Filing # 18197595 Electronically Filed 09/12/2014 05:33:17 PM

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
FAMILY DIVISION

IN RE THE MARRIAGE OF

HEATHER BRASSNER,

Petitioner, CASE NO. 13-012058 (37)

and

MEGAN E. LADE,

Respondent.
_____/

STATE OF FLORIDA'S MOTION TO INTERVENE

The State of Florida, through Attorney General Pamela Jo Bondi and pursuant to Florida Rule of Civil Procedure 1.230, Florida Family Law Rule of Procedure 12.210, and section 16.01, Florida Statutes, moves for leave to intervene. The Attorney General's office has monitored this case and other similar actions and has defended related challenges to Florida's marriage laws in federal and state court. Now the Attorney General seeks to participate in this case to defend state law, ensure further review if necessary, and promote an orderly resolution of the legal issues presented.

The challenges to Florida's marriage laws turn on the same question: Whether the Fourteenth Amendment to the United States Constitution requires a state to recognize same-sex marriage. The United States Supreme Court has the final word on federal constitutional questions, and it is likely to resolve this question definitively in the near future. Until then, the State of Florida has an interest in defending its laws against challenges asserted by the petitioner here.

LEGAL ARGUMENT

Authority to Intervene

The Attorney General is charged under section 16.01, Florida Statutes, to "appear in and attend to, in behalf of the state, all suits … in which the state may be a party, or in anywise interested." This case involves a challenge to certain of the State's statutory and constitutional provisions, so the State has an interest in the lawsuit. *See State ex rel. Shevin v. Kerwin*, 279 So. 2d 836, 837-38 (Fla. 1973) ("It cannot be doubted that the constitutional integrity of the laws of Florida is a matter in which the State has great interest, or that the State is a proper, but not necessary, party to any determination of the constitutionality of any state statute.").

The Attorney General has the authority to intervene in matters like this one. *See, e.g.*, *State ex rel. Boyles v. Fla. Parole & Prob. Comm'n,* 436 So. 2d 207, 210 (Fla. 1st DCA 1983); *see also Ervin v. Collins,* 85 So. 2d 852, 854 (Fla. 1956).

Constitutional Validity of Florida's Marriage Laws

The sole legal issue in this case is the constitutional validity of Florida's laws precluding the recognition of same-sex marriages. The policy question—whether Florida should recognize same-sex marriage—is not before the Court. That question, with "good people on all sides," *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting), was instead before Florida's voters in 2008. Under our constitutional structure, any changes to that policy should come from the voters and not from the courts.

I. A State's Definition of Marriage Does Not Implicate Federal Due Process or Equal Protection.

The United States Supreme Court is the ultimate authority on interpreting the United States Constitution, and that Court has held that a traditional definition of marriage does not implicate federal due process or equal protection. Regulation of marriage is "an area that has

long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Windsor*, 133 S. Ct. at 2689-90 ("By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."). The United States Supreme Court therefore unanimously dismissed, "for want of a substantial federal question," an appeal from the Minnesota Supreme Court presenting the question at issue here—whether a state's decision not to sanction same-sex marriage violated "due process of law under the Fourteenth Amendment" or "the equal protection clause of the Fourteenth Amendment." *Baker v. Nelson*, 409 U.S. 810 (1972); Jurisdictional Statement of Appellants at 3, *Baker v. Nelson*, No. 71-1027, (Feb. 11, 1971); *Baker v. Nelson*, 191 N.W.2d 185, 185, 187 (Minn. 1971).

In *Baker v. Nelson*, two men were unable to marry because Minnesota law defined marriage as being between a man and a woman. Jurisdictional Statement of Appellants at 3-4 *Baker v. Nelson*, No. 71-1027, (Feb. 11, 1971); *Baker*, 191 N.W.2d at 185. The Minnesota Supreme Court held that the state's law did not violate federal due process or equal protection, *Baker*, 191 N.W.2d at 186-87, and the plaintiffs asked the United States Supreme Court for relief. On direct appeal, the Supreme Court summarily dismissed. *See Baker v. Nelson*, 409 U.S. 810 (1972). That dismissal was a decision "reject[ing] the specific challenges presented in the statement of jurisdiction," and it "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

