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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-011447 11/12/2013

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
D. Harding
Deputy

KEITH FLOYD, et al. WILLIAM MICHAEL WALZ

v.

STATE OF ARIZONA, et al. GREGORY W FALLS

UNDER ADVISEMENT RULING

The Court has reviewed Defendants' Motion to Dismiss, filed September 5, 2013; Plaintiffs' Opposition, filed September 25, 2013; and Defendants' Reply, filed October 4, 2013. Having also considered counsels' oral argument and the applicable law, the Court concludes that:

1) Plaintiffs' action is not barred by unused administrative remedies;
2) Plaintiffs have standing; and
3) A.R.S. § 36-2804.02(A)(3)(f) (which precludes medical marijuana cultivation within 25-miles of a licensed dispensary) does not violate Article 27, Section 2 of the Arizona Constitution (referred to as the "Amendment").

Defendants' Motion is granted, and the Complaint is dismissed. Plaintiffs shall have leave to file an Amended Complaint.

Jurisdiction and Standing

Defendants assert two procedural issues. Neither bars this action. First, Defendants

contend that Plaintiffs failed to exhaust their administrative remedies. As a result, this Court is precluded from reviewing the decisions of the Department of Health Services ("DHS") denying Plaintiffs a permit to grow their own medical marijuana.

Plaintiffs are not appealing DHS' decision. They acknowledge that DHS applied the 25-mile provision in the AMMA as written. Rather, Plaintiffs seek equitable relief in the form of a declaratory judgment that the Amendment is unconstitutional and an order enjoining its implementation. The Court has original jurisdiction over these claims pursuant to Article 6, Section 14, of the Arizona Constitution and A.R.S. § 12-123.

Second, Defendants contend that Plaintiffs lack standing because they do not allege a sufficiently personal harm. A "generalized harm" that is "shared alike by all or a large class of citizens generally is not sufficient to confer standing." *See Sears v. Hull,* 192 Ariz. 65, 69, 961 P.2d 1013, 1017 (1998).

Granted, there are no doubt others who share Plaintiffs' situation – individuals who qualify to receive, but not grow, medical marijuana based on where they live. However, this group is a small fraction of the State's population. As Defendants' Reply states, this group accounts for less than one percent of Arizonans who reside within twenty-five miles of an operating dispensary. Plaintiffs' alleged injury is more than a "generalized harm" to a "large class of citizens" and is sufficient to confer standing.

The Claim

Jurisdiction and standing alone, however, cannot sustain the Complaint. Plaintiffs must allege a viable constitutional claim. Plaintiffs contend that the AMMA provision that limits marijuana cultivation rights to those who live more than twenty-five miles from a dispensary is an unconstitutional limitation on their health care rights in violation of the Amendment. However, a plain reading of the Amendment establishes that it does not apply to the AMMA.

The Court must start with the well-established law that courts presume that statutes are constitutional. Courts must also construe statutes, if possible, to give them a constitutional meaning. *State Compensation Fund v. Symington,* 174 Ariz. 188, 193, 949 P.2d 273, 278 (1993). "[N]o court should strike down legislation if there can be found a legal basis for its validity." *Hernandez v. Frohmiller,* 68 Ariz. 242, 249, 204 P.2d 854, 859 (1949).

The Amendment, paragraph A.1, states:

> A. To preserve the freedom of Arizonans to provide for their health care: 1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any **health care system.** (Emphasis added.)

Paragraph B states:

> B. Subject to reasonable and necessary rules that do not substantially limit a person's options, **the purchase or sale of health insurance in private health care system** shall not be prohibited by law or rule. (Emphasis added.)

The Amendment defines "health care system" as:

> any public or private entity whose function or purpose is the **management of, process or, enrollment of individuals for** or payment for, in full or in part, **health care services or health care data or health care information** for its participants. (Emphasis added.)

Dispensaries are not a "health care system" as defined in the Amendment. They sell medical marijuana. They do not manage, process, enroll or pay for health care services, data, or information for qualifying patients. Also, reading paragraph A in context with paragraph B, it is clear that the Amendment applies to a law or rule that compels someone to participate in a mandated health insurance system, not to businesses that sell controlled substances. If a dispensary is unconstitutional because it violates the Amendment, then so are CVS, Walgreens, and any pharmacy that fills prescriptions for controlled substances.

In addition, the AMMA is not a compulsory program. It does not force any person, employer, or health care provider to join. Participation is voluntary. Qualifying patients are free to decide whether they wish to apply for and obtain a registry identification card. The AMMA protects people from criminal prosecution if they choose to use medical marijuana. It does not compel people to use medical marijuana or even to obtain a qualifying registry card.

For these reasons, the Court concludes that the 25-mile provision in the AMMA does not violate the Amendment because the Amendment does not apply to the AMMA program.

Equal Protection Argument

In their Response, Plaintiffs assert an additional equal protection argument. They argue that the twenty-five mile limitation creates two classes of participants and treats Plaintiffs differently from "similarly situated citizens who reside outside a twenty-five mile zone." Response, pp. 5-6. They state that this issue was "clearly pled in the complaint." Response, p. 6. Defendants disagree but also argue that the equal protection argument is futile.

Plaintiffs' 18-page Complaint does not allege a claim based on equal protection guarantees. Differential treatment is an equal protection issue, not a question of the applicability of the Amendment to the AMMA. The 25-mile provision does appear to create two groups of AMMA participants based on residence. While this rule may be well-founded, the Court will not rule in a vacuum as to its validity. The claim must first be pled so that the Court can fully consider it as well as any challenge Defendants may bring.

For these reasons,

IT IS HEREBY ORDERED dismissing Plaintiffs' Complaint pursuant to Rules 12(b)(1) and (1) without prejudice.

IT IS FURTHER ORDERED that Plaintiffs may file an amended complaint **no later than December 16, 2013.**

IT IS FURTHER ORDERED vacating the evidentiary hearing set for November 14, 2013.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.