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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

EPILEPSY ASSOCIATION OF UTAH, a Utah non-profit corporation; CHRISTINE STENQUIST; DOUGLAS ARTHUR RICE; TRUCE, a Utah non-profit corporation; NATHAN KIZERIAN; SHALYCE KIZERIAN; ANDREW TALBOT, M.D., Plaintiffs, v. GARY HERBERT, Governor of the State of Utah, in his official capacity; JOSEPH K. MINER, M.D., MSPH, Executive Director, Utah Department of Health, in his official capacity, Defendants.	**SUGGESTION OF MOOTNESS** Case No. 2:19-cv-00360-DBP Magistrate Judge Dustin B. Pead

INTRODUCTION

Defendants removed this case from state court after Plaintiffs amended their complaint to add a new claim (the "federal claim") that raised, for the first time, questions of federal law. Plaintiffs' federal claim targets provisions ("Challenged Provisions") of Utah's medical marijuana law (H.B. 3001) that would, if implemented, require a "state central fill" and local health departments to distribute medical marijuana. Plaintiffs allege the Challenged Provisions are preempted by federal law.

But, during a special legislative session last week, the Utah Legislature repealed the Challenged Provisions. The Governor signed the amended law yesterday. The repeal of the Challenged Provisions moots Plaintiffs' only federal claim. With only a state-law claim remaining, the Court may now properly remand the case to allow this claim to be resolved in state court.

For the same reasons, Defendants' pending motion to dismiss and Plaintiffs' pending motion to remand are also moot. The only remaining matter requiring resolution by the Court is Plaintiffs' pending and disputed motion for attorney fees.

ARGUMENT

I. Recent Amendments to Utah's Medical Marijuana Law Have Mooted Plaintiffs' Second Claim for Relief

Based on recent amendments to H.B. 3001, Plaintiffs' sole federal claim, found in their second claim for relief, is now moot. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997) ("It is the duty of counsel to bring to the federal tribunal's attention, "*without delay*," facts that may raise a question of mootness.").

In the second claim for relief, entitled "Facial Unconstitutionality and Preemption of H.B. 3001 Because it Directly Conflicts with Federal Law," Plaintiffs challenge the provisions ("Challenged Provisions") of H.B. 3001 that require (1)"the Utah Health Department to create and operate a 'state central fill' to arrange for the purchase and distribution of marijuana," and (2) local health departments "to distribute state central fill shipments" and "to participate in arranging for the purchase, distribution, transportation, storage, and sale of" marijuana. (*See* First Amendment Complaint ("FAC"), Doc. 9-6, ¶¶ 53-55). Plaintiffs allege the Challenged Provisions violate, and are preempted by, the federal Controlled Substances Act ("CSA") and Drug-Free Workplace Act. (*Id.*)

The second claim for relief has been mooted by a legislative change to H.B. 3001. Specifically, during a special session on September 16, 2019, the Utah Legislature enacted Senate Bill 1002 ("S.B. 1002"), which repealed the Challenged Provisions from H.B. 3001. (See , Exhibit A, lines 13-14, 266-271, 1149-55, 2620-2664, 2548-2554, 2978-2986, 3009-3026, *available at* https://le.utah.gov/~2019s1/bills/static/SB1002.html). S.B. 1002 was signed by Governor Herbert on September 23, 2019, (*id.*) and went into effect on that same day. (*Id.*, lines 3770-71).

The repeal of the Challenged Provisions moots Plaintiffs' second claim for relief. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116-17 (10th Cir. 2010) (stating that amendment or repeal of a statute moots a case challenging the statute except where the "legislature has openly expressed its intent to reenact the challenged law."). The Utah Legislature has not expressed an intent to reenact the Challenged Provisions.

II. With the Sole Federal Claim Resolved, the Court may Properly Remand the Case

With the second claim for relief now resolved, only the first claim for relief remains. The first claim for relief arises under state law, specifically Article VI, Section 1 of the Utah constitution. (FAC, pp. 40-41). Thus, the Court now has to discretion to remand the case to allow the remaining state constitutional claim to be resolved by state court. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350-

53, 357 (1988) (holding a district court has discretion to remand a removed case to state court when all federal-law claims have "dropped out of the action" and only pendent state-law claims remain where doing so would "best promote the values of economy, convenience, fairness, and comity."); *Smith v. City of Enid By & Through Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims."); *cf. Dahn v. United States*, 127 F.3d 1249, 1255 (10th Cir. 1997) ("[Plaintiff] insists that the district court should have remanded his removed action back to state court at the conclusion of the proceedings. As all of the federal claims had been dismissed for lack of jurisdiction, it was within the discretion of the district court to dismiss without prejudice, rather than remand, whatever state causes of action were implicated in the pleadings.")

The Court would properly exercise its discretion by remanding this case. Now that the sole federal claim is resolved as moot, principles of economy, convenience and comity favor remanding to case to allow the Utah state courts to resolve the remaining state constitutional claim. Utah state courts are well-equipped to resolve issues of state constitutional law. And, given the potential for an appeal, it is worth noting that the Utah Supreme Court has recently resolved another case involving a related challenge to H.B. 3001 under Article VI, Section 1 of the Utah Constitution. *Grant v. Herbert*, 2019 UT 42, ¶¶ 27-29 (interpreting

and applying provision of Article VI, Section 1, and concluding laws passed by a two-thirds supermajority are not subject to voter referendum). This recent experience would help the Utah Supreme Court efficiently resolve any appeal in this case.

The parties' pending motions do not prevent resolving the case on mootness grounds. Although Defendants' motion to dismiss challenges the adequacy of Plaintiffs' allegations of standing, (Doc. 14), the Court may resolve this case on mootness grounds without ruling on the motion to dismiss (which is not yet fully briefed). *Arizona*, 520 U.S. at 66, 71-73 (resolving case on mootness grounds, despite concerns raised over whether parties had standing).

Likewise, resolving and remanding this case based on the mootness of the federal claim should moot Plaintiffs' motion to remand. (Doc 15.). At this point, with their federal claim undeniably mooted, Plaintiffs' motion to remand, if granted, would lead to the same result as this suggestion of mootness: remand of the case with only the second claim of relief remaining.

As such, the Court may and should resolve this case as suggested herein, without ruling on Plaintiffs' motion to remand. The theory underlying Plaintiffs' motion to remand is strongly disputed by the State. (Doc. 21). Specifically, Plaintiffs' motion to remand is premised on the theory the Court should remand this case simply because Defendants filed a motion to dismiss challenging Plaintiffs' standing, without a ruling or stipulation that Plaintiffs actually lack

standing. (*Id.*) Plaintiffs' theory has not been adopted by the U.S. Supreme Court, Tenth Circuit and most other courts and, in Defendants' view, is wrong on several levels. (Doc. 21).

In contrast, the premises underlying this suggestion of mootness are supported by controlling precedent. Plaintiffs' federal claim is clearly moot, and the Court has the discretion to remand the remaining state-law claim, as shown previously.

Resolving the case as suggested herein would leave only Plaintiffs' motion for attorney fees, (Doc. 15), to be resolved by the Court. That motion, which is opposed by Defendants, (Doc. 21), has been fully briefed and submitted for decision.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' second claim for relief as moot and remand the case and first claim for relief to state court.

Date this 24th day of SEPTEMBER 2019.

OFFICE OF THE UTAH ATTORNEY GENERAL

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CERTIFICATE OF MAILING

I certify that on **SEPTEMBER 24, 2019**, I electronically filed the foregoing, **SUGGESTION OF MOOTNESS**, using the Court's electronic filing system and I also certify that a true and correct copy of the foregoing was sent by United States mail, postage prepaid, to the following:

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