

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY BISHOP and SHARON BALDWIN,)
et al.,)
)
Plaintiffs,) Case No. 04-CV-848K(J)
)
v.)
)
The STATE OF OKLAHOMA, et al.,)
)
Defendants.)
_____)

BRIEF IN SUPPORT OF MOTION TO DISMISS
BY UNITED STATES OF AMERICA EX REL.
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INTRODUCTION

In 1996, Congress enacted the Defense of Marriage Act ("DOMA") by an overwhelming margin, and President Clinton signed it into law. Section 2 of DOMA provides that no State shall be required to give effect to any marriage between persons of the same sex performed under the laws of another State. Section 3 states that the terms "marriage" and "spouse," for purposes of federal statutes and regulations, refer to the legal union of a man and a woman.

The plaintiffs in this action, two same-sex couples, allege that DOMA violates the Due Process Clause, the Equal Protection Clause, the Full Faith and Credit Clause, and the Privileges and Immunities Clause. Their claims fail as a matter of law on several grounds. First, two of the four plaintiffs lack standing to challenge section 2 of DOMA because they have not alleged any cognizable injury traceable to that section. Given that these plaintiffs have not alleged that they were married under the laws of any State, there simply is no marriage that could have implicated the authority of another State, under section 2, to decline "to give effect" to such marriage. In the absence of a same-sex marriage performed in one State that is denied effect in another, these two plaintiffs have no injury traceable to section 2, and they accordingly lack standing.

All of the plaintiffs' claims also fail on the merits pursuant to clear and well-established precedent. Under binding Supreme Court precedent, State laws limiting marriage to a man and a woman comport with both the Due Process Clause and the Equal Protection Clause. Thus, Congress surely can incorporate that definition into federal statutes, and can protect the ability of the States to use that definition notwithstanding any contrary standards adopted in other States. Moreover, plaintiffs' claims would fail even in the absence of binding precedent, in that DOMA

does not impinge on any fundamental right, does not make any suspect classification, and is rationally related to several legitimate governmental interests.¹

DOMA is likewise a valid exercise of Congress's power, under the Full Faith and Credit Clause, to prescribe the effect of one State's acts in the other States. Indeed, in recognizing the power of the States to preserve their own conception of a valid marriage relationship in the face of another State's opposing position, Congress was merely confirming longstanding conflict of laws principles in the valid exercise of its express power to prescribe "the Effect" of a sister State's laws. See U.S. Const. art. IV, § 1, cl. 2. Finally, the Privileges and Immunities Clause cannot apply to DOMA, because this Clause does not affect the powers of the federal government.

In short, dismissal of plaintiffs' case will properly continue an unbroken line of judicial authority. The courts have spoken with a single, authoritative voice in every case in which they have considered challenges, under the United States Constitution, to the traditional definition of marriage; in every case to address that question in the wake of the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003); and in the one decision that has directly addressed the constitutionality of DOMA. In re Kandu, 315 B.R. 123 (Bankr. W. D. Wash. 2004) [hereinafter Kandu], appeal pending Kandu v. United States Trustee, Case 3:04-cv-05544-FDB (W.D. Wash.). In each of these cases, the courts have uniformly rejected claims under the United States Constitution like those asserted in this case, and the result here should be the same. Congress

¹ In addition to their challenges against DOMA, plaintiffs challenge Article 2, section 35, of the Oklahoma constitution, which defines marriage as "the union of one man and one woman," and declares the State's public policy that same-sex marriages performed in another State will not be recognized in Oklahoma. The "[State] Defendant's Motion to Dismiss and Brief in Support" (docket #7) explains why the Court should dismiss plaintiffs' claims against this provision of the State constitution.

plainly acted within its authority in codifying the traditional, longstanding definition of marriage and in recognizing the States' unquestioned authority to adhere to their own standards for the licensing of the marriage relationship.²

BACKGROUND

In 1996, Congress overwhelmingly enacted, and President Clinton signed into law, the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996). Section 2 of DOMA provides that no State "shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State." 28 U.S.C. § 1738C. Section 3 of DOMA defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman. Specifically, it provides that:

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 wife.

1 U.S.C. § 7.

² Counsel for the United States is aware of five cases currently pending in other federal courts which raise substantially the same claims alleged here: F.D.R. "Fluffy" Sullivan, et al. v. John Ellis Bush, et al., Case No. 04-21118-CIV-GRAHAM/GARBER (S.D. Fla.); Rev. Nancy Wilson, et al. v. Richard L. Ake, et al., Case No. 8:04-CV-1680-T-30TBM (M.D. Fla.); Phyllis Elaine Hunt, et al. v. Richard L. Ake, et al., Case No. 8:04-CV-1852-T-30TBM (M.D. Fla.); Arthur Bruno Smelt, et al. v. County of Orange, et al., Case No. SACV04-1042 GLT (C.D. Cal.); Kandu v. United States Trustee, Case 3:04-cv-05544-FDB (W.D. Wash.) (appeal from In re Kandu, 315 B.R. 123 (Bankr. W. D. Wash. 2004)). The federal government has filed dispositive motions in the first four cases, and briefing on the Kandu appeal from the bankruptcy court to the district court begins this month (January 2005).

The House Judiciary Committee issued a report explaining the background and purposes of DOMA. As the Committee explained, DOMA was a direct response to Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), in which a plurality of the Hawaii Supreme Court concluded that the definition of marriage under Hawaii law (as the union of one man and one woman) might warrant heightened scrutiny under the State constitution. H.R. Rep. No. 104-664, at 2, reprinted in 1996 U.S.C.C.A.N. 2905, 2906. In response, Congress sought both to "preserve[] each State's ability to decide" what should constitute a marriage under its own laws and to "lay[] down clear rules" regarding what constitutes a marriage for purposes of federal law. Id. In enacting section 2 of DOMA, Congress relied on its "express grant of authority," under the second sentence of the Constitution's Full Faith and Credit Clause, "to prescribe the effect that public acts, records, and proceedings from one State shall have in sister States." Id. at 25, reprinted in 1996 U.S.C.C.A.N. at 2930. That sentence, said the Committee, empowers Congress to "resolv[e] conflicts" between the enactments of the different States, id., and section 2 of DOMA does so by preserving the power of the States to decline to give effect to the laws of other States respecting same-sex marriage.

Section 3 of DOMA merely codifies, for purposes of federal law, the definition of marriage set forth in "the standard law dictionary." Id. at 29, reprinted in 1996 U.S.C.C.A.N. at 2935 (citing Black's Law Dictionary 972 (6th ed. 1990)). In explaining why Congress chose to limit federal marital benefits to opposite-sex couples, the House Judiciary Committee stressed the link between traditional opposite-sex marriage and procreation. According to the Committee, society "recognizes the institution of marriage" in order to encourage "responsible procreation and child-rearing." Id. at 12-13, reprinted in 1996 U.S.C.C.A.N. at 2916-17. Congress thus agreed with the Supreme Court that "no legislation can be supposed more wholesome and

necessary . . . than that which seeks to establish [government] on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman." Id. at 12, reprinted in 1996 U.S.C.C.A.N. at 2916 (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1885)). The Committee elaborated: "Why is marriage our most universal social institution, found prominently in virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in childrearing and in generational continuity." Id. at 13-14, reprinted in 1996 U.S.C.C.A.N. at 2917-18.

ARGUMENT

I. The Challenge to Section 2 of DOMA by Plaintiffs Bishop and Baldwin Should Be Dismissed for Lack of Standing

The power of federal courts extends only to "Cases" and "Controversies." See U.S. Const. art. III, § 2. To satisfy this requirement, a plaintiff must demonstrate, as the "irreducible constitutional minimum" of standing to sue, an "injury in fact," a "fairly traceable" causal connection between the injury and defendant's conduct, and redressability. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-03 (1998). The injury needed for constitutional standing must be "concrete," "objective," and "palpable," not merely "abstract" or "subjective." See Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Bigelow v. Virginia, 421 U.S. 809, 816-17 (1975). If the plaintiff lacks standing, the Court lacks subject matter jurisdiction. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) ("standing 'is perhaps the most important of [the jurisdictional] doctrines") (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)).

Under these principles, plaintiffs Mary Bishop and Sharon Baldwin lack standing to challenge section 2 of DOMA. Since these plaintiffs do not and cannot allege that they have been married by the authority of any "State, territory, possession or tribe," section 2 can have no

cognizable effect on them. See Complaint ¶ 13. If they had been married in another State, this provision would permit Oklahoma to follow its own policy in deciding whether to recognize that marriage. See 28 U.S.C. § 1738C. Given that there is no marriage in another State to consider, however — much less any decision by Oklahoma not to recognize any such marriage — section 2 has no practical impact on these two plaintiffs.³

For these reasons, plaintiffs Bishop and Baldwin are without standing to challenge section 2 of DOMA.

II. The Federal Defense of Marriage Act Is Consistent with the Due Process Clause and Equal Protection Clause

The federal Defense of Marriage Act merely codifies, for purposes of federal legislation, the longstanding, traditional, and nearly-universal definition of marriage as the union of a man and a woman, and protects each State's ability to retain that definition as its policy if the State so chooses. As far as counsel for the United States are aware, every court to address the question — including the Supreme Court and a number of federal circuits — has rejected federal constitutional challenges to that definition of marriage. See, e.g., Lofton v. Secretary of Dep't of Children & Family Servs., 358 F.3d 804, 811-27 (11th Cir. 2004), rehearing denied, 377 F.3d 1275 (11th Cir. 2004); Adams v. Howerton, 673 F.2d 1036, 1041-43 (9th Cir. 1982); McConnell v. Nooner, 547 F.2d 54, 55-56 (8th Cir. 1976) (per curiam); Dean v. District of Columbia, 653

³ The other two plaintiffs in this action, Susan G. Barton and Gay E. Phillips, allege that they have been joined in a "civil union" in Vermont. See Complaint ¶ 14. Given that a "civil union" under the law of Vermont has "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage," see Vt. Stat. Ann. tit. 15, § 1204(a) (2004), and given that plaintiffs seek to have Oklahoma "recognize their civil union as valid," see Complaint ¶ 24, their civil union would appear to constitute, for purposes of DOMA, "a relationship between persons of the same sex that is treated as a marriage under the laws of [the State where performed]." See 28 U.S.C. § 1738C.

A.2d 307, 331-33, 362-64 (D.C. 1995); Baehr v. Lewin, 852 P.2d 44, 55-57 (Haw. 1993); Singer v. Hara, 522 P.2d 1187, 1195-97 (Wash. Ct. App. 1974); Jones v. Hallahan, 501 S.W.2d 588, 589-90 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972). Indeed, the only court that has specifically addressed the constitutionality of DOMA expressly upheld it against all constitutional challenges. In re Kandu, 315 B.R. 123 (Bankr. W. D. Wash. 2004), appeal pending Kandu v. United States Trustee, Case 3:04-cv-05544-FDB (W.D. Wash.). This Court should do likewise.

Plaintiffs' due process and equal protection claims, see Complaint ¶¶ 19-24, are controlled by Baker v. Nelson, a decision of controlling precedential effect by virtue of the Supreme Court's dismissal of an appeal in the case. In Baker, the Minnesota Supreme Court had rejected the contention that a State statute limiting marriage to one man and one woman violated federal due process and equal protection principles. The court specifically held that there is no "fundamental right" to same-sex marriage, 191 N.W.2d at 186-87, that the traditional definition of marriage effects no "invidious discrimination," and that the definition easily survives rational basis review. Id. at 187. Invoking the United States Supreme Court's then-mandatory appellate jurisdiction, see 28 U.S.C. § 1257(2) (repealed 1988), a same-sex couple sought review of those rulings. See Jurisdictional Statement, Baker v. Nelson, No. 71-1027, at 3 (Exhibit A hereto)⁴ (questions presented are whether denial of same-sex marriage "deprives appellants of their liberty

⁴ Inclusion of the exhibits to this brief does not convert this motion to dismiss into a motion for summary judgment. See, e.g., Papasan v. Allain, 478 U.S. 265, 268 n.1 (1986) (court may consider matters of public record in adjudicating motion to dismiss); Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1278 n.1 (10th Cir. 2004) ("facts subject to judicial notice may be considered without converting a motion to dismiss into a motion for summary judgment") (citing 27A Fed. Proc., L. Ed. § 62:520 (2003)).

to marry . . . without due process of law under the Fourteenth Amendment" and "violates their rights under the equal protection clause of the Fourteenth Amendment"). Upon review, the Supreme Court dismissed the appeal "for want of a substantial federal question." 409 U.S. 810 (1972) (Mem).

Baker is binding and dispositive here. As the Supreme Court has explained, a dismissal for want of a substantial federal question is a decision on the merits. Hicks v. Miranda, 422 U.S. 332, 343-44 (1975). Referring to an earlier appeal that had been dismissed for lack of a substantial federal question, the Court said in Hicks:

That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our [mandatory] appellate jurisdiction . . . and we had no discretion to refuse adjudication of the case on its merits We are not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one.

Id. (emphasis added). As the Eighth Circuit has observed, therefore, the Supreme Court's dismissal in Baker is "binding on the lower federal courts." McConnell, 547 F.2d at 56; accord Adams, 673 F.2d at 1039 n.2 (acknowledging that Supreme Court's dismissal in Baker "operate[d] as a decision on the merits"). Moreover, "dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction." Mandel v. Bradley, 432 U.S. 173, 176 (1977). Accordingly, Baker definitively establishes that neither the Due Process Clause nor the Equal Protection Clause bars the States from limiting marriage to one man and one woman. Necessarily, therefore, Baker also definitively establishes that the federal government may incorporate the traditional opposite-sex definition of marriage for purposes of federal statutes, and may protect the States' ability to continue using that

definition. This precedent is binding on the federal courts. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); see also Agostini v. Felton, 521 U.S. 203, 237-38 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent.").

Nothing in Romer v. Evans, 517 U.S. 620 (1996), overrules or otherwise undermines Baker — neither explicitly nor by implication. In Romer, the Supreme Court applied rational basis review to invalidate an "unprecedented" State constitutional amendment that barred homosexuals from seeking any protection under State or local anti-discrimination statutes or ordinances. Id. at 633; see Kandu, 315 B.R. at 147-48 (distinguishing DOMA and the amendment in Romer on the basis that "DOMA is not . . . exceptional and unduly broad"); accord Standhardt v. Superior Court, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003). Romer is plainly inapposite here: codifying the traditional definition of marriage is by no means "unprecedented," see Kandu, 315 B.R. at 148 ("DOMA simply codified that definition of marriage historically understood by society"); Romer's rational basis holding provides no support for application of heightened scrutiny here or elsewhere; and because DOMA, like the Minnesota statute upheld in Baker and unlike the Colorado amendment struck down in Romer, is rationally related to the legitimate government interest in "procreation and [the] rearing of children," Baker, 191 N.W.2d at 186, it cannot fairly be described as "born of animosity toward the class of persons affected." Romer, 517 U.S. at 634.

Nor does Lawrence v. Texas, 539 U.S. 558 (2003), overrule or otherwise undermine Baker. In Lawrence, the Supreme Court held that the government cannot criminalize private, consensual, adult homosexual sodomy. At the same time, however, the Court unequivocally noted that the case before it did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Id. at 578. The Eleventh Circuit has expressly concurred in this view of Lawrence in Lofton v. Secretary of Department of Children & Family Services, 358 F.3d 804, 818 (11th Cir. 2004), rehearing denied, 377 F.3d 1275 (11th Cir. 2004). In rejecting a constitutional challenge to Florida's prohibition against adoption of children by practicing homosexuals, the court in Lofton observed that Lawrence simply does not address "the affirmative right to receive official and public recognition" for a relationship. Id. at 817. Because Lawrence declined to address any question regarding marriage, Baker remains binding and dispositive precedent.

Even without the binding precedent of Baker, plaintiffs' due process and equal protection claims still would fail as a matter of law. Most such claims are subject to "rational basis" review, under which the challenged statute will be upheld if it "bears a rational relationship to legitimate governmental objectives." Eaton v. Jarvis Prods. Corp., 965 F.2d 922, 929 (10th Cir. 1992) (equal protection); accord DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1394 (10th Cir. 1990) (due process). "[O]nly if [a statute] target[s] a suspect class or involve[s] a fundamental right" will it be subjected to a higher standard of review. Save Palisade FruitLands v. Todd, 279 F.3d 1204, 1210 (10th Cir. 2002). Neither section 2 nor section 3 of the Defense of Marriage Act impinges upon any fundamental right or "target[s] a suspect class," and the Act easily satisfies the rational basis test.

A. DOMA Does Not Impinge Upon Any Fundamental Right

A fundamental right is one that is, "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality), and Palko v. Connecticut, 302 U.S. 319, 325 (1937)). As the Tenth Circuit has observed, only a "small number" of substantive rights qualify as "fundamental." United States v. Deters, 143 F.3d 577, 582 (10th Cir. 1998). Under these standards, the right to marry is "fundamental." Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978). That right does not, however, encompass the right to marry someone of the same sex.

The Supreme Court has mandated extreme caution in elevating purported liberty interests to the status of fundamental constitutional rights. As the Court explained in a case involving one State's ban on assisted suicide:

By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Glucksberg, 521 U.S. at 720 (citations omitted); see Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1250 (11th Cir. 2004) (observing that conferring constitutional status on an asserted right prevents future revision through democratic process).

As part of this "restraint," the court must reach a "careful description" of the alleged right before determining whether it is fundamental. Glucksberg, 521 U.S. at 721. Most importantly, the asserted right must be defined with specificity, rather than in general terms. In Washington v. Glucksberg, for example, the right was not — properly characterized — a "right to die," but a

"right to commit suicide." Id. at 722-23. Similarly, in Reno v. Flores, the Supreme Court rejected an invitation to characterize the asserted right as "freedom from physical restraint," and instead characterized it as "the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." 507 U.S. 292, 302 (1993). As this holding reflects, a court is "constrained by the factual record before [it], which sets the boundaries of the liberty interest truly at issue in the case. . . . [The court's] 'careful description' of the asserted right must be one that is specific and concrete, one that avoids sweeping abstractions and generalities." Doe v. City of Lafayette, Ind., 377 F.3d 757, 769 (7th Cir. 2004) (emphasis in original). Once this specific, "careful description" is reached, the court can proceed to determine whether the asserted right is fundamental. See Glucksberg, 521 U.S. at 720-21.

The right which the plaintiffs seek to vindicate in this case is not merely the right to marry, but a "right" to marry someone of the same sex. Thus properly characterized, the right asserted here is far from "fundamental," as there is no history or tradition of same-sex marriage in this country or elsewhere. See Kandu, 315 B.R. at 140 ("there is no basis for this Court to unilaterally determine at this time that there is a fundamental right to marry someone of the same sex"); Standhardt, 77 P.3d at 455-60 (no fundamental right to same-sex marriage under Arizona or U.S. constitutions). The traditional understanding of marriage as the union of one man and one woman is deeply rooted in Western history. See Baker, 191 N.W.2d at 185-86; Black's Law Dictionary 762 (2d ed. 1910) (defining marriage as "the civil status of one man and one woman united in law for life"). Until recently, moreover, no State or foreign country had ever permitted same-sex marriages. See H.R. Rep. No. 104-664, at 3, reprinted in 1996 U.S.C.C.A.N. at 2907.

To the contrary, virtually every State understands "marriage" in accordance with the historical practice, and courts repeatedly have upheld prohibitions against same-sex marriage despite due process attacks. See, e.g., Dean, 653 A.2d at 331-33; Baker, 191 N.W.2d at 186-87. Occasional contrary decisions, resting exclusively on State constitutional law, have been promptly overruled by constitutional amendment. See Haw. Const. art. 1, § 23 (ratified 1998) ("The legislature shall have the power to reserve marriage to opposite-sex couples."); Alaska Const. art. 1, § 25 (effective 1999) ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); see also Neb. Const. art. I, § 29 (adopted 2000); Nev. Const. art. 1, § 21 (ratified 2002); Mo. Const. art. 1, § 33 (adopted 2004); La. Const. art. XII, § 15 (approved 2004); Ark. Const. amend. 83 (approved 2004); Ga. Const. art. 1, § 4, ¶ I (ratified 2004); Ky. Const. § 233A (adopted 2004); Miss. Const. art. 14, § 263A (approved 2004); Ohio Const. art. XV, § 11 (adopted 2004); Okla. Const. art. 2, § 35 (adopted 2004); Utah Const. art. 1, § 29 (adopted 2004).⁵ Currently, same-sex marriage is permitted only in Massachusetts, as a result of a judicial decision resting entirely on the State constitution. See Goodridge v. Department of Pub. Health, 798 N.E.2d 941, 948-49 (Mass. 2003) (noting that Massachusetts constitution is "more protective of individual liberty and equality than the Federal Constitution"); see also Andersen v. King County, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004) (holding that prohibition against same-sex marriage violates Washington constitution, but declining to enter "specific remedy" and staying any remedial order pending appellate review). Whatever the merit of that decision under

⁵ In addition to the States cited above, citizens in four other States — Michigan, Montana, North Dakota, and Oregon — have recently approved constitutional amendments prohibiting the recognition of same-sex marriage to one degree or another. See Exhibits B through E hereto. Litigation regarding some of these amendments is pending in State courts.

State law, it cannot possibly be described as creating or reflecting a tradition "deeply rooted in this Nation's history and tradition." See Glucksberg, 521 U.S. at 721.⁶

Moreover, the United States Supreme Court has defined the right to marry consistent with traditional understandings. Thus, the Court has repeatedly linked marriage to related rights of procreation, see, e.g., Zablocki, 434 U.S. at 386 (fundamental right to "marry and raise the child in a traditional family setting"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage is "fundamental to our very existence and survival"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."), and has repeatedly enforced traditional restrictions on marriage such as age limitations and prohibitions against polygamy. See, e.g., Maynard v. Hill, 125 U.S. 190, 205 (1888); Reynolds v. United States, 98 U.S. 145, 166-67 (1878); Gaines v. Relf, 53 U.S. (12 How.) 472, 504 (1851). As Justice Powell has explained, State regulation has permissibly "included bans on . . . homosexuality, as well as various preconditions to marriage." Zablocki, 434 U.S. at 399 (concurring opinion); see Vaughn v. Lawrenceburg Power Sys., 269 F.3d 703, 711 (6th Cir. 2001) ("marriage as it was recognized by the common law is constitutionally protected, but this protection has not been extended to forms of marriage outside the common-law tradition") (emphasis added).

Absent any history or tradition of same-sex marriage, there is no basis for defining that arrangement to be a fundamental constitutional right. As the Supreme Court made clear in Glucksberg, substantive due process does not authorize the courts to "reverse centuries of legal

⁶ Similarly, no such longstanding tradition can be inferred from Baker v. State, 744 A.2d 864, 887 (Vt. 1999), which held that the Vermont constitution required the State "to extend to same-sex couples the common benefits and protections that flow from marriage," but not to permit marriage by same-sex couples.

doctrine and practice, and strike down the considered policy choice of almost every State." 521 U.S. at 723.⁷

In any event, unlike the State marriage statutes discussed above, DOMA does not directly or substantially interfere with the ability of anyone, including homosexuals, to marry the individual of his or her choice. Instead, it simply preserves each State's ability to determine who may marry, based on its own public policy, and indicates how couples who have already married will be treated under federal statutes. The Supreme Court has made clear that regulations which "do not significantly interfere with decisions to enter into the marital relationship" may be upheld without heightened scrutiny. Zablocki, 434 U.S. at 386. Accordingly, statutes that allocate benefits and burdens based on marital status are routinely subjected only to rational basis review — and upheld under that standard. See, e.g., Califano v. Jobst, 434 U.S. 47, 54 (1977) (loss of federal social security benefits upon marriage does not "interfere with the individual's freedom to make a decision as important as marriage"); Parks v. City of Warner Robins, Ga., 43 F.3d 609 (11th Cir. 1995) (city's anti-nepotism policy for supervisory employees does not "create a direct legal obstacle that would prevent absolutely a class of people from marrying," and thus does not "directly and substantially interfere with the right to marry"); P.O.P.S. v. Gardner, 998 F.2d 764, 768 (9th Cir. 1993) (same for child support obligations that imposed distinct "financial pressures" on married individuals); Druker v. Commissioner, 697 F.2d 46, 50 (2d Cir. 1982)

⁷ The Supreme Court's decision in Lawrence is not to the contrary. Lawrence addressed the government's response to certain private sexual conduct, and did not address whether the government must permit two people to marry or must recognize such a marriage. The Lawrence Court itself pointedly emphasized that the case before it did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578; Standhardt, 77 P.3d at 456-57 (holding that Lawrence does not compel recognition of fundamental right to same-sex marriage).

(same for "marriage penalty" in federal tax code). Similarly, DOMA does not address the question whether the plaintiffs in this case may marry under the law of Oklahoma or of any other State.

B. DOMA Does Not Make Any Suspect Classification

DOMA cannot be subjected to heightened scrutiny on the theory that it draws any suspect classification. The Tenth Circuit has squarely held that homosexuality is not a suspect class. See Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (rejecting challenge to discharge of soldier for falsely stating, during enlistment, that he was not homosexual); see also Walmer v. Department of Defense, 52 F.3d 851, 854-55 (10th Cir. 1995) (finding no likelihood of success on motion for preliminary injunction to prevent discharge for engaging in homosexual conduct). More recently, the Eleventh Circuit observed that all of the circuits which "have considered the question have declined to treat homosexuals as a suspect class." Lofton, 358 F.3d at 818 (citing cases from the Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, District of Columbia, and Federal Circuits). The Tenth Circuit's holding to that effect is binding here.

DOMA also does not discriminate on the basis of sex. To begin with, DOMA on its face makes no "detrimental . . . classification[]" that disadvantages either men or women. Michael M. v. Superior Court, 450 U.S. 464, 478 (1981) (plurality). The effect of DOMA — to the extent the statute has any direct effect on a person — is the same on men and women. Moreover, DOMA cannot be "traced to a . . . purpose" to discriminate against either men or women. Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979). Thus, as the United States Bankruptcy Court for the Western District of Washington has noted, in holding that DOMA does not discriminate on the basis of sex, "Women, as members of one class, are not being treated differently from men, as members of a different class." Kandu, 315 B.R. at 143.

Loving v. Virginia is not to the contrary. There the Supreme Court rejected a contention that the assertedly "equal application" of a statute prohibiting interracial marriage immunized the statute from strict scrutiny. 388 U.S. at 8. The Court had little difficulty concluding that the statute, which applied only to "interracial marriages involving white persons," was "designed to maintain White Supremacy" and therefore unconstitutional. Id. at 11. No comparable purpose is present here, however, for DOMA does not seek in any way to advance the "supremacy" of men over women, or of women over men. Accordingly, in upholding the traditional definition of marriage, numerous courts have expressly rejected an alleged analogy to Loving. See, e.g., Baker v. State, 744 A.2d at 880 n.13 (rejecting claim that "defining marriage as the union of one man and one woman discriminates on the basis of sex"); Singer, 522 P.2d at 1191-92; Baker v. Nelson, 191 N.W.2d at 187; see also Dean, 653 A.2d at 362-63 & n.2 (Steadman, A.J., concurring) ("It seems to me to stretch the concept of gender discrimination to assert that it applies to treatment of same-sex couples differently from opposite-sex couples.").

C. DOMA Easily Satisfies Rational Basis Review

Because DOMA neither burdens fundamental rights nor makes any suspect classification, it is subject only to rational-basis review. See, e.g., Glucksberg, 521 U.S. at 728. The Supreme Court has described the elements of rational-basis review in Heller v. Doe:

[R]ational-basis review . . . is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. [A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot [be found unconstitutional] if there is a rational relationship between the [challenged government action] and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

[The government], moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. [T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.

509 U.S. 312, 319-20 (1993) (emphasis added) (citations and internal quotation marks omitted); see Powers v. Harris, 379 F.3d 1208, 1217 (10th Cir. 2004) ("[Under rational basis review,] it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.") (emphasis added) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993)), petition for cert. filed, 73 U.S.L.W. 3338 (U.S. Nov. 22, 2004) (No. 04-716). Indeed, as several federal circuits have held, a court applying rational basis review "may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack." Shaw v. Oregon Public Employees' Retirement Bd., 887 F.2d 947, 948-49 (9th Cir. 1989) (internal quotation marks omitted); accord, e.g., Lamers Dairy Inc. v. USDA, 379 F.3d 466, 473 (7th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3355 (U.S. Nov. 11, 2004) (No. 04-766); United States v. Pollard, 326 F.3d 397, 408 (3d Cir.), cert. denied, 540 U.S. 932 (2003); Haves v. City of Miami, 52 F.3d 918, 922 (11th Cir. 1995). This test, obviously, imposes a "very difficult burden" on the plaintiffs, United States v. Phelps, 17 F.3d 1334, 1345 (10th Cir. 1994); rational-basis analysis is "a paradigm of judicial restraint." Beach Communications, Inc., 508 U.S. at 314; see Save Palisade FruitLands, 279 F.3d at 1213 (referring to rational-basis test as "minimal scrutiny").

DOMA is rationally related to at least two legitimate government interests.⁸ First, both section 2 and section 3 of DOMA are rationally related to the legitimate government interest in encouraging the development of relationships that are optimal for procreation. As the House Judiciary Committee explained, the benefits and obligations of marriage are rooted in "the inescapable fact that only two people, not three, only a man and a woman, can beget a child." H.R. Rep. No. 104-664, at 13, reprinted in 1996 U.S.C.C.A.N. at 2917. Congress could seek to encourage the creation of stable relationships in which people can securely procreate. To this end, marriage historically has provided an important legal and normative link between procreation and family responsibilities. See 1 William Blackstone, Commentaries on the Laws of England 443 (Univ. of Chicago Press 1979) ("The main end and design of marriage [is] to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong . . ."). Congress's interest in encouraging responsible procreation is manifestly legitimate. Indeed, the Ninth Circuit, applying rational basis review, has upheld Congress's use of the traditional definition of marriage for purposes of federal immigration statutes. The court reasoned that such a definition was rational "because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores." Adams, 673 F.2d at 1043 (emphasis added). The United States Bankruptcy Court for the Western District of Washington relied on the same rationale in rejecting a contention that DOMA

⁸ Section 2 of DOMA also properly and reasonably advances the additional governmental interest of protecting the interests of each State in determining and implementing its own policy on same-sex marriage. For the reasons described in footnote 12 infra, DOMA is a rational, constitutional exercise of Congress's express power under the Full Faith and Credit Clause, and the exercise of that power provides another rational basis for section 2.

unconstitutionally forecloses the filing of a joint bankruptcy petition by a same-sex couple. Kandu, 315 B.R. at 145 ("a heterosexual union is the only one that can naturally produce a child"). In short, Congress has an interest in promoting heterosexual marriage because it has an interest in the stable generational continuity of the United States. See id. at 145-46 ("Marriage and procreation are fundamental to the very existence and survival of the race.") (quoting Skinner, 316 U.S. at 541). DOMA furthers this interest by permitting the States, notwithstanding the Full Faith and Credit Clause, to deny recognition to same-sex marriages performed elsewhere, and by adopting the traditional definition of marriage for purposes of federal statutes.

Second, again in relation to both section 2 and section 3 of DOMA, Congress may permissibly decide to encourage the creation of stable relationships that facilitate the rearing of children by both of their biological parents. The Eleventh Circuit explicitly accepted this rationale in upholding Florida's prohibition against adoption of children by practicing homosexuals:

Florida argues that the statute is rationally related to Florida's interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers. Such homes, Florida asserts, provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization. . . . Florida clearly has a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children. . . . More importantly for present purposes, the state has a legitimate interest in encouraging this optimal family structure by seeking to place adoptive children in homes that have both a mother and father.

Lofton, 358 F.3d at 818-19. The bankruptcy court in Kandu also relied on this rationale in upholding DOMA. See 315 B.R. at 146 ("Authority exists that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional

concern. . . .") Just as the statutes challenged in Lofton and Kandu promoted the placement of children in stable families with both a father and a mother, the federal Defense of Marriage Act encourages the creation of stable families in which children can be nurtured by a father and a mother, by ensuring that States can choose whether or not to give effect to same-sex marriages, and by incorporating the traditional definition of marriage into federal statutes. Congress could legitimately seek to strengthen that relationship so as to "unite men and women . . . through the prolonged period of dependency of a human child" — and thus facilitate what Congress reasonably understood to be the "most durable and effective means of meeting children's needs over time." See H.R. Rep. No. 104-664, at 14 n.50 (citations omitted), reprinted in 1996 U.S.C.C.A.N. at 2918.

Under rational-basis review, it is no valid objection to contend that some opposite-sex couples cannot or choose not to procreate (which makes DOMA arguably overinclusive in its allocation of federal marital benefits), or that many individuals besides biological parents can raise children quite effectively (which makes DOMA arguably underinclusive). See Standhardt, 77 P.3d at 462-63 (rejecting these contentions in upholding State statute limiting marriage to opposite-sex couples). As explained above, rational classifications cannot be struck down merely because they are to some degree over- or under-inclusive. See, e.g., Vance v. Bradley, 440 U.S. 93, 108 (1979). To the contrary, in framing any legislation, Congress "must necessarily engage in a process of line drawing," which "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (citation omitted). As the Tenth Circuit has said:

All legislation involves classification. The fact that some persons who have almost equally strong claims to particular treatment are placed on different sides of the line, does not render legislation irrational; although the line may have been drawn differently, still this is a matter of legislative rather than judicial consideration.

United States v. Lee, 957 F.2d 778, 782 (10th Cir. 1992). In this case, it is beyond dispute that procreation requires one man and one woman; Congress reasonably concluded that children ideally should be raised by their biological parents, and DOMA is rationally related to Congress's plainly legitimate interest in encouraging the optimal social arrangements for procreation and childrearing. Under settled principles of rational-basis review, nothing more is required. See, e.g., Heller, 509 U.S. at 319-20; Beach Communications, Inc., 508 U.S. at 314-15.

III. Plaintiffs Cannot Challenge Section 3 of the Federal Defense of Marriage Act under the Full Faith and Credit Clause

Plaintiffs' challenge under the Full Faith and Credit Clause also fails as a matter of law.

That Clause reads:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. Plaintiffs allege that DOMA violates the Full Faith and Credit Clause "by prohibiting the federal government from acknowledging and recognizing the rights, privileges, and immunities to which Plaintiffs Susan Barton and Gay Phillips are entitled as a result of their civil union [in Vermont]." See Complaint ¶ 24 (emphasis added).⁹ Thus, this claim is aimed at section 3 of DOMA, which defines "marriage" and spouse," in federal statutes

⁹ The Complaint contains two paragraphs bearing the number 24. The one cited above is on page 6.

and regulations, as referring only to "a legal union between one man and one woman." 1 U.S.C. § 7.¹⁰

Plaintiffs cannot challenge section 3 under the Full Faith and Credit Clause, however, because this provision of the Constitution "by its terms binds only the States." In re Tapp, 16 B.R. 315, 320-21 (Bankr. D. Alaska 1981). As the Ninth Circuit has explained:

The first sentence of [the Full Faith and Credit Clause] is clear that it does not bind the federal government but the many states. In context, it is each of our fifty states who must give full faith and credit to the acts of the other states. . . . By its terms, and in light of its purpose, the Full Faith and Credit Clause imposes no obligation whatsoever on the federal government.

Taylor v. Sawyer, 284 F.3d 1143, 1152 (9th Cir. 2002) (emphasis added) (rejecting contention that Clause was violated by failure of Bureau of Prisons to follow State court order requiring concurrent sentences); see University of Tenn. v. Elliott, 478 U.S. 788, 799 (1986) ("The Full Faith and Credit Clause is of course not binding on federal courts . . .").

Plaintiffs do not — and cannot — allege that section 3 of DOMA prevents a State from giving "Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State." See U.S. Const. art. IV, § 1, cl. 1. Rather, section 3 merely has the effect of instructing federal agencies to disregard any same-sex marriage in determining whether persons are "married" or "spouses" for purposes of federal statutes and regulations. See H.R. Rep. No. 104-664, at 30, reprinted in 1996 U.S.C.C.A.N. at 2935 ("If Hawaii or some other State eventually recognizes homosexual marriage, Section 3 will mean simply that that marriage will not be

¹⁰ The above-cited language from paragraph 24 of the Complaint is the pleading's only reference to any claim that DOMA violates the Full Faith and Credit Clause. This claim cannot be read as applying to section 2 of DOMA, in light of plaintiffs' reference to "the federal government" and the fact that section 2 pertains to actions by the States rather than the federal government. See 28 U.S.C. § 1738C.

recognized as a marriage for purposes of federal law."). This provision of DOMA cannot, therefore, be challenged under the Full Faith and Credit Clause.

The fact that the Full Faith and Credit Clause does not bind the federal government to recognize State acts and proceedings is made even clearer by the existence and purpose of the second sentence of the Clause. The second sentence empowers Congress to prescribe by law "the Effect" of a State's acts in the other States. See U.S. Const. art. IV, § 1, cl. 2. The Framers of the Constitution explained that the Full Faith and Credit Clause was designed to correct the inadequacies of a predecessor provision in the Articles of Confederation — a provision that called for according full faith and credit to a sister State's laws, but that recognized no legislative power to prescribe the "effect" of such laws. In the Framers' view, the provision in the Articles of Confederation was "deficien[t]," because it did not "declare what was to be the effect of a judgment obtained in one state in another state." McElmoyle ex rel. Bailey v. Cohen, 38 U.S. (13 Pet.) 312, 325-26 (1839) (Mem) (emphasis added). In the absence of any provision as to such "effect," the Framers viewed the meaning of "full faith and credit" as "extremely indeterminate," and "of little importance."¹¹ In short, the "Effect" provision confirms that the federal government's authority is only enhanced, and in no way limited, by the Full Faith and Credit Clause.¹²

¹¹ See The Federalist No. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961) ("The meaning of the [the full faith and credit clause in the Articles] is extremely indeterminate, and can be of little importance under any interpretation which it will bear.").

¹² Even if plaintiffs' fourth cause of action were somehow read as effectively challenging section 2 of DOMA — which recognizes the prerogative of each State to decline to "give effect" to a same-sex marriage performed in another State — the claim would still be subject to dismissal as a matter of law. The Full Faith and Credit Clause has long been understood as incorporating traditional principles of conflict of laws, including the concept that a State may decline to apply another State's law when it conflicts with its own legitimate public policy. See Sun Oil Co. v. Wortman, 486 U.S. 717, 723 & n.1 (1988) (noting the Framers' "expectation" that the Full Faith and Credit Clause "would be interpreted against the background of principles

Accordingly, this Court should dismiss plaintiffs' claim that the Full Faith and Credit Clause requires the federal government to "acknowledg[e] and recogniz[e]" the civil union entered into by plaintiffs Barton and Phillips in Vermont. See Complaint ¶ 24.

IV. The Privileges and Immunities Clause Does Not Apply to the Federal Defense of Marriage Act

Lastly, plaintiffs contend that DOMA violates the Privileges and Immunities Clause of the Constitution. See id. ¶ 18. That Clause reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." See U.S. Const. art. IV, § 2, cl. 1. In the words of the Supreme Court, this language "has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States." Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978).

The Privileges and Immunities Clause does not, however, affect the powers of the federal government. Several courts — including this Court — have expressly rejected claims that federal statutes or actions violated the Clause, stating that it does not apply to the federal

developed in international conflicts of law"); Nevada v. Hall, 440 U.S. 410, 422 (1979) (indicating that a State is "not require[d] . . . to apply another State's law in violation of its own legitimate public policy"). Section 2 of DOMA easily fits within this principle, which has long been applied to recognize the power of each State to apply its own licensing standards — including specifically for marriage licenses — when they conflict with those of another State. See Restatement (First) of Conflict of Laws § 134; Restatement (Second) of Conflict of Laws § 284. Indeed, the unquestioned authority of the States in this area is clearest in a case like this one, where the issue is simply whether Oklahoma can apply its own law to its own citizens with respect to matters within its own borders. Moreover, as noted above, the Full Faith and Credit Clause expressly empowers Congress to prescribe "the Effect" of one State's laws in another State. See U.S. Const. art. IV, § 1, cl. 2. Under any conceivable construction of this "Effect" provision, Congress clearly has the power to preserve the authority of each State to give primacy to its own standards for marriage licensing and to decline to give effect to the conflicting standards of another State, consistent with established common-law principles.

government. This Court, in a civil enforcement action by the United States, rejected defendant's assertion that the government had violated the Privileges and Immunities Clause:

Defendants argue that plaintiff's enforcement actions violate the Privileges and Immunities Clause, U.S. Const., art. IV, § 2. The Privileges and Immunities Clause does not apply here; the Clause requires a State to accord residents and non-residents equal treatment when regulating the means of livelihood or doing business.

United States v. Rx Depot, Inc., 290 F. Supp. 2d 1238, 1249 (N.D. Okla. 2003) (Eagan, D.J.).

Similarly, the Fifth Circuit has rejected a claim that a federal statute violated the Clause, observing that "the Privileges and Immunities Clause protects citizens of one state from abuses by other states, and does not address powers . . . of the federal government." Nehme v. INS, 252 F.3d 415, 430 n.18 (5th Cir. 2001); accord Nevada v. Watkins, 914 F.2d 1545, 1555 (9th Cir. 1990) ("[T]he Privileges and Immunities Clause has been construed as a limitation on the powers of the States, not on the powers of the federal government.") (citations omitted).

Thus, since DOMA is a federal enactment, it cannot be held to violate the Privileges and Immunities Clause.

CONCLUSION

For the foregoing reasons, this action should be dismissed with prejudice.

Dated this 6th day of January, 2005.


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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2005, I served the foregoing document by electronic mail transmission on the following, who have consented in writing to service of this document by e-mail:

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