

THE 2009 MORRIS B. MYEROWITZ
MOOT COURT COMPETITION

Sponsored By:

THE UNIVERSITY OF MARYLAND SCHOOL OF LAW
MOOT COURT BOARD

Transcript of Record

In The
Supreme Court of the United States

March Term 2009

Docket No. 0101-8

BARRY MONTGOMERY,
Petitioner,

v.

MICHAEL MUKASEY, et al.
Respondents.

TABLE OF CONTENTS

Background information.....	3
Opinion and Order of the U.S. Court of Appeals for the Fourteenth Circuit.....	6
Opinion of Bartley-Holland, C.J.	6
Dissenting Opinion of Adams, J.....	12
Dissenting Opinion of Ramirez, J.....	16
Order Granting <i>Certiorari</i>	18

The Record

Background

In August 2005, Fred Hillhouse and Barry Montgomery, two homosexual males, were married under the laws of Massachusetts. Following their marriage, the couple jointly purchased a townhouse in South Boston. However, on January 18, 2006, Fred was diagnosed with a rare form of cancer and left his job.

Through the Internet, the couple soon found out about Dr. Gina Kline, a successful lawyer who, in her second career, had opted to become a doctor specializing in cancer. Dr. Kline had an internationally recognized reputation for treating the type of cancer from which Fred suffered. At the time, Dr. Kline was practicing medicine at the University of Avalon Hospital, located in Avalon, a U.S. state.

In February 2006, to live nearer to the University of Avalon Hospital, Fred and Barry moved into a single-family home in Avalon with the intention to live there permanently. Barry quickly secured a job with the Avalon Department of Motor Vehicles (DMV). As part of his compensation, Barry was allotted 10 days of paid sick leave per year. Avalon law allowed employees to use sick leave for illnesses of the employee's "immediate family," which included spouses.¹

Unfortunately, in February 2007, Fred's condition deteriorated to the point where he needed continuing treatment by an oncologist and constant supervision at home. To care for Fred, Barry made two requests. First, he requested 10 workweeks of leave from the DMV under the Family and Medical Leave Act (FMLA).² Second, he asked to use 10 days of paid sick leave to care for Fred, pursuant to § 2-301 of the Labor and Employment Article of the Avalon Code.³ As required by Avalon law, Barry made the requests in writing to Eric Dumas, the Avalon Commissioner of Benefits.

¹ AV CODE ANN. LAB. & EMPL. 2-301. Leave for illness of immediate family.

- (a)
- (1)
 - (i) "Employer" includes both private and public entities that employ 15 or more individuals in the State.
 - (ii) "Employer" includes a person who acts directly or indirectly in the interest of another employer with an employee.
 - (3) "Immediate family" includes a child, spouse, and parent.
 - (4)
 - (i) "Leave with pay" means time away from work for which an employee receives compensation.
 - (ii) "Leave with pay" includes sick leave, vacation time, and compensatory time.
- (b) An employee of an employer may use leave with pay for the illness of the employee's immediate family.

(c) This section does not affect leave granted under the federal Family and Medical Leave Act of 1993.

² Pub. L. 103-3 (1993), codified at 29 U.S.C. § 2601-2654.

³ See supra note 1.

The Commissioner denied both of Barry's requests. Mr. Dumas denied Fred's first request because the Defense of Marriage Act (DOMA)⁴ excludes individuals in same-sex marriages from the definition of "spouse"⁵ under federal laws including the FMLA. Mr. Dumas denied Fred's second request because DOMA⁶ allows Avalon to refuse to recognize same-sex marriages from other states. The Commissioner informed Barry that he could remain at work or be fired. Barry stayed at home to care for Fred. As a result, the DMV fired Barry.

⁴ Pub. L. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

⁵ 1 U.S.C. § 7. Definition of "marriage" and "spouse."

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 a wife.

⁶ 28 U.S.C. § 1738C. Certain acts, records, and proceedings and the effect thereof.

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Lawsuit

1. U.S. District Court for the District of Avalon

Barry sued Eric Dumas in his official capacity as the Avalon Commissioner of Benefits. Barry argued that (1) the Commissioner's denial of 10 workweeks of leave, under 1 U.S.C. § 7, violated the Equal Protection and Due Process guarantees of the Fifth Amendment to the Constitution; and (2) the Commissioner's denial of paid sick leave pursuant to 28 U.S.C. § 1738C violated the Full Faith and Credit Clause of the Constitution.⁷ Barry sought injunctive and declarative relief.

Because Barry's arguments involved the constitutionality of DOMA, the United States intervened as a defendant.⁸ The United States moved for summary judgment on the grounds that (1) DOMA's first part, 1 U.S.C. § 7, did not violate the Fifth Amendment; and (2) DOMA's second part, 28 U.S.C. § 1738C, did not violate the Full Faith and Credit Clause. The U.S. District Court for the District of Avalon (District Court) denied summary judgment.

2. U.S. Court of Appeals for the Fourteenth Circuit

Immediately after the District Court denied the United States' motion for summary judgment, the United States filed an interlocutory appeal to the U.S. Court of Appeals for the Fourteenth Circuit. The Fourteenth Circuit reviewed the case en banc. The Fourteenth Circuit held that DOMA did not violate the Fifth Amendment or the Full Faith and Credit Clause. Therefore, the Fourteenth Circuit reversed the District Court's denial of summary judgment.

3. U.S. Supreme Court

The United States Supreme Court granted certiorari to determine the constitutionality of DOMA.

⁷ U.S. CONST. art. IV, § 1.

⁸ FED. R. CIV. P. 24(a)(1); 28 U.S.C. § 2403.

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Civil Docket No. 08-0908

MICHAEL MUKASEY, in his official *
capacity as the Attorney *
General of the United States, *
et al.

Appellant, *

v. *

BARRY MONTGOMERY, *

Appellee. *

*

* * * * *

OPINION AND ORDER

Before: Bartley-Holland, C.J., Chabon, J., Kincaid, J., Cornelius, J., O'Brien, J. McKnight, J., Brown, J., Lee J., King J., Ramirez, J., and Adams, J.

Bartley-Holland, C.J., delivered the opinion of the Court. Ramirez, J., filed a dissenting opinion. Adams, J., delivered a separate dissenting opinion.

BARTLEY-HOLLAND, C.J.

This appeal concerns the constitutionality of the Defense of Marriage Act (DOMA). For the reasons that follow, we hold that DOMA does not violate the Equal Protection or Due Process guarantees of the Fifth Amendment, or the Full Faith and Credit Clause. Accordingly, we reverse the District Court's denial of summary judgment.

I. Background and Procedural History

The following facts are undisputed. Fred Hillhouse and Barry Montgomery are gay males who were married in 2005 under the laws of Massachusetts. In 2006, the couple moved to Avalon, where Mr. Montgomery began working for the Avalon Department of Motor Vehicles (DMV). To care for Mr. Hillhouse, Mr. Montgomery

sought to leave work under the Family and Medical Leave Act (FMLA).⁹ Additionally, Mr. Montgomery sought to use 10 days of paid sick leave to care for Fred. Avalon law allows employees to use sick leave to care for their spouses,¹⁰

The Avalon Commissioner of Benefits, Eric Dumas, denied these requests because (1) 1 U.S.C. § 7 (DOMA Part I) excludes individuals in same-sex marriages from the definition of spouse under the FMLA; and (2) 28 U.S.C. § 1738C (DOMA Part II) allows states to refuse to recognize same-sex marriages of other states.

Mr. Montgomery sued Mr. Dumas in his official capacity as the Avalon Commissioner of Benefits. Barry argued that (1) the Commissioner's denial of FMLA benefits based on 1 U.S.C. § 7 (DOMA Part I), violated the Equal Protection and Due Process guarantees of the Fifth Amendment; and (2) the Commissioner's denial of paid sick leave based on 28 U.S.C. § 1738C (DOMA Part II), violated the Full Faith and Credit Clause of the Constitution.¹¹ He sought injunctive and declarative relief.

Because Barry's arguments involved the constitutionality of DOMA, the United States intervened as a defendant.¹² The United States moved for summary judgment on the grounds that (1) DOMA Part I did not violate the Fifth Amendment; and (2) DOMA Part II did not violate the Full Faith and Credit Clause of the Constitution. The District Court denied summary judgment.

II. Standard of Review

We review the lower court's decision *de novo*. Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c).

⁹ Pub. L. 103-3 (1993), codified at 29 U.S.C. § 2601-2654.

¹⁰ AV Code Ann. Lab. & Empl. 2-301. Leave for illness of immediate family.

- (a)
 - (1)
 - (i) "Employer" includes both private and public entities that employ 15 or more individuals in the State.
 - (ii) "Employer" includes a person who acts directly or indirectly in the interest of another employer with an employee.
 - (3) "Immediate family" includes a child, spouse, and parent.
 - (4)
 - (i) "Leave with pay" means time away from work for which an employee receives compensation.
 - (ii) "Leave with pay" includes sick leave, vacation time, and compensatory time.
- (b) An employee of an employer may use leave with pay for the illness of the employee's immediate family.
- (c) This section does not affect leave granted under the federal Family and Medical Leave Act of 1993.

¹¹ U.S. CONST. art. IV, § 1.

¹² F.R.C.P. 24(a)(1); 28 U.S.C. § 2403.

III. Discussion

A. **Whether the Defense of Marriage Act violates the Equal Protection and Due Process guarantees of the Fifth Amendment**

We hold that DOMA Part I does not violate the Due Process and Equal Protection guarantees of the Fifth Amendment. *See Frontiero v. Richardson*, 411 U.S. 677, 680 n.5 (1973) (applying equal protection guarantees to the federal government through the Fifth Amendment); *see also Bolling v. Sharpe*, 347 U.S. 497 (1954). As a result, the District Court erred in denying summary judgment on this ground.

1. Due Process

In order for rights to be recognized under Due Process, those rights must be fundamental. *Palko v. Connecticut*, 302 U.S. 319 (1937). Fundamental rights are "those privileges and immunities that are so rooted in the traditions and conscience of society that they are considered implicit in the concept of ordered liberty." *Id.*; *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). It is important for courts addressing questions of this nature to recall that their guide must be the traditions of society, not any "personal and private notions" sitting judges themselves may hold. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Marriage is a fundamental right. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). It is not, however, absolute, and a review of the traditions and conscience of our society leads this court to distinguish between marriage and homosexual marriage. Marriage in our society's deeply-rooted traditions has always been regarded as a union between a man and a woman, as well as an important institution in fostering procreation. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007). After all, we must "define precisely" the fundamental right at issue in order to assess the question whether it is available to Petitioners. *Reno v. Flores*, 507 U.S. 292 (1993); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

Finally, marriage between two people of the same sex has been recognized by only the slimmest minority of jurisdictions within this country. Because judicial extensions of due process rights remove issues from "the arena of public debate" and the floor of the legislature, courts must exercise the utmost caution when proceeding along those lines. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

2. Equal Protection

a. Standard of review

Three levels of scrutiny may apply: (1) strict scrutiny, the highest level of review; (2) heightened, or intermediate scrutiny; and (3) rational basis scrutiny, the lowest bar that may be set before the state.

Statutes must only undergo vigorous, strict scrutiny when they create a distinction based upon clearly suspect criteria, or when they infringe upon fundamental

rights. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). As this court has made clear in the discussion of due process rights above, this is not the case with DOMA.

Neither do homosexuals constitute a suspect class. Gay, lesbian and bisexual people in our society are not politically powerless, despite the discrimination they have faced and still face. *Lyng v. Castillo*, 477 U.S. 635 (1986); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938). And there is not at this time a consensus within the scientific community to indicate with certainty that homosexuality is an immutable characteristic. *Conaway v. Deane*, 932 A.2d 571, fn 57 (Md. 2007)

b. Application of standard

The mere fact that a statute makes reference to differences amongst human beings does not render it unconstitutional. *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964). Under the rational basis level of review, DOMA is valid "so long as it is rationally related to a legitimate governmental interest." *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

DOMA passes muster under several possible rational bases, including encouraging a favorable setting for procreation, providing an optimal setting for child rearing, conserving government resources, upholding the institution of marriage, and respecting the sovereignty of different states. These reasons need not be perfect; it is enough that they provide "plausible reasons for Congress' action." *U.S.R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

Accordingly, the Defense of Marriage Act does not violate the Equal Protection guarantee of the Fifth Amendment.

B. Whether the Defense of Marriage Act Violates the Full Faith and Credit Clause of the Constitution

We hold that DOMA does not violate the Full Faith and Credit Clause.

1. DOMA is Valid Under the "Effects Clause" of the Full Faith and Credit Clause

Congress's actions in adopting DOMA are exactly what the Framers envisioned when they drafted the second sentence of the Full Faith and Credit Clause. DOMA is an example of Congress exercising its power under the Effects Clause to determine the effect that "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" has on the other States. In *M'Elmoyle v. Cohen*, 38 U.S. 312 (1839), the Supreme Court indicated that the Effects Clause's grant of power to Congress limits the

self-executing mandate of the first sentence of the Full Faith and Credit Clause, subjecting both the manner and effect of full faith and credit to Congressional conditions. *See also Yarborough v. Yarborough*, 290 U.S. 202 (1933). We agree with the United States District Court for the Middle District of Florida, which, in 2005, conclusively held that 28 U.S.C. § 1739(C) does not violate the Full Faith and Credit Clause. *Wilson v. Ake*, 354 F.Supp.2d 1298 (M.D. Fla. 2005).

Unlike Article I's Necessary and Proper Clause, Article IV's Effects Clause grants Congress full and general power to "prescribe" the full-faith "effect" of state acts and proceedings. Absent powerful evidence to the contrary, the natural meaning of the "Effect" language is that Congress can prescribe that a particular class of acts will have *no effect at all*, or that effect of such acts will be confined to their state of origin. When states' laws or procedures are in conflict, the second sentence of the Full Faith and Credit Clause broadly authorizes Congress to ratchet the scope of full faith and credit up *or* down to create a result that best preserves stability and sovereignty. Adopting the District Court's rigid interpretation of the Full Faith and Credit Clause would create a license for one state to create national policy. *See Nevada v. Hall*, 440 U.S. 410 (1979).

Thus, we hold that the second sentence of the Full Faith and Credit Clause empowers Congress as the ultimate umpire of state laws that are in dispute. Congress's role is meaningless if full faith and credit is already mandatory and Congress is powerless to create exceptions.

2. DOMA Does Not Intrude on States' Rights

Final judgments of state courts are generally entitled to full faith and credit, meaning no public policy exception permits other states to refuse to recognize divorces granted in other jurisdictions, *Williams v. North Carolina*, 317 U.S. 287 (1942), absent lack of jurisdiction. *See Sherrer v. Sherrer*, 334 U.S. 343 (1948). But unlike divorce, marriage involves a public act or record, not a judgment. Thus, the Full Faith and Credit Clause does *not* require a state to recognize a marriage that violates an important public policy. The public policy exception has been applied in various cases of marriage (*e.g.* polygamy, miscegenation, consanguinity). So generally, states have the constitutional power to withhold recognition from foreign marriages where those marriages violate strong state public policies. *See Pink v. A.A.A. Highway Express*, 314 U.S. 201 (1941) (noting that one state could threaten the sovereignty of another state if it were able to implement its determinative policy on domestic matters).

Because a state has the right to apply the public policy exception to give no effect to another state's same-sex marriage license, creating an interstate conflict, *Huntington v. Attrill*, 146 U.S. 657 (1892), Congress has a corresponding power under the Effects Clause to enact DOMA to govern the full-faith effect of these marriage licenses, and to resolve the conflict. It is irrelevant that marriage is a state issue, because while the Full Faith and Credit Clause does not allow Congress to create substantive marriage law, it broadly empowers Congress to dictate the "effect thereof" of state "Acts, Records, and Proceedings" for full-faith purposes.

Finally, we disagree with Judge Adams' argument (Adams, J., dissenting) that "[r]equiring state law to yield to the Full Faith and Credit Clause is the price we pay to enjoy a cohesive and stable United States." Instability and less unity result from compelling a state to embrace another state's act or proceeding that violates the former's public policy. The Effects Clause specially empowers Congress to limit full faith and credit in appropriate ways to protect state sovereignty and national stability.

