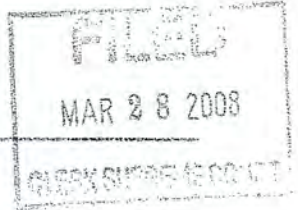


IN THE SUPREME COURT FOR THE STATE OF IOWA



KATHERINE VARNUM, PATRICIA HYDE *
VARNUM; DAWN BARBOUROSKE and *
JENNIFER BARBOUROSKE, individually *
and as next friends of MCKINLEY and *
BREEANNA BARBOUROSKE, minor *
children; JASON MORGAN, CHARLES *
SWAGGERTY; DAVID TWOMBLEY, *
LAWRENCE HOCH; WILLIAM M. *
MUSSER, OTTER DREAMING; INGRID *
OLSON, and REVA EVANS, individually, *
and as next friend of JAMISON OLSON, *
a minor child, *

Supreme Court No. 07-1499

Polk County CVCV 005965

Plaintiffs/Appellees,

vs.

TIMOTHY J. BRIEN, in his official capacities *
as the Polk County Recorder and Polk County *
Registrar, *

Defendant/Appellant. *

Appeal from the Iowa District Court for Polk County
The Honorable, Robert Hanson, District Judge

BRIEF AMICUS CURIAE OF IOWA AND NATIONAL FAITH LEADERS,
COMMUNITIES AND SCHOLARS

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STATEMENT OF THE INTEREST OF THE *AMICI CURIAE*

Amici joining in this brief are religious leaders, organizations and scholars that support the right of all committed couples to enter into civil marriage, including same-sex couples. *Amici* represent a wide variety of religious faiths and traditions that mirror the rich diversity of the citizens of the State of Iowa and the United States of America. Though *Amici* represent different faiths and practice in different ways, *Amici* stand united in support of the dignity of loving, committed same-sex couples, and believe that same-sex couples should be permitted to enter into civil marriage. *Amici* submit this brief to counter the argument that current marriage laws, to the extent that they discriminate against same-sex couples, must be upheld in deference to the traditions and religious beliefs of only certain groups of citizens. *Amici* urge this honorable Court to order the State of Iowa to include same-sex couples under the civil, legal framework of the marriage laws of Iowa.

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INTRODUCTION

More than one hundred sixty (160) *Amici Curiae* Iowa religious leaders, communities and scholars, and a number of national and regional religious organizations, both groups representing many denominations, respectfully submit this brief in support of the Appellees.

As representatives of a wide variety of religious faiths, traditions and other religious organizations in the State of Iowa and across the country, and as supporters of the right of persons to enter into marriage with persons of the same sex, *Amici* believe that the Appellant's invocation of "tradition" to support its position in this case raises grave concerns for religious freedom.

Amici submit this brief to urge recognition of the following principles in this Court's analysis: (1) marriage equality for same-sex couples is an issue of civil rights, not religious rights, because there is a fundamental distinction between civil marriage and the religious rites of matrimony; (2) the free exercise of religion is not constrained, but enhanced, by recognizing the civil right of marriage between same-sex partners; (3) given the diversity of religious thought and practice, the separation of church and state requires an interpretation of Iowa law without reference to any single conception by any particular religious tradition of what is "moral" from a religious standpoint; and (4) a broad and diverse spectrum of clergy and other people of faith support marriage equality for all committed couples.

Amici urge the Court to uphold the important distinction between State-sanctioned civil marriage and the religious rites of matrimony as mandated by the tenets of any individual religion. Iowa's constitutional hallmarks of fairness and justice require equal rights of access to civil marriage without regard to gender or sexual orientation.

STATEMENT OF THE CASE

The Appellees are twelve adult Iowans who comprise six same-sex couples and three of their children. The adult Appellees each went to the offices of the Appellant and applied for marriage licenses. After each of the couples were refused a license on the sole basis that the members of the couple are of the same sex, the Appellees sought relief in this Court, seeking a Declaratory Judgment that Iowa's prohibitions on marriages by same-sex couples are invalid and unconstitutional. The Appellant filed a Motion for Summary Judgment. The Appellees filed a Cross-Motion for Summary Judgment. On August 30, 2007, the district court entered its Ruling on Plaintiffs' and Defendant's Motions for Summary Judgment, in which the court granted the Plaintiffs' motion and denied the Defendant's. The Defendant promptly filed a Notice of Appeal.

ARGUMENT

I. ALTHOUGH "MARRIAGE" HAS BOTH RELIGIOUS AND CIVIL MEANINGS, IOWA LAW DEFINES AND GOVERNS ONLY CIVIL MARRIAGE

Our society typically uses the same word, "marriage," to describe both the religious rite

and the state-sponsored process for the legal union of two people. The term "marriage," therefore, has been applied both to wedding ceremonies performed within the confines of a religious community ("religious marriage"), and to the licensing and solemnization process set forth in the Iowa statutes and common law ("civil marriage"). The statutory provisions and common law, however, explicitly define the legal concept of marriage as a civil institution, and many religious faiths have long held views of religious marriage that diverge greatly from Iowa's construct of civil marriage. Entitlement to the legal status of civil marriage, therefore, should be unaffected by the varying and divergent concepts of religious marriage.

A. Civil Marriage is a Legal Status Created By The State.

Marriage is a civil contract that requires the consent of the parties. *See* Iowa Code §595.1A; In the Matter of the Estate of Fisher, 176 N.W.2d 801, 806 (Iowa 1970). Civil marriage is an institution and a status recognized legally, apart from and regardless of religious background.

Two forms of civil marriage are recognized in Iowa. In re the Marriage of Martin, 681 N.W.2d 612, 616 (Iowa 2004). One is ceremonial, governed by statute. *See generally* Iowa Code §§ 595.1 - 20 (2005). The second form of marriage is informal, known as a common law marriage. This type of marriage has been recognized in Iowa for well over a century. Fisher, 176 N.W.2d at 804. Three elements must exist to create a common law marriage: (1) present intent and agreement to be married by both parties; (2) continuous cohabitation, (3) and public declaration that the parties are married. Martin, 681 N.W.2d at 617; In re the Marriage of Winegard, 278 N.W.2d 505, 510 (Iowa 1979).

Iowa statutes recognize marriage as a civil legal status by which the State issues a marriage license and the marriage is solemnized by an appropriate civil or religious official, at the option of the couple. *See* Iowa Code §595.10 (Who May Solemnize) and Iowa Code §595.3 (License). Iowa law does not require that a religious official solemnize a marriage. To the contrary, a marriage in Iowa may be performed by a judge, or, if desired by the particular couple, by a religious official. Iowa Code §§ 595.10 and 595.17. Marriage, even when solemnized by a religious official, is a civil status conferred by the State.

In addition to the recognition of civil marriage by the State of Iowa, the United States Supreme Court has historically recognized civil marriages and has stated that they "do[] not require any religious ceremony for [their] solemnization." Maynard v. Hill, 125 U.S. 190, 210 (1888). As a result, courts should evaluate whether the Iowa Constitution requires that same-sex couples could not be denied the freedom to marry on the basis of neutral legal principles and not from any religious viewpoint or perspective.

B. Religious Marriages Involve Diverse Requirements Established by Each Religion, and are Distinct From Civil Marriage Under Iowa Statutes and Common Law.

The parameters of religious ceremonies are governed by the belief systems of individual religious faiths, clergy or houses of worship and therefore are separate from the parameters of marriage set forth in the Iowa statutes and common law. Consistent with the traditions of their faith, religious leaders pass judgment upon the suitability of potential couples and choose whom they will join in religious unions. Communities of faith are not compelled to accept the State's parameters for civil marriage, and indeed, many religious institutions do not accept them. As

such, religious conceptions of marriage vary widely.

Some religious marriage criteria are far more restrictive than the civil criteria found in the Iowa statutes and common law. Conservative Judaism, for example, prohibits interfaith marriages: "Rabbis and cantors affiliated with the Conservative Movement may not officiate at the marriage of a Jew to a non-Jew, may not co-officiate with any other clergy, and may not officiate or be present at a purely civil ceremony."¹ Other religious faiths, like Roman Catholicism, reject remarriages after legal divorce: "[i]f the divorced are remarried civilly, they find themselves in a situation that objectively contravenes God's law."² Such differences between religious and civil marriage strictures have always existed and demonstrate that if Iowa were to recognize civil marriages of same-sex couples (as it does interfaith marriages and remarriages after divorce), those unions would confer a legal status wholly separate from any single religious conception of marriage.

On the other hand, some religions confer religious marriage in a far more expansive and inclusive manner than Iowa's current restrictions on access to civil marriage. For example, many religious faiths and communities of worship officiate and celebrate the religious marriages of gay and lesbian couples.³ These examples also demonstrate that the religious and civil institutions of

¹ See, e.g., Leadership Council on Conservative Judaism, "Statement on Intermarriage" (March 7, 1995), available at http://www.seedwiki.com/wiki/conj/statement_on_intermarriage (last visited February 28, 2008).

² Catechism of the Catholic Church - Part Two, Section Two, Chapter 3, Article 7, Section V, The Goods and Requirements of Conjugal Love, Verse 1650 available at http://www.vatican.va/archive/ENG0015/_P55.HTM (last visited February 28, 2008) ("In fidelity to the words of Jesus Christ - 'whoever divorces his wife and marries another, commits adultery against her; and if she divorces her husband and marries another, she commits adultery'").

marriage can and do vary greatly without doing harm to either.

II. ALLOWING SAME-SEX COUPLES TO ENTER INTO CIVIL MARRIAGES WILL NOT INFRINGE RELIGIOUS GROUPS' FREE EXERCISE RIGHTS

The separation of church and state, as guaranteed by the United States Constitution, *see U.S. Const. amend. I*, and the Constitution of the State of Iowa, *see Iowa Constitution Article 1 Section 3*, protects the free exercise of religion. The United States Supreme Court has held that "freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law." Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940). "[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization...on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law" Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713, 96 S. Ct. 2372 (1976).

In the same vein, Iowa courts have applied the guarantee of free exercise to protect the rights of religious citizens. If there is any one thing which is settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state. Knowlton v. Baumhover, 182 Iowa 691, 704, 166 N.W.2d 202, 206 (1918). "The right of a man to worship God, or even to refuse to worship God, and to entertain such religious views as appeal to his individual conscience, without dictation or interference by any person or power, civil or ecclesiastical, is as fundamental in a free government like ours as is the right to life, liberty, or the pursuit of

³ See discussion *infra* at 10-16.

happiness.” Id. at 182 Iowa at 705, 166 N.W.2d at 208. “Iowa, like virtually every other jurisdiction, avoids interfering in purely ecclesiastical matters.” Kliebenstein v. Iowa Conference of United Methodist Church, 663 N.W.2d 404, 406 (Iowa 2003).

The State of Iowa has had a long history of recognizing the importance of religious autonomy and choice. In fact, the Iowa Constitution of 1857, Article I, sections 3 and 4, state that:

Religion. Sec 3. The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.

Religious test – witness. Sec. 4. No religious test shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law.

Given Iowa's long-standing commitment to the free exercise of religion, if same-sex couples were allowed to marry in the State, religious institutions' authority to regulate their marriages would be unaffected. In fact, the free exercise of religion would in no way be impaired by the recognition of civil marriage between couple of the same gender. The autonomy of religious institutions to determine their own guidelines for religious worship would remain undisturbed, but the rights and obligations of the legal institution of civil marriage should be available, for those who choose to enter into it.

III. CIVIL MARRIAGE BETWEEN SAME-SEX COUPLES IS SOLELY A MATTER OF CIVIL LAW, WITHOUT REFERENCE TO ANY PARTICULAR RELIGIOUS BELIEFS OR TRADITIONS

In this case, the Appellant has invoked "promoting the concept of fundamental marriage" and the "integrity of traditional marriage" as a basis for upholding the current laws that restrict same-sex couples from civil marriage. However, as Justice Scalia recognized: "[p]reserving the traditional institution of marriage is just a kinder way of describing the State's moral disapproval of same-sex couples." Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). The arguments based on "tradition" are nothing more than thinly veiled appeals to the moral and religious disapproval that some individuals hold against gay and lesbian people.

State and federal courts have acknowledged certain civil rights in the face of an "historical foundation" that would tend to abrogate those rights. In 1979, the Iowa Supreme Court overturned the interspousal immunity doctrine precluding one spouse from suing another because the tradition of viewing a married couple as one financial and contractual unit was outdated. Shook v. Crabb, 281 N.W.2d 616, 617 (Iowa 1979). In 1967, the United States Supreme Court, in Loving v. Virginia, 388 U.S. 1 (1967), rejected the state of Virginia's argument that there was no fundamental right to interracial marriage because the "historic tradition of marriage" did not contemplate it.

Iowa law recognizes the creation of civil rights in the face of traditions to the contrary. See Coger v. Northwestern Union Packet Co., 37 Iowa 145 (1873) (recognizing the right of an African-American woman to sit in the dining area with white passengers in face of common carrier's regulation and traditions of segregation.) The Court stated,

"[i]t cannot be doubted that she was excluded from the table and cabin, not

because others would have been degraded and she elevated in society, but because of prejudice entertained against her race, growing out of its former condition of servitude – a prejudice, be it proclaimed to the honor of our people, that is fast giving way to nobler sentiments, and, it is hoped, will soon be entombed with its parent, slavery. Coger, 37 Iowa at 158.

The United States Supreme Court very recently elaborated on the principle that a religious or "moral" rationale cannot justify discrimination. In Lawrence v. Texas, the Court noted that "for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." Lawrence, 539 U.S. at 570. But the Court concluded that these rationales give rise to "no legitimate state interest." Id. at 578. *See also* Moore v. City of E. Cleveland, 431 U.S. 494; 506 (1977) (plurality opinion) (striking down a housing ordinance that limited occupancy of a unit to a narrowly defined family); Lawrence v. Texas, 539 U.S. at 583 (Justice O'Connor, concurring) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. . . . Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons").

Thus, as this Court considers the fundamental right of same-sex couples to join in the civil institution of marriage, it should not be swayed by a claim by some individuals that their particular religious values demand that the State discriminate within the institution of civil marriage. To do so would run counter to Iowa's long adherence to the separation of Church and State by endorsing one particular view of marriage held by one or more religious groups but not all religious groups or citizens. In each case, the deviation from the views historically embraced

by the law of spousal immunity, interracial marriage and sodomy did not discourage the courts from protecting the rights of individuals. Social dynamics constantly change and historically held views do not always account for the need to meet the changes. In considering the fundamental right of same-sex couples to exercise the same right to enter a civil marriage, the rhetoric of moral and religious positions is not a valid basis for denying constitutionally protected rights. The State can have no religious opinions. Knowlton, 182 Iowa at 710, 166 N.W.2d at 208.

IV. IN ADDITION TO SUPPORTING FULL CIVIL MARRIAGE EQUALITY, MANY RELIGIOUS TRADITIONS ALREADY CELEBRATE THE MARRIAGES OF SAME-SEX COUPLES IN THEIR RELIGIOUS COMMUNITIES

The restrictive notion of marriage as a union only between a man and a woman would be a fundamentally flawed basis upon which to deny marriage equality to same-sex couples, particularly when this antiquated belief has been rejected by many diverse religious traditions and faiths. A growing number of religious traditions and faith organizations support equal civil marriage rights and regularly perform religious marriages for same-sex couples.

For example, the Reform Jewish movement, the largest Jewish movement in North America with more than 900 congregations and 1.5 million members, supports the rights of same-sex couples to obtain civil marriage and allows its rabbis to perform religious wedding ceremonies for same-sex couples.⁴ Within the Reform movement, the Central Conference of

⁴ The Union for Reform Judaism (formerly the Union of American Hebrew Congregations) has consistently affirmed its commitment to welcoming gay and lesbian couples into its congregations and in 1993 expanded that support with a resolution supporting full equality under the law, including legal recognition of same-sex relationships. UAHC 1977 Biennial Convention, Civil Marriage for Gay and Lesbian Jewish Couples (1977), available at

country, expressly provides that its clergy and congregations may celebrate the religious marriages of same-sex couples.¹¹ Like the United Church of Christ, the Unitarian Universalist Association, traces its history directly to the Puritans of New England.

In addition to these religious denominations, many faith organizations are working within their respective traditions for the full inclusion of gays and lesbians and the recognition of both civil and religious marriages between same-sex partners. For example, the Al-Fatiha Foundation, an organization dedicated to lesbian, gay, bisexual, transgender and intersex Muslims "promotes the progressive Islamic notions of peace, equality and justice" while envisioning "a world that is free from prejudice, injustice and discrimination, where all people are fully embraced and accepted into their faith, their families and their communities."¹²

The Executive Director of Lutherans Concerned/North America, a Christian Ministry comprised of individuals who assert God's love for all people of all sexual orientations and gender identities, recently stated that:

As members of the Body of Christ and practicing Lutherans, we [lesbian and gay members of the Lutheran Church] are secure in our God-given faith despite the long years of exclusion by our church. We believe that the Good News of the Gospel will ultimately prevail. We remain committed to the removal of discriminatory policies that violate our calls to ministry and marginalize our relationships.¹³

¹¹ In 1996, the Unitarian Universalist Association's Board of Trustees adopted a resolution in support of both civil and religious marriage for same-sex couples. See "History of Unitarian Universalist Involvement in and Support of Bisexual, Gay, Lesbian and Transgender Issues" (1996), available at <http://www.uua.org/members/justicediversity/bisexualgay/20962.shtml> (last visited February 28, 2008)

¹² Al-Fatiha Foundation Homepage, available at <http://www.alfatiha.org> (last visited February 28, 2008).

¹³ Press Release, Lutherans Concerned/North America, "Lutheran Alliance remains focused on the full participation of gays and lesbians in the life of the Lutheran Church (January 13, 2005),

Similarly, in August of 2003, the board of directors of DignityUSA, a national organization of gay, lesbian, bisexual and transgender ("GLBTH) Catholics and GLBT-supportive Catholics, adopted a resolution saying:

Consistent with the pursuit of liberty and justice for all, same-sex couples should have full and equal access to the rights and responsibilities bestowed by civil marriage. . . . As Catholics, we remind our Church of a foundational conviction of our faith: God is love and all who abide in love abide in God and God abides in them. The love that brings and binds two people of the same, or opposite sex, together has a divine source.¹⁴

The Alliance of Baptists "supports the rights of all citizens to full marriage equality, and. . . affirm[s] anew that the Alliance will 'create places of refuge and renewal for those who are ignored by the church.'"¹⁵ Also, please see the interest statements of National Religious Organization *Amici* attached to the undersigned's Motion to File Brief *Amicus Curiae*, filed contemporaneously with this brief.

Therefore, this court should not uphold the State of Iowa's current, discriminatory application of marriage laws based on the argument that religious tradition would require such an outcome. Different religious faiths will continue to come to various conclusions on the issue of religious marriage for same sex couples, but this has no bearing on the issue of the right to civil

available at http://www.lcna.org/lcna_news/2005-01-13.shtm (last visited February 28, 2008).

¹⁴ Press Release, DignityUSA, "DignityUSA Urges Washington State Supreme Court to Uphold Lower Court Rulings Affirming Marriage Equality" (March 1, 2005) available at <http://www.dignityusa.org/news/050301seattle.html> (last visited February 28, 2008).

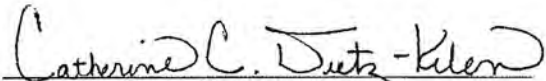
¹⁵ Alliance of Baptists Statement on Same Sex Marriage (April 17, 2004), available at <http://www.allianceofbaptists.org/sssm-2004.htm> (last visited February 28, 2008). The Alliance of Baptists is a national coalition of individuals and churches "dedicated to the preservation of historic Baptist principles, freedoms, and traditions." www.wabaptists.org/links.htm (last visited February 28, 2008).

marriage for these couples. Given the diversity of religious thought on the issue of marriage between same-sex partners, any invocation of "traditional values" to justify the exclusion of loving same-sex couples from the right of civil marriage is wholly inappropriate and without rational basis, and, therefore, should not form the basis for a decision by this Court.

CONCLUSION

The issue before this Court is a civil, not a religious or moral, issue. Communities of faith must retain their freedom to develop their own views on religious solemnization of marriage. Protection of religious freedoms does not, however, mean that the views of some religions and faiths can or should be used to deny same-sex couples the legal rights granted to, and responsibilities imposed upon, married couples by the State.

Respectfully submitted,



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CERTIFICATE OF FILING

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Catherine C. Dietz-Kilen

CERTIFICATE OF SERVICE

Now on this ____ day of March 2008, the undersigned, on behalf Amicus Iowa and National Faith Leaders, Communities and Scholars, served two copies of this Brief by mail to:

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