IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

YOLANDA DANIELS, et al., *Plaintiffs/Appellants*,

v.

ARIZONA DEPARTMENT OF HEALTH SERVICES, et al.,
Defendants/Appellees.

No. 1 CA-CV 17-0466
FILED 10-23-2018

Appeal from the Superior Court in Maricopa County
No. 2016-016708
The Honorable Jo Lynn Gentry, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Kent E. Cattani joined.

M c M U R D I E, Judge:

¶1 Yolanda Daniels and Lisa Becker (collectively, "the Cardholders") appeal from the superior court judgment dismissing their class action lawsuit against the Arizona Department of Health Services ("the Department"), its director, Cara Christ, and Governor Doug Ducey (collectively, "the Defendants"). For the following reasons, we affirm the superior court's judgment dismissing the Cardholders' action against the Defendants.

FACTS[1] AND PROCEDURAL BACKGROUND

¶2 In 2010, Arizona voters enacted the Arizona Medical Marijuana Act ("the Act"), Arizona Revised Statutes ("A.R.S.") sections 36-2801 to -2819. The Act provides that qualifying patients or their designated caregivers may obtain a registry identification card from the Department, and thereby acquire immunity from prosecution for the acquisition, possession, and use of medical marijuana pursuant to certain statutory conditions. A.R.S. §§ 36-2801(3), (13), -2804.02, -2811(B); *State v. Gear*, 239 Ariz. 343, 344, ¶ 2 (2016).

¶3 To comply with the constitutional mandate that voter initiatives "provide for an increased source of revenues sufficient to cover the entire immediate and future costs of the proposal," Ariz. Const. art. 9, § 23(A), the Act required the Department to establish and enforce an application and renewal fee scheme for registry identification cards.

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[1] Because this appeal arises from a grant of a motion to dismiss for failure to state a claim, we "assume as true the facts alleged in the complaint and will not affirm the dismissal unless satisfied as a matter of law that [the Cardholders] would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fidelity Sec. Life Ins. v. Ariz. Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4 (1998).

Specifically, the Act provides that the total amount of all fees under this scheme:

> shall generate revenues sufficient to implement and administer this chapter, except that fee revenue may be offset or supplemented by private donations.

A.R.S. § 36-2803(A)(5)(a). Pursuant to this provision, the Department promulgated rules setting the initial and annual renewal card fee for qualifying patients at $150, and for designated caregivers at $200. Ariz. Admin. Code ("A.A.C.") R9-17-102(A)(5)–(6). Qualifying patients may be entitled to a reduced fee of $75 if they are enrolled in the United States Department of Agriculture's Supplemental Nutrition Assistance Program. A.A.C. R9-17-102(B).

¶4 On November 4, 2016, the Cardholders filed a class action complaint against the Defendants arguing the registry identification card fees set by the Department were unlawfully excessive. In their complaint, the Cardholders alleged the $150 and $200 fees generated revenues that far exceeded the amount necessary to administer the Act's programs, created an unnecessary and wasteful fund surplus, and the implemented fee scheme was designed to "further restrict access to [medical marijuana]." The Cardholders sought two forms of relief from the court: (1) non-statutory and statutory mandamus relief, under A.R.S. §§ 12-2021 and 36-2818(A) respectively, to compel the Defendants to only charge patients and caregivers the fees necessary to administer the Act's programs; and (2) a declaratory judgment stating that the Defendants "have violated the [Act] and [the Cardholders'] rights thereunder."[2]

¶5 The Defendants moved to dismiss the Cardholders' action. The Defendants argued the Cardholders had failed to demonstrate that they were "without another plain, adequate and speedy remedy at law" as required by A.R.S. § 12-2021 for a non-statutory mandamus action, and that the plain language of A.R.S. § 36-2818(A) did not authorize the Cardholders' claim for statutory mandamus relief. The Defendants also

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[2] In their complaint, the Cardholders also requested damages, including a refund of all excess funds collected under the fee scheme since the Act's inception. Because the Cardholders have abandoned this request on appeal, we decline to address it. *See Vortex Corp. v. Denkewicz*, 235 Ariz. 551, 556, ¶ 16 (App. 2014) (court will not address arguments raised in the superior court but not argued in the opening brief).

argued the alleged excessiveness of the registry identification card fees was a nonjusticiable political question.

¶6 The court agreed with the Defendants and dismissed the Cardholders' action. The court found the Cardholders had "offered no argument for a non-statutory claim for mandamus relief in their response to [the Defendants'] motion to dismiss," and that even if they had, it essentially would be the same as its argument for declaratory relief. The court also found that A.R.S. § 36-2818(A) did not expressly authorize the Cardholders' action and thus did not entitle them to statutory mandamus relief. The court then found the Cardholders' claim for declaratory relief presented a nonjusticiable political question. The court concluded, "[t]he only way the Court could determine what fee meets the sufficiency requirements of the [Act] and the Constitution would be to take over the administration of the [Act] from [the Department]."

¶7 The court entered a final judgment dismissing the Cardholders' action with prejudice under Arizona Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Cardholders timely appealed from that judgment, and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

A. The Cardholders Are Not Entitled to Non-Statutory or Statutory Mandamus Relief.

¶8 Arizona recognizes two distinct types of special actions: (1) non-statutory special actions, which encompass traditional, discretionary writs of mandamus, and (2) statutory special actions, including statutory actions for mandamus relief, which are expressly authorized by statute and "are not at all discretionary." Ariz. R.P. Spec. Act. 1; *Circle K Convenience Stores, Inc. v. City of Phoenix*, 178 Ariz. 102, 103 (App. 1993). The Cardholders assert the superior court erred by denying their claim for non-statutory mandamus relief, and concluding A.R.S. § 36-2818(A) did not authorize their claim for statutory mandamus relief.

1. The Superior Court Did Not Abuse Its Discretion by Refusing to Grant the Cardholders' Request for Non-Statutory Mandamus Relief.

¶9 The Cardholders contend non-statutory mandamus relief was appropriate because, by charging fees that "generate more revenue than necessary to sufficiently implement and administer the [Act's] program," the Defendants have arbitrarily exceeded their authority under the Act. The

decision to grant or deny non-statutory mandamus relief lies within the sound discretion of the superior court, and we will not disturb its determination absent a showing of an abuse of that discretion. *White Mountain Health Ctr., Inc. v. Maricopa County*, 241 Ariz. 230, 238, ¶ 29 (App. 2016).

¶10 As the superior court noted, however, the Cardholders did not present any argument in support of their claim for mandamus relief under A.R.S. § 12-2021. Thus, the court did not abuse its discretion by denying the Cardholders' unsupported petition for mandamus relief under A.R.S. § 12-2021. *Hannosh v. Segal*, 235 Ariz. 108, 115, ¶ 25 (App. 2014) ("[W]e generally will not consider arguments that were not presented to the trial court for the first time on appeal.").

2. The Plain Language of A.R.S. § 36-2818(A) Does Not Authorize a Mandamus Action to Compel the Department to Change the Registry Identification Card Fees.

¶11 The Cardholders also argue A.R.S. § 36-2818(A) provides for a mandamus action to compel the Department to comply with A.R.S. § 36-2803(A)(5)(a) if it is not doing so. Statutory interpretation issues are reviewed *de novo*. *Glazer v. State*, 244 Ariz. 612, 614, ¶ 8 (2018).

¶12 Section 36-2818(A) reads:

> 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.

"Our primary objective in construing statutes adopted by initiative is to give effect to the intent of the electorate." *State v. Gomez*, 212 Ariz. 55, 57, ¶ 11 (2006). "The best indicator of that intent is the statute's plain language . . . and when that language is unambiguous, we apply it without resorting to secondary statutory interpretation principles." *SolarCity Corp. v. Ariz. Dep't of Revenue*, 243 Ariz. 477, 480, ¶ 8 (2018). "Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial." *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, ¶ 8 (2007) (alteration in original) (quoting *Williams v. Thude*, 188 Ariz. 257, 259 (1997)).

¶13 According to the Cardholders, the first clause of A.R.S. § 36-2818(A) only applies if the Department failed to act within 120 days,

but does not limit the ability to challenge whether the Department properly implemented the Act under the second clause. We disagree.

¶14 The statutory special action established by the second clause in A.R.S. § 36-2818(A) is expressly conditioned on the circumstances described in the first clause, namely, the Department's failure to "adopt regulations" implementing the Act "within one hundred twenty days of the effective date of [the Act]." The provision unambiguously authorizes a citizen to commence a mandamus action *only* if the Department fails to adopt regulations to implement the Act within 120 days of its effective date. Accordingly, because the Cardholders' did not challenge whether the Department had failed to adopt the regulations necessary to implement the Act within 120 days of its effective date, the superior court correctly concluded they were not entitled to the statutory mandamus relief authorized by A.R.S. § 36-2818(A).

B. Whether the Application and Renewal Fees for Registry Identification Cards Are Excessive Presents a Nonjusticiable Political Question.

¶15 The Cardholders argue the superior court erred by holding their request for declaratory relief concerning the excessiveness of the Department's fee scheme for registry identification cards presented a nonjusticiable political question. We review questions of statutory and constitutional interpretation *de novo*. *State v. Dann*, 220 Ariz. 351, 369, ¶ 96 (2009).

¶16 The political question doctrine stems from the judiciary's longstanding recognition that the fundamental principle of separation of powers requires courts to refrain from addressing questions constitutionally entrusted to other branches of government. *See Baker v. Carr*, 369 U.S. 186, 210–11 (1962); *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192, ¶ 12 (2007). Additionally, the Arizona Constitution expressly provides that the departments of our state government "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. 3; *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988) ("Nowhere in the United States is this system of structured liberty more explicitly and firmly expressed than in Arizona.").

¶17 Under the political question doctrine, "[a] controversy is nonjusticiable . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'"

Kromko, 216 Ariz. at 192, ¶ 11 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)). We address each prong of the doctrine's two-part test in turn.

1. Decisions About Setting Fee Schemes Are Constitutionally Committed to Branches of Government Other than the Judiciary.

¶18 The Cardholders contend their claim survives the first step of the political question test because no textually demonstrable constitutional commitment "of the amount of fees that [the Department] can charge exists within the [Act]." However, this argument presents a far too narrow perspective of the issue here. Instead, we must determine whether decisions about setting fee schemes such as the Act's "are constitutionally entrusted to branches of government other than the judiciary." *See Kromko*, 216 Ariz. at 193, ¶ 13. For the reasons stated below, we conclude that they are.

¶19 The people's power to craft, manage, and delegate the operation of fee schemes is derived from two sources within our constitution's text. First, by reserving to themselves the powers of initiative and referendum, "[t]he legislative power of the people [of Arizona] is as great as that of the legislature." *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987); *see also* Ariz. Const. art. 4, pt. 1, § 1; *id.* art. 22, § 14. Any textual commitment in our constitution to the legislature thus applies equally to the people.

¶20 "[T]he Legislature has all the legislative power that our Constitution does not prohibit and that the states did not surrender to the federal government." *Cave Creek United Sch. Dist. v. Ducey*, 233 Ariz. 1, 5, ¶ 13 (2013). There is no question that the ability to impose fees on government-regulated activities is firmly rooted within the legislature's, and thereby the people's, police power. And this power necessarily encompasses the discretion to impose a fee directly, or delegate its setting and enforcement to a department within the executive branch. *See, e.g.*, A.R.S. § 4-203.02(A)(1) (fee of $25 per day for special event liquor license); A.R.S. § 17-333(A) (game and fish commission shall set fees for hunting and fishing licenses).

¶21 Second, the Revenue Source Rule, Ariz. Const. art. 9, § 23(A), explicitly requires that "[a]n initiative or referendum measure that . . . establishes a fund for any specific purpose . . . must also provide for an increased source of revenues sufficient to cover the entire immediate and *future costs* of the proposal." (Emphasis added.) Under the Revenue Source Rule, the people are obligated to exercise their constitutionally reserved legislative authority to provide an independent funding source for

initiatives like the Act. *See Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533, 539, ¶¶ 16–20 (2017) (initiative to implement and enforce earned paid sick time complied with Revenue Source Rule by imposing civil fines on employers who failed to comply with the initiative).

¶22 Together, the reserved legislative authority of the people and Revenue Source Rule represent a clear textual commitment of the power to establish fee schemes like the Act's to those acting in a legislative capacity.

2. Judicially Discoverable and Manageable Standards Do Not Exist to Resolve the Cardholders' Claims.

¶23 "Although [the political question] test is generally framed in the disjunctive, the fact that the Constitution assigns a power to another branch only begins the inquiry." *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 351, ¶ 17 (2012). "[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Kromko*, 216 Ariz. at 193, ¶ 14 (quoting *Nixon*, 506 U.S. at 228–29). "In other words, the two aspects of the test are interdependent." *Brewer*, 229 Ariz. at 351, ¶ 18. We must therefore also consider whether judicially discoverable and manageable standards exist to review the Department's decisions concerning the application and renewal fees for registry identification cards.

