

O/JS-6

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ARTHUR SMELT and
CHRISTOPHER HAMMER,

Plaintiff(s),

v.

UNITED STATES OF AMERICA,
STATE OF CALIFORNIA, and DOES
1 through 1,000,,

Defendant(s).

CASE NO. SACV 09-00286 DOC (MLGx)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

Before the Court is Defendant United States of America's Motion to Dismiss ("Motion"). After considering the moving, opposing, and replying papers, as well as oral argument by the parties, the Court hereby GRANTS the Motion.

I. BACKGROUND

On December 29, 2008, Plaintiffs Arthur Bruno Smelt and Christopher David Hammer ("Plaintiffs") filed the instant case in California Superior Court. The case was removed to this Court on March 9, 2009. The Plaintiffs in this case are a same-sex couple who received a Declaration of Domestic Partnership from the State of California on January 10, 2000 and were subsequently married under the laws of California, "on or subsequent to July 10, 2008" – *i.e.*,

1 before Proposition 8 was passed in California's November 4, 2008 election. Plaintiffs allege that
2 "the refusal of all states and jurisdictions" to recognize the validity of their marriage results in
3 the denial to them of numerous rights, benefits and responsibilities bestowed on all other married
4 couples, so long as they are opposite-sex couples. Plaintiffs state that the rights, benefits and
5 responsibilities that they are denied include the right to social security survivor benefits,
6 decision-making authority for funeral arrangements and the disposition of a spouse's body, the
7 right to bereavement leave in the event of a spouse's death, the presumption that both spouses
8 are the parent of a child born during marriage, and the right to a certain division of their spouse's
9 separate property and the couple's marital property upon the death of a spouse who dies
10 intestate. Plaintiffs further argue that the denial of such rights, benefits and responsibilities has
11 caused them to suffer severe emotional distress, mental anguish, humiliation, loss of liberty and
12 the pursuit of happiness, denial of equal protection of laws, denial of freedom of association,
13 denial of privacy rights, and denial of the right to travel to establish residency anywhere in the
14 United States with the full recognition of the legality of Plaintiffs' marriage.

15 Plaintiffs target their action at the federal Defense of Marriage Act (the "DOMA").
16 The DOMA consists of two separate sections, which state:

17 In determining the meaning of any Act of Congress, or
18 of any ruling, regulation, or interpretation of the various
19 administrative bureaus and agencies of the United States, the word
20 "marriage" means only a legal union between one man and one
21 woman as husband and wife, and the word "spouse" refers only to a
22 person of the opposite sex who is a husband or a wife.
23 1 U.S.C. §7 ("Section 3").

24 No State, territory, or possession of the United States,
25 or Indian tribe, shall be required to give effect to any public act,
26 record, or judicial proceeding of any other State, territory,
27 possession, or tribe respecting a relationship between persons of the
28 same sex that is treated as a marriage under the laws of such other

1 State, territory, possession, or tribe, or a right or claim arising from
2 such relationship.

3 28 U.S.C. §1738C ("Section 2"). Plaintiffs argue that the DOMA violates the Full Faith and
4 Credit Clause, their constitutional right to travel, the Due Process Clause of the Fifth
5 Amendment (including its equal protection component), their constitutional right to privacy,
6 their right to free speech, and their "rights" under the Ninth Amendment.

7 Plaintiffs seek broad relief. Plaintiffs seek a permanent injunction compelling the
8 United States and the State of California ("Defendants") to "take all necessary acts to require the
9 entire nation of the United States of America, all of its territories and jurisdictions, to eliminate
10 any distinction in the law that prejudices the rights of Plaintiffs." Additionally, Plaintiffs seek a
11 declaratory judgment "establishing that any law that restricts Plaintiffs' rights or distinguishes
12 Plaintiffs' rights in any way from any opposite gender couple to be unconstitutional, under the
13 United States Constitution, including all provisions of the [DOMA]." Plaintiffs claims against
14 the State of California were dismissed on July 15, 2009 for lack of standing.

15 In the instant Motion, the United States moves to dismiss all of Plaintiffs' claims
16 against the U.S. (centered on the federal Defense of Marriage Act), arguing that this Court lacks
17 jurisdiction over Plaintiffs' claims, that Plaintiffs lack standing to assert their claims, and that
18 Plaintiffs have failed to state a claim upon which relief may be granted.

19 II. LEGAL STANDARD

20 A. Subject Matter Jurisdiction

21 Under Federal Rule of Civil Procedure 12(b)(1), a complaint must be dismissed if
22 the Court lacks subject matter jurisdiction to adjudicate the claims. Once subject matter
23 jurisdiction is challenged, the burden of proof is placed on the party asserting that jurisdiction
24 exists. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (holding that "the party seeking to
25 invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists").
26 Accordingly, the Court will presume lack of subject matter jurisdiction until the plaintiff proves
27 otherwise in response to the motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511
28 U.S. 375, 377, 114 S. Ct. 1673, 1675 (1994).

B. Failure to State a Claim for Relief

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. Once it has adequately stated a claim, a plaintiff may support the allegations in its complaint with any set of facts consistent with those allegations. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007). Dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief. *Bell Atlantic*, 127 S. Ct. at 1968 (abrogating *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957)). However, if the complaint "lacks a cognizable legal theory" or "sufficient facts alleged under a cognizable legal theory," it must be dismissed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Under a 12(b)(6) motion analysis, the Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff. *Guerrero v. Gates*, 442 F.3d 697, 703 (9th Cir. 2006); *Balistreri*, 901 F.2d at 699. Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003) (citing *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996)); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

In evaluating a 12(b)(6) motion, review is "limited to the contents of the complaint." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). However, exhibits attached to the complaint, as well as matters of public record, may be considered in determining whether dismissal was proper without converting the motion to one for summary judgment. See *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Further, the Court may consider documents "on which the complaint 'necessarily relies' if: (1) the complaint refers to the documents; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez*, 450

1 F.3d 445, 448 (9th Cir. 2006). “The Court may treat such a document as ‘part of the complaint,
2 and thus may assume that its contents are true for purposes of a motion to dismiss under Rule
3 12(b)(6).” *Id.*

4 C. Standing

5 Each element of standing is "an indispensable part of the plaintiff's case," and
6 accordingly "must be supported in the same way as any other matter on which the plaintiff bears
7 the burden, *i.e.*, with the manner and degree of evidence required at the successive stages of the
8 litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130 (1992). To
9 establish standing, a plaintiff must demonstrate: (1) an ‘injury in fact’ – an invasion of a legally
10 protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not
11 ‘conjectural’ or ‘hypothetical’”; (2) “there must be a causal connection between the injury and
12 the conduct complained of – the injury has to be ‘fairly ... trace[able] to the challenged action of
13 the defendant, and not ... th[e] result [of] the independent action of some third party not before
14 the court;” (3) “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be
15 ‘redressed by a favorable decision.’” *Id.* at 2136 (internal citations omitted). *See also Bird v.*
16 *Lewis & Clark College*, 303 F.3d 1015, 1019 (9th Cir. 2002) (internal quotation marks and
17 citations omitted)("In the context of declaratory and injunctive relief, [a plaintiff] must
18 demonstrate that [he or she] has suffered or is threatened with a concrete and particularized legal
19 harm . . . coupled with a sufficient likelihood that [he or she] will again be wronged in a similar
20 way.").

21 III. DISCUSSION

22 This is the second time that Plaintiffs have come before this Court, presenting
23 substantially similar arguments each time. In *Smelt, et al. v. County of Orange, California, et*
24 *al.*, SACV04-1042 DOC (MLGx), Plaintiffs filed suit before Judge Gary L. Taylor, arguing that
25 they had applied for, and been denied, a marriage license by the County Clerk of Orange
26 County, California, in violation of the U.S. Constitution. More specifically, Plaintiffs argued
27 that Section 2 of the DOMA violates the United States Constitution’s Due Process, equal
28 protection rights under the Fifth Amendment, the Right to Privacy and the Full Faith and Credit

1 Clause. Additionally, they argued that Section 3 of the DOMA violates the “liberty interests
2 protected by the Due Process Clause”; discriminates “on the basis of gender” and “sexual
3 orientation” in violation of equal protection; and violates “the privacy interest protected by the
4 Right to Privacy.” Plaintiffs also argued that the California Family Code violated the U.S.
5 Constitution. Plaintiffs sought a declaratory judgment that the relevant sections of the California
6 Family Code and the DOMA were unconstitutional as well as injunctive relief “[m]andating the
7 use of gender-neutral terms and issuing a marriage license to [them].”

8 Judge Taylor (1) abstained from deciding the constitutionality of the challenged
9 sections of the California Family Code until the resolution of cases then-pending before the
10 California Court of appeal concerning whether the portions of the California Family Code that
11 limit marriage to opposite-sex couples violated the California Constitution, (2) held that
12 Plaintiffs had no standing to challenge Section 2 of the DOMA, and (3) held that Plaintiffs had
13 no standing to challenge Section 3 of the DOMA but that that section did not violate the U.S.
14 Constitution. In *Smelt v. County of Orange*, 374 F.Supp.2d 861, 685 (C.D. Cal. 2005), the Ninth
15 Circuit reviewed Judge Taylor’s ruling in SACV04-1042 DOC (MLGx), upholding his decision
16 to abstain as to Plaintiffs’ challenge to the California Family Code, upholding his decision that
17 Plaintiffs did not have standing to challenge either Section 3 or Section 2 of the DOMA as
18 Plaintiffs were not married (and as they presented abstract and generalized grievances), and
19 vacating his decision regarding the merits of the DOMA Section 3 claim as, given the “abstract
20 facial attack made,” no one could “know whether in the context of some particular statute as
21 applied to some particular person in some particular situation Congress’s use of the word
22 ‘marriage’ [would] amount to an unconstitutional classification.”

23 On remand, the case was transferred to this Court. On August 29, 2008, this Court
24 dismissed the case, as directed by the Ninth Circuit. The Plaintiffs filed the instant lawsuit on
25 November 3, 2008, this time including the fact that, after the filing of the initial lawsuit, they had
26 been married under California law.

27 The U.S. Motion turns not on the merits of the dispute, but rather on a technical
28 issue relating to jurisdiction. As stated earlier, Plaintiffs initially filed this suit in state court and

1 the United States removed this dispute to this Court. When a case is “removed from state court
2 pursuant to [28 U.S.C.] §1442, [the federal court’s jurisdiction] is derivative of the state court’s
3 jurisdiction.” See *In re Elko County Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997). In other
4 words, while 42 U.S.C. §1441(f) eliminated derivative jurisdiction for removal actions under
5 §1441, it did not eliminate jurisdiction for removal actions, such as the removal at issue, brought
6 under §1442. See *id.*, *Barnaby v. Quintos*, 410 F.Supp.2d 142, 146 (S.D.N.Y., 2005) (“Had
7 Congress intended to abolish derivative jurisdiction altogether, it could have done so when
8 amending § 1441 again in 2002, but it chose to make it clear that the elimination of derivative
9 jurisdiction was limited to cases removed under § 1441.”). Thus, a federal court, after removal,
10 “has no more jurisdiction than the state court” did before removal. See *Salveson v. Western
11 States Bankcard Ass’n*, 731 F.2d 1423, 1431 (9th Cir. 1984).

12 In this case, the California Superior Court, in which this case was originally filed,
13 did not have jurisdiction over this lawsuit due to United States sovereignty immunity in state
14 court where there is no waiver of immunity. See, e.g., *Powelson v. United States*, 150 F.3d 1103,
15 1105 (9th Cir. 1998). As follows, this Court does not have jurisdiction. In addition, while
16 Plaintiffs argue that there was an agreement between the parties that this case would be filed in
17 state court and then removed to federal court, parties cannot by agreement change this court’s
18 jurisdiction. See *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 660, 67 S. Ct.
19 601, 604, 91 L.Ed. 577 (1964). Because Plaintiffs’ claims against the United States must be
20 dismissed on jurisdictional grounds, the Court need not address arguments asserted as to
21 Plaintiffs’ standing to pursue this case against the United States.

22 IV. OUTCOME

23 For the foregoing reasons, the Motion is GRANTED and the present case is hereby
24 DISMISSED, IN ITS ENTIRETY, WITHOUT PREJUDICE.

25 IT IS SO ORDERED.

26 DATED: August 24, 2009

27 

28 DAVID O. CARTER
United States District Judge