2009 WL 2610458 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California,
Southern Division.

Arthur SMELT and Christopher Hammer, Plaintiffs,
v.
UNITED STATES OF AMERICA, State of California, and Does 1 through 1,000, Defendants.

No. SACV09-00286 DOC (MLGx).
August 17, 2009.

Reply Memorandum in Support of Defendant United States of America's Motion to Dismiss

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Date: August 24, 2009

Time: 8:30 a.m.

INTRODUCTION

Plaintiffs invite the Court to make broad rulings unnecessarily. The Court should decline that invitation for a number of reasons. This case can and should be decided on much narrower grounds -- plaintiffs' failure to establish the Court's jurisdiction over this action and plaintiffs' inability to demonstrate that they have standing to pursue their claims. The plaintiffs have not shown that any other state has refused to recognize their California marriage, and they do not allege that the federal definitions of "marriage" and "spouse" set forth in DOMA have been applied to them (*e.g.,* plaintiffs do not allege that they have applied for and been denied any federal benefits because of the operation of DOMA). Nothing in plaintiffs' opposition to the United States' motion to dismiss -- to the extent it addresses the issues at all -- undercuts either of these threshold arguments (Doc. 40).1 Thus, on the issues of jurisdiction and standing alone, without even reaching the merits, this case should be dismissed.

Footnotes

With respect to the merits, this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal. Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here.2 And in this case, plaintiffs' constitutional claims are unavailing. In their opposition brief, plaintiffs offer only a token response to the United States' arguments on the merits. Indeed, they say nothing at all in response to the arguments concerning their "full faith and credit," right to travel, right to privacy, First Amendment, or Ninth Amendment claims. On that basis alone, those claims should be dismissed.

1 Much of plaintiffs' opposition is irrelevant to the United States' motion to dismiss. Specifically, four of the memorandum's six pages are a verbatim repetition of plaintiffs' opposition (Doc. 33) to the State of California's motion to dismiss in this action, focusing on issues of state sovereign immunity that are inapplicable here.

Accordingly, the present motion to dismiss should be granted.

ARGUMENT

I. *This Court Lacks Jurisdiction Over Plaintiffs' Claims Against the United States Because the State Court Lacked Jurisdiction*

Plaintiffs do not dispute that a federal court, after removal of a case from state court, "has no more jurisdiction than the state court" did before removal, *see Salveson v. Western States Bankcard Ass'n,* 731 F.2d 1423, 1431 (9th Cir. 1984), nor that the Superior Court of California for the County of Orange lacked jurisdiction over plaintiffs' claims in this case before removal. *See Powelson v. United States,* 150 F.3d 1103, 1105 (9th Cir. 1998) (dismissing removed matter where "[t]he government [had] not waived its immunity from suit in state courts"); *Nebraska v. Bentson,* 146 F.3d 676, 679 (9th Cir. 1998) ("Without an express waiver of the IRS's sovereign immunity as an agency of the United States, the state court lacked jurisdiction."). Plaintiffs' only response to these principles is to allege that the parties herein "understood" between themselves that this action would initially be filed in state court, followed by removal to this Court by the United States (Doc. 40 at 2). That, however, is inaccurate.3 As explained in the accompanying declaration, the United States at no time agreed to the initial filing of this action in state court, and counsel for the parties did not communicate regarding removal of the case to federal court until after the United States had transmitted its Notice of Removal to this Court. (*See* Declaration of W. Scott Simpson ¶¶ 2-4 (Attachment 1 hereto).) Thus, there was no "understanding" between the parties regarding the filing of this action in state court or its removal to this Court. In any event, even if there had been such an "understanding" between counsel, it could not create jurisdiction in this Court contrary to the established principles set forth above. *See United States v. New York Rayon Importing Co.,* 329 U.S. 654, 660, 67 S. Ct. 601, 604, 91 L.Ed. 577 (1947) ("[O]fficers of the United States possess no power through their actions to ... confer jurisdiction on a court in the absence of some express provision by Congress."); *see also United States v. Judge,* 944 F.2d 523, 525 (9th Cir. 1991) ("[I]t is well-established that litigants cannot confer [subject matter] jurisdiction by consent where none exists.").

2 This longstanding and bipartisan tradition accords the respect appropriately due to a co-equal branch of government and ensures that subsequent administrations will faithfully defend laws with which they may disagree on policy grounds.