¶24 Our supreme court's decision in *Kromko* provides us with dispositive guidance in examining this question. In *Kromko*, the court held no judicial standards existed to determine whether the tuition for state universities set by the Arizona Board of Regents violated our state constitution's requirement that tuition be "as nearly free as possible." 216 Ariz. at 193–94, ¶¶ 15–21; *see also* Ariz. Const. art. 11, § 6. Assessing what amount of tuition violated the "as nearly free as possible" requirement, the court explained, would require a court to make "an initial policy determination of a kind clearly reserved to the Legislature and the Board." *Kromko*, 216 Ariz. at 194, ¶ 20.

¶25 The same concerns raised by the court in *Kromko* are present here. Sections 36-2803(A)(5) and -2803(A)(5)(a) provide that the Department must "establish[] application and renewal fees for registry identification cards," and that "the total amount of all fees shall generate revenues *sufficient to implement and administer* [the Act]." (Emphasis added.) Neither section specifies the amount of revenues needed to fund the Act. Nor do they identify which proportions of those revenues should be

generated through the fees for registry identification cards or any other fee authorized by the Act. *See Kromko*, 216 Ariz. at 194, ¶ 17 (concluding the same with respect to a university operating budget).

¶26 Instead, the Act delegates those calculations to the Department. These calculations, in turn, require the Department to make discretionary policy decisions about the operating costs of the Act's programs, including whether to establish a fund surplus for future contingencies. Indeed, the text of the Act and the Revenue Source Rule require the Department to account for both the present and *future* costs of the Act's programs in setting fees. Such decisions lay beyond our review, and for good reason; the judiciary is ill equipped to evaluate the budgetary decisions of the other branches, including the wisdom or necessity of maintaining a contingency surplus. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *Kromko*, 216 Ariz. at 194, ¶¶ 19–21.

¶27 Moreover, the Cardholders provide no satisfactory "North Star" to guide courts in deciding whether the application and renewal fees are excessive. *Kromko*, 216 Ariz. at 194, ¶ 21. The Cardholders assert A.R.S. § 36-2803(A)(5)(a) supplies such a standard. Under their construction of the provision, a fee would be excessive whenever it generates more revenue than is necessary to implement and administer the Act's patient and caregiver programs. But the plain language of this provision and A.R.S. § 36-2803(A)(5) place no limitation on the fees for registry identification cards;[3] the Department is only required to ensure that the revenues generated by *all* fees cover both the present and future costs of the Act's programs. And even assuming that we agreed with the Cardholders' restrictive interpretation of A.R.S. § 36-2803(A)(5)(a), we neither have the means nor authority to determine what amount of revenues are necessary to adequately fund these programs, or to manage a contingency surplus. *See Kromko*, 216 Ariz. at 194, ¶ 20; *Fogliano v. Brain ex rel. County of Maricopa*, 229 Ariz. 12, 21, ¶ 26 (App. 2011) ("[I]t is not our constitutional role to assess the soundness of the State's financial prioritizations.").

¶28 In sum, we can conceive of no judicially discoverable and manageable standard by which a court could decide whether the

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[3] This is in stark contrast to other fees described in the same subsection of the statute. *See, e.g.*, A.R.S. § 36-2803(A)(5)(B) ("Nonprofit medical marijuana dispensary application fees may not exceed $5,000."); *id.* § 36-2803(A)(5)(C) ("Nonprofit medical marijuana dispensary renewal fees may not exceed $1,000.").

Department has exceeded its fee-setting authority under the Act. As the superior court aptly observed, judicial review of this question would, at best, result in improperly substituting our judgment for that of the Department regarding a matter of public policy. *See Kromko*, 216 Ariz. at 194, ¶ 21. The issue of whether the application and renewal fees for registry identification cards exceed the Act's statutory authority is thus a nonjusticiable political question.

¶29 Our conclusion that this issue is nonjusticiable is not the same as a determination that the registry identification card fees are constitutional. "[T]hat determination would be a 'a decision on the merits that reflects the *exercise* of judicial review, rather than an abstention of judicial review.'" *Fogliano*, 229 Ariz. at 21, ¶ 29 (quoting *Kromko*, 216 Ariz. at 195, ¶ 22). Nor does our decision mean that the Department is free from constitutional restraints in setting fees now or in the future. *See Kromko,* 216 Ariz. at 195, ¶ 23 ("[W]e hold only that other branches of state government are responsible for deciding whether a particular level of tuition complies with [the constitution]."). We hold only that we cannot review whether the Department has exceeded the discretion granted to it by the Act to set the fees for registry identification cards.

COSTS ON APPEAL

¶30 Because they are the prevailing party, we award the Defendants their costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶31 For the foregoing reasons, we affirm the judgment of the superior court dismissing the Cardholders' action.

AMY M. WOOD • Clerk of the Court
FILED: AA