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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

State of Arizona, et al.,

Plaintiffs,

vs.

United States of America, et al.,

Defendants.

No. 2:11-cv-01072-SRB

FEDERAL DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Federal Rule of Civil Procedure 12(b)(1), the United States of America, the U.S. Department of Justice, Attorney General Eric H. Holder, and United States Attorney Dennis K. Burke (collectively the "Federal Defendants") hereby move this Court to dismiss Plaintiffs' complaint, for the reasons set forth below.

INTRODUCTION

The Supreme Court has recognized that "[t]he best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (plurality opinion). "Federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Id.* at 504.

By asking this Court for a declaratory judgment as to whether a state law is consistent with, or preempted by, federal law, Plaintiffs' complaint flies in the face of that admonition and fails to satisfy the fundamental requirements of Article III of the Constitution. Their complaint presents no actual controversy, instead asking this Court for an advisory opinion as to a hypothetical dispute in which Plaintiffs themselves pick no side but rather resort to a purported disagreement among various fictional Defendants. Moreover, Plaintiffs lack standing to raise even that claim, because they have not alleged any actual injury to the interests of the State. The claim they present is not ripe for review, as they point to no genuine threat that any state employee will face imminent prosecution under federal law. And they ask this Court to consider whether a state law is unconstitutional – a question that the Supreme Court cautions should be answered only when necessary.

For these reasons, the Court lacks jurisdiction and this case should be dismissed.

BACKGROUND

I. The Controlled Substances Act

The federal drug laws, and the penalties associated with their violation, are contained in the Controlled Substances Act (CSA), as amended, codified at 21 U.S.C. § 801 *et seq.* Marijuana is designated as a Schedule I controlled substance, *see* 21 U.S.C. § 812(c), and, as such, Congress has found that it has a high potential for abuse and no accepted use, medical or otherwise, *see id.* § 812(b)(1). Therefore, its possession, use, cultivation, manufacture, sale, and distribution are illegal under federal law, with the singular exception of research studies approved by the FDA. *Gonzales v. Raich*, 545 U.S. 1, 14 (2005).[1] *See id.* at 14 (recognizing that, through 21 U.S.C. §§ 841(a)(1) and

[1] More recently, albeit in a different law, Congress found that "[a]ny attempt to authorize under State law an activity prohibited under . . . the Controlled Substances Act would conflict with that . . . Act," and expressed its sense that "the several States, and the citizens of such States, should reject the legalization of drugs through legislation, ballot proposition, constitutional amendment, or any other means." Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Div. D, 112 Stat. 2681, 2681-758 (1998).

844(a), Congress "devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA").[2]

II. The Arizona Medical Marijuana Act

In 2010, Arizona enacted Proposition 203, known as the Arizona Medical Marijuana Act (AMMA). Compl. ¶¶ 1-2. According to Plaintiffs, the AMMA "envisioned decriminalizing medical marijuana for use by people with certain chronic and debilitating medical conditions." *Id.* ¶ 1. As a matter of Arizona state law, the AMMA provides that "a qualified patient, designated caregiver, or nonprofit medical marijuana dispensary agent with a registry card is allowed to acquire, possess, cultivate, manufacture, use, administer, deliver, transfer, and transport marijuana." *Id.* ¶ 13.

III. Executive Branch Guidance With Respect to Medical Marijuana

Both before and after the enactment of the AMMA, the Department of Justice has issued guidance as to how the federal government will allocate its resources to enforce the CSA. Prior to the enactment of the AMMA, on October 19, 2009, then-Deputy Attorney General David Ogden issued a memorandum to certain United States Attorneys for use "solely as a guide to the exercise of investigative and prosecutorial discretion" for investigations and prosecutions in states authorizing the medical use of marijuana. *See* Ex. C to Compl. ("Ogden Memorandum") at 2. The Ogden Memorandum recognized that "the Department of Justice is committed to the enforcement of the Controlled Substances Act in all States." *Id.* at 1. In order to make "efficient and rational use of its limited investigative and prosecutorial resources," the Department acknowledged the need to focus on the prosecution of significant traffickers of illegal drugs and the

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[2] The CSA also criminalizes, *inter alia*, knowingly opening, leasing, renting, maintaining, or using property for the manufacturing, storing, or distribution of controlled substances, including marijuana, *see* 21 U.S.C. § 856(a); using any communication facility to commit felony violations of the CSA, *see id.* § 843(b); and conspiring or attempting to commit any of the crimes set forth in the CSA, including manufacturing, distributing, or possessing marijuana, *see id.* § 846.

disruption of illegal drug manufacturing and trafficking networks. *Id.* The memorandum stated that, "[a]s a general matter, pursuit of these priorities should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." *Id.* at 1-2. However, the Ogden Memorandum recognized that "no State can authorize violations of federal law," and made clear that "this memorandum does not alter in any way the Department's authority to enforce federal law." *Id.* at 2. The memorandum reserved the Department's right to pursue investigations or prosecutions "even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests." *See id.* at 3.

On May 2, 2011, Dennis K. Burke, United States Attorney for the District of Arizona, directed a letter to Will Humble, Director of the Arizona Department of Health Services. *See* Ex. B to Compl. ("Burke Letter"). The letter provides guidance, consistent with the Ogden Memorandum, as to the Department of Justice's view of the AMMA and its implementing regulatory scheme. Mr. Burke's letter reiterated the Department's view that "growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws that purport to permit such activities." *Id.* at 1. The letter acknowledged that, consistent with the Ogden Memorandum, the United States Attorney's Office would "not focus [its] limited resources on those seriously ill individuals who use marijuana as part of a medically recommended treatment regimen and are in clear and unambiguous compliance with . . . state laws." *Id.* Mr. Burke recognized, however, "that even clear and unambiguous compliance with AMMA does not render possession or distribution of marijuana lawful under federal statute."[3]

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[3] Other United States Attorneys have sent similar letters, but each focuses on a different state regulatory regime and has no bearing on Arizona or its law. Moreover, on June 29, 2011, Deputy Attorney General James M. Cole provided United States Attorneys new guidance regarding the Ogden Memorandum. While the Cole Memorandum postdates the complaint, it also indicates that "[t]he Department's view of the efficient use of

(Continued...)

LEGAL STANDARD

"[I]n all actions before a federal court, the necessary and constitutional predicate for any decision is a determination that the court has jurisdiction – that is the power – to adjudicate the dispute." *Toumajian v. Frailey*, 135 F.3d 648, 652 (9th Cir. 1998). "Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citation omitted). Although Plaintiffs have brought this action against Attorney General Holder and United States Attorney Burke, in addition to the United States and the Department of Justice, "any lawsuit against . . . an officer of the United States in his or her official capacity is considered an action against the United States." *Balser v. Dep't of Justice*, 327 F.3d 903, 907 (9th Cir. 2003). This motion thus addresses Plaintiffs' claims against all Federal Defendants.

ARGUMENT

I. THE COURT LACKS JURISDICTION BECAUSE PLAINTIFFS' COMPLAINT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

In their complaint, Plaintiffs ask this Court for a declaratory judgment as to whether the AMMA is consistent with, or preempted in whole or in part by, federal law – a question as to which Plaintiffs themselves take no position. Because this complaint raises no substantial federal question, and presents this Court with a request for an advisory opinion rather than an actual controversy, the Court lacks jurisdiction.

A. Plaintiffs' Request for a Declaration of the Validity of State Law is Not Within the Original Jurisdiction of this Court

Through 28 U.S.C. § 1331, Congress has given the district courts original jurisdiction over all civil actions "arising under the Constitution, laws, or treaties of the

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limited federal resources as articulated in the Ogden Memorandum has not changed." Ex. 1, Cole Memorandum at 1.

United States."[4] "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiffs' properly pleaded complaint." *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 (9th Cir. 2000).

