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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' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

Plaintiffs' complaint seeks a judgment "declaring whether the AMMA complies with federal law and should be implemented in accordance with its terms, or conversely, whether the AMMA is preempted by the CSA and therefore void." Compl. ¶ 165. But "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." *Franchise Tax Board of the State of Cal. v. Constr. Laborers Vacation Trust of S. Cal.*, 463 U.S. 1, 21-22 (1983).

Unable to overcome this fundamental principle, Plaintiffs resort to semantic maneuvers and a recasting of their complaint. They now say that they "do not seek to have this Court determine whether the AMMA is valid." Pls.' Opp'n 4. But Plaintiffs' complaint speaks for itself. It asks this Court to declare whether the AMMA complies with, or "is preempted by," federal law. Compl. ¶ 165. And their opposition brief

crystallizes that request: "Plaintiffs bring this action to determine whether and to what extent the AMMA is preempted." Pls.' Opp'n 10.

Plaintiffs point to no case in which a state has successfully sought such a declaratory judgment in federal court, and they ignore the binding precedent barring such actions. *See, e.g.*, *Franchise Tax Board*, 463 U.S. at 21-22. While Plaintiffs' arguments as to standing and ripeness are legally incorrect, the Court need not reach that far; even overcoming those jurisdictional deficiencies cannot rehabilitate Plaintiffs' failure to present a claim within the limited jurisdiction of this Court. Therefore, this case should be dismissed in its entirety.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIM FOR A DECLARATORY JUDGMENT

Federal Defendants' motion showed that the Court lacks jurisdiction over this dispute because Plaintiffs' request for a declaratory judgment as to the validity of state law presents no federal question. *See* Fed. Defs.' Mot. 5-11. In response,[1] Plaintiffs' jurisdictional argument rests on the premise that "[f]ederal courts may grant a declaratory judgment to any party seeking clarification of their rights and legal obligations." Pls.' Opp'n to Non-Gov't Defs.' Mot. 15. But that is incorrect. The Declaratory Judgment Act allows a federal court to "declare the rights and other legal relations" of parties, but only when there exists a "case of actual controversy." 28 U.S.C. § 2201. *See also Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996) ("[T]he Declaratory Judgment Act does not expand the jurisdiction of the federal courts.").

It is important to be clear about the claim Plaintiffs present, given their attempts to recast the claim in their opposition brief. At one point, Plaintiffs contend that they "do not seek to have this Court determine whether the AMMA is valid," but then just pages

[1] Rather than seek leave to file a response in excess of the page limit, Plaintiffs' 15-page opposition purports to "incorporate by reference" their 21-page opposition to the co-defendants' motion to dismiss. Pls.' Opp'n 2 n.1. Federal Defendants have endeavored to address all arguments relevant to their motion in this reply.

later they say that they "bring this action to determine whether and to what extent the AMMA is preempted." Pls.' Opp'n 4, 10. Whatever distinction one can draw between whether a law is "valid" and whether it is "preempted," it is apparent from Plaintiffs' complaint that they ask the Court to issue a declaratory judgment as to the validity of a state law. They ask for a judgment "declaring *whether the AMMA complies with federal law* and should be implemented in accordance with its terms, or conversely, *whether the AMMA is preempted by the CSA and therefore void*." Compl. ¶ 165 (emphasis added).[2]

Such a complaint is outside the Court's jurisdiction. Plaintiffs cite to the Supreme Court's decision in *Franchise Tax Board*, yet they fail to acknowledge – let alone respond to – the holding of that case: "[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." *Franchise Tax Board*, 463 U.S. at 21-22. Plaintiffs also do not address the Ninth Circuit's decisions in *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 832-33 (9th Cir. 2004), where the court held that it lacked jurisdiction over a declaratory action concerning the validity and enforcement of a local policy vis-à-vis federal law, or *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1089 (9th Cir. 2002), which held that the court lacked jurisdiction over a declaratory action seeking a determination of whether a Guam statute was valid under federal law.

While Plaintiffs ignore those Supreme Court and Ninth Circuit cases, they cite to the Eleventh Circuit's decision in *Stuart Weitzman, LLC v. Microcomputer Resources, Inc.*, 542 F.3d 859 (11th Cir. 2008), for the proposition that a court has jurisdiction when a plaintiff seeks declaratory relief against a defendant who could have brought a coercive action against the plaintiff. (Plaintiffs' contention is that, here, the United States could bring a coercive action against Arizona and its employees for violations of the Controlled

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[2] Of course, Plaintiffs themselves take no side in the dispute. While never addressed in their opposition brief, the most curious feature of their complaint may be their reliance on a controversy that exists "among Defendants" – and among fictional defendants at that, as they create ten fictional defendants who "contend that the AMMA does violate federal law" and ten who contend that it does not. *See* Compl. ¶¶ 167-69.

Substances Act ("CSA") when they implement the AMMA.) The *Stuart Weitzman* case concerned a dispute between two private parties, and the Supreme Court contemplated that scenario in *Franchise Tax Board* when it rejected the argument now raised by Plaintiffs. There, the Court recognized that, "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question" (*i.e.*, the situation described in *Stuart Weitzman*). *Franchise Tax Board*, 463 U.S. at 19. But the Court rejected jurisdiction in similar declaratory judgment actions brought by states concerning their own laws. *Id.* at 19-20 ("If [the defendant] could have sought an injunction under ERISA against application to it of state regulations that require acts inconsistent with ERISA, does a declaratory judgment suit by the State 'arise under' federal law? We think not.").

Without a response to binding adverse precedent, Plaintiffs are left to recast their complaint, arguing that they seek a declaration as to their rights and obligations under the state law, rather than a declaration as to the law's validity. In other words, Plaintiffs are not asking the Court for any particular outcome. They want a declaration as to whether the state law is fully enforceable in light of federal law, but they take no position on that question. The only thing that differentiates Plaintiffs' claims from those that the Supreme Court and Ninth Circuit have held to be outside the courts' jurisdiction is that the plaintiffs in those cases actually took a position on the questions they presented by advocating for the validity of state law. By refusing to advocate for a particular outcome, Plaintiffs remove their claim even further from the bounds of this Court's jurisdiction, because Plaintiffs' presentation denies the court the "'concrete adverseness which sharpens the presentation of issues' necessary for proper resolution of constitutional questions." *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1350 (9th Cir. 1984) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Plaintiffs' argument that the Court nonetheless has the discretion to exercise jurisdiction in a declaratory judgment action is also wrong. *See* Pls.' Opp'n to Non-Gov't

Defs.' Mot. 13 n.5. Such discretion exists only after jurisdiction has been established, as the Declaratory Judgment Act says that a court "*may* declare the rights and other legal relations of any interested party" *if* it is presented with "a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201(a) (emphasis added). "Subject matter jurisdiction is a necessary predicate to the issuance of a declaratory judgment, so if subject matter jurisdiction over [Plaintiffs'] action could not be established, the question whether to exercise discretionary jurisdiction would not arise." *United Nat'l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1107 (9th Cir. 2001).

The Court need go no further. Plaintiffs' memorandum proceeds to argue that state employees face a "real and imminent" threat of prosecution under federal law, that they have standing to present their claim, and that their claim is ripe. While each of those arguments is wrong, for the reasons discussed in Federal Defendants' motion and below, even if correct they cannot save Plaintiffs' claim because Plaintiffs fail to identify a federal question within the Court's jurisdiction. *See Harris v. Blueray Techs. Shareholders, Inc.*, 669 F. Supp. 2d 1225, 1227 (E.D. Wash. 2009) (recognizing that plaintiff must show existence of federal question *and* standing). Jurisdiction is foreclosed by clear and binding precedent, and Plaintiffs' claim must be dismissed.

II. THE UNITED STATES HAS NOT WAIVED ITS SOVEREIGN IMMUNITY OVER PLAINTIFFS' CLAIM

If the Court considers the other jurisdictional requirements that Plaintiffs must satisfy, Plaintiffs concede that their complaint does not identify a waiver of sovereign immunity that would permit their suit against the United States. *See* Pls.' Opp'n 11-12. To compensate for that deficiency, they now seek to invoke the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. The APA waives sovereign immunity, *see Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 865 (9th Cir. 2011), but only for actions where the party seeks non-monetary relief and "stat[es] a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority," *see* 5 U.S.C. § 702.

Plaintiffs have no such claim because they do not seek the review of any governmental action or inaction. That makes this case unlike *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), relied on by Plaintiffs, in which the plaintiffs challenged an agency's activities as violations of the First and Fourth Amendments. *Id.* at 520. Plaintiffs here challenge no action taken by the United States, its agencies, or officers, nor do they seek to compel the United States to act in any particular way. By instead raising a general question about the relationship of state and federal law, their complaint falls outside the scope of any waiver expressed in the APA.

III. PLAINTIFFS LACK STANDING

Even if the Court identifies a justiciable controversy over which the United States has waived its sovereign immunity, Plaintiffs lack standing to raise their claim. In their opposition, Plaintiffs rely on an assortment of interests that they contend support standing: "the economic interests of their residents, as well as the health and well-being of their residents," along with a *parens patriae* interest in representing "the rights of third-parties acting in compliance with the AMMA." Pls.' Opp'n 13. But the interests of individual citizens and "third-parties" cannot confer standing because a plaintiff "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). That is no less true when the plaintiff is a state, as a state's claim must be based on "an interest apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982).

