Vet. App. No. 11-3083

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARMEN J. CARDONA
Appellant,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,
Appellee,

BIPARTISAN LEGAL ADVISORY GROUP
OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervenor.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

REPLY BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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	)	
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BIPARTISAN LEGAL ADVISORY	)	
GROUP OF THE U.S. HOUSE OF	)	
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ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS IN REPLY TO BRIEF OF THE INTERVENOR BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

I. INTRODUCTION

As discussed in the Secretary's initial brief, section 3 of the Defense of Marriage Act (DOMA) and section 101(31) of title 38 of the United States Code unconstitutionally discriminate by treating same-sex couples who are legally married under their states' laws differently than similarly situated opposite-sex

couples. Under well-established factors set forth by the Supreme Court, discrimination based on sexual orientation merits heightened judicial scrutiny and, under that standard of review, both statutory classifications violate the equal protection component of the Fifth Amendment.

The Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) does not address the substance of this argument in its brief. Rather, it argues principally that binding precedent, including the Federal Circuit decision in *Woodward v. United States,* 871 F.2d 1068 (Fed. Cir. 1989), requires rational basis review of the statutory classifications. In addition, BLAG raises two further arguments: that this case is controlled by *Baker v. Nelson,* 409 U.S. 810 (1972) and that marriage definitions should be left to the democratic process. (*See* Intervenor's Brief at 21-24 & 49-50). The Secretary's initial brief explained why *Woodward* is incorrect and warrants reconsideration. To the extent that BLAG relies on appellate decisions from other circuits, these decisions have likewise been undermined by intervening Supreme Court precedent, do not fully consider the relevant factors, or are simply incorrect and are, in any event, not binding on this Court. And because *Baker* did not consider, much less resolve, the question of whether classifications based on sexual orientation are subject to heightened scrutiny, and because, regardless of whether one may prefer that marriage definitions be left to the democratic process, this Court is required to consider and apply equal protection principles

to the statutory classifications at issue, neither of BLAG's additional arguments have merit.

II. RESPONSE ARGUMENT

A. Appellate rulings in other circuits that determined that rational basis review applies to classifications based on sexual orientation are neither binding nor correct.

The Federal Circuit and ten other courts of appeals have at some point applied rational basis review to classifications based on sexual orientation. The Federal Circuit applied such analysis in *Woodward* when it held that gays and lesbians were not members of a protected class and upheld, under rational basis review, the policy of the Department of the Navy that required the discharge of those who engaged in homosexual conduct. *Woodward,* 871 F.2d at 1075-76. However, as stated in the Secretary's initial brief, *Woodward* has been superseded by intervening decisions and warrants reconsideration, as it was predicated on *Bowers v. Hardwick,* 478 U.S. 186 (1986), a case that was subsequently overruled by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (explaining that "*Bowers* was not correct when it was decided, and is not correct today").

The decisions of the other courts of appeals that utilized rational basis review are not only non-binding, but each suffers from one or more key flaws, including reliance on *Bowers* or the failure to adequately consider the factors the Supreme Court has identified to guide the determination of whether heightened scrutiny should apply. This Court should not follow these precedents and should

instead undertake a complete analysis of the appropriate level of scrutiny applicable to classifications based on sexual orientation.

Like the Federal Circuit in *Woodward,* several appellate courts that have applied rational basis review have done so by relying in whole or in part on *Bowers*. *See Equality Found. v. City of Cincinnati*, 54 F.3d 261, 266–67 & n.2 (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc)*; High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *see also Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996) (citing reasoning of prior appellate decisions based on *Bowers*); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (same). Those courts, like the Federal Circuit*,* reasoned that "because homosexual conduct can . . . be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes." *See High Tech Gays*, 895 F.2d at 571; *e.g. Woodward*, 871 F.2d at 1076. Like *Woodward*, the reasoning of which was rendered untenable in light of the Supreme Court's subsequent overruling of *Bowers* in *Lawrence*, the reasoning of these out-of-circuit decisions cannot withstand scrutiny. Thus, like *Woodward*, being based on *Bowers*, the reasoning of those cases was "not correct when [they were] decided, and it is not correct today." *Lawrence*, 539 U.S. at 578.

Other appellate courts relied on the fact that the Supreme Court has not recognized that sexual orientation constitutes a suspect or quasi-suspect class.

See Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006). Although these courts are correct that the Supreme Court has not yet recognized that sexual orientation is a suspect class, the fact that the Supreme Court disposed of recent cases without deciding whether heightened scrutiny applies is not a decision on whether sexual orientation is a suspect class. *Cf. Lawrence*, 539 U.S. at 574-75; *Romer,* 517 U.S. at 631. Finally, the remaining courts that have addressed the issue offered no pertinent reasoning. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984).

Only two out-of-circuit decisions discuss any of the factors relevant to the heightened scrutiny analysis. *See High Tech Gays*, 895 F.2d at 571 (discussing mutability of sexual orientation and political power of gays and lesbians); *Ben-Shalom*, 881 F.2d at 465–66 (discussing political power of gays and lesbians)**.** Like *Woodward,* 871 F.2d at 1076 (discussing mutability of sexual orientation), each of these decisions also relied in part on *Bowers*. *See High Tech Gays*, 895 F.2d at 571; *Ben-Shalom*, 881 F.2d at 465–66. Moreover, for reasons already explained, their analysis of the factors is incomplete or unpersuasive. [1]

[1] For example, in *High Tech Gays*, the Ninth Circuit reasoned that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes." *Id.* at 573. But as the Secretary explained in his initial brief, this reasoning is incorrect and has

Accordingly, for reasons set forth herein and in the Secretary's brief, this Court should find these cases neither binding nor persuasive and, instead, should apply the factors set forth by the Supreme Court for determining whether heightened scrutiny should apply to classifications based on sexual orientation.[2]

B. *Baker* is not controlling and does not foreclose an equal protection challenge to section 3 of DOMA or section 101(31) of title 38.

In *Baker*, the Supreme Court dismissed an appeal as of right from a Minnesota Supreme Court decision denying marriage status to a same-sex couple. 409 U.S. 810. As a per curiam order dismissing an appeal for lack of a substantial federal question, *Baker* only "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided" by the dismissal of the appeal. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). In *Baker*, the Supreme Court dismissed an appeal as of right from a Minnesota Supreme Court decision denying marriage status to a same-sex couple. 409 U.S. 810. As a per curiam order dismissing the appeal for lack of a substantial federal question, *Baker* only "prevent[s] lower courts from coming to

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been undermined by subsequent Supreme Court decisions that "have declined to distinguish between status and conduct in this context." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (citing, *inter alia*, *Lawrence*, 539 U.S. at 575); *see Able v. U.S.*, 155 F.3d 628, 635 (2nd Cir. 1998) (recognizing that "*Romer* . . . involved restrictions based on status," not conduct).

2 Indeed, two recent decisions have held that heightened scrutiny applies to section 3 of DOMA because it classifies individuals on the basis of sexual orientation. *See Pedersen v. Office of Personnel Mgmt.*, No, 10-1750, 2012 WL 3113883, at *35 (D. Conn. July 31, 2012); *Golinski v. Office of Personnel Mgmt.*, 824 F.Supp.2d 968, 989 (N.D. Cal. 2012).

opposite conclusions on the precise issues presented and necessarily decided" by the dismissal of the appeal. *Mandel*, 432 U.S. at 176. The constitutionality of federal statutes like section 3 of DOMA or section 101(31) of title 38 which distinguish among couples who are already legally married in their own states was not presented and therefore not decided – necessarily or otherwise – in *Baker.*

BLAG's argument that *Baker* forecloses an equal protection challenge to both section 3 of DOMA and section 101(31) of title 38 is based on its assumption that *Baker* stands for the proposition that a state may define marriage as the union of one man and one woman without violating equal protection and that, because the same standards apply under the equal protection component of the Fifth Amendment as under the Fourteenth Amendment, *Baker* resolves all equal protection challenges to any statutes, state or federal, that discriminate against same-sex couples in defining marriage. Intervenor Brief (Int. Br.) at 21-22. This argument is flawed as it involves both an overreading of *Baker* as well as a misunderstanding of equal protection review.

BLAG overreads *Baker* insofar as it reasons that *Baker* addressed, resolved, or even considered laws, like section 3 of DOMA or section 101(31) of title 38, that distinguish ,on the basis of sexual orientation, between couples already married under the laws of states that do in fact recognize same-sex marriage. Indeed, the underlying Minnesota Supreme Court decision, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), concerned only the *state's* classification

of persons authorized to marry. Thus, *Baker* could not have addressed, resolved or even considered laws like section 3 of DOMA or section 101(31) of title 38 that distinguish, for purposes of federal law, among couples who are already legally married in their own states.

Moreover, *Baker* did not involve the standard of review for classifications based on sexual orientation such as those created by section 3 of DOMA or section 101(31) of title 38. Neither the Minnesota Supreme Court decision, *Baker*, 191 N.W.2d at 187, nor the questions presented in the plaintiffs' jurisdictional statement raised whether classifications based on sexual orientation are subject to heightened scrutiny. *See Baker v. Nelson*, Jurisdictional Statement, No. 71-1027 (Sup. Ct.), at 2; *see also id.* at 13 (describing equal protection challenge as based on the "arbitrary" nature of the state law). Indeed, it is not even apparent that the plaintiffs' equal protection claims in *Baker* were claims of discrimination on the basis of sexual orientation, as opposed to sex. *Baker*, 191 N.W.2d at 186 ("These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory."). Given that the plaintiffs in *Baker* did not claim that the state law at issue classified on the basis of a suspect or quasi-suspect classification, the Supreme Court's resolution of *Baker* cannot be taken to resolve Appellant's and the Secretary's position that the classifications created by section 3 of DOMA and section 101(31) of title 38

are subject to heightened scrutiny and unconstitutional under this standard of review.

C. This court is required to consider and apply equal protection principles to any discriminatory statutory classification.

BLAG's argument that any redefinition of marriage should be left to the democratic process is a non-sequitur to the Secretary's equal protection argument. Even assuming that it would be preferable for Congress to repeal an unconstitutionally discriminatory law, that does not mean that courts may abdicate their responsibility to apply equal protection principles to closely scrutinize laws that discriminate against suspect or quasi-suspect classes, and to declare such laws unconstitutional if they fail such scrutiny.

III. CONCLUSION

WHEREFORE, in light of the foregoing and the reasons stated in the Secretary's opening brief, the Court should hold that section 3 of DOMA and section 101(31) of title 38, U.S.C., violate the equal protection component of the Fifth Amendment and reverse the Board's August 2011 denial of Appellant's claim of entitlement to additional compensation for a dependent spouse.

Respectfully submitted,

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