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Attorneys for plaintiffs

UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

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.

SACV12-01137 CBM (AJWx)

NOTICE OF MOTION AND MOTION TO MODIFY STAY, RECONSIDER MOTION FOR PRELIMINARY INJUNCTION, AND ISSUE CLASS-WIDE PRELIMINARY INJUNCTION.

Hearing: August 5, 2013
Time: 10:00 a.m.
Hon. Consuelo B. Marshall
Spring St., Courtroom No. 2

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/ / /

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To defendants and their attorneys of record:

PLEASE TAKE NOTICE that on August 5, 2013, at 10:00 a.m., or as soon thereafter as counsel may be heard, plaintiffs will and do hereby move the Court to modify the stay entered April 24, 3013 (Dkt. 129) to permit reconsideration of its order of April 19, 2013, denying a preliminary injunction (Dkt. 128), and to issue a class-wide preliminary injunction —

1) restraining defendants from deeming class members' presence in the United States unauthorized for purposes of 8 U.S.C. § 1182(a)(9)(B), pending reopening and adjudication of their applications and petitions for lawful immigration status in accordance with the Supreme Court's decision in *United States v. Windsor*, __U.S. __; 2013 U.S. LEXIS 4921, 2013 WL 3196928 (June 26, 2013); and

2) restraining defendants to vacate their denials of plaintiff's and class members' employment authorization applications and granting such applications, pending reopening and adjudication of class members' applications and petitions for lawful immigration status in accordance with the Supreme Court's decision in *United States v. Windsor*, *supra*.

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This motion is based upon the accompanying memorandum of law and exhibits, and upon all other matters of record herein. A proposed order is lodged concurrently herewith.

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This motion is made following conferences of counsel pursuant to Local Rule 7-3 which took place on May 2, 2013, and July 2, 2013. Defendants and intervenor BLAG stated that they will advise the Court regarding their position on the instant motion after they review plaintiff's moving papers.

Dated: July 8, 2013.

CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW
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/s/ Peter A. Schey

/s/ Carlos R. Holguín

Attorneys for Plaintiffs

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Certificate of Service

SACV12-01137 CBM (AJWX)

I hereby certify that on this day I electronically filed the foregoing NOTICE OF MOTION AND MOTION TO MODIFY STAY AND ISSUE CLASS-WIDE PRELIMINARY INJUNCTION with the Clerk of Court by using the CM/ECF system, which provided an electronic notice and electronic link of the same to all attorneys of record through the Court's CM/ECF system.

Dated: July 8, 2013. /s/ Carlos Holguin _____

/ / /

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

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.

SACV12-01137 CBM (AJWx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO MODIFY STAY AND ISSUE CLASS-WIDE PRELIMINARY INJUNCTION.

Hearing: August 5, 2013
Time: 10:00 a.m.
Hon. Consuelo B. Marshall
Spring St., Courtroom No. 2

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Additional counsel for plaintiff Aranas:

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO MODIFY STAY AND ISSUE CLASS-WIDE PRELIMINARY INJUNCTION

I INTRODUCTION

This is an action for declaratory and injunctive relief challenging defendants' applying § 3 of the Defense of Marriage Act, 1 U.S.C. § 7 (DOMA),[1] to deny immigrant members of lawfully married same-sex couples marriage-based benefits under the Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.* (INA).

By order dated April 19, 2013 (Dkt. 126), this Court held that "DOMA § 3 is not rationally related to Congress' interest in a uniform federal definition of marriage … does not 'ensur[e] that similarly situated couples will be eligible for the same federal marital status regardless of the state in which they live' … and that Plaintiffs have stated a claim that DOMA § 3 violates their equal protection rights." *Id*. at 14.

The Court certified this action pursuant to Rule 23(b)(2), Fed.R.Civ.Proc., on behalf of the following class:

> All members of lawful same-sex marriages who have been denied or will be denied lawful status or related benefits under the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq*., by the Department of Homeland Security solely

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[1] DOMA § 3 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.

due to § 3 by the Defense of Marriage Act, 1 U.S.C. § 7.

Order Granting Provisional Class Certification, Dkt. 127, at 12.

