

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 04-21118-CIV-GRAHAM/GARBER

F.D.R. "FLUFFY" SULLIVAN and)
PEDRO "ROCK" BARRIOS, et al.,)
))
Plaintiffs,)
))
v.)
))
JOHN ELLIS BUSH, in his official capacity)
as Governor of the State of Florida, et al.,)
))
Defendants.)
_____)

FEDERAL DEFENDANT'S MOTION TO DISMISS

Defendant John Ashcroft, in his official capacity as Attorney General of the United States, through his undersigned counsel, hereby moves to dismiss this action pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs lack standing to challenge section 2 of the federal Defense of Marriage Act, given that the Act has never been applied to them. If plaintiffs were found to have standing, this action should be dismissed for failure to state a claim upon which relief can be granted.

The grounds for this motion are more fully set forth in the accompanying Memorandum.
Dated this 27th day of August, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Federal Defendant's Motion to Dismiss, with the Memorandum and Exhibit in support thereof, with the proposed Order, were, this 27th day of August, 2004, served by first-class mail, postage prepaid, upon counsel for the plaintiffs and the local government defendant, as follows:

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I also certify that electronic copies of the above-named document(s) were, on the same date, transmitted by e-mail to Ellis S. Rubin and David Glantz.

s/ W. Scott Simpson

W. SCOTT SIMPSON

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MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANT'S
MOTION TO DISMISS

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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, four same-sex couples, allege that DOMA violates the Due Process Clause, the Equal Protection Clause, and the Full Faith and Credit Clause of the Constitution. Their claims fail as a matter of law on several grounds. First, plaintiffs lack standing to challenge section 2 of DOMA because they have not alleged any cognizable injury traceable to that section. Given that the 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, plaintiffs have no injury traceable to section 2 and they accordingly lack standing.

Plaintiffs' claims also fail on the merits pursuant to clear and well-established precedent. Under binding Supreme Court and Eleventh Circuit 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. 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.

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 to the traditional definition of marriage under the United States Constitution; in every case to address that question in the wake of the Supreme Court's decision in Lawrence v. Texas, 123 S. Ct. 2472 (2003); in a recent Eleventh Circuit decision addressing the impact of Lawrence, see Lofton v. Secretary of Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004); and in the one decision that has directly addressed the constitutionality of DOMA. In re Kandou, 2004 WL 1854112 (Bankr. W. D. Wash. Aug. 17, 2004). In each of these cases, the courts have uniformly rejected claims like those asserted in this case, and the result here should be the same. Congress 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.

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 . . . 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.

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.¹

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.

¹ Thus, DOMA does not, as plaintiffs allege, "require[e] any State not to give effect" to another State's same-sex marriage. See Amended Complaint ¶ 19 (emphasis in original). DOMA is not a "marriage ban." Contra *id.* ¶ 23.

ARGUMENT

I. Plaintiffs' Challenge to Section 2 of DOMA 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 lack standing to challenge section 2 of DOMA. Since the 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. If plaintiffs had been married in another State, this provision would permit Florida 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 Florida not to recognize any such marriage — section 2 has no practical impact on the plaintiffs.

Moreover, plaintiffs lack standing on causation or traceability grounds, for reasons explained in greater detail in section III below. Specifically, the causation defect in plaintiffs' standing stems from the fact that section 2 of DOMA merely restates a conflicts of law principle that is both firmly rooted in the common-law background of the Full Faith and Credit Clause and that exists independent of DOMA — a principle that has long recognized the authority of one State to decline to apply another State's laws (including its laws on marriage licensing) when they conflict with its own public policies. Because Florida's authority to decline to recognize a same-sex marriage performed in another State existed independently of and prior to the enactment of DOMA, there can be no injury that is caused by or traceable to DOMA.

In apparent recognition of the lack of any injury to a (non-existent) marital relationship traceable to DOMA, plaintiffs purport to identify three other forms of injury. But those

allegations fall far short of alleging the "concrete," "objective" injury required for federal court jurisdiction.

1. Plaintiffs allege that the statutes challenged here "send a stigmatizing message that Plaintiffs are less worthy than other Americans and that their relationship is inferior to those of other Americans." See Amended Complaint ¶ 13. The Supreme Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing." United States v. Hays, 515 U.S. 737, 743 (1995). Thus, mere membership in an allegedly "stigmatized" segment of society — assuming plaintiffs could show the reality of any such "stigma" here — does not, without more, establish standing. A "stigmatizing injury" may provide a basis for standing "only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." Allen, 468 U.S. at 755 (internal quotation marks omitted). Because they have not identified any marriage denied recognition under DOMA, however, plaintiffs cannot have been denied any equal treatment pursuant to section 2. Any abstract claim of stigma fails under Allen: "If . . . abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular . . . groups against which the Government was alleged to be discriminating All such persons could claim the same sort of abstract stigmatic injury" Id. at 755-56.

2. Plaintiffs allege that "Congress' edict to not recognize same-sex marriage in any State [has] left the Plaintiffs in doubt and uncertain about their rights" See Amended Complaint ¶ 28. Obviously, doubt and uncertainty are not "concrete" and "palpable" injuries. Otherwise, any number of proposed or incomplete governmental actions — such as the mere introduction of a bill in Congress — could inflict an injury sufficient to confer standing. Additionally, DOMA is no "edict" requiring States not to recognize same-sex marriages; rather, it leaves the decision up to each State.

3. Finally, plaintiffs allege that "Defendant ASHCROFT seeks to and has announced intentions to enforce [the challenged] Statutes." Id. This allegation fails to establish standing, however, both because section 2 does not contemplate any enforcement by the Attorney General (or anyone else, for that matter), and because plaintiffs have not carried their burden of establishing a "real and immediate threat" that the statute will be applied to them. See Focus on the Family v. Pinellas Suncoast Transit, 344 F.3d 1263, 1274 (11th Cir. 2003) ("The Supreme

Court has held that where a plaintiff seeks [injunctive or declaratory] relief, it must demonstrate a 'real and immediate threat' of future injury to satisfy the 'injury in fact' requirement."); see also American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County, 221 F.3d 1211, 1214 (11th Cir. 2000) (standing may rest on "threat of enforcement" where "there exists a credible threat of prosecution"). As explained above, section 2 of DOMA is implicated only where a same-sex marriage performed in one State is denied effect under the laws of another State, and the plaintiffs do not allege that they have been married anywhere, much less that Florida would exercise its authority to decline to recognize any such marriage. In any event, such an allegation would be speculative and premature.

For these reasons, plaintiffs 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 the federal defendant is aware, every court to address the question — including the Supreme Court and the Eleventh Circuit — 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); Adams v. Howerton, 673 F.2d 1036, 1041-43 (9th Cir. 1982); McCConnell v. Noonan, 547 F.2d 54, 55-56 (8th Cir. 1976) (per curiam); Dean v. District of Columbia, 653 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, 2004 WL 1854112 (Bankr. W. D.Wash. Aug. 17, 2004). This Court should do likewise.

Plaintiffs' due process and equal protection claims 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 rejected the contention that a State statute limiting marriage to one man and one woman violated federal due process or 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) (questions presented are whether denial of same-sex marriage "deprives appellants of their liberty 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).

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, 207 (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 In re Kandu, 2004 WL 1854112, at *17 (Bankr. W. D.Wash. Aug. 17, 2004) (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 In re Kandu, 2004 WL 1854112, at *17 ("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, 123 S. Ct. 2472 (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 2484. The Eleventh Circuit has concurred in this view of Lawrence in Lofton v. Secretary of Department of Children & Family Services, 358 F.3d 804, 818 (11th Cir. 2004). In holding that a State may constitutionally prohibit practicing homosexuals from adopting children, the court observed that Lawrence simply does not address "the affirmative right to receive official and public recogni-

tion" 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 is "rationally related to furthering a legitimate governmental interest." Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1574 (11th Cir. 1992) (equal protection); accord Eady v. Siegelman, 239 F.3d 1222, 1223-24 (11th Cir. 2001) (per curiam) (due process). Only if the statute is found to "burden[] a fundamental right or target[] a suspect class" will it be subjected to a higher standard of review. Lofton, 358 F.3d at 818; see Schwarz v. Kogan, 132 F.3d 1387, 1390 (11th Cir. 1998) ("Substantive due process challenges that do not implicate fundamental rights are reviewed under the highly deferential 'rational basis' standard."). Neither section 2 nor section 3 of the Defense of Marriage Act impinges upon any fundamental right or "targets 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 "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)); see Lofton, 358 F.3d at 816-17. The right to marry qualifies as "fundamental" under these standards. 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 advocated 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., ___ F.3d ___, 2004 WL 1681149, at *17 (11th Cir. 2004) (observing that conferring constitutional status on an asserted right prevents future revision through democratic process).

There is no history or tradition of same-sex marriage in this country or elsewhere. See In re Kandu, 2004 WL 1854112, at *10 ("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 Nov. 3, 1998) ("The legislature shall have the power to reserve marriage to opposite-sex couples."); Alaska Const. art. 1, § 25 (effective Jan. 3, 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) ("Only marriage between a man and a woman shall be valid or recognized in Nebraska."); Nev. Const. art. 1, § 21 (ratified 2002) ("Only a marriage between a male and female person shall be recognized and given effect in this state."). 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 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 721.²

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 doctrine and practice, and strike down the considered policy choice of almost every State." 521 U.S. at 723.³

² 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.

³ The Supreme Court's decision in Lawrence is not to the contrary. Regardless of whether that decision is read as establishing a broad "fundamental right [to] sexual privacy," or only as holding that a State may not "impose a criminal prohibition on private consensual homosexual conduct," compare Lofton v. Secretary of Dep't of Children & Family Servs., ___ F.3d ___, 2004 WL 1627022, at *9 (denying petition for rehearing), with id. at *29 (Barkett, J., dissenting from denial of rehearing), Lawrence undeniably addressed the government's response to certain private

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) (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 Florida 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 Eleventh Circuit has squarely held that homosexuality is not a suspect class, observing that all of the other circuits "that 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,

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." 123 S. Ct. at 2484; Standhardt, 77 P.3d at 456-57 (holding that Lawrence does not compel recognition of fundamental right to same-sex marriage).

Sixth, Seventh, Ninth, Tenth, District of Columbia, and Federal Circuits). That holding 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 Kandu court 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." In re Kandu, 2004 WL 1854112, at *13.

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; Heller v. Doe, 509 U.S. 312, 319 (1993). The Eleventh Circuit has set forth a two-step process for rational basis review:

The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate government purpose — a goal — which the

enacting government body could have been pursuing. The actual motivations of the enacting governmental body are entirely irrelevant. Moreover, the Equal Protection Clause does not require government decisionmakers to articulate any reason for their actions, nor does it require any record evidence of a legitimate purpose.

The second step of rational-basis scrutiny asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose. The proper inquiry is concerned with the existence of a conceivably rational basis, not whether that basis was actually considered by the legislative body. As long as reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational, the legislation survives rational-basis scrutiny. As with the legitimate purpose inquiry, courts are not confined to the record when determining whether a rational basis for the classification exists. In sum, those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.

Haves v. City of Miami, 52 F.3d 918, 921-22 (11th Cir. 1995) (emphasis in original) (citations and internal quotation marks omitted). Under rational basis review, furthermore, a statute "is accorded a strong presumption of validity." Jackson v. State Bd. of Pardons & Paroles, 331 F.3d 790, 797 (11th Cir. 2003). In short, this standard is "a paradigm of judicial restraint." FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993); see Gary v. City of Warner Robins, Ga., 311 F.3d 1334, 1339 (11th Cir. 2002) (rational basis standard is "highly deferential").

DOMA is rationally related to at least two legitimate government interests.⁴ 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 procrea-

⁴ 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 all of the reasons described in section III below, 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.

tion 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). In short, Congress has an interest in promoting heterosexual marriage because it has an interest in the stable generational continuity of the United States. 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 by a practicing homosexual:

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. Just as the Florida statute 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); Lofton, 358 F.3d at 822-23. 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). 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 interests 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, 508 U.S. at 314-15.

III. The Federal Defense of Marriage Act Is a Valid Exercise of Congress's Power under the Full Faith and Credit Clause

Plaintiffs' challenge to section 2 of DOMA under the Full Faith and Credit Clause also fails as a matter of law. In plaintiffs' view, Congress's preservation of one State's prerogative to decline to give "effect" to another State's laws respecting same-sex marriage runs afoul of the Full Faith and Credit Clause, which plaintiffs quote for the proposition that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." See Amended Complaint ¶ 27. In fact, however, section 2 of DOMA is fully consistent with the Full Faith and Credit Clause for two important reasons. First, section 2 of

DOMA is entirely consistent with the quoted language in the first sentence of the Full Faith and Credit Clause. The notion of according "Full Faith and Credit" has never been construed to require one State to give absolute deference to another State's laws in all circumstances. Rather, this provision has long been understood to leave room for the application of traditional principles of conflict of laws, including the concept that each State retains the authority to decline to apply another State's law when it conflicts with its own legitimate public policies. 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. Indeed, the unquestioned authority of the States in this area is clearest in a case like this one, where the issue is simply whether Florida has the power to apply its own law to its own citizens with respect to matters within its own borders. Second, in any event, plaintiffs completely ignore the second sentence of the Full Faith and Credit Clause, which expressly empowers Congress to prescribe "the Effect" of one State's laws in another State and clearly condones the exercise of that power in DOMA. Under any conceivable construction of this "effects" provision, Congress clearly has the power to recognize 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.

A. Section 2 is Consistent With Common Law Conflicts Principles

The principle of "Full Faith and Credit" has never been construed to require the States literally to give effect, in all circumstances, to the statutes or judgments of other States. Indeed, "[a] rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 547 (1935).

Consistent with this principle, the Supreme Court has indicated that the Framers of the Constitution had an "expectation" that the Full Faith and Credit Clause "would be interpreted against the background of principles developed in international conflicts law." Sun Oil Co. v. Wortman, 486 U.S. 717, 723 & n.1 (1988). And, as the Court repeatedly has acknowledged, longstanding principles of conflicts of law do "not require a State to apply another State's law in violation of its own legitimate public policy." See, e.g., Nevada v. Hall, 440 U.S. 410, 422

(1979); see also Williams v. North Carolina, 317 U.S. 317 U.S. 287, 296 (1942) ("Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state."). Under this longstanding public policy doctrine, out-of-state statutes or acts that are obnoxious to the forum State's policy need not be followed under the Full Faith and Credit Clause. See, e.g., Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939) (holding that California courts need not apply Massachusetts law of workers compensation to Massachusetts employee of Massachusetts employer, where that law was contrary to California's "policy to provide compensation for employees injured in their employment within the state"); see also Hilton v. Guyot, 159 U.S. 113, 167 (1895) ("A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law."); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589 (1839) (noting the longstanding principle of conflicts that the laws of one country "will, by the comity of nations, be recognised and executed in another . . . provided that law was not repugnant to the laws or policy of their own country") (emphasis added).

The courts have followed this principle, moreover, in relation to the validity of marriages performed in other States. Both the First and Second Restatements of Conflict of Laws recognize that State courts may refuse to give effect to a marriage, or to certain incidents of a marriage, which is "sufficiently offensive" to the forum State's policy. See Restatement (First) of Conflict of Laws § 134; Restatement (Second) of Conflict of Laws § 284.⁵ And the courts have widely held that certain marriages performed elsewhere need not be given effect, because they violated the public policy of the forum. See, e.g., Catalano v. Catalano, 170 A.2d 726, 728-29 (Conn. 1961) (marriage of uncle to niece, "though valid in Italy under its laws, was not valid in Connecticut because it contravened the public policy of th[at] state"); Wilkins v. Zelichowski,

⁵ Among the "incidents" of marriage mentioned in the Restatement (Second) of Conflict of Laws are "that the spouses may lawfully cohabit as man and wife . . . the marital property interests which each spouse may have in the other's assets . . . the forced share or intestate share which the surviving spouse has in the estate of the deceased spouse [and] that a party to the marriage is the 'spouse' of the other . . . within the meaning of these terms when used in a will, trust or other instrument." See Restatement (Second) of Conflict of Laws § 284 cmt. a.

140 A.2d 65, 67-68 (N.J. 1958) (marriage of 16-year-old female held invalid in New Jersey, regardless of validity in Indiana where performed, in light of N.J. policy reflected in statute permitting adult female to secure annulment of her underage marriage); In re Mortenson's Estate, 316 P.2d 1106 (1957) (marriage of first cousins held invalid in Arizona, though lawfully performed in New Mexico, given Arizona policy reflected in statute declaring such marriages "prohibited and void").