II. *Plaintiffs' Claims and Allegations Against the United States Must Be Dismissed for Lack of Standing*

Plaintiffs lack standing to challenge either section of DOMA. Section 2 provides that one state need not recognize a same-sex marriage performed under the laws of another state. 28 U.S.C. § 1738C. Plaintiffs are married under the laws of California, but they are residents of California and do not allege that any other state has refused to recognize their marriage (Complaint ¶¶ 9, 10). Section 3 of DOMA defines the words "marriage" and "spouse" for purposes of federal law, but plaintiffs do not allege that that definition has ever been applied to them. 1 U.S.C. § 7.4

3 Plaintiffs also assert that the United States has "inadvertently led [this Court] to misunderstand why Plaintiffs filed in State court," by "fail [ing] to mention" plaintiffs' state court filing (Doc. 40 at 2). That is also incorrect, as the United States' motion to dismiss sets forth in detail the facts regarding plaintiffs' attempted filing in this Court, the denial of *in forma pauperis* status, and the subsequent filing in state court (Doc. 25 at 8).

Plaintiffs' only response in support of standing is to assert that "the Ninth Circuit ruled [in *Smelt v. County of Orange,* 447 F.3d 673 (9th Cir. 2006)] that if Smelt and Hammer were married they had standing to address DOMA in it's [sic] entirety" (Doc. 40 at 7). But that is a misreading of the Court of Appeals' decision, and a misunderstanding of the requirements for standing. Regarding plaintiffs' lack of standing to challenge Section 2, the court said, "In sum, while Section 2 *may* affect someone who has been declared married in some state, Smelt and Hammer do not come within that category of people." *Smelt,* 447 F.3d at 683 (emphasis added). In other words, marriage was a necessary, but not a sufficient, circumstance for

challenging Section 2. That also is stated in this Court's opinion granting summary judgment to the defendants:

> Plaintiffs ... have not shown they will suffer an imminent injury as a result of section 2. They do not claim to have plans or a desire to get married in Massachusetts or elsewhere and attempt to have the marriage recognized in California. *They do not claim to have plans to seek recognition of their eventual California marriage in another state.* Without definite plans to engage in an act that will cause them to suffer an injury in fact, Plaintiffs have not established an imminent injury sufficient to confer standing to challenge section 2.

Smelt v. County of Orange, 374 F. Supp. 2d 861, 871 (C.D. Cal. 2005) (emphasis added). Because plaintiffs "do not claim to have plans to seek recognition of their ... California marriage in another state," they still lack standing to challenge Section 2.

Furthermore, plaintiffs' argument ignores the Court of Appeals' separate holding regarding plaintiffs' lack of standing to challenge Section 3, the definitional section. In that regard, the Court said:
In fact, [plaintiffs] do not suggest that they have applied for any federal benefits, much less been denied any at this point. That they might someday be married under the law of some state or ask for some federal benefit which they are denied is not enough.

Smelt, 447 F.3d at 684 (citations omitted) (emphasis added). These principles apply regardless of plaintiffs' marital status. They still have "not suggest [ed] that they have applied for any federal benefits, much less been denied any at this point." *Id.* Thus, plaintiffs lack standing to challenge Section 3. Accordingly, the instant motion to dismiss should be granted.

III. *Plaintiffs' Equal Protection and Due Process Claims Must Be Dismissed Because DOMA Survives Rational Basis Review*

Plaintiffs' equal protection and due process claims raise several issues, all of which were addressed in the United States' motion to dismiss. As established in the government's opening memorandum, federal courts have unanimously upheld the constitutionality of DOMA.5 Plaintiffs' only response to the government's arguments in favor of dismissal is to assert, without elaboration, that "same gender marriage is a ... fundamental right" such that DOMA is subject to "heightened scrutiny," and to imply that DOMA constitutes "gender discrimination" (Doc. 40 at 4, 5). The United States refuted these assertions in its opening memorandum.

4 The Court has dismissed plaintiffs' claims against the State of California in this case for lack of standing (Doc. 36).

Courts have held that challenges to DOMA are subject to rational basis review.6 Under that deferential standard of review, this Court should find that Congress could reasonably have concluded that there is a legitimate government interest in maintaining the status quo regarding the distribution of federal benefits in the face of serious and fluid policy differences in and among the states. That there is now a debate taking place in this country about same-sex marriage does not make Congress's belief in this regard any less rational. Basic federalism principles allowed Congress in 1996, and allow Congress now, to take this uniform approach based on a traditional definition of marriage that all 50 states recognize while the states grapple with the emerging debate over same-sex marriage. Under rational basis review, Congress can reasonably take the view that it wishes to wait to see how these issues are resolved at the state level before extending federal benefits to marriages that were not recognized in any state when Congress tied eligibility for those benefits to marital status.

5 *See In re Kandu,* 315 B.R. 123, 140 (Bankr. D. Wash. 2004); *Wilson v. Ake,* 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005); *Hunt v. Ake,* Case No. 04-1852 (M.D. Fla. Jan. 20, 2005); *Smelt v. County of Orange,* 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005); *see also Bishop v. Oklahoma,* 447 F. Supp. 2d 1239, 1252 (N.D. Okla. 2006), *rev'd on other grounds,* No. 06-5188, 2009 WL 1566802 (10th Cir. June 5, 2009).

Unlike the intervenors here, the government does not contend that there are legitimate government interests in "creating a legal structure that promotes the raising of children by both of their biological parents" or that the government's interest in "responsible procreation" justifies Congress's decision to define marriage as a union between one man and one woman (Doc. 42 at 8-9). Since DOMA was enacted, the American Academy of Pediatrics, the American Psychological Association, the

American Academy of Child and Adolescent Psychiatry, the American Medical Association, and the Child Welfare League of America have issued policies opposing restrictions on lesbian and gay parenting because they concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.7 Furthermore, in *Lawrence v. Texas,* 539 U.S. 558, 605 (2003), Justice Scalia acknow-ledged in his dissent that encouraging procreation would not be a rational basis for limiting marriage to opposite-sex couples under the reasoning of the *Lawrence* majority opinion -- which, of course, is the prevailing law -- because "the sterile and the elderly are allowed to marry." For these reasons, the United States does not believe that DOMA is rationally related to any legitimate government interests in procreation and child-rearing and is therefore not relying upon any such interests to defend DOMA's constitutionality.

6 As noted in the government's opening brief, under existing Ninth Circuit precedent, plaintiffs' claims are subject to rational basis review (Doc. 25 at 25-32). Courts that have considered constitutional challenges to DOMA have applied a rational basis test (*see supra* n.5).

IV. *Plaintiffs Have Conceded the United States' Motion to Dismiss As to All of Their Other Claims*

Plaintiffs' response says nothing about any of their other claims -- under the Full Faith and Credit Clause, the right to travel, the right to privacy, the First Amendment, and the Ninth Amendment -- all of which the United States fully addressed in its motion to dismiss. Given that plaintiffs have not responded to the United States' arguments on those claims, such arguments must be taken as conceded. *See adidas-America, Inc. v. Payless Shoesource, Inc.,* 546 F. Supp. 2d 1029, 1076 (D. Or. 2008) (failing to respond to opponent's argument constitutes conceding argument); *Canatella v. Stovitz,* 365 F. Supp. 2d 1064, 1083-84 (N.D. Cal. 2005) (same); *Southern Nevada Shell Dealers Ass'n v. Shell Oil Co.,* 725 F. Supp. 1104, 1109 (D. Nev. 1989) (same). Thus, the Court can and should dismiss those claims on this basis alone.

CONCLUSION

Accordingly, the United States' motion to dismiss should be granted, and all of plaintiffs' claims against the United States should be dismissed with prejudice.

Dated: August 17, 2009

Respectfully submitted,

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7 These organizations' respective policy statements can be located as follows: American Academy of Pediatrics, *http:// aappolicy.aappublications.org/cgi/content/full/pediatrics; 109/2/339* (February 2002 policy statement); American Psychological Association, *http:// www.apa.org/pi/lgbc/policy/parents.html* (July 2004 policy statement); American Academy of Child and Adolescent Psychiatry, *http:// www.aacap.org/cs/root/policy___statements/gay___lesbian___transgender___and___ bisexual___parents___policy___statement* (June 1999 policy statement); American Medical Association, *http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding -sexual-orientation.shtml* (AMA Policy Regarding Sexual Orientation); Child Welfare League of America, *http:// www.cwla.org/programs/culture/glbtqposition.htm* (Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults).