STATE OF MINNESOTA
IN COURT OF APPEALS
A11-08111

DOUGLAS BENSON, DUANE GAJEWSKI, THOMAS TRISKO, JOHN RITTMAN, JESSICA DYKHUIS, LINDZI CAMPBELL, AND SEAN CAMPBELL, MINOR CHILD,

Appellants

Relator,

v.

JILL ALVERSON, IN HER OFFICIAL CAPACITY AS THE HENNEPIN COUNTY LOCAL REGISTRAR

and

STATE OF MINNESOTA,

Respondents.

PRINCIPAL BRIEF OF APPELLANTS

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CONCISE STATEMENT OF ISSUES

1. Date of appealable order: 8 March 2011

2. Date of Petition for Notice of Appeal: 2 May 2011

3. Jurisdiction for Appeal: Minn. R. Civ. App. P. 103.03(a) (appeal from final judgment) and 104.01 subd. 1 (appeal from final judgment within sixty (60) days).

4. Brief description of claims, defenses, issues litigated and result below:

Specific issues to be raised on appeal:

a. **Whether appellants state claims that Minn. Stat. §§ 517.01, 517.03, and 517.04, comprising the Minnesota Defense of Marriage Act (MN DOMA, 1997 Laws of Minnesota Chapter 203, art. 10), violate their constitutional rights to due process of law under Minn. Const. Art. I, § 7.**

Result below: The district court dismisses their claims in accordance with Minn. R. Civ. P. 12.02(e).

Standard for review: *de novo*

1) *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29, 33 (Minn. 1980)

2) *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008)

3) *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010) (Walker, Vaughn, J.)

4) *Loving v. Virginia*, 388 U.S. 1, 12 (1967)

b. **Whether appellants state claims that Minn. Stat. §§ 517.01, 517.03, and 517.04, comprising the Minnesota Defense of Marriage Act (MN DOMA, 1997 Laws of Minnesota Chapter 203, art. 10), violate their constitutional rights to equal protection of the law under Minn. Const. Art. I, § 2.**

Result below: The district court dismisses their claims in accordance with Minn. R. Civ. P. 12.02(e).

Standard for review: *de novo*

1) *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29, 33 (Minn. 1980)

2) *State v. Russell*, 477 N.W.2d 886, 888 – 89 (Minn. 1991)

3) *In re Balas,* 2:11-bk-17831 TD (Bankr. C.D. Cal. June 13, 2011)

4) *Dragovich v. U.S.*, 10-cv-01564 (N.D. Cal. Jan. 18, 2011)

c. **Whether appellants state claims that Minn. Stat. §§ 517.01, 517.03, and 517.04, comprising the Minnesota Defense of Marriage Act (MN DOMA, 1997 Laws of Minnesota Chapter 203, art. 10), violate their constitutional rights to free exercise of conscience under Minn. Const. Art. I, § 16.**

Result below: The district court dismisses their claims in accordance with Minn. R. Civ. P. 12.02(e).

Standard for review: *de novo*

1) *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29, 33 (Minn. 1980)

2) *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990)

3) *Hill-Murray Federation of Teachers v. Hill-Murray High School*, 487 N.W.2d 857, 864 (Minn. 1992)

d. **Whether appellants state claims that Minn. Stat. §§ 517.01, 517.03, and 517.04, comprising the Minnesota Defense of Marriage Act (MN DOMA, 1997 Laws of Minnesota Chapter 203, art. 10), violate their constitutional rights to freedom of association under Minn. Const. Art. I, § 16.**

Result below:

Standard of review: *de novo*

1) *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29 (Minn. 1980)

2) *State by McClure v. Sports & Health Club*,

370 N.W.2d 844 (Minn. 1985)

3) *Lawrence v. Texas*, 539 U.S. 558 (2003)

4) *In re Guardianship of Sharon Kowalski,* 478 N.W.2d 790

(Minn. Ct. App. 1991), review denied, (Minn. Feb. 10, 1992)

e. **Whether appellants state claims that Minn. Stat. § 517.01, 517.03, and 517.04, comprising the Minnesota Defense of Marriage Act (MN DOMA, 1997 Laws of Minnesota Chapter 203, art. 10), violates the Single Subject Clause of Minn. Const. Art. IV, § 17.**

Result below: The district court dismisses their claim in accordance with Minn. R. Civ. P. 12.02(e).

1) Minn. Const. Art. IV, § 17

2) *Associated Builders and Contractors v. Ventura*, 610 N.W.2d 293, 295 (Minn. 2000)

3) *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 588 (Minn. Ct. App. 2005), appeal dismissed, (Minn. June 9, 2005)

f. **Whether the district court erred in dismissing the state of Minnesota on the grounds of improper joinder.**

Result below: The district court dismisses the state on the grounds of improper joinder.

Standard of Review: ***de novo***

1) Minn. Stat. § 555.01

2) Minn. Stat. § 555.11

3) *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 588 (Minn. Ct. App. 2005), appeal dismissed, (Minn. June 9, 2005)

4) *Doe v. Ventura*, 2001 WL 543734

(Minn. Fourth Dist. Ct. Hennepin County, May 15, 2001)

STATEMENT OF THE CASE

This case comes before the Court as a timely appeal from the 8 March 2011 entry of judgment by the Fourth Judicial District Court of Hennepin County, Mary S. DuFrense, J., dismissing per Minn. R. Civ. P. 12.02(e) the appellants' multiple state constitutional claims of equal protection, due process, single subject, freedom of association, and freedom of conscience and religious freedom. The appellants, Minnesota domiciliaries comprising three same-sex couples and the minor child of one couple, seek declaratory, equitable and mandamus relief from the Minnesota Defense of Act (MN DOMA)[1] and all provisions of Chapter 517 of Minnesota Statutes that deny recognition of them as married persons under Minnesota law, with the concomitant rights and benefits, and recognition of the minor child as a child of two lawfully married parents.

Messrs. Benson and Gajewski lawfully wed in Vermont and Ontario. Messrs. Trisko and Rittman wed in Manitoba and have married according to the rites of St. Mark's Episcopal church in Minneapolis. Ms. Dykhuis and Ms. Campbell are registered domestic partners in Duluth. Their minor child, Sean Campbell, was born during their marriage. They seek reversal, remand, and rejoinder of the state, for trial and award of declaratory, equitable, and mandamus relief, recognizing the three same-sex couples as married persons under Minnesota law, and the minor child as a child born of lawfully married parents.

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[1] 1997 Laws of Minnesota Chapter 203, art. 10, codified at Minn. Stat. §§ 517.01 and 517.03

THE FACTS[2]

1. Douglas Benson and Duane Gajewski[3]

Plaintiffs Douglas Benson ("Doug"), age 56, and Duane Gajewski (Duane), age 46, are a gay couple residing in Robbinsdale, Minnesota, in Hennepin County. Doug and Duane have been together as a same-sex couple in a loving, committed relationship since 1990. They were both born and raised in Duluth, St. Louis County.

Duane has a Bachelor's Degree from the College of St. Scholastica and a Master's Degree from the University of Minnesota, Duluth. He is an actuary. Doug has a Bachelor's Degree from the University of Minnesota, Duluth and is the Executive Director of a Minnesota non-profit. They met and began their life together as a loving, committed, same-sex couple in 1990, in Duluth. Doug and Duane are close to their families of origin and have been accepted and treated by their families as a married couple, as any of their heterosexual siblings and respective spouses are treated, from the beginning of their relationship.

Both Doug and Duane are community minded, founding the Northland Gay Men's Center in Duluth in 1992, with the goal of providing support and affirmation to gay men in a chemical-free environment while building community. The organization exists to this day. Doug and Duane have considered themselves

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[2] Appellants cite the First Amended Complaint by paragraph and line (1st Am. Cmplt., ¶ 15, l. 3, or 1st Am. Cmplt., Prayer for Relief #3)
[3] Am. Cmplt. ¶ 2

to be married since near the beginning of their relationship. Heterosexual friends have told the couple that their relationship serves as a model for their own marriages.

In 1993 Doug and Duane applied for a marriage license in St. Louis County to express their commitment to one another and challenge laws that kept them from experiencing the respect, recognition, security and obligations offered to different-sex couples through legal marriage. The application was rejected by the County Attorney. Publicity surrounding the application resulted in death threats to the couple, but this only served to strengthen their commitment to one another. During this period, Duane was a graduate student, Teaching Assistant at UMD, maintaining part time hours at his father's store while Doug provided the bulk of the family income at this time as a full time school bus driver with Duluth Public Schools.

In 1995 Duane was offered his first actuarial position in Montpelier, Vermont. Duane and Doug left their jobs and their hometown of Duluth so Duane could pursue his career. While in Vermont, Duane volunteered as the treasurer of the state's largest gay and lesbian rights organization. Doug took temporary positions as a bus driver and administrative assistant.

In 1998, the couple returned to Minnesota, in another career move for Duane. They bought a home in Robbinsdale under joint tenancy, where they have resided together for the past eleven years. The home purchase was their first. Doug was appointed, by the mayor of Robbinsdale, to the Robbinsdale Human

Rights Commission in 2000, where he served for seven years, including a term as chairman.

In the year 2000, when the State of Vermont became the first state in the union to institute "civil unions" for same-sex couples, Doug and Duane traveled to Vermont to take advantage of the opportunity to have their committed relationship recognized by government. They opted for a courthouse ceremony to make their marriage seem as official as possible, while knowing their "civil union" would not be legally recognized in their home state. In 2003, Doug and Duane drove to Thunder Bay, Ontario, Canada to get legally married, again in spite of knowing that their marriage would not be "officially" recognized when they got home.

Because Doug does not now have a paid position and is dependent on Duane for support, the couple's household operates as a traditional married couple where one stays at home. While Doug was working, he built up an IRA, but because the couple's marriage is not legally recognized, they are not allowed by law to continue contributing to Doug's IRA, whereas different-sex couples are allowed to contribute to the IRA of an unemployed spouse. Also, because the couple is not allowed to file a joint tax return, as any different-sex married couple would be allowed to, the couple pays thousands of dollars in extra taxes each year. Doug receives healthcare coverage through Duane's employer as Duane's "domestic partner," but because the couple's marriage is not legally recognized in Minnesota, the couple has to pay taxes on that coverage, whereas Duane's heterosexual coworkers do not have to pay taxes on their spouse's coverage. They

also worry that if one of them becomes hospitalized the other may not be able to visit and comfort the other in time of need and make necessary medical decisions.

The couple would like to have their marriage legally recognized so they can experience the same benefits and protections afforded any other married couple.

2. Thomas Trisko and John Rittman[4]

Plaintiffs Thomas Trisko ("Tom"), age 65, and John Rittman ("John"), age 68, are a gay couple residing in Minneapolis, Hennepin County, Minnesota. Tom and John have been together as a same-sex couple in a loving, committed relationship for 36 years.

Tom was born in Minneapolis and grew up in Hopkins and Saint Cloud. He is descended from families that have been citizens of Minnesota for seven generations since the mid-Nineteenth Century. Tom graduated with a BA in Economics from Saint John's University in Collegeville and with an MA in Political Science from the University of Minnesota. He also studied at Georgetown University in Washington, D.C. on a doctoral fellowship in Government. Tom has held positions such as Corporate Economist, Government Affairs Director, Finance Director and Chief Financial Officer at companies and non-profit organizations such as Dayton Hudson Corporation (now Target), Medtronic, Minnesota Multiple Sclerosis Society, and The Bridge for Runaway Youth. He retired in 2006. In retirement, he volunteers as the Treasurer of the

[4] Am. Cmplt. ¶ 4

Wells Memorial Foundation and serves on the altar as a Eucharistic Minister at their church, Saint Mark's Episcopal Cathedral in Minneapolis. He has also served on the Finance Committees and/or as Treasurer of Philanthrofund Foundation, Calhoun Isles Condominium Association and the Twin Cities Gay Men's Chorus.

John was born and raised in Anderson, Indiana and graduated from Ball State University in Muncie, Indiana with a BA degree in Business Education and an MA degree in History. John served as an officer in the US Air Force after graduation at Wright Patterson AFB. He was posted to the University of Minnesota in 1972 where he was a professor of military history in the AFROTC program. After leaving the Air Force John worked as an engineering personnel recruiter for Rosemount Engineering in Eden Prairie. He returned to college to graduate as a Registered Nurse in 1985 and thereafter provided nursing services at facilities such as Mt. Sinai Hospital, Walker Methodist and the Courage Center.

In 1994, he became a nursing home, home health care and hospital Inspector for the Minnesota Department of Health. He retired in 2005. In retirement, he volunteers for the Twin Cities Gay Men's Chorus and OutFront Minnesota, as well as serving as an usher and on the Gay and Lesbian Ministry Committee at Saint Mark's Episcopal Cathedral.

Tom and John met December 21, 1973 at their apartment building in Roseville and have been committed to each other in a loving relationship ever since. They moved in together in March 1975 at Tom's condominium in Little Canada. They bought a townhouse together as joint tenants in Minneapolis in

1981 and bought their current home in southwest Minneapolis as joint tenants in 2000.

They registered as domestic partners with the City of Minneapolis in 1991 and the University of Minnesota in 1996. They were religiously married in their church, Saint Mark's Episcopal Cathedral in Minneapolis on May 1, 1999 in front of friends and relatives. They were legally married in Winnipeg, Manitoba, Canada on May 27, 2005.

Even with all this evidence of their commitment, when they are faced with stating on an official form whether they are "Married" or "Single," they don't know for sure which to choose when they are at home in Minnesota. Tom and John feel increasingly vulnerable as legally unmarried partners in their home state of Minnesota as they grow older. They are worried about the practical and dignitary harms they have suffered and may suffer in the future from being denied the right to marry in Minnesota. Although they have completed many partial measures such as Medical and Financial Powers of Attorney Wills, Beneficiary statements, etc. they still do not have the 515 legal protections, rights, obligations, cost/tax savings and benefits that come with marriage in Minnesota. When they travel, they must carry all these documents with them in case of accident, illness or death.

They have witnessed several of their friends have legal difficulties claiming the body of their deceased partner, participating in health care decisions, and

inheriting assets and pension benefits. This particularly concerns Tom who has no brothers or sisters, whose parents are deceased, and who has no close relatives.

Tom and John have known they were gay since childhood and have always felt like second class citizens in their own country because the federal and Minnesota Bill of Rights have not been interpreted to mean what they say when it comes to gay and lesbian citizens and couples. They have utilized every avenue open to them to demonstrate and legally cement their commitment to each other over the past 36 years. Legal marriage is the normal way to do this. Therefore, Tom and John wish to marry in Minnesota and have it recognized throughout the United States.

3. Jessica Dykhuis, Lindzi Campbell, and Sean Campbell[5]

Plaintiffs Jessica Dykhuis ("Jesse"), age 34, and Lindzi Campbell ("Lindzi"), age 32, are a lesbian couple residing in Duluth, St. Louis County, Minnesota. Jesse and Lindzi have been together as a same-sex couple in a loving, committed relationship for 2 years. Lindzi, a Twin Ports native – born and raised on Park Point - is a firefighter and Jesse, a Minneapolis transplant, is a Doula. Lindzi and Jesse live in Duluth's Lincoln Park neighborhood and are actively raising two sons Jackson (age 9) and Sean (born 10/19/2009) together. Lindzi and Jesse met in 2003 and have been in a same sex, committed, and loving relationship since 2007.

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[5] Am. Cmplt. ¶ 3

Jesse is the co-chair of the Duluth-Superior Pride committee and an avid gardener and music fan. Lindzi enjoys fundraising for the MDA and plays volleyball, hockey and broomball. The couple and their children go camping, hiking, kayaking and skiing throughout the State of Minnesota. Lindzi and Jesse are registered domestic partners in Duluth MN, although that status confers absolutely no rights to the couple.

Jesse currently lacks health insurance. Lindzi's employer does not extend its health coverage to domestic partners, only married couples. When Lindzi went into labor with Sean 6 weeks early, the couple had to hurriedly complete and have notarized piles of legal paperwork including durable power of attorney for health care and guardianship transfer designations between labor contractions to make sure Jesse had some amount of legal support for their relationship and her relationship to the baby, since the rights and protections of marriage are not afforded to same sex couples in Minnesota.

Lindzi and Jesse's parents and friends are very supportive of their relationship and honor their commitment as a couple. However, attending weddings of heterosexual friends and family is always bittersweet, as a couple Lindzi and Jesse are invited to and expected to celebrate in a tradition that they are unsure they will ever be able to participate in themselves.[6]

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[6] Jesse and Lindzi plan to wed in Iowa in August 2011.

ARGUMENT

SUMMARY OF ARGUMENT

The Minnesota Defense of Marriage Act, 1997 Laws of Minnesota Chapter 203, art. 10, codified at Minn. Stat. §§ 517.01 and 517.03[7] (hereinafter "MN DOMA"), unconstitutionally discriminates in defiance of the Minnesota Constitution's guarantees of equal protection,[8] due process,[9] freedom of conscience and exercise of religion,[10] and freedom of association.[11] MN DOMA treats same-sex couples, lawfully married in other states and jurisdictions or married in accordance with the rituals and dictates of their faiths, differently from similarly situated opposite-sex couples. In so doing, MN DOMA denies to same-sex couples and their children the status, recognition, and benefits of 1,138 federal and 515 Minnesota laws otherwise available to married persons and their children.

Applicable to the states as a minimum standard, settled federal law sets forth two major and two supporting factors that trigger heightened scrutiny of group classifications. The factors are (a) whether the group in question has suffered historically from discrimination, (b) whether the characteristics

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[7] Suffering injuries that include increased taxation, denial of health insurance benefits, denial of recognition of the solemnity of their religious vows, and recognition as a child born of lawfully married parents, appellants seek general and "as applied" relief under the Minnesota Constitution from all provisions of Chapter 517 prohibiting recognition of equality of marriages between two individuals of the same gender, but most especially against Minn. Stat. § 517.03 subd. 1(b) and secondarily against Minn. Stat. §§ 517.01 and 517.03 subd. 1(a)(3).

[8] Minn. Const. Art. I, § 2

[9] Minn. Const. Art. I, § 7

[10] Minn. Const. Art. I, § 16

[11] Minn. Const. Art. I, § 16

distinguishing the group have concrete connection to legitimate policy objectives or to an individual's "ability to perform or contribute to society[,]" *Bowen v. Gilliard*, 483 U.S. 587, 602 – 03 (1987), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), (c) whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a group" -- traits that they cannot, or should not have to, change, and (d) whether the group is a political minority or politically vulnerable. This case demonstrates the need to apply heightened scrutiny to classification by sexual orientation.

Under heightened scrutiny and the discerning state constitutional equal protection rational basis test, the appellants state claims that MN DOMA is facially unconstitutional and unconstitutional as applied to them. They state claims that MN DOMA violates their state constitutional rights to due process. As a subset of a multi-subject bill, MN DOMA violates Minn. Const. Art. IV, § 17.

Moreover, the appellants state claims that MN DOMA, facially and as applied, violates state constitutional guarantees of freedom of conscience and free exercise of religion that are more expansive than those in the First Amendment, and state constitutional rights of freedom of association. The state constitutional guarantee of freedom of association includes the unalienable right to form a family, and the child's unalienable right to form a relationship with a parent. Appellants seek reversal and remand for trial, declaratory and equitable relief, and recognition as married persons in Minnesota.

DE NOVO REVIEW

Dismissal of the appellants' amended complaint per Minn. R. Civ. P. 12.02(e) requires *de novo* review of each claim. *Bahr v. Capella University*, 788 N.W.2d 76, 80 (Minn. 2010) (Rule 12.02(e) dismissal of MN Human Rights Act reprisal claim reviewed *de novo*; dismissal aff'd). The court considers only the pleadings in the complaint, accepting those as true, resolving all doubts in the nonmovant's favor, without being bound to accept labels and conclusory statements. Id., citing *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 – 35 (Minn. 2008) (reversing 12.02(e) dismissal of *de facto* takings claim), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (labels and conclusory statements in antitrust case).

"'[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.'" *Bahr* at 80, quoting *N. States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963) (claim stated for continuous trespass). "When constitutional violations are alleged, the defendant must demonstrate the *complete* frivolity of the complaint before dismissal under Rule 12.02 is proper." *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29, 33 (Minn. 1980) (reversal of Rule 12.02 dismissal of Due Process challenge to notice and hearing procedures under Chapter 171 of Minnesota Statutes; italics included by the Court). Pleadings that are "arguable on their merits" are, as a matter of law, not frivolous. *Anders v. California,* 387 U.S. 738, 744 – 45 (1967) (allowing

indigent *habeas* petitioner to proceed), *Christopher v. Harbury*, 536 U.S. 403, 416 (2002) (nonfrivolous claim equated to "arguable claim", defined as a quantum "more than hope"), *White v. Kautzky*, 494 F.3d 677, 680 (8th Cir. 2007) (nonfrivolous equated to "arguably meritorious").

Cases *infra* striking down, or otherwise neutralizing the United States DOMA, 1 U.S.C. § 7, on federal constitutional due process and equal protection grounds[12] show the appellants' state constitutional claims against Minnesota DOMA clearing the Rule 12.02(e) "complete frivolity" test by a wide margin.

STATE AS PROPERLY JOINED PARTY

To gain recognition of marriages solemnized outside Minnesota and within their own church, and to enjoy the rights and benefits that five hundred fifteen (515) Minnesota statutes confer upon married adults and their minor children,[13] the appellants seek declaratory relief in their facial and applied challenges to the Minnesota "Defense of Marriage Act" (MN DOMA), codified at Minn. Stat. §§ 517.01 and 517.03. With the Hennepin County Registrar exercising no jurisdiction or authority over these statutes or individuals married outside

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[12] *In re Levenson*, 587 F.3d 925, 931 – 32 (9th Cir. 2009), *Gill v. United States Office of Personnel Mgt.*, 699 F.Supp.2d 374, 387 (D. Mass. 2010), *Massachusetts v. U.S. Dep't of Health & Human Servs*., 698 F. Supp. 2d 234, 253 (D. Mass. 2010), *Dragovich v. U.S*., No. 10–01564, 2011 WL 175502, at *13, *14 (N.D. Cal. Jan. 18, 2011), *In re Balas*, 2:11-bk-17831-TD (Bankr. C.D. Cal. June 13, 2011)

[13] "The 515 Project", a Minnesota nonprofit corporation's work identifying 515 statutes placing different-sex spouses at an advantage over married same-sex spouses

Hennepin County, she is not a proper party to the appellants' MN DOMA claims. The state, however, IS a proper party.

Minnesota's Uniform Declaratory Judgments Act requires that "persons . . . who have or claim any interest which would be affected by the declaration" be joined as parties. Minn. Stat. § 555.11. The definition of persons under the Act does not include the State. Minn. Stat. § 555.13. However, there is absolutely *no* language in the Minnesota Declaratory Judgments Act that *prohibits* joining the state as a party. The language in Minn. Stat. § 555.11 is not exclusive. Simply because the Appellants are not *required* to join the State as a party does not mean that they are *prohibited* from joining the State as a party. Declaratory judgments are proper when there is a "genuine conflict in tangible interests between parties with adverse interests." *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270 (Minn. Ct. App. 2001).

Minnesota case law conclusively demonstrates that the State may be joined as party in declaratory judgment actions. See *Unbank Co., LLP v. Merwin Drug Co., Inc.*, 677 N.W.2d 105, 106 (Minn. Ct. App. 2004) (challenge to validity of competitor's currency exchange license; "[A]n administering state board has an interest in the act it administers that is affected by a declaratory judgment . . . and . . . a declaration of rights cannot be made when that entity is not a party to the action.") Thus, under the rule in *Unbank*, a state administrate agency, and by extension the State, may be a necessary party in a declaratory judgment action.

Minnesota courts authorize the state's joinder under the Minnesota Uniform Declaratory Judgments Act. See *Red Lake Band of Chippewa Indians* v. *State*, 248 N.W.2d 722 (Minn. 1976) (seeking declaratory judgment that band is "state" or "territory and possession of the United States" within the meaning of Minnesota's automobile registration statutes), *Studor Inc. v. State*, 781 N.W.2d 403 (Minn. Ct. App. 2010) (seeking declaratory judgment that the state's statutory ban on air-admittance valves in plumbing systems is unconstitutional; state as named defendant), *Ruter v. State*, 695 N.W.2d 389 (Minn. Ct. App. 2005) (seeking declaratory judgment to revoke disability benefits and receive regular retirement annuity), *Unity Church of St. Paul v. State*, 694 N.W.2d 585 (Minn. Ct. App. 2005), appeal dismissed, (Minn. June 9, 2005) (seeking declaratory judgment that Minnesota's Personal Protection Act of 2003 is unconstitutional; state as the *only* named defendant). And a case with a significant bearing to this case, *Doe v. Ventura*, 2001 WL 543734 (Minn. Fourth Dist. Ct., Hennepin County, May 15, 2001) (Pierce, Delila, J.), is the successful declaratory judgment action striking down Minnesota's sodomy law, Minn. Stat. § 609.293 (2000), as unconstitutional in its application to private, consensual, noncommercial sex between consenting adults, regardless of the adults' genders. The state is a named defendant with the Governor and Attorney General.

Allowing the appellants to join the State as a defendant will not result in the State becoming a party in all cases in which a constitutional claim is made. Declaratory judgments are only proper when there is a "genuine conflict in

tangible interests between parties with adverse interests." *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270 (Minn. Ct. App. 2001).

Cases challenging U.S. DOMA, 1 U.S.C. § 7, on federal constitutional grounds see the United States and its several agencies and departments named as defendants against prayers for monetary, equitable, and declaratory relief.[14] In the instant case, the appellants seek declaratory and equitable relief from MN DOMA – as well as the right to obtain marriage licenses in Hennepin County. The appellants challenge MN DOMA and the obstacle it poses to the appellants' enjoyment of 515 separate laws that confer tangible benefits upon married couples and their families, and relieve the injuries the appellants face in taxation, inheritance, powers of attorney, health care, and child rearing, amongst other matters.

Contrary to the state's claims, joinder here does not require the state's joinder as a necessary party in all state constitutional issues. The facts require the state's joinder here. Joining the state follows settled Minnesota law authorizing joinder of the state in matters that unjustly classify same-sex couples in comparison to different-sex couples. *Doe v. Ventura*, MC 01-149, 2001 WL 543734 (Minn. Fourth Dist. Ct., Hennepin County, May 15, 2001) (Pierce, Delila,

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[14] *Gill v. U.S. Office of Personnel Mgt., 699 F.Supp.2d 374 (D. Mass. 2010), Massachusetts v. U.S. Dep't of Health & Human Services and U.S. Dep't of Veterans Affairs,* 698 F.Supp.2d 234 (D. Mass. 2010), *Dragovich v. U.S. Dep't of Treasury,* 10-cv-1564, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011)*, Windsor v. U.S.,*10-cv-8435 (S.D.N.Y. 2010)*, Golinski v. U.S. Office of Personnel Mgt.,* 3:10-cv-257 (N.D. Cal. 2010)

J.).The Court should reverse the judgment of the district court, remand, and rejoin the state as a defendant.

***BAKER V. NELSON* DEFANGED AND DISTINGUISHED**

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972), neither binds nor informs this Court's resolution of appellants' state constitutional challenge to MN DOMA.

Resting on its interpretation of the Book of Genesis for its holding, the *Baker* Court turns aside an early bid by a same-sex couple seeking to marry under Minnesota law. *Baker*, 191 N.W.2d at 186. Under a now-repealed statute mandating appellate jurisdiction. the U.S. Supreme Court summarily dismisses *Baker* "for want of a substantial federal question." *Baker*, 409 U.S. at 810.

Summary dismissal has extraordinarily narrow precedential value. Summary dispositions bind only the precise legal questions and the facts set forth in the jurisdictional statement. *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979), *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Summary dispositions do not signal the Court's adoption of a lower court's reasoning. *Mandel*, 432 U.S. at 176, *Bush v. Vera*, 517 U.S. 952, 996 (1996) (Kennedy, Anthony, J., concurring) ("We do not endorse the reasoning of the [lower court] when we order summary affirmance."). *Baker's* summary affirmance presents, at best, "a slender reed" on which future decisions may rest. *Morse v. Republican Party of Va.,* 517 U.S. 186, 203 n. 21 (1996), quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 – 85 n. 5 (1983).

The appellants present different claims from those before the *Baker* Court. Messrs. Benson and Gajewski seek recognition in Minnesota of their marriage under the laws of Vermont[15] and Ontario. Messrs. Trisko and Rittman seek recognition of the marriage under the laws of Manitoba. They also seek recognition of their marriage in their home Episcopal church in Minneapolis. Ms. Dykhuis and Ms. Campbell seek recognition of their registered domestic partnership as a marriage in Minnesota.[16] Sean Campbell seeks legal recognition of his relationship with both his parents, Jessie and Lindzi. MN DOMA thwarts their pursuit. MN DOMA injures them.

The appellants challenge MN DOMA under the equal protection, due process, freedom of conscience, and freedom of association provisions of Minn. Const. Art. I, §§ 2, 7, and 16, with reference to the Remedies Clause at Minn. Const. Art. I, § 8. The appellants challenge MN DOMA on the additional ground that it violates the Single Subject Clause at Minn. Const. Art. IV, § 17. *Baker*, in contrast, addresses a challenge to the existing state marriage licensing statute on due process, equal protection, and privacy grounds under the United States Constitution. *Baker*, 191 N.W.2d at 186 – 87. Neither U.S. DOMA nor MN DOMA exist in *Baker's* time.

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[15] civil union, now treated as a marriage under Vermont law

[16] These appellants plan to wed in Iowa in August. As a result, they will pose the same challenge to MN DOMA as the four other adult appellants – Minnesota's withholding recognition of a marriage duly solemnized in another lawful jurisdiction.

Moreover, the appellants challenge the Hennepin County Registrar's refusal to issue marriage licenses under the Minnesota Constitution's equal protection, due process, freedom of conscience, and freedom of association provisions at Minn. Const. Art. I, §§ 2, 7, and 16[17]. *Baker* says nothing on the Minnesota Constitution. The trial court finds troubling *Baker's* failure to address freedom of conscience under the state constitution. District Court Order and Memorandum, p. 11 *Baker's* failure to address freedom of association and the unalienable right to form a family under Minn. Const. Art. I, § 16 is especially significant in view of the recognition of these very rights under Minn. Const. Art. I, 16 in *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 14 N.W.2d 400 (1944), a case only twenty-seven years older than *Baker* and which remains good law today. Furthermore, *Baker* does not address the rights of minor children of same-sex parents. Thus, the appellants' principal claims have nothing to do with *Baker*. *Baker* does not have binding effect in this case. See *Smelt v. County of Orange*, 374 F.Supp.2d 861, 873 (C.D. Cal. 2005) (stating the court "[could not] conclude *Baker* necessarily decided the questions raised by the constitutional challenge to DOMA), aff'd in part and vacated in part on other grounds, 447 F.3d 673 (9th Cir. 200); *In re Kandu*, 315 B.R. 135, 137 – 38 (Bankr. W.D. Wash. 2004) (rejecting *Baker*'s application to DOMA challenge as case concerns "subsequently enacted federal legislation" with its own history); see also *In the Matter of the Marriage of*

[17] Noting Minn. Const. Art. I, § 8's Remedies Clause

J.B. & H.B., 326 S.W.3d 654, 671 – 72 (Tex. App. 2010) (finding *Baker* "did not control the disposition" of equal protection challenge to state law that precluded adjudication of married same-sex couple's divorce, a "distinguishable" matter presenting different legal issues). Notwithstanding the state's protests to the contrary, and notwithstanding the district court's reluctance to rule contrary to *Baker* in spite of its stated misgivings,[18] *Baker* does not determine the outcome of this case. In addressing the claims of same-sex couples lawfully married in other jurisdictions, this court may grant the appellants relief from MN DOMA, regardless of *Baker.*

[18] Trial Court Order and Memorandum, p. 11 (noting absence of discussion on state constitutional religious freedom in *Baker.*

POINT I

APPELLANTS STATE CLAIMS UNDER THE EQUAL PROTECTION CLAUSE AT MINN. CONST. ART. I, § 2.

The appellants state claims for relief under the Equal Protection Clause of Minn. Const. Art. I, § 2.[19]

A. FEDERAL TESTS AS A MINIMUM FLOOR FOR ART. I, § 2

1. **Heightened Scrutiny**

Applicable to the states as a minimum standard,[20] settled federal law sets forth two major and two supporting factors that trigger heightened scrutiny of group classifications. The factors are (a) historical discrimination, (b) concrete connection between the group's distinguishing characteristics and legitimate policy objectives, or to an individual's "ability to perform or contribute to society[,]", (c) existence of obvious, immutable, or distinguishing characteristics defining the group -- traits that they cannot, or should not have to, change, and (d) political minority or politically vulnerable status of the group. *Bowen v. Gilliard*, 483 U.S. 587, 602 – 03 (1987), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Suspect or quasi-suspect classifications of such groups require, at minimum, proof of the law's "substantial relationship to an important

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[19] Am. Cmplt. "Count III," ¶¶ 26 – 33, ¶¶ 41 – 45, Prayer for Relief 1 – 3, 5

[20] *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987) (recognizing right to privacy in Minn. Constitution), citing *State v. Fuller*, 374 N.W.2d 722, 726 – 27 (Minn. 1985)

government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (children born out of wedlock as quasi-suspect class).

Heightened scrutiny enables courts to discern whether government imposes classifications for significant and just purposes, and to prevent use of classifications that arise from impermissible prejudices or stereotypes. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality; affirmative action in municipal contracting), *U.S. v. Virginia ("VMI"),* 518 U.S. 515, 533 (1996) (striking down restrictions against admission of women). Heightened scrutiny requires defense of the statute by reference to the "actual [governmental] purpose" behind it, not a different "rationalization" or hypothetical created for the courthouse. *VMI*, 518 U.S. at 535 – 36. Restated, Section 3 of U.S. DOMA at 1 U.S.C. § 7 must rise or fall on Congress' actual justifications for the law.

Citing pervasive, longstanding discrimination at national and local levels by the public and private sector, the President and the Attorney General concede that classifications on the basis of sexual orientation merits heightened scrutiny, and that Section 3 of U.S. DOMA is unconstitutional under heightened scrutiny. Feb. 23, 2011 Letter to Speaker of the U.S. House of Representatives John Boehner from Attorney General Eric Holder Re Defense of Marriage Act, p. 2 (Attorney General Letter)[21]:

First and most importantly, there is, regrettably, a significant history

[21] Addendum, p. 25, Appendix p. LXIV, Defendants' (United States Office of Personnel Mgt. et al.) Brief in Opposition to Motion to Dismiss, *Golinski v. U.S.*, 3:10-00257-JSW (N.D. Cal. July 1, 2011)

> of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

At footnote 3, the Attorney General adds, "In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation[,]" citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985) (heightened scrutiny warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue).

Citing Judge Richard Posner's *Sex and Reason 101* (1991) and Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321, 124 Stat. 3515 (2010), the Government concedes sexual orientation to be an immutable trait, regarding it as unfair to force gays and lesbians to hide their sexual orientation to avoid discrimination.[22]

Citing Colorado's Amendment 2 at issue in *Romer v. Evans*, 517 U.S. 620 (1996), the Texas sodomy statute criminalizing same-sex sodomy only in *Lawrence*, the bans on gays and lesbians in the military, and the absence of federal protection against sexual orientation employment discrimination, the Government concedes the limited political power, and significant political

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[22] Attorney General Letter, p. 3, ¶ 1

vulnerability, of gays and lesbians. The Government adds that, while gays and lesbians are not totally powerless in view of the repeal of Don't Ask, Don't Tell, total powerlessness is not the test, citing the heightened scrutiny accorded gender-based classifications, notwithstanding the Nineteenth Amendment and Title VII.[23]

Citing the repeal of "Don't Ask, Don't Tell", *Lawrence*, *Romer*, and "evolutions… in social science regarding sexual orientation", the Government finds sexual orientation to have "no relation to ability to perform or contribute to society."[24]

The Government adds that circuit court authority subjecting sexual orientation classification to rational basis review does not survive the overruling of *Bowers v. Hardwick*, 478 U.S. 186 (1986), in *Lawrence v. Texas*, 538 U.S. 558 (2003).[25] Going further, the Government notes its disavowal of Congress' stated reasons for passage of U.S. DOMA – "responsible procreation and child-rearing" and moral disapproval of homosexuality in the favor of "traditional Judeo-Christian" heterosexuality".[26] In citing the legislative history of U.S. DOMA, the Government states, "The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection

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[23] Id. at p. 3, ¶ 2
[24] Id. at ¶ 3
[25] Id. at ¶ 4
[26] Id. at ¶ 4, pp. 3 – 4 nn. 6 – 7, citing H.R. Rep. No. 104-664 at pp. 13,15 - 17

Clause is designed to guard against."[27] In conclusion, the Government finds Section 3 of U.S. DOMA unconstitutional under heightened scrutiny as applied to legally married same-sex couples.[28]

2. **Flunking Federal Rational Basis**

Section 3 of U.S. DOMA flunks the deferential federal rational basis test. See *Gill v. Office of Personnel Mgt.,* 699 F.Supp.2d 374, 388 – 89 (D. Mass. 2010) (finding no rational basis in the stated purposes of U.S. DOMA: "(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources", citing H.R. Rep. 104-664, pp. 12 – 18. See also *Perry v. Schwarznegger*, 704 F.Supp.2d 921, 998 (N.D. Cal. 2010) (Walker, Vaughan, J.) (striking down on rational basis grounds stated bases for CA Proposition 8:

> (1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest.)

Finding these to be *post-hoc* justifications, the court holds Prop. 8 to rest on a sincere belief, that heterosexual couples are morally superior as couples and as parents than homosexual couples, a private prejudice, an argument based on

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[27] Id. at p. 4, p. 4, n. 7, and p. 5, ¶ 1 (citations omitted)

[28] Id. at p. 5, ¶ 2

"tradition"[29], and a moral judgment unenforceable under law.[30] In accord, *In re Balas*, 2:11-bk-17831 TD (Bankr. E.D. Cal. June 13, 2011) (no rational basis to prevent lawfully married same-sex couple to file joint Chapter 13 petition), *Dragovich v. U.S. Treasury Dep't*, 10-cv-01564 CW (N.D. Cal. Jan. 18, 2011) (Wilkin, Claudia, J.) (motion to dismiss challenge to U.S. DOMA § 3 denied).

The justifications for MN DOMA are the same as those for U.S. DOMA. As § 3 of U.S. DOMA flunks the rational basis and heightened scrutiny equal protection tests, and as § 3 cannot defeat same-sex litigants at the federal Rule 12(b)(6) stage, so, too, must MN DOMA fail. Accordingly, the appellants state claims for relief against MN DOMA that merit reversal and remand for trial and all appropriate declaratory and equitable relief.

B. EQUAL PROTECTION OF MINNESOTA LAW

The Minnesota Supreme Court prescribes a more stringent rational basis test than the federal test. *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (striking down Minnesota sentencing disparity between possession of powdered cocaine and crack cocaine for lack of rational basis under Minn. Const. Art. I, § 2). Under the Minnesota rational basis test:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or

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[29] See Sholem Aleichem and Jerome Robbins, *Fiddler on the Roof* "Tradition!"
[30] Id. at 1022.

> relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Russell at 888.

Under Minnesota's stricter rational basis test, the Minnesota Supreme Court is "unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires." *Id*. at 889. Thus, Minn. Const. Art. I, § 2 requires the same close, i.e., "substantial" relationship between the legislative means and actual stated purpose of the examined law as the heightened scrutiny test for equal protection under U.S. Const. amend V[31] and XIV, so long as the statute's purpose is "legitimate", in contrast to heightened scrutiny's demand for an "important government objective."[32] The Court's test demands discovery outside the four corners of the complaint. *Russell* at 888 – 89 (examination of chemical composition of crack and powdered cocaine with anecdotal testimony of State witnesses to strike down disparate sentencing). In examination of data outside the four corners of the complaint, the court goes beyond Minn. R. Civ. P. 12.02(e). Id., *Kahn v. Griffin*, 701 N.W.2d 815, 833 – 34 (Minn. 2005) (examination of election and redistricting data outside pleadings to answer "no" to certified question at *summary judgment* whether Minn. Const. Art. I, § 2 provides greater protections to right to vote than Fourteenth Amendment).

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[31] *Bolling v. Sharpe*, 347 U.S. 497 (1954) (Equal Protection Clause applied to federal government in Fifth Amendment)

[32] *Clark v. Jeter*, 486 U.S. 456, 461 (1988)

MN DOMA has the same stated purposes as U.S. DOMA – promotion of heterosexuality over homosexuality, and the raising of children of heterosexual marriage in accordance with claimed "Judeo-Christian" principles.[33] Advancement of one perceived moral code over others does not constitute a legitimate, let alone, important government objective. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992). Noting the deeply held beliefs by many "condemning homosexual conduct as immoral", *Lawrence v. Texas*, 539 U.S. 558, 571 (2003), holds that the majority may not use the power of the State to enforce its moral views over all society: "'Our obligation is to define the liberty of all, not to mandate our own moral code.' [citing *Planned Parenthood*, supra]".

That which serves no legitimate purpose under national law serves no legitimate purpose under Minnesota law. MN DOMA does not survive heightened scrutiny.[34] MN DOMA flunks the federal rational basis test. In so flunking federal law, MN DOMA flunks the more discerning Minnesota rational basis

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[33] *Benson et al. v. Alverson et al.,* 27-CV-10-11697 (Minn. Fourth Dist. Ct., Hennepin County, Nov. 26, 2010), Order Denying Motion of Minnesota Family County (MFC) to Intervene per Minn. R. Civ. P. 24.01 and 24.02, pp. 3 – 4 (identifying Minnesota Family Council as principal proponent and organizer for MN DOMA in 1997, citing Affidavit of MFC President Tom Prichard), Prichard Aff., ¶¶ 12 – 23 (raising children of heterosexual marriage as goal)

[34] Minnesota's own legal and political history show gays and lesbians to have suffered, and to suffer now, from political vulnerability. See *St. Paul Citizens for Human Rights v. City Council of the City of St. Paul*, 289 N.W.2d 402, 404 (Minn. 1979) (concerning repeal of clauses of St. Paul Human Rights Ordinance prohibiting sexual orientation discrimination), 1990 unsuccessful attempt to repeal reenacted clauses prohibiting sexual orientation discrimination in St. Paul City Ordinance, and HF 1613, 2011 referendum for 2012 general election, to amend Minnesota Constitution to define marriage as that civil contract between one man and one woman only.

test.[35] Concomitantly, classifications drawn between married couples of different sexes and married couples of the same sex do not survive Minn. Const. Art. I, § 2's minimal scrutiny. Thus, the appellants state claims for declaratory and equitable relief against MN DOMA, and all other provisions of Chapter 517 that wrongfully disadvantage same-sex marriages in favor of different-sex marriages. The court should reverse and remand the district court's Rule 12.02(e) dismissal for discovery, trial, and suitable relief.

POINT II

APPELLANTS STATE CLAIMS UNDER THE DUE PROCESS CLAUSE AT MINN. CONST. ART. I, § 7.

The appellants state claims under the Due Process Clause at Minn. Const. Art. I, § 7.

Due process protects individuals from arbitrary governmental intrusion into life, liberty, or property. *Washington v. Glucksberg*, 521 U.S. 702, 719 – 20 (1997). Infringement of a fundamental right violates Fourteenth Amendment substantive due process rights unless the infringement serves a compelling state interest by narrowly tailored means. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Fundamental rights may not be submitted to the vote of a plurality; their existence does not turn on the results of elections. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Jehovah's Witnesses not compelled to

[35] *Russell*, 477 N.W.2d at 888 - 89

recite Pledge of Allegiance on account of fundamental right of free exercise of religion).

Freedom to marry is a fundamental right. *Zablocki*, 434 U.S. at 384, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965):

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 – 40 (1974) (marriage and family life), *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (freedom to marry as vital personal right; miscegenation statute struck down).

Minn. Const. Art. I, § 16, stating, "[t]he enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people[,]" enshrines the right to form a home and establish family relations *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 224 – 25, 14 N.W.2d 400, 405 (1944) (case of pauper family disseised from freehold; claim against town board members stated; $150 awarded at jury against individual town board members). The Due Process Clause at Minn. Const. Art. I, § 7 is coextensive with U.S. Const. amend. V and XIV. *Sartori v. Harnischfager Corp.*, 432 N.W.2d 448, 453 (Minn. 1988).

Messrs. Benson and Gajewski are a married couple under Vermont and Ontario law. Messrs. Trisko and Rittman are duly married under the laws of

Manitoba and solemnized in accordance with the rites of St. Mark's Episcopal Church of Minneapolis. Ms. Dykhuis and Ms. Campbell are registered domestic partners in Duluth.[36] They seek recognition from Minnesota, that their respective unions are "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486. They seek recognition of an old right – the freedom to marry – not a new right. *Perry v. Schwarznegger*, 704 F.Supp.2d 921, 993 (N.D. Cal. 2010) (Proposition 8, banning same-sex marriages after approval of same by California Supreme Court, struck down on due process and equal protection grounds as unlawful infringement of fundamental freedom to marry). They are married.

Minn. Stat. § 517.03 subd. 1 prohibits certain marriages in Minnesota, in addition to same-sex marriage: bigamy and marriages between close relatives. Id. The only marriages duly solemnized in other states and foreign jurisdictions that Minn. Stat. § 517.03 subd. 1(b)[37] explicitly refuses to recognize are marriages between two persons of the same gender. Contrary to the appellees' representations, MN DOMA impairs the fundamental rights of marriage that the adult appellants respectively enjoy as same-sex couples, duly married under law and solemnized, in the case of Messrs. Trisko and Rittman, according to their religious faith. The interests the state seeks to protect in MN DOMA are not legitimate, and are thus not compelling. *Zablocki*, 434 U.S. at 388, *Sartori*, 432

[36] They will wed in Iowa in August.
[37] Added in MN DOMA in 1997

N.W.2d at 453. Accordingly, the appellants state claims against MN DOMA and the remaining Chapter 517 prohibitions against marriage equality. The court should reverse the judgment of the district court, and remand for further proceedings and suitable declaratory and equitable relief, striking down MN DOMA and ordering the Registrar to issue marriage licenses to the appellants.

POINT III

MN DOMA VIOLATES THE MINN. CONST. ART. IV, § 17 SINGLE SUBJECT CLAUSE.

The appellants state claims that MN DOMA violates the Minn. Const. Art. IV, § 17 Single Subject Clause.

Article IV, § 17 of the Minnesota Constitution provides that that "[n]o law shall embrace more than one subject, which shall be expressed in its title." The purpose of the Single Subject Clause is to "prevent what is called "log-rolling legislation" or "omnibus bills," by which a number of different and disconnected subjects are united in one bill, and then carried through by a combination of interests." *Johnson v. Harrison*, 50 N.W. 923, 924 (Minn. 1891).

To satisfy the Single Subject Clause, "All that is necessary is that the act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject." *Id*. at 924. The Minnesota Supreme Court further clarified this standard by stating that legislation satisfies the Single Subject

Clause when the "common thread which runs through the various sections . . . is indeed a mere filament." *Blanch v. Suburban Hennepin Regional Park Dist.*, 449 N.W.2d 150, 155 (Minn. 1989).

After a long period of liberally construing the Single Subject Clause, in the last decade the Minnesota Supreme Court has adopted a more stringent approach. In *Associated Builders and Contractors v. Ventura*, 610 N.W.2d 293, 295 (Minn. 2000), the court addressed the issue of whether an amendment to the state's prevailing wage law enacted as part of an omnibus tax bill related to tax relief and reform violated the Single Subject Clause. There, the appellants assert that the prevailing wage amendment is germane to the subject of tax relief because it purposes to overturn a prior Minnesota Supreme Court decision impacting tax relief. *Id*. at 302. The Minnesota Supreme Court rejects the appellants' reasoning as "strained" and strikes down the amendment as a violation Single Subject Clause. *Id*. The court reasons that the "clear wording" of the Clause does not permit the "inclusion of such disparate provisions in one bill". *Id*.

More recently, in *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 595 (Minn. Ct. App. 2005), appeal dismissed, (Minn. June 9, 2005), the court addresses the issue of whether the Personal Protection Act ("PPA", or "concealed-carry"), legislation relating to handguns permits, enacted as part of a natural resources bill violates the Single Subject Clause. The appellant -- the state -- argues the PPA does not violate the Single Subject Clause because it is not a tiny section of an immense omnibus bill and because it receives extensive legislative

attention in both the House and the Senate. *Id*. at 596. The court rejects these and strikes down the PPA as a violation of the Single Subject Clause. *Id*. at 600. The court holds the proper inquire was whether the challenged law is germane to a single subject. *Id*. at 596. Because natural resources and handguns are "two disparate subjects" that "lack a legitimate connection to one another," the PPA violates the Single Subject Clause. *Id.* at 595.

Sen. Samuelson introduces S.F. 1908 on the thirty-eighth day of the session on 14 April 1997. S.F. 1908 states that it is:

> A bill for an act relating to the operation of state government services; appropriating money for the operation of the departments of human services and health, the veterans home board, the health related boards, the disability council, the ombudsman for families, and the ombudsman for mental health and mental retardation; including provisions for agency management; children's programs; basic health care programs; medical assistance and general assistance medical care; long-term care; state-operated services; mental health and health department…[38] (emphasis added)

At birth, S.F. 1908 contains no provisions addressing same-sex marriage.[39]

On 16 May 1997, the sixty-first day of the session, the Conference Committee adds the provisions that become MN DOMA, codified at Minn. Stat. §§ 517.01, 517.03, and 517.04.[40] The Conference Committee Report on S.F. No.

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[38] Journal of the Senate, 80th Session, April 14th, 1997, pp. 1850 - 1851

[39] Id.

[40] Journal of the Senate, 80th Session, Friday May 16, 1997, pp. 3307, 3526 – 27, 3545 ("So the bill, as amended by the Conference Committee, was repassed and its title was agreed to.") The only apparent connection – a fig leaf, not a filament – between the original bill and the multispecies creature reaching Governor Carlson is the provision codified at Minn. Stat. § 517.03 subd. 2 requiring the Commissioner of Human Service's consent to the marriage of a mentally retarded person committed to the Commissioner's

1908 contains no description of the bill's effect on marriage.[41] Only in the final version of Chapter 203 does the phrase "changing provisions for marriage" appear for the first time, between "creating a demonstration project for persons with disabilities" and "accelerating state payments."[42]

Human services, aid to disabled individuals, long-term care facility funding, welfare reform, and same-sex marriage are widely disparate subjects that lack a legitimate connection to one another. As conceded by the national government, "responsible procreation" and child-rearing are disavowed as legitimate purposes to support U.S. DOMA.[43] This court struck down the original concealed-carry law as a misplaced graft on an unrelated spending bill. *Unity Church*, 694 N.W.2d at 595, 600. If the state continues to argue the existence of a filament to survive Single Subject scrutiny, the state must also answer why it is not a proper party to this lawsuit, when the bill establishing MN DOMA appropriates state monies and tasks three state departments – Human Services, Health, and Veterans Affairs – with new duties. The state cannot have its cake, and cower outside the courthouse while eating it.

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guardianship. Thus, a mentally retarded ward of the state may marry anyone of the opposite sex, subject to the Commissioner's consent, but a fully competent person may neither marry, nor have his or her existing marriage to, a person of the same sex recognized in Minnesota.

[41] Id. at p. 3307

[42] https://www.revisor.mn.gov/laws/?id=203&doctype=Chapter&year=1997&type=0

[43] Holder Letter, p. 3, ¶ 4, n. 5 "As the Department has explained in numerous, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised

One can receive human services regardless of whether one is married. One can be denied a marriage license regardless of whether one receives human services. One may marry whether one desires children, already has children, or is physically capable of having children. The inclusion of the Minnesota DOMA into a large funding bill is emblematical of the gross logrolling that Minnesota's constitutional Framers forbid. The legislative history of Chapter 203 and S.F. 1908 exposes the MN DOMA provisions as a transgenetic, eleventh-hour graft. Minnesota's DOMA, Minn. Stat. § 517.03 subd. 1(b) therefore violates the Single Subject Clause.

The appellants spell out facts, not mere conclusions that support their Single Subject Clause claim against MN DOMA. They make extensive citations outside the corners of the pleadings. They specify the declaratory and equitable relief they seek. (Am. Compl. 17-18.) Their claim that Minnesota's DOMA violates the Single Subject Clause is legally sufficient and plausible, and survives Minn. R. Civ. P. 12.02(e) scrutiny. *Bahr v. Capella University*, 788 N.W.2d 76, 80 (Minn. 2010). The court should reverse and remand the appellants' Single Subject Clause claim against MN DOMA.

POINT IV

APPELLANTS STATE CLAIMS FOR VIOLATION OF THEIR FREEDOM OF ASSOCIATION RIGHTS AT MINN. CONST. ART. I, § 16.

MN DOMA violates the appellants' clearly established freedom of

association rights at Minn. Const. Art. I, § 16.

Thiede v. Town of Scandia Valley, 217 Minn. 218, 224 – 25, 14 N.W.2d 400, 405 (1944), sets forth the full meaning of the unenumerated, but altogether real, inherent, and primordial rights that Minn. Const. Art. I, § 16:

> The entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these are the right to be protected in life, liberty, and the pursuit of happiness; the right to acquire, possess, and enjoy property; and the right to establish a home and family relations – all under equal and impartial laws which govern the whole community and each member thereof. [citations omitted] … The rights, privileges, and immunities of citizens exist notwithstanding there is no specific enumeration thereof in State Constitutions. "These instruments measure the power of rules, but they do not measure the rights of the governed." [citations omitted]
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> …
>
> The Constitution of Minnesota specifically recognizes the right to "life, liberty or property" (art. I, § 7), but does not attempt to enumerate all "the rights or privileges secured to any citizen thereof" (see art. I, § 2). It, however, significantly provides: "The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people." (Art. I, § 16).

Twenty-one years later, *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965), in striking down the Connecticut law prohibiting the sale of contraceptives to married individuals, finds the freedom to marry as a freedom of association, within the right to privacy discerned within "the penumbra" of the Bill of Rights" "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life…" Reaffirming the right to terminate a pregnancy as a Fourteenth

Amendment Due Process liberty interest, the Court states,

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education…. [citations omitted] These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).[44] *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (same, following *Casey* and overruling *Bowers v. Hardwick* 478 U.S. 186 (1986), "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."). In accord, *Lawrence*, 539 U.S. at 604 – 05 (Scalia, J., dissenting, acknowledging that majority opinion sweeps away all constitutional objections to marriage equality regardless of sexual orientation, and acknowledging procreation as no basis for marriage restrictions).

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), ignores *Thiede* and Minn. Const. Art. I, § 16, without interpretation of the Minnesota Constitution to guide or frustrate any future Court.

State by McClure v. Sport & Health Club, 370 N.W.2d 844, 850 (Minn.

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[44] citation to U.S. Const. amend. IX, id. at 848 – 49: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."

1984), appeal dismissed, 478 U.S. 1015 (1986), finds freedom of association within Minn. Const. Art. I, § 16. In so doing, the Court upholds the finding of religious and marital status discrimination against Sport & Health Club's claims of infringement of the owners' freedom of association and conscience. The district court's finding of no freedom of association in the Minnesota Constitution is misplaced. Order, pp. 14 – 15.

Citing *Thiede* and *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987) (privacy), *Johnson v. Hunter*, 447 N.W.2d 871, 876 (Minn. 1989), recognizes the fundamental right of a child to establish a relationship with a parent, whether the child is born in or out of wedlock. *Baker* offers no analysis of the right to establish family relations under the Minnesota Constitution.

Doe v. Ventura, 2001 WL 543734 (Minn. Fourth Dist. Ct., Hennepin County, May 15, 2001) (Pierce, Delila, J.), a declaratory action against the state, strikes down on state constitutional privacy grounds Minn. Stat. § 609.293's criminal prohibition against sodomy, as applied to consensual, noncommercial relations between two consenting adults. *Doe*, 2001 WL 543734 at *7 - *9:

> Plaintiffs assert, appeals to natural or theological ethics cannot constitutionally be used to legitimate laws that simply do not advance public welfare…. The Court finds Plaintiffs' reasoning persuasive and, accordingly, declares Minn. Stat. § 609.293 to be unconstitutional, as applied…

The state does not appeal *Doe.* As a result, *Doe* is binding precedent throughout the state. *Devescovi v. Ventura*, 195 F.Supp.2d 1146, 1149 (D. Minn. 2002) (Davis, Michael, C.J.).

In re Guardianship of Sharon Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991), review denied (Minn. Feb. 10, 1992), finds a "family of affinity" in the same-sex couple of Sharon Kowalski and Karen Thompson as it names Karen Thompson as the guardian of the brain-injured Kowalski. While reversing the district court's award of guardianship to Karen Tomberlin, this court affirms the district court's finding Kowalski and Thompson a "family of affinity"[45] under the Minnesota Constitution's right to privacy. *Kowalski*, 478 N.W.2d at 797.

The right of familial association is a right that Minn. Const. Art. I, § 16 protects as a pre-constitutional inherent right. *Baker* leaves the right undisturbed. The state constitutional right of association finds reaffirmation in *Sports & Health Club*, *Gray*, *Johnson*, and *Devescovi*. *Kowalski* rests upon this Minn. Const. Art. I, § 16 family association right within the right to privacy, and specifically recognizes Kowalski and Thompson as a family of affinity. The appellants, including minor child Sean Campbell, state claims for violation of their right to familial association that merit remand and suitable declaratory and equitable relief at trial.

[45] Affinity: "2. Relationship by marriage. 3. Any familial relation resulting from a marriage." (Black's Law Dictionary, 9th Ed., 2010)

POINT V

APPELLANTS STATE CLAIMS FOR VIOLATION OF THEIR FREEDOM OF CONSCIENCE AND FREE EXERCISE OF RELIGION AT MINN. CONST. ART. I, § 16.

MN DOMA and Chapter 517 prohibitions against marriage equality regardless of gender or sexual orientation violate the appellants' freedom of conscience and religious freedom rights under Minn. Const. Art. I, § 16.

Minn. Const. Art. I, § 16[46] provides greater protection to freedom of conscience and free exercise of religious beliefs, and greater restrictions upon government support of any religious establishment or belief system, than the First Amendment. *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) (Popovich, Peter, C.J.) (striking down Minn. Stat. § 169.522 as applied to Amish; contrast First Amendment prohibitions against free exercise of religion with Art. I, § 16 prohibitions against infringement or interference), *Hill-Murray Federation of Teachers, St. Paul, Minnesota v. Hill-Murray High School, Maplewood, Minnesota*, 487 N.W.2d 857, 865 (Minn. 1992) (Keith, Sandy, C.J.) (upholding

[46] … The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state…

certification of collective bargaining unit against Art. I, §16 challenge). The provision has its origins in the 1777 New York Constitution and the Northwest Ordinance of 1787. *Hershberger*, 462 N.W.2d at 399, nn. 2 – 3 (Simonett, John, J., concurring) (N.Y. Const. of 1777, art. XXXVIII, Northwest Ordinance of 1787, art. I), Francis H. Smith, The Debates and Proceedings of the Minnesota Constitutional Convention Including the Organic Act of the Territory 279, 281 (1857), cited in, Nicholas Dranias, Reclaiming Minnesota's Territorial Birthright: Why the Northwest Ordinance Restricts the State's Power of Eminent Domain to Public Exigencies, http://works.bepress.com/nicholas_dranias/2, pp. 5 – 6 (January 2009). The provision restricts state interference except in cases of "licentiousness" or "practices inconsistent with the peace or safety of the state," and only then when the state demonstrates that alternative means cannot assure public safety. *Hershberger*, 462 N.W.2d at 397 – 98,[47] *Hill-Murray*, 487 N.W.2d at 865.[48] Art. I, § 16 prohibitions against compelled support of religious establishment or practices apply the *Lemon v. Kurtzman*, 403 U.S. 602, 612 – 13 (1973) tests of secular vs. sectarian purpose, inhibition or promotion of religion in primary effect, and entanglement between state and religion. *Hill-Murray*, 487 N.W.2d at 863.

Baker fails to address freedom of conscience or establishment of religion

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[47] equating "compelling state interest" and "least restrictive alternatives" to state test
[48] four-part test: sincere religious belief; whether state regulation burdens religious belief; whether state interest is compelling; and whether regulation applies least restrictive means

under the state constitution. The district court's reluctance to dismiss comes through most clearly on this point. Order, p. 11: "Defendants contend that *Baker v. Nelson* disposes of Plaintiffs' Freedom of Conscience claim. This Court cannot fully agree." *Doe, Devescovi,* and *Lawrence* obliterate claims that marriage equality promotes licentiousness or acts "inconsistent with the peace or safety of the state".[49] Thus, Minn. Stat. MN DOMA and Minn. Stat. §§ 517.01 and 517.03 run afoul of Art. I, § 16. *Hershberger*, 462 N.W.2d at 397 – 98. *Lawrence* identifies the religious motivation of those opposing same-sex marriage and supporting criminal sodomy statutes. *Lawrence*, 539 U.S. at 571. *Varnum v. Brien*, 763 N.W.2d 862, 904 – 05 (Iowa 2009), strikes down Iowa's statutory ban on same-sex marriage as a violation of the Iowa Constitution's equal protection, establishment of religion, and free exercise of religion clauses:

> Our constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government *avoids* them…. The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, "Marriage is a civil contract" and then regulates that civil contract. [citation omitted]. Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics… This mission to protect religious freedom is consistent with our task to prevent government from endorsing any religious view. State government can have no religious views, either directly or indirectly, expressed through its legislation.

Messrs. Trisko and Rittman solemnize their marriage at St. Mark's Episcopal Church in Minneapolis. The district court wishes them well, and says in

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[49] *Hershberger*, 462 N.W.2d at 397 – 98, Minn. Const. Art. I, § 16

the breath that marriages between two people of different sexes are more equal than theirs. Order, pp. 13 – 14. The district court's holding flies in the face of Art. I, § 16, which prohibits any infringement or interference with free exercise of religion and conscience, *Hershberger* at 397: "Accordingly, government actions that may not constitute an outright prohibition on religious practices (thus not violating the first amendment) could nonetheless infringe on or interfere with those practices, violating the Minnesota Constitution." The district court errs.

Art. I, § 16 prohibits playing favorites between religions and sects. Whereas the Missouri Synod prohibits same-sex marriage, the Evangelical Lutheran Church of America (ELCA) leaves the decision to respective congregations. Whereas the Roman Catholic Church and Church of Jesus Christ of Latter-Day Saints prohibits same-sex marriage, the Episcopal Church, the United Church of Christ, and the Society of Friends (i.e., Quakers) sanctify marriages regardless of the spouses' genders. Whereas Orthodox Jewish congregations currently prohibit same-sex marriages, the Conservative movement leaves it up to individual congregations while ordaining rabbis regardless of sexual orientation, and the Reform, Reconstructionist, and Jewish Renewal movements sanctify same-sex marriages.[50]

During debates over the 2011 anti-marriage equality amendment, HF 1613, Rep. Steve Simon (DFL-St. Louis Park) addresses the "nature vs. nurture" issue

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[50] *Varnum*, 763 N.W.2d at 905, n. 31

in sexual orientation, asking amendment proponents to address its effect on their moral argument. He then asks rhetorically, "How many more gay people does G-d have to create before we can decide whether G-d wants to have them around?"[51] On 20 May 2011, Rev. Bradlee Dean, a minister with a record of calling for the jailing of gays or worse, delivers the invocation in the Minnesota House of Representatives on the day of the vote on HF 1613. In his invocation of "Jesus Christ" in his "non-denominational" prayer, and his implied criticism of President Obama for "not acknowledging" Jesus, Dean brings down such outrage in the chambers that Speaker of the House Zellers reconvenes the House from the beginning, leads the Pledge of Allegiance a second time, calls on the regular House Chaplain to give the invocation, and then apologizes to the House:

> As Speaker of the House, I take responsibility for this mistake. I am offended at the presence of Bradlee Dean on the floor of the Minnesota House of Representatives. I denounce him, his actions and his words. He does not represent my values or the values of this state.[52]

Art. I, § 16 enshrines the paramount purpose of Minnesotans to create a state which compels no one to contribute to organized faiths contrary to their own values, which allows unfettered freedom of conscience so long as it neither infringes nor interferes with the peace and safety of others, and which creates a common platform, on which men and women peaceably may question, worship, or

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[51]http://www.minnpost.com/minnclips/2011/05/05/28044/rep_steve_simons_gay_marriage_speech_goes_viral/?utm_source=MinnPost+email+newsletters&utm_campaign=41d95e86b1-5_6_2011_MinnPost_Daily5_6_2011&utm_medium=email

[52]http://www.minnpost.com/stories/2011/05/20/28497/legislative_firestorm_erupts_over_bradlee_deans_prayer

refrain from worshipping or recognizing, Spirit, Deity, Higher Powers, or G-d, and on which they marry whom they choose, without religious restriction, to fulfill marriage's secular purposes of commitment, mutual caring, intimacy, and peaceful co-existence and pursuit of happiness and meaning in the home and community.[53]

MN DOMA and Minn. Stat. §§ 517.01 and 517.03 frustrate Art. I, § 16's purpose by imposition of one moral code at the expense of "the liberty of all", and without enactment of reasonable and lesser restrictive means. *Lawrence*, 539 U.S. at 539, *Hershberger*, 462 N.W.2d at 399. HF 1613, "the marriage amendment", intends wholesale evisceration of Art. I, § 16's inalienable, primordial rights, and invites wholesale civil strife, of which the 20 May 2011 events on the House floor are but a minor trailer to a major tragedy. The district court's misgivings as to *Baker's* effect on Art. I, § 16 is well-founded, but its ultimate decision is misplaced. The appellants state claims for violation of their rights of freedom of conscience under Minn. Const. Art. I, § 16. The court should reverse the district court, and remand for discovery, trial and declaratory and equitable relief for these married couples, parents, and minor child.

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[53] *Thiede*, 217 Minn. at 224 – 25, 14 N.W.2d at 405, *Planned Parenthood of Southeastern Pa.*, 505 U.S. at 850. Those who claim that marriage equality will force ministers to perform gay marriages against their will and religious beliefs, establish tax-supported "gay churches", or interfere with the free exercise of conscience of same-sex marriage opponents need only examine A8354, the New York Assembly statute enshrining marriage equality by Gov. Cuomo's 24 June 2011 signature. In addressing the sincere concerns of fence-sitters, New York creates a statutory scheme that meets the four-part *Hershberger* test for same-sex marriage proponents, and same-sex marriage opponents, without running afoul of Art. I, § 16's "Establishment Clause".

CONCLUSION

The United States DOMA[54] flunks the rational basis and heightened scrutiny tests under the United States Constitution's Fifth and Fourteenth Amendment Due Process and Equal Protection Clauses. Minnesota's DOMA[55] fails the discerning rational basis test of Minn. Const. Art. I, § 2. MN DOMA fails the stringent Single Subject Test of Minn. Const. Art. IV, § 17.

The Curia[56] has no place in the Capitol. The State has no place in the pulpit. The government has no place in the adult bedroom. Minnesota DOMA runs hard aground on the bedrock of Freedom of Conscience and Freedom of Association enshrined at Minn. Const. Art. I, § 16.

Baker v. Nelson is a dying, distinguishable derelict, bereft of any analysis of the Minnesota Constitution or statutes yet to come into existence, and not relied upon by federal courts in rulings on U.S. DOMA. *Baker* poses no obstacle to the appellants' state constitutional claims against MN DOMA. To the extent *Baker* thwarts prospective same-sex marriages in Minnesota, *Baker* must be overruled on state constitutional freedom of conscience and freedom of association grounds.

The Minnesota Court of Appeals should REVERSE the decision of the district court, find that the state is a properly joined party, find that the appellants state claims that Minn. Stat. §§ 517.01, 517.03, and 517.04, the embodiment of

[54] 1 U.S.C. § 7
[55] Laws of Minnesota Chapter 203, art. 10, codified at, Minn. Stat. § 517.03 subd. 1(b)
[56] Seat of power of the Roman Catholic Pope

Minnesota DOMA, violate the Equal Protection, Due Process, Freedom of Association and Assembly, and Freedom of Conscience Clauses of Minn. Const. Art. I, §§ 1, 2, 7, 8, and 16, find that the appellants state claims that the 1997 Minnesota Defense of Marriage Act (DOMA), 1997 Laws of Minnesota Chapter 203, art. 10, violates the Single Subject Claus of Minn. Const. Art. IV, § 17, and remand the matter for discovery, trial, and all declaratory, equitable, and mandamus relief to recognize the appellants as married persons under Minnesota law, and to recognize the minor child as the minor child of married parents.

10 July 2011

Respectfully submitted:

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CERTIFICATE OF WORD COUNT

I, Peter J. Nickitas, attorney for appellants hereby certify in accordance with Minn. R. App. P. 132.01 that this principal brief has 12,714 words, that the typeface is Times New Roman 13 point, that this brief is the product of a 13 inch MacBook operating Mac OSX 10.6 Snow Leopard and Microsoft Word 2008, and this brief is free of all known viruses.

10 JULY 2011 /s/ *Peter J. Nickitas*

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Peter J. Nickitas

ADDENDUM

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APPENDIX

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