United States District Court
Southern District of Texas
ENTERED
November 07, 2017
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NOEL FREEMAN, et al.,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 4:17-CV-2448**
SYLVESTER TURNER, et al.,	§	
Defendants.	§	

ORDER

Pending before the Court are Plaintiffs' Motion for Preliminary Injunction (**Instrument No. 7**) and Defendants Pidgeon and Hicks' Motion to Dismiss for Lack of Subject Matter Jurisdiction. (**Instrument No. 15**).

I.

Plaintiffs Noel Freeman and William Bradley Pritchett; Yadira Estrada and Jennifer Flores; and Ronald Reeser and Vincent Olivier (hereinafter, "Plaintiffs") are three married couples that currently receive and are entitled to benefits as employees and employee spouses of the City of Houston, Texas. Plaintiffs began receiving spousal benefits from the City of Houston in 2013 after the United States Supreme Court held that the federal Defense of Marriage Act violated the United States Constitution in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Despite that ruling and subsequent federal precedent affirming the rights of same-sex couples, Defendants Jack Pidgeon and Larry Hicks (hereinafter, "Pidgeon and Hicks"), who are taxpayers and Houston residents, have repeatedly sought to enjoin Defendants City of Houston and Mayor Sylvester Turner (hereinafter, "the City") from providing benefits to same-sex spouses of City employees. Pidgeon and Hicks have filed two lawsuits in Texas state court to that effect,

including one that remains pending. *See Pidgeon v. Turner*, No. 15-0688, 2017 WL 2829350 (Tex. June 30, 2017).

Pidgeon and Hicks base their arguments in state court on the 2003 Texas Defense of Marriage Act and the 2005 Texas Marriage Amendment. In *Obergefell v. Hodges* and *Pavan v. Smith*, the United States Supreme Court struck down similar state laws that denied same-sex couples the "constellation of benefits that the Stat[e] ha[s] linked to marriage." *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)). In *De Leon v. Abbott*, the United States Court of Appeals for the Fifth Circuit expressly found that the Texas Defense of Marriage Act and the Texas Marriage Amendment were unconstitutional because they violated same-sex couples' Fourteenth and First Amendment rights. *See* 791 F.3d 619, 625 (5th Cir. 2015).

Despite this clear precedent, the Supreme Court of Texas recently held in *Pidgeon v. Turner* that *Obergefell* "did not address" the question of whether "states must provide the same publicly funded benefits to all married persons." No. 15-0688, 2017 WL 2829350, at *10 (Tex. June 30, 2017). The court also noted that it was not required to follow Fifth Circuit precedent from *De Leon* because Texas courts "are obligated to follow only higher Texas courts and the United States Supreme Court." *Id.* at *6 (quoting *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993)). The court remanded the case to trial court to decide the constitutionality of the Texas Defense of Marriage Act and the Texas Marriage Amendment, and the City filed a petition for writ of certiorari before the United States Supreme Court on September 20, 2017.

Following this decision from the Supreme Court of Texas, Plaintiffs filed suit in this Court on August 10, 2017 to seek declaratory judgment and preliminary injunction protecting their rights to spousal benefits under the Fourteenth Amendment. (Instruments No. 1; No. 7).

Pidgeon and Hicks filed a motion to dismiss on August 16, 2017, in which they contend that because Plaintiffs are still receiving full spousal benefits from the City—and no state court has yet ordered the City to stop conferring benefits—Plaintiffs have not suffered an Article III injury that is ripe for adjudication. (Instrument No. 15 at 1).

II.

Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., Art. III, § 2. The standing doctrine under Article III allows courts to "identify those disputes which are appropriately resolved through the judicial process." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish Article III standing, a plaintiff must show (1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury "will be redressed by a favorable decision." *Id.* at 560–561. An injury sufficient to satisfy Article III must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560. An allegation of future injury may suffice if the threatened injury is "certainly impending," or there is a "'substantial risk' that the harm will occur." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

The doctrine of ripeness also stems from Article III's "Cases" and "Controversies" requirement. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Ripeness may also be based on "prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). A court should dismiss a case for lack of ripeness when the case is abstract or hypothetical. *Choice Inc. of Texas v.*

Greenstein, 691 F.3d 710, 715 (5th Cir. 2012). The key considerations are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149.

III.

Plaintiffs claim that they have Article III standing because a Texas state court has twice ordered the City to stop granting benefits to same-sex couples. (Instrument No. 16 at 3). On December 26, 2013, Judge Lisa Millard of the 310th Family Court of Harris County, Texas granted a temporary restraining order requiring the City "to cease and desist providing benefits to same-sex spouses of employees." (Instrument No. 16-1 at 2). On November 5, 2014, Judge Millard entered a preliminary injunction preventing the city "from furnishing benefits to persons who were married . . . to City employees of the same sex." (Instrument No. 16-2 at 6). Although neither the temporary restraining order nor the preliminary injunction remain in effect, Plaintiffs assert that it is "substantially likely—indeed, a virtual certainty" that the trial court will once again enjoin the City from providing benefits to same-sex spouses of City employees. (Instrument No. 16 at 6).

Although Plaintiffs have twice before seen their rights curtailed before the Texas trial court, the law has changed substantially since Judge Millard issued her orders in December 2013 and November 2014. Most significantly, *Obergefell* was decided on June 26, 2015 and *Pavan* was decided on June 26, 2017. In *Pavan*, the Supreme Court held that "the Constitution entitles same-sex couples to civil marriage 'on the same terms and conditions as opposite-sex couples.'" *Pavan v. Smith*, 137 S. Ct. 2075, 2076 (2017) (quoting *Obergefell v. Hodges,* 135 S.Ct. 2584, 2605 (2015)). In *Pavan*, the Court reiterated that every individual, regardless of sexual orientation, is entitled not only to marry the spouse of their choice, but is also guaranteed "the

constellation of benefits that the States have linked to marriage." 137 S. Ct. at 2077.

In light of this precedent, which the Texas trial court is required to follow, it seems constitutionally impermissible for the City to deny benefits to same-sex spouses of its employees. Indeed, the City has taken this position in a writ of certiorari before the United States Supreme Court and in its briefing before this Court. *See* (Instrument No. 23 at 7) ("Houston may not, consistent with *Obergefell*, *Pavan*, and *De Leon*, withhold from employees in same-sex marriages the same employee benefits it provides to employees in opposite sex marriages. Accordingly, Houston does not oppose the relief sought."). Although the City does not oppose Plaintiffs' motion for a preliminary injunction, this Court has an independent obligation to determine whether Plaintiffs have standing to proceed with their claims. *See Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000) ("[T]his Court has an obligation to assure itself that [Plaintiff] had Article III standing at the outset of the litigation.").

Here, the Court finds that Plaintiffs' claims are not yet ripe for review. The case between the City and Pidgeon and Hicks is still pending in Texas state court, and a state court judge may decide the merits of that case in the City's favor. Alternatively, the City has also filed a writ of certiorari before the United States Supreme Court challenging the decision of the Supreme Court of Texas that *Obergefell* "did not decide" whether same-sex couples are entitled to equal benefits. If this Court preemptively issues a preliminary injunction or declaratory judgment, it may interfere with either of those proceedings. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (claims may not be ripe for review based on "prudential reasons for refusing to exercise jurisdiction.").

Plaintiffs have also failed to show that they have yet suffered an "injury in fact" to confer Article III standing. Although an allegation of future impending harm may suffice to confer standing, it must be "certainly impending" or there must be a "substantial risk that the harm will occur." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Here, there is a chance that injury could occur in the future, but this is based on speculation of what will happen before the Texas trial court. Currently, Plaintiffs are still receiving all of the benefits to which they are entitled and no state court has yet ordered the City to stop conferring benefits. Moreover, the City has stated that it is committed to ensuring that Plaintiffs' benefits remain intact and has various legal mechanisms at its disposal to protect those benefits. Thus, although there is a possibility that future injury could occur, it is still "too remote" to be "certainly impending" and there is not a "substantial risk that the harm will occur." *Id.* at 432.

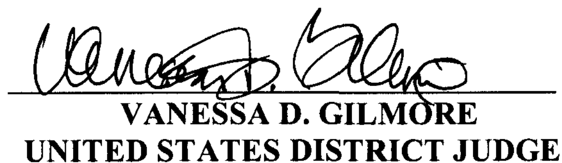
Plaintiffs cite *Susan B. Anthony List v. Driehaus* for the proposition that the Supreme Court has recently broadened the doctrine of standing for future impending harm, but that case involved an Ohio statute that was actively being enforced by the Ohio Elections Commission. *See* 134 S. Ct. 2334, 2338 (2014). Here, there is no government entity that is currently enforcing the Texas Defense of Marriage Act or the Texas Marriage Amendment. In *De Leon*, the Fifth Circuit enjoined the Governor and Attorney General from following those statutes, and now all spouses of state employees are legally entitled to benefits. *See De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015). Similarly, the City of Houston is continuing to confer benefits to same-sex spouses of City employees in accordance with federal law. These factors reduce the risk of impending harm and make any future injury more remote than what the plaintiff faced in *Susan B. Anthony List*. *See* 134 S. Ct. at 2338. Accordingly, Plaintiffs currently lack standing under Article III and their claims are not yet ripe for review.

IV.

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant Pidgeon and Hicks' Motion to Dismiss for Lack of Subject Matter Jurisdiction is **GRANTED. (Instrument No. 15). IT IS FURTHER ORDERED** that Plaintiffs' claims are **DISMISSED without prejudice** and Plaintiffs' Motion for Preliminary Injunction is **DENIED as moot. (Instrument No. 7).**

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 7th day of November, 2017.



VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE