

IN THE CIRCUIT COURT OF QUEENS COUNTY

Cynthia H.,)	
)	
<i>Plaintiff</i>)	Case No. 1554-09
)	
v.)	Memorandum Opinion and Order
)	
Hilda N.,)	January 22, 2009
)	
<i>Defendant</i>)	
)	

John Paul Brennan, Judge:

Cynthia H.¹, a Massachusetts resident, filed this action to enforce a child visitation order entered by a Massachusetts court against her former spouse, Hilda N., a South Virginia resident. Both parties have filed motions for summary judgment. For the following reasons, I will grant Cynthia H.’s motion for summary judgment, deny Hilda N.’s motion, enforce the Massachusetts visitation order, and order Hilda N. to allow visitation according to the order’s terms.

Facts

The following facts are undisputed. In late August 2001, Hilda, who lived in Worcester, Massachusetts, became pregnant out of wedlock. The father was Levi J., a man Hilda had been dating intermittently. She gave birth to a daughter, Mary N., on May 23, 2002.

In October 2002, Hilda met the plaintiff, Cynthia H., while on a weekend trip to Boston with Levi and Mary. Hilda and Cynthia hit it off and became friends, and over the course of the next several months, Hilda and Cynthia corresponded regularly by telephone, e-mail, and regular mail. Hilda also traveled to Boston several times to visit Cynthia. As their friendship grew, Hilda and Cynthia began to realize that they were sexually attracted to and falling in love with

¹ To protect the confidentiality of the minor child who is the subject of this action, I will refer to the parties and the child by their first names.

each other. Hilda and Cynthia became lovers and eventually decided to live together. Because Cynthia had a good job as a CPA in Boston, the couple decided that Hilda should move to Boston. In February 2003, Hilda moved with Mary into Cynthia's condominium in Boston.

In November 2003, the Supreme Judicial Court of Massachusetts decided in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), that Massachusetts's law restricting marriage to couples comprised of a man and a woman violated the Massachusetts Constitution. Shortly after that, Cynthia and Hilda decided to marry. On June 20, 2004, several weeks after the decision in *Goodridge* became effective, Cynthia and Hilda were married in a civil service in Boston.

When Cynthia first met Hilda and Mary, she took an immediate liking to the child. Hilda would typically bring Mary with her on her trips to Boston to visit Cynthia, and Cynthia would play with Mary and help Hilda with Mary's care. Hilda was happy to have Cynthia involved in Mary's life, and when Hilda and Mary moved into Cynthia's condominium, Hilda and Cynthia decided that they would raise Mary together as parents. Since that time, Cynthia, initially with Hilda's blessing, has held Mary out as her own daughter and taken an active role in Mary's life. When she was not working, Cynthia spent much of her time playing with Mary and assisting Hilda with childcare chores such as feeding Mary, dressing her, changing diapers, and taking her to doctors' and other appointments.

Hilda and Cynthia eventually agreed that Cynthia should adopt Mary, which Cynthia could not do unless Levi relinquished his parental rights. Hilda attempted to persuade him to do so, even offering to allow him to continue visitation with Mary, but he refused. In response, Hilda filed an action in a Massachusetts court seeking to terminate Levi's parental rights.

Before the court could rule in Hilda's action, Hilda and Cynthia had a falling out. They concluded that the marriage was not working and decided that it would be best for them and for Mary if Hilda and Cynthia separated.² On January 3, 2006, Hilda and Mary moved out of Cynthia's condominium and moved back to Worcester. Hilda and Cynthia entered into a separation agreement. Among other things, the agreement provided that Cynthia, because she had a high-paying job and had been the primary source of income for the couple while they were together, would pay Hilda \$700 per month in child support. The agreement also provided that Cynthia was entitled to unsupervised visits with Mary for two weekends each month and on certain specified holidays. Despite the separation, Cynthia still wanted to be actively involved in Mary's life to the extent possible, and Hilda agreed that Cynthia should remain involved in Mary's life.

After waiting the time period required by Massachusetts law to be separated before filing for divorce, Hilda filed a petition for divorce. On December 22, 2007, the Massachusetts probate court entered a final decree of divorce. The decree, as agreed to by Hilda and Cynthia, incorporated the separation agreement's provisions regarding child support and visitation. The decree also provided that Hilda would inform Cynthia of any change of address and any move out of Massachusetts with Mary.

During the separation and after the divorce, Cynthia took full advantage of her right to visit Mary. Twice a month, and on the designated holidays, Cynthia would travel from Boston to Worcester to spend the weekend visiting Mary. Cynthia would read books with Mary, take Mary shopping and to movies, and spend time with Mary doing various other activities. Cynthia also regularly made, and continues to make, her child support payments.

² As a consequence of the separation, Hilda voluntarily dismissed her action to terminate Levi's parental rights.

During the separation and for several months after the divorce, Hilda encouraged Cynthia to be active in Mary's life. But in mid-2008, Hilda became less encouraging. In May, 2008, Hilda started dating Levi J., Mary's father, who had become a member of a local Christian church that frowned on homosexual activity. Hilda began attending the church with Levi. Although she and Levi eventually broke up, Hilda continued attending the church. She renounced her lesbian past and became convinced that Cynthia, who by this time was involved in a relationship with another woman, was a bad influence on Mary. As a result, Hilda stopped encouraging, and in fact began actively discouraging, Cynthia's visits with Mary. Undaunted, Cynthia continued to visit Mary as the divorce decree allowed and threatened to have her lawyer move to have Hilda found in contempt of court if she interfered with her right to visit Mary. In August 2008, Hilda petitioned the Massachusetts court that had granted the divorce to modify the visitation order to remove Cynthia's visitation rights. The court denied the petition.

In late November, 2008, Hilda decided she and Mary needed to get away from Massachusetts and the tension caused by the visitation dispute with Cynthia. Without telling Cynthia, in violation of the divorce decree, Hilda and Mary moved to Landseer, South Virginia, at the urging of friends from her church who had moved there. Eventually, Cynthia discovered where Hilda was living. On December 26, 2008, Cynthia arrived at Hilda's apartment to visit Mary. Hilda refused to allow Cynthia to enter. Several days later, Cynthia filed this action to enforce the visitation provision of the Massachusetts divorce decree.

Discussion

Cynthia argues that the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2006), obliges this court to enforce the Massachusetts visitation decree. Subsection (a) of the PKPA provides that

[t]he appropriate authorities of every state *shall enforce*, according to its terms, and shall not modify except as provided by subsections (f), (g), and (h) of this section any . . . visitation determination made consistently with the provisions of this section by a court of another state.

(emphasis added.) In effect, the PKPA commands state courts to give full faith and credit to other states' courts visitation orders that are consistent with the PKPA's provisions.

In this case, it is clear that the Massachusetts visitation order was “made consistently with the provisions of” the PKPA. Subsection (c) of the PKPA provides that a visitation determination is made consistently with the PKPA if the court making the determination “has jurisdiction under the law of such state” and that state “is the home State of the child on the date of the commencement of the proceeding.” 28 U.S.C. § 1738A(c)(1) & (2)(A) (2006). There is no dispute in this case that the Massachusetts court entering the divorce decree that granted Cynthia's visitation rights and denying Hilda's petition to remove those rights had jurisdiction to enter those judgments. Nor is there any dispute that Massachusetts was Mary's home state at the time Hilda commenced the divorce proceeding and petitioned the court to modify the visitation order. Thus, on its face, the PKPA requires this court to enforce the Massachusetts visitation order.

Hilda argues, however, that because Cynthia's right to visit Mary arises out of her marriage with Hilda, the federal Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (2006),

supersedes the PKPA's full faith and credit requirement and allows this court to refuse to enforce the Massachusetts visitation order. DOMA provides that

[n]o State . . . shall be required to give effect to any 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 . . . or a right or claim arising from such relationship.

28 U.S.C. § 1738C.

Cynthia, in turn, argues that Congress did not have the authority to allow states to refuse to give full faith and credit to judgments adjudicating rights arising from same-sex marriages in other states. And even if Congress does have this authority, Cynthia argues, DOMA violates the Fifth Amendment's guarantee that the federal government may not deprive any person of "liberty" without due process of law. Finally, Cynthia argues that for a state to refuse to give full faith and credit to judgments concerning rights arising from same-sex marriages when the state would give full faith and credit to similar judgments arising from opposite-sex marriages would violate the Fourteenth Amendment Due Process Clause.³

I need not decide whether Congress had the authority to enact DOMA or whether DOMA is otherwise unconstitutional. Even if DOMA is constitutional, and allows states to disregard the PKPA's full faith and credit requirement for judgments regarding rights arising from same-sex marriages, there is nothing in South Virginia law that would lead me to refuse to enforce the Massachusetts visitation decree. South Virginia has no stated public policy disapproving of same-sex marriages. In fact, South Virginia repealed its criminal prohibition of sodomy more than ten years ago. Moreover, both South Virginia's public accommodations statute and employment discrimination statute prohibit discrimination on the basis of sexual orientation. *See*

³ Although this case might implicate equal protection issues, Cynthia has not asserted an equal protection argument in her motion for summary judgment.

S. Va. Rev. Stat. § 26-1-5 (prohibiting discrimination “on the basis of . . . sexual orientation . . . in the use and enjoyment of any public accommodation”); S. Va. Rev. Stat. § 26-2-1 (prohibiting discrimination “with regard to any term or condition of employment on the basis of . . . sexual orientation”).

To refuse to enforce the Massachusetts visitation order would be especially unjust in this case. The undisputed facts indicate that Hilda encouraged Cynthia to be actively involved in Mary’s life. Cynthia has had a close relationship with Mary since Mary was a toddler. Cynthia assisted greatly with Mary’s care during the duration of her relationship with Hilda, and even after she and Hilda separated and divorced, Cynthia has taken an active role in Mary’s life by consistently exercising her visitation rights and faithfully paying child support. From all indications, Cynthia has been a loving and positive influence for Mary. I see no good reason to end this influence simply because Hilda has moved with Mary to South Virginia.

ORDER

For the foregoing reasons, this court denies Hilda N.’s motion for summary judgment. The court grants Cynthia H.’s motion for summary judgment. The court hereby orders Hilda N. to allow Cynthia H. to visit Mary N. according to the terms of the visitation provision in the Massachusetts divorce decree dissolving Hilda’s and Cynthia’s marriage.

IN THE SUPREME COURT OF SOUTH VIRGINIA

Cynthia H.,)	
)	
<i>Plaintiff-Appellee</i>)	Case No. 09-163
)	
v.)	OPINION
)	
Hilda N.,)	May 11, 2009
)	
<i>Defendant-Appellant</i>)	
)	

Before SUTCLIFFE, C.J., and McCARTNEY, HARRISON, BEST, and LENNON, JJ
SUTCLIFFE, C.J.

Hilda N. appeals from the decision of the Circuit Court of Queens County enforcing an order by a Massachusetts court allowing Hilda’s ex-spouse, Cynthia N., the right to periodically visit Mary N., Hilda’s daughter. The visitation order was originally entered as part of a divorce decree dissolving Hilda’s marriage with Cynthia, and thus Cynthia’s visitation rights arise from her marriage with Hilda. Because (1) this state does not recognize same-sex marriages or rights arising from same-sex marriages, (2) the federal Defense of Marriage Act, which allows states to refuse to recognize rights arising from same-sex marriages, does not violate the United States Constitution, and (3) refusing to enforce the visitation order does not violate the South Virginia Constitution, we reverse the Circuit Court’s judgment and dismiss Cynthia H.’s action seeking to enforce the visitation order.

I.

The undisputed facts in this cast are set forth in the Circuit Court’s opinion. *See Cynthia H. v. Hilda N.*, No. 1554-09, slip op. at 1–4 (Cir. Ct. of Queens County, Jan. 22, 2009). We adopt and incorporate that statement of the facts as our own, with the following addition. After

the Circuit Court’s decision in this case, the South Virginia legislature, in reaction to that decision, enacted the South Virginia Marriage Protection Act. The Act defines marriage as “an inherently unique relationship between a man and a woman” and provides that South Virginia will neither issue marriage licenses to same-sex couples nor recognize as valid same-sex marriages entered into in other states or “any rights arising from such marriages.” *See* South Virginia Marriage Protection Act (Marriage Protection Act), §§ (b), (c) (2009).¹

II.

As the Circuit Court recognized, the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, which provides that states “shall enforce . . . any . . . visitation determinations made consistently with the provisions of [the PKPA] by a court of another state” would, standing alone, require South Virginia courts to enforce the Massachusetts visitation order. *See Cynthia H.*, slip op. at 5. However, Hilda argues that the federal Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (2006), removes that requirement and allows this state’s courts to refuse to enforce rights arising from same-sex marriages entered into in other states, and that

¹ The Act states in full:

(a) This section shall be known and may be cited as the “South Virginia Marriage Protection Act.”

(b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

(c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.

(d) No marriage license shall be issued in the State of South Virginia to parties of the same sex.

(e) The State of South Virginia shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction, regardless of whether a marriage license was issued, nor any rights arising from such a marriage.

the Marriage Protection Act requires this court to do so. We agree. DOMA plainly removes the requirement to enforce rights arising from same-sex marriages by stating that

[n]o State . . . shall be required to give effect to any judicial proceeding of any other state . . . respecting [same-sex marriages] . . . or a right or claim arising from [a same-sex marriage].

28 U.S.C. § 1738C. Because the South Virginia legislature, in the Marriage Protection Act, has commanded that South Virginia shall not recognize same-sex marriages or any rights arising from same-sex marriages, and Cynthia's right to visit Mary arises from Hilda's marriage with Cynthia, this Court is constrained from enforcing the visitation order.

Cynthia argues that this result violates both the United States and South Virginia constitutions. Cynthia argues that DOMA violates the United States Constitution because Congress did not have the authority under the Constitution to enact DOMA and because DOMA violates the Fifth Amendment's guarantee that the federal government not deprive any person of "liberty" without due process of law. Cynthia also argues that following DOMA's invitation to refuse to enforce the visitation order would violate the due process guarantees of the United States and South Virginia Constitutions.

The Circuit Court held that it did not have to reach Cynthia's constitutional arguments because even if DOMA was constitutional, nothing in South Virginia law or public policy suggested that this state's courts should not enforce the order. *Cynthia H.*, slip op. at 6. However, as noted, after the Circuit Court's decision, the South Virginia legislature enacted the Marriage Protection Act. That Act commands South Virginia courts not to recognize rights arising from same-sex marriages and thus requires us not to enforce the visitation order. Therefore, we must decide the constitutional issues Cynthia raises, for if DOMA is unconstitutional, federal law (the PKPA) requires us to enforce the judgment despite The

Marriage Protection Act. *See* U.S. Const. art. VI, cl. 2 (declaring that the “Laws of the United States” are the “Supreme Law of the Land” and state judges are bound by federal law, “anything in the Constitution or Laws of [the] State to the contrary notwithstanding”). For the following reasons, we find Cynthia’s constitutional arguments unconvincing.

A. *Congressional Authority to Enact DOMA*

Congress enacted DOMA under its power granted in the Full Faith and Credit Clause of the Constitution. That clause states:

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.*

U.S. Const. art. IV, § 1 (emphasis added). The plain language of the Clause’s second sentence is most naturally read as giving Congress the power to determine the effect that a state’s acts, records, and judicial proceedings would have in other states’ courts. *See Defense of Marriage Act: Hearings on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. (1996). That is precisely what Congress did in DOMA; Congress determined the effect that states would be required to give out-of-state same-sex marriages and the rights or claims arising from those marriages, including rights recognized in judicial proceedings.

Cynthia argues that to interpret the clause’s second sentence to grant Congress the power to deny (or allow states to deny) full faith and credit to certain acts or judgments of other states would be inconsistent with the command of the first sentence that states “shall” give full faith and credit to those acts and judgments. Cynthia also argues that to interpret the second sentence to give Congress the power to deny full faith and credit would be inconsistent with the clause’s purpose to help unify the disparate states into one nation.

With regard to the first point, there is significant historical evidence that the first sentence's command to states to accord full faith and credit to other states' acts and judicial proceedings was merely a command to "admit them into evidence as 'full' proof of their existence" and not a command to give those acts and proceedings any substantive effect. Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and The Defense of Marriage Act*, 32 Creighton L. Rev. 255, 294 (1998). But even if, as is now commonly held, the first sentence requires states to give effect to other states' acts and judgments, the second sentence still plainly grants Congress the power to prescribe the effect of those acts and judgments. To allow Congress to "prescribe" the effect of acts or judgments in other states' courts is to allow Congress to determine what effect those acts or judgments will have in those courts. The United States Supreme Court has not definitively determined whether the second sentence gives Congress the power to allow states to give no effect to other states' acts and judgments. We are reluctant, without a definitive command from that Court, to disregard the most natural reading of the actual language used in the second sentence. Moreover, given that the purpose of the Full Faith and Credit Clause was to regulate interstate relations so as to achieve closer unity among the states, it makes sense that the Constitution's drafters would grant Congress the power to determine the effect of states' acts or judgments in other states. After all, Congress is the body in which states qua states were represented in the original constitutional plan. *See* U.S. Const. art. I, § 3, cl. 1 (providing for Senators' election by state legislatures), *repealed by* U.S. Const. amend. XVII. Congress, then, was the most logical body in which to lodge a power that requires balancing the states' relations to each other.

B. *Due Process*

Cynthia argues that, by allowing the South Virginia courts to refuse to enforce the Massachusetts custody order, DOMA violates her rights under the Fifth Amendment Due Process Clause. She also argues that for the South Virginia courts to refuse to enforce the visitation order would violate her rights under the Fourteenth Amendment Due Process Clause. Because both arguments ultimately boil down to an argument that due process entitles her to have her visitation rights enforced, we will treat the arguments as one.²

Both Due Process Clauses prohibit government—federal or state—from depriving a person of liberty without due process of law. *See* U.S. Const. amend. V, cl. 4; U.S. Const. amend. XIV, § 1, cl. 3. Therefore, the first issue we must address is the liberty interest at stake here. Cynthia claims that the liberty interest at stake is her interest as Mary’s stepparent in visiting Mary. But because Cynthia’s interest as a stepparent in visiting Mary derives from her marriage to Mary’s mother, her interest in visiting Mary depends upon the validity of her marriage to Hilda. Therefore, the question here is: Does due process require us to recognize Cynthia’s relationship with Hilda as a marriage? Put more generally, does due process require recognition of same-sex relationships as marriages when solemnized in the same manner as marriage between a man and a woman?

There is no fundamental right to state recognition of any same-sex relationship as a marriage. In *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), the United States Supreme Court held that only rights that are “deeply rooted in this nation’s history and tradition” are to be recognized as fundamental rights. To put it succinctly, despite the fact that a few states within the last decade have allowed persons of the same sex to marry, there is no history or tradition in

² Because this Court has held consistently that due process analysis under the South Virginia Constitution tracks that under the United States Constitution, our analysis of Cynthia’s federal due process argument will also dispose of her state due process argument.

this country of recognizing same-sex relationships as marriages. *See generally* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. Rev. 1. Under *Glucksberg*, this lack of any history or tradition dooms the argument that a fundamental right to state recognition of same-sex relationships as marriages exists.³

Because the right to governmental recognition of a same-sex relationship as a marriage is not fundamental, the government's refusal to recognize such a relationship as a marriage is subject only to rational basis scrutiny. Thus, refusing to recognize a same-sex relationship as a marriage does not violate due process if that refusal is rationally related to a legitimate government interest. *See Glucksberg*, 521 U.S. at 728–36 (applying rational basis scrutiny). Refusing to recognize same-sex relationships as marriages serves at least two legitimate governmental interests. First, the “privileges and benefits of civil marriage serve the legitimate—some would say compelling—goal of encouraging heterosexual unions (and therefore acts of the procreative type) to take place within a stable and protective institution.” Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 Wm. & Mary Bill Rts. J. 147, 160 (1997). Because “homosexual acts are inherently non-procreative,” it is reasonable to differentiate same-sex relationships from the class of relationships in which procreation may occur. Second, recognizing only different-sex marriages advances “the widely shared belief that it is in the best interest of children to be raised in a home that includes a mother and father.” *Id.* at 161. As one scholar has noted, “children generally develop best, and develop most completely, when raised by both a mother and a father and experience regular family interaction with both genders’

³ Moreover, neither *Zablocki v. Redhail*, 434 U.S. 374 (1978), nor *Loving v. Virginia*, 388 U.S. 1 (1967), establishes that the right to marry a person of the same sex is fundamental. Both cases involved marriages between a man and a woman.

parenting skills during their years of childhood.” Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833, 860.

Cynthia’s citations to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Lawrence v. Texas*, 539 U.S. 558 (2003), are unavailing. While both *Casey* and *Lawrence* set forth a very broad understanding of liberty (“the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” *Casey*, 505 U.S. at 851), the Court in neither case intended that understanding to be a general definition of due process liberty. The language in *Casey* “merely described, in a general way and in light of [the Court’s] prior cases, those personal activities and decisions” that the Court had held previously were sufficiently fundamental to be protected by the Due Process Clauses. *See Glucksberg*, 521 U.S. at 735. Although *Lawrence* relied on the broad language from *Casey* to support its holding that criminal prohibitions of same-sex sodomy violated due process, *see* 539 U.S. at 573–74, there is a significant difference between allowing certain conduct and affirmatively supporting and encouraging it. Both the majority in *Lawrence* and Justice O’Connor in her concurring opinion stated that *Lawrence* did not give rise to any due process right to have government recognize same-sex relationships as marriages. *See id.* at 578; *id.* at 585 (O’Connor, J., concurring).

III.

For the foregoing reasons, we reverse the Circuit Court’s judgment and dismiss Cynthia H.’s action to enforce the Massachusetts visitation order.

REVERSED.

Best, J., dissenting

While I agree with the majority that nothing in either the United States or South Virginia Constitutions creates any right to have a same-sex relationship recognized as a marriage, that observation is ultimately beside the point. While Cynthia's right to visit Mary arises from the divorce decree that ended her marriage with Hilda, Cynthia is not seeking the benefits South Virginia provides to married couples; rather, she is simply asking us to enforce a *judgment* duly entered by a sister state court with jurisdiction to enter that judgment. Cynthia is thus in the same position as any person—married or unmarried—who has, by the judgment of another state's court, the right to visit a child who now lives in South Virginia.

While DOMA may well validly allow South Virginia to refuse to recognize same-sex marriages of couples who simply move to the state, in my view, DOMA cannot, consistently with the Full Faith and Credit Clause, allow South Virginia to refuse to recognize the Massachusetts court's *judgment*. The Full Faith and Credit Clause states that full faith and credit "shall" be given "to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, §1. This language is mandatory. While the Supreme Court has allowed states to consider public policy in deciding whether to apply another state's law, the Court has not done so with regard to judgments. As one scholar has explained, "Judgments . . . are essentially unassailable if presented to another court, unless entered without personal or subject matter jurisdiction."⁴ Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-traditional Marriages*, 32 Creighton L. Rev. 147, 164 (1998). In *Baker v. General Motors*, 522 U.S. 222 (1998), the United States Supreme Court stated emphatically that "our decisions support no roving 'public policy exception' to the full

⁴ Here, there is no dispute that the Massachusetts court that entered the divorce decree and the order denying Hilda's petition to modify the visitation order lack either subject matter or personal jurisdiction.

faith and credit due judgments.” 522 U.S. at 233. Rather, “[r]egarding judgments, the full faith and credit obligation is exacting. A final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.” *Id.*; *see also, Williams v. North Carolina*, 317 U.S. 287 (1942); *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

The United States Supreme Court has required this exacting obligation to honor sister-state judgments because allowing states not to honor those judgments would thwart the purpose of the Full Faith and Credit Clause. That clause was intended to unify the disparate states into one nation by “alter[ing] the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created by sister states.” *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438–39 (1943).

To interpret the second sentence of the Full Faith and Credit Clause to allow Congress to permit states to refuse to recognize sister-states’ judgments, as the majority has done here, would be inconsistent with Supreme Court precedent applying the Full Faith and Credit Clause to judgments. The Clause states that *full* faith and credit *shall* be given, and the Supreme Court has interpreted this to mean precisely what it says with regard to judgments. The unqualified “full” and mandatory “shall” lose much of their meaning if Congress can simply allow states to disregard sister-states’ judgments. A better understanding of the second sentence, at least with respect to judgments, is that it allows Congress to increase or augment the effect of judgments but not to create an exception to the mandate that states must honor sister states’ judgments. This interpretation of the second sentence harmonizes it with the command of the first sentence and is consistent with the overall purpose of the Full Faith and Credit Clause to unify the states into one nation.

In my view, then, DOMA, if interpreted to allow states to refuse to recognize sister-states' judgments arising from same-sex marriages (an interpretation DOMA's plain language seems to command), exceeds Congress's power under the Full Faith and Credit Clause. That being so, the command of the Clause, augmented by the PKPA's command to enforce sister states' visitations determinations, requires us to affirm the Circuit Court's judgment enforcing the Massachusetts visitation order. Because the majority of this Court holds otherwise, I respectfully dissent.

Lennon, J., dissenting

I cannot accept the majority's crabbed understanding of the liberty protected by the Due Process Clauses of the United States and South Virginia Constitutions, an understanding that is at odds with the Supreme Court's landmark decisions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Lawrence v. Texas*, 539 U.S. 558 (2003). Taking seriously the great constitutional guarantees of liberty, as interpreted and applied by the United States Supreme Court, requires this Court to affirm the Circuit Court's judgment enforcing the Massachusetts visitation order in favor of Cynthia. Because this Court does not take that guarantee seriously, and therefore refuses to enforce the visitation order, I dissent.⁵

I.

By refusing to enforce the Massachusetts visitation order, this Court is denying Cynthia the right to visit Mary, a child she has known, loved, helped care for, and helped support since she was a toddler. The Court denies Cynthia this right because it arises from her marriage with Hilda, Mary's mother. In other words, the Court denies Cynthia this right because Cynthia

⁵I agree with Justice Best's conclusion that in enacting the so-called Defense of Marriage Act, Congress acted outside its authority under the Full Faith and Credit Clause.

exercised her right to marry the person whom she loved and chose to marry, a person who happened to be a woman.

The Court does so because DOMA allows it to refuse to recognize rights arising from same-sex marriages and because the South Virginia Marriage Protection Act commands the Court to accept DOMA's invitation to refuse to recognize those rights. But what DOMA ultimately allows and the Marriage Protection Act ultimately commands is to deprive people of the benefits that accompany the exercise of their right to marry the persons they love. What DOMA allows and the Marriage Protection Act commands is nothing less than to deny homosexuals the right to marry those they love. The United States Supreme Court has deemed the right to marry "fundamental." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *see also Loving v. Virginia*, 388 U.S. 1, 12 (1967). The right to marry means little or nothing if it does not include the right to marry the person whom one chooses. *See Goodridge*, 798 N.E.2d. at 959.

Moreover, to limit the fundamental right to marry to opposite-sex couples is inconsistent with the Supreme's Court's understanding of the concept and value of marriage. In *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), the Court noted that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals." Consistent with *Eisenstadt*, Justice Blackmun, in his dissent in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (a dissent later vindicated by the Court in *Lawrence v. Texas*), noted that the Court has protected the right to marry and enter into family and sexual relationships because the choice to enter into those relationships is central to a person's dignity and autonomy. *Id.* at 204–05 (Blackmun, J., dissenting). In *Casey*, the Court highlighted how the Due Process Clauses' guarantee of liberty protects individual autonomy to choose for one's self how to order her intimate affairs:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family

relationships, child rearing, and education These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Casey, 505 U.S. at 851 (joint opinion of Justices O'Connor, Kennedy, and Souter) (citations omitted). The Court reiterated the importance of autonomy in sexual and familial matters in *Lawrence*, in which the Court relied on *Casey*'s robust exposition of liberty to hold that a Texas statute prohibiting same-sex sodomy violated the Due Process Clause. *See Lawrence*, 539 U.S. at 571–78. The *Lawrence* Court was concerned not merely with the narrow right to engage in same-sex activity, but in the broader interest in deciding how to order one's intimate personal relationships and to express one's sexuality in the context of those relationships. *See id.* at 567. Our nation's constitutional jurisprudence recognizes that the value of marriage, which makes the right to marriage so cherished, lies in profound respect for the choice of two people to live together in a life of sexual intimacy. *See Goodridge*, 798 N.E.2d at 961 (“it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage”).

The majority rejects this analysis because, it says, only those rights that are “deeply rooted in this nation's history and tradition” can be considered fundamental. *See supra* at 13–14 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). But in *Lawrence*, the United States Supreme Court repudiated this myopic view, at least with regard to the liberty to make one's own intimate choices:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight.

They know times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

539 U.S. at 578–79.

As in *Lawrence*, more recent law and tradition is more relevant. *See id.* at 573. Since 2001, at least six countries (Belgium, Canada, Netherlands, South Africa, Spain, and Sweden) and four states (Connecticut, Iowa, New Jersey, and Massachusetts) have legalized same-sex marriages.

In my view, the weight of precedent and simple justice require that we recognize as a fundamental constitutional right the right to marry (and, thus, not to be penalized for marrying) the person whom one chooses, even if that person is of the same gender. We should recognize the right as fundamental under the South Virginia Constitution, regardless of how the United States Supreme Court would interpret the federal Due Process Clauses. Because the right is fundamental, it may only be infringed if the infringement is the least restrictive means of advancing a compelling government interest. *See Zablocki*, 434 U.S. at 389–90. Because Hilda has not demonstrated any compelling interest in refusing to allow Cynthia to visit Mary, we must enforce the Massachusetts visitation order.

II.

In any event, the refusal to enforce the visitation order, simply because it arises from a same-sex marriage, fails even under rational basis review. The majority posits that refusing to recognize same-sex marriages encourages procreative acts to take place within a stable institution and that it is in the best interest of children to be raised by a mother and a father. *See supra*, at 14. But recognizing same-sex marriages does not inhibit heterosexuals from marrying;

therefore, recognizing same-sex marriages does not at all diminish any interest the state has in ensuring that procreative acts take place within the context of marriage. And the idea that it is necessarily in the best interest of children to be raised by heterosexual couples is an insult to the single parents and same-sex couples who raise healthy, well-adjusted children every day.

But there is a deeper problem with the majority's reasoning. In our nation's constitutional jurisprudence, the value of marriage lies in the choice of two people to live together in a life of sexual intimacy. While in heterosexual marriages procreation is usually a possibility and often a reality, it is not a necessity. To focus on procreation as the central point of marriage is to focus too narrowly.⁶

As the Massachusetts Court stated in *Goodridge*, the “‘marriage is procreation’ argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.” 798 N.E.2d. at 962. Thus, the argument “‘identifies persons by a single trait and then denies them protection across the board.’” *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

Moreover, even if procreation is considered essential to marriage in some metaphysical sense, there is nothing about “marriage” as understood in our law that prevents same-sex couples from entering into it. The law also allows couples to thwart reproduction by using contraceptives or being sterilized; indeed, a couple can completely close off the possibility of procreation throughout their entire marriage if they so choose. The law also allows couples, or even the woman alone, to choose an abortion post-conception. The law does nothing to prevent married

⁶ The focus on procreation within heterosexual marriages also obscures the fact that South Virginia law facilitates procreation outside marriage. For instance, South Virginia law allows in vitro fertilization and artificial insemination and does not restrict those procedures to married heterosexual couples. South Virginia law also allows homosexual persons to adopt. As the Massachusetts court noted in *Goodridge*, “If procreation were a necessary component of marriage, our statutes would draw a tighter circle around non-marital childbearing” 798 N.E.2d. at 962.

couples from performing the same intimate acts that same-sex couples are capable of performing. In short, marriage law reserves the full guarantees of intimacy to heterosexual couples, with no regard to procreation, and reserves to heterosexual couples a relationship, and the benefits that flow from that relationship, that same-sex couples are just as capable of entering into.

I cannot agree with the majority's crabbed view of liberty or with the arbitrary and unjust burden it imposes on Cynthia simply because she chose to marry another woman. Therefore, I dissent.

IN THE SUPREME COURT OF SOUTH VIRGINIA

Cynthia H.,)
)
 Plaintiff-Appellee) Case No. 09-163
)
 v.)
)
 Hilda N.,)
)
 Defendant-Appellant)
)
)

ORDER

It is hereby ordered, in accordance with the opinion issued this date in this cause that the decision of the Circuit Court of Queens County in Case No. 1554-09, Cynthia H. v. Hilda N. be vacated and that Cynthia H.'s action to enforce the Massachusetts order entitling her to visit Mary N., a minor, be dismissed.

Dated: May 11, 2009

[s]
Mahulia Jackson
Clerk of Court

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. 09-9513

Cynthia H.,
Petitioner

v.

Hilda N.,
Respondent

October 12, 2009

Petition for writ of certiorari to the Supreme Court of South Virginia is GRANTED. The issues before the Court are:

1. Does the provision of the Defense of Marriage Act, 28 U.S.C. § 1738C, that allows States to refuse to give effect to judicial proceedings of other states respecting same-sex marriages or rights arising from same-sex marriages exceed Congress's power under Article IV, section 1 of the United States Constitution?
2. Does a state court's refusal to enforce a visitation order entered by a sister state court in a divorce decree dissolving a same-sex marriage, as allowed by the Defense of Marriage Act, when the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, would otherwise require the court to enforce that order, violate the constitutional right to due process?

The parties shall brief the case on an expedited schedule to be established by the Court.

Argument will be heard on an expedited basis.