By seeking a declaratory judgment as to the validity of its own law, Plaintiffs' complaint does not present a federal question. The Supreme Court held as much in *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust of Southern California*, 463 U.S. 1 (1983), where the Court recognized that "[t]he situation presented by a State's suit for a declaration of the validity of state law is . . . not within the original jurisdiction of the United States district courts." *Id.* at 22. The court indicated that, despite the availability of the Declaratory Judgment Act, "the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law." *Id.* at 21. *See also* Charles Alan Wright et al., Federal Practice & Procedure § 3566 (3d ed. 2011) ("[T]here is no federal jurisdiction of a suit by a state to declare the validity of its regulations despite possibly conflicting federal law").

In recent years, the Ninth Circuit has continued to reject complaints such as Plaintiffs'. For example, in *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086 (9th Cir. 2002), the plaintiffs asked the court to determine whether the Guam legislature's

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[4] Plaintiffs cannot show that jurisdiction exists under 28 U.S.C. § 1346, the only other statutory basis identified in their complaint. *See* Compl. ¶ 58. The only potentially relevant section of that provision is § 1346(a)(2), known as the Little Tucker Act, which confers jurisdiction over a "civil action or claim against the United States, not exceeding $10,000 in amount, founded upon either the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1346(a)(2). That provision "empowers district courts to award damages but not to grant injunctive or declaratory relief." *Lee v. Thornton*, 420 U.S. 139, 140 (1975) (per curiam). *See also Santucci v. U.S. State Dep't*, No. CV-04-2499-PHX-SRB, 2005 WL 3113173, at *4 (D. Ariz. Nov. 21, 2005) (recognizing that § 1346(a)(2) "provides jurisdiction over awards of damages but not equitable relief such as injunctive or declaratory relief or mandamus"). Plaintiffs seek only declaratory relief in this case.

enactment of an election reform statute was permissible under a federal statute, the Organic Act of Guam. The Ninth Circuit recognized that "[t]his type of declaratory action cannot support federal question jurisdiction," and that "the district court lacks jurisdiction to adjudicate the plaintiffs' claim that [the Guam law] does not conflict with the [federal statute]." *Id.* at 1089.

The Ninth Circuit reached a similar conclusion in *Opera Plaza Residential Parcel Homeowners Association v. Hoang*, 376 F.3d 831 (9th Cir. 2004), in which a private condominium association sought a declaratory judgment that its policy prohibiting satellite dishes was valid under federal law. *Id.* at 832-33. The Ninth Circuit, as the district court before it, recognized the lack of a federal question:

> [Plaintiff's] declaratory judgment claim seeks a determination that its satellite policy is valid under federal law. Federal law will thus enter the picture only as a possible basis to invalidate the policy – a claim that something is consistent, rather than inconsistent, with federal law raises the specter of a federal question only to rebut the possible defense that it conflicts with a federal statute. It will always be possible to claim that a policy is *consistent* with federal law, but such a claim is not sufficient to confer federal subject matter jurisdiction.

Id. at 838 (internal citation omitted).

Other courts have repeatedly rejected cases in which states sought to uphold or determine the validity of their own laws relative to federal law. *See, e.g., Missouri v. Cuffley*, 112 F.3d 1332, 1333 (8th Cir. 1997) (no jurisdiction over state agency's claim that regulatory plan to deny application to participate in state program was constitutional); *City of Greenwood, Mo. v. Martin Marietta Materials, Inc.*, No. 07-157-CV-W-DW, 2007 WL 1859192, at *1 (W.D. Mo. June 26, 2007) (no jurisdiction over city's request for declaratory judgment that ordinance were valid and enforceable); *Carlisle Twp. Bd. of Trs. v. Hynolds LLC*, 303 F. Supp. 2d 873, 877 (N.D. Ohio 2004) (no jurisdiction over township's request for declaration that zoning resolutions were constitutional); *Keith v. La. Dep't of Educ.*, 553 F. Supp. 295, 298 (M.D. La. 1982) (no jurisdiction over declaratory judgment that Louisiana statute was constitutional).

B. By Seeking an Advisory Opinion, Plaintiffs Do Not Present an Actual Controversy For Adjudication Under the Declaratory Judgment Act

Even if jurisdiction were not foreclosed, as demonstrated above, Plaintiffs' complaint presents no actual controversy sufficient to confer jurisdiction.

Plaintiffs bring their claim under the Declaratory Judgment Act, which allows a federal court to "declare the rights and other legal relations" of parties to a "case of actual controversy." 28 U.S.C. § 2201. "The Declaratory Judgment Act creates a federal remedy, but is not itself a basis for federal jurisdiction." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. ESI Ergonomic Solutions, LLC*, 342 F. Supp. 2d 853, 861 (D. Ariz. 2004). *See also Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 543 (9th Cir. 2011) ("'[T]he operation of the Declaratory Judgment Act is procedural only' and does not confer arising under jurisdiction.") (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)).

A declaratory judgment action is proper only to the extent that, "absent the availability of declaratory relief, the . . . case could nonetheless have been brought in federal court." *Stuart Weitzman, LLC v. Microcomputer Resources, Inc.*, 542 F.3d 859, 862 (11th Cir. 2008) (internal quotation omitted). But Plaintiffs could not maintain this suit absent the availability of declaratory relief. With respect to the Federal Defendants, the United States cannot be sued without its consent, and the Declaratory Judgment Act does not waive sovereign immunity. *See, e.g., Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228, 1230 (1st Cir. 1996); *Grondal v. United States*, 682 F. Supp. 2d 1203, 1218 (E.D. Wash. 2010); *AMCO Ins. Co. v. W. Drug, Inc.*, 2008 WL 4368929, at *1 (D. Ariz. Sept. 24, 2008); *see also* Wright et al., Federal Practice & Procedure § 2766 ("If the court would lack jurisdiction of a coercive action against the United States because of sovereign immunity, it is equally without jurisdiction of a declaratory action against the United States."). Plaintiffs' claim against the Federal Defendants must therefore be dismissed.

Moreover, to establish jurisdiction over a claim brought under the Declaratory Judgment Act, Plaintiffs must identify an actual, concrete controversy. "The 'actual controversy' requirement of the [Declaratory Judgment] Act is the same as the 'case or controversy' requirement of Article III of the United States Constitution." *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 942 (9th Cir. 1981); *see also Powell v. McCormack*, 395 U.S. 486, 517-18 (1969) ("The availability of declaratory relief depends on whether there is a live dispute between parties.").

The Supreme Court's cases "have required that the dispute be 'definite and concrete, touching the legal relations of parties having adverse legal interests,' and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). The need for an actual controversy ensures that a court does not go beyond its proper role and issue an advisory opinion. "The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions." Wright et al., Federal Practice & Procedure § 3529.1. The courts do not "decide hypothetical issues or [] give advisory opinions about issues as to which there are not adverse parties." *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982). Courts regularly find that no case or controversy exists when a party seeks a declaratory judgment to settle an issue of law that might be relevant in a future suit. *See, e.g.*, *Calderon v. Ashmus*, 523 U.S. 740, 746-47 (1998).

Here, Plaintiffs seek to determine the validity of state law, but Plaintiffs identify no controversy between the parties on that issue. That is most clear from the fact that Plaintiffs' complaint never identifies which side of the supposed dispute Plaintiffs are on. Indeed, even their prayer for relief does not identify whether they believe the AMMA is preempted by federal law. Instead, Plaintiffs attempt to manufacture disputes among the other parties. They name as defendants various individuals and organizations whom

Plaintiffs contend support the implementation and enforcement of the AMMA, such as Defendant AZADP, with respect to whom Plaintiffs contend "AZADP's standing and legal position in this action may be adverse to that of the government Defendants." Compl. ¶ 44. Plaintiffs even create twenty fictitious defendants – ten who contend that the AMMA "does violate federal law" and ten who contend that it does not – and then rely on the purported disagreement "among Defendants." *See id.* ¶¶ 167-69. But Plaintiffs cannot rely on a dispute that exists only among Defendants (even accepting that such a dispute or that such hypothetical defendants existed). Parties cannot have the "adverse legal interests" necessary to establish a live controversy, *see MedImmune, Inc.*, 549 U.S. at 127, when one party (particularly the plaintiff) professes to take neither side of the dispute.

Moreover, as will be discussed further below, there is no actual controversy here because Plaintiffs can point to no threat of enforcement against the State's employees.[5] In *Muskrat v. United States*, 219 U.S. 346 (1911), the Supreme Court "established the longstanding precedent that a federal court will not, before the law is applied, declare laws to be constitutional, because by doing so the court would issue advisory opinions." *Int'l Soc'y for Krishna Consciousness v. City of Los Angeles*, 611 F. Supp. 315, 318-19 (C.D. Cal. 1984). *See also Poe v. Ullman*, 367 U.S. 497, 508-09 (1961) (plurality opinion) (no case or controversy in suit seeking a declaratory judgment on the constitutionality of a law absent indications that the law would be enforced); *Nat'l Union Fire Ins. Co.*, 342 F. Supp. 2d at 862 (finding no actual controversy when plaintiff did not "allege that [the defendant] is considering or has threatened legal action against" the plaintiff). Because Plaintiffs can point to no threat of prosecution by Defendants, no controversy exists and their claim must be dismissed.

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[5] The analysis of whether an actual controversy exists is similar to the separate analysis of whether Plaintiffs' claim is ripe for review. *See, e.g.*, *Cuffley*, 112 F.3d at 1337 (finding that state's suit for declaratory relief presented no federal question *and* was not ripe). Federal Defendants separately address below why Plaintiffs' claim is not ripe.

By seeking a declaratory judgment as to a question to which they take no side and have no legal interest adverse to Defendants', Plaintiffs present no concrete dispute to this Court. This case thus runs counter to the Supreme Court's admonition that "[t]he declaratory judgment procedure . . . may not be made the medium for securing an advisory opinion in a controversy which has not arisen." *Coffman v. Breeze Corps.*, 323 U.S. 316, 324 (1945). Plaintiffs' claim must be dismissed.

II. PLAINTIFFS LACK STANDING

Even if the Court determines that an actual controversy exists, Plaintiffs lack standing to raise their claim. As discussed above, Plaintiffs rely on manufactured disputes between various defendants, even referring to one defendant's "standing and legal position" relative to other defendants. *See* Compl. ¶ 44. But Plaintiffs cannot establish standing through such maneuvers. A party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Instead, to establish standing, Plaintiffs must identify that they themselves have "suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). And when the plaintiff is a state, such as Arizona, standing cannot be based on the state's desire "'to protect her citizens from the operations of federal statutes.'" *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971 (9th Cir. 2009) (referencing *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (holding that Massachusetts lacked standing to enjoin a congressional appropriations act)). Instead, "the state's interest must be in some way distinguishable from that of its citizens." *Id.*

To the extent Plaintiffs attempt to base standing on the allegation that particular residents disagree with the effect of federal law, such *parens patriae* standing does not provide a basis for jurisdiction. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (state's claim must be based on "an interest apart from the interests of

particular private parties"). The same is true for Plaintiffs' unspecific suggestions about a supposed risk that Arizona citizens will lose revenue or property. *See* Compl. ¶ 89. As in *Legal Services Corp.*, Arizona's "factual allegations do not rise to the level of a concrete, particularized, actual or imminent injury against the state itself, that is independent from alleged harm to private parties." *Legal Services Corp.*, 552 F.3d at 971-72.

At most, Plaintiffs' complaint may allege the possibility of an injury to state employees who are responsible for the implementation of the AMMA. But Plaintiffs have no such injury because at no point in their complaint do Plaintiffs actually allege that the CSA preempts the AMMA.[6] *See id.* at 973 (finding lack of standing to raise claim that Oregon was injured by federal regulations because there is "no claim that Oregon's laws have been invalidated as a result of the [federal] restrictions"). Because Plaintiffs' resort to hypotheticals does not allege that federal law has had any effect on state law, they have alleged no actual injury, and they lack standing to bring their claim.

III. PLAINTIFFS' CLAIMED INJURY TO STATE EMPLOYEES IS NOT RIPE FOR REVIEW

Even assuming that Plaintiffs have standing to raise a claim concerning federal law's effect on state employees, the Court still lacks jurisdiction because that claim will not be ripe for review until Plaintiffs are subjected to a genuine threat of prosecution.

Ripeness is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). The ripeness inquiry is related to the requirement of an actual controversy, as the court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution."

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[6] Even if Plaintiffs were to amend their complaint to allege that the Arizona state law is preempted in its entirety by federal law, that would not cure the other jurisdictional defects addressed elsewhere in this motion.

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). "[T]he ripeness inquiry contains both a constitutional and a prudential component." *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993). *See also Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) ("The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993))). Here, Plaintiffs satisfy neither component.

A. Plaintiffs' Claim Is Not Ripe Because They Identify No Genuine Threat of Imminent Prosecution

"The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas*, 220 F.3d at 1138. "In assuring that this jurisdictional prerequisite is satisfied, we consider whether the plaintiffs face 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement,' or whether the alleged injury is too 'imaginary' or 'speculative' to support jurisdiction." *Id.* at 1139 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

Pre-enforcement challenges are generally unripe because courts "possess no factual record of an actual or imminent application of [the law] sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Renne v. Geary*, 501 U.S. 312, 321-22 (1991). Even when a party alleges injuries that are "real and concrete rather than speculative and hypothetical," it must also show a "genuine threat of imminent prosecution" in order to bring a pre-enforcement challenge. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009). It is not enough to show "the mere existence of a proscriptive statute nor a generalized threat of prosecution." *Thomas*, 220 F.3d at 1139.

To analyze the genuineness of a threat of prosecution, courts consider three factors: "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under

the challenged statute." *Thomas*, 220 F.3d at 1139. Plaintiffs' allegations fail to satisfy each factor.

First, Plaintiffs' complaint appears to contemplate state employees implementing the AMMA, but they do not detail any concrete plan to act in violation of the CSA. (If anything, the State has made plans to avoid such conduct: it determined not to accept applications from prospective dispensaries in June as contemplated by the AMMA's regulatory rules.[7]) The Ninth Circuit requires more than Plaintiffs have offered to satisfy ripeness: "[a] general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Thomas*, 220 F.3d at 1139.

Second, as in *Thomas*, "the record is devoid of any threat – generalized or specific – directed toward" Plaintiffs. *Id.* at 1140. "Significantly, the mere possibility of criminal sanctions applying does not of itself create a case or controversy." *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (internal quotation omitted). Here, Plaintiffs point to a letter from United States Attorney Burke that emphasizes that the Department of Justice "will continue to vigorously prosecute individuals and organizations that participate in unlawful manufacturing, distribution and marketing activity involving marijuana." *See* Burke Letter at 1. The letter also explains that "the CSA may be vigorously enforced against those individuals and entities who operate large marijuana production facilities," as well as those "[i]ndividuals and organizations – including property owners, landlords and financiers – that knowingly facilitate the actions of traffickers." *Id.* at 1-2. But nothing in the letter refers to state employees. Plaintiffs thus resort to citations and discussion of various letters sent by other United States

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[7] The rules adopted by the State provided that the Department of Health Services "shall accept dispensary registration certificate applications for 30 calendar days beginning June 1, 2011." *See* 17 Ariz. Admin. Reg. 732, 759 (May 6, 2011), § R9-17-303(D), available at http://www.azsos.gov/public_services/Register/2011/18/exempt.pdf. The State has determined not to do so, indicating on the Department's website that "the Department suspended the dispensary and dispensary agent portions [of the program] on May 27, 2011," and that the State "won't accept dispensary applications in June." *See* http://www.azdhs.gov/medicalmarijuana (accessed on July 28, 2011).

Attorneys around the country, each of which addresses a state regulatory regime distinct from Arizona's, and none of which genuinely threatens imminent prosecution anyway. What Mr. Burke's letter and the other cited guidance make clear is that the Department of Justice retains discretion to determine how to allocate its prosecutorial resources, and it is mere speculation for Plaintiffs to suggest that Arizona state employees could be subject to federal prosecution. *See, e.g.*, *Stormans, Inc.*, 586 F.3d at 1125 ("[B]ecause no enforcement action against plaintiffs is concrete or imminent or even threatened, Appellee's claims against HRC are not ripe for review").

Third, Plaintiffs identify no prior instances in which the federal government has sought to prosecute state employees for the conduct vaguely described in Plaintiffs' complaint. Without evidence of such prior prosecutions, Plaintiffs cannot credibly show a genuine threat of imminent prosecution in this case. *See, e.g.*, *id.* (finding lack of ripeness because "HRC has never initiated an action against any pharmacist refusing to provide Plan B"); *Thomas*, 220 F.3d at 1140 (finding lack of ripeness because, "[i]n the twenty-five years that these housing laws have been on the books, the record does not indicate even a single criminal prosecution, and of the two reported instances of civil enforcement, only one raised the freedom of religion issue presented here").

Plaintiffs thus cannot identify a genuine threat of imminent prosecution under the law. "[A]ny threat of enforcement or prosecution against [state employees] in this case – though theoretically possible – is not reasonable or imminent." *Thomas*, 220 F.3d at 1141. Accordingly, Plaintiffs do not face a realistic danger of imminent injury, and their claim is thus not ripe for review.

B. Plaintiffs Cannot Satisfy the Prudential Component of Ripeness

Even if the Court determines that Plaintiffs have satisfied the constitutional component of ripeness, the prudential component still warrants dismissal for lack of jurisdiction. Prudential standing looks to "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," *Abbott Labs.*, 387 U.S. at 149, both of which demonstrate that Plaintiffs' claim is not ripe.

1. Plaintiffs' Claim is Not Fit for Review

First, the issues presented in Plaintiffs' complaint are not fit for judicial decision at this time. "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). A party bringing a pre-enforcement challenge must "present a 'concrete factual situation . . . to delineate the boundaries of what conduct the government may or may not regulate without running afoul' of the Constitution." *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007) (quoting *San Diego County Gun Rights Comm.*, 98 F.3d at 1132). "[T]o resolve an issue lacking factual development simply to avoid a threatened harm would be to favor expedition over just resolution." *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000).

As discussed above, Plaintiffs' presentation is "devoid of any specific factual context." *Thomas*, 220 F.3d at 1141; *see also id.* ("The record before us is remarkably thin and sketchy, consisting only of a few conclusory affidavits."). Plaintiffs ask this Court for a declaratory judgment as to "whether the AMMA complies with federal law" or whether it "is preempted by the CSA and therefore void." Compl. ¶ 165. But Plaintiffs are not challenging any specific application of the CSA or its regulations. Plaintiffs do not cite to any particular actions taken in violation of the CSA, any particular governmental action taken to enforce the CSA, or even any threat of imminent prosecution by federal law enforcement agencies.

2. Withholding Review at This Time Would Not Harm Plaintiffs

Furthermore, to satisfy the requirement of hardship, Plaintiffs must show "that withholding review would result in direct and immediate hardship." *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999). The question of hardship "dovetails, in part, with the constitutional consideration of injury. Although the constitutional and prudential considerations are distinct, the absence of any real or imminent threat of enforcement, particularly criminal enforcement, seriously undermines

any claim of hardship." *Thomas*, 220 F.3d at 1142. In fact, the Ninth Circuit has recognized that forcing a defendant to defend certain laws "in a vacuum" imposes a hardship on the defendant. *Id.*

As discussed above, Plaintiffs point to no individual who has been charged with violating the CSA, or even threatened with prosecution. And the State can identify no real hardship in deferring resolution of the issues raised in the complaint to a time when a concrete factual scenario has been developed. The Court should decline jurisdiction over this hypothetical dispute.

CONCLUSION

For the reasons stated herein, the Court should grant Federal Defendants' motion and dismiss Plaintiffs' complaint.

Dated: August 1, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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