

Rutgers School of Law-Newark

**2010 David Cohn Appellate Advocacy
Competition**

Instructions and Problem

PART 1: INTRODUCTION

- The Rutgers Moot Court Board (<http://www.rutgersmootcourtboard.com>) welcomes all participants to the 2010 David Cohn Appellate Advocacy Competition.
- This packet contains instructions and rules for the competition, as well as the competition problem, set forth in a mock intermediate federal appellate court decision.
- Please read all materials with extreme care.
- For purposes of enforcing all rules and deadlines set forth herein, the Rutgers Moot Court Board will assume you have read the competition packet in its entirety and understand all rules, deadlines, and other conditions set forth herein.
- This year's problem is a mock United States Supreme Court case. Competitors should assume they are counsel on certiorari appeal from a ruling of the United States Court of Appeals for the Fourteenth Circuit.
- Please remember that the competition problem is an academic exercise designed to help you develop skills in appellate advocacy.
- Competitors should focus only on the questions in the writ of certiorari, and should assume that other procedural issues (e.g. standing) are satisfied.
- The statements made by the authors of the fact pattern and lower court decision contained herein are for this purpose only and should not be construed to reflect their real-life views, with respect to legal issues or any other subject. Nor should any statement contained herein be construed as reflecting the opinions or other views of any member of the Rutgers Moot Court Board, its faculty advisor, or any associated individual.

PART 2: REGISTRATION

COMPETITION DROPS

- Participants wishing to receive one credit can add the competition with Dean Garbaccio between Monday, February 8, 2010 and Monday, February 15, 2010.
- The last day to drop the competition without it appearing on your transcript is Tuesday, February 22, 2010. All drops must be completed with Dean Garbaccio.

REGISTERING WITH THE MOOT COURT BOARD

- Regardless of whether you are receiving academic credit for the competition, you must register your participation with the Moot Court Board.

- **Page 9 of this packet is a registration form that must be submitted in person to the Moot Court Office (Room 391) by 6:00pm on Monday, February 22, 2010. Failure to submit the form to the Moot Court Office by the deadline will result in disqualification. If, for some reason, you need to submit this form by e-mail attachment, you must obtain advance permission from one of the Co-Chairs of the Rutgers Moot Court Board before doing so.**

COMPETITOR ID NUMBER

- On the registration form contained on page 9 of this packet, there is a line reserved for “Competitor ID Number.” You may choose your own ID number; please make sure it contains exactly nine digits.

PART 3: COMPETITION BRIEF

GENERAL REQUIREMENT

- During the first stage of the competition, participants must prepare a written brief on the merits of the case presented.

PAGE LIMITS

- Page Limits:
 - Competitors who want to use this brief to satisfy the graduation writing requirement:
 - Briefs must be a **minimum** of twenty-five (25) pages
 - Competitors who do not want to use this brief to satisfy the graduation writing requirement:
 - Briefs must be a **minimum** of seventeen (17) pages

ORGANIZATION

- The briefs must be organized as follows:
 - The pages containing the following sections must be numbered using roman numerals, and they do not count toward the required page minimum.
 - Caption Page
 - Questions Presented
 - Table of Contents
 - Table of Authorities
 - However, the pages containing the following sections must be numbered with arabic numerals, and do count toward the required page minimum.
 - Opinion Below (this should be a cite to the lower court’s opinion – for example, “The Opinion Below is located at Kameny v. . .).
 - Statement of Jurisdiction
 - Standard of Review
 - Statement of the Case
 - Summary of the Argument

- Argument
- Conclusion

CITATION FORMAT

- Citations should conform to the eighteenth edition of A Uniform System of Citation (“THE BLUEBOOK”). Briefs must be typed, double spaced, in Courier or Courier New font, font size 12, and must have one (1) inch margins.

GRADING CRITERIA

- Briefs will be evaluated and graded by the Moot Court Board using the following criteria: writing style, strength and logical development of arguments, thoroughness and accuracy, and adherence to the criteria established by this packet.

PROCEDURAL HISTORY

- The manner by which this case has come before the Court is not a subject for briefing or argument, and competitors should not address issues arising from or related to the procedural posture of the case.
- Accordingly, competitors should omit the “Procedural History” section normally included in appellate briefs.

CHOOSING A SIDE

- Competitors may write on behalf of either Petitioner or Respondent in the brief.

NUMBER OF COPIES REQUIRED

- Each competitor must submit five (5) copies of his or her brief.

RECOMMENDATIONS AND RULES ABOUT SOURCES

- In researching the problem, competitors are not limited to the sources cited in the lower court opinion alone – competitors may and are strongly encouraged to consult both primary (case law, statutes, regulations, etc.) and secondary legal research materials (newspapers, magazines, law journals, etc.).
- Competitors should feel free to utilize case law from all federal and state jurisdictions to support their arguments.
- If competitors cite any resources other than reported case law, statutes, law journals, or other materials cited in the lower court opinion contained in the packet, or anything else not easily located, one copy of such material(s) must be submitted with the brief.

OVERVIEW OF ETHICS REQUIREMENTS

- The brief submitted must be the exclusive work of the competitor. No other person may review or edit drafts of the brief. Other ethical requirements, including some pertaining to the competition brief, are set out in Part 5 of this packet.

BRIEFS ARE DUE THURSDAY, FEBRUARY 25, 2010, at the Moot Court Board office, Room 391, by 8:00 p.m. Briefs will not be accepted after this time. **No exceptions.** Remember – you must submit **five (5) copies.** Electronic submissions will not be accepted.

- The name of the competitor may **NOT** appear on the brief. Briefs must be identified only by using the Competitor ID Number selected by the registrant (see Part 2 of this packet).
 - The ID number must be placed on the brief in lieu of the competitor’s name in the upper right-hand corner of every page.
 - If the competitor wishes to use the brief to satisfy the graduation writing requirement, the competitor must indicate this on the registration sheet included on page 9 of this packet.
- Failure to include all the necessary information may result in tardy submission, which will bar the registrant from competing.

PART 4: ORAL ARGUMENT

BREAKDOWN OF ROUNDS

- After you submit your brief, the competition is comprised of three rounds of oral argument, consisting of the:
 1. Preliminary Round;
 2. Semifinal Round; and
 3. Final Round.

PRELIMINARY ROUND

- The Preliminary Round requires each competitor to compete in two oral arguments (one argument on behalf of the Petitioner and one on behalf of the Respondent).
- Arguments will take place on the evenings of:
 - Monday, March 1 through Thursday, March 4; and
 - Monday, March 8 through Thursday, March 11.
- You will argue once during the week of March 1 (“Week 1 Argument”), and once during the week of March 8 (“Week 2 Argument”).
- Arguments may be scheduled to start at 6pm or 7 pm, depending on the number of competitors.

DETERMINING THE SEMIFINALISTS

- The composite score by which the four semifinalists will be calculated is as follows:

Appellate Brief Score	40%
Oral Argument Score (Week 1 Argument)	30%
Oral Argument Score (Week 2 Argument)	30%

- The four competitors with the highest composite score will advance to the semifinal round, which will take place on Tuesday, March 23, at 6pm.

THE ROLE OF THE BRIEF SCORE AFTER THE PRELIMINARY ROUND

- The brief score will not factor into the determination of which two competitors advance from the semifinals to the finals, nor will it factor into determining which competitor wins the final round argument.
- The winners of the semifinal rounds and the final round will be based on their oral argument scores in that round alone.

SEMIFINAL ROUND

- For the competitors who advance to the semifinal round, the competitor with the higher preliminary round composite score will have the right to choose whether to argue on behalf of the Petitioner or Respondent.
- By virtue of single elimination, the two competitors who receive the higher scores within their respective semifinal round oral arguments will advance to the Final Round.

FINAL ROUND AND AWARDS BANQUET

- The Final Round argument will take place on Wednesday, March 31, at 6pm, in the Baker Trial Courtroom (Room 125).
- At present, Justice Virginia Long, of the New Jersey Supreme Court, is scheduled to serve as the presiding Justice on the Final Round panel.
- Immediately following the Final Round argument, the Board will announce three awards at a banquet held in the Berson Board Room.
- In addition to announcing and awarding the winner and runner-up of the Final Round argument, the Board will announce the winner of the Best Brief Award.

BEST BRIEF AWARD

- The Best Brief Award will be given to the individual submitting the highest scoring brief, regardless of oral argument score.

REGIONAL COMPETITION TEAM

- Both Final Round competitors and the author of the highest scoring brief will represent the school in the Regional Competition in the fall semester of 2010.
- As such, participation in this competition reflects your acknowledgement and agreement that, should you advance to the finals or submit the highest scoring brief, it is your responsibility to represent Rutgers in the Regional Competition during the Fall 2010 semester and to satisfy all requirements related to it.
 - These requirements include, but are not limited to, participating in oral argument practice rounds with the team and the academic advisor and following all procedures set by the host of the Regional Competition.
- In the event that author of the highest scoring brief advances to the Final Round argument, the third member of the Regional Competition team will be the semifinalist who received the highest Semifinal Round score without advancing

to the Final Round. All the requirements stated in the previous paragraphs shall apply to that competitor.

ACADEMIC CREDIT REQUIREMENT

- In order to receive academic credit for the competition, all competitors must submit the brief and participate in the Preliminary Round (two oral arguments) in accordance with the rules set forth within this packet.

ORAL ARGUMENT FORMAT AND CONDUCT

- At each round of oral argument, each competitor will be limited to twenty (20) minutes to present an argument. Of this time, the petitioner may choose to reserve up to three (3) minutes of rebuttal time.
- Proper courtroom etiquette and decorum must be practiced at all times toward both the judges and adversaries. Failure to act in an appropriate manner may result in a penalty and/or disqualification.

PART 5: ETHICAL REQUIREMENTS

MOOT COURT BOARD RULES

Competitors **MAY NOT**:

1. Discuss the problem, issues, brief, or the substance of the oral argument **in any way with another person**, except for questions either asked:
 - a. at the Moot Court Board's appellate skills workshop on February 20,
 - b. at optional practice arguments organized and supervised by the Board (12pm-4pm on February 26 and 27), or
 - c. submitted to the Board's Co-Chairs and determined to be appropriate for response; OR
2. Obtain or use briefs from actual cases **in any way** concerning matters similar or related to the issues in this problem.

THE LAW SCHOOL HONOR CODE

- Participants found to have violated these rules may also be subjected to disciplinary action under the Honor Code.
- THE LAW SCHOOL HONOR CODE and the RUTGERS UNIVERSITY DISCIPLINARY HEARING CODE AND PROCEDURES (see the Student Handbook) apply to participation in this competition, and to the use of all reference and other materials.

COMPLAINTS OF CHEATING/WRONGDOING, DECISIONS, AND APPEALS

- The Moot Court Board is an autonomous organization that reserves the right to decide disputes that arise from any competition it sponsors.
- Any allegations of cheating or wrongdoing brought to the Moot Court Board must be verbally raised during the night of the competition to the bailiff and followed up with a written complaint within 24 hours of the incident.
- All allegations will be decided by the Co-Chairs of the Board. Any appeal may be made within 24 hours of written notification of the Board's decision.
- The Co-Chairs of the Board and Academic Adviser of the Board will hear all appeals.
- All decisions are final and binding upon the competition and its contestants.

PART 6: QUESTIONS

GENERAL RULE

- Questions regarding the competition, no matter how small, must be submitted to LevineJ@pegasus.rutgers.edu. The Co-Chairs of the Moot Court Board will have discretion to answer questions in person, based on the appropriateness of the question.

QUESTIONS ABOUT THE COMPETITION PROBLEM AND BRIEF

- All appropriate questions about the competition problem or brief that are submitted by email to LevineJ@pegasus.rutgers.edu by 6:00 pm on Saturday, February 20 will be answered.
 - After that point, the Co-Chairs of the Moot Court Board reserve the right to decline to answer such questions.
 - The Board will, however, send out an email to competitors listing frequently asked questions and the answers provided in response.

QUESTIONS ABOUT ORAL ARGUMENT

- All appropriate questions about oral argument that are submitted by email to LevineJ@pegasus.rutgers.edu by 6:00 pm on Saturday, February 27 will be answered.
 - After that point, the Co-Chairs of the Moot Court Board reserve the right to decline to answer such questions.

2010 DAVID COHN APPELLATE ADVOCACY COMPETITION

REGISTRATION FORM

Name: _____

Competitor ID Number: _____

E-Mail Address: _____

Phone Number: _____

Schedule Conflicts (in order of importance, please list no more than five):

1. _____
2. _____
3. _____
4. _____
5. _____

Graduation Writing Requirement (please mark one):

Yes, I intend to use the competition brief to satisfy the school's writing requirement.

No, I do not intend to use the competition brief to satisfy the school's writing requirement.

- THIS FORM IS DUE IN THE MOOT COURT OFFICE (ROOM 391) BY 6:00 P.M. ON MONDAY, FEBRUARY 22, 2010.
- FAILURE TO RETURN THIS FORM BY THE DEADLINE STATED ABOVE AND BY THE MANNER REQUIRED OR OTHERWISE ALLOWED WILL RESULT IN DISQUALIFICATION.

Franklin KAMENY, Appellant v.

**Peter WARREN, in his official capacity as Director of the Administrative Office of
the United States Courts, et al., Respondents**

No. 04-5588

United States Court of Appeals for the Fourteenth Circuit

**January 21, 2009, Argued
February 12, 2009, Decided**

**Appeal from the United States District Court for the District of New Greenwich,
(No. 07-103). Before: SCHRECKENGOST and LEVINE, Circuit Judges, and
BAYER, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge
LEVINE.**

LEVINE, Circuit Judge.

INTRODUCTION

The Federal government has the distinction of being our nation’s largest employer, with a comprehensive statutory scheme governing employee benefits for more than two million federal employees. Included among this sprawling complex of federal legislation is the federal Employee Health Benefits Act, 5 U.S.C. §§ 8901-8914 (2007) (“FEHBA”), which grants health benefits to employees as well as their “spouses” and dependent children. Employees of the Federal judiciary obtain these benefits through the Administrative Office of the United States Courts (“AOUSC”),¹ led by Director Peter Warren (“Warren”). In this appeal, a Federal employee contends that the AOUSC and Director Warren (collectively, “Respondents”) violated his right to equal protection under the Fifth Amendment by denying his request for spousal benefits because of his sexual orientation. The District Court ruled in favor of the Respondents, finding that while the denial of benefits was motivated by sexual orientation, “under our

¹ The AOUSC is a central component of the Federal judiciary. In addition to administering payroll and employee benefits, the AOUSC handles public affairs, security issues, financial auditing, training programs, and caseload management.

Supreme Court's jurisprudence, such discrimination simply does not give rise to an equal protection claim in the context of marital benefits." *Kameny v. Warren*, No. 07-103, slip op. at 1 (D.N.G. Jan. 16, 2008). For the reasons stated below, we reverse the District Court's decision and order Respondents to process the Petitioner's request for spousal benefits.

I. BACKGROUND

The facts in this case are uncontested. The Petitioner, Franklin Kameny ("Kameny" or "Petitioner") resides in Nevins City, New Greenwich and is a permanent law clerk for The Honorable Sarah Marsey ("Judge Marsey"), a Senior Judge on the United States District Court for the District of New Greenwich. After graduating from law school in 2002, Kameny began practicing at the New Greenwich law firm of Betcher, Atkin & Lewis. On February 22, 2005, Kameny and his long-term partner Jack Nichols ("Nichols") were married pursuant to the New Greenwich Civil Marriage and Religious Protection Act ("CMRPA"), P.L. 2005, Chapter 103, which eliminated the state's prohibition on same-sex marriage. Three months later, the couple jointly adopted a two-year-old son, Frederick Nichols-Kameny ("Frederick"). In the following months, Kameny decided to pursue a career change that would allow him to spend more time with his family. After applying for several clerkships, he left his law firm and accepted a permanent position with Judge Marsey, which he began on September 26, 2005.

At that time, Nichols was employed as an administrator at a Nevins City public school. Nichols's job provided their family with an additional source of income and generous health insurance benefits. As required by the CMRPA, the Nevins City school system extended spousal health insurance benefits to same-sex and opposite-sex spouses alike. Consequently, Nichols was able to request that Kameny be named a beneficiary of his employer-provided health insurance policy.

On March 7, 2006, however, Nichols lost his job in a round of layoffs by the New Greenwich Department of Education. In anticipation of Nichols losing his health insurance, Kameny filed insurance forms with the AOUSC requesting that both Nichols and Frederick be added as beneficiaries of his Federal health insurance policy. Under

the FEHBA, Federal employees may elect coverage “either as an individual or for self and family,” 5 U.S.C. § 8905(a), and the term “member of family” is defined as “the spouse of an employee or annuitant” or “an unmarried dependent child under 22 years of age.” 5 U.S.C. § 8901(5). However, while Kameny’s request was granted with respect to Frederick, he received a notice denying the extension of coverage to Nichols. The reason behind this denial was simple; unlike the State of New Greenwich, the Federal government will not extend spousal benefits to married same-sex partners because, under the Federal Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, such couples cannot be deemed “spouses” for the purpose of the FEHBA.² Specifically, DOMA mandates that,

“[i]n 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.”

Id.

Kameny became increasingly outraged by the government’s refusal to provide him with spousal health insurance benefits readily available to all married heterosexual employees.³ By December of 2006, the monthly cost for an additional health insurance policy for Nichols, who remained unemployed, had reached \$600. On December 14, 2006, Kameny again submitted insurance forms to the AOUSC, requesting that Nichols be made a family member beneficiary of his Federal health benefits. That request was denied on the basis of an official Agency Opinion prepared by Director Warren, stating

² DOMA prevents same sex partners from receiving a host of Federal benefits. See Mary L. Bonauto, *Doma Damages Same-Sex Families*, 32-WTR FAM. ADVOC. 10 (2010).

³ Kameny was not the only Federal employee outraged by this policy. On November 20, 2007, former Ambassador to Romania Michael Guest resigned from his position at the State Department in protest of the Department’s refusal to extend benefits to domestic partners of State Department employees. At his widely publicized retirement ceremony, Guest voiced his frustration, stating “I’ve felt compelled to choose between obligations to my partner — who is my family — and service to my country. That anyone should have to make that choice is a stain on the Secretary’s leadership and a shame for this institution and our country.” Glen Kessler, *Envoy Quits State Department Over Policies on Gay Partners*, SAN FRANCISCO CHRONICLE, Dec. 7, 2007, at A 30.

that the provision of benefits to same-sex spouses is prohibited by DOMA. According to the Opinion:

[T]he Federal government does not recognize a same-sex union as marriage for any purpose, even if the state law recognizes such unions as marriages. Judicial Branch employees work for the Federal government. The Federal law defines a Federal employee's rights to health benefits, and those benefits are delivered through the Federal Employee Health Benefits (FEHB) program. For this reason, we cannot extend any health benefits beyond those prescribed by Federal law.

36 Dir. AOUSC Op. No. 01-105 (Dec. 21, 2006).

On March 17th, 2007, after exhausting all administrative remedies, Kameny filed a suit against Director Warren and the AOUSC, alleging that the Respondents' application of DOMA violated his right to equal protection under the Fifth Amendment. Both parties stipulated to the facts and cross-moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The District Court granted summary judgment for the Respondents, finding, as a matter of law, that Kameny's challenge was foreclosed by *Baker v. Nelson*, 409 U.S. 810 (1972). We now reverse the District Court's determinations and grant the Petitioner's request for summary judgment.

II. DISCUSSION

The Petitioner raises challenging questions regarding the proper role of sexual orientation in the legislative arena. For the reasons stated below, we hold 1) that *Baker v. Nelson* does not preclude Petitioner's challenge to the denial of his spousal benefits, and 2) that the application of DOMA to deny Petitioner's spousal benefits on the basis of his sexual orientation violates the Constitutional guarantee of equal protection under the Fifth Amendment. Consequently, we reverse the District Court's decision and grant the Petitioner's request for summary judgment.

Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In this case, both parties have stipulated to all material facts, and the only remaining questions are questions of law. As discussed below, we find that the

Petitioner is entitled to his requested benefits as a matter of law, and we order the Respondents to process his request and add Nichols as a beneficiary of his Federal benefits.

A. *Baker v. Nelson* is Not Controlling

We turn first to the District Court's determination that, as a matter of law, Petitioner's challenge is foreclosed by *Baker v. Nelson*. The challenge in *Baker* reached the US Supreme Court in 1972 on appeal from a decision of the Minnesota Supreme Court. In the underlying case, plaintiffs Richard Baker and James McConnell challenged Minnesota's prohibition on same-sex marriage, alleging, *inter alia*, that the statute deprived them of equal protection under the Fourteenth Amendment to the U.S. Constitution. The Minnesota Supreme Court rejected their claims, finding that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis," and consequently that the "equal protection clause of the Fourteenth Amendment . . . is not offended by the state's classification of persons authorized to marry." *Baker v. Nelson*, 291 Minn. 310, 312-313 (1971).

After that decision was rendered, the plaintiffs sought mandatory review from the U.S. Supreme Court pursuant to 28 U.S.C. § 1257(2), a now antiquated mechanism of mandatory appellate jurisdiction over Federal challenges litigated in state supreme courts. In short, unlike the *certiorari* process that now governs such appeals, at that time the Court was required by Federal law to reach the merits of the plaintiffs' claim. However, as it had done in numerous other instances of mandatory review, the Court chose not to hold oral arguments or issue a written opinion, and instead issued a summary dismissal "for want of a substantial Federal question." *Baker*, 409 U.S. at 810.

While it has been more than two decades since the Court's mandatory appellate jurisdiction was repealed, establishing the precedential value of such summary dispositions remains a daunting task. In drawing its own conclusion, the District Court began with the premise that, unlike a denial of *certiorari*, a dismissal for want of a substantial Federal question is considered a decision on the merits and is binding on

lower courts. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). On these grounds, the District Court concluded that, “in issuing its summary decision, the Supreme Court held that the plaintiffs in *Baker* lacked a cognizable claim under the Fourteenth Amendment, and the Court’s decision effectively foreclosed future equal protection challenges to statutes limiting marital recognition to opposite sex couples.” *Kameny*, No. 07-103, slip op. at 2.

While it is beyond dispute that a summary decision functions as a decision on the merits, this premise should have served as the beginning and not the end of the District Court’s inquiry. As recounted by the Third Circuit in *Lecates v. Justice of the Peace*, 637 F.2d 898, 902-07 (1980), Supreme Court decisions subsequent to *Hicks* have significantly limited the precedential value of summary dismissals. To begin with, it is now widely understood that summary dismissals affirm the judgment and not necessarily the reasoning of the lower court. *Mandel*, 432 U.S. 173, 176 (1977) (Burger, J., concurring). Furthermore, as summarized in *Lecates*:

Under *Mandel* and *Illinois State Board*, the precedential value of a summary disposition by the Supreme Court is to be confined to the exact facts of the case and to the precise question posed in the jurisdictional statement. Furthermore, indications that there have been doctrinal developments since the summary action will relieve a lower court from the duty to adhere to a summary disposition.

637 F.2d at 904 (citing *Mandel*, 432 U.S. at 173; *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)).

In the instant case, the District Court failed to properly consider whether Kameny’s challenge posed novel legal questions outside the Supreme Court’s jurisdictional statement in *Baker*. Similarly, the District Court failed to determine whether doctrinal developments in the Supreme Court’s equal protection jurisprudence relieved it from its duty to apply *Baker*. We now reverse the District Court’s decision and find that *Baker* does not foreclose Kameny’s equal protection challenge.

First, we find that the legal challenge presented by Kameny is sufficiently distinguishable from the issues posed in *Baker* to avoid its application as precedent. In *Baker*, the relevant jurisdictional question considered by the Supreme Court inquired

“[w]hether appellee’s refusal, pursuant to Minnesota marriage statutes, to sanctify appellants’ marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.” Juris. Statement in *Baker v. Nelson*, October Term, 1972, p. 3. At first blush, this question bears a substantial similarity to Kameny’s challenge, specifically as it seeks to challenge the denial of marital recognition to same-sex couples along equal protection grounds. However, we find that the factual distinctions are legally significant.

Whereas the plaintiffs in *Baker* sought to challenge a state marriage licensing statute under the Fourteenth Amendment, here Kameny is bringing a Fifth Amendment challenge to DOMA, a Federal statute “with its own Congressional history that concerns exclusively Federal benefits.” *In re Kandu*, 315 B.R. 123, 137 (Bankr. W.D. Wash. 2004); *Smelt v. Count of Orange*, 374 F. Supp. 2d 861, 872 (C.D. Cal. 2005) (finding that *Baker* did not preclude a Fifth Amendment Challenge to DOMA); *c.f. Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fl. 2005) (applying *Baker* as binding precedent to plaintiff’s challenge to DOMA); *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal 1980) (applying *Baker* and finding that the INS’s denial of immediate relative status to a same sex foreign spouse did not violate equal protection). Consequently, the legal issues raised by Kameny’s challenge are sufficiently novel to fall outside of the Supreme Court’s jurisdictional statement in *Baker*.

Second, we do not rest our decision solely on the arguable dissimilarities between Kameny’s claim and the issues posed in *Baker*. As the Supreme Court stated in *Hicks*, “if the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*.” 422 U.S. at 344 (emphasis added). In accordance with this principle, we find that, over the past four decades, doctrinal developments in the Supreme Court’s equal protection jurisprudence have effectively eviscerated the limited precedential value of the Court’s summary decision in *Baker*. Specifically, the Court’s recent decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Romer v. Evans*, 517 U.S. 620 (1996) signal a radical shift in the constitutional analysis of laws that discriminate on the basis of sexual orientation. See *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (noting the majority’s decision “leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples”); *Smelt*, 374

F.Supp.2d at 873 (“[i]t seems unlikely the Supreme Court would bypass the rational basis analysis prescribed in *Romer* by relying on the binding effect of *Baker*.”); Andrew Koppelman, *Symposium: Romer v. Evans*, 6 WM. & MARY BILL RTS. J. 89 (1997) (arguing that *Romer* stands for the proposition that all laws that discriminate against gays are constitutionally suspect); Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453 (1997). In light of these decisions, we disagree with the District Court’s conclusion that, because *Baker* has never explicitly been overruled, it remains binding on the questions posed by Kameny. Accordingly, we now discuss the merits of Kameny’s claim.

B. Petitioner Prevails on His Fifth Amendment Claim

We conclude that the application of DOMA to deny Kameny’s spousal benefits violates his right to equal protection under the Fifth Amendment.⁴ While the Fifth Amendment contains no equal protection clause itself, it has been interpreted to prohibit discrimination that is so “unjustified as to be violative of due process,” and Fifth Amendment equal protection claims are analyzed in the precise same manner as claims under the Fourteenth Amendment. *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). While there is no explicit reference to sexual orientation in DOMA itself, here the statute is being applied to promote the provision of spousal benefits to married heterosexual employees while denying those same benefits to lawfully wedded gay and lesbian employees. We therefore conclude that Kameny has suffered discrimination on the basis of his sexual orientation. The Respondents’ refusal to grant the Petitioner’s application for spousal insurance benefits was so “‘closely correlated with [his] being homosexual’ as to make it apparent [that] the law is targeted at gay and lesbian people as a class.” *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) (quoting *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring)).

⁴ Because the Respondents are part of a Federal agency, the Fourteenth Amendment, which applies only to state government, is not applicable in this case.

i. Rational Basis Review

While the Supreme Court has not provided clear guidance on the appropriate level of scrutiny for this type of discrimination, we believe that, under the Court's jurisprudence, gays and lesbians should be deemed either a suspect or quasi-suspect class entitled to some degree of heightened scrutiny. See *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 232-38 (2008); *Varnum*, 763 N.W.2d at 885-95.

However, because we find that the Respondents' action cannot be justified under even rational basis review, we will not reach the broader constitutional question of whether heightened scrutiny may be appropriate. See *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885) (ordering the judiciary "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."). Accordingly, because there is no rational basis for denying spousal benefits to gay Federal employees while granting those benefits to identically situated heterosexual employees, we conclude that the application of DOMA to reach that result is unconstitutional.⁵

The Supreme Court has long recognized that, as a practical matter, "most legislation classifies for one purpose or another," and that where a law does not burden a fundamental right or target a suspect class, it will be upheld "so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. However, the rational basis test articulated by the Court does not compel unquestioning deference to legislative claims of rationality, and "[i]f the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality [is] suspect." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring). We disagree with the Dissent's characterization of rational basis review as a toothless analysis that compels us to rubber stamp legislative pretexts for discrimination, and we find ample case law to

⁵ It is significant to note that Kameny is not bringing a facial challenge to DOMA but rather challenges the statute "as applied" to deny his spousal benefits. Consequently, we need not "establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). Instead, we need only address the narrow question of the Respondents' application of DOMA to deny federally mandated spousal benefits to the Petitioner based on his sexual orientation.

support our conclusion. See, e.g. *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (“States may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”).

ii. Review of Governmental Interests

We thus turn to a review of the five governmental interests that are allegedly furthered by the application of DOMA in this case. First, the Respondents identify four interests contained within the legislative history of DOMA, including “(1) defending and nurturing the institution of traditional heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self governance; and (4) preserving scarce government resources.” H.R.Rep. No. 104-664, at 12, *reprinted* in 1996 U.S.C.C.A.N. at 2916. Additionally, the Respondents argue that the application of DOMA in this case furthers the state’s interest in promoting the development of relationships optimal for procreating and raising children.

To begin with, we find no rational relationship between the denial of Kameny’s spousal benefits and the proposed interest in defending and nurturing traditional heterosexual marriage. Kameny and Nichols are already lawfully married in New Greenwich, and it is simply irrational to suppose that the Respondents’ actions will encourage them or other gay people to enter into marriages with members of the opposite sex. Likewise, it is not clear how denying Kameny’s benefits will nurture or promote the marriage of heterosexual couples. See *Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 793 (Alaska 2005) (“There is no indication . . . that denying benefits to public employees with same-sex domestic partners has any bearing on who marries.”). Furthermore, we agree with the Montana Supreme Court that granting equal benefits to gay and lesbian employees “has not destroyed any important institutions in or the moral fabric of our society, and there is no evidentiary basis for concluding that

extending health insurance benefits to gay and lesbian couples will have that effect either.” See *Snetsinger v. Montana Univ. Syst.*, 325 Mont. 148, 178 (2004)

But at an even more fundamental level, we find that the defense of the traditional, heterosexual institution of marriage is simply not a legitimate state interest for equal protection purposes. The basic premise of equal protection is that a classification may not be maintained “for its own sake,” and thus the preservation of a tradition cannot justify a statute “when the tradition is nothing more than the historical classification . . . expressed in the statute.” *Romer*, 517 U.S. at 635; *Varnum*, 763 N.W.2d at 898. Here, the Respondents are arguing that the denial of marital recognition and benefits to a gay employee is justified by a history of denying marital recognition and benefits to gays and lesbians in general. This is surely an argument wherein “the justification of ‘tradition’ does not explain the classification; it merely repeats it.” *Hernandez v. Robles*, 7 N.Y.3d 338, 395 (2006) (Kate, J., dissenting). As the Massachusetts Supreme Court rightly noted, “neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families.” *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 973 (Mass. 2003). Accordingly, we find that the defense of traditional heterosexual marriage entails discrimination for “its own sake” and may not be considered a legitimate state interest. See *Romer*, 517 U.S. at 635.

The Respondents also argue that denial of the Petitioner’s benefits is supported by the defense of traditional notions of morality. However, the Supreme Court’s decisions in *Lawrence* and *Romer* establish that “[m]oral disapproval of [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.” *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring); *Romer*, 517 U.S. at 644 (Scalia, J., dissenting) (noting that the Colorado constitutional amendment held unconstitutional by the majority expressed the “moral disapproval of homosexual conduct”); *c.f. Williams v. Alabama*, 378 F.3d 1232, 1238, n.8 (11th Cir. 2004) (finding that the promotion of morality remains a legitimate state interest). In light of its legislative history, we do not doubt for a moment that the application of DOMA in this context is motivated by an honestly held moral

disapproval of homosexuality among many of our nation's legislators. See H.R. REP. NO. 104-664, at 15-16; 142 CONG. REC. H7444 (daily ed. July 11, 1996) ("No society . . . has lived through the transition to homosexuality and the perversion which it [brings] forth.") (statement of Rep. Tom Coburn); 142 CONG. REC. H7482 (daily ed. July 12, 1996) ("The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society. . . .") (statement of Rep. Bob Barr); 142 CONG. REC. S10068 (daily ed. Sept. 9, 1996) (DOMA "will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America's moral fabric in the process.") (statement of Sen. Jesse Helms).

That passionate and conflicting senses of morality underlie our nation's political process is beyond dispute. Indeed, it is a testament to the vitality and strength of our political institutions that such deep ideological conflicts are resolved through our electoral process. However, while we value the intensity of this political debate, we are guided in our decision by the Supreme Court's frequent reminder that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidote*, 466 U.S. 429, 433 (1984). In accordance with this principle, we find that the promotion of "traditional" morality at the expense of a disfavored minority does not constitute a legitimate state interest and thus cannot justify the denial of the Petitioner's benefits.

The Respondents also argue that the application of DOMA is justified by a concern for state sovereignty. We agree that the regulation of marriage, like other domestic affairs, touches on issues fundamentally rooted in the sovereignty of states. However, we see no logical connection between *denying* the Petitioner's request for spousal benefits and *promoting* state sovereignty. To the contrary, the denial of benefits directly cuts against the State of New Greenwich's carefully deliberated exercise of its sovereign authority to regulate the institution of marriage. Because refusing to recognize New Greenwich's decision in this regard does not promote New Greenwich or any other state's sovereignty, such an interest cannot rationally be related to the denial of the Petitioner's benefits.

Furthermore, while preserving scarce government resources is undoubtedly a legitimate governmental interest, the “government ‘may not accomplish such a purpose by invidious distinctions between classes of its citizens.’” *Moreno*, 413 U.S. at 543 (citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)). The spousal healthcare benefits denied to the Petitioner have a significant monetary value and constitute a coveted aspect of employee compensation. The Respondents’ argument, taken to its logical conclusion, suggests that financial savings can always justify discrimination on the basis of sexual orientation. However, we find the idea that the government could preserve its resources by terminating or cutting the salaries of its gay employees repugnant to the basic premise of equal protection, and we fail to see the distinction between that hypothetical and the case currently before us. While classification is often an inevitable component of the legislative process, such classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). There is simply no rational connection between an employee’s sexual orientation and the government’s desire to limit its health insurance expenses. Accordingly, such a concern cannot rationally support the denial of the Petitioner’s request for spousal health benefits.

Finally, we reach the Respondents’ contention that the application of DOMA in this case promotes the optimal environment for procreation and raising children. Again, this court fails to see any rational relationship between denying the Petitioner’s request for health insurance benefits and promoting the interest of children. To begin with, like many Federal employees, the Petitioner has decided to undertake the very difficult and rewarding task of raising a family with his spouse. That his family, and thus his son Frederick, would benefit from receiving the entire value of his employment compensation is no less true than if the Petitioner were heterosexual. We cannot rationally conceive how refusing to provide full compensation in this instance improves the child rearing environment of this or any other family. Further, we find that even if promoting opposite sex family groups were a permissible goal of the statute, it is simply irrational to argue that denying benefits on the basis of sexual orientation will

discourage gay couples from raising children or somehow encourage heterosexual couples to do so. To whatever extent such a goal is a legitimate governmental interest, it is clearly not served by the denial of the Petitioner's benefits, and cannot serve as a rational basis for that decision.

III. CONCLUSION

Having reviewed the alleged governmental interests, we find no conceivable rational basis that supports the application of DOMA to deny the Petitioner's request for spousal benefits. In coming to this conclusion, we reject the notion that decisions concerning fundamental social institutions like marriage are matters solely for our nation's legislatures. Such an argument finds no foothold in the jurisprudence of our courts. Rather, the history of civil rights in this country reveals that our laws are slow to adapt to evolving conceptions of human dignity, and that the courts must often lead the way when our legislatures are unable or unwilling to guarantee *all* citizens equal treatment under the law. As jurists, we cannot help but reflect on the fact that, in the course of our own lives, we have seen a time when racial segregation was said to be reconcilable with our Constitution's guarantees of equal protection. A century from now, we will likely look back in similar awe at our current treatment of certain disfavored minorities. As Justice Kennedy reminded us in *Lawrence*, "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." 539 U.S. at 578-79. We believe that DOMA, as applied here, is one such law. Accordingly, we find that the denial of the Petitioner's request for spousal benefits is a violation of his right to equal protection under the Fifth Amendment.

For the foregoing reasons, we reverse the decision of the U.S. District Court for the District of New Greenwich and we order Director Warren and the Administrative Office of the United States Courts to immediately process the Petitioner's request that his husband be added as a beneficiary of his Federal health benefits.

BAYER, Senior Circuit Judge, *dissenting*:

From our nation's beginning, the Founding Fathers have assured the citizens of this nation that our Constitution would not permit capricious life-tenured judges to nullify the valid and justifiable laws enacted by their elected representatives. Alexander Hamilton adeptly stated in FEDERALIST 78, "[i]t can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature." FEDERALIST No. 78. Rather, the judiciary is "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." *Id.* The majority's opinion makes a mockery of Hamilton's assurances. Not only does this Court trample on 234 years of well-established morality and jurisprudence, it does so at the utmost expense of the Constitution and the elected legislature.

Today, the Court mistakes purported social ideals, for valid constitutional interpretation. Instead of relying on 'rules' and 'precedents', the Court has merely rubber-stamped the flimsy arguments crafted by the so-called "homosexual agenda." See *Lawrence*, 539 U.S. 558, 602 (Scalia, J., dissenting). First, the Court finds that "doctrinal developments" warrant judicial examination of the relationship between equal protection and sexual orientation. However, over the past forty years, and most notably in the last fourteen, our jurisprudence has demonstrated more of a concern for the overbreadth of particular legislation and less for the protection of a small social sub-group. Second, the Court fillets the meaning of 'rational basis review.' Contrary to precedent, the Court has invalidated the government's reasoning for a law's enforcement because it contradicts the Court's subjective and pre-determined conclusions.

In conducting this type of review, the Court has boldly ignored the meaning of rational basis review. Rational basis review bestows substantial deference to the legislature's enactments, so long as these enactments serve a legitimate state purpose. *United States v. Carolene Products Company*, 304 U.S. 144, n.4 (1938). Indeed, rational basis review is "a paradigm of judicial restraint," and not "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications Inc.*, 508 U.S. 307, 313-14 (1993) (citation omitted). Since Petitioner

is not a member of a constitutionally suspect class and makes no assertion to the contrary, the majority has no legal basis in holding the government's legislative decision to a de facto heightened scrutiny. See generally *Korematsu v. United States*, 323 U.S. 214 (1944).

These conclusions represent a clear substitution of the Court's judgment for that of the elected representatives of this country. Because I do not believe the subjective views of a few members of this Court and like-minded agenda-driven individuals should mandate a state's legitimate legal policies, I dissent.

I. BAKER v. NELSON

As an initial consideration, this Court should never have considered this case based on the holding in *Baker v. Nelson*, 409 U.S. 810 (1972). Not only are the assertions of this case categorically the same as the propositions in *Baker*, doctrinal developments have not demonstrated a certain maturity that would permit us to hear the Petitioner's claim. Rather, the constitutional challenge asserted by the Petitioner remains insubstantial at this time. Homosexuals are not members of a suspect class, and constitutional challenges that require the court to treat them as such do not present a cognizable claim. While the majority indicates that a renewal of these considerations might be warranted, equal protection as it stands does not require the judiciary to reevaluate its precise relationship to homosexuals. Rather, *Baker* remains binding precedent.

No jurisprudential developments indicate that this Court is faced with an issue that is equipped for judicial review. The majority refers to *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003), in an attempt to demonstrate that developments in case law dictate we now consider the matter before us. On its face, the decision in *Romer* appears to nullify legislation targeted towards homosexuals. 517 U.S. at 620. However, in that case, the Supreme Court invalidated Colorado's Amendment 2 simply because it was overly broad in its denial of protections. *Id.* at 632. In particular the Court noted, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a

denial of equal protection of the laws in the most literal sense.” *Id.* at 633. The Court’s determination that there was no legitimate state purpose in passing that type of amendment was born out of a concern that Colorado would thereafter unequivocally deny government protection to a group of citizens, without regard for their potential needs. *Id.* at 620. The language of *Romer* does not indicate that the Court was concerned for homosexuals as a suspect class or that future narrowed legislation addressing the state’s concerns would be overturned. Instead, “[i]t was the extreme overbreadth of Amendment 2 — not the identity of the class of persons covered by the Amendment” that formed the basis of the Court’s decision. Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage*, 6 WM. & MARY BILL RTS. J. 147, 150 (1997). Further indication that *Romer* is not a “gay rights” case, as the majority characterizes it, is that the Court did not so much as reference the holding of *Bowers v. Hardwick*, 478 U.S. 186 (1986) (citations omitted) in rendering its opinion. Instead of fitting within a doctrinal framework of equal protection for homosexuals, *Romer* actually stands as a judicial opinion on the constitutionality of overly broad statutes.

Moreover, while *Lawrence* invalidated sweeping anti-sodomy laws and overruled *Bowers v. Hardwick*, the Supreme Court also explicitly stated that their decision did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Lawrence*, 539 U.S. at 578. This case does not assert that homosexual marriage is a fundamental right under the Due Process Clause nor does it conclude that governments have an obligation to approve or endorse homosexual relationships. While certainly a landmark case for the homosexual community, *Lawrence* does not represent any type of doctrinal development or capstone that indicates courts must now consider whether the Federal government must recognize state-legalized homosexual marriages. Regardless of the changes in attitudes in our society, constitutional entitlements do not come into existence simply because certain behaviors are decriminalized or become more accepted. The “doctrinal developments” envisioned in *Hicks* did not refer to changes in society; they referred to changes in the Supreme Court’s jurisprudence. See 422 U.S. at 344. Consequently, since the case law has not evinced a need for this Court to revisit the issue of same-sex

marriage or marital benefits, the Majority should have applied the Supreme Court's ruling in *Baker* and should not have reached the merits of this case.

II. RATIONAL BASIS REVIEW

Even if the case before us bypassed this precedential barrier, the majority's conclusions today are nonetheless misguided. A judge's role is not to determine what the law should be, but to determine whether the law conforms to constitutional standards and to defer to the legislature. Had my fellow justices employed the Constitution instead of their personal views, they would have reached the proper conclusion that, under rational basis review, the state is constitutionally permitted to employ DOMA in determining whether to extend health benefits to certain individuals. Further, under rational basis review, a statute is presumed constitutional unless the plaintiffs can show that the classification drawn is not rationally related to a legitimate state interest. *Heller v. Doe*, 509 U.S. 312, 319 (1993); see also Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court From the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999) (in the Supreme Court, between the years of 1971 and 1996 there have been only ten successful rational basis claims out of hundreds under the Equal Protection Clause). In the area of economic and social welfare legislation, "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect" or because "the classification 'is not made with mathematical nicety or . . . results in some inequality.'" *Dandridge v. Williams*, 397 U.S. 471 (1970) (citations omitted). Consequently, if a certain group possesses certain characteristics and the state chooses to identify these characteristics in implementing a legitimate legislative action, a constitutional violation does not automatically result. *Bd. of Trs. Of the Univ. of Ala. v. Garret*, 531 U.S. 356, 366 (2001) (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985)).

In the case before us, the Federal government has determined that its particular definition of marriage best serves the policy underlying its distribution of health benefits. While this determination most certainly affects particular individuals, the reasoning for the government's decision cannot be challenged as unconstitutional without some affirmative demonstration of its illegitimacy. Petitioner has made no such showing. Nor

has the majority explained how the interests it deems irrational have been upheld as legitimate by every Federal court and nearly every state court that has considered them. See, e.g., *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fl. 2005); *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal 1980); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006).

Concededly, animus for a certain group of individuals does not give rise to a legitimate state interest that warrants upholding a statute. *Romer*, 517 U.S. at 634. However, the majority has erroneously determined that the antigay sentiments expressed by a few members of Congress have undermined the legitimacy of the government's application of this law. In asserting that those who voted for DOMA are bigots, and on account of that, that the statute's application is invalid, the majority is incorrectly extending the bounds of rational basis review. The impetus behind a handful of legislators voting for DOMA is not dispositive of a determination that the legislation does not bear a rational relation to a legitimate state purpose. Furthermore, precedent indicates that morality based legislation may further a legitimate state interest. See, e.g. *Virginia v. Black*, 538 U.S. 343, 359 (2003) (state has a legitimate "social interest in order and morality" to justify its prohibition of cross burning); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (government had a substantial interest in public decency statutes). One only has to look to statutes prohibiting bigamy, incest, prostitution, fornication, bestiality, and obscenity to see that morality-based laws are sustainable. Moreover, the Supreme Court in *Romer* merely displayed a discomfort with exclusively moral-based rationales for legislation. 517 U.S. at 635. In the current case, morality is but one reason for the contested government action.

Even where traditional concepts of morality have shifted, the state, not the judiciary, holds the right to adjust its laws to meet the emerging needs of the people. See *In re Marriage Cases*, 49 Cal Rpt .3d 675, 685 (Cal. App. 1 Dist.,2006), *overruled by In re Marriage Cases*, 76 Cal. Rptr. 3d 683 (Cal. May 15, 2008) (NO. S147999), rehearing denied (Jun 04, 2008) ("moral judgments about balance, order, beauty, and goodness, and prudential judgments concerning the best social policy are all in the

exclusive purview of the legislative branch.”). By utilizing DOMA to implement its health benefit scheme, the government is not prohibiting homosexuals from engaging in the lifestyle of their choice. Rather, it is manifesting the belief that its policy is best served by aligning itself with culturally embedded notions of marriage. This determination is no more unconstitutionally discriminatory than the government’s decision to restrict marriage to a union between *one* woman and *one* man. The recognition of certain types of marriages does not demean others’ choices or express disapproval of their decision.

I do not dispute that attitudes towards same-sex couples have changed positively throughout the years, that they enter into meaningful committed relationships, or that they may promote their agenda through democratic means. What I am not prepared to concede, however, is that the judiciary and not the legislature should determine what the laws of our nation should be. Accordingly, I dissent.

Rutgers School of Law - Newark

2010 David Cohn Appellate Advocacy Competition

SUPREME COURT OF THE UNITED STATES

FALL TERM 2010

DOCKET NO. 2010 – 1678

FRANKLIN KAMENY,
Plaintiff - Petitioner,

v.

PETER WARREN, et al.,
Defendants - Respondents.

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit, having been reviewed by JUSTICE SOTOMAYOR and referred by her to the Court, is granted.

The Court certifies the following questions:

1. Is the Supreme Court's summary disposition in *Baker v. Nelson* binding precedent in a Fifth Amendment equal protection challenge to a denial of spousal benefits on the basis of sexual orientation?
2. For the purposes of a Fifth Amendment equal protection challenge, does the application of the Defense of Marriage Act to deny spousal benefits on the basis of sexual orientation survive rational basis scrutiny?