No. 11-0024

IN THE
SUPREME COURT OF TEXAS

IN THE MATTER OF THE MARRIAGE OF J.B. AND H.B.

On Petition for Review from the
Fifth Court of Appeals at Dallas, Texas
No. 05-09-01170-CV

BRIEF *AMICI CURIAE* OF TEXAS STATE REPRESENTATIVE WARREN CHISUM AND THE HONORABLE TODD STAPLES IN SUPPORT OF THE STATE OF TEXAS

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TABLE OF CONTENTS

IDENTITIES OF ADDITIONAL PARTIES AND COUNSEL iii

INDEX OF AUTHORITIES iv

INTRODUCTION AND INTEREST OF AMICI CURIAE 1

ARGUMENT.. 2

PRAYER 7

CERTIFICATE OF SERVICE... 8

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INDEX OF AUTHORITIES

Cases

Adams v. Howerton,
673 F.2d 1036, 1039 n.2 (9th Cir. 1982) 5

Baker v. Nelson,
409 U.S. 810 (1972) 4, 5

Hernandez v. Robles,
855 N.E.2d 1 (N.Y. 2006) 4

Hicks v. Miranda,
422 U.S. 332, 343-44 (1975) 5

In re Cooper,
187 A.D.2d 128, 134 (N.Y. 1993) 5

Lawrence v. Texas,
539 U.S. 558 (2003) 5

Lockyer v. San Francisco,
95 P.3d 459, 488 (Cal. 2004) 5

McConnell v. Nooner,
547 F.2d 54, 55-56 (8th Cir. 1976) 5

Morrison v. Sadler,
821 N.E. 2d 15, 19 (Ind. Ct. App. 2005) 5

Ohio ex rel. Eaton v. Price,
360 U.S. 246, 247 (1959) 5

Pennoyer v. Neff,
95 U.S. 714, 734-35 (1878) 6

Romer v. Evans,
517 U.S. 620, 631-33 (1996) 5

Sosna v. Iowa,
419 U.S. 393, 404 (1975) 6

State v. Naylor,
330 S.W.3d 434 (Tex. App.—Austin 2011, pet. filed) 3

Wilson v. Ake,
354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005) 5

Constitutional Provisions, Statutes

1 U.S.C. § 7 (2011) 3

TEX. CONST. art I, § 32 .... 1, 2

TEX. CONST. art I, § 32(a) 2, 3, 7

TEX. FAM. CODE §6.001 3

TEX. FAM. CODE § 6.204 .... 1, 2, 3

TEX. FAM. CODE § 6.204(b) 2

TEX. FAM. CODE § 6.204(c)(1) 2

Other Authorities

H.J.R. 6, 79th Leg., Reg. Sess. (Tex. 2005) 1, 6

HOUSE RESEARCH ORGANIZATION, H.J.R. 6 Bill Analysis, 79th Leg., Reg. Sess., April 25, 2005. 6

S.B. 7, 78th Leg., Reg. Sess. (Tex. 2003) 1

INTRODUCTION AND INTEREST OF AMICI CURIAE[1]

Amici curiae are Texas State Representative Warren Chisum and the Honorable Todd Staples. Representative Chisum has served in the Texas House for over twenty years. He represents House District 88, which includes nineteen counties located in the Texas Panhandle. Staples formerly served in the Texas Senate from 2001 through 2007, and is currently a statewide elected official. He represented Senate District 3, which includes sixteen counties comprising the greater part of East Texas. Staples joins this brief in his individual capacity and in his capacity as a former state senator.

In 2003, Chisum sponsored and Staples coauthored Senate Bill 7, which was codified as section 6.204 of the Texas Family Code. S.B. 7, 78th Leg., Reg. Sess. (Tex. 2003). This legislation clarifies that Texas will not recognize same-sex marriages or civil unions, and deems such unions void under Texas law. In 2005, Chisum authored and Staples sponsored a constitutional amendment providing that marriage is limited to unions between one man and one woman, later codified as article 1, section 32 of the Texas Constitution. H.J.R. 6, 79th Leg., Reg. Sess. (Tex. 2005).

As authors of the Texas legislation safeguarding traditional marriage, *amici* have a particular interest in seeing that activist judges are not permitted to invalidate Texas laws defining marriage. *Amici* strongly believe that the traditional definition of marriage should endure, and that Texas law should only recognize marriages between one man and one woman. Because of the important question of state law at issue, and the conflicting

[1] There were no fees paid for the preparation of this brief.

rulings from the Fifth and Third Courts of Appeals, *amici* urge the Court to grant the petition for review and affirm the Fifth Court of Appeals decision that the granting of a same-sex divorce is contrary to Texas law and public policy.

ARGUMENT

The issue of same-sex marriage is one of tremendous importance and contention. The people of Texas addressed this issue in 2003 and again in 2005. After much debate, Texans decided that Texas law will only recognize marriages between one man and one woman. Enacted in 2003 by 93% of voting Texas representatives, section 6.204 of the Texas Family Code provides that "[a] marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state." TEX. FAM. CODE § 6.204(b). Approved in 2005 by 76% of Texas voters, article I, section 32 of the Texas Constitution, provides that "[m]arriage in this state shall consist only of the union of one man and one woman." TEX. CONST. art I, § 32(a). These two provisions unequivocally codify that only traditional marriages will be recognized in Texas, and that same-sex unions are null and void *ab initio*.

Despite the clear language of these laws, in acts of unfettered judicial activism, two Texas district courts, the 302nd District Court in Dallas County and the 126th District Court in Travis County, along with the Third Court of Appeals, disregarded Texas law and granted divorces to same-sex couples. The Texas Family Code provides that Texas courts "may not give effect to a … judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction." TEX. FAM. CODE § 6.204(c)(1). By granting divorces to same-sex

couples, these courts "gave effect" to the underlying marriage in violation of Texas law because a court may only grant a divorce "[o]n the petition of either party to a *marriage*" TEX. FAM. CODE §6.001 (emphasis added).

In the present case, the 302nd District Court overstepped its authority by overturning section 6.204 of the Texas Family Code and article 1, section 32(a) of the Texas Constitution. The District Court's order also overturned the federal Defense of Marriage Act ("DOMA")[2] *sub silentio*. The Fifth Court of Appeals correctly reversed the 302nd District Court's granting of a same-sex divorce and upheld the constitutionality of Texas laws defining marriage. However, the decision from the Third Court of Appeals granting a same-sex divorce still stands. *State v. Naylor*, 330 S.W.3d 434 (Tex. App.—Austin 2011, pet. filed). The conflict between the courts of appeals on this important issue of state law necessitates review by this Court.

By granting same-sex divorces, judges are imposing their own policy judgments over the views of over 2.2 million Texas voters and a substantial majority of their elected representatives. The implications and consequences of these erroneous rulings extend far beyond their decisions. Our country is currently engaged in a robust debate on whether

[2] DOMA affirms the definition of traditional marriage by declaring that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2011). Like the Texas Family Code and Texas Constitutional provisions at issue, DOMA passed with broad, bipartisan support. In the U.S. House, over 83% of voting members voted in favor of this act. In the U.S. Senate, the vote was eighty-five Yeas to fourteen Nays (over 85% support), with forty-six Democrats supporting the bill. President Bill Clinton signed DOMA into law on September 21, 1996.

the government should sanction same-sex unions. This debate should play out in our democratic institutions and should not be short-circuited by the courts. By striking down a valid law enacted by the people's representatives, the courts illegitimately aggrandized power for themselves at the expense of the people and their representatives. In our constitutional democracy, only the people through their elected officials can legitimately enact public policy. Judges serve the important, yet limited, role of strictly interpreting the laws enacted by the legislature; if they overstep this defined role, their acts lack legitimacy and are a threat to democracy.

