)(7): requiring documentation of ownership of address of dispensary or permission from owner for applicant to operate dispensary at the address.
>
> R9-17-322(A)(3): requiring application to comply with state law.

These are not selection criteria to determine whether an applicant will be given a registration certificate; rather they are regulations "for the complete operation and enforcement of legislation." *Boyce,* 157 Ariz. at 268, 756 P.2d at 937. The Court finds these challenged regulations to be valid. To the extent Plaintiffs argue these challenged regulations are unconstitutionally vague, the Court simply disagrees. A law is not void for vagueness unless it fails to provide persons of ordinary intelligence reasonable notice or sufficiently restrict the discretion of those who apply it. *See, e.g., State v. Anderson,* 199 Ariz. 187, 191, 16 P.3d 214, 218 (App. 2000). A law need not be drafted with absolute precision or define all its terms. *Curtis v. Richardson,* 212 Ariz. 308, 314, 131 P.3d 480, 486 (App. 2006). These challenged regulations provide clear notice how they will be used in issuing a NPMMD certificate and how DHS will proceed with regard to the process.

Accordingly,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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IT IS ORDERED denying Defendants' Motion to Decline Non-Statutory Special Action Jurisdiction, Motion to Dismiss or in the Alternative, Motion to Stay.

IT IS FURTHER ORDERED granting Plaintiffs' Motion for Summary Judgment.

IT IS ORDERED declaring the following regulations to be *ultra vires* and invalid: R9-17-322(A)(2) (requiring applicant to have been an Arizona resident for three years); R9-17-302(A)(4) (setting criteria that applicant have never filed personal or corporate bankruptcy); R9-17-302(A)(1) (setting criteria that applicant has submitted Arizona personal income tax returns for previous three years); R9-17-302(A)(2) (setting criteria that applicant is current on court-ordered child support; is not delinquent in paying taxes, interest or penalties to the government; does not have an unpaid judgment to the government; and is not in default on a government-issued student loan).

IT IS FURTHER ORDERED directing Defendants to implement the lawful provisions of the AMMA and, if necessary, to promulgate regulations that conform thereto.

Dated: January 17, 2012

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT

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