However, on April 24, 2013, the Court stayed further proceedings in this action pending the ruling of the United States Supreme Court in *United States v. Windsor*, No. 12-307, on the ground that the Supreme Court's ruling "will simplify the issues before this Court." Dkt. 129 at 2.[2]

The Court's staying these proceedings derived directly from its having "denied preliminary injunctive relief, finding that Plaintiff failed to carry her burden of showing that irreparable harm was likely *pendente lite* in the absence of a

---

[2] On June 26, 2013, the Supreme Court held that DOMA § denies due process and equal protection in violation of the Fifth Amendment to the U.S. Constitution. *United States v. Windsor*, __U.S. __; 2013 U.S. LEXIS 4921, 2013 WL 3196928 (June 26, 2013).

Shortly after the Supreme Court's ruling defendant Napolitano stated: "Working with our federal partners, including the Department of Justice, we will implement today's decision so that all married couples will be treated equally and fairly in the administration of our immigration laws." http://www.dhs.gov/news/2013/06/26/statement-secretary-homeland-security-janet-napolitano-supreme-court-ruling-defense (last checked July 1, 2013).

To date, however, defendants have adopted *no* procedures—nor given any indication if or when they intend to do so—for (a) identifying class members; (b) providing notice to class members of relief from CIS's prior application of DOMA § 3 and how they may secure it; (c) reopening and readjudicating without additional fee applications for immigration benefits denied pursuant to DOMA § 3; (d) providing class members priority in reconsideration of applications for immigration benefits denied pursuant to DOMA § 3; (e) promptly granting employment authorization to class members; (f) stopping further accumulation of class members' unauthorized presence or (g) ensuring that periods of unauthorized presence class members have accrued because of DOMA § 3 do not render them inadmissible pursuant to 8 U.S.C. § 1182.

preliminary injunction. [Docket No. 128.]." *Id*.

Although the Court had indicated, "[t]entatively, … the showing for irreparable harm has been made…" Reporter's Transcript of Proceedings, November 20, 2012, Plaintiffs' Exhibit 23 (Dkt. 125-1), at 7, it ultimately changed course and accepted defendants' argument that a memorandum issued October 5, 2012, by U.S. Immigration and Customs Enforcement (ICE) makes it "less likely Plaintiffs or other putative class members will suffer irreparable harm prior to final judicial resolution of the constitutionality of Section 3 of the Defense of Marriage Act." Defendants' Notice of Supplemental Authority Regarding Plaintiffs' Motion for Preliminary Injunction, November 6, 2012 (Dkt. 82), at 1. The Court found:

> Since the October 5, 2012 amendment, immigrants in same-sex marriages may qualify for deferred action status, which includes the temporary work authorization and tolling of unlawful presence accrual that Plaintiff DeLeon seeks by this Motion. *Indeed, none of the adverse immigration decisions provided by DeLeon post-date the October 5, 2012 amendment to the Morton Memo*. The parties have filed with the Court several supplemental authorities following briefing and oral argument on this motion. None of these supplemental authorities include adverse immigration decisions affecting those in the plaintiff class after October 5, 2012.

Order Denying Preliminary Injunction, *supra*, at 8 (docket references omitted) (emphasis added). The Court's conclusion that because of the October 5, 2012 amendment to the Morton Memorandum, "immigrants in same-sex marriages may

qualify for deferred action status," was not based on anything in the text of the document. The Morton Memorandum and the October 5, 2012 supplement address only the exercise of prosecutorial discretion to stay removal proceedings or execution of orders of removal of certain immigrants, *not* eligibility for deferred action. The Court's critical finding that the October 5, 2012 memorandum offered a viable remedy to extend interim relief to class members was wrong, as was its stated assumption that defendants had ceased issuing adverse decisions based on DOMA § 3.

On April 26, 2013, defendants filed a notice correcting the key factual finding underlying the Court's having denied preliminary injunctive relief. Therein, defendants make clear that—

1) "USCIS has, in fact, denied I-130 Petitions for Alien Relative since October 5, 2012, based on" DOMA § 3, Dkt. 131 at 2;

2) CIS "will continue to [issue such denials] until there is a definitive ruling" striking down DOMA § 3, *id* at 3; and

3) defendants grant class members "deferred action" and employment authorization "only in *extraordinary circumstances*…" *Id*. at 4 (emphasis added).[3]

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[3] Defendants further clarify that their prosecutorial discretion memos address *only* whether DHS immigration enforcement agencies, typically ICE, will proceed against a class member in removal or deportation proceedings. *See* Dkt. 131 at 3-4 and n.3 ("USCIS therefore does not exercise prosecutorial discretion pursuant to the Morton memo.").

