UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOANNE PEDERSEN, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 3:10-cv-1750 (VLB)**
OFFICE OF PERSONNEL MANAGEMENT, et al.,	)	
Defendants.	)	

INTERVENOR-DEFENDANT'S SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Paul D. Clement
H. Christopher Bartolomucci
Conor B. Dugan
Nicholas J. Nelson
BANCROFT PLLC
1919 M Street, Northwest, Suite 470
Washington, District of Columbia 20036

Counsel for the Bipartisan Legal Advisory Group of the U.S. House of Representatives

OF COUNSEL:

Kerry W. Kircher, General Counsel
Christine Davenport, Senior Assistant Counsel
Katherine E. McCarron, Assistant Counsel
William Pittard, Assistant Counsel
Kirsten W. Konar, Assistant Counsel
OFFICE OF GENERAL COUNSEL
U.S. House of Representatives
219 Cannon House Office Building
Washington, District of Columbia 20515

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

The legislative classification made by DOMA is subject to the rational basis test and is clearly rational. As nearly every Circuit has held, sexual orientation does not meet the traditional criteria for denominating a suspect or quasi-suspect class. The daily political victories of gay and lesbian advocacy groups demonstrate both the political power of homosexuals and why the question at the heart of this case should be decided democratically rather than by judicial fiat.

ARGUMENT

I. THE HOUSE PRESENTS NUMEROUS DOCUMENTS THAT CONSTITUTE LEGISLATIVE FACTS THAT THIS COURT IS FREE TO REVIEW.

As an initial matter, Plaintiffs are flatly wrong to argue that the House has presented no admissible evidence to this Court. Reply Mem. of Law in Supp. of Pls.' Mot. for Summ. J. (Sept. 14, 2011) (ECF No. 94) ("Pls.' SJ Reply") at 1-3. In particular, Plaintiffs ask this Court to disregard sources upon which the House has relied. Pls.' SJ Reply at 2-3. Plaintiffs argue this despite the fact that they themselves invoke the concept of legislative facts in both their Separate Statement of Non-Adjudicative Facts (July 15, 2011) (ECF No. 62) ("Pls.' Separate Statement") and their Memorandum of Law in Opposition to Intervenor-Defendant's Motion to Dismiss (Sept. 14, 2011) (ECF No. 95) ("Pls.' Opp'n"). In the former, Plaintiffs state: "Although legislative facts need not be introduced into evidence, and although Plaintiffs need not demonstrate the absence of dispute concerning legislative facts, Plaintiffs set forth legislative facts below to assist the Court." Pls.' Separate Statement at 2; *see also* Pls.' Opp'n at 13 n.7.

Plaintiffs were correct in those early filings, and their current effort to backtrack and deny the House's ability to invoke legislative facts is not only

hypocritical, it reflects a profound misunderstanding of legislative facts and the nature of constitutional review. Plaintiffs seem to assume that the constitutionality of legislation turns on the metes and bounds of admissible evidence in a particular case. That is not how constitutional litigation, at any level, works—especially over determination of whether a particular characteristic qualifies for heightened scrutiny. Such a determination does not turn on normal factual evidence, but rather depends almost entirely on principles of law and legislative facts. Every document that Plaintiffs argue is inadmissible is rightly considered by this Court as a legislative fact.[1]

Indeed, if Plaintiffs' assumption had been the law, many of our nation's most prominent constitutional decisions could not have been decided the way they were and "Brandeis briefs" would be prohibited. For example, in *Brown v. Board of Education*, the Supreme Court cited directly to "modern authority" consisting of several works of social science. 347 U.S. 483, 494 n.11 (1954); *see also United States v. Virginia*, 518 U.S. 515, 523-24, 535-40 (1996) (rejecting trial court's conclusion; relying instead on several works of historical scholarship to render decision). As these cases show, in considering rules of constitutional law, courts and parties are not confined to the formally-produced record in identifying relevant scholarly works and data.