Accordingly, section 2 of DOMA follows long-established principles in relation to the recognition of marriages performed in other States, and ensures that States may continue to rely on their own public policies to reject requests to recognize same-sex marriages. The fact that States have long had the authority to decline to give effect to marriages performed in other States based on the forum State's public policy strongly supports the constitutionality of Congress's exercise of its authority in DOMA. Surely the Full Faith and Credit Clause cannot be read to preclude a State from applying these established principles to its own definition of marriage involving its own citizens within its own borders. That Clause clearly does not mandate any interference with "long established and still subsisting choice-of-law practices." Sun Oil Co., 486 U.S. at 728-29.

B. DOMA Was Enacted Under Congress's Authority to Prescribe the "Effect" of One State's Acts in the Other States

The constitutionality of section 2 of DOMA is further confirmed by the second sentence of the Full Faith and Credit Clause, which expressly empowers Congress to prescribe "the Effect" to be accorded to the laws of a sister State. See U.S. Const. art. IV, § 1, cl. 2. Although the broad contours of this provision have not been conclusively established, the power exercised by Congress in enacting DOMA clearly conforms to any conceivable construction of the effects provision.

First, there is ample support in both history and case law for according plenary power to Congress under the effects provision. When the Framers considered the Full Faith and Credit Clause, they explained that it was designed to make up for 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."⁶

As the Supreme Court explained in McElmoyle, this historical record accords limited significance to the first sentence of the Full Faith and Credit Clause, and plenary power to Congress to prescribe the substantive effects of a sister State's laws. Specifically, the first sentence merely provides that the judgments of one State "are only evidence in a sister state that the subject matter of the suit has become a debt of record." McElmoyle, *id.* at 325 (emphasis added). It "does not declare what was to be the effect of a judgment obtained in one state in another state," *id.* (emphasis added); the prescription of any substantive effect of a sister State's laws is left to Congress under the second sentence — the effects provision.

This same construction was embraced by the Court in Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813). At issue in Mills was the Full Faith and Credit statute of 1790, now codified in substantially similar terms at 28 U.S.C. § 1738, which provided that one State's judgment would have the same effect in other States as it would have in the rendering State. In rejecting a reading of the statute that would treat "judgments of the state Courts . . . as prima facie evidence only," the Court noted that "the constitution contemplated a power in congress to give a conclusive effect to such judgments." *Id.* at 485 (emphasis added). As in McElmoyle, then, the Mills decision reads the effects provision — not the first sentence of the Full Faith and Credit Clause — as conferring on Congress the broad power "to give a conclusive effect" to the laws of another State.

Under this view, Congress obviously acted within its plenary effects power in enacting section 2 of DOMA. If the Constitution itself does not declare "the effect" of the law of "one state in another state," McElmoyle, 38 U.S. (13 Pet.) at 325, but instead leaves that "power in congress," Mills, 11 U.S. (7 Cranch) at 485, then Congress clearly had the authority in DOMA to

⁶ 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.").

declare that no State is "required to give effect" to the same-sex marriage laws of other States.
28 U.S.C. § 1738C.

Moreover, the Court need not embrace this plenary reading of Congress's effects power in order to sustain section 2 of DOMA. Whatever the breadth of Congress's power under the Full Faith and Credit Clause, it clearly encompasses the authority to confirm the applicability of one of the longstanding, generally applicable principles of conflicts law that formed the background of the Clause. See Sun Oil Co., 486 U.S. at 723 & n.1. As explained in detail above, one such principle was the public policy doctrine, which has long recognized the sovereign authority of the States to decline to give effect to the laws of a sister State that offend their legitimate public policy. Section 2 of DOMA merely confirms the specific applicability of that longstanding principle in the context of laws regarding same-sex marriage.

This exercise of Congress's effects power easily fits within any conceivable construction of this provision. As the Supreme Court recognized in Sun Oil Co., the conflicts law that formed the "background" of the Full Faith and Credit Clause was common law, subject to further "development." Id. In authorizing Congress to declare the "effect" of one State's laws in another State, the Constitution empowers Congress, at the very least, to codify the applicability of a longstanding common law principle in a context where State public policies are poised to clash. That is all that Congress has done in enacting section 2 of DOMA, and its exercise of that authority must be upheld under any reasonable interpretation of its power.

CONCLUSION

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

Dated this 27th day of August, 2004.

Respectfully submitted,

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Exhibit A

Supreme Court, U.S.

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71-1027

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

—————
RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

—————
ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

=====
JURISDICTIONAL STATEMENT
=====

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No.

RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 10a-17a and 18a-23a.

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file this Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra*, pp. 1a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case¹

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18, 1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County² (T. 10).

¹ T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

² Appellant McConnell is also petitioner before this Court in *McConnell v. Anderson*, petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

The efforts of appellants to get married evidently precipitated the Regents' decision not to employ Mr. McConnell.

Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T. 1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.³

³ In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr. Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 16, Mr. Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as

How the Federal Questions Were Raised

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra*, pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra*, p. 12a), and to the Supreme Court of Minnesota (App. *infra*, p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But

to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); Finger, *Sex Beliefs and Practices Among Male College Students*, 42 *J. ABNORMAL AND SOCIAL PSYCH.* 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law.

Only then will the public perceive that homosexuals are not freaks or unfortunate aberrations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E. Westermarck, *2 Origin and Development of the Moral Idea* 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, *Homosexual Behavior Among Males* 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.*, at 17; see also W. James, *The Varieties of Religious Experience*, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra*, at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.*, at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homo-

sexuality causes earthquakes. H. Hart, *Law, Liberty and Morality* 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

"Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, *Crime and the Human Mind* 117 (1944), it is stated:

"All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scientific community when he wrote as follows in 1935:

"Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too." Reprinted in 107 *Am. J. of Psychiatry* 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, "a great injustice" to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.⁴ This Court's decision, therefore, would affect the marriage laws of virtually every State in the Union.

⁴ See, e.g., *Jones v. Hallahan*, W-152-70. (Ct. Apps. Ky. 1971).

I.

Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits

and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie v. Connecticut, supra*; *Loving v. Virginia, supra*; *Griswold v. Connecticut, supra*; *Skinner v. Oklahoma, supra*; *Meyer v. Nebraska, supra*. Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer v. Nebraska, supra*. In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the

relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination. With regard to the due process component, see *Boddie v. Connecticut, supra*; *Griswold v. Connecticut, supra* (all the majority opinions); *Meyer v. Nebraska, supra*. With regard to the equal protection component of this argument, see *Loving v. Virginia, supra*; *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Skinner v. Oklahoma, supra*; cf. *Reed v. Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving v. Virginia, supra*. Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. The institution of marriage "as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis" (App., *infra*, pp. 20a-21a). On its face, however, Minnesota law neither

states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold v. Connecticut*, *supra*.

Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving v. Virginia*, *supra*; *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite

clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving v. Virginia*, 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently

denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving v. Virginia*, 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra*, p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race, (see, e.g., *Loving v. Virginia, supra; McLaughlin v. Florida, supra*), has not yet been extended to classifications based upon sex (see *Reed v. Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro v. Thompson*, 394 U.S. 618, (1969). As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed v. Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971),

which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the

difference is drawn between same sex and different sex marriages.⁵

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. Connecticut, 381 U.S. 479, 491-492 (Goldberg, J., concurring); see also, *Mindel v. United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is

⁵ The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed v. Reed*, *supra*; *Loving v. Virginia*, *supra*; *McLaughlin v. Florida*, *supra*.

a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold v. Connecticut*, *supra*; *Loving v. Virginia*, 388 U.S. 1 (1967); cf. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold v. Connecticut*, *supra*.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 04-21118-CIV-GRAHAM/GARBER

F.D.R. "FLUFFY" SULLIVAN and)
PEDRO "ROCK" BARRIOS, et al.,)
)
Plaintiffs,)
)
v.)
)
JOHN ELLIS BUSH, in his official capacity)
as Governor of the State of Florida, et al.,)
)
Defendants.)
_____)

ORDER GRANTING FEDERAL DEFENDANT'S MOTION TO DISMISS

THIS CAUSE is before the Court upon motion of the federal defendant, John Ashcroft, Attorney General of the United States, to dismiss this action for lack of standing and for failure to state a claim upon which relief can be granted.

Upon consideration of defendant's motion and of all materials submitted in relation thereto,

IT IS ORDERED that defendant's motion to dismiss is hereby GRANTED.

IT IS FURTHER ORDERED that this case is closed for administrative purposes.

DONE AND ORDERED in chambers at Miami, Florida, this _____ day of

_____, 2004.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: Ellis S. Rubin, Esq.
David J. Glantz, Esq.
W. Scott Simpson, Esq.