Plaintiffs rely on *Oregon v. Legal Services Corp.*, 552 F.3d 965 (9th Cir. 2009), but there the Ninth Circuit recognized that a state may not base standing on its desire "to protect her citizens from the operation of federal statutes." *Id.* at 971. The state must have an interest "in some way distinguishable from that of its citizens." *Id.* Nor are Plaintiffs saved by their reliance on *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011), where the Ninth Circuit recognized that a state has standing to address harms to its territorial and proprietary interests. Plaintiffs cannot rest on

unspecific suggestions about a supposed risk that the state and its residents will lose revenue or property, *see* Compl. ¶ 89, both because the state is limited to asserting its own interests and because such general allegations – unsupported by any explanation of *how* the state would lose revenue or property – "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 Servs. Corp.*, 552 F.3d at 971-72.

Instead, Arizona, "like all states, 'does not have standing as *parens patriae* to bring an action against the Federal Government.'" *Sierra Forest Legacy*, 646 F.3d at 1178 (quoting *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 610 n.16). It cannot appear in this Court to assert "the rights of third-parties acting in compliance with the AMMA," Pls.' Opp'n at 13, and it lacks standing to raise its claim.

IV. PLAINTIFFS CLAIM IS NOT RIPE FOR REVIEW

Federal Defendants' motion also explained that, even assuming Plaintiffs have standing to raise a claim concerning federal law's effect on state employees, such a claim is not ripe for review because Plaintiffs identify no genuine threat of imminent prosecution.[3]

A. Plaintiffs Identify No Genuine Threat of Imminent Prosecution

Plaintiffs' arguments on the constitutional component of ripeness in pre-enforcement challenges fail in two principal respects: they misunderstand the burden they

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[3] Plaintiffs argue that the "threat of prosecution" establishes ripeness *and* the existence of a live case or controversy. Pls.' Opp'n 5-6. As Federal Defendants previously noted, the analysis of whether a controversy exists is similar to the ripeness analysis. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (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."). While Federal Defendants address the argument as a matter of ripeness, the lack of a genuine threat of enforcement also demonstrates that proceeding here would lead to the issuance of an advisory opinion. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. ESI Ergonomic Solutions, LLC*, 342 F. Supp. 2d 853, 862 (D. Ariz. 2004) (finding no controversy when plaintiff did not "allege that [the defendant] is considering or has threatened legal action"). However the Court considers the issue, "a federal court has leeway to choose among threshold" jurisdictional grounds in dismissing a case. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007).

must carry, and they fail to identify a genuine threat that Arizona state employees will soon face prosecution for actions taken to implement the AMMA.

First, Plaintiffs misplace the burden on this issue when they contend that the United States has not disavowed any intention of prosecuting state employees. To do so, Plaintiffs rely on a dissenting opinion from the Ninth Circuit's en banc decision in *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000), in which Judge Kleinfeld, writing only for himself, contended that the government has the burden to "disavow any intention to enforce the law in the circumstances" at issue. *Id.* at 1149-50 (Kleinfeld, J., dissenting). The en banc panel's majority decision makes clear that that is not the law. To demonstrate that his claim is ripe, it is not enough for a plaintiff to show that the government has not disavowed an intention to prosecute, or even that "a generalized threat of prosecution" exists. *Id.* at 1139 (majority op.). Instead, the court looks to "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." *Id. See also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) ("[B]ecause no enforcement action against plaintiffs is concrete or imminent or even threatened, Appellee's claims against HRC are not ripe for review.").

By misplacing the burden for ripeness, Plaintiffs' approach would allow a party to sue the federal (or state) government at any time in a declaratory action, and such a case would present an actionable controversy unless and until the government had expressly disclaimed any intention to prosecute the individual. That approach would allow individuals with no interest adverse to the government to force the government to declare its intentions with respect to particular criminal prosecutions simply by bringing suit under the Declaratory Judgment Act. Such an approach is plainly inconsistent with the Ninth Circuit's decisions in *Thomas* and *Stormans*.

The relevant question is not whether prosecution is possible, or whether the government has indicated a general intent to enforce the CSA. "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). Rather, Plaintiffs' claim is ripe only if Plaintiffs identify a "genuine threat of imminent prosecution" against state employees. *Stormans*, 586 F.3d at 1122.

Plaintiffs have shown no such threat. *See* Pls.' Opp'n 8-10. Plaintiffs turn first to a letter sent by the U.S. Attorneys in the State of Washington, but that letter concerned legislative proposals unique to Washington and says nothing about Arizona's law or the circumstances of its state employees. Plaintiffs discuss the views of the Governor of Washington, *see* Pls.' Opp'n to Non-Gov't Defs.' Mot. 6-7, but do not explain how her opinion establishes that the United States has threatened employees in Arizona. Similarly, Plaintiffs cite a letter written by the Attorney General of New Mexico to a New Mexico state official, but a state official's determination that New Mexico state employees "may be subject to federal prosecution under the CSA," *see* Ex. J to Compl. (ECF No. 1-2 at p. 35), does not constitute "statements made and actions taken by the Federal Defendants," as Plaintiffs claim. *See* Pls.' Opp'n 8.

The only letter Plaintiffs identify addressing Arizona's state law is the letter from former U.S. Attorney Burke to Plaintiff Humble, and Plaintiffs themselves note that the letter says nothing about the liability of state employees. Unable to show a threat of prosecution, Plaintiffs went so far as to ask the U.S. Attorney to provide a written threat. He refused to do so, and now Plaintiffs claim that his unwillingness to immunize employees is proof enough that they will be prosecuted. In so arguing, they disregard Mr. Burke's clear statement that, "We have no intention of targeting or going after people who are implementing or who are in compliance with state law." *See* Mary K. Reinhart, *Arizona to Sue Over Medical Marijuana Law*, *Arizona Central*, May 27, 2011, http://www.azcentral.com/news/election/azelections/articles/2011/05/27/20110527arizona-medical-marijuana-federal-lawsuit.html (quoted in Pls.' Opp'n to Non-Gov't Defs.' Mot. 19).

Plaintiffs' inability to identify a genuine threat subjecting state employees to imminent prosecution distinguishes this case from *Lake Carriers Association v.*

MacMullan, 406 U.S. 498 (1972), relied on by Plaintiffs. There, the plaintiffs challenged a state law that required them to install sewage storage devices, arguing that the law was preempted by federal regulation. *Id.* at 506-07. (The Court recognized the case as an "attack on the validity of the law," *id.* at 507, which alone sets it apart from this case for the reasons discussed above and in *Franchise Tax Board*.) Plaintiffs are incorrect in reading that case as dispensing with a requirement of immediacy. Instead, the Supreme Court recognized that the government there had threatened future enforcement that required the plaintiffs to modify their current behavior in preparation for compliance. In that circumstance, "compliance is coerced by the threat of enforcement, and the controversy is both immediate and real." *Id.* at 508. By contrast, here Plaintiffs identify no genuine threat of enforcement, present or future, that requires them to modify their current behavior.

In sum, Plaintiffs still cannot point to any "prosecution threats" against Arizona or its state employees. Plaintiffs are left to resort to the United States' general intention to enforce the CSA, demonstrated by the Drug Enforcement Administration's recent denial of a petition to reschedule marijuana and the fact that the federal government has conducted raids and prosecutions under the CSA, each of which has nothing to do with Arizona state employees. The possibility that traffickers may be prosecuted, or that other actions to enforce the CSA may be brought, does not demonstrate that state employees are subject to a genuine threat of imminent criminal prosecution. "[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, and Plaintiffs' claim is thus not ripe for review.

B. Plaintiffs Cannot Satisfy the Prudential Component of Ripeness

Finally, even if the Court determines that Plaintiffs have satisfied the constitutional component of ripeness, the prudential component still requires dismissal.

While 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 Cnty. Gun Rights Comm.*, 98 F.3d at 1132), Plaintiffs here do not provide a discrete factual scenario for the Court to address. Instead, Plaintiffs ask for a complete determination of federal law's relation to a comprehensive state law that Plaintiffs contend gives state employees a wide range of responsibilities. The lack of concrete factual circumstances in Plaintiffs' complaint is made clear by their need to offer "a comprehensive set of facts" in their opposition to a motion to dismiss. *See* Pls.' Opp'n 2 n.1. And while Plaintiffs rely on the "economic interests" of the state and its citizens, and the "health and well-being" of its residents, they present no concrete factual context in which the Court can reasonably consider and weigh those interests. Because they challenge no specific application of the CSA or its implementing regulations to the AMMA, Plaintiffs' claim lacks necessary factual development and is not fit for review.

Furthermore, Plaintiffs' contention that withholding review at this time will subject them to hardship is undermined by the lack of a genuine threat of imminent prosecution. While a threat of prosecution can constitute hardship, "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.

CONCLUSION

For the reasons stated herein and in their Motion to Dismiss, the Court should grant Federal Defendants' motion and dismiss Plaintiffs' complaint.

Dated: October 4, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 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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