---

[1] Indeed, in *Windsor v. United States*, a related DOMA challenge in the Southern District of New York, the Court rejected the same argument packaged as a motion to strike largely the same documents with which Plaintiffs take issue here. *See* Order, 10 Civ. 8435 (BSJ) (S.D.N.Y. Aug. 29, 2011) (ECF No. 75), attached as Ex. A.

Legislative facts are "those which have relevance to legal reasoning and the lawmaking process." Fed. R. Evid. 201 advisory comm.'s note. "'[L]egislative facts,' which go to the justification for a statute, usually are not proved through trial evidence but rather by material set forth in the briefs, the ordinary limits on judicial notice having no application to legislative facts." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999). For purposes of the application of formal rules of evidence, the difference between adjudicative and legislative facts is simple and stark. As stated by Judge Posner, "besides facts in that sense—the kind of facts that a trier of fact determines—there are background facts (sometimes called 'legislative' facts) that *lie outside the domain of rules of evidence* yet are often essential to the decision of a case." *Wiesmueller v. Kosobucki*, 547 F.3d 740, 742 (7th Cir. 2008) (emphasis added). It is beyond reasonable dispute that the citations and references in the House's opposition to summary judgment involve issues of legislative fact and thus are not subject to the evidentiary and procedural rules Plaintiffs invoke.

II. THE CLASSIFICATION AT ISSUE IN DOMA IS SUBJECT TO RATIONAL BASIS REVIEW.

A. Persuasive Authority Rejects the View That Sexual Orientation Is a Suspect or Quasi-Suspect Class.

Contrary to Plaintiffs' contentions, Pls.' SJ Reply at 9-10, the out-of-circuit case law persuasively establishes that sexual orientation is not a suspect class or quasi-suspect class. Plaintiffs attempt to discredit this case law by lumping it into one of two categories: "[1] cases that arose before *Lawrence* [*v. Texas*, 539 U.S. 558 (2003),] and whose reasoning is inextricably tied to the now-overruled

***Bowers v. Hardwick*, [478 U.S. 186 (1986),] and [2] post-*Lawrence* cases that rely unthinkingly on pre-*Lawrence* caselaw without analysis of the relevant factors."** Pls.' SJ Reply at 10. **This contention does not withstand even passing scrutiny. In *High Tech Gays v. Defense Industrial Security Clearance Office*, which was decided pre-Lawrence, for example, the Ninth Circuit did not rely reflexively on *Bowers* but rather did examine the traditional criteria in the suspect class analysis and concluded: "[H]omosexuals are not without political power; they have the ability to and do 'attract the attention of lawmakers.'" 895 F.2d 563, 574 (9th Cir. 1990) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985)).[2] Moreover, numerous courts have reached the same conclusion in post-*Lawrence* and post-*Romer* decisions based not on an absence of reasoning, but on a combination of independent analysis and *Romer*'s express assurance that it was not applying heightened scrutiny. *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (stating that "*Romer*, by its own terms, applied rational basis review" and that "*Lawrence* does not alter this conclusion"), cert. denied sub. nom., *Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 & 868 n.3 (8th Cir. 2006) (stating that *Romer* articulated and applied "the core standard of rational-basis review" and that *Lawrence* relied**

---

[2] **This demonstrates the problem with Plaintiffs' citation to *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), which appears in conflict with binding Ninth Circuit precedent. The proper approach for a District Court in the Ninth Circuit is reflected in the recent *Lui v. Holder* decision in which the court dismissed a challenge to Section 3 of DOMA as foreclosed by Ninth Circuit precedent—confirming the continuing vitality of precedent predating *Romer* and *Lawrence*. *See* Order, *Lui v. Holder*, No. 2:11-cv-01267-SVW (JCGx) (C.D. Cal. Sept. 28, 2011) (ECF No. 38), attached as Ex. B.**

on substantive due process); *Lofton v. Sec'y of Dep't of Children & Fam. Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (explaining that "Florida's statute burdens no fundamental rights" and that, as other circuits had held, sexual orientation is not a suspect class).

Nor is Plaintiffs' dismissal of *Romer* and *Lawrence* persuasive. In those cases, each of which involved a classification based on sexual orientation, the Supreme Court applied the rational basis test in analyzing the conduct at issue. *See* Mem. of Law in Opp'n to Pls.' Mot. for Summ. J. (Aug. 15 2011) (ECF No. 82) ("House SJ Opp'n") at 6. Indeed, in light of *Romer* and *Lawrence*, the court in *Cook* demonstrated the proper approach a lower court should take on the question whether sexual orientation constitutes a suspect class: "Absent additional guidance from the Supreme Court, we . . . declin[e] to read *Romer* as recognizing homosexuals as a suspect class." 528 F.3d at 61. The First Circuit concluded that, because "neither *Romer* nor *Lawrence* mandate heightened scrutiny," the district court had analyzed the issue correctly. *Id.* This Court likewise should decline Plaintiffs' invitation to create a new suspect class.

B. <u>Based on the Traditional Criteria, Sexual Orientation Clearly Is Not a Suspect or Quasi-Suspect Class</u>.

The traditional criteria for determining whether a class is suspect or quasi-suspect are: (1) whether the class has suffered a history of discrimination; (2) whether the classification at issue relates to one's "ability to perform or contribute to society," (3) whether the class at issue is politically powerless; and (4) whether the class demonstrates immutable characteristics. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that "[c]lose relatives are not a 'suspect' or

'quasi-suspect' class" because, "[a]s a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or *politically powerless*") (emphasis added); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (supporting second factor). Contrary to Plaintiffs' claim, Pls.' SJ Reply at 9, 16 n.18, the questions of (1) whether the class is politically powerless and (2) whether a classification involves an immutable characteristic are essential to the heightened scrutiny analysis. *See Lyng*, 477 U.S. at 638; *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992).

1. Political Powerlessness. Plaintiffs take issue with the House's statement concerning the irony of Plaintiffs maintaining that homosexuals lack political power in light of the Justice Department's changed stance in this litigation. Pls.' SJ Reply at 14. But it is very difficult to understand that decision as not reflecting the political clout of homosexuals as a group. One can accept the Department's explanation for its decision at face value and still conclude—as gay activists concluded[3]—that the decision did not occur in a political vacuum and reflected the increasing political clout of those groups. Nor is the Administration's about-face—despite its traditional duty to defend—an isolated instance. Advocates of homosexual rights have scored other notable victories

[3] ***See, e.g.*, *Victory! Administration Drops DOMA Defense*, HUMAN RIGHTS CAMPAIGN, https://secure3.convio.net/hrc/site/Advocacy?cmd=display&page=UserAction&id=1045.**

with the Administration,[4] in Congress,[5] and in the states.[6]

Plaintiffs state that "the House's argument seems to be that a classification cannot be suspect or quasi-suspect unless the affected group is completely unable to achieve any sort of political protection." Pls.' SJ Reply at 16. This is not the House's argument. Rather, the House's position is that when a group objectively has significant power, far in excess of what its numbers would suggest, *see* House SJ Opp'n at 12-21, it hardly can claim the sort of political powerlessness necessary to warrant the highest form of constitutional scrutiny.[7]

2. Immutability. Suspect classes involve "immutable characteristic[s]" that are both determinable at birth and "determined *solely* by the *accident* of birth." *Frontiero*, 411 U.S. at 686 (emphasis added) (plurality). Yet, as Plaintiffs' own expert admitted, (i) "[l]ooking at a newborn," one cannot tell "what that

---

[4] *See, e.g.*, Elisabeth Bumiller, *Obama Ends Don't Ask Don't Tell Policy*, N.Y. TIMES, July 22, 2011, http://www.nytimes.com/2011/07/23/us/23military.html; Janie Lorber, *In Small Steps, Federal Agencies Recognize Gay Marriages*, ROLL CALL, Oct. 3, 2011, http://www.rollcall.com/issues/57_35/In-Small-Steps-Federal-Agencies-Recognize-Gay-Marriages-209092-1.html?pos=hbtxt.

