

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

04-21118

CIVIL ACTION NO:

CIV-GRAHAM

F.D.R. "FLUFFY" SULLIVAN and PEDRO "ROCK" BARRIOS;  
CYNTHIA PASCO and ERIKA Van der DIJAS;  
MICHAEL SOLIS and JESUS M. CARABEO; and  
JASON HAY-SOUTHWELL and WILLIAM HAY-SOUTHWELL,

Plaintiffs,

MAGISTRATE JUDGE  
GARBER

v.

JOHN ELLIS BUSH, in his official capacity as Governor of the  
State of Florida; and CHARLES J. CRIST, JR., in his official capacity  
As Attorney General of the State of Florida; and HARVEY RUVIN, in his  
Official capacity as Clerk of the Circuit and County Courts, Miami-Dade  
County, Florida; and JOHN ASHCROFT, in his official capacity as Attorney  
General of the United States,

Defendants.

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**COMPLAINT FOR DECLARATORY JUDGMENT**

**CLAIM OF UNCONSTITUTIONALITY**

1. This Court has jurisdiction pursuant to 28 U.S. Code 1331. This is a civil action arising under the Constitution and laws of the United States presenting a substantial Federal question.
2. Venue is properly in the Southern District of Florida, Miami Division, pursuant to 28 United States Code 1391. All of the Defendants reside in Florida and all have offices for the conduct of official business in Miami-Dade County, Florida; also a substantial part of

the event or omissions giving raise to the claim occurred in the Southern District of Florida, Miami Division.

3. This is an action for a Declaratory Judgment pursuant to 28 U.S. Code 2201 and Rule 57 of the Federal Rules of Civil Procedure for the purpose of determining an actual and existing justiciable controversy to declare the rights and other legal relations and questions of construction and/or the validity of an Act of Congress and a Florida Statute between the parties as hereinafter more fully appears.

### **BACKGROUND**

4. Through the institution of marriage, society publicly guarantees individuals respect and legitimacy as a couple. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial and social benefits. The ability to marry and to thereby participate in this fundamental societal institution is something that most Americans take for granted. Same-sex couples don't; they are denied access solely on the basis of their sexual orientation.
5. The Supreme Court of the United States has found that: the right to marry is not a privilege conferred by the State, but a fundamental right that is protected against unwarranted State interference; freedom to marry is one of the basic and vital personal civil rights incidental to the orderly pursuit of happiness for free men under the Due Process Clause of the Fourteenth Amendment; this right is essentially vitiated if one is denied the right to marry a person of one's choice; and that the decision to marry is among the personal decisions that is part of the fundamental "right of privacy" protected by the Fourteenth Amendment. Excluding same-sex couples from a basic element of

civic life – marriage – infringes human dignity and violates the Constitution of the United States, which the United States Constitution affirms the dignity and equality of all individuals; it forbids the creation of second-class citizens. There is no identifiable constitutionally adequate reason for denying civil marriage to same-sex couples.

6. Our highest court has also mandated that if a law “impinges upon a fundamental right explicitly or implicitly secured by the Constitution, (it) is presumptively unconstitutional.” As a result, the burden shifts to the government to pass a “strict scrutiny” test by the courts for certain classifications and fundamental rights to be valid; the government must justify an intrusion on Plaintiffs’ fundamental rights of privacy, liberty and autonomy found in the Due Process Clause and the right of equality in the Equal Protection Clause.

Plaintiffs would show that the Act of Congress and the Florida Statute under the microscope here and both of which define “marriage” as a legal union between one man and one woman as husband and wife AND which prohibit recognition of same-sex marriages - - can meet constitutional muster ONLY if they further a compelling governmental interest and the legislation substantially furthers that interest, doing so through the least restrictive means to overcome the constitutional right. The ordinary deference due legislation does not apply when fundamental constitutional rights are implicated.

7. Plaintiffs ask this Court to construe constitutional rights which operate in favor of the individual against government so as to achieve the primary goal of individual freedom and autonomy - - especially where homosexuals are a suspect class, the traditional targets of unfair, irrational and unlawful discrimination.

The legislative decisions of Congress and Florida are clearly erroneous, arbitrary or wholly unwarranted here; their decisions clearly transgress private rights.

In spite of the foregoing, the United States' and Florida's statutory codes as detailed later, do not permit marriages of lesbian and gay couples. It is this selective denial of marriage equality to this disfavored group that has led to this action. Excluding same-sex couples from marriage infringes equality, human dignity, liberty and self-determination; thus, violating the Constitution of the United States.

### PLAINTIFFS

9. Plaintiffs are four Miami-Dade resident gay and lesbian couples who are citizens of the United States, over 18 years of age seeking to live a full life by availing themselves of marriage, the social validation it confers, and the hundreds of rights, responsibilities, benefits and obligations that it affords and which are predicated on marriage under the laws of the United States and the State of Florida. These Plaintiffs share the same goal as countless "straight" American couples; their reasons for wanting to engage in a formal civil ceremony of marriage are the same as the reasons of heterosexual couples. Plaintiffs seek only to be married, not to undermine the institution of marriage; they do not want marriage abolished; they do not attack the binary nature of marriage, the consanguinity provisions or any of the other gate-keeping provisions of marriage licensing laws. Recognizing same-sex marriages will not diminish the nature, dignity or validity of opposite-sex marriages.
10. None of the Plaintiffs has another living wife or husband; they are not first cousins or any nearer of kin to each other; and none are incapable for want of legal age or sufficient

understanding. They consent freely to marry each other; but for the fact that they are same-sex couples, the United States and the State of Florida would recognize their marriage.

11. The Plaintiffs want to live with the confidence that, if one of them unexpectedly dies or becomes disabled or sick, the other will have all of the protections that marriage affords. Although they have tried to make arrangements to maximize economic and legal protections for their families' well-being, marriage affords greater security in light of the many legal benefits that are reserved for spouses. These Plaintiffs need the benefits of marriage to protect themselves from economic hardship and discrimination.

12. All of the Plaintiffs have, through legal counsel, sought a marriage license from the Defendant RUVIN in his official capacity as Clerk of the Miami-Dade Circuit and County Courts on April 29, 2004. They were prepared to complete an application and to pay the required fees; however Defendant RUVIN refused to accept an application and fees, stating: "I must comply with all Federal and Florida laws. They do not allow me to issue a license or recognize, for marriage purposes, same-sex couples."

As a result, the United States and the State of Florida send a stigmatizing message that Plaintiffs are less worthy than other Americans and that their relationship is inferior to those of other Americans.

### **PLAINTIFFS SULLIVAN AND BARRIOS**

13. FLUFFVESTER DAVID R. SULLIVAN is an actor and humanitarian, raising funds for such projects as combating Alzheimer's disease, HIV and AIDS, Parkinson's disease and many more.

PEDRO BARRIOS has been an art director, graphics designer, commercial art teacher, and illustrator and has won several advertising awards.

SULLIVAN and BARRIOS have been partners for the past three (3) years.

**PLAINTIFFS PASCO AND Van der DIJS**

14. CYNTHIA PASCO currently manages four pediatric, physical and occupational therapy clinics for children with disabilities; she is also active with volunteering her pet therapy dog and sits on the board for a charitable foundation.

ERIKA Van Der DIJS is a Medical Legal Consultant who testifies nationwide in various cases, including tobacco, asbestos and medical malpractice. Erika is also a respiratory therapist for over ten years.

PASCO and VAN DER DIJS have been partners for the past two (2) years. "As U.S. citizens, we are not asking for equal rights under the law; we are demanding it. It should not be a question; it should already be the answer. Without equal protection under the law, we cannot make medical or legal decisions for one another; we cannot have equal rights for our future children. There are too many challenges in becoming and staying successful in this country; one's sexual orientation should not be an added factor. No one should have the right to tell us who to love... which is an affair of the heart, not of government. We wholly believe that the changes in this law are overdue. We are proud to stand up for what we believe in."

**PLAINTIFFS SOLIS AND CARABEO**

15. MICHAEL SOLIS was born and raised in South Florida. After a successful employment record, MICHAEL was disabled in an automobile accident in 1998 and is currently unable to work.

JESUS M. CARABEO has owned a business and when his partner SOLIS became disabled, Jesus decided not to continue working in order to take care of MICHAEL SOLIS.

SOLIS and CARABEO have been partners for the past thirteen (13) years. "Almost from the time we met, one of our greatest wishes in life was to marry. Unfortunately, due to the laws of the United States and Florida, our wish has not come true. On a daily basis, we live in fear with the thought that if either of us was to pass on, the other would be left in limbo. We are human beings; we bleed the same as any heterosexual couple and we deserve...no, we demand, equal rights as stated in the Constitution of the United States of America. We look forward to seeing equal rights laws throughout the United States and in the State of Florida in our time. We, too, are a family, just like any other.

**PLAINTIFFS JASON AND WILLIAM HAY-SOUTHWELL**

16. JASON HAY-SOUTHWELL served in the United States Air Force, moving to Miami, Florida in 1986. He is a Certified Interpreter for the Deaf, working as such for nearly 15 years in the Miami-Dade County Public Schools. In 1996 he was the School Support Employee of the Year.

WILLIAM HAY-SOUTHWELL also served in the United States Air Force and also worked for the Miami-Dade County Public Schools as a Staff Interpreter for Deaf

students. He is nationally certified and holds B.A. and M.A. Degrees from the University of Montana in Anthropology.

JASON and WILLIAM legally changed names to HAY-SOUTHWELL in the year 2000; they have been partners since 1998.

### **DEFENDANTS**

17. Defendant JAMES ELLIS BUSH is the duly elected Governor of the State of Florida charged with execution of its laws, and is sued in his official capacity. He has confirmed his support and approval for the Federal and Florida Statutes that do not permit marriages of same-sex couples.

Defendant CHARLES J. CRIST, JR. is the duly elected Attorney General of the State of Florida charged with enforcement of its laws, and is sued in his official capacity. He has also confirmed his support and approval for the Federal and Florida Statutes that do not permit marriages of same-sex couples.

Defendant HARVEY RUVIN is the duly elected Clerk of the Circuit and County Courts in and for the 11<sup>th</sup> Judicial Circuit of Florida and, pursuant to Florida Statute 741.01 (1), is the public official who shall issue every marriage license upon application for the license, "if there appears to be no impediment to the marriage." This Defendant is also sued in his official capacity.

Defendant JOHN ASHCROFT is the duly appointed Attorney General of the United States charged with enforcement of its laws and is sued in his official capacity. He has confirmed his support and approval of the Federal Act of Congress that does not permit marriages of same-sex couples or recognition of same by any State.

## THE QUESTIONED ACT OF CONGRESS

18. In 1996, the Congress of the United States enacted into law The Defense of Marriage Act, 110 Stat. 2419 (1996), Title 28, U.S. Code 1738C and Chapter 1 of Title 1, U.S. Code, Paragraph 7. A copy of the full Act is attached hereto as Exhibit "A" and should be considered a part of this Complaint. Basically, the Federal DOMA defines marriage as "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." This Act of Congress also requires any State not to give effect to any public act of any other State respecting a relationship, right or claim between persons of the same sex treated as a marriage under the laws of such other State.
  
19. As such, for the past 8 years and to this present day, same-sex couples who desire to marry have not and will not be treated as "married" for such purposes as Federal taxation (both income taxes, and even more significantly, estate taxes), Social Security benefits (of any kind), immigration, or Federal programs providing health care or nursing home care benefits, to name but a few. And where those Federal programs set the eligibility requirements for many of our federally funded State of Florida programs, those corresponding Florida programs will not be allowed to treat same-sex couples as married either; thus excluding them from (or profoundly affecting the calculation of) entitlement to benefits under many such Florida programs. Florida officials - - not just Federal officials will, of necessity, have to differentiate between same-sex and opposite-sex couples for all of these Florida programs.

Yet another significant difference stems from the fact that, at present, other States will refuse to recognize a “marriage” license issued by Florida to a same-sex couple and vice-versa. Not only would such a couple be deprived of the many benefits of being “married” if that couple moved to or came from another State, but such a couple would not have access to that State’s courts for purposes of obtaining a divorce or separation and the necessary orders (with respect to alimony, child support or child custody) that accompany a divorce or separation.

### **THE FLORIDA STATUTE**

20. In 1997, the Florida legislature followed Congress’ lead and adopted as law The Florida Defense of Marriage Act, Section 741.212 (1), (2) and (3), Florida Statutes, a copy of which is attached hereto as Exhibit “B” and should be considered a part of this Complaint. F.S. 741.212 does not allow Florida to recognize or give effect to marriages between persons of the same-sex entered into or outside of Florida, the United States of America or any other jurisdiction, either domestic or foreign. The Florida DOMA also tracks the Federal DOMA definition of “marriage” as “only a legal union between one man and one woman as husband and wife,…”

### **THE ISSUE**

21. The question this Court is asked to consider is whether it is constitutional to create a separate class of citizens by status and gender discrimination, withholding from that class the right to participate in the fundamental institution of civil marriage, with its attendant protections, benefits and obligations, anywhere in the world.

Plaintiffs challenge this combination of the Act of Congress and the Florida Statute as a violation of both their fundamental rights and the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as being a violation of the Full Faith and Credit Clause of the Constitution of the United States.

### **THE EQUAL PROTECTION CLAUSE**

“.... No State shall.... deny to any person within its jurisdiction the equal protection of laws.” United States Constitution, Amendment XIV. Section I.

22. The Fourteenth Amendment does not tolerate unjustified discrimination against a disfavored class. The exclusion of lesbian and gay couples from marriage violates this most fundamental and basic constitutional guarantee of equality of privileges and immunities for all Americans.

Plaintiffs urge that this Act of Congress and the Florida Statute make it more difficult for them, if not impossible, than for all others to seek to be civilly married, that this is itself a denial of equal protection in the most literal sense.

A bare desire to harm a politically unpopular group cannot constitute a legitimate government interest; the Act of Congress and the Florida Statute at issue raise the inevitable inference that they were born of animosity toward the class that they were to affect. The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against

persons who are (or who are believed to be) homosexual. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

23. Plaintiffs would also show that these Statutes are a "status-based" classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. Plaintiffs, solely because of their sexual orientation, by Federal and Florida decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres.

Congress and Florida withdraw from homosexuals, BUT NO OTHERS, specific legal protection from the injuries caused by discrimination. These Defendants have imposed a special disability upon the Plaintiffs alone. Homosexuals are forbidden the safeguards, benefits and rights of civil marriage that others enjoy or may seek without constraint. These Statutes not only lack a rational relationship to legitimate Federal and State interests, but this classification also was drawn for the purpose of disadvantaging the group burdened by these laws.

24. Guaranteed to all people in this country equally is the enjoyment of rights that are deemed important or fundamental. The withholding of relief from the Plaintiffs who wish to marry and are otherwise eligible to marry on the ground that the couples are of the same gender, constitutes a categorical restriction of a fundamental right. The restriction creates a straight forward case of discrimination that disqualifies an entire group of our citizens and their families from participation in an institution of paramount legal and social importance because of their sex or gender. This is impermissible under the Fourteenth Amendment of the Constitution.

Because these questioned marriage statutes intend and state that marriage under our law consists only of a legal union between a man and a woman, they create a statutory classification based on the sex of the two people who wish to marry. That the classification is sex based is self-evident. As a factual matter, an individual's choice of a marital partner is constrained because of his or her own sex. Only their gender prevents the Plaintiffs from marrying their chosen partners under the present law. By enacting these questionable laws mandating that gays and lesbians shall not have any of the rights, benefits and protections awarded to married heterosexuals, Defendants inflict on these Plaintiffs immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. Plaintiffs contend that these statutes classify homosexuals, not to further a proper legislative end, but to make them unequal to everyone else. The United States and Florida cannot so deem a class of persons a stranger to its laws. Moreover, the substantive equal protection guarantees of the Constitution prohibit an unjustifiable burden on the fundamental right to equality and non-discrimination. The failure to permit marriages of same-sex couples constitutes an unjustified denial of a privilege based on sexual orientation and gender.

The Act of Congress and the Florida Statute under consideration violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

### **DUE PROCESS CLAUSE**

“...; nor shall any State deprive any person of life, liberty, or property without due process of law...” United States Constitution, Amendment XIV, Section 1.

25. Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion.

The United States Supreme Court has read into the federal constitution an implicit right of privacy, which includes the right to liberty and self-determination. That Court has also reaffirmed the substantive force of the liberty protected by the Due Process Clause. "Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." In explaining the respect the Constitution demands for the autonomy of the person in making these choices, the Supreme Court has held:

"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

"Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."

The Supreme Court has already struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. "We concluded that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose."

The Defendants cannot show that their discriminatory laws bear a close relationship to the promoting of a compelling state interest or that the classification is necessary to achieve the government's goal or that the classification is narrowly drawn to achieve the

goal by the least restrictive means possible - - all of which are required when, such as here, laws impinge on certain fundamental rights that will be subjected to strict judicial scrutiny and the presumption that such laws are unconstitutional.

The Plaintiffs' liberty, privacy and autonomy safeguards in the United States Constitution protect both "freedom from" unwarranted government intrusion into protected spheres of life and "freedom to" partake of benefits created by the State for the common good. Both freedoms are involved here. Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family - - these are among the basics of everyone's liberty, privacy and self-determination due process rights. The liberty interest in choosing whether and whom to marry would be hollow if the State could foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage. The substantive due process guarantees of the Constitution prohibit an unjustifiable burden on the fundamental right to privacy liberty and autonomy, including the fundamental right to enter into a civil marriage.

This Act of Congress and the Florida Statute violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

#### **THE FULL FAITH AND CREDIT CLAUSE**

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial proceedings of every other State." United States Constitution, Article IV, Section 1.

26. Plaintiffs urge this Court to compare this constitutional requirement with the wording and intent of 28 United States Code 1738C, which mandates that "No State...shall be required to give effect to any public act, record, or judicial proceedings of any other

State... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State..., or a right or claim arising from such relationship.” And Florida Statute 741.212 (1) also bars recognition of same-sex marriages from any other state and within Florida.

The Constitution clearly mandates that the public Acts, Records, and Judicial Proceedings of each State SHALL be given FULL FAITH AND CREDIT by every other State. Congress and Florida, on the other hand, say NO! The States SHALL NOT be required to give FULL FAITH AND CREDIT to those Acts respecting same-sex marriages. This is a conflict that should be resolved in favor of the United States Constitution.

The Florida legislature, in deciding to cancel out, overrule, and nullify Article IV, Section I by enacting Sections 741.212 (1) and (2), Florida Statutes, 1997, not only exempted every other State and itself from recognizing same-sex marriages, but also extends the ban to “any other jurisdiction, either domestic or foreign, or any other place or location...” Florida really wants to make sure; however limiting the jurisdiction of State courts over out-of-state marriage relationships is a violation of this Clause.

No sister state has such an overriding valid interest in the Florida Statute or the Act of Congress such that the sister state’s own constitution and laws can be ignored by surrendering jurisdiction, subject matter and fundamental due process to another State. The same-sex prohibitions in question constitute infringement of that sister state’s sovereignty.

No out-of-state judicial proceedings can gain or exert jurisdiction over the Defendant RUVIN or any other Florida official in order for the other State to direct RUVIN to issue

or not issue a marriage license to Floridians. This can only be done by Florida invoking the FULL FAITH AND CREDIT CLAUSE. This Act of Congress and the Florida Statute violate the FULL FAITH AND CREDIT CLAUSE of the United States Constitution.

### **RELIEF SOUGHT**

27. The refusal of the Defendant RUVIN to issue both an application for and an actual marriage license to the Plaintiffs and Congress' edict to not recognize same-sex marriage in any State have left the Plaintiffs in doubt and uncertain about their rights under said Statutes; thus giving rise to a justiciable controversy and an actual rather than a theoretical controversy as to the validity and constitutionality of the Act of Congress and Florida Statute 741.212.

The Defendants contend that these two almost identical laws are constitutional and the Defendants seek to and have announced intentions to enforce those Statutes. Accordingly, an active justiciable controversy has arisen and now exists between the Plaintiffs and the Defendants concerning their respective rights, duties and responsibilities. The controversy is definite and concrete, touching on the legal relations of the parties as well as many millions of people not before this Court.

Title 28 U.S. Code 2201 and Rule 57 of the Federal Rules of Civil Procedure (Declaratory Judgments) allow this Court to render declaratory judgments on the existence or nonexistence of any immunity, power, privilege or right OR of any fact upon which the existence or nonexistence of such immunity, power, privilege or right does or may depend; and whether such immunity, power, privilege or right now exists or will arise in the future.

Section 2201 and Rule 57 also permits this Court to order a speedy hearing and may advance it on the calendar.

28. Pursuant to F.S. 86.091 the State Attorney for the Eleventh Judicial Circuit of Florida is being served with a copy of this Complaint so that he may be heard in this action.

WHEREFORE, for the reasons set forth above, Plaintiffs pray for relief as follows:

1. An Order of this Court advancing this cause on its calendar and granting a speedy hearing thereof; and
2. A Declaration that this Court has jurisdiction of a real and active justiciable controversy between these parties; and
3. A Declaration that the right to marry is fundamental under the Fourteenth Amendment; and
4. A Declaration that fundamental rights are entitled to this Court's "strict scrutiny;" and
5. A Declaration that the Act of Congress and the Florida Statute under consideration herein do not further a compelling State interest nor has Congress and Florida employed the least restrictive means to overcome Plaintiffs' constitutional rights; and
6. A Declaration of the Plaintiffs' Rights, Status and other equitable and other legal relations as to Florida Statute 741.212 and the Act of Congress; and
7. A Declaration of the power and duties of the Defendants in applying these laws to the Plaintiffs and other same-sex couples; and
8. A Declaration that F.S. 741.212 and the Act of Congress at issue are unconstitutional in that they violate the Fourteenth Amendment's Equal Protection and Due Process Clauses and the Full Faith and Credit Clause of the United States Constitution and thus are void and unenforceable; and

9. A Declaration that eligible same-sex couples enjoy and are entitled to the benefits, protections, rights and responsibilities afforded opposite sex-couples by the marriage laws of the State of Florida and all Federal laws; and
10. Costs, including but not limited to attorney's fees and for any and all other relief to which the Plaintiffs may be justly entitled.

Dated: May 12, 2004

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