The important question of how a state defines the institution of marriage must be decided by the people and their representatives, and not by activist judges. Marriage is one of, if not the most, important institutions in our society. It is the organizational basis of our families and it provides the environment in which we ideally raise our children. Texans have overwhelmingly decided, not once but twice, that marriage is restricted to unions between one man and one woman, and that same-sex unions are void. In doing so, it is in step with the vast majority of States and the federal government.[3]

Texas' refusal to recognize same-sex marriage is constitutional. The United States Supreme Court confirmed in *Baker v. Nelson*, 409 U.S. 810 (1972), that States may

[3] Forty-one States plus the federal government have passed either constitutional amendments or statutory provisions defining marriage as between one man and one woman. Only Massachusetts, New Jersey, New Mexico, New York, and Rhode Island's laws are silent on this issue. New York's highest court, however, held in *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), that only the union of a man and a woman will receive legal recognition. Only five states (Massachusetts, Connecticut, Iowa, New Hampshire, and Vermont) plus the District of Columbia recognize same-sex marriages.

constitutionally limit the institution of marriage to unions between one man and one woman.[4] In *Baker*, the United States Supreme Court summarily dismissed for want of a substantial federal question an appeal from the Minnesota Supreme Court challenging the state's marriage laws on equal protection grounds. Because the U.S. Supreme Court was required to hear appeals from State Supreme Courts presenting constitutional challenges prior to 1988, *Baker* is a ruling on the merits. *See Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975) ("[V]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case … ") (quoting *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959)).[5]

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[4] The U.S. Supreme Court's decision in *Lawrence v. Texas* leaves *Baker* undisturbed. The *Lawrence* majority clarified that the case before it "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. 558, 578 (2003). Furthermore, Justice O'Connor in her concurrence clearly stated that traditional marriage laws are constitutional, even if sodomy laws do not pass constitutional muster. 539 U.S. at 585 (O'Connor, J., concurring). In addition, she recognized that Texas has a legitimate state interest in preserving and promoting traditional marriage.

> That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under *rational basis review*. Texas cannot assert any *legitimate state interest here*, such as national security or *preserving the traditional institution of marriage*. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Id. (emphasis added).

[5] Furthermore, several lower courts have recognized *Baker's* precedential value. *E.g. Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982); *McConnell v. Nooner*, 547 F.2d 54, 55-56 (8th Cir. 1976); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005); *In re Cooper*, 187 A.D.2d 128, 134 (N.Y. 1993); *Lockyer v. San Francisco*, 95 P.3d 459, 488 (Cal. 2004); *Morrison v. Sadler*, 821 N.E. 2d 15, 19 (Ind. Ct. App. 2005).

Sexual orientation is not a suspect class. *See Romer v. Evans*, 517 U.S. 620, 631-33 (1996) (applying rational basis review to a Colorado law which distinguished citizens based upon their sexual orientation). Neither is there a fundamental right to a same-sex divorce; therefore, Texas marriage laws need only to withstand rational basis review. The Texas Legislature clearly stated its goals for enacting legislation protecting this valued institution:

> A traditional marriage consisting of a man and a woman is the basis for a healthy, successful, stable environment for children. It is the surest way for a family to enjoy good health, avoid poverty, and contribute to their community. The sanctity of marriage is fundamental to the strength of Texas' families, and the state should ensure that no court decision could undermine this fundamental value.

HOUSE RESEARCH ORGANIZATION, H.J.R. 6 Bill Analysis, 79th Leg., Reg. Sess., April 25, 2005. Because there are rational, legitimate reasons for the State of Texas to give legal status to traditional marriage while withholding it from same-sex relationships, Texas laws defining marriage as between one man and woman are constitutional.

The U.S. Supreme Court declared long ago, and has since reaffirmed, that a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878)). Consistent with the U.S. Constitution, Texas may protect traditional marriage between a man and a woman, refuse to recognize out-of-state marriages that violate its public policy, and determine that purported marriages between persons of the same sex are void. Because this case presents important constitutional issues involving the validity of Texas

laws on marriage, and the courts of appeals have issued conflicting rulings on the validity of same-sex divorces, *amici* agree with the State of Texas that this Court should grant the petition for review.

PRAYER

For these reasons, Texas State Representative Warren Chisum and the Honorable Todd Staples respectfully request that the Court grant the petition for review, affirm the decision of the Fifth Court of Appeals, uphold the constitutionality of article I, section 32 of the Texas Constitution and section 6.204 of the Texas Family Code, and hold that the granting of a same-sex divorce is contrary to Texas law and public policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below on May 11, 2011.

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