

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-001875

04/07/2022

HONORABLE JOAN M. SINCLAIR

CLERK OF THE COURT

S. Motzer

Deputy

JEWISH COMMUNITY RELATIONS
COUNCIL OF GREATER PHOENIX, et al.

CRAIG M WAUGH

v.

STATE OF ARIZONA, et al.

BRUNN W ROYSDEN III

JUDGE SINCLAIR

MINUTE ENTRY

Plaintiffs seek a temporary restraining order prohibiting the Defendants from using cyanide gas to carry out any executions and prohibiting the Defendants from using any taxpayer funds in its cyanide gas program. Defendants seek dismissal of the underlying complaint. For the reasons noted below, the Court denies the request for a temporary restraining order and grants the motion to dismiss.

Initially, the Court must determine if the Plaintiffs have standing to make their requests. “[A]s a matter of sound jurisprudence a litigant seeking relief in the Arizona courts must first establish standing to sue.” *Bennett v. Napolitano*, 206 Ariz. 520, 525, ¶ 19 (2003). “To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury.” *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998) (citation omitted) (“*Sears*”).

Plaintiffs allege they suffer injury because their taxes have been used both to purchase cyanide and other chemicals, and to refurbish the gas chamber. Plaintiffs claim that the State spent \$1,529.50 on a cyanide brick and \$687.11 for other chemicals in December, 2020. See Complaint, ¶35 (On a motion to dismiss, the Court assumes all factual allegations and reasonable inferences as true. *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012) (citations omitted)). All parties agree that state funds were used to refurbish and recertify the gas chamber. Complaint, ¶ 39;

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Defendants' Response to Application for Temporary Restraining Order p. 5 ("Defendants' Response to TRO"); Lao Declaration, ¶ 3. While it is unknown at this time how much state money was spent on refurbishing the gas chamber to date, the purchase of the chemicals constitutes only a nominal use of state funds.

Plaintiffs further claim psychological injury. Complaint, ¶ 2 (Plaintiffs, as Jewish residents and taxpayers, would be effectively forced to "subsidize and relive unnecessarily the same form of cruelty used in World War II atrocities."). However, this is not a "distinct and palpable injury" to these plaintiffs outside of an "allegation of generalized harm that is shared alike by all or a large class of citizens." *Sears, id.* at 69, ¶ 16 (citation omitted).

According to the Plaintiffs, the use of cyanide gas in a state execution constitutes cruel and unusual punishment and is therefore unconstitutional. Complaint, ¶ 110. Plaintiffs' argument that, as taxpayers, they have the right to seek declaratory relief to stop the use of cyanide gas in a state execution fails because the use of lethal gas is specifically sanctioned in the state constitution.

Taxpayers may stop the "illegal expenditure" of municipal and state funds. *Ethington v. Wright*, 66 Ariz. 382, 386-87 (1948) (citations omitted). This is true where the connection between the injury and the putatively illegal act is not too remote. *Welch v. Cochise County Board of Supervisors*, 251 Ariz. 519, 525, ¶ 20 (2021) (citation omitted). Here, the connection is remote. Death row inmates can choose between lethal gas and lethal injection for offenses committed prior to November 23, 1992. If no choice is made, the default is lethal injection. A.R.S. § 13-757(B). Only 17 inmates are in the pool of persons who may make this choice. Complaint, ¶ 30. Although two death warrants may be issued imminently, at this time no one has made the choice for lethal gas.

The state constitution specifically allows for the use of lethal gas in death penalty cases. Ariz. Const. art. 22, § 22; see *State v. Williams*, 166 Ariz. 132, 142 (1987) (citation and internal quotations omitted); *Hernandez v. State*, 43 Ariz. 424, 441 (1934). The type of gas used is within the discretion of the Director of the Arizona Department of Corrections. Complaint, ¶31; A.R.S. § 41-1604(1) ("The director shall [b]e responsible for the overall operations and policies of the department."); Ariz. Const. art. 22, § 22 ("The lethal injection or lethal gas shall be administered under such procedures and supervision as prescribed by law. The execution shall take place within the limits of the state prison.").

In sum, Plaintiffs are not contesting the constitutionality of the death penalty. Nor are they contesting the constitutionality of lethal gas generally. The only issue they are contesting is the use of cyanide as the lethal gas used in Arizona as specified the protocol at the Arizona Department of Corrections ("DOC") for state executions. "Judicial deference should be given to agencies

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charged with the responsibility of carrying out specific legislation.” *Scenic Arizona v. City of Phoenix Bd. of Adjustment*, 228 Ariz. 419, 430, ¶ 33 (App. 2011) (citation and quotation omitted).

The nominal taxes used to date, the remoteness of those taxes from anyone on death row actually choosing lethal gas, and the delegation of what type of gas to use to the DOC Director leads the Court to the conclusion that Plaintiffs have not sufficiently met the standing requirement. Therefore,

IT IS ORDERED denying the request for a temporary restraining order.

IT IS FURTHER ORDERED granting the Defendants’ motion to dismiss.

This constitutes a final judgment under Rule 54(c) of the Arizona Rules of Civil Procedure. No further matters remain pending.

/s/ JOAN SINCLAIR
JUDGE JOAN SINCLAIR
JUDICIAL OFFICER OF THE SUPERIOR COURT