IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

BROTHELLA QUICK *et al.*,	)	
	)	
Plaintiffs,	)	19 C 7797
	)	
v.	)	District Judge Rowland
	)	Magistrate Judge Weisman
ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR RULE 12(b)(6) MOTION TO DISMISS

Defendants – the Illinois Department of Financial and Professional Regulation ("IDFPR") and Bret Bender, individually and in his capacity as Deputy Director of Medical Cannabis within IDFPR – by their counsel, Kwame Raoul, Illinois Attorney General, submit this reply in support of their motion to dismiss all claims against them in Plaintiffs' First Amended Complaint with prejudice and state as follows:

ARGUMENT

I. Plaintiffs cannot bring their claims against IDFPR in federal court.

Defendants argued that Counts I (state-law administrative review) and II (Section 1983 due process/property right) cannot proceed against IDFPR for two reasons. First, Defendants cited to *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989), for the precedent that Section 1983 claims must be brought against "persons", state agencies are not "persons", and therefore state agencies are not subject to suit under this statute. Plaintiffs did not respond to this argument, and thus this Court should dismiss Count II against IDFPR due to the *Will* precedent alone.

Plaintiffs did respond to Defendants' second argument regarding IDFPR – Eleventh Amendment immunity bars both counts – but they did so by citing ten cases that fail to counter Defendants' argument. In their motion, Defendants set forth the longstanding and non-controversial case law on this immunity, namely that states and state agencies cannot be sued in federal court, regardless of the relief sought, unless they consent to such suit or Congress abrogates the immunity. [Defs' Mem., at 9-10.]

Plaintiffs believe that they can sue IDFPR for equitable relief. Their reliance on *Ex Parte Young*, 209 U.S. 123 (1908), *Kroll v. Board of Trustees of the University of Illinois*, 934 F.3d 904, 908 (7th Cir. 1991), and *Whitfield v. Illinois Department of Corrections*, 2011 WL 5282639, at *4 (S.D. Ill. Nov. 2, 2011), is misplaced. These cases concerned official capacity suits against state officials, not state agencies such as IDFPR.[1] Defendants did not argue here that Eleventh Amendment immunity bars an official capacity claim against Defendant Bender for equitable relief.

In three additional cases, the opinions cited are somewhat vague about the role that the state agency played in the lawsuit. The plaintiff in *Goodman v. Illinois Department of Financial and Professional Regulation*, 430 F.3d 432, 432 (7th Cir. 2005), sued the state agency along with several official capacity defendants. The court's decision to affirm the denial of a preliminary injunction did not address the issue of whether Eleventh Amendment immunity applied. Considering that the plaintiff had brought a Section 1983 claim under the First Amendment (which cannot be brought against a state agency), it

[1] In *Whitfield*, the Illinois Department of Corrections was indeed named as a Defendant. The court granted its motion to dismiss all claims against it as barred by Eleventh Amendment immunity. 2011 WL 5282639, at *3. The court allowed injunctive and declaratory relief claims to proceed against prison officials. *Id.* at *5.

should be inferred that the injunction was considered with respect to the official capacity defendants. *See id.* at 435.

The same is true, in part, with *Wilson v. Illinois Department of Financial and Professional Regulation*, 376 F. Supp. 3d 849 (N.D. Ill. 2019). There were numerous individuals sued along with the state agency, *id.* at 855, and in fact the court applied sovereign immunity to bar state-law claims against these individuals. *Id.* at 873. It is not clear why the court addressed a state-law *damages* claim against the state agency. It dismissed the claim at the Rule 12(b)(6) stage, so it is possible that the court decided to dispose of the claim as legally deficient instead of considering whether Eleventh Amendment immunity applied. The only discussion of this immunity took place when the court simply deferred the issue of whether the State of Illinois had to indemnify the individual defendants for monetary judgments that might be entered. *Id.* at 874. In any event, nothing in *Wilson* disturbs the U.S. Supreme Court precedents that Defendants cited in their motion. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984) (Eleventh Amendment immunity applies regardless of relief sought).

It should also be noted that the court in *Benjamin v. Illinois Department of Financial and Professional Regulation*, 376 F. Supp. 2d 840, 852 (N.D. Ill. 2011), appears to have similarly declined to consider how *Pennhurst* controls the issue of Eleventh Amendment immunity with respect to the Illinois State Officials and Employees Ethics Act ("Ethics Act"). Although the court allowed an Ethics Act claim to proceed against a state agency and individual defendants in federal court, a different court in the Northern District that same year reached the opposite conclusion and ruled that Eleventh Amendment immunity barred Ethics Act claims against state agencies in federal court. *See*

Titus v. Illinois Dep't of Transp., 828 F. Supp. 2d 957, 974 (N.D. Ill. 2011). More recently, yet another court in the Northern District reached the same conclusion as in *Titus*. *See Gnutek v. Illinois Gaming Bd.*, 2017 WL 2672296, at *6 (N.D. Ill. June 21, 2017). More specifically, the court reviewed the *Benjamin* opinion and found that this opinion did not address *Pennhurst* and could not "be reconciled with the Supreme Court's holding in that case." *Id.* (ruling that the Ethics Act claim could not be brought against the state agency for monetary or equitable relief).

Plaintiffs' cases regarding state-law administrative review claims in federal court are equally unpersuasive. Plaintiffs find fault with Defendants' citation to Justice Ginsburg's dissent in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 177 n. 3 (1997), but in doing so they demonstrate a further confusion about Eleventh Amendment immunity. Defendants are not relying on *International College* as the basis for their argument that Count I for administrative review is not permissible here. *Seminole Tribe, Kroll, and Pennhurst* establish this, given the absence of waiver or abrogation. [Defs' Mem., at 9-10.] Rather, Justice Ginsburg's footnote is useful because it states a rather uncontroversial point, namely that the Supreme Court's holding in *International College* (supplemental jurisdiction covered administrative review cases) applied only to *local government* decisions and not state agency decisions due to the precedent set forth in *Pennhurst.* 522 U.S. at 177 n. 3. Put simply, state-law administrative review claims - if they can be brought – must be brought against a state agency, *see* 735 ILCS 5/3-107 (state agency is required defendant), and they must be brought in state court.

Likewise, Plaintiffs' final three cases regarding administrative review and Eleventh Amendment immunity fail to show how this precedent can be overcome here. In *Petroff*

Trucking Company v. Illinois Department of Transportation, an unpublished Southern District of Illinois case, the court misstated the law regarding lawsuits for prospective injunctive relief (which would necessarily include Section 1983 claims). It noted in passing that the Eleventh Amendment does not apply to requests for such relief against state employees sued in their official capacities (correct) or states and state agencies (incorrect, for reasons discussed above). 2011 WL 6026108, at *4 (S.D. Ill. Dec. 2, 2011). The court went on to dismiss the plaintiffs' federal claims as time barred and decline to exercise jurisdiction over a state-law claim against the state agency. *Id.* at *5-6. As with the *Benjamin* decision discussed above, it is difficult to reconcile the *Petroff* court's initial decision to find that the state-law claim could be brought in federal court with the U.S. Supreme Court's *Pennhurst* precedent.

United States v. Illinois Pollution Control Board and *Pickford v. Board of Trustees of Southeastern Illinois College* are completely irrelevant to this discussion. The federal government was the plaintiff in *Pollution Control Board*, 17 F. Supp. 2d 800, 801 (N.D. Ill. 1998), and the Eleventh Amendment does not apply to the federal government as a plaintiff. *See United States v. Mississippi*, 380 U.S. 128, 140 (1965). A community college was the defendant in *Pickford*, and so the Eleventh Amendment was also not at issue. *See* 110 ILCS 805/3-11 (community college law provides that community college district boards may be sued "in all courts and places where judicial proceedings are had").

Finally, for the same reasons as outlined above and in Defendants' motion, Eleventh Amendment immunity bars Count I even if it is considered a petition for a common-law writ of certiorari. Although Plaintiffs claim that Defendants "acknowledge the availability of such relief" [Pls' Resp. at 13], this is a misstatement of Defendants'

motion. To the contrary, Defendants argued that Eleventh Amendment immunity also bars a writ of certiorari under state law and then added that the claim would fail on the merits if the Court were to disagree and examine the claim's merits. [Defs' Mem. at 13-14.]

II. Plaintiffs do not have a property right at issue in this case.

The legal theory in Count II is that (1) Plaintiffs automatically obtained a property right, protected by the Fourteenth Amendment's due process clause, in a medical cannabis dispensary license by virtue of the plain terms of the Compassionate Use of Medical Cannabis Program Act ("the Act"), and (2) Defendants deprived them of this right in 2019 by failing to allow a change of physical location stated in Plaintiffs' application from 2014 in order to complete the process of obtaining this license. Many of the facts contained in Plaintiffs' amended complaint and their response brief are irrelevant to the analysis of this legal theory. Plaintiffs' biographical information, Defendants' treatment of other successful or unsuccessful applicants (preferential or otherwise), and the new recreational cannabis statute have no bearing on whether Plaintiffs have a property right to a medical cannabis dispensary license.

It is inconceivable how Plaintiffs have such a right based on a plain reading of the Act and IDFPR's rules. To get to their conclusion, Plaintiffs have simply pulled a few provisions out of the statute and the rules and stitched together what they want. So they start with the Act's provision that IDFPR needed to award all 60 dispensary licenses if there were qualified applicants to receive them. *See* 410 ILCS 130/115(a). Plaintiffs' theory necessarily ignore the rest of Section 115(a) regarding the imperative for geographic diversity. Plaintiffs then skip ahead to the undisputed fact that IDFPR deemed them qualified under the Act's rules. They accept the validity of the rules regarding geographic

districts solely for the purpose of each laying claim to a district that still had a license left to award. At the end of this selective review of the relevant law is Plaintiffs' conclusion that they must have a license because they are qualified, there are licenses left, and they possess property in a district with a remaining license.

This theory dismisses all the rules that stand in the way as "inconsistent" with the Act. [Pls' Resp. at 8.] Plaintiffs do not believe it was valid for IDFPR to enact a rule to divide the state into 60 districts and award licenses among these districts using competitive scoring if necessary [*Id.* at 2-3, 6], despite relying on this geographic scheme as part of their property right theory. They also object to the rule that provides for another round of applications if a qualified applicant did not emerge for a specific district in the first application process. [*Id.* at 4.] Plaintiffs appear to further object to the rule requiring applicants to submit separate applications for each district. [*Id.* at 2-3.] It can be inferred that they also object to the rule that each application requires a separate application fee. *See* 68 Ill. Adm. Code §1290.40(a)(6).

Plaintiffs' problem is that they cannot establish a property right just by claiming that administrative rules are inconsistent with a statute. It is well settled in Illinois law that "administrative rules and regulations have the force and effect which govern the construction of statutes" and that these rules and regulations "enjoy the presumption of validity." *Progressive Realty Advisors, Inc. v. Great-West Life Assur. Co.*, 783 F. Supp 1114 (N.D. Ill. 1991) (citing *Northern Illinois Automobile Wreckers, Etc. v. Dixon*, 75 Ill. 2d 53, 58 (1979)). Plaintiffs are not arguing that IDFPR's rules as enacted violate any federal right; rather, they think these rules merely conflict with the Act.

Unfortunately for Plaintiffs, they cannot advance this position in federal court. Count II is a Section 1983 claim, and Section 1983 "protects plaintiffs from constitutional violations, not violations of state law or departmental regulations." *Williams v. Shah*, 927 F.3d 476, 479 n. 1 (7th Cir. 2019) (citing *Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 2006)).

So we are left with the relevant provisions of the Act and IDFPR's rules, as well as the relevant facts contained in the amended complaint and Plaintiffs' response brief. The Act does not simply award a license to all qualified applicants. It directs that up to 60 licenses be awarded so long as license-holders are geographically dispersed throughout the state. 410 ILCS 130/115(a). Section 115 thus expressly allows for a scenario where some qualified applicants do not obtain a license in order to avoid a lack of geographic diversity. Plaintiffs are indeed correct that the Act does not explain how this diversity is to be achieved. Like countless other statutes, it direct the agency involved to "adopt rules establishing the procedures for applicants for dispensing organizations." 410 ILCS 130/115(b).

Accordingly, the presumptively-valid rules create the statewide districts, set forth the application process (including the requirement to submit separate applications and fees for up to five districts), and authorize a second application round if the first round does not match a qualified applicant with every district. *See* 68 Ill. Adm. Code § 1290.20(a); 68 Ill. Adm. Code § 1290.40(a); 68 Ill. Adm. Code. §1290.40(a)(13). Moreover, the Act establishes the minimum requirements to be deemed "qualified", *see* 410 ILCS 130/115(c), but Section 115(b), as noted above, authorizes IDFPR to enact rules regarding the application process. In accordance with Section 115(b), IDFPR established additional

application requirements for being deemed qualified. *See* 68 Ill. Adm. Code. §1290.50. Thus, Plaintiffs cannot rely solely on the Act and ignore the rules when claiming to be qualified. IDFPR's rules further established criteria to be used to rank competing qualified applications in the context of a formal application round. *See* 68 Ill. Adm. Code §1290.70.

Plaintiffs' complaint demonstrates that they have no entitlement to a license. They did not apply for, or pay the application fee for, the districts they are now seeking years later, and there has been no subsequent active application round at any time relevant to the complaint. The regulatory scheme centered around statewide districts is rooted in the text of the Act, which balances the command to award up to 60 licenses with the need for geographic diversity. It is possible that Plaintiffs had (or continues to have) remedies available in the state-court system to challenge the validity of IDFPR's rules, but they cannot seek redress for alleged state-law violations in federal court.

This Court may also look at this issue another way. Suppose Plaintiffs are correct and prior unsuccessful applications can and should be changed at any time. What is IDFPR to do if two more qualified, yet unsuccessful, applicants obtain property in the same districts that Plaintiffs are seeking now? What is IDFPR to do if three or five or ten such prior applicants do the same for one of the other three districts with a license still left? By Plaintiffs' reasoning, each applicant would have a property right to the license. Yet, it would be impossible for IDFPR to comply with its rules (or the Act if the total number of re-emerging applicants pushes the total number of licenses past 60). Any such absurd conclusion would be entirely avoided by recognizing that no person obtains a property right under the Act unless all its provisions, and all of the relevant administrative code provisions, are followed.

III. Dismissal of Count II against Defendant Bender in his individual capacity at this stage is appropriate.

Plaintiffs argue, and Defendants agree, that qualified immunity is rarely decided at the Rule 12 stage. Yet, a district court may dismiss claims at this stage based on this immunity when the complaint establishes that this immunity applies. Defendants cited to one such case. *See Bianchi v. McQueen*, 818 F.3d 309, 319 (7th Cir. 2016). This present lawsuit is a further example where qualified immunity against damages is quite apparent from the complaint and the applicable law. Section 1983 individual capacity claims require an allegation of personal involvement by a state actor in some sort of constitutional deprivation. *See Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir.1995). The amended complaint does not actually allege that Defendant Bender did anything, though it can be inferred (and is acknowledged by all parties) that Bender wrote the 2019 denial letters to Plaintiffs at issue in this case. To the extent that Plaintiffs want to use IDFPR's actions many years ago regarding other applicants as the basis of a Section 1983 claim, they cannot do so against Bender because they do not allege he had any personal involvement in these prior actions.

As for what Plaintiffs do allege against Bender, it is difficult to imagine how qualified immunity would not apply. Plaintiffs cannot point to the existence of entitlements that certain people have to certain governmental benefits and conclude that any state official should be aware of Plaintiffs' specific right to a cannabis license after the Act and its rules are torn apart and partially rebuilt as Plaintiffs see fit. It is only alleged that Defendant Bender received requests from applicants from a 2014 process who wished to change their applications about five year later. The Act and the rules directed Defendant Bender to decline these requests for the reasons outlined above. It is possible that Plaintiffs

succeed here in inventing a new way to create a property right in a license that they never possessed, but qualified immunity exists to protect public officials who cannot predict the future course of constitutional law.

IV. Administrative review is not available even if Eleventh Amendment immunity did not apply.

One final note is necessary regarding administrative review. Defendants argued that the Act only adopted the Illinois Administrative Review Law with respect to certain disciplinary actions. [Defs' Mem. at 3.] Plaintiffs point out, correctly, that administrative review is available for certain disciplinary *and non-disciplinary* actions that IDFPR takes. *See* 410 ILCS 130/130(n). However, Plaintiffs are focusing on an irrelevant issue by highlighting non-disciplinary actions. Section 130(n) only applies to actions (disciplinary or otherwise) against "the registration [i.e. license] of any person issued under this Act to operate a dispensing organization or act as a dispending organization agent…." *Id.* Plaintiffs have never been issued any such registration, and so Defendants' argument remains that judicial review under the ARL is not available, even in the absence of Eleventh Amendment immunity.

WHEREFORE, Defendants respectfully request that this Honorable Court grant their motion, dismiss all claims against them in Plaintiffs' First Amended Complaint with prejudice, and grant any further relief deemed reasonable and just. Defendants request in the alternative that this Court should decline to exercise supplemental jurisdiction over Count I (for state-law administrative review) if Count II is dismissed.

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

s/ *Michael D. Arnold*
MICHAEL D. ARNOLD
Assistant Attorney General
100 W. Randolph St., 13th Floor
Chicago, Illinois 60601
(312) 814-3720
marnold@atg.state.il.us

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Defendants' reply in support of their Rule 12(b)(6) motion to dismiss was served on February 4, 2020, on all parties through the Court's electronic CM/ECF system.

s/ *Michael D. Arnold*
MICHAEL D. ARNOLD
Assistant Attorney General
100 West Randolph St., 13th Floor
Chicago, Illinois 60601
(312) 814-3720
marnold@atg.state.il.us