UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Martin R. ARANAS, Irma RODRIGUEZ, and Jane DELEON;

Plaintiffs,

v.

Janet NAPOLITANO, Secretary of the Department of Homeland Security; Alejandro MAYORKAS, Director, United States Citizenship & Immigration Services; UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES; and DEPARTMENT OF HOMELAND SECURITY;

Defendants.

SACV 12-1137 CBM (AJWx)

ORDER DENYING PRELIMINARY INJUNCTION

Plaintiff Jane DeLeon ("Plaintiff" or "DeLeon") challenges the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, as applied to preclude her from receiving certain immigration benefits that are available to immigrants in heterosexual marriages. Plaintiff seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 57 as well as review of agency action pursuant to 5 U.S.C. §§ 701-706. (Complaint ("Compl.") at ¶ 4, Docket No. 1.)

The matter before the Court, the Honorable Consuelo B. Marshall, United States District Judge presiding, is Plaintiff's Motion for Preliminary Injunction ("Motion"). [Docket No. 12.]

JURISDICTION

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331.

BACKGROUND

The facts of this case were recited in this Court's April 19, 2013 Order Granting In Part and Denying In Part Motions to Dismiss and will not be repeated herein except as necessary to clarify the decision.

This case concerns Defendants' November 9, 2011 denial of Plaintiff Jane DeLeon's I-601 waiver of inadmissibility due to Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. A I-601 waiver of inadmissibility requires a showing that DeLeon's removal from the United States would result in extreme hardship to her U.S. citizen spouse or parent. (Compl. at ¶ 28.) Pursuant to DOMA § 3, DeLeon's same-sex spouse Irma Rodriguez does not qualify as a "spouse" for purposes of establishing the requisite hardship. 1 U.S.C. § 7.

Nine months after Defendant U.S. Citizenship and Immigration Services ("USCIS") denied DeLeon's I-601 waiver of inadmissibility, DeLeon moved for a preliminary injunction. [Docket No. 12]. DeLeon seeks to enjoin[1] Defendants Janet Napolitano, Secretary of the Department of Homeland Security ("Napolitano"), Department of Homeland Security ("DHS"), Alejandro Mayorkas, Director of Defendant United States Citizenship & Immigration Services ("USCIS"), and USCIS from:

[1] Plaintiff DeLeon defined the scope of injunctive relief requested differently in her Notice of Motion, Motion, and Proposed Order. [*Compare* Docket Nos. 12, 12-1.] The language here is taken from DeLeon's Proposed Order. [Docket No. 12-1.]

a) removing or detaining plaintiffs DeLeon, Ar[a]nas and unnamed members of the plaintiff class;

b) denying employment authorization to plaintiffs DeLeon, Ar[a]nas and unnamed members of the plaintiff class;

c) issuing final administrative denials of applications or petitions filed under the Immigration and Nationality Act ("INA") solely because the petitioner's or applicant's lawful spouse is of the same sex;

d) deeming plaintiffs DeLeon and Ar[a]nas and unnamed members of the plaintiff class inadmissible pursuant to 8 U.S.C. § 1182(a)(9)(B)(i), where such persons would not have accrued more than six months in unlawful status but for § 3 of the Defense of Marriage Act, 1 U.S.C. § 7; and

e) failing to timely provide those in same sex marriages filing applications or petitions under the INA based upon their same sex marriages with notice of this Order.[2]

STANDARD OF LAW

A "preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 676, 128 S. Ct. 2207, 2210, 171 L. Ed. 2d 1 (2008). A district court should enter a preliminary injunction only "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008). In deciding whether to issue a preliminary injunction, the Court must consider: (1) the likelihood that the moving party will succeed on the merits of its claim; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships tips in favor of one party or the other; and in certain cases (4) whether the public interest will be advanced by granting preliminary relief. *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994);

[2] At oral argument, counsel for Plaintiff DeLeon agreed that more limited injunctive relief would sufficiently preserve the status quo. (Pltfs. Supplemental Exhibit 23 at 71:17-72:4.) Such a modified preliminary injunction would include a more limited prohibition on removing, detaining, or denying work authorizations to DeLeon and members of the plaintiff class *pendente lite* where such actions would occur solely because the petitioner's or applicant's lawful spouse is of the same sex. (*Id.*) Counsel for Defendants requested an opportunity to review and comment on any revised preliminary injunction prior to its issuance. (*Id.* at 74:24-75:4.) No revised proposed preliminary injunction has been filed and this Order addresses only the scope of the preliminary injunctive relief originally requested.

see also Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1120 (9th Cir. 2005).

Winter did not completely erase the Ninth Circuit's "sliding scale" approach, which provided that "the elements of the preliminary injunction tests are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Therefore, "'serious questions going to the merits' and a hardship balance that tips sharply in the plaintiff's favor can support issuance of an injunction, so long as the plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public interest." *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 739-40 (9th Cir. 2011).

DISCUSSION

A. Likelihood of Success on the Merits

To prevail on her claims, Plaintiff DeLeon must show that DOMA fails rational basis review because it is not rationally related to legitimate government interests. *See Aranas, et al. v. Napolitano, et al.*, SACV 12-1137 CBM (AJWx), Docket No. 126[3]; *Perry v. Brown*, 671 F.3d 1052, 1082 (9th Cir. 2012) (citing *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855 (1996)), *cert. granted*, 133 S. Ct. 786, 184 L. Ed. 2d 526 (2012). Defendants concede that DeLeon is likely to succeed on her claim that DOMA violates the equal protection component of the Fifth Amendment. (Opp'n at 17:5-18:8.) Intervenor argues that DeLeon is not likely to succeed on the merits of her equal protection claim. (Intervenor Opp'n at 8:6-26.) Intervenor's arguments are identical to the arguments Intervenor made in support of its motion to dismiss this litigation. (*Id.*) The Court has previously rejected these arguments. *See* Docket

[3] *See, e.g., Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (affirming the district court's determination that where "savings depend upon distinguishing between homosexual and heterosexual employees, similarly situated . . . such a distinction cannot survive rational basis review."); *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (holding that Don't Ask, Don't Tell violated substantive due process principles under heightened scrutiny but did not violate equal protection principles under rational basis review).

No. 126.

The Court finds that Plaintiff DeLeon has demonstrated a likelihood of success on the merits.

B. Irreparable Injury

It is the plaintiff's burden to show that irreparable injury is likely in the absence of an injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "'[C]onstitutional violations . . . generally constitute irreparable harm . . .'" *Nelson v. Nat'l Aeronautics & Space Admin.*, 568 F.3d 1028, 1030 n.5 (9th Cir. 2009) (finding irreparable harm not only likely but certain); *see also Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (acknowledging that appellees could simply close their pharmacy or hire a non-objecting pharmacist but finding that "[i]f Appellees are compelled to stock and distribute Plan B without the benefit of the preliminary injunction, and a trial on the merits shows that such compulsion violates their constitutional rights, Appellees will have suffered irreparable injury . . . .").

Plaintiff DeLeon argues that she will suffer irreparable injury in the absence of a preliminary injunction because DOMA's continued application relegates her to "the status of undocumented alien[], with all disabilities attendant thereto." (Motion at 22:15-23:8.) DeLeon further argues that "case-by-case" prosecutorial discretion is insufficient because many immigration field officers lack the training to make appropriate and consistent determinations and, even if favorable, the exercise of prosecutorial discretion may not preserve work authorization or toll accrual of "unlawful presence." (Reply at 3-7; Declaration of Kevin Cathcart in Support of Motion ("Cathcart Decl.") at ¶¶ 11-12.) DeLeon proffers a number of Board of Immigration Appeals ("BIA") and USCIS Decisions denying benefits, as well as declarations concerning the injuries previously sustained by members of the proposed class. (*See* Combined Exhibits in Support of Motions for Preliminary

Injunction and Class Certification ("Combined Exhibits"), Exs. 2, 3, 6, 7, 11-14, 16, 17; Pltfs. Supplemental Exhibits in Support of Motions for Preliminary Injunction and Class Certification ("Pltfs. Suppl."), Ex. 18 (Declaration of Holga Martinez, Docket No. 93.))

Defendants and Intervenor argue that there is no possibility of future irreparable injury to Plaintiff DeLeon herself and further argue that any potential injuries are better remedied through the prosecutorial discretion permitted to U.S. Immigration and Customs Enforcement ("ICE") in prioritizing its detention and removal responsibilities. (*See, e.g.*, Dfts. Opp'n, Exs. A-B.) Defendants and Intervenor provide evidence that the appropriate application of prosecutorial discretion to immigrants in same-sex marriages has already been clarified as part of a comprehensive policy update in three memoranda issued by ICE Director John Morton to all ICE employees (hereinafter, the "Morton Memo"). (*See* Dfts. Opp'n, Exs. A-B; Dfts. Notice of Supplemental Authority Regarding Plaintiffs' Motion for Preliminary Injunction ("Suppl. Authority"), Ex. 1, Docket No. 82.)

The Morton Memo addresses the irreparable harm the plaintiff class will suffer in the absence of preliminary injunctive relief. First, the Morton Memo lists nineteen nonexclusive factors that ICE employees should consider in exercising prosecutorial discretion. (*Id.*) As of October 5, 2012, these nineteen factors explicitly include an individual's ties and contributions to the community, such as same-sex family relationships, which weigh against removal and in favor of affirmative relief. (Suppl. Authority, Ex. 1.) Second, the Morton Memo specifies decisions that may be influenced by exercise of prosecutorial discretion. These decisions include ICE employees' determinations of whether to initiate removal proceedings by issuing a Notice to Appear; whether to detain or to release on bond, supervision, personal recognizance, or other condition; whether to settle or dismiss a proceeding; and whether to grant deferred action, grant parole, or stay a final order of removal. (Dfts. Opp'n, Ex. B). Decisions to initiate removal

proceedings, detain, or grant deferred action status (which includes both temporary work authorizations and tolling accrual of unlawful presence) encompass precisely the injunctive relief sought by DeLeon. (*Id.*; Motion at 24:5-15; Dfts. Opp'n at 25:1-22; Reply at 8:1-5 ("plaintiffs are *not* seeking an injunction requiring that defendants adjudicate applications under the INA without regard to DOMA") (emphasis in original).)

When co-equal branches of government are actively changing a challenged practice, the doctrine of prudential mootness urges the judiciary to decline exercise of its authority. *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90, 119 S. Ct. 936, 946, 142 L. Ed. 2d 940 (1999) (decisions to prosecute are particularly ill-suited to judicial review); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (preliminary injunction unnecessary where no *new* harm is imminent). The doctrine comes from the Supreme Court's decision in *A.L. Mechling Barge Lines, Inc. v. United States*, which the Supreme Court declined to adjudicate because "[t]he Commission . . . represents that it has amended its practice accordingly. It thus appears that one of the 'continuing' practices whose validity appellants would have us adjudicate continues no longer." 368 U.S. 324, 330-31, 82 S. Ct. 337, 341, 7 L. Ed. 2d 317 (1961); *see also In re Cont'l Airlines*, 91 F.3d 553, 561 (3d Cir. 1996); *Bldg. & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1492 (10th Cir. 1993) ("[A] court may decline to grant declaratory or injunctive relief where it appears that a defendant, usually the government, has already changed or is in the process of changing its policies or where it appears that any repeat of the actions in question is otherwise highly unlikely.").

While DeLeon and the plaintiff class have undeniably been harmed by the potentially unconstitutional application of DOMA § 3 to their immigration petitions, it is less clear whether any members of the plaintiff class are likely to

suffer irreparable injury *pendente lite*. The Morton Memo provides detailed guidance on the proper exercise of ICE's prosecutorial discretion. The October 5, 2012 amendment to the Morton Memo specifically expanded ICE prosecutorial discretion for the benefit of those in same-sex family relationships. (Suppl. Authority, Ex. 1.) Since the October 5, 2012 amendment, immigrants in same-sex marriages may qualify for deferred action status, which includes the temporary work authorization and tolling of unlawful presence accrual that Plaintiff DeLeon seeks by this Motion. Indeed, none of the adverse immigration decisions provided by DeLeon post-date the October 5, 2012 amendment to the Morton Memo. (*See, e.g.*, Combined Exhibits, Exs. 1, 7, 13, 14, 17.) The parties have filed with the Court several supplemental authorities following briefing and oral argument on this motion. (*See, e.g.*, Docket Nos. 113, 119, 125.) None of these supplemental authorities include adverse immigration decisions affecting those in the plaintiff class after October 5, 2012.

In the absence of a showing that the plaintiff class is likely to suffer future irreparable injury *pendente lite* without the benefit of preliminary injunctive relief and considering Defendants' showing that they have moved to ameliorate any future injury, the Court finds that Plaintiff DeLeon has not satisfied her burden of showing irreparable injury.

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CONCLUSION

Because the Court has found that Plaintiff DeLeon has not demonstrated a likelihood of irreparable harm, it need not consider the remaining two factors. For the reasons stated, the Court **DENIES** the Motion for Preliminary Injunction.

IT IS SO ORDERED.

DATED: April 19, 2013

By _____
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE