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 GRANTING PROVISIONAL CLASS CERTIFICATION

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. DeLeon seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. R. 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 DeLeon's Motion for Provisional Class Certification ("Motion"). [Docket No. 13.]

JURISDICTION

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

BACKGROUND

The facts of this case were recited in the 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.

Plaintiff DeLeon moves to provisionally certify the following class under Rules 23(a) and 23(b)(2):

> All members of lawful same-sex marriages whom the Department of Homeland Security, pursuant to § 3 of the Defense of Marriage Act, 1 U.S.C. § 7, has refused or will refuse to recognize as spouses for purposes of conferring lawful status and related benefits under the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*

(Motion at 4:8-14; Proposed Order at 3.)[1]

[1] In Plaintiff's moving brief and at oral argument, Plaintiff's counsel refer to a proposed class composed of individuals "refused immigration benefits under the INA *solely* because of DOMA § 3." (Mem. of Points and Authorities In Support of Motion ("Mem.") at 3:1-5 (emphasis added); *see also* Reply to Opposition to Motion ("Reply") at n.1 ([Defendants] would have no reason to evaluate an applicant's eligibility . . . where DOMA § 3 is fatal.")) While this is not clearly stated in Plaintiff's proposed class definition, the Court will exercise its "broad discretion" to amend Plaintiff's proposed class definition accordingly. *Armstrong v. Davis*, 275

Non-Parties Edwin Blesch, Timothy Smulian, Frances Herbert, Takako Ueda, Santiago Ortiz, Pablo Garcia, Kelli Ryan, Lucy Truman, Heather Morgan, and Maria del Mar Verdugo filed a Memorandum in support of Plaintiffs' Motion for Class Certification, asking the Court to keep the non-parties listed informed as to any proceeding relating to this Motion because they are potential class members. [Docket No. 70] The Court granted the non-parties' request. [Docket No. 111.]

STANDARD OF LAW

Motions for class certification require a two-part analysis pursuant to Fed. R. Civ. P. ("Rule") 23.

First, Rule 23(a) requires Plaintiffs to demonstrate (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S. Ct. 2231, 2245, 138 L. Ed. 2d 689 (1997).

Second, and in addition to meeting the four conjunctive requirements of Rule 23(a), a class action must also qualify under one of the three subdivisions of Rule 23(b). *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163-64, 94 S. Ct. 2140, 2146, 40 L. Ed. 2d 732 (1974). Here, Plaintiffs argue that the proposed class qualifies for certification under Rule 23(b)(2), permitting certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class," thereby making broad injunctive and/or declaratory relief appropriate. Fed. R. Civ. P. 23(b)(2); *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003).

The party seeking certification must provide facts sufficient to satisfy the requirements of Rule 23(a) and (b). *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1308-09 (9th Cir. 1977). A district court may certify classes only if, after

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F.3d 849, 871, n.28 (9th Cir. 2001), *abrogated on other grounds by Wang v. Chinese Daily News, Inc.*, 709 F.3d 829 (9th Cir. 2013). *See infra*.

"rigorous analysis," it determines the party seeking certification has met its burden of establishing by sufficient evidence that all the requirements for a class action under Rule 23 are satisfied. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 158-61, 102 S. Ct. 2364, 2372-73, 72 L. Ed. 2d 740 (1982). In determining whether an action warrants class treatment under Rule 23, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 178.

While the Court's analysis must be rigorous, Rule 23 confers "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *Armstrong v. Davis*, 275 F.3d 849, 872, n.28 (9th Cir. 2001), *abrogated on other grounds by Wang v. Chinese Daily News, Inc.*, 709 F.3d 829 (9th Cir. 2013).

DISCUSSION

Defendants oppose Plaintiff's Motion for Provisional Class Certification, arguing that Plaintiff's proposed class definition is "defective" and "overly broad" and that Plaintiff fails to satisfy the requirements of Rule 23. (Opp'n at 2:21-23.) The Court will consider each argument in turn.

A. Class Definition

1. Article III Standing

The Court is not persuaded by Defendants' argument that Plaintiff DeLeon's Motion should be denied solely because her proposed class definition includes potential class members who lack Article III standing because they will be harmed, if at all, at some future date.[2] With regard to class standing, "our law keys on the representative party, not all of the class members." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1970, 182 L. Ed. 2d 819 (2012). "In a class action, standing is satisfied if at least

[2] The Court's analysis considers Plaintiff's proposed class definition as amended by Plaintiff's argument in the briefs and at oral argument. *See supra* note 1.

one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). Defendants concede that Plaintiff DeLeon has standing. (*See, e.g.*, Defendants' Partial Motion to Dismiss at 7:19-23, Docket No. 46-1.)

The Ninth Circuit's opinion in *Mazza v. Am. Honda Motor Co.* is not to the contrary. 666 F.3d 581, 594 (9th Cir. 2012). In *Mazza*, the Ninth Circuit quoted the Second Circuit's opinion in *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) for the proposition that "[n]o class may be certified that contains members lacking Article III standing." *Id.* The Second Circuit, however, was concerned with "definition[s] of the class . . . 'so amorphous and diverse' that it [is] not 'reasonably clear that the proposed class members have all suffered a constitutional or statutory violation warranting some relief.'" *Denney*, 443 F.3d at 264 (citations omitted). The Second Circuit went on to agree with a well-known treatise that "[i]f plaintiff can show that there is a possibility that defendant's conduct may have a future effect, even if injury has not yet occurred, the court may hold that standing has been satisfied." *Id.* at 265 (citations omitted). Both the Ninth and the Second Circuits in *Mazza* and *Denney* ultimately concluded the respective class definitions at issue were proper even though both definitions concededly included class members who might be unable to satisfy "particularized proof of injury and causation." *Mazza*, 666 F.3d at 595.

The Court finds that Plaintiff's proposed class definition is not improper solely because some potential class members have not yet been harmed. *See also Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010) ("The inclusion of future class members in a class is not itself unusual or objectionable.")

2. Geographic Scope

The lack of a limit on the geographic scope of the class is also not enough to defeat class certification. Defendants rely on *Califano v. Yamasaki* to argue that nationwide class actions should be denied because they may "interfere with

the litigation of similar issues in other judicial districts." 442 U.S. 682, 702, 99 S. Ct. 2545, 2558, 61 L. Ed. 2d 176 (1979; (Opp'n at 7:24-28; 8:1-7.) The portion of *Califano* that Defendants quote is dicta. The Supreme Court in *Califano* ultimately refused to limit the geographic scope of the class, holding that "[n]othing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule." *Califano*, 442 U.S. at 702, 706. The Court finds that Plaintiff's proposed class definition is not improper solely because the proposed class encompasses the entire country.

B. Fed. R. Civ. P. 23(a)

1. Numerosity

The class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[G]eographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought, should be considered in determining impracticability of joinder." *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810, 103 S. Ct. 35, 74 L. Ed. 2d 48 (1982). Even if the exact class size is unknown, the numerosity requirement is satisfied if general knowledge and common sense indicate that the class is large. *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 569 (C.D. Cal. 2008) (Phillips, J.). *See also Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007) (Hamilton, J.) (using Census statistics to show the possible number of people involved).

Plaintiff has provided sufficient evidence to demonstrate that joinder of all potential class members is impracticable.[3] Plaintiff cites empirical data, including 2010 Census Bureau estimates of as many as 42,000 American households that

[3] Indeed, counsel for Defendants conceded at oral argument that "if we're talking about I-130 as well as I-601 [immigration benefits applications], there probably is no reason to dispute numerosity."

1 include same-sex spouses. *See* Daphne Lofquist, *Same-Sex Couple Households*,
2 U.S. Census Bureau: American Community Survey Briefs (Sept. 2011), *available*
3 *at* http://www.census.gov/prod/2011pubs/acsbr10-03.pdf. Plaintiff also provides
4 evidence of the large number of same-sex couples seeking immigration benefits in
5 the U.S. (*See* Combined Exhibits in Support of Motions for Preliminary
6 Injunction and Class Certification ("Combined Exhibits"), Exs. 3, 4, 5, 6, 11;
7 Supplemental Exhibits 21-22 In Support of Motions for Class Certification and
8 Preliminary Injunction, Ex. 22.) One of Plaintiff's declarants, an immigration
9 attorney, estimates that she has counseled "over 100 . . . couples . . . . seeking
10 lawful immigration status for foreign-born spouses [who] . . .[i]n the main, [were]
11 . . . lawfully married under the laws of the states in which they are domiciled."
12 (Declaration of Gloria Curiel at ¶ 3.)
13 The Court finds that Plaintiff has satisfied the numerosity requirement of
14 Fed. R. Civ. P. 23(a).
15 **2. Commonality**
16 Commonality is satisfied if there are "questions of law or fact common to
17 the class." Fed. R. Civ. P. 23(a)(2). Class members only need to share *a* common
18 issue of law or fact. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168,
19 1172 (9th Cir. 2010) (emphasis added); *see also Rodriguez v. Hayes*, 591 F.3d
20 1105, 1123 (9th Cir. 2010) (finding a common constitutional question in the center
21 of all the class's claims is enough to meet commonality). This Court is also
22 guided by the Supreme Court's instruction: there must be "a common answer to
23 the crucial question *why was I disfavored*." *Wal-Mart Stores, Inc. v. Dukes*, 131
24 S. Ct. 2541, 2552, 180 L. Ed. 2d 374 (2011) (emphasis in original). The members
25 of the proposed class have all been "disfavored" by DOMA's denial of their state-
26 recognized same-sex marriages. *See also Wang v. Chinese Daily News, Inc.*, 709
27 F.3d 829, 834 (9th Cir. 2013) (citations omitted) ("[T]he district court must
28 determine whether the claims of the proposed class 'depend on a common

1 contention . . . that determination of its truth or falsity will resolve an issue that is
2 central to the validity of each of the claims in one stroke.'").
3 Defendants argue that an I-601 waiver of inadmissibility, which Plaintiff
4 DeLeon seeks, is discretionary and DeLeon may not receive the waiver even if
5 DOMA § 3 is deemed unconstitutional. (Opp'n at 10:22-11:17.) Defendants'
6 argument concentrates on the ultimate immigration benefits that DeLeon and the
7 proposed class members seek. (*Id*. at 11:18-20.) That is not at issue in this case.
8 Certainly other members of the proposed class may seek different types of
9 immigration benefits, but DeLeon and *all* proposed class members are foreclosed
10 from any consideration for immigration benefits by DOMA § 3. *See, e.g.*, *Wal-*
11 *Mart*, 131 S. Ct. at 2553 (considering the hypothetical "use[] [of] a biased testing
12 procedure to evaluate both applicants for employment and incumbent employees"
13 and stating "a class action on behalf of every applicant or employee who might
14 have been prejudiced by the test clearly would satisfy the commonality and
15 typicality requirements of Rule 23(a)."). Like the hypothetical biased testing
16 discussed in *Wal-Mart*, DOMA § 3 is an allegedly unconstitutional, and absolute,
17 initial threshold foreclosing consideration for the immigration benefits sought.
18 The Court finds that Plaintiff has satisfied the commonality requirement of
19 Fed. R. Civ. P. 23(a).
20 **3. Typicality**
21 To demonstrate typicality, the proposed class must show that the named
22 parties' claims are typical of the class. Fed. R. Civ. P. 23 (a)(3). "The typicality
23 requirement looks to whether 'the claims of the class representatives [are] typical
24 of those of the class, and [is] satisfied when each class member's claim arises
25 from the same course of events, and each class member makes similar legal
26 arguments to prove the defendant's liability.'" *Rodriguez*, 591 F.3d at 1124; *see*
27 *also Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir.
28 1984), *cert. denied*, 470 U.S. 1004, 105 S. Ct. 1357, 84 L. Ed. 2d 379 (1985)

(typicality is satisfied where the named plaintiffs' claims "arise from the same event or pattern or practice and are based on the same legal theory" as the claims of the class). Plaintiff's and proposed class members' claims revolve solely around the issue of whether DOMA § 3 is constitutional when applied to deny immigration benefits to same-sex spouses.

Although Defendants argue that the facts concerning Plaintiff DeLeon's immigration status are unique, it is undisputed that Plaintiff DeLeon was denied a I-601 waiver of inadmissibility solely due to DOMA §3. (Compl. at ¶ 1; Dfts' Opp'n at 15:8-20; *see also Rodriguez*, 591 F.3d at 1124 (finding typicality where "the determination of whether Petitioner is entitled to a bond hearing will rest largely on interpretation of the statute authorizing his detention").) While Plaintiff DeLeon's I-601 waiver of inadmissibility will ultimately depend on a discretionary weighing of facts and circumstances peculiar to her, that decision is not before this Court. (Compl. at ¶¶ 69-73.) Plaintiff is thus not "likely to be preoccupied with litigating the defense to the detriment of the class as a whole." *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D., 534, 557 (C.D. Cal. 2012) (Morrow, J.) (quoting *J.H. Cohn & Co. v. Am. Appraisal Assocs., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980)).

The Court finds that Plaintiff has satisfied the typicality requirement of Fed. R. Civ. P. 23(a).

4. Adequacy

The named plaintiffs must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In making this determination, courts must consider two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012) (citations omitted). Only the first question is in dispute here.

1 Defendants argue that Plaintiff DeLeon is not an adequate class
2 representative because her interests may conflict with those of other class
3 members. Defendants recycle their argument that Plaintiff DeLeon does not
4 allege legal claims typical of the class (and thus is not an adequate class
5 representative) because "[e]ven if Ms. DeLeon prevails in striking down DOMA,
6 the relief she seeks is entirely discretionary."[4] (Opp'n at 15:23-25.) "Whether the
7 class representatives satisfy the adequacy requirement depends on 'the
8 qualifications of counsel for the representatives, an absence of antagonism, a
9 sharing of interests between representatives and absentees, and the unlikelihood
10 that the suit is collusive.'" *Rodriguez*, 591 F.3d at 1125 (citations omitted). As
11 discussed already, Defendants' argument focuses solely on the ultimate
12 immigration benefit sought, and ignores the substantial shared interest among
13 Plaintiff DeLeon and the class members in a declaration of DOMA's
14 constitutionality. Whether Plaintiff DeLeon ultimately receives a waiver of
15 inadmissibility is beyond the scope of this action. The Court finds that Plaintiff
16 DeLeon is an adequate class representative.

17 **C. Fed. R. Civ. P. 23(b)**

18 Defendants concede that Fed. R. Civ. P. 23(b)(2) applies. (*See* Opp'n at
19 16:12-20; 18:25-26.) Fed. R. Civ. P. 23(b)(2) permits class action certification
20 where "the party opposing the class has acted or refused to act on grounds that
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22 [4] Defendants also argue that Plaintiff DeLeon is not an adequate class representative
because she may abandon this action to pursue other relief and because other class members
23 may prefer to seek special relief available only after commencement of removal proceedings.
(Opp'n at 15:21-16:11.) As to the first argument, it is well-established that once certified, the
24 class acquires separate legal status and may separately qualify for such relief. *See LaDuke v.
Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985), *amended* 796 F.2d 309 (9th Cir. 1986). As to the
25 second argument, counsel for Plaintiff clarified at oral argument that Plaintiff seeks to enjoin
26 only deportation, detention, or termination of work authorization based on a denial of
immigration benefits due to DOMA. (Pltfs. Supplemental Ex. 23 at 71:17-72:4.) Counsel for
27 Plaintiff further clarified that Defendants could continue to issue denials of petitions for
immigration benefits due to DOMA. (*Id.*) Thus narrowed, the injunctive relief sought by
28 Plaintiffs is unlikely to conflict with the interests of the proposed class members.

1 apply generally to the class, so that final injunctive relief or corresponding
2 declaratory relief is appropriate respecting the class as a whole." *Id.* The Court
3 finds that Plaintiff satisfies Fed. R. Civ. P. 23(b)(2).

4 **D. Fed. R. Civ. P. 23(g)**

5 Fed. R. Civ. P. 23(g) governs appointment of class counsel. Rule 23(g)
6 provides, inter alia, that courts must consider the following factors in appointing
7 class counsel:

8 (i) the work counsel has done in identifying or investigating potential
9 claims in the action;
10 (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
11 (iii) counsel's knowledge of the applicable law; and
12 (iv) the resources that counsel will commit to representing the class.

13 Plaintiff requests that Peter A. Schey and Carlos R. Holguin of the Center
14 for Human Rights & Constitutional Law be appointed interim class counsel.[5] The
15 Center for Human Rights & Constitutional Law is a non-profit organization
16 specializing in complex federal litigation on behalf of immigrants and refugees.
17 (Mem. at 8:21-22.) Mssrs. Schey and Holguin are, respectively, the Executive
18 Director and General Counsel for the Center. Mssrs. Schey and Holguin have
19 extensive experience litigating class actions on behalf of immigrants and refugees.
20 *See Plyler v. Doe*, 457 U.S. 202 (1982); *Reno v. Catholic Soc. Servs.*, 509 U.S. 43
21 (1993) (on briefs); *Reno v. Flores*, 507 U.S. 292 (1993); *League of United Latin*
22 *Am. Citizens v. Wilson*, 131 F.3d 1297 (9th Cir. 1997). They have actively
23 litigated this case on behalf of Plaintiff, including filing and responding to several
24 motions. [*See, e.g.,* Docket Nos. 12, 13, 56, 59, 71, 94, 115.] The Court finds that
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26 [5] Plaintiff's [Proposed] Order Provisionally Certifying Class Action lists additional attorneys as class counsel. These attorneys are not referenced in Plaintiff's briefing and the
27 Court has not been provided with any information about these attorneys. (*See, e.g.*, Mem. at
28 8:21-9:6; Reply.) The Court is thus unable to evaluate these attorneys' fitness to serve as class counsel pursuant to Fed. R. Civ. P. 23.

1 Peter A. Schey and Carlos R. Holguin of the Center for Human Rights &
2 Constitutional Law satisfy the requirements of Fed. R. Civ. P. 23(g) and are
3 qualified to serve as interim class counsel. Accordingly, the Court hereby
4 appoints Peter A. Schey and Carlos R. Holguin to serve as interim class counsel.

5 **CONCLUSION**

6 For the reasons stated above, the Court **GRANTS** Plaintiff's
7 Motion for Provisional Class Certification. It is hereby ordered that this
8 action is provisionally certified as a class action pursuant to Fed. R. Civ.
9 P. 23. The class shall be defined as:

10 All members of lawful same-sex marriages who have been denied
11 or will be denied lawful status or related benefits under the
12 Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* by the
Department of Homeland Security solely due to § 3 of the
13 Defense of Marriage Act, 1 U.S.C. § 7

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15 DATED: April 19, 2013 By______________________________

CONSUELO B. MARSHALL
16 UNITED STATES DISTRICT JUDGE

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