[5] *See, e.g.*, Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES, Dec. 18, 2010, http://www.nytimes.com/2010/12/19/us/politics/19cong.html?pagewanted=all.

[6] *See, e.g.*, Michael Barbaro, *Behind N.Y. Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES, June 25, 2011, http://www.nytimes.com/2011/06/26/nyregion/the-road-to-gay-marriage-in-new-york.html?pagewanted=all.

[7] In the section of their brief regarding the political power of homosexuals, Plaintiffs cite *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010). Mem. of Law in Supp. of Mot. for Summ. J. (July 15, 2011) (ECF No. 63). That case recently was vacated as moot. *See Log Cabin Republicans v. United States*, __F.3d__, 2011 WL 4494225 (9th Cir. Sept. 29, 2011); *see also id*. at *9 (O'Scannlain, J., concurring) (in context of substantive due process challenge to "Don't Ask, Don't Tell," forcefully explaining application of deferential, rational basis review).

child's sexual orientation is going to be" and (ii) a significant percentage of gays and lesbians believe they exercised some or a great deal of choice in determining their sexuality. Dep. of Letitia Anne Peplau, Ph.D. at 25:20-23, 36:24-37:24 (July 8, 2011), relevant excerpts at ECF No. 83-2. Additionally, that same expert has recognized the concept of sexual plasticity and fluidity—that "individuals have reported changes in their sexual orientation in midlife." Aff. of Letitia Anne Peplau (July 15, 2011) (ECF No. 73) ("Peplau Aff.") ¶ 23. And, as demonstrated in the House's previous filing, Plaintiffs' own experts cannot agree on what the terms "sexual orientation," "homosexual," "gay," and "lesbian" mean. House SJ Opp'n at 22. All of this clearly distinguishes sexual orientation from the attributes denominating suspect classes.

Plaintiffs' misunderstanding of both the nature of legislative facts and immutable characteristics is on full display in their overwrought contention that the House mischaracterized Professor Lisa Diamond's writings. Pls.' SJ Reply at 18. The truth is that the House did not characterize, let alone mischaracterize, Dr. Diamond's work; rather, the House quoted it. In one instance, the House quoted her observation concerning the current scientific and popular uncertainty as to what constitutes homosexuality. Neither Plaintiffs nor Dr. Diamond disputes the accuracy of that quotation or that it fairly states her summary of the current scientific and popular understanding of what constitutes homosexuality. *See also* Lisa Diamond, *New Paradigms for Research on Heterosexual & Sexual-Minority Development*, 32 J. of Clinical Child & Adolescent Psychol. 490, 491

(2003) ("Different individuals have remarkably different interpretations of the categories 'heterosexual,' 'lesbian/gay,' and 'bisexual' . . . .").

What Plaintiffs and Dr. Diamond object to is the House's legal argument that those "remarkably different interpretations" are relevant to the immutability analysis. They decidedly are. But, in any event, that is a legal question, and neither Plaintiffs nor Dr. Diamond have monopoly control over the legal import of her academic observations. It may be distressing to have one's academic work used to support a legal conclusion one dislikes, but if the quotation is accurate and the legal principle is sound, there is no basis to object.

The situation is no different with regard to the House's second citation to Dr. Diamond's work, concerning the percentage of study participants who had changed their sexual identity label in a particular manner. Neither Plaintiffs nor Dr. Diamond disputes either the accuracy of the quotation or the percentages reported. Plaintiffs and Dr. Diamond quibble only on the difference between "sexual identity labels" and "sexual orientation" (which Dr. Diamond's affidavit defines as a "capacity for same-sex attraction"). Aff. of Lisa M. Diamond (Sept. 14, 2011) (ECF No. 99) ("Diamond Aff.") ¶ 8. They may not be the same thing, but they are surely related. Moreover, what distinguishes sexual orientation from the characteristics that give rise to judicially-recognized suspect classes is that sexual orientation is not an obvious physical characteristic. A person's sexual orientation is often communicated by self-identification—as opposed to readily-identifiable immutable characteristics. Dr. Diamond's findings about the fluidity

of sexual identity labels are thus relevant to the legal conclusion regarding immutability.

Moreover, Dr. Diamond's research in the same article confirms that sexual orientation is more complicated than the simple immutable characteristics typically afforded heightened scrutiny:

- **"[E]xclusive same-sex attractions are the exception rather than the norm among sexual minority women." Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. of Soc. Issues 300, 301 (2000).**

- **"The prevalence of nonexclusivity in sexual-minority women's attractions suggests that other-sex attractions and relationships remain an ever-present possibility for most sexual-minority women, a fact that creates multiple opportunities for discontinuity and inconsistency in the female sexual-minority life course." *Id.***

- **"One of the unavoidable implications of nonexclusivity and sexual fluidity is that no heterosexual woman can be unequivocally assured that she will never desire same-sex contact, just as no lesbian woman can be unequivocally assured that she will never desire other-sex contact." *Id.* at 302.**

As to whether Dr. Diamond's research ultimately supports the immutability prong of the strict scrutiny analysis, that is the province of lawyers and the courts. It demands a legal answer, not a "scientific answer." Diamond Aff. ¶ 11. Academics simply do not have a veto over how their statements and findings, which may properly be treated as legislative facts, are marshaled in legal arguments.

CONCLUSION

Plaintiffs' motion for summary judgment should be denied.

Respectfully submitted,

/s/ Paul D. Clement
Paul D. Clement
H. Christopher Bartolomucci
Conor B. Dugan
Nicholas J. Nelson
BANCROFT PLLC
1919 M Street, Northwest, Suite 470
Washington, District of Columbia 20036
Telephone: (202) 234-0090
Facsimile: (202) 234-2806

Counsel for the Bipartisan Legal Advisory Group of the U.S. House of Representatives[8]

OF COUNSEL:

Kerry W. Kircher, General Counsel
Christine Davenport, Senior Assistant Counsel
Katherine E. McCarron, Assistant Counsel
William Pittard, Assistant Counsel
Kirsten W. Konar, Assistant Counsel
OFFICE OF GENERAL COUNSEL
U.S. House of Representatives
219 Cannon House Office Building
Washington, District of Columbia 20515
Telephone: (202) 225-9700
Facsimile: (202) 226-1360

October 5, 2011

[8] **The Bipartisan Legal Advisory Group currently is comprised of the Honorable John A. Boehner, Speaker of the House; the Honorable Eric Cantor, Majority Leader; the Honorable Kevin McCarthy, Majority Whip; the Honorable Nancy Pelosi, Democratic Leader; and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip decline to support the House's Sur-Reply in Opposition to Plaintiffs' Motion for Summary Judgment.**

CERTIFICATE OF SERVICE

I certify that on October 5, 2011, I served one copy of Intervenor-Defendant's Sur-Reply in Opposition to Plaintiffs' Motion for Summary Judgment by CM/ECF and by electronic mail (.pdf format) on the following:

Gary D. Buseck
Janson Wu
Mary L. Bonauto
Vickie L. Henry
Gay & Lesbian Advocates & Defenders
30 Winter St., Suite 800
Boston, MA 02108-4720
617-426-1350
gbuseck@glad.org
jwu@glad.org
mbonauto@glad.org
vhenry@glad.org

Karen L. Dowd
Kenneth James Bartschi
Horton, Shields & Knox
90 Gillett St.
Hartford, CT 06105
860-522-8338
Fax: 860-728-0401
kdowd@hortonshieldsknox.com
kbartschi@hsklawfirm.com

David J. Nagle
Richard L. Jones
Sullivan & Worchester LLP
One Post Office Square
Boston, MA 02109
dnagle@sandw.com
rjones@sandw.com

Paul M. Smith
Luke C. Platzer
Daniel I. Weiner
Matthew J. Dunne
Jenner & Block
1099 New York Ave., NW, Suite 900
Washington, DC 20001-4412
psmith@jenner.com
lplatzer@jenner.com
dweiner@jenner.com
mdunne@jenner.com

David Christopher Nelson
U.S. Attorney's Office – HTFD
450 Main St., Rm. 328
Hartford, CT 06103
david.c.nelson@usdoj.gov

Judson O. Littleton
United States Department of Justice, Civil Division
20 Massachusetts Ave., NW, Seventh Floor
Washington, DC 20530
judson.o.littleton@usdoj.gov

/s/ Kerry W. Kircher
Kerry W. Kircher

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDITH SCHLAIN WINDSOR,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

10 Civ. 8435 (BSJ)

Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Before the Court is Plaintiff's Motion to Strike filed August 10, 2011. After review of the submissions of both parties, Plaintiff's Motion is DENIED. However, the Court finds that the submission of additional evidence by Plaintiff regarding the topics discussed in the motion to strike would be helpful in deciding the pending motion for summary judgment. Therefore, Plaintiff's alternative request to submit "additional affidavits and rebuttal evidence" is GRANTED. Plaintiff's request to file a reply brief of up to 30 pages is GRANTED. Plaintiff's reply is due on or before September 16, 2011.

SO ORDERED:

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
August 29, 2011

Exhibit B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	No: 2:11-CV-01267-SVW (JCGx)	Date	September 28, 2011
Title	Handi Lui, et al. V. Eric H. Holder, U.S. Attorney General, et al.		

JS - 6

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE	
Paul M. Cruz	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER re DEFENDANTS' PARTIAL MOTION TO DISMISS; INTERVENOR'S MOTION TO DISMISS [18] [19]

I. INTRODUCTION

Plaintiffs Hamdi Lui ("Lui") and Michael Ernest Roberts,("Roberts") (collectively "Plaintiffs") bring this suit challenging Defendants' denial of Roberts' Form I-130 Petition (the "Petition"). Roberts filed the Petition on behalf of Lui, seeking to classify Lui as an "immediate relative" in order for Lui to gain lawful permanent resident status in the United States. See 8 C.F.R. § 204.1(a). Plaintiffs challenge the denial of the Petition on two grounds. First, Plaintiffs claim that the denial of the Petition violates the Immigration and Nationaity Act's ("INA") anti-discrimination provision based on alleged "sex" discrimination. (Compl., ¶¶ 8, 32, 35). Second, Plaintiffs challenge the constitutionality of the denial of the Petition as a result of the United States Citizenship and Immigration Services' ("USCIS") interpretation of the Defense of Marriage Act ("DOMA") Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7.

On June 17, 2011 Defendants filed their Partial Motion to Dismiss, which focuses solely on the INA "sex" discrimination claim. On the same day, Intervenor the Bipartisan Legal Advisory Group for the U.S. House of Representatives ("Intervernor") filed its Motion to Dismiss, which focuses solely on Plaintiffs' constitutional challenge to Section 3 of DOMA. Plaintiffs and Defendants filed separate Oppositions to Intervenor's Motion to Dismiss.[1]

[1]As Intervenor notes, in February of this year, the Department of Justice decided to forego defending the constitutionality of DOMA. Accordingly, Defendants filed an Opposition to Intervenor's Motion to Dismiss in order to argue that Section 3 of DOMA is unconstitutional.

Initials of Preparer PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	No: 2:11-CV-01267-SVW (JCGx)	Date	September 28, 2011
Title	Handi Lui, et al. V. Eric H. Holder, U.S. Attorney General, et al.		

JS - 6

II. BACKGROUND FACTS

Plaintiff Lui is a native and citizen of Indonesia. Plaintiff Roberts is a U.S. Citizen. Plaintiffs, same-sex couple, were legally married under the laws of Massachusetts on April 9, 2009. On the same day, Plaintiff Roberts filed the Petition on behalf of Plaintiff Lui with the USCIS California Service Center. (Id. ¶ 28). On August 28, 2009, Plaintiffs' Petition was denied. On January 20, 2011, the BIA dismissed Plaintiffs' appeal of the I-130 Petition Denial.

Plaintiffs claim that Defendants' refusal to grant the Petition on the basis of Plaintiffs' same-sex marriage constitutes "sex" discrimination in violation of the INA's anti-discrimination provision, 8 U.S.C. § 1152(a)(1)(A). (Compl. ¶ 8). Plaintiffs further contend that Defendants' application of DOMA's definition of marriage in making the determination that a same-sex spouse is not an "immediate relative" for I-130 petition purposes violated their constitutional due process and equal protection rights. (Id. ¶¶ 5, 18).

III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. See Fed. R. Civ. Proc. 12(b)(6). To survive a motion to dismiss, the plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. __, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Id.; see also Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (Citing Iqbal, 129 S. Ct. at 1951).

In reviewing a Rule 12(b)(6) motion, the Court must accept all allegations of material fact as true and construe the allegations in the light most favorable to the nonmoving party. Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002). While a court does not need to accept a pleader's legal conclusions as true, the court reviews the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).

The court may grant a plaintiff leave to amend a deficient claim "when justice so requires." Fed. R. Civ. P. 15(a)(2). "Five factors are frequently used to assess the propriety of a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his Complaint." Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (Citing Ascon Properties, Inc. v. Mobil Oil Co., 866

_____ : _____

Initials of Preparer PMC

F.2d 1149, 1160 (9th Cir. 1989)).

Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at 658; Schreiber, 806 F.2d at 1401.

IV. DISCUSSION

The gravamen of Plaintiffs' complaint is that Roberts' Petition was improperly rejected because Lui, as Roberts' same-sex spouse, qualifies as an immediate relative under the INA. Defendants maintain that the USCIS and the BIA do not engage in impermissible sex discrimination under the INA when they refuse to grant an I-130 petition under these circumstances. The Court finds that this proposition is well settled under Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), which also involved an I-130 immediate relative petition filed by a party to a same-sex marriage. See Adams, 673 F.2d at 1036 (holding that the agency's interpretation of marriage in the INA, 8. U.S.C. § 1151(b), as excluding same-sex couples did not violate plaintiffs' due process or equal protection rights under rational basis review).[2] Furthermore, Plaintiffs have failed to assert any facts to suggest the Defendants discriminated against them on the basis of their sex, as opposed to their sexual orientation. Accordingly, the Court GRANTS Defendants' Partial Motion to Dismiss without prejudice.

As noted above, USCIS relied on the definitions of marriage and spouse contained in Section 3 of DOMA in denying Plaintiffs' Petition. In this instance, Defendants walk a fine line, on the one hand

[2]As Intervenor notes, eleven federal circuits have held that homosexuals are not a suspect class. See Cook v. Gates, 528 F.3d 42, 61-62 (1st Cir. 2008), *cert. denied*, Pietrangelo v. Gates, 129 S. Ct. 2763 (2009); Citizens for Equal Prot., v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006); Lofton v. Sec. of Dept. of Children & Fam. Servs., 358 F.3d 804, 818 & n.16 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (7th Cir. 1996); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049 (5th Cir. 1984); Rich v. Sec'y of the Army, 735 F.2d 1220 (10th Cir. 1984); see also Able v. United States, 155 F.3d 628, 632 (2d Cir. 1998) (not applying heightened scrutiny).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	No: 2:11-CV-01267-SVW (JCGx)	Date	September 28, 2011
Title	Handi Lui, et al. V. Eric H. Holder, U.S. Attorney General, et al.		

JS - 6

arguing in their Partial Motion to Dismiss that they did not violate the INA by discriminating against Plaintiffs on the basis of their same-sex marriage while simultaneously arguing that Section 3 of DOMA, which excludes same-sex couples from the definitions of marriage and spouse for purposes of federal law, violates equal protection.

To the extent that Plaintiffs Challenge Section 3 of DOMA on equal protection grounds, that issue has been decided by Adams.[3] 673 F.2d at 1041.[4] In Adams, the Ninth Circuit held that "Congress's decision to confer spouse status . . . only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements."[5] Id. at 1042. The fact that DOMA was enacted years after the Ninth Circuit's decision in Adams is not persuasive given that marriage as defined in Section 3 of DOMA is consistent with Adams. While Plaintiffs and Defendants point out the alleged deficiencies in the reasoning in Adams, this Court is not in a position to decline to follow Adams or critique its reasoning simply because Plaintiffs and Defendants believe that Adams is poorly reasoned.[6] Furthermore, as Intervenor

[3]In addition to Adams, Intervenor argues that Baker v. Nelson, 409 U.S. 810 (1972) controls. In Baker, plaintiffs, a same-sex couple, appealed a decision of the Minnesota Supreme Court affirming rejecting a constitutional challenge to the rejection of their application for a Minnesota marriage license. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972). The Supreme Court unanimously dismissed plaintiffs' appeal "for want of a substantial federal question." The Court need not determine the effect of a summary disposition of the Supreme Court because we are bound to follow the Ninth Circuit's decision in Adams.

[4]See also, High-Tech Gays v. Def. Indus. Sec. Clearance Ofc., 895 F.2d 563, 571 (9th Cir. 1990) (rejecting the argument that "homosexuality should be added to the list of suspect or quasi-suspect classifications requiring strict or heightened scrutiny").

[5]The Court in Adams noted that Congress "has almost plenary power to admit or exclude aliens," and that, as a result, "the decisions of Congress [in the immigration context] are subject only to limited judicial review." Adams, 673 F.2d at 1041. While the Court noted that, pursuant to its plenary power in the immigration context, Congress "may enact statues which, if applied to citizens, would be unconstitutional," the Court ultimately upheld the exclusion of same-sex couples from the definition of marriage under the INA under rational basis review, as opposed to "some lesser standard of review." Id. at 1042.

[6]The Court is aware of a similar case recently heard by District Judge R.Gary Klausner. See Torres-Barragan v. Holder, No. 2:09-cv-08564-RGK-MLG (C.D. Cal. April 30, 2010) (ECF No. 24) *appeal docketed*, No. 10-55768 (9th Cir.). The only substantive difference between Torres-Barragan and the instant action is that Torres-Barragan arose prior to the Department of Justice's change in

:

Initials of Preparer PMC

argues, the

prerogative to overturn Ninth Circuit precedent rests not with this District Court, but with the *en banc* Ninth Circuit and the Supreme Court. See Twentieth Century Fox Film Corp. v. Entm't Distrib., 429 F.3d 869, 877 (9th Cir. 2005) (citing Palmer v. Sanderson, 9 F.3d 1433, 1437 n.5 (9th Cir. 1993) ("As a general rule, a panel not sitting en banc may not overturn circuit precedent."). The Court feels bound by Ninth Circuit precedent, and believes that those precedents are sufficiently clear.[7]

V. CONCLUSION

For the reasons set forth in this Order, Defendants' Partial Motion to Dismiss and Intervenor's Motion to Dismiss are hereby GRANTED without prejudice.

.

policy.

[7]The Court is aware of the District of Massachusetts' decision in Gill v. OPM, 699 F. Supp. 2d 374 (D. Mass. 2010) *appeal docketed*, No. 10-2204 (1st Cir.), in which the court held that Section 3 of DOMA violates equal protection under rational basis review. The Court notes that the plaintiffs in Gill were spouses of federal employees who brought suit on the basis of denial of certain federal marriage-based benefits, thus the context of that case was somewhat different from the present case, which arose in the context of immigration law. More importantly, the court's decision in Gill does not affect this Court's obligation to follow binding Ninth Circuit precedent.

_____ : _____

Initials of Preparer PMC