

No. 12-144

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS HOLLINGSWORTH, et al.,
Petitioners,

v.

KRISTIN M. PERRY, et al.,
Respondents.

*On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit*

**BRIEF OF MINNESOTA FOR MARRIAGE AS
AMICUS CURIAE IN SUPPORT OF
PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae, Minnesota for Marriage is a non-profit, 501(c)(4) advocacy organization, incorporated under the laws of Minnesota. It was created in 2011 to campaign for the enactment of a Minnesota state constitutional amendment that would have defined civil marriage in Minnesota solely as the union of one man and one woman. The amendment failed to obtain the votes needed at the 2012 general election for enactment. Minnesota for Marriage now works to preserve the current statutory definition of marriage as defined in Minnesota law, and asks this Court to let the political processes of the several states continue to debate the matter rather than impose a revisionist definition of marriage.

SUMMARY OF THE ARGUMENT

Americans are engaged in a spirited debate about the legal status of same-sex couples. Like most political debates, it is often loud, impassioned, and more about emotions than reason. The results are often partial, incremental, or incomplete as citizens struggle to resolve their differences and promote the common good.

In this case, the citizens of California responded to the debate with the creation of “civil unions” while affirming the traditional definition of marriage in

¹ The parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

their state constitution. Whether they would have constitutionalized the definition of marriage absent judicial intrusion into the public debate is an unanswerable question. Yet recent events in Minnesota suggest that many citizens are content to allow the public conversation to continue while working through the ordinary legislative process to resolve their differences. Amicus curiae urges this Court to reverse the lower court in this case, and allow Californians, and all Americans, to continue the public debate on this important issue.

ARGUMENT

I. Events in Minnesota Evidence the Robust and Multi-Faceted Debate Surrounding Marriage and Alternative Domestic Relationships.

Minnesota has a unique place in the national debate over redefining marriage. Both Minnesota voters and Minnesota courts were the first in the country to be asked to constitutionalize a definition of marriage. These choices and their attendant history illustrate the value of collective self-governance through democratic debate.

A. Minnesota Courts and this Court Correctly Refused to Constitutionalize a Definition of Marriage in the Early 1970's.

In *Baker v. Nelson*, 191 N.W.2d 185 (1971), two men, denied a marriage license by a court clerk,

claimed that the denial violated their rights under the Fourteenth Amendment to the U.S. Constitution.

The Minnesota Supreme Court rejected these claims. “This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.” *Baker v. Nelson*, 191 N.W. 2d 186 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), “Marriage and procreation are fundamental to the very existence and survival of the race.”).

Plaintiffs sought review of the decision by this Court, and the appeal was “dismissed for want of a substantial federal question.” *Baker v. Nelson*, 409 U.S. 810 (1972).

B. Minnesotans Continued to Refine the Definition of Marriage and Expand Legal Protections Based on Sexual Orientation and Gender Identity.

Minnesotans, like most other Americans, assumed the definition of marriage was settled, although in 1977, partially in response to the *Baker* case, the Minnesota legislature amended Minnesota Statutes § 517.01 to include the statement that marriage is “a civil contract between a man and a woman.” *Id.* Simultaneously Minnesotans’

expanding notion of anti-discrimination protections increasingly included homosexuals and bisexuals.²

In 1989 the Minnesota Legislature also became one of the first states to adopt a hate crime statute, which included sexual orientation as a protected category. Act of May 25, 1989, ch. 261, 1989 Minn. Laws 892.³ In 1993 Minnesota became the second state in the union to extend legal protection against employment and housing discrimination based on sexual orientation, and the first state to define “sexual orientation” to include not only emotional or physical attraction to members of the same sex, but also “gender identity” or self-identification that differs from a person’s “biological maleness or femaleness.” Minn. Stat. § 363A.03, subd. 44 (2012). Legislators did not see expanding these protections

² The Minneapolis Civil Rights ordinance included protection from discrimination in employment, labor relations, real property transactions, public accommodations, public services, and banking on the basis of “affectional or sexual preference” since 1974. Minneapolis, Minn., Ordinance 99-68 (1974) (amending Minneapolis, Minn., Code of Ordinances ch. 945 (relating to Civil Rights)). The capital city of St. Paul took this one step further in 1990 and extended its anti-discrimination law to those with bi-sexual orientations. St. Paul, Minn., Legis. Code § 183.01 (1990). Attempts to repeal this extension of protections at the ballot box were unsuccessful. Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*; 35 *Williamette L. Rev.* 421, 423 n. 3 (1998).

³ See e.g. Minn. Stat. § 609.2231(4)(a) (2012) (“Whoever assaults another because of the victim’s or another’s actual or perceived race, color, religion, sex, sexual orientation, disability as defined in section 363A.03, age, or national origin may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.”).

as inconsistent with the state's definition of marriage as the union of a man and a woman. Minn. Stat. § 363A.27(4) (2012).

In response to attempts to judicially redefine marriage in Alaska, Hawaii, and elsewhere, in 1997 the Minnesota legislature amended the state's definition of marriage to make clear that Minnesota would not recognize marriages from other states involving members of the same-sex. Minn. Stat. § 517.03 (2012). This remains the state of the law today.

Minnesotans were content with this state of affairs,⁴ and no additional legislation regarding the definition of marriage was introduced until the Massachusetts Supreme Court redefined marriage as a matter of state constitutional law in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

⁴ A 2004 poll conducted by Equality Minnesota found 75% of the respondents supported the current law defining marriage as the union of one man and one woman. Mike Fitzpatrick, Senate Committee Kills Minnesota Anti-Gay Amendment, QUEST NEWS, Apr. 13, 2006, available at <http://www.quest-online.com/NewFiles/QuestXIII6.html>.

C. Minnesotans Begin to Debate Constitutionalizing the Definition of Marriage in Response to the Judicial Redefinition of Marriage in Massachusetts.

In response to the perceived threat of a judicial redefinition of marriage, bills were introduced in 2004 and 2005 to amend the Minnesota Constitution to address the definition of marriage. Minnesota Senate File 3003 proposed to limit the power to define marriage and civil unions to only the state legislature, and deny such power to the judiciary. It was heard in committee, but never voted on by either chamber. S.F. 3003, 2004 Leg., 83rd Sess. (Minn. 2004).

Minnesota House File 2798 would have asked voters, “Shall the Minnesota Constitution be amended to provide that marriage or its legal equivalent is limited to only the union of one man and one woman?” H.F. 2798, 2004 Leg., 83rd Sess. (Minn. 2004). This bill was passed by the House of Representatives by a vote of 88-42, Minn. H.J., 83th Leg., Reg. Sess. 5657 (2004), but never received a vote in the Senate.

In 2005, Minnesota House File 6 was introduced. It would have asked voters, “Shall the Minnesota Constitution be amended to provide that the state and its political subdivisions shall recognize marriage or its legal equivalent as limited to only the union of one man and one woman?” H.F. 006, 2005 Leg., 84th Sess. (Minn. 2005). It passed the House of Representatives by a vote of 77-56. Minn. H.J., 84th Leg., Reg. Sess. 1381 (2005). Members of

the Minnesota Senate never took up the bill, notwithstanding motions to place it on the General Orders Calendar of the Senate. Minn. Sen. J., 84th Leg., Reg. Sess. 1655-56 (2005) and Minn. Sen. J., 84th Leg., Reg. Sess. 4125 (2006).

From 2005 to 2010 multiple bills were introduced concerning the definition of marriage; some seeking to constitutionalize the existing definition (*e.g.* S.F. 2160, 2007 Leg., 85th Sess. (Minn. 2007)); some seeking to redefine marriage (*e.g.* H.F. 4248, 2008 Leg., 85th Sess. (Minn. 2008)); and some seeking to abolish marriage as a legal status and substitute civil unions (*e.g.* H.F. 999, 2009 Leg., 86th Sess. (Minn. 2009)). None passed.

Finally on May 21, 2011, a bill passed both houses of the Minnesota legislature presenting the question of whether to constitutionalize the definition of marriage to the voters. Minn. H.J., 87th Leg., Reg. Sess. 4916 (2011). It was narrower than the proposed amendments that had passed the House of Representatives in 2004 and 2005. The language did not address alternative domestic relationships such as civil unions, domestic partnerships, or reciprocal beneficiaries. Voters were only to be asked, “Shall the Minnesota Constitution be amended to provide that only a union of one man and one woman shall be valid or recognized as a marriage in Minnesota?” S.F. 1308, 2011 Leg., 87th Sess. (Minn. 2011). This shift in the language and its intended effect is strong evidence of the value of continued political dialogue on this issue.

On November 6, 2012, Minnesota voters defeated the amendment by a vote of 1,512,156 to 1,401,275. *Marriage Amendment*, MPR News, <http://minnesota.publicradio.org/collections/special/2012/campaign/results/mn/marriage.php>.

If this Court affirms the lower court opinion in this case, states will no longer be able to consider political compromise on the definition of marriage. States like Minnesota will be required to either deny any legal status to same-sex unions or accept them as marriages. This “winner-take-all” approach is not mandated by the Constitution and is destructive of our common bonds. It encourages demonization of the contending sides, and does little to advance the development of a common understanding.

The Minnesota experience offers an alternative route that reflects mutual respect, even during times of disagreement. To usurp the robust political debate on the definition of marriage in the name of constitutional interpretation threatens our common bonds. Constitutionalizing a definition of marriage through the courts, with no vote of the people, forecloses the sort of vibrant political community that exists when disputed social questions are left in the hands of the people.

D. Marriage Amendment Opponents Stressed the Value of Public Discussion and Legal Development.

During the public debate of the Minnesota Marriage Amendment, opponents often focused on the need for continued conversation about the status

of same-sex unions, and the harm from constitutionalizing the definition of marriage. Richard Carlbom, campaign manager for Minnesotans United for All Families, a group opposing the amendment, consistently characterized the campaign as “a statewide conversation” and “pressed supporters to have one-on-one dialogues with those on the other side.” Helgeson, Baird, *For Top Foe, Marriage Fight is for Freedom*, Star Tribune (Oct. 5, 2012) accessed Jan. 27, 2013, ProQuest Newsstand; Star Tribune (Minneapolis/St. Paul).

He argued that the Marriage Amendment would put “a hard stop to the conversation.” He identified the goal of opponents as “preserv[ing] an environment in which the state can figure it out without a conclusion having been locked in to the constitution.” Belden, Doug, *Marriage Amendment: A Focus on the Future*, Saint Paul Pioneer Press (June 30 2012) accessed Jan. 27, 2013, ProQuest Newsstand; St. Paul Pioneer Press.

The day after the historic victory by Amendment opponents, Mr. Carlbom said, “[t]he conversation didn't end last night, the conversation just began.” Helgeson, Baird, *Movement to Legalize Gay Marriage Gains Steam*, Star Tribune (Nov. 8 2012) accessed Jan. 27, 2013, ProQuest Newsstand; Star Tribune (Minneapolis/St. Paul).

Minnesota House Majority Leader and Amendment opponent, Erin Murphy, stated, “On the question of marriage freedom and marriage equality, I think most important for us is to engage in a

continued conversation with Minnesotans and that has to happen both inside the Capitol and outside of the Capitol.” Aslanian, S., *Same-sex marriage debate moves to the capitol*, MPR News (Jan. 8, 2013) accessed Jan. 27, 2013, <http://minnesota.publicradio.org/display/web/2013/01/08/politics/same-sex-marriage-debate-legislature>.

This important conversation should continue, and not be stifled or constricted by judicial intervention. The lower court opinion in this case does exactly that by mischaracterizing honest disagreement and incremental steps as “animus” and bigotry. *See Perry v Brown*, 671 F.3d 1052, 1094 (2012). Yet even those who seek to redefine marriage to include same-sex couples do not make that charge.

“These were not mean people, not bigots, not bad people,” said Thalia Zepatos, who, as Freedom to Marry's director of public engagement, spent 2010 synthesizing a massive amount of marriage-related research -- collating nearly 100 different surveys, studies, exit polls and focus groups from every state that had considered the issue, including new research the group commissioned. “As long as they'd ever thought about marriage, they'd had a certain image of what it meant, and now all of a sudden we were asking them to expand that,” she said. “They had questions that deserved to be answered.”

Ball, Molly, *The Marriage Plot: Inside this Year's Epic Campaign for Gay Equality*, The Atlantic (Dec. 2012) (accessed January 27, 2013) <http://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865/1/?single_page=true>.

This view was echoed by Richard Carlbom at a fund raising event in New York City. “Those who support the Minnesota Marriage Amendment, Richard told the group, ‘are not bigots. They don't hate gay people.’” Jeff Zuckerman, *Black Pants Affair: Fighting the Minnesota Marriage Amendment in New York City*, Huffington Post (Mar. 27, 2012) (accessed January 27, 2013) <http://www.huffingtonpost.com/jeffzuckerman/minnesota-marriage-amendment_b_1382973.html>.

The decision of this Court in this case will either promote continued conversation and understanding between those supporting and opposing a redefinition of marriage, or the decision will discourage political compromise and incremental recognition of same-sex couples, and embitter opponents of redefinition through an unjust characterization of their position. Amicus curiae urges this Court to take the first path, and reverse the opinion of the Ninth Circuit.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the decision of the court below.

Respectfully submitted,

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