2009 WL 1683905 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.

Arthur SMELT and Christopher Hammer, Plaintiff,
v.
UNITED STATES OF AMERICA, State of California, and Does 1 through 1,000, Inclusive, Defendant.

No. SACV-09-286 DOC (MLGx).
June 11, 2009.

Memorandum of Points and Authorities in Support of Motion to Dismiss Action Against Defendant State of California for Failure to State A Claim [Fed. R. Civ. P. 12(b)(6)]

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Judge: The Hon. David O. Carter.

Date: July 13, 2009

Time: 8:30 a.m.

Ctrm: 9D

Trial Date: None

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INTRODUCTION

On May 26, 2009, the California Supreme Court issued its highly anticipated decision in a set of consolidated cases challenging the validity of Proposition 8 under the California Constitution. Although it upheld Proposition 8 as a valid constitutional amendment, the Court narrowly construed the measure's scope and, most importantly for this motion, held that Proposition 8 did not retroactively apply to same-sex marriages solemnized before the measure was approved by the voters in the November 2008 election. "Those marriages," wrote the court, "remain valid in all respects." *Strauss v. Horton* (May 26, 2009) 2009 WL 1444594 at 65, 93 Cal. Rptr. 2d 591, 680.

Strauss leaves no doubt that same-sex marriages lawfully occurring in California before the November election remain valid and recognized under California law notwithstanding the passage of Proposition 8. This means that Plaintiffs, a same-sex couple who allege that they were lawfully married in California before the election, lack standing to challenge the facial validity of Proposition 8 under the United States Constitution. As for this challenge, Plaintiffs are unable to establish *any* of the essential elements of standing that would demonstrate the presence of a "case or controversy" within the meaning of Article III. Quite simply, there is no relief that this Court can grant Plaintiffs that California has not already recognized.

Because Plaintiffs lack standing to bring any of the claims alleged in their complaint against the State of California, the state must be dismissed from this action under Federal Rule of Civil Procedure 12(b)(6). Moreover, because there is no possibility that Plaintiffs can amend these claims to assert standing, the action against the state should be dismissed without leave to amend.

It is not unlikely that the constitutionality of Proposition 8 will be challenged by litigants in other federal court proceedings. Indeed, at least one highly publicized challenge has already been filed in the Northern District: *Perry v. Schwarzenegger,* Northern District case no. CV09-2292. But if such challenges are to be heard by the federal courts, they must be brought by plaintiffs who come with sufficient standing to satisfy Article III. The plaintiffs in this case, their marriage unaffected in any way by the passage of Proposition 8, lack standing to sue and are not the proper parties to present this challenge.

STATEMENT OF THE CASE

I. THE FIRST *SMELT* LAWSUIT AND THE *MARRIAGE* CASES DECISION.

This case is the second time that Plaintiffs Arthur Smelt and Christopher Hammer have challenged the constitutionality of California marriage laws in federal court. In the previous case (*Smelt v. County of Orange,* Central District case no. SACV 04-1042), which was the subject of published opinions in the district court and the Ninth Circuit, Plaintiffs' claims against the State of California were dismissed as moot after the California Supreme Court held that the state's ban on same-sex marriage violated the state Constitution. *In re Marriage Cases* (2008) 43 Cal. 4th 757, 76 Cal. Rptr. 2d 683.

In this initial lawsuit, filed in 2004, Plaintiffs alleged that the Orange County Clerk had denied them a marriage license because they were a couple of the same sex. *Smelt v. County of Orange,* 374 F. Supp. 2d 861, 864 (C.D. Cal. 2005). In addition to suing the County of Orange, Plaintiffs sued the State Registrar of Vital Statistics and the Department of Health Services, alleging that California statutes prohibiting same-sex marriage violated provisions of the United States Constitution, including the Due Process and Equal Protection Clauses. *Id.* Among other statutes, Plaintiffs challenged California Family Code section 300, which defined marriage as "a personal relation arising out of a civil contract between a man and a woman," and section 308.5, which provided that "[o]nly marriage between a man and a woman is valid or recognized in California." *Id.*

Plaintiffs also challenged the constitutionality of the federal Defense of Marriage Act ("DOMA"). *Smelt v. County of Orange,* 374 F. Supp. 2d at 864. They asserted that section 2 of the DOMA, which provides that no state is required to recognize a relationship between a same-sex couple treated as marriage by another state, violated the Full Faith and Credit Clause of the United States Constitution.1 *Id.* at 865. And they asserted that section 3 of the DOMA, which defines marriage for purposes of federal law, violated the Due Process and Equal Protection Clauses of the U.S. Constitution and their right of privacy.2 *Id.* At the Court's invitation, the United States intervened to respond to the DOMA challenge. *Id.*

Footnotes

1 Section 2 of the DOMA provides: "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C.

In his published decision, Judge Taylor granted the state defendants' motion to abstain and to stay the part of the case challenging the state statutes pending resolution of *In re Marriage Cases* in the California Supreme Court. *Smelt v. County of Orange,* 374 F. Supp. 2d at 865-870. As for the DOMA claims, Judge Taylor held that plaintiffs lacked standing to challenge Section 2, and, although he found that they had standing to challenge section 3, upheld that section as constitutional. *Id.* at 870-880.

Affirming in part and reversing in part, the Ninth Circuit upheld Judge Taylor's decision to abstain from deciding the constitutionality of the state marriage laws until the California Supreme Court had resolved their validity under the state Constitution. *Smelt v. County of Orange,* 447 F. 3d 673, 678-682 (9th Cir. 2006). Further, the Ninth Circuit agreed that plaintiffs lacked standing to challenge section 2 of the DOMA. *Id.* at 682-683. But the appellate court concluded that plaintiffs also lacked standing to challenge section 3 of the DOMA and held that the district court should not have reached the question of its constitutionality. *Id.* at 683-686. Therefore, while upholding the decision to abstain from the state claims and to dismiss the section 2 claim, the Ninth Circuit vacated the district court's decision on the section 3 claim and remanded with instructions to dismiss that claim as well. *Id.* at 686.

In May 2008, the California Supreme Court issued its long-awaited decision in *In re Marriage Cases.* Holding that the statutes violated the California Constitution, the Court struck down Family Code section 308.5 in its entirety and language in Family Code section 300 limiting marriage to a union between a man and a woman. *In re Marriage Cases,* 43 Cal. 4th at 857.

After the opinion in *Marriage Cases* was issued, the district court in the first *Smelt* case (now reassigned to Judge Carter) dismissed the action on remand from the Ninth Circuit. (*See* Request for Judicial Notice, Order Dismissing Case Pursuant to Ninth Circuit Order.) In its order, the district court took note of the *Marriage Cases* decision, adding that plaintiffs "were subsequently married." (*Id.* at 2.) Addressing the state law claims, the district court wrote:

With regard to the challenges of California state-law, the California Supreme Court resolved these challenges based on the state Constitution. Thus, there is no need to resolve the Federal Constitutional issues, absent some subsequent change in law. Accordingly this claim is hereby DISMISSED.

(*Id.* at 2 (original emphasis).)

The district court specified that the state law claims were dismissed with prejudice. *Id.* Additionally, the court dismissed the section 2 and section 3 DOMA claims. *Id.*

II. PROPOSITION 8 AND THE *STRAUSS V. HORTON* DECISION.

In the November 2008 election, after the decision in *Marriage Cases* and the dismissal of the first *Smelt* lawsuit, California voters approved Proposition 8. This measure added the following provision to the California Constitution: "Only marriage between a man and a woman is valid or recognized in California." Cal. Const., art. I, § 7.5. This wording was identical to the wording of Family Code section 308.5, found unconstitutional in *Marriage Cases.*

The measure was immediately challenged in three original petitions filed in the California Supreme Court, later consolidated under the lead case of *Strauss v. Horton,* no. 168047.3 In accepting the petitions for review, the Supreme Court directed the parties to brief three issues: (1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution? (2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution? (3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8? *Strauss v. Horton,* 2009 WL 1444594 at 13 fn. 4.

2 Section 3 of the DOMA provides: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

The Court upheld Proposition 8 as a constitutional amendment validly approved through the initiative process. *Strauss v. Horton,* 2009 WL 1444594 at 43-54. Additionally, the Court held that Proposition 8 did not violate the separation of powers doctrine. *Id.* at 57-59.

On the third issue, the measure's impact on existing same-sex marriages, the court held that Proposition 8 "should be interpreted to apply prospectively and not to invalidate retroactively the marriages of same-sex couples performed prior to its effective date." *Id.* at 62. "[A]pplying ... well-established principles of interpretation relating to the question of retroactivity," the Court concluded that "Proposition 8 cannot be interpreted to apply retroactively so as to invalidate the marriages of same-sex couples that occurred prior to the adoption of Proposition 8." *Id.* at 65. Therefore, "[t]hose marriages remain valid in all respects." *Id.*

Moreover, *Strauss* interpreted Proposition 8 in a "limited fashion" and construed the measure "as eliminating only the right of same-sex couples to equal access to the designation of marriage, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family relationship." *Strauss v. Horton,* 2009 WL 1444594 at 19. "Accordingly, ... those couples continue to possess ... 'the core set of basic *substantive* legal rights and attributes traditionally associated with marriage,' including, 'most fundamentally, the opportunity of an individual to establish--with the person with whom the individual has chosen to share his or her life-an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.' " *Id.* at 20, quoting *In re Marriage Cases, supra,* 43 Cal. 4th at p. 781 (original emphasis).

III. THE PLAINTIFFS' CLAIMS.

Plaintiffs commenced this lawsuit on December 29, 2008 in the aftermath of Proposition 8 by filing their Complaint for Declaratory and Injunctive Relief in Orange County Superior Court. The Complaint names the United States of America and the State of California as defendants along with unnamed Does 1 through 1,000. On March 9, 2009, the United States removed the action to the district court.

In their complaint, Plaintiffs allege that "they are a same-sex couple who married lawfully within the State of California on or subsequent to July 10, 2008." (Compl., ¶2.)

Most of the substantive allegations of the complaint are directed at the DOMA and the United States, not Proposition 8 and the State of California. (Compl., ¶¶ 6-8, 10-28.) With respect to the State of California, all of the substantive allegations appear in paragraph 29, which alleges:

Defendant, State of California, caused Proposition 8 to be published on the ballot for the November 4, 2008 election. Proposition 8 amends the California Constitution to defined (*sic*) marriage as between a man and a woman and to prohibit same gender marriage. As amended, the State of California Constitution violates the United States Constitution as follows: Violation of the Equal Protection and Due Process Clauses and violation of the Right to Life, Liberty and the Pursuit of Happiness. The prohibition further violates the right to be free from an undue invasion of the Right of Privacy; and violates the Ninth Amendment Right of Reservation of all Rights not Enumerated to the People and the Right to Travel, and The Right of Free Speech.

(Compl., ¶ 29.)

The complaint does not allege separate claims for relief, but the prayer asks for a declaration that Proposition 8 violates provisions of the United States Constitution, including the Equal Protection and Due Process Clauses. (Compl. at p. 6 [prayer, ¶ 5].) Further, Plaintiffs ask for an injunction "mandating and compelling the State of California to eliminate from its Constitution the amendment which bans same gender marriage and defines marriage as between a man and woman commonly known as Proposition 8." (*Id.* at p. 7 [prayer, ¶ 6].) Finally, Plaintiffs ask for "an injunctive order mandating the use of gender-neutral terms in all legislation affecting marriage." (*Id.* at p. 7 [prayer, ¶ 7].)

With respect to the DOMA claims, Plaintiffs appear to focus again on sections 2 and 3 (1 U.S.C. § 7; 28 U.S.C. § 1738C), the subject of their earlier challenge. (Compl. at ¶¶ 15-16.) Plaintiffs allege that these sections violate various provisions of the U.S. Constitution. (*Id.* at ¶¶ 17-28.) They ask for a declaratory judgment that these provisions are unconstitutional. (*Id.* at p. 7

[prayer, ¶¶ 1-5].)

ARGUMENT

I. THE COURT MAY DISMISS A CLAIM FOR RELIEF PURSUANT TO RULE 12(B)(6) WHEN THE PLAINTIFF LACKS STANDING TO SUE.

Pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." In the Ninth Circuit, a Rule 12(b)(6) motion is the appropriate vehicle to attack a complaint that fails to allege standing. *Sacks v. Office of Foreign Assets Control,* 466 F. 3d 764, 771 (9th Cir. 2006) ["To survive a Rule 12(b)(6) motion to dismiss, Sacks must allege facts in his Amended Complaint that, if proven, would confer standing upon him."]

"[A] Rule 12(b)(6) motion to dismiss for failure to state a claim can be used when plaintiff has included allegations in the complaint that, on their face, disclose some absolute defense or bar to recovery." Schwarzer, et. al., Federal Civ. Pro. Before Trial (The Rutter Group 2009) § 9:193, p. 9-34. On a Rule 12(b)(6) motion, "[i]f the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts." *Weisbach v. County of Los Angeles,* 119 F. 3d 778, 783 fn. 1 (9th Cir. 1997).

Here, plaintiffs allege that they were lawfully married in California in July 2008 before the passage of Proposition 8. Moreover, their previous lawsuit was dismissed with prejudice in August 2008, before passage of the measure, based in part on the court's finding that plaintiffs were in fact married following the *In re Marriage Cases* decision. Therefore, the question of Plaintiffs' standing to challenge Proposition 8 at this time may be properly assessed under Rule 12(b)(6).

II. PLAINTIFFS LACK STANDING TO CHALLENGE PROPOSITION 8 BECAUSE CALIFORNIA LAW RECOGNIZES THEIR MARRIAGE AS VALID.

"Article III of the Constitution limits the judicial power of the United States to the resolution of 'cases' and 'controversies.' " *Council of Insurance Agents & Brokers v. Molasky-Arman* 522 F. 3d 925, 930 (9th Cir. 2008). "[P]arties cannot 'invoke the judicial power of the United States in a case that does not present an actual case or controversy.' " *Williams v. Boeing Co.,* 517 F. 3d 1120, 1129 (9th Cir. 2008), *Sosna v. Iowa,* 419 U.S. 393, 398 (1975).

The doctrine of standing is one of the elements of justiciability in the federal courts, and "the core component of standing is an essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" contains three elements:
First, the plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized, [cit. omit] and (b) "actual or imminent, not 'conjectural' or 'hypothetical' " [cit omit]. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court." [Cit. omit.] Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [Cit. omit.]

Id. (internal brackets omitted).

Here, the complaint demonstrates that Plaintiffs cannot establish any of the core components of standing with respect to their claims against the State of California.

With respect to the first element, Plaintiffs have not suffered an "injury in fact" because Proposition 8, as interpreted by the California Supreme Court, has no effect on their marriage. In holding that Proposition 8 lacks retroactive effect, the California Supreme Court recognized that the estimated 18,000 same-sex marriages performed before the election, including

Plaintiffs' marriage, remain valid in all respects. *See Strauss v. Horton,* 2009 WL 1444594 at 65. Thus, plaintiffs' legally protected interest--their marriage-has not in any sense been invaded by the measure's enactment.

This conclusion is bolstered by the California Supreme Court's determination that Proposition 8 did not alter any of the substantive rights of same-sex couples recognized by *In re Marriage Cases* other than the right to have their relationship legally afforded the designation of marriage. *Strauss v. Horton,* 2009 WL 1444594 at 18-22. As noted above, although Proposition 8 restricts the designation of marriage to opposite-sex couples only, "in all other respects same-sex couples retain the same substantive protections ... as those accorded to opposite-sex couples." *Id* at 22. Unlike unmarried same-sex couples, Plaintiffs retain the only right impacted by Proposition 8--the designation of marriage--while also retaining all of the rights left uninfringed by the measure.

Moreover, Plaintiffs' inability to satisfy the injury-in-fact element is virtually compelled by the district court's determination that their marriage mooted the prior lawsuit. (*See* Request for Judicial Notice, Order Dismissing Case.) Previously, the district court held that *In re Marriage Cases* and the Plaintiffs' subsequent marriage mooted their claims against the State. (*Id.* at p. 2). Plaintiffs are in no different situation today. They retain all of the substantive rights that were left unaffected by Proposition 8 and retain the designation of marriage that was not retroactively altered by Proposition 8. Thus, for the same reasons their earlier challenge to California marriage laws was rendered moot, Plaintiffs' challenge to Proposition 8 falters for lack of an injury-in-fact that would support standing.

The fact that unmarried same-sex couples might have sufficient standing to challenge the constitutionality of Proposition 8 does nothing to confer standing on Plaintiffs. "The claim must be for injury to *plaintiff's own* legal rights and interests, rather than the legal or interests of third parties." Schwarzer, § 2:1207, p. 2E-3 (original emphasis); accord: *Warth v. Seldin,* 422 U.S. 491, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 ["[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."]

The absence of an injury-in-fact disposes of the remaining elements of causation and redressability. Without a cognizable injury, Plaintiffs cannot establish a connection between an actionable harm and any act of the defendant. And Plaintiffs do not seek any relief that would redress any harm actually suffered by them. As the United States Supreme Court has said: "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 107, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Plaintiffs will be in the identical situation-married with rights recognized by California Supreme Court--whether the court overturns Proposition 8 under the U.S. Constitution or upholds it. Plainly, standing may not rest on such shallow ground.

Plaintiffs' allegation that the "refusal of all states and jurisdictions of the United States of America" to recognize their marriage has resulted "in the denial of hundreds of state law rights, benefits and responsibilities, and more than a thousand federal rights, benefits, and responsibilities" is insufficient to confer standing. (Compl. at ¶ 3.) This conclusory allegation is plainly directed to the DOMA claims, not the Proposition 8 claims; it would make little sense to allege that Plaintiffs are be denied rights under *California* law by Proposition 8 when the California Supreme Court has expressly held otherwise. Moreover, Plaintiffs fail to allege that the State of California or any state actor has failed to recognize the legitimacy of their marriage or has denied them any benefit available under state law.

Because Plaintiffs cannot establish any of the essential elements of standing, their complaint must be dismissed. Moreover, because no allegation consistent with the pleading could possibly cure this deficiency, the state respectfully submits that the motion to dismiss should be granted without leave to amend. See *Schreiber Distributing Co. v. Serv-Well Furniture Co.,* 806 F. 2d 1393, 1401 (9th Cir. 1986) [recognizing that a court need not grant leave where "the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency."]

CONCLUSION

As a couple who allege that they were lawfully married before the passage of Proposition 8, a measure the California Supreme Court has held does not retroactively apply to marriages performed before its approval by the voters, Plaintiffs lack

standing to challenge its validity under the U.S. Constitution. Defendant State of California therefore respectfully requests that the Court dismiss all claims against the state without leave to amend.

Dated: June 11, 2009

Respectfully submitted,

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3 The other petitions were *Tyler v. State of California,* no. 168066, and *City and County of San Francisco v. Horton,* no. 168078.