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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CENTRAL DIVISION

DARRYL COTTON, an individual,

Plaintiff and Petitioner,

v.

STATE OF CALIFORNIA, a public entity, ROBERT BONTA, an individual acting under color of law; and DOES 1 through 200, inclusive,

Defendants and Respondents.

Case No. 37-2021-00053551-CU-WM-CTL

DEFENDANTS AND RESPONDENTS' REPLY IN SUPPORT OF DEMURRER

Date: April 29, 2022
Time: 10:30 a.m.
Dept: C-64
Judge: The Honorable John S. Meyer
Trial Date: TBD
Action Filed: December 22, 2021

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INTRODUCTION

The demurrer filed by Respondents, the State of California and Attorney General Rob Bonta (collectively, Respondents) should be granted because Petitioner, Daryl Cotton (Petitioner) has failed to make allegations adequate to establish standing, or sufficient to satisfy the elements necessary for issuance of mandamus or injunctive relief. Petitioner's Opposition to Respondents' Demurrer (Opposition), offers a novel, but meritless theory that a congressional budget rider, known as the Rohrabacher-Farr Amendment, creates a personal right that is protected under the Fourteenth Amendment of the United States Constitution. However, Petitioner does not meaningfully address any of the fatal defects identified in Respondents' demurrer, and does not explain how the Petition for Peremptory Writ of Mandate and Complaint ("Petition") could be amended to support any cause of action. For these reasons, and those discussed in the demurrer, this case should be dismissed without leave to amend.

ARGUMENT

I. THE OPPOSITION BRIEF DOES NOTHING TO CURE THE FATAL DEFECTS IN THE PETITION AND COMPLAINT

The Opposition makes it clear that the Petitioner cannot show that any right has been violated or that any duty is owed to him. Without meaningfully responding to any of the arguments forming the basis of Respondents' demurrer, Petitioner argues that "he has suffered and continues to suffer – the exigent, ongoing violation of his right to equal protection under the law under the 14th Amendment through the passage of Proposition 64." (Opp. at p.7:13-14). This claim is based on a theory that the creation of an adult use commercial cannabis regulatory program "removed Petitioner's protection from federal criminal jeopardy, provided by federal law to compliant state medical marijuana program participants." (Opp. at p. 7:22-14). Petitioner further argues that the California Attorney General has a "duty to protect Petitioner and other compliant California Medical cannabis program participants' 14th Amendment Rights to the protection from federal criminal prosecution mandated by Rohrabacher." (Opp. at p. 9:7-10). These are meritless legal conclusions that cannot support the existence of any cause of action.

First, Petitioner has not alleged that Respondents' actions have resulted in his or any other medicinal cannabis user's arrest or prosecution by federal authorities. Therefore, the "exigent ongoing violation of his right to equal protection of the law" (Opp. at p. 7:13-14) which the Petitioner believes establishes his standing, is merely a hypothetical possibility based on faulty legal conclusions. Second, Petitioner fails to identify any authority that provides that the State of California or its Attorney General have a duty to protect its citizens from criminal prosecution by federal authorities. Third, Petitioner mistakenly asserts that the "Rohrabacher-Farr Amendment" created a new constitutionally protected right to possess and use cannabis so long as one does so in accordance with applicable state medical cannabis laws. Fourth, Petitioner overlooks the fact that California maintains a medical cannabis regulatory program and he is free to comply with its provisions, if he believes that doing so would protect him from federal prosecution. For these reasons, Petitioner has no standing and cannot establish any of the required elements necessary to sustain a petition for writ of mandamus or complaint for injunctive relief.

A. Petitioner Has Suffered No Injury and Lacks Standing.

A party must be beneficially interested in the resolution of the questions raised in a petition to have standing to seek a writ of mandate. (Code Civ. Proc,, § 1086.) "[S]tanding is jurisdictional." (*Associated Builders & Contractors, Inc. v. S.F. Airports Com.* (1999) 21 Cal.App.4th 352, 361.) "[O]ne may obtain the writ [of mandamus] only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. . . One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165.) Petitioner asserts that "[i]t is because the exigency of his legal jeopardy that the Petitioner has brought this matter before the Court." (Opp. at p.17:8-9.) However, the existence of any "exigency" is not supported by any factual allegation because the Petitioner has not alleged that he has been arrested or that he is currently engaged in activity that places him in jeopardy of arrest. Moreover, Petitioner cannot demonstrate that any alleged action by Respondents has caused him any injury, and thus Petitioner lacks standing. Petitioner's apparent fear of possible

future events is based upon his belief that Proposition 64 and the legislature's enactment of Senate Bill 94 have rendered him unable to comply with state medicinal marijuana laws, which makes him *susceptible* to arrest by federal agents, notwithstanding the restrictions on the use of federal resources imposed by the Rohrabacher-Farr Amendment. This purported beneficial interest and anticipated potential harm are not only attenuated, hypothetical, and inadequate to establish a concrete, particularized injury, they are based upon misguided assumptions and mischaracterizations of applicable law. For these reasons, the demurrer should be granted.

B. The Rohrabacher-Farr Amendment Did Not Create Any Protected Interest Nor Any Affirmative Duty.

The "Rohrabacher-Farr" Amendment was a 2014 budget rider amendment to H.R. 4660, entitled the "Commerce, Justice, Science, and Related Agencies Appropriations Act of 2015." It states:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana. (H.R. 4660, 113th Cong., 2d Sess, § 558 (2013-2014).)

Those courts tasked with interpreting the provision have explained that it "prohibits the DOJ from spending money on actions that prevent [states with medical marijuana laws from] giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." (*United States v. Bilodeau* (2022) 24 F.4th 705, 712-713, quoting *United States v. McIntosh* (2016) 833 F.3d 1163, 1176 (bracketed text in the original).) Plainly, the budget rider does enjoin the United States Department of Justice from expending funds to undertake specified types of actions, but it cannot be interpreted to create any private right nor does it impose any duty on Respondents or any other state official.

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The budget rider was renewed in subsequent years[1] and was most recently referred to as the "Blumenauer, McClintock, Norton, Lee Amendment." It was passed as part of the 2022 federal budget. (H.R. 2471, 117th Cong., 2d Sess, § 531 (2021-2022).) Petitioner's theory that his Fourteenth Amendment right to equal protection of the law was extended by an appropriations bill to his right to use, cultivate, or sell medical cannabis fails for several reasons. First, none of the various iterations of this legislative appropriation changed the federal status of cannabis, which remains contraband per se except in narrow, specific circumstances. (See 21 U.S.C. §§ 802, subd, (16)(A), (44) and 812, Schedule I, (c)(1).) It is well-established that there can be no federally protected interest in the production, possession, or use of contraband. (*Gonzales v. Raich* (2005) 545 U.S. 1, 29; see also *United States v. Jeffers* (1951) 342 U.S. 48, 53 (holding that no person can have a legally protected interest in contraband per se.) Moreover, the budget rider expires at the termination of each budget cycle, so no cannabis cultivator or medical cannabis patient can expect to be protected from potential federal prosecution from year to year unless such amendments are inserted in appropriations bills and passed into law. Even if the prohibition on the expenditure of funds allocated to the Department of Justice did create some expectation of immunity from prosecution by federal authorities, federal enforcement could resume immediately upon the expiration of each budget bill. Thus, even disregarding the other fundamental flaws in Petitioner's arguments regarding the effect of these budget amendments, no permanent entitlement can be read into them by any contortion of the text.

Finally, Petitioner argues that Respondents have a "duty to protect Petitioner and other compliant California medical cannabis program participants' 14th Amendment Rights to the protection from federal criminal prosecution mandated by Rohrabacher" (Opp. at p. 9:8-10.) This argument is baseless. The plain text of the Rohrabacher-Farr Amendment and its subsequent iterations is clear. These budget provisions imposed a restriction on the United States Department

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[1] Commerce Justice, Science, and Related Agencies Appropriations Act of 2016 (H.R. 2578, 114th Cong., 1st Sess,, § 540 (2015-2016).)
Consolidated Appropriations Act of 2018 (H.R. 1625, 115th Cong. §538 (2017-2018)
Consolidated Appropriations Act of 2020 (H.R. 1158, 116th Cong., §531 (2019-2020)
Consolidated Appropriations Act of 2022 (H.R. 2471, 117th Cong., § 531 (2021-2022)

of Justice; they did not create any affirmative duty for any state officials, nor did they create a new personal right protected under the Fourteenth Amendment. Because Petitioner cannot establish that any protected interest is implicated in this case, the demurrer should be granted.

C. Neither Proposition 64 nor Senate Bill 94 Eliminated California's Medicinal Cannabis Laws.

Even if the Court were to indulge Petitioner's contention that he has a right to be free from federal prosecution if he complies with state medicinal cannabis laws, that right could not have been violated by the passage of Proposition 64 or Senate Bill 94. Petitioner claims that the merging of Proposition 64's adult-use provisions with the commercial medicinal provisions somehow exposed medicinal cannabis users to prosecution by federal authorities (Opp. at p. 8:20-21). However, California still has what the Rohrabacher-Farr Amendment refers to as "laws that authorize the use, distribution, possession, or cultivation of medical marijuana." (H.R. 2471, § 531, *infra*.)

The Compassionate Use Act of 1996 remains in effect. (Health & Saf. Code, § 11362.5.) Health and Safety Code section 11362.1, which was added through the passage of Proposition 64 to decriminalize adult use of cannabis within certain limits had no effect on the Compassionate Use Act. "Section 11362.1 does not amend, repeal, affect, restrict, or preempt: . . . Laws pertaining to the Compassionate Use Act of 1996." (Health & Saft. Code, § 11362.41, subd. (i).) With respect to commercial medicinal cannabis activities, it is true that the collective or co-operative medical cannabis model that was created in 2004 by senate Bill 420 expired by operation of law when commercial medical licenses began to be issued (see former Health & Saf. Code, § 11362.775, amended by Stats. SB 94, § 140 (Reg Sess. 2017-2018).) Nonetheless, California still has medicinal cannabis laws with which the Petitioner is free to comply. California's commercial cannabis regulatory program is called the "*Medicinal* and Adult Use Regulation and Safety Act" (Bus. & Prof. Code, § 26000, subd. (a)) and nothing currently prohibits petitioner from seeking a medicinal cannabis license. (see Bus. & Prof. Code., § 26001, subds, (af) and (ai).) If Petitioner believes that his compliance with medicinal cannabis

laws provides him with a right to be free from federal prosecution, he remains free to comply with California's medical cannabis laws. For these reasons, petitioner's claims are without merit and the demurrer should be granted.

D. Petitioner Fails to Establish Any of the Elements Necessary for Either Cause of Action.

In this case, no duty has been breached, there is no duty for the Court to compel, no rights of the Petitioner have been violated, and no protected interests are implicated by the allegations in the Petitioner's pleadings. Therefore, no grounds exist to order Petitioner's requested relief.

1. Petition for Writ of Mandamus

To qualify for mandamus relief, "[a] petitioner ... is required to show the existence of two elements: a clear, present, and usually ministerial duty upon the part of the respondent, and a clear, present, and beneficial right belonging to the petitioner in the performance of that duty." (*Cal. Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 302.) For the reasons set forth above, the supplemental argument made in the Opposition regarding the Rohrabacher-Farr Amendment is entirely without merit and does not assist Petitioner in establishing any protected interest or any affirmative duty for the Respondents. Therefore, neither of the requisite elements for issuance of writ relief are satisfied, and the first cause of action should be disposed of by granting Respondents' demurrer.

2. Injunctive Relief

To obtain an injunction, Petitioner must show "irreparable injury, i.e., a factual showing that the wrongful act constitutes an actual or threatened injury to property or personal rights." *Cal200 Inc. v. Apple Valley Unified School Dist.* (2019) 41, Cal.App. 5th 230, 243. Here, Petitioner fails to allege any facts showing any wrongful conduct, or that he has or will suffer any injury. Rather, because of his misunderstanding of the Rohrabacher-Farr Amendment and its relationship to state law, Petitioner theorizes that it is possible that federal authorities will arrest him and prosecute him for violation of the Controlled Substances Act. Because the potential injury is hypothetical and based upon erroneous conclusions of law, Petitioner cannot establish that he will suffer irreparable harm in the absence of the Court's intervention, or that Respondents

have engaged in any wrongful conduct. Therefore, the demurrer should be granted as to Petitioner's second cause of action.

II. DEMURRER SHOULD BE GRANTED WITHOUT LEAVE TO AMEND

Petitioner's claims that any duty exists, that any beneficial interest has been impacted, or that there is a possibility of any injury are all based upon erroneous conclusions of law, not factual allegations which could be deemed true for the purpose of demurrer. It is not disputed that Proposition 64 was enacted by the voters or that Senate Bill 94 was passed by the legislature, but all characterizations of Respondents' conduct as wrongful or characterizations of the effect of these laws as injuries, are based upon legal presumptions that have no basis in any legitimate authority. In considering a demurrer, courts "need not accept allegations containing legal conclusions, adjectival descriptions or unsupported speculation." (*Doe v. Roman Catholic Archbishop of Los Angeles* (2016), 247 Cal.App.4th 953.) If the baseless legal conclusions and erroneous assumptions were to be removed from Petitioner's pleadings, nothing of substance remains.

If there is a reasonable possibility that the defects of a complaint can be cured, leave to amend is generally granted, but the "burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan*, *supra,* 39 Cal.3d 318.) Petitioner's Opposition clearly demonstrates that Petitioner has not, and cannot overcome this burden. "[L]eave to amend should not be granted where, in all probability, amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685.) Here, amendment would unquestionably be futile.

CONCLUSION

For the reasons set forth, Respondents respectfully request that the Court grant their demurrer without leave to amend.

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Dated: April 22, 2022

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: **Cotton v. State of CA, et. al.**
No.: **37-2021-00053551-CU-WM-CTL**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of e-mail correspondence.

On April 22, 2022, I served the attached **DEFENDANTS AND RESPONDENTS' REPLY IN SUPPORT OF DEMURRER** by transmitting a true copy via electronic mail, addressed as follows:

Darryl Cotton
6176 Federal Blvd.
San Diego, CA 92114
E-mail Address: 151DarrylCotton@gmail.com

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 22, 2022, at Rocklin, California.

N. Clark
Declarant

Signature

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