The Supreme Court has not expressly overruled *Baker v. Nelson.* Before *Windsor*, numerous federal courts considering *Baker*'s holding in the context of state marriage laws recognized that it controls. *See, e.g.*, *Mass. v. HHS*, 682 F.3d 1, 8 (1st Cir. 2012) (stating that *Baker v. Nelson* forecloses arguments that "presume or rest on a constitutional right to same-sex

marriage"); *McConnell v. Nooner*, 547 F.2d 54, 55-56 (8th Cir. 1976) (recognizing that *Baker v. Nelson* "is binding on the lower federal courts" regarding federal constitutionality of state marriage definitions that do not permit same-sex marriages); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1002-03 (D. Nev. 2012) (concluding that *Baker v. Nelson* precludes equal protection challenge to "a state's refusal to recognize same-sex marriage"); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1088 (D. Haw. 2012) (noting that *Baker* "is the last word from the Supreme Court" that "state law limiting marriage to opposite-sex couples" does not violate Equal Protection Clause and "remains binding on this Court."); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005) (noting that "*Baker v. Nelson* is binding precedent upon this Court"); *see also Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982).

Courts are bound by *Baker v. Nelson* "until such time as the [Supreme] Court informs them that they are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (internal quotations and citations omitted). Some recent federal court decisions have nonetheless found *Baker v. Nelson* no longer binding because of "doctrinal developments." To be sure, the Supreme Court explained that "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*." *Id.* at 344 (internal quotation and citation omitted; emphasis supplied). But the "doctrinal developments" exception is necessarily a narrow one. After *Hicks*, the Supreme Court stated without qualification that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

The Supreme Court later reaffirmed that strict rule, advising lower courts not to "conclude [that] more recent [Supreme Court] cases have, *by implication*, overruled an earlier precedent." *Agostni v. Felton*, 521 U.S. 203, 237 (1997) (emphasis supplied); *accord id.* at 208-09, 237-38 (explaining that lower court correctly recognized that binding earlier Court precedent had to be followed, even if it could not "be squared" with later Court jurisprudence in area, "unless and until this Court reinterpreted the binding precedent"); *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1263-64 (11th Cir. 2012). This Court must follow *Baker v. Nelson* until the United States Supreme Court overrules it.

At any rate, *Windsor*—which dealt with a *federal* law defining marriage, which repeatedly discussed the virtually exclusive province of states to define marriage, and which did not even mention *Baker*—did not signal a doctrinal shift or offer any implication about what the Court might decide on *this* issue. The Court did not announce a new fundamental right or a new protected class. Instead, *Windsor* expressly reaffirmed the principle at the heart of *Baker v. Nelson,* that definitions of marriage are left to the states. Furthermore, the United States Supreme Court's decisions in *Lawrence v. Texas* and *Romer v. Evans*, which were limited in scope, do not support a finding of doctrinal shift. *Cf. Lofton v. Sec'y, Fla. Dept. of Children & Family Servs.*, 358 F.3d 804, 815-17, 826-27 (11th Cir. 2004) (rejecting argument that *Lawrence v. Texas* had broad application and finding "*Romer* [*v. Evans*]'s unique factual situation and narrow holding [] inapposite to this case").

II. The Rational Basis Test Applies.

The Due Process Clause includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests"—but only "those fundamental rights and liberties which are, objectively, deeply rooted

in this Nation's history and tradition. . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted). The Supreme Court has been reluctant to expand this concept of substantive due process:

> 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.

Id. at 720 (internal citations omitted).

Instead of being "objectively, deeply rooted in this Nation's history and tradition," same-sex marriage was not permitted in the United States until 2003 and not permitted in any country before 2000. *See Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). Even today, fewer than 20 states and the District of Columbia have legalized same-sex marriages through statute or finalized court decision. *See* Nat'l Conf. of State Legislatures, http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx (last visited Sept. 10, 2014).

Windsor does not change anything in this respect. *Windsor* did not find a new fundamental right to same-sex marriage or apply heightened scrutiny to the state definitions. *See Windsor*, 133 S. Ct. at 2705-07 (discussing absence of usual "substantive due process" language, lack of declaration of fundamental right, and apparent citation by majority to rational basis propositions) (Scalia, J., dissenting). Rather, it sought, and failed to find, a rational basis for Congress to override the states' individual definitions of marriage as a matter of national policy. *See id.* at 2696 (finding Congress had no basis to override what had been exclusive state authority to define marriage).

Had *Windsor* established a new fundamental right to same-sex marriage, it would have done so clearly. *Cf. Glucksberg*, 521 U.S. at 721. Instead, *Windsor* effectively reaffirmed the states' authority to define and regulate marriage, *see id.*, 133 S. Ct. at 2689-90, 2691-92, 2693, and disapproved of federal interference with state marriage law, *see id.* at 2693 (criticizing the federal law's "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage"). *Windsor* did not limit the voters' ability to determine state marriage policy.

As recently as last November, the Florida Supreme Court applied a rational basis analysis to its review of a claim of sexual-orientation discrimination. *See D.M.T. v. T.M.H.*, 129 So. 3d 320, 341-42 (Fla. 2013) (holding that "[s]exual orientation has not been determined to constitute a protected class and therefore sexual orientation does not provide an independent basis for using heightened scrutiny"). Based on this precedent, the Court must apply rational basis—not any heightened scrutiny.

III. Florida's Marriage Laws Satisfy the Deferential Rational-Basis Standard.

Rational-basis review is not about "the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313-14 (1993). The question is not whether the policy is a good one; the question is whether the challenged legislation rationally relates to a legitimate state interest. *See Heller v. Doe,* 509 U.S. 312, 320 (1993). Under this deferential standard, which this Court must apply, a legislative classification "is accorded a strong presumption of validity," *id.* at 319, and "must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification*," *id.* at 320 (internal quotation and citation omitted; emphasis supplied).

Moreover, a state has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller,* 509 U.S. at 320; *but cf. Fla. Dept. of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 87 (Fla. 3d DCA 2010) (reading *Cox v. HRS*, 656 So. 2d 902 (Fla. 1995), as requiring evidentiary hearing in challenge under *state* equal protection clause). Rather, "the burden is on the one attacking the legislative arrangement to negative *every conceivable basis* which might support it, whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320-21 (internal quotations, brackets, and citation omitted; emphasis supplied).

The issue, therefore, is whether a challenger can demonstrate that there is not even a conceivable reason for Florida's voters to define marriage as they have. Under current law, appellant cannot satisfy this showing. At a minimum, the Constitution permits Florida's voters to consider the experience of other states before deciding whether to change the traditional definition of marriage. All the while, the voters of course remain free to again amend their Constitution to permit same-sex marriage, as some other states have done.

Numerous courts applying the rational basis standard to state same-sex marriage prohibitions have upheld the laws. *See, e.g.*, *Robicheaux v. Caldwell*, Case No. 2:13-cv-5090, DE 131 at 15 (E.D. La. Sept. 3, 2014); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1014-16 (D. Nev. 2012); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 677 (Tex. App. 2010); *Standhardt v. Super. Ct.*, 77 P.3d 451, 461-64, 465 (Ariz. App. 2003); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. App. 1974); *Baker*, 191 N.W.2d at 187; *see also generally Dean v. Dist. of Columbia*, 653 A.2d 307 (D.C. 1995) (refusing to find new right to strike down traditional marriage law); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. App. 1973) (same). And numerous courts have found conceivable justifications for those laws. *See, e.g., Robicheaux*, Case No. 2:13-cv-5090,

DE 131 at 15-18 (E.D. La. Sept. 3, 2014); *Conaway v. Deane*, 932 A.2d 571, 630-31 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 982-83 (Wash. 2006) (en banc); *Dean,* 653 A.2d at 332-33; *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1106-1117 & n.36 (D. Haw. 2012).

The challenged laws satisfy rational basis review.[1] Neither the United States Supreme Court nor the Florida Supreme Court has said otherwise. Unless and until one of them does, this Court should uphold the challenged laws.

WHEREFORE, the Attorney General asks that the Court allow the State of Florida to intervene in this action.

Respectfully submitted,

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[1] Rational basis review applies here, but Florida's marriage laws could also satisfy higher levels of scrutiny. *Cf. The Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 2014, a true copy of the foregoing motion was filed electronically with the Clerk of Court through the Florida Courts eFiling Portal, which shall serve via e-mail a copy to the following counsel of record and constitute compliance with the service requirements of Florida Rule of Judicial Administration 2.516(b) and Florida Family Law Rule of Procedure 12.080:

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