

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

**American Online Dating Association and Mark
Strickler,**

Plaintiffs,

v.

**Case No. 3:06-cv-123
Judge Thomas M. Rose**

**Alberto Gonzales, in his Official Capacity as
Attorney General of the United States,**

Defendants.

**ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER. DOC. 3.**

Plaintiffs have requested a temporary restraining order prohibiting enforcement of §§ 833(d)(2) and (e)(4) of the International Marriage Brokers Regulation Act of 2005 (IMBRA) (codified at 8 U.S.C. § 1375a(d)(2) and (e)(4)). IMBRA regulates international marriage brokers, which the statute defines, with two important exceptions, as any entity “that charges fees for providing dating matrimonial, matchmaking services, or social referrals between” United States residents and foreign nationals. 8 U.S.C. § 1375a(e)(4)(A). IMBRA § 833(d)(2), requires an international marriage broker to search national and state public sex offender registries and to collect from the domestic client information regarding arrests or convictions for a wide range of offenses, as well as restraining orders, marital history and the ages of any minor children of the domestic client. 8 U.S.C. § 1375a(d)(2). IMBRA § 833(d)(3), requires disclosure by international marriage brokers to foreign potential spouses of this information before the international marriage broker can

obtain permission to release contact information of the foreign potential spouse to the United States client. 8 U.S.C. § 1375(d)(3). Plaintiffs assert that IMBRA § 833(d)(2) violates the First Amendment to the United States Constitution by imposing a prior restraint upon protected expression without adequate procedural safeguards. They further assert that this section impinges upon a putative right of privacy guaranteed by the substantive due process appendage to the Fifth Amendment to the United States Constitution. The substantive due process claim alleges that the provision places unreasonable and unnecessary restrictions upon intimate human relationships. Finally, Plaintiffs assert a violation of the First Amendment right to freedom of association on behalf of the clients of the international marriage brokers, clients who include Plaintiff Mark Strickler.

The other challenged provision, IMBRA § 833(e)(4), 8 U.S.C. § 833(e)(4), creates two exemptions from the definition of an international marriage broker: one for non-profit religious and traditional cultural marriage brokers, the other for “dating services [whose] principal business is not to provide international dating services between United States citizens or United States residents and foreign nationals and [who] charge[] comparable rates and offer[] comparable services to all individuals...serve[d] regardless of the individual's gender or country of citizens[hip].” 8 U.S.C. § 833(e)(4)(B). Plaintiffs assert that these exemptions violate the Equal Protection Clause of the Constitution.

I. Legal Standard

Federal Rule of Civil Procedure 65 permits a party to a suit to seek preliminary relief if he believes he will suffer irreparable harm or injury while the suit is pending. In determining whether a grant of a temporary restraining order or a preliminary injunction is appropriate, a court should consider: (1) the likelihood that the requesting party will succeed on the merits of the action; (2)

whether the party requesting the relief will suffer irreparable harm without the grant of relief; (3) the likelihood or extent that granting the injunction will cause substantial harm to others; and (4) the degree to which granting the injunction will advance the public interest. See, e.g., *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson County*, 274 F.3d 377, 400 (6th Cir. 2001); *Wonderland Shopping Center Venture Ltd. P'ship v. CDC Mortgage Capital, Inc.*, 274 F.3d 1085, 1097 (6th Cir. 2001); *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*); *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994).

These four different considerations are not required elements of a conjunctive test but are rather factors to be balanced. *Washington*, 35 F.3d at 1099. While the four factors are to be balanced in determining whether a temporary restraining order or preliminary injunction should issue, courts have often recognized that the first factor is traditionally of greater importance than the remaining three. See *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 537 (6th Cir. 1978). In fact, the Sixth Circuit has held that when the proponent of the injunctive relief has no chance of success on the merits of the claim, the court may dismiss the motion without considering the other three factors. See *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997). Failure to do so has been found to be reversible error. See *id.*; *Sandison v. Michigan High School Athletic Ass'n*, 64 F.3d 1026, 1037 (6th Cir. 1995).

In any case, "[t]he complaint or motion of the party seeking such relief must identify specific facts and reasons demonstrating the existence and extent of the immediate injury and why it is irreparable." *City of Parma, Ohio v. Levi*, 536 F.2d 133, 135 (6th Cir. 1976). "To show a likelihood of prevailing on the merits, the [party seeking the injunction] must show the likely existence of a...violation causally related to the result sought to be enjoined." *L.P. Acquisition Co. v. Tyson*, 772

F.2d 201, 205 (6th Cir. 1985), quoting *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 565 (6th Cir. 1982).

However, “[w]hen First Amendment rights are implicated, the factors for granting a preliminary injunction essentially collapse into a determination of whether restrictions on First Amendment rights are justified to protect competing constitutional rights.” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996). The Sixth Circuit has noted that, in general, “when a district court issues a TRO, it is to ‘review factors such as the party's likelihood of success on the merits and the threat of irreparable injury,’ but ‘[i]n the case of a prior restraint on pure speech, the hurdle is substantially higher: publication must threaten an interest more fundamental than the First Amendment itself.’” *County Sec. Agency v. Ohio Dept. of Commerce*, 296 F.3d 477, 485 (6th Cir. 2002) (quoting *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996)).

II. Analysis

A. Prior Restraint

In the instant case Plaintiffs assert that the contested law creates a prior restraint on speech. The Court, however, cannot identify any speech that is prohibited. To the contrary, the statute regulates a forum that individuals freely choose to enter. No speech is prohibited, but certain disclosures are required. Notably, the required disclosure to the potential foreign spouse must be made not by the client, but by the international marriage broker under an unchallenged provision, 8 U.S.C. § 1375(d)(3). Plaintiffs challenge the provision of information from the client to the international marriage broker, see 8 U.S.C. § 1375a(d)(2)(B). Because this speech takes place between a client who is paying money to a broker who is in the business of disseminating

information for the client, the Court perceives this also as a form of commercial speech. The statute compels provision of information regarding a product, the domestic client, being offered to a potential foreign spouse, not unlike product labeling laws that compel and regulate speech in other markets. See *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 -47 (10th Cir. 1991) (upholding a labeling regulation on beer).

Challenges to rules regulating commercial speech are subject to the intermediate scrutiny test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343 (1980):

Central Hudson permits the regulation of commercial speech "if the government satisfies a test consisting of three related parts: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn."

Capobianco v. Summers, 377 F.3d 559, 562 (6th Cir. 2004) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S. Ct. 2371 (1995)). The Court does not find that Plaintiffs have demonstrated a substantial likelihood of prevailing on this claim. The Government asserts two substantial interests in support of its regulation: preventing the abuse of spouses and the Constitutional authority to regulate immigration. Having heard oral arguments from the parties, the Court cannot say that there is a substantial likelihood of Plaintiffs prevailing.

B. Substantive Due Process

As regards their substantive due process claim, Plaintiffs recognize that "the Supreme Court has never explicitly held that a person has a fundamental liberty interest in contacting a person from another country in order to develop an intimate relationship...." Doc. 3 at 28. Nevertheless, they urge the Court to recognize the denial of a fundamental liberty interest based upon the autonomy

passages of *Lawrence v. Texas*, 539 U.S. 558, 562, 574 (2003). The Supreme Court, however, has often stated its reluctance to recognize new “fundamental liberty interests.” *Chavez v. Martinez*, 538 U.S. 760, 776, 123 S. Ct. 1994, 2006 (2003). It is difficult for the Court to discern the practical application of the autonomy passages of *Lawrence* passage to actual cases without guidance from higher courts. The Court will not recognize the asserted fundamental liberty interest in the instant case without such guidance.

C. Freedom of Association

Plaintiffs’ asserted Freedom of Association claim fails for the same reason. They recognize that “IMBRA does not completely deny a citizen’s right to marry....” *Id.* at 27. In fact, it does not impinge on this right at all.

C. Equal Protection

Plaintiffs’ Equal Protection claim asserts discrimination on the basis of non-suspect classifications. Therefore, there need only be a rational basis for the distinction excluding non-profit religious and traditional cultural marriage brokers and domestic dating services. The government asserts that men who pay for access to a foreign bride harbor a heightened sense of ownership that leads to potentially higher rates of abuse. While Plaintiffs have put forward some statistical evidence that tends to debunk this theory, it is not sufficient to support a conclusion that Plaintiffs are likely to prevail on the merits of their claim.

E. Remaining TRO Factors

If the Court had found a substantial likelihood of a First Amendment violation, the remaining factors would automatically be met. See *Tharp v. Board of Educ. of Northwest Local School Dist.*,

2005 WL 2086022, *4 -5 (S.D. Ohio Aug. 26, 2005) (Dlott, J.). In the absence of a likely First Amendment violation, however, the Court will briefly consider each factor.

The Court finds no irreparable injury. The international marriage brokers can be compensated for lost business. Their clients remain free to search for marriage partners via other channels, including the web sites excluded from IMBRA's coverage.

The Court also finds no harm to others to inhere in the enforcement of IMBRA.

In the absence of a likely First Amendment violation, the public interest is upheld by allowing the enforcement of a law designed to limit the occurrences of domestic abuse.

III. Conclusion

While the likelihood of success on the merits on the Equal Protection claim remains too unfocused to say what party is likely to prevail on the merits, all factors that yield a discernable answer point towards denying the requested TRO. Wherefore, Plaintiffs' Motion for a Temporary Restraining Order, doc. 3, is **DENIED**.

DONE and **ORDERED** in Dayton, Ohio, Thursday, May 25, 2006.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE