Case Nos. 10-2204, 10-2207 and 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
NANCY GILL, *et al.*,
Plaintiffs-Appellees,
KEITH TONEY; ALBERT TONEY, III,
Plaintiffs,
v.
OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants/Cross-Appellees,
HILARY RODHAM CLINTON,
in her official capacity as United States Secretary of State,
Defendant.

Appeals from the United States District Court for the District of Massachusetts
Civil Action Nos. 1:09-cv-11156-JLT, 1:09-cv-10309-JLT
(Honorable Joseph L. Tauro)

BRIEF OF *AMICUS CURIAE*, MASSACHUSETTS FAMILY INSTITUTE, IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

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FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae, Massachusetts Family Institute, has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. As it has no stock, there is no publicly held corporation that owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Massachusetts Family Institute, Inc., a not-for-profit research and education corporation organized under the laws of the Commonwealth of Massachusetts, is dedicated to strengthening the family and upholding traditional moral values in the public policy and cultural arenas. Founded in 1991, MFI is a strong supporter of male-female marriages and mother-father-children families. MFI seeks to carry out its mission by a team of professional staff and volunteers made up of physicians, lawyers, and university professors. The case at bar is of the utmost interest to MFI. The family values espoused by MFI directly conflict with the plaintiffs' request for same-sex "marriage" to be recognized by the federal government. MFI is concerned with the untold consequences same-sex "marriages" will have on American society, moral principles, and the family.

This Brief is filed pursuant to consent of all parties. No party or party's counsel authored any part of the brief nor contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

These cases are not the first challenges to the Defense of Marriage Act (DOMA). Since its enactment, the Department of Justice has successfully

defended the law, in part due to the binding precedent of *Baker v. Nelson*, 409 U.S. 810 (1972). *See, e.g., Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005). But in these cases, surprisingly, the Department of Justice has not mentioned *Baker v. Nelson*. But because *Baker* is controlling precedent, this Court must consider it. This brief provides the Court with the missing argument that the Supreme Court has foreclosed assertions that there is a fundamental right to same-sex "marriage" in *Baker v. Nelson*.

ARGUMENT

In *Baker v. Nelson*, 409 U.S. 810 (1972) ("appeal dismissed for want of a substantial federal question"), the United States Supreme Court considered and rejected the claims by two Minnesota men that Minnesota's exclusion of same-sex couples from marriage violated the Ninth and Fourteenth Amendments to the U.S. Constitution. The Court affirmed the Minnesota Supreme Court's ruling that there is no fundamental right to same-sex "marriage" under the Ninth Amendment or the Due Process Clause of the Fourteenth Amendment, and that excluding same-sex couples from marriage does not constitute irrational or invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment. *See Baker v. Nelson*, 291 Minn. 310, 311-13, 191 N.W.2d 185, 186-87 (Minn. 1971). Although the question presented in *Baker v. Nelson* was in the context of the Minnesota law

rather than DOMA, the laws are identical in their definition of marriage as the union of a man and a woman. As a result, *Baker*'s precedent controls.[1]

I. *BAKER V. NELSON* HAS PRECEDENTIAL VALUE THAT PREVENTS A LOWER COURT FROM HOLDING THAT DOMA'S DEFINITION OF MARRIAGE VIOLATES THE U.S. CONSTITUTION.

Under current *certiorari* jurisprudence, it seems strange to say that there is precedential value in a Supreme Court dismissal of an appeal from a State Supreme Court, with no opinion from the Court. Indeed, under current rules, review of a State Supreme Court decision is entirely discretionary under the U.S. Supreme Court's *certiorari* jurisdiction. 28 U.S.C. § 1257(a). "*Cert. denied*" now has little, if any, precedential effect. *See Hopfmann v. Connolly*, 471 U.S. 459, 460-61 (1985) (unlike dismissal for want of a substantial federal question, denial of *certiorari* has no precedential effect). But the Supreme Court jurisdictional rules were altered in 1988. Until then, 28 U.S.C. § 1257 stated:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) *By appeal*, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution,

[1] Prior to this case, the Justice Department agreed. "Because *Baker* specifically resolved due process and equal protection challenges to the traditional definition of marriage . . . *Baker* remains the governing precedent with respect to marriage." Brief for Appellee United States at 16, *Smelt v. Cnty. of Orange*, 447 F.3d 673 (9th Cir. 2005) (No. 05-56040).

> treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. § 1257 (as amended July 29, 1970, Publ. L. 91-358, 84 Stat. 590) (emphasis added). Because the Minnesota Supreme Court decided that the Minnesota statute was valid under the U.S. Constitution, 28 U.S.C § 1257 gave the plaintiffs an automatic right of appeal to the U.S. Supreme Court.

Governed by the same language in effect at the time of *Baker*, in *Hicks v. Miranda*, 422 U.S. 332 (1975), the Supreme Court described the significance of an order dismissing an appeal for lack of a substantial federal question. In *Hicks*, a movie theater owner filed suit in federal court, seeking an injunction against enforcement of California's obscenity statute on the ground that it violated the U.S. Constitution. On June 4, 1974, a three-judge District Court panel relied on *Miller v. California*, 413 U.S. 15 (1973) (*Miller I*) and held that the California obscenity statute did not meet the *Miller* standards and was, therefore, unconstitutional. *Hicks*, 422 U.S. at 340. But six weeks later, in *Miller v. California*, 418 U.S. 915 (1974) (*Miller II*), the U.S. Supreme Court dismissed for want of a substantial federal question a subsequent appeal from a state court decision *upholding* the same California obscenity statute against a federal constitutional challenge. *Hicks*, 422 U.S. at 340. The three-judge *Hicks* panel, however, rejected a motion to reconsider and concluded that it was not bound by the Supreme Court's dismissal of *Miller II*. *Hicks*, 422 U.S. at 341. The Supreme Court, however, disagreed:

> We agree with appellants that the District Court was in error in holding that it would disregard the decision in *Miller II*. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. § 1257(2), and *we had no discretion to refuse adjudication of the case on its merits* as would have been true had the case been brought here under our *certiorari* jurisdiction. We are not obligated to grant the case plenary consideration, and we did not; but *we were required to deal with its merits*. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. *The three-judge court was not free to disregard this pronouncement*.

Hicks, 422 U.S. at 343-44 (emphasis added).

The Supreme Court further clarified the extent of precedential impact of a case in which an appeal was dismissed for want of a substantial federal question in *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*). In *Mandel*, the Court criticized a three-judge panel for assuming that *Hicks* meant that a summary affirmance of a district court opinion meant that the Court had adopted the reasoning (and not just the judgment) of the decision being appealed. It reiterated its statement in *Hicks* that "'[a]scertaining the reach and content of summary actions may itself present issues of real substance.'" *Id*. (quoting *Hicks*, 422 U.S. at 345 n.14). The Court also reaffirmed and clarified the significance of a dismissal for want of a substantial federal question:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. *They do prevent lower courts from coming to opposite*

> *conclusions on the precise issues presented and necessarily decided by those actions*.

Mandel, 432 U.S. at 176 (emphasis added). The elimination of the Court's appellate jurisdiction in 1988 does not change the applicability of this rule to current cases. 16B Charles A. Wright et al., *Federal Practice and Procedure* § 4014 (2d ed. 2010) ("Abolition of the appeal jurisdiction does not change this rule. Lower courts must continue to honor it").

II. *BAKER V. NELSON* MUST BE READ AS AN ADJUDICATION ON THE MERITS, UNDER THE PRINCIPLE OBSERVED BY THIS COURT IN *AUBURN POLICE UNION V. CARPENTER*.

A number of courts have cited *Hicks*, and then mistakenly added, "overruled on other grounds, *Mandel v. Bradley*, 432 U.S. 173 (1977)."[2] *See, e.g., Postscript Enters., Inc. v. Peach*, 878 F.2d 1114, 1116 (8th Cir. 1989); *Commc'ns Telesystems Int'l v. California Pub. Util. Comm'n*, 196 F.3d 1011, 1016 (9th Cir. 1999); *American Constitutional Law Found., Inc. v. Meyer,* 113 F.3d 1245, No. 94-1145, 1997 WL 282874, at *4 (10th Cir. May 29, 1997) (unpublished table decision). But in *Auburn Police Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993), this Court correctly cites *Hicks* as holding that "[t]he Supreme Court's summary disposition

[2] It is noteworthy that these cases fail to identify the ruling in *Hicks* that *Mandel* purportedly overruled. In any event, *Mandel* did not purport to overrule *Hicks*. Only Justice Brennan's concurrence, which no other Justice joined, claimed that *Mandel* created a new rule. *Id*. at 179-80 (Brennan, J., concurring). But the rule Justice Brennan stated differs from the rule stated in the *per curiam* opinion.

of an appeal to it is an adjudication on the merits that must be followed by lower courts." *Id.* at 894. The Supreme Court agrees that this Court's interpretation of *Hicks* as controlling authority that a dismissal for want of substantial federal question "constitutes a decision on the merits" is appropriate. *Boggs v. Boggs*, 520 U.S. 833, 849 (1997) (citing *Hicks'* holding on this point); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 436 (1982) (following abstention holding in *Hicks*). Many other courts agree that *Hicks* stands as controlling precedent for the interpretation of a dismissal for want of a substantial federal question. *See, e.g., Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 549 (6th Cir. 2007) (citing *Hicks* as authority that the Supreme Court's dismissal of an appeal "for want of a substantial federal question . . . constituted a decision on the merits"); *Green v. City of Tucson*, 255 F.3d 1086, 1099 (9th Cir. 2001) (citing abstention holding in *Hicks*); *Neely v. Newton*, 149 F.3d 1074, 1078 (10th Cir. 1998) (citing precedential discussion in *Hicks*); *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266, 272 (2d Cir. 1985) (same).

Thus, according to *Hicks*, the Court had no discretion to refuse to consider the merits of the appeal in *Baker v. Nelson*, and the dismissal of the appeal for want of a substantial federal question was a definitive decision on the merits of the precise issues presented on appeal. As a result, other federal courts may not decide

that the issue presented to the Court in *Baker* presents a substantial federal question that they are entitled to decide differently.

III. *BAKER V. NELSON* IS NOT LIMITED TO THE IDENTICAL LAW CHALLENGED IN THAT CASE, RATHER, *BAKER* CONTROLS ALL FEDERAL COURT DECISIONS CONCERNING A CONSTITUTIONAL RIGHT TO REDEFINE MARRIAGE TO INCLUDE SAME-SEX PARTNERS UNDER EQUAL PROTECTION AND DUE PROCESS.

Baker is not limited to just the Minnesota state law that its plaintiffs challenged. Courts that have discussed the nature of the dismissal in *Baker* have recognized the binding nature of the decision regarding the definition of marriage in various contexts, including DOMA. *See, e.g., Adams v. Howerton*, 673 F.2d 1036, 1039 n. 2 (9th Cir. 1982) (denying marital recognition for purposes of federal immigration law and noting that the Supreme Court's dismissal of the *Baker* appeal "operates as a decision on the merits") (citation omitted) *cert. denied*, 458 U.S. 1111 (1982); *Walker v. Mississippi*, No. 3:04CV140LS, 2006 U.S. Dist. LEXIS 98320, at *4 (S.D. Miss. Apr. 11, 2006) (unpublished) (dismissing challenge of Mississippi law defining marriage as the union of one man and one woman because "until the United States Supreme Court makes a different pronouncement on the issues decided in *Baker*, other federal courts must reach the same result on those issues"); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005) ("*Baker v. Nelson* is binding precedent upon this Court and Plaintiffs' case against [DOMA] must be dismissed.").

The Statement of Jurisdiction in the appeal from the Minnesota Supreme Court's rejection of the claims of a right to same-sex "marriage" specifically raised the issues of whether excluding same-sex couples from marriage:

> deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment . . . [and] violates their rights under the equal protection clause of the Fourteenth Amendment . . . [and] deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Appellants' Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027) (attached as addendum). The *Baker* appellants directly raised a claim of a fundamental right to marry, "fully protected by the due process and equal protection clauses of the Fourteenth Amendment." *Id*. at 11 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 535 (1923). The right-to-privacy argument of the *Baker* appellants relied on *Griswold*, *Loving*, and *Boddie*, *id*. at 18-19, and the Supreme Court's dismissal of the *Baker* appeal for want of a substantial federal question was a rejection of the merits of those claims.

As a result, the Supreme Court has held that there is no federal due process, equal protection or privacy right to same-sex "marriage" in the Ninth or

Fourteenth Amendments to the U.S. Constitution.[3] Courts are "not free to disregard this pronouncement."[4] *Hicks*, 422 U.S. at 344. Yet the district court did exactly that when it entertained the *Gill* plaintiffs' claims that DOMA violates their federal due process and equal protection right to same-sex "marriage." Second Am. and Supplemental Compl. for Declaratory, Injunctive, or Other Relief and for Review of Agency Decision at paras. 432, 444, 452, 467, 482, 491, 500, 509, 518, 527, 536, 545, 554, 563, 573, 583, 592, 601, 609, 617, 626, 630, *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (2010) (No. 09-10309-JLT) (alleging violations "of the right of equal protection secured by the Fifth Amendment"). This is the same issue that *Baker v. Nelson* addressed, and the district court and this Court "do not have the authority to refuse to follow a binding precedent from the Supreme Court of the United States." *Irving v. U.S.*, 162 F.3d 154, 187 (1st Cir. 1998) (Bownes, J., dissenting). Irrespective of the parties' silence concerning

[3] *Baker*, of course, does not foreclose challenges to DOMA under other Constitutional provisions. In particular, *Baker* does not prevent this Court from weighing the merits of Massachusetts' arguments that DOMA violates the Tenth Amendment and Spending Clause. But as described in the briefs of defendants and other amici, it is well-established that Congress has the authority to regulate marriage for federal purposes.

[4] Although *Baker* may not have the same precedential weight before the U.S. Supreme Court as plenary consideration would have, *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974), the issues "necessarily decided" prevent other federal courts from reaching opposite conclusions. *Mandel*, 432 U.S. at 176.

Baker, courts cannot disregard *Baker*'s holding that there is no equal protection or substantive due process right to same-sex "marriage."

CONCLUSION

As this Court accurately stated, "invocation of constitutional authority, without more, cannot breathe life into a theory already pronounced dead by the Supreme Court in binding precedent." *E. Bridge, LLC v. Chao*, 320 F.3d 84, 91 (1st Cir. 2003). The Supreme Court's binding precedent of *Baker v. Nelson* rejected the theory that equal protection and substantive due process require that people of the same gender can marry. Because that theory has been "pronounced dead by the Supreme Court" in *Baker v. Nelson*, this Court must reverse the district court's decision.

For the foregoing reasons, and for additional reasons stated in the Appellees' Brief, the judgment of the district court should be reversed.

Respectfully submitted,
this 27th day of January 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2480 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I have electronically filed the foregoing Brief *Amicus Curiae* of the Massachusetts Family Institute in the consolidated cases of *Massachusetts v. United States Department of Health and Human Services* and *Hara, Gill et al. v. Office of Personnel Management*, Nos. 10-2204, 10-2207 and 10-2214, with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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Addendum

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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IN THE

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—v.—

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 10a-17a and 18a-23a.

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file this Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra*, pp. 1a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether 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.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case[1]

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18, 1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County[2] (T. 10).

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[1] T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

[2] Appellant McConnell is also petitioner before this Court in *McConnell* v. *Anderson*, petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

The efforts of appellants to get married evidently precipitated the Regents' decision not to employ Mr. McConnell.

Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T. 1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.[3]

[3] In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr. Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 16, Mr. Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as

How the Federal Questions Were Raised

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra*, pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra*, p. 12a), and to the Supreme Court of Minnesota (App. *infra*, p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But

to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); Finger, *Sex Beliefs and Practices Among Male College Students*, 42 J. ABNORMAL AND SOCIAL PSYCH. 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law.

Only then will the public perceive that homosexuals are not freaks or unfortunate abberations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E. Westermarck, 2 Origin and Development of the Moral Idea 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, Homosexual Behavior Among Males 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.*, at 17; see also W. James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra*, at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.*, at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homo-

sexuality causes earthquakes. H. Hart, Law, Liberty and Morality 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

> "Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, Crime and the Human Mind 117 (1944), it is stated:

> "All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scientific community when he wrote as follows in 1935:

"Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too." Reprinted in 107 Am. J. of Psychiatry 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, "a great injustice" to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.* This Court's decision, therefore, would affect the marriage laws of virtually every State in the Union.

* See, e.g., *Jones* v. *Hallahan*, W.152-70 (Ct. Appa. Ky. 1971).

I.

Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Meyer* v. *Nebraska*, 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits

and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie* v. *Connecticut, supra; Loving* v. *Virginia, supra; Griswold* v. *Connecticut, supra; Skinner* v. *Oklahoma, supra; Meyer* v. *Nebraska, supra.* Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer* v. *Nebraska, supra.* In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the

relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination. With regard to the due process component, see *Boddie* v. *Connecticut, supra; Griswold* v. *Connecticut, supra* (all the majority opinions); *Meyer* v. *Nebraska, supra.* With regard to the equal protection component of this argument, see *Loving* v. *Virginia, supra; McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Skinner* v. *Oklahoma, supra;* cf. *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving* v. *Virginia, supra.* Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. The institution of marriage "as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis" (App., *infra,* pp. 20a-21a). On its face, however, Minnesota law neither

states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold* v. *Connecticut*, *supra*.

"Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving* v. *Virginia*, *supra*; *Cohen* v. *California*, 403 U.S. 15 (1971); *Street* v. *New York*, 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite

clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving* v. *Virginia*, 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently

> denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving* v. *Virginia*, 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra*, p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race (see, e.g., *Loving* v. *Virginia, supra; McLaughlin* v. *Florida, supra*), has not yet been extended to classifications based upon sex (see *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed* v. *Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971),

which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

> In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A 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).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the

difference is drawn between same sex and different sex marriages.[8]

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranted in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. *Connecticut*, 381 U.S. 479, 491-492 (Goldberg, J., concurring); see also, *Mindel* v. *United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is

[8] The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed* v. *Reed*, *supra*; *Loving* v. *Virginia*, *supra*; *McLaughlin* v. *Florida*, *supra*.

a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold* v. *Connecticut*, *supra*; *Loving* v. *Virginia*, 388 U.S. 1 (1967); cf. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold* v. *Connecticut*, *supra*.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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