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As defendants now largely admit, neither the prosecutorial discretion Morton memos nor the highly unlikely possibility of getting deferred action affords class members whose immigration applications CIS has unconstitutionally denied adequate protection from irreparable injury *pendente lite*.

A district court has discretionary power to stay proceedings in its own court. *See Landis v. North American Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936). However, "the same court that imposes a stay of litigation has the inherent power and discretion to lift the stay." *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp. 2d 64, 74 (D.D.C. 2002).

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When exercising inherent authority to stay cases, courts must be aware of changing facts and circumstances. *Landis*, *supra*, 299 U.S. at 256 ("We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions."). "When circumstances have changed such that the court's reasons for imposing the stay no longer exist or are inappropriate, the court may lift the stay *sua sponte* or upon motion." *Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003).

This Court's misinterpretation of the scope of the October 5, 2012 amendment to the Morton Memorandum and erroneous assumption that no further adverse decisions were being issued against class members, as defendants' April 26

As explained below, the favorable exercise of prosecutorial discretion is at most tangentially related to deferred action, work authorization, and the accrual of unauthorized presence.

clarification confirms, furnish *prima facie* cause for this Court to reconsider its order denying class-wide preliminary relief. Plaintiff DeLeon accordingly moves the Court to reconsider issuing a class-wide preliminary injunction.

Defendants now admit having made numerous "adverse immigration decisions affecting those in the plaintiff class after October 5, 2012," *See* Dkt. 131; *see also* Plaintiffs' Exhibits 37-41 filed herewith (post-October 5, 2012, denials of multiple class members' immigration applications). Defendants also largely admit that neither their prosecutorial discretion memos nor the unlikely possibility of getting deferred action affords class members whose applications for pre-adjudication employment authorization and for adjustment of status CIS unconstitutionally denied any real protection from joblessness or inadmissibility.

As will be seen, statistics, studies, expert opinion and class members' actual experiences in seeking deferred action and work authorization buttress defendants' admissions and are wholly contrary to the key factual assumption underlying the Court's having denied a class-wide preliminary injunction: *i.e.*, that defendants' discretion to grant deferred action and work authorization offer class members a viable means to avoid irreparable injury pending final judgment in this case or the agency's readjudication of their denied applications for lawful permanent resident status. The fact is they do not.

Plaintiff class representative DeLeon accordingly moves the Court to modify the stay to permit reconsideration of a class-wide preliminary injunction and to issue a limited preliminary injunction saving class members from further irreparable injury

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pending entry of final judgment.[4]

Almost a year after plaintiffs filed their motion for a preliminary injunction in this case, plaintiff DeLeon and hundreds or thousands of class members continue to suffer irreparable injury solely because defendants have been unwilling to extend to DeLeon and members of the certified class the same interim benefits defendants have always granted and continue to grant to similarly situated applicants for family-based permanent resident status, including applications based on heterosexual marriages. *At bottom, all plaintiff now seeks for herself and immigrant members of the certified class is prompt issuance of the* ***same*** *interim relief granted to all other applicants for family-based adjustment of status whose applications are pending, rather than having been denied based on DOMA § 3. See* Declaration of Peter A. Schey, July 6, 2013, Exhibit 36 filed concurrently herewith, at ¶ 9.

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[4] Plaintiff DeLeon and similarly situated class members are ineligible for adjustment to lawful permanent resident status if they "continue[ ] in or accept[ ] unauthorized employment prior to filing an application for adjustment of status or who [are] in unlawful immigration status on the date of filing the application for adjustment of status or who ha[ve] failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States." 8 U.S.C. 1255(c)(2). A discretionary waiver may be available to class members who "have not, for an aggregate period of more than 180 days: (A) failed to maintain, continuously, a lawful status; (B) engaged in unauthorized employment; or (C) otherwise violated the terms and conditions of his or her admission." 8 U.S.C. 1255(k).

Denying plaintiff DeLeon and class members interim employment authorization and

II STUDIES, EXPERT OPINION, AND DEFENDANTS' STANDARDS ALL CORROBORATE DEFENDANTS' ADMISSION THAT DEFERRED ACTION AND WORK AUTHORIZATION ARE EFFECTIVELY UNAVAILABLE TO ALL BUT AN INSIGNIFICANT MINORITY OF CLASS MEMBERS.

Class members denied immigration benefits pursuant to DOMA § 3 reasonably fear three concrete injuries: (1) arrest and removal; (2) denial of the right to work lawfully in the United States (and possible discretionary or mandatory denial of their applications for adjustment of status based upon their unauthorized employment); and (3) accrual of time toward three- and ten-year bars to admission prescribed by 8 U.S.C. § 1182(a)(9)(B).

Though defendants may not seek class members' actual removal,[5] their prosecutorial discretion memos, deferred action, and work authorization procedures do nothing to ameliorate the second and third of these injuries.

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[5] Defendants argued, and the Court accepted, that ICE's Morton and Mead memos (Dkt. 39-1, 39-2, and 82-1) afford class members adequate protection against arrest and removal *pendente lite*.

Defendants offer no statistics on immigrants in same-sex marriages denied lawful status solely pursuant to DOMA § 3 who have benefitted from the favorable exercise of prosecutorial discretion under the Morton Memorandum. General statistics, however, suggest that very few aggrieved class members are being affirmatively helped thereby. *See* http://www.nytimes.com/2012/06/07/us/politics/deportations-continue-despite-us-review-of-backlog.html ("After seven months of an ambitious review by the Obama administration of all deportations before the nation's immigration courts … fewer than 2 percent have been closed so far.").

1) Deferred Action.

Contrary to this Court's conclusion in denying plaintiff's motion for a preliminary injunction, neither ICE's March 2, 2011 (Dkt. 39-1), nor its June 17, 2011 (Dkt. 39-2) Morton memos, addresses granting immigrants, including members of same-sex marriages, temporary lawful status or work authorization. ICE's "Mead" memo of October 5, 2012 (Dkt. 82-1), says nothing regarding deferred action, any other form of temporary status, work authorization, or the accrual of unauthorized presence.

As defendants now point out, these memoranda address only whether ICE will exercise discretion *not to proceed against class members in removal proceedings*. *They do not offer class members any of the interim protection against joblessness, possible denial of adjustment of status because of unlawful employment, or the accrual of time toward the three- and ten-year bars to admission that defendants routinely extend to immigrants in different-sex marriages or other family-based visa categories who file I-485 applications to adjust status*.[6]

Defendants vaguely suggest that the hypothetical availability of deferred

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Nevertheless, class representative DeLeon presently knows of no class member defendants are actively seeking to remove, and she accordingly does not now seek an injunction against arrest or removal.

[6] As the record makes clear, in some cases defendants *have* extended interim relief to immigrants in same-sex marriages, but only until CIS discovered the underlying visa petition was based upon a same sex marriage, at which time the agency summarily terminated employment authorization and informed immigrant class members they could no longer work and were henceforth accumulating unauthorized presence

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action—an administrative remedy distinct from favorable exercise of prosecutorial discretion—may offer some victims of unconstitutional discrimination a viable means of protecting themselves against joblessness and inadmissibility *pendente lite*. Dkt. 131 at 4. That is clearly not the case.

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Defendants admit that deferred action is granted only in "extraordinary" cases, Dkt. 131 at 4, yet they fail to explain just how *very* extraordinary a case must be before an occasional class member would have any realistic chance of obtaining deferred action.

"[D]eferred action [is] an act of administrative convenience to the government which gives some cases lower priority…" 8 C.F.R. § 274a.12(c)(14).[7] In 2003, CIS was given exclusive authority to grant deferred action. Citizenship and Immigration Services Ombudsman, *Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process*, July 11, 2011, Exhibit 34 filed herewith, at 3 (2011 Ombudsman Report). In exercising this authority, CIS purports to follow a November 17, 2000, memorandum issued by then-INS Commissioner Doris Meissner. *Id*.[8] The requirements the Meissner memo lists for the granting of deferred

---

towards the 3- and 10-year bars to admissibility. *See, e.g.*, Exhibits 37-45 filed herewith (notices denying multiple class members' immigration applications).

[7] Immigration judges have no authority to grant deferred action. *Johnson v. INS*, 962 F.2d 574, 579 (7th Cir. 1992). There is no judicial review of decisions concerning deferred action. *Reno v. American Arab Anti-Discrimination Comm.*, 525 U.S. 471; 119 S. Ct. 936; 142 L. Ed. 2d 940 (1999).

[8] Internal "operations instructions" addressing deferred action were withdrawn in June 2007. *See* former Operations Instructions § 242.1(a)(22). Intervening plaintiffs

action are many and exacting:

- Length of residence in the United States …
- Humanitarian concerns: Relevant humanitarian concerns include, but are not limited to, family ties in the United States, medical conditions affecting the alien or the alien's family; the fact that an alien entered the United States a very young age; ties to one's home country (e.g. whether the alien speaks the language or has relatives in the home country); extreme youth or advanced age; and home country conditions.
- [P]ast history of violating the immigration laws...
- Likelihood of ultimately removing the alien: Whether a removal proceeding would have a reasonable likelihood of ultimately achieving its intended effect, in light of the case circumstances such as the alien's nationality, is a factor that should be considered. …
- Whether the alien is eligible or is likely to become eligible for other relief: Although not determinative on its own, it is relevant to consider whether there is a legal avenue for the alien to regularize his or her status if not removed from the United States. …
- Effect of action of future admissibility: The effect an action such as removal may have on an alien can vary—for example—a time-limited as opposed to an indefinite bar to future admissibility …

---

know of no extent regulation or even an internal operations instruction regulating the adjudication of deferred action applications.

- Community attention: Expressions of opinion, in favor of or in opposition to removal …
- Resources available to the INS ...

Memorandum, "Exercising Prosecutorial Discretion" (Nov. 17, 2000) (Meissner Memo), filed herewith as Exhibit 35, at 7-8.

The Meissner memorandum emphasizes that "[t]here is no precise formula for identifying which cases warrant a favorable exercise of discretion," *id.* at 7; that "the responsibility for exercising prosecutorial discretion in this manner rests with the District Director (DD) or Chief Patrol Agent (CPA) based on his or her common sense and sound judgment.," *id*. at 5, and that "[t]here is no legal right to the exercise of prosecutorial discretion, and … no right or obligation enforceable at law by any alien or any other party." *Id*. at 10.

Nothing in the Meissner memo, nor any other DHS document addressing deferred action gives any preference *per se* to immigrant members of same-sex couples denied immigration benefits solely because of their sex or sexual orientation. The best a class member could hope for would be consideration of his or her "family ties" by virtue of being married to a U.S. citizen or permanent resident. As the Meissner memo makes clear, this is but one factor CIS considers, which counts for little in actual practice or some 4 million undocumented immigrants in the U.S. with visa petitions pending would be eligible for deferred action. In reality, far less than one tenth of 1% are ever deemed eligible for deferred action.

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Class counsel Peter A. Schey has represented several individuals seeking

deferred action. He describes the practical requirements and process of seeking such relief as prohibitively exacting, time-consuming, and expensive:

> Over the past few years I have represented multiple individuals seeking deferred action. In my experience, and as reported to me by numerous other lawyers throughout the country with whom I maintain frequent communication, deferred action is a status that is *extremely* difficult to obtain. To have any chance of winning deferred action for a client I am typically required to devote at least 40 hours marshaling evidence, preparing written argument, and arranging face-to-face meetings with DHS managers … [T]he usual fee for a competently prepared application and required communications with the Government ranges from $5,000 to $15,000. Few immigrants, especially when here without employment authorization … can afford these fees …
>
> The substantive standards DHS uses when adjudicating applications for deferred action are far from transparent. They are not set out in federal regulation or even in internal Operations Instructions. Rather, they are contained in various internal memoranda, which are not readily accessible to the public, and which leave individual DHS officials with immense discretion to grant or withhold deferred action as they see fit. I have yet to be approached by any client who was even aware of deferred action, let alone of the internal Government memoranda that set forth the criteria to be used when adjudicating applications for deferred action …

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In my experience, the primary factor determining the success or failure of a deferred action application is … the presence of an extremely compelling and unusual humanitarian element warranting the immigrant being granted temporary authorized presence and employment authorization: *e.g.*, the immigrant is seriously ill or disabled and would not have access to adequate care in his or her country of origin, or the immigrant is the primary caregiver for a U.S. citizen or lawful resident who is suffering from a catastrophic illness or disability. *Merely having a spouse who is a United States citizen or permanent resident does not suffice to win deferred action*. An applicant whose case does not involve some highly unusual or exceptional humanitarian circumstance, or who lacks counsel familiar with deferred action, has little to no realistic chance of obtaining deferred action …

As counsel for the certified class in the *Aranas* litigation, I am familiar with the circumstances of a large number of class members who have contacted me (in my capacity as class counsel) seeking information about the status of the case. I have also been contacted by numerous lawyers who represent class members in their individual applications and petitions for immigration benefits denied under DOMA. Based on probably hundreds of communications, I am informed and believe that the vast majority (probably something close to 95-99%) of class members do NOT qualify for deferred action because their cases do not involve the types of exceptional circumstances described in defendants' memoranda regarding eligibility for deferred action.

Declaration of Peter A. Schey, July 6, 2013, Exhibit 36 filed herewith (emphasis added).

According to DHS statistics provided the *New York Times,* however, as of May 2012—three-quarters of the way through the fiscal year—DHS had granted deferred action *or* issued a stay of a final order of removal in 1,973 cases in fiscal year 2012.[9] *This means someone in removal proceedings has an approximate 0.64 percent chance of getting either form of relief*.[10] For the over 4 million immigrants in the US with visa applications pending, the chance of being granted deferred action drops to close to zero.

In any event, the vast majority of class members simply do not and will not know they may even apply for deferred action. As DHS's own ombudsman observes,

> [T]here is little public information explaining how to request deferred action

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[9] In FY 2012, ICE removed 409,849 individuals. *See* http://www.ice.gov/removal-statistics (last checked May 11, 2013). If one assumes ICE removes aliens at a relatively regular rate over the course of the fiscal year, the agency would have removed approximately 307,387 persons during the first three-quarters of the year.

[10] Of those granted either form of relief, 1,687, or 86 percent, were individuals subject to a final order of removal. *See*, *Deportations Continue Despite U.S. Review of Backlog*, The New York Times, June 6, 2012 (*Deportations Continue*), *available at* http://www.nytimes.com/2012/06/07/us/politics/deportations-continue-despite-us-review-of-backlog.html, and http://www.documentcloud.org/documents/367098-ice-review-stats.html, last checked May 11, 2013, *reprinted at* Exhibit 54 filed concurrently (ICE Stats).

Ironically, since deferred action appears largely unavailable until someone is formally ordered removed, class members who benefit from prosecutorial discretion memos—and are thus *not* prosecuted in removal proceedings—would have almost zero chance of receiving deferred action.

> and what type of supporting documentation should be submitted with a request. … Some USCIS offices have provided local guidance, but this is often only visible to community-based organizations or legal representatives, and not to individuals who lack access to such aid networks, leaving the most vulnerable individuals—those who are not represented—without knowledge of how to be considered for this temporary form of relief.

2011 Ombudsman Report at 6.[11]

First, CIS does *not* advise class members whose immigration applications it has denied based on DOMA § 3 that they may seek the favorable exercise of prosecutorial discretion, deferred action, or employment authorization. *See, e.g.*, Plaintiffs' Exhibits 37-45 filed herewith (notices denying multiple class members

and employment authorization).

Second, even when class members do manage to learn about deferred action, they must navigate a murky, recondite process marked more by unbridled discretion than coherent standards. Again, the ombudsman's conclusions corroborate class counsel's declaration:

- Stakeholders lack clear, consistent information regarding requirements for submitting a deferred action request and what to expect following submission of the request.
- There is no formal national procedure for handling deferred action requests. Accordingly, it is difficult to track deferred action processing, in order to determine who receives deferred action, and under what circumstances.
- When experiencing a change in the type or number of submissions, local USCIS offices often lack the necessary standardized process to handle such requests in a timely and consistent manner. As a result, many offices permit deferred action requests to remain pending for extended periods.
- Stakeholders lack information regarding the number and nature of deferred action requests submitted each year; and they are not provided with any information on the number of cases approved and denied, or the reasons underlying USCIS' decisions.

2011 Ombudsman Report at 1. Plaintiff knows of *no* action defendants have taken to address the ombudsman's concerns. Regardless, as noted above, even if class members knew about and applied for deferred action, over 99.9% of all applications

would be denied.

2) Employment authorization.

Nor is employment authorization issued as a matter of course to the miniscule number of immigrants actually granted deferred action. 8 C.F.R. §§ 274a.12(c)(14). Rather, they must apply to CIS for it. *Id*.; *see also* 2011 Ombudsman Report at 4 ("Once granted deferred action, the requestor is eligible to apply for employment authorization.").

Again, defendants have not provided, nor has plaintiff uncovered, any statistics on immigrants denied immigration benefits pursuant to DOMA § 3 who have been issued employment authorization following a grant of deferred action. Defendants' general statistics, however, indicate that only 40 percent of persons granted deferred action end up being authorized to work. ICE Statistics, *supra*, at 2. Thus, in the very rare cases where CIS actually grants a class member deferred action, such beneficiaries of defendants' administrative grace "are left in legal limbo, without … authorization to work." *Deportations Continue, supra*.

III DEFENDANTS' DENYING CLASS MEMBER CONLON INTERIM RELIEF IS TYPICAL OF THE TREATMENT CLASS MEMBERS HAVE RECEIVED AND WILL RECEIVE *PENDENTE LITE*.

As has been seen, deferred action has always been and *by design* remains a wholly discretionary, obscure, and little-used procedure defendants employ at their pleasure and only in highly extraordinary cases. Contrary to what defendants may have earlier suggested to this Court, deferred action is obviously not a viable means

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by which class members may secure their right to work or avoid accruing time toward the three- and ten-year bars to admission following the denial of their immigration applications pursuant to an unconstitutional statute.

By any measure, class member Conlon's fruitless efforts to secure interim relief following CIS's denying him immigration benefits pursuant to DOMA § 3 were extraordinarily tenacious. First, he had the good fortune to find counsel who knew about deferred action and was qualified to pursue that relief on his behalf. Second, he was able to afford an attorney. Nevertheless, his efforts were still for naught. *See* Exhibits 46 (deferred action request) and 47 (denial of deferred action request), filed herewith.

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IV A PRELIMINARY INJUNCTION SHOULD NOT BE WITHHELD BECAUSE OF THE ILLUSORY AVAILABILITY OF ADMINISTRATIVE RELIEF.

As has been seen, CIS's granting class members deferred action is a wholly discretionary decision, unconstrained by statute, regulation, or even internal operations instruction. As a matter of policy and practice, class members are simply not eligible for deferred action unless they also happen to be gravely ill or the victim of some other catastrophe.

When Congress has provided an administrative procedure capable of resolving a controversy that procedure must generally be exhausted before one may expect the aid of a federal court. However, where, as here, pursuing an administrative remedy is not statutorily required, whether to require a party to request relief first from an administrative agency rests within the discretion of the district court. *Assiniboine and*

Sioux Tribes v. Board of Oil and Gas, 792 F.2d 782, 790 (9th Cir. 1986); *Southeast Alaska Conservation Council v. Watson*, 697 F.2d 1305, 1309 (9th Cir. 1983). In exercising this discretion, however, it is very well established that —

> *exhaustion of administrative remedies is not required where administrative remedies are inadequate or not efficacious, where pursuit of administrative remedies would be a futile gesture, [or] where irreparable injury will result unless immediate judicial review is permitted ...*

Southeast Alaska Conservation Council, supra, 697 F.2d at 1309, *citing Aleknagik Natives, Ltd. v. Andrus*, 648 F.2d 496, 499 (9th Cir. 1980) (emphasis supplied).

Class member Conlon's experience, the sworn statements of counsel familiar with the difficulty of winning deferred action generally, CIS's written requirements for deferred action, DHS's ombudsman's findings, and defendants' own correction of the Court's factual grounds for denying a class-wide preliminary injunction all show the absolute futility of plaintiff class members' pursuing deferred action as a remedy for defendants' refusal to extend to class members the same interim relief it routinely grants to immigrants in different sex marriages (and other family-based visa categories) with pending applications for adjustment of status. The Court should not leave class members to pursue wholly discretionary administrative relief they cannot afford to seek and would only be denied in any event.