For the foregoing reasons, the decision of the District Court is REVERSED.

/s/

The Honorable L. Bartley-Holland
Chief Judge, U.S. Court of Appeals for the Fourteenth Circuit

ADAMS, J., DISSENTING

I respectfully dissent. I would affirm the District Court's summary judgment. DOMA Part I, codified at 1 U.S.C. § 7, violates the Fourteenth Amendment. And DOMA Part II, codified at 28 U.S.C. § 1738C, violates the Full Faith and Credit Clause.

A. Whether the Defense of Marriage Act Violates the Equal Protection and Due Process guarantees of the Fifth Amendment

The Fifth Amendment to the United States Constitution provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . .” U.S. Const. Amend. V. The amendment has been held to include the protections provided by the equal protection clause of the Fourteenth Amendment. *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

1. Standard of review

At a minimum, equal protection and due process require that laws that affect individuals with different characteristics differently have a “rational means to serve a legitimate end.” *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). See also *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (plurality); *Romer v. Evans*, 517 U.S. 620 (1996). Laws that implicate a fundamental right or classify based on suspect classifications merit strict scrutiny. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938); *Korematsu v. United States*, 323 U.S. 214 (1944).

Respondent argues that heightened scrutiny applies because the law discriminates on the basis of sex, on the basis of sexual orientation, or because marriage is a fundamental right. However, because we find that the law lacks rational basis, as explained below, we do not reach the arguments that strict scrutiny applies. Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685 (2008).

2. Applying the standard

For the purposes of interpreting federal law, DOMA limits the meaning of “marriage” to a “legal union between one man and one woman as husband and wife,” and limits the meaning of “spouse” to “only a person of the opposite sex who is a husband or a wife.” Pub. L. No. 104-199, 110 Stat. 2419, codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C. In effect, this bans same-sex couples who are married under state law from receiving the same federal benefits as opposite-sex couples who are married under state law. We hold that this ban lacks a rational basis and is therefore invalid under the Due Process Clause.

First, 1 U.S.C. § 7 does not rationally serve the purpose of providing a favorable setting for procreation. It is far too narrow to serve this purpose. See *Romer v. Evans*,

517 U.S. 620 (1996). Federal law does not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. Federal benefits do not generally require that couples be married, nor do they require that couples have consummated their marriage. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

Second, 1 U.S.C. § 7 does not rationally serve the purpose of encouraging an optimal setting for child rearing. The government has offered no evidence that limiting marriage-based benefits to opposite-sex marriages will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. Moreover, same-sex couples who adopt children, or have children through in-vitro fertilization, can be even better parents than opposite-sex couples. Restricting marriage-based federal benefits from same-sex married couples simply makes it more difficult for those couples to parent.

Third, 1 U.S.C. § 7 does not rationally further the government's interest in conserving government resources. Same-sex couples and their children are not less deserving or less needy than married couples and their children. See *Goodridge*, 798 N.E.2d at 964 (Mass. 2003).

Fourth, 1 U.S.C. § 7 does not serve the purpose of maintaining state sovereignty. States are already required to recognize certain marital rights of other states. See, e.g., *Sherrer v. Sherrer*, 334 U.S. 343 (1984). Requiring states to recognize same-sex marriages from other states will not measurably restrict state sovereignty any more than existing law does.

Additionally, the law does not serve the purpose of upholding the institution of marriage. Although this decision would mark a change in the definition of marriage, it does not undermine the institution of marriage. Recognizing the right of an individual to receive benefits due to a marriage to someone of the same-sex does will not diminish the validity or dignity of opposite-sex marriages, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. See *Goodridge*, 798 N.E.2d at 965.

B. Whether the Defense of Marriage Act violates the Full Faith and Credit Clause of the Constitution

I would hold that DOMA Part II, 28 U.S.C. § 1738(C),¹³ which provided the second reason for Avalon's denial of benefits to Mr. Montgomery, violates the Full Faith and Credit Clause.¹⁴

¹³ 28 U.S.C. § 1738(C) provides: "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

¹⁴ Article IV, Section I of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

1. DOMA is an Improper Exercise of Congress's Power Under the "Effects Clause"

The Supreme Court of the United States has deemed the Full Faith and Credit Clause a fundamental component of unified government. In *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), the Court stated that the "very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties." Requiring state law to yield to the Full Faith and Credit Clause is the price we pay to enjoy a cohesive and stable United States.

To enact 28 U.S.C. § 1738(C), Congress relied on the second sentence of the Full Faith and Credit Clause ("Effects Clause"). In fact, the House Judiciary Committee stated that "[w]hile full faith and credit is the rule . . . Congress retains a discretionary power to carve out such *exceptions* as it deems appropriate." H.R. Rep. No. 104-664, at 105 (emphasis added). But the U.S. Supreme Court has never held that the Effects Clause empowers Congress to carve out exceptions to full faith and credit. The Effects Clause allows Congress only to dictate the "effect" of the "Manner" in which state acts, records, and proceedings are "proved"; it does not authorize Congress to license States to give no effect at all to a specific category of state acts, records, and proceedings. Under such an impermissibly broad reading of the Effects Clause, Congress could easily write a statute repealing the Full Faith and Credit Clause altogether.

Moreover, this Court is persuaded by evidence that Congress can use its Effects Clause power *only* to "ratchet up" the application of full faith and credit to judgments and acts that previously lacked such respect, not to take away full faith and credit. In all of Congress's prior acts under the Effects Clause—including the Parental Kidnapping Prevention Act of 1990 (PKPA), the Full Faith and Credit for Child Support Orders Act of 1994 (FFCCSOA), and the Violence Against Women Act of 1994 (VAWA)—Congress *mandated* full faith and credit. DOMA is the first and only Congressional statute in U.S. history to use the Effects Clause to "ratchet down" full faith and credit by authorizing an exception to it.

Besides, the framers knew how to grant Congress the power to make exceptions to a constitutional command. Article III, for instance, gives the Supreme Court appellate jurisdiction over an enumerated class of cases "with such Exceptions, and under such Regulations as the Congress shall make."

2. DOMA Unconstitutionally Lacks Substantive Neutrality

Even if Congress could grant exceptions under the Effects Clause, those exceptions could not prefer one substantive policy by denying full faith and credit to all opposing policies. In every other statute that Congress has passed under the Effects Clause, including PKPA, FFCCSOA, and VAWA, Congress has used substantively neutral factors, correctly assuming that Congress lacks power under the Effects Clause

to make policy judgments as to which state's domestic relations law is better. See *Williams v. North Carolina* (Williams I), 317 U.S. 287 (1942).

In contrast, under the pro-DOMA reading of the Effects Clause, Congress can regulate any area of substantive law by selectively granting full faith and credit to those state acts that Congress prefers, and selectively withdrawing full faith and credit from those state acts that Congress opposes. But if Congress lacks the power to dictate marriage standards in the first place (because marriage is soundly a state issue), then it should not be able to use Article IV's Effects Clause to bypass the limits of that power by simply rendering certain marriages ineffective in other states. By doing so, DOMA removes important sovereignty from states that are on the "wrong" side of Congress's preferences. Indeed, if DOMA were permissible, then so too would be a detailed federal code of unenforceable state laws, listing disfavored rules of tort, property, and contract that are disentitled to full faith and credit, even when reduced to judgment. The correct reading of the Effects Clause does not authorize Congress to pick and choose among the judgments that states should be required to recognize.

3. DOMA Cannot Rely on the Public Policy Exception to Full Faith and Credit

The U.S. Supreme Court has held that the Full Faith and Credit Clause does not require a state to apply another state's law in violation of its own legitimate public policy. *Pacific Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939). In addition, the Court has made clear that "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930). But the Court has also noted the need for states to recognize marriages validly performed in sister states. See *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

The public policy exception to the Full Faith and Credit Clause fails to save DOMA. This exception plainly requires a state to determine that recognition of an act or judgment of a sister state would result in the violation of the former state's public policy. *Pacific Insurance Co.*, 306 U.S. at 502–03. DOMA, however, eliminates the requirement of a public policy, and instead authorizes states to reject, unilaterally and without any reason, sister states' same-sex marriages. DOMA's abrogation of the necessary finding of a public policy against same-sex marriages makes the public policy exception to the Full Faith and Credit Clause inapplicable, and thereby renders DOMA unconstitutional.

Further, although the full faith and credit requirement applies more strictly to final judgments than to public acts, this Court is not convinced that marriages issued by a jurisdiction that had a right to determine the status of its domiciliaries are not final judgments. Just like a divorcing couple, a lawfully married couple is "entitled to expect . . . rules of law that will enable individuals to tell whether they are married and, if so, to whom." *Estin v. Estin*, 334 U.S. 541 (1948) (Jackson, J., dissenting). Besides, if the final-judgment status of "marriage" becomes disputed, it should be no insurmountable

obstacle to convert a non-judicial determination of marriage into a judicial one through a declaratory judgment action.

4. Conclusion

DOMA is fundamentally unconstitutional primarily because it improperly relies on the Effects Clause as a back-door attempt to replace state sovereign lawmaking with substantive rules on matters that Congress lacks the power to legislate.

/s/

The Honorable Raleigh Adams
Judge, U.S. Court of Appeals for the Fourteenth Circuit

RAMIREZ, J., DISSENTING

A. Whether the Defense of Marriage Act violates the Equal Protection and Due Process guarantees of the Fifth Amendment

Although I agree with the result that Judge Adams would have reached on both issues, I write separately to express my view that the Equal Protection and Due Process issues should be resolved based on strict scrutiny.

Strict scrutiny applies when a law “interferes with the exercise of a fundamental right.” *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Additionally, strict scrutiny applies when the law makes a distinction based on a suspect classification, such as race. *Korematsu v. United States*, 323 U.S. 214 (1944); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The law here, which denies federal benefits based on marriage to same-sex married couples, interferes with the fundamental right of marriage. *Zablocki*, 434 U.S. at 388 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see also* *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Turner v. Safley*, 482 U.S. 78 (1987). Therefore, strict scrutiny is appropriate.

In the alternative, the law makes a distinction based on a suspect classification. A classification is suspect if the group is “saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (plurality). Additionally, other factors are instructive: (1) whether the class is defined by a trait that “frequently bears no relation to ability to perform or contribute to society,” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality), (2) whether the group has unique disabilities based on prejudice or inaccurate stereotypes,

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976), and (3) whether the trait defining the class is immutable. Plyler v. Doe, 457 U.S. 202, 220 (1982).

Homosexuals, the target of DOMA, satisfy this test. They have been discriminated against historically. See Rowland v. Mad River Local School Dist., 470 U.S. 1009 (Mem.) (dissenting from a denial of certiorari); Harris M. Miller II, Note, *Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV., 824-25 (1984). Homosexuality bears no influence to ability to contribute to society. Further, the political powerlessness of homosexuals is evident from their inability to pass laws guaranteeing same-sex marriage. Additionally, to the extent the immutability prong is required at all, I would interpret it to inquire whether homosexuality is a “determinative feature of personality.” 98 Harv. L. Rev. 1285, 1303. Homosexuality clearly meets this requirement. Thus, for this second reason, strict scrutiny is appropriate.

I would thus apply the reasoning the majority employed under the rational-basis test to the strict scrutiny test. The law is not closely connected to compelling government objectives, and therefore violates the due process clause.

/s/

The Honorable Arcadia Ramirez
Judge, U.S. Court of Appeals for the Fourteenth Circuit

**In The
Supreme Court of the United States**

BARRY MONTGOMERY,
Petitioner,

v.

MICHAEL MUKASEY, et al.
Respondents.

ORDER GRANTING CERTIORARI

The Petition for a writ of *certiorari* to the U.S. Court of Appeals for the Fourteenth Circuit is hereby GRANTED.

IT IS SO ORDERED that the above-captioned appeal be set down for argument on the following issues:

1. **Whether the Defense of Marriage Act (1 U.S.C. § 7) violates the Equal Protection and Due Process guarantees of the Fifth Amendment of the Constitution.**
2. **Whether the Defense of Marriage Act (28 U.S.C. § 1738C) violates the Full Faith and Credit Clause of the Constitution.**

/s/

Laura Johnson
Court Clerk