V CLASS MEMBERS WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

Lastly, class members will clearly suffer irreparably should this Court not

protect them *pendente lite*.

Class member Samuel Conlon describes the precarious situation caused by defendants' having applied DOMA § 3 to his case and refusing to extend to him the same pre-adjudication interim relief granted to immigrants married to U.S. citizens in different sex relationships:

> My mother passed away several years ago. My father lives in England and suffered a severe stroke on August 13, 2012. He was hospitalized and then released to recover at home. He is of advanced age and I urgently would like to visit him but am unable to do so because of my unauthorized presence. *I am informed and believe that if I was in a heterosexual marriage I would be permitted to work, my presence would be temporarily authorized, and I could apply for advance parole to briefly travel abroad.* …
>
> I am also informed that because USCIS refused to hold my immigration petitions in abeyance and instead denied them I am now accruing "unauthorized presence" which may preclude me from being admitted to the United States for three, or perhaps even ten, years if I have to apply for my permanent resident status abroad. … The prospect that I could be separated from my family for long is causing me extreme emotional hardship.
>
> USCIS's denying my and class members' applications makes it much more difficult for us to pursue recourse before the courts. If I remain here in temporary unauthorized status, but do not prevail on my claims that DOMA § 3 is unconstitutional, I will be barred from the United States for up to ten

years. … On the other hand, if class members and I forgo wholly viable legal claims and leave the United States now, we may be able to return … but will face a three-year bar to re-entry if we accumulated six months of unauthorized presence prior to departing, and a 10-year bar if we remained here for 12 months or more in unauthorized presence after USCIS denied our adjustment of status applications.

Declaration of Samuel Conlon, Exhibit 50 filed herewith at 4-5 (emphasis added).

Class member Alexander Bustos Garcia, who is lawfully married to U.S. citizen class member Richard Fitch, similarly explains the irreparable injury he is suffering as a result of defendants' refusal to extend to him the same interim relief it has granted to other similarly situated immigrants in different sex lawful marriages:

Richard is employed part-time as an independent contractor working as a hairdresser. The pay he receives is extremely modest and because I am unable to be lawfully employed we face extreme hardship and difficulty meeting the daily needs of life. Among other things, we cannot afford medical insurance or medical care …

… *[W]e are unable to afford retained counsel to protect our legal interests in our dealings with the US Citizenship and Immigration Service (USCIS) regarding my eligibility for adjustment of status and employment authorization*.

In May 2013 I applied for adjustment of status and employment authorization. [Those applications were denied on or about June 14, 2013] …

> *… As described in Richard's declaration executed June 11, 2013, we experience routine anxiety, apprehension and depression that could be substantially eliminated if the USCIS granted the same interim relief to us as it extends to heterosexual couples while their petitions and applications are being processed. The depression I experience as a result of being denied the same interim protections offered immigrants in heterosexual marriages includes sleeplessness, feelings of helplessness, extreme sadness, and a sense of hopelessness and despair.*

Declaration of Alexander Bustos Garcia, Exhibit 56 filed herewith (emphasis added).

VI CONCLUSION

For the foregoing reasons, the Court should preliminarily enjoin defendants to vacate their denials of employment authorization for class members and grant class members otherwise eligible for adjustment of status interim employment authorization pending the entry of final judgment or the readjudication of their denied applications to adjust status. It should also enjoin defendants against deeming class members' presence in the United States unauthorized for purposes of 8 U.S.C. § 1182(a)(9)(B) pending the entry of final judgment.

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Dated: July 8, 2013.

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CERTIFICATE OF SERVICE

SACV12-01137 CBM (AJWX)

I hereby certify that on this day I electronically filed the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO MODIFY STAY AND FOR CLASS-WIDE PRELIMINARY INJUNCTION with the Clerk of Court by using the CM/ECF system, which provided an electronic notice and electronic link of the same to all attorneys of record through the Court's CM/ECF system.

Dated: July 8, 2013. /s/ Carlos Holguin

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