A11-0811

STATE OF MINNESOTA

IN SUPREME COURT

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

Petitioner,

V.

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

AND

STATE OF MINNESOTA

Respondents.

DEFENDANT ALVERSON'S PETITION FOR REVIEW AND APPENDIX

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TO: THE SUPREME COURT OF THE STATE OF MINNESOTA.

Pursuant to Minn. R. Civ. App. P. 117, Petitioner Jill Alverson hereby petitions this Court for an Order granting review of the decision of the Court of Appeals in Benson, et. al. v. Alverson, No. A11-811, 2012 WL 171399 (Minn. App. Jan. 23, 2012) (Appendix at 1-6).

1. Statement of the legal issues sought to be reviewed:

The legal issue sought to be reviewed is whether the State of Minnesota was improperly dismissed from this declaratory judgment action challenging the constitutionality of Minnesota Statutes Ch. 517 where the local registrar named as a defendant in the declaratory judgment lawsuit is performing only a ministerial role on behalf of the State Registrar and the State of Minnesota. The Court of Appeals affirmed the trial court's dismissal of the State of Minnesota as a party.

2. Statement of the criteria relied upon to support the petition, or other substantial and compelling reasons for review:

Petitioner relies upon the criteria that the question presented is an important one upon which the Supreme Court should rule and that a decision by the Supreme Court will help develop, clarify, or harmonize the law and the resolution of the question has possible statewide impact.

3. Statement of the case:

In 2009, Respondents, three same-sex couples, made application to Petitioner for marriage licenses pursuant to Minn. Stat. ch. 517. Minn. Stat. § 517.01 defines marriage as "a civil contract between a man and a woman." Minn. Stat. § 517.03(a)

(4) prohibits "a marriage between persons of the same sex." (known as the Minnesota Defense of Marriage Act or "MN DOMA"). Petitioner, in the ministerial role as a local registrar, refused to issue marriage licenses to Respondents based upon the plain language of Chapter 517 and this Court's previous ruling in Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971).

On June 7, 2011, Respondents filed a declaratory judgment action against Petitioner alleging that MN DOMA violated a number of their rights under the Minnesota Constitution. The complaint conceded that Petitioner acted in compliance with Minnesota State Law but sought a declaratory judgment striking down MN DOMA. Respondents amended the complaint to naming the State as a party after Petitioner moved to dismiss the complaint for failing to join the State as a party. The district court subsequently granted motions by Petitioner and the State to dismiss the complaint and a motion by the State to dismiss the State as a party.

Respondents appealed the dismissals to the Court of Appeals which affirmed the dismissal of the State as a party, but reversed the dismissal of the complaint and remanded for trial on the grounds that the Baker decision was not controlling and did not foreclose an action based upon the Minnesota Constitution. Petitioner seeks review of that part of the decision dismissing the State of Minnesota as a party.

4. Brief argument in support of the petition:

The Court of Appeals erred as a matter of law in affirming the dismissal of the State of Minnesota as a party to this declaratory judgment action challenging the constitutionality of MN DOMA. Petitioner, as a local registrar, performs merely a

ministerial function in issuing or denying marriage licenses. Petitioner has no policy role in the passage or enforcement of Minnesota's marriage licensing law. As such, the State Registrar, and by extension the State of Minnesota, is a necessary party in interest to this declaratory judgment action regarding the constitutionality of the MN DOMA.

Minn. Stat. § 555.11 provides that, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration." Person is defined as "any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character." Minn. Stat. § 555.13. Further, "if the statute...is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard." Minn. Stat. § 555.11.

The Court of Appeals, in affirming the dismissal of the State, mistakenly held that the "state's participation or degree of involvement is discretionary with the state." Benson v. Alverson, No. A11-811, *2. The Court of Appeals wrongly reasoned that "the state does not issue marriage licenses" and that therefore the justiciable controversy existed only between Petitioner and the other Respondents. Although initially appealed by Respondents, Petitioner should not be barred from seeking review of this issue for failure to raise it because it was raised prominently in Petitioner's briefing below and would not prejudice the other parties. See Watson v. United Servs. Auto Assn., 566 N.W.2d 683, 687-88 (Minn. 1997); Appendix at 15-17, 52-55. Further, this Court should adopt an exception to the general rule that a

party may not appeal decisions affecting other parties because Petitioner's rights are intertwined with those of Respondents as it relates to the State as a party. See Mocuik v. Svoboda, 253 Minn. 562, 93 N.W.2d 547, 550 (1958) (general rule); State v. Schultz, 676 N.W.2d 337,344 (Minn. App. 2004) (recognizing exception).

Petitioner, as a mere agent of the State, is at the mercy of state policy in issuing marriage licenses. The State has established a comprehensive set of laws regulating the existence and activities of local registrars that leaves Petitioner without discretion in the issuance or denial of marriage licenses. See Minn. Stat. §§ 144.213 (Establishing Office of State Registrar; State Registrar to enforce the laws regarding local registrars); 144.214 (Establishing control by the State Registrar over local registrars including the power to remove a local registrar); Minn. R. 4601.0300 (the local registrars must "comply with the procedure established by the State Registrar"). While marriage licenses may only be obtained through a local registrar, such as Petitioner, there is no discretion for the local registrar as to who may obtain a license. See Minn. Stat. §§ 517.01-.10; § 144.223. Further, applicants need not reside in the county where the marriage license is obtained and the marriage may occur anywhere in the state. Minn. Stat. § 517.07. Thus, Petitioner, as a local registrar has a purely ministerial role in the issuance of marriage licenses in Minnesota.

This Court has previously recognized that county officials acting in a purely ministerial role have no role in questioning the constitutionality of a law. See State ex rel. Clinton Falls Nursery Co., v. Steele County Bd. Of Com'rs, 181 Minn. 427, 232 N.W. 737, 738(1930) (an official "charged with the performance of a ministerial

duty [is] not . . . allowed to question the constitutionality of such a law"); Mower County Board v. Board of Trustees of PERA, 271 Minn. 505, 136 N.W.2d 671, 675-76 (1965) (concluding that the County Board did not have standing to challenge the constitutionality of certain provisions of PERA that imposed a ministerial duty on the County). If Petitioner, performing a ministerial duty on behalf of the State Registrar, has no role in questioning the constitutionality of MN DOMA, then under this Court's case law, it follows that she has no role in defending MN DOMA as well. The indispensable party here is the State of Minnesota.

Since Petitioner has only a ministerial function, Petitioner has no role in discerning the Minnesota Legislature's basis for passing MN DOMA or articulating the underlying policies for MN DOMA. Without the State's participation at the trial court level, the State's interest will go unrepresented regarding a statute that impacts the fundamental rights of Minnesotans to marry. The role of the State as a party under these circumstances therefore requires clarification and will inevitably have statewide impact.

Respectfully submitted,

Dated: February 22, 2012

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APPENDIX INDEX

2012 WL 171399
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Court of Appeals of Minnesota.

Douglas BENSON, et al., Appellants,
v.
Jill ALVERSON, in her official capacity as the Hennepin County Local Registrar, Respondent,
State of Minnesota, Respondent.

No. A11–811. | Jan. 23, 2012.

Synopsis

Background: Same-sex applicants appealed dismissal by the Hennepin County District Court of their state constitutional claims against the state and the county registrar, in denying their requests for marriage licenses in accordance with the Minnesota Defense of Marriage Act (MN DOMA).

Holdings: The Court of Appeals, Worke, J., held that:
1 district court appropriately dismissed the State from proceeding;
2 MN DOMA did not violate constitutional single-subject requirement for legislation;
3 MN DOMA did not violate freedom of conscience clause of the state constitution; and
4 district court failed to properly address applicant's other constitutional challenges based on equal protection, due process, and freedom of association.

Affirmed in part, reversed in part, and remanded.

Hennepin County District Court, File No. 27–CV–10–11697.

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Jason Adkins, Minnesota Catholic Conference, St. Paul, MN, for amici curiae Minnesota Catholic Conference, Greater Minnesota Association of Evangelicals, and Upper Midwest Merkos–Chabad Lubavitch.
Jordan W. Lorence, Alliance Defense Fund, Washington, D.C., for amicus curiae Minnesota Family Council.
Marshall H. Tanick, Mansfield, Tanick & Cohen, P.A., Minneapolis, MN, for amicus curiae Minnesota Atheists.

Considered and decided by HALBROOKS, Presiding Judge; STONEBURNER, Judge; and WORKE, Judge.

Opinion

UNPUBLISHED OPINION

WORKE, Judge.

*1 Appellants challenge the dismissal of their claims against the state and the Hennepin County Registrar for failure to issue marriage licenses, arguing that the Minnesota Defense of Marriage Act (MN DOMA) violates their Minnesota constitutional rights. Appellants also argue that the district court erred by determining that the state is not a proper party. We affirm the district court's determination that the state is not a proper party, and we affirm the district court's determination that MN DOMA does not violate the single-subject and freedom-of-association provisions of the Minnesota Constitution. But because the district court inappropriately dismissed the matter at this early stage of litigation, we reverse and remand the remaining claims.

FACTS

Appellants Douglas Benson, Duane Gajewski, Jessica Dykhuis, Lindzi Campbell,1 Thomas Trisko, and John Rittman filed a complaint against respondent Jill Alverson, in her official capacity as the Hennepin County Local Registrar, alleging that she refused to accept their applications for marriage licenses based solely on the fact that the three couples are comprised of same-sex individuals. Appellants claimed that respondent Alverson violated their due-process, equal-protection, freedom-of-conscience, and freedom-of-association rights under the Minnesota Constitution, and the single-subject provision of the Minnesota Constitution. Appellants amended their complaint, adding respondent State of Minnesota as a party.2 Respondents moved to dismiss appellants' complaint pursuant to Minn. R. Civ. P.

12.02(e) for failure to state a claim upon which relief can be granted. The state also moved to dismiss on the ground of misjoinder. The district court dismissed the state and granted respondents' motion to dismiss, concluding that *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972) is binding precedent, holding that MN DOMA is constitutional. This appeal follows.

1 Dykhuis and Campbell also filed the complaint on behalf of their child, appellant Sean Campbell.

2 Appellants added the state as a party only after respondent Alverson moved to dismiss appellants' claims on the ground that appellants failed to include the state as an indispensable party.

DECISION

State as a proper party

Appellants argue that the district court erred in dismissing the state as a party, claiming that the state was properly joined under the Uniform Declaratory Judgment Act. A declaratory-judgment action must present a justiciable controversy or a district court lacks jurisdiction to declare rights under the act. *Onvoy, Inc. v. ALLETE, Inc.,* 736 N.W.2d 611, 617 (Minn.2007). A justiciable controversy exists if "the claim (1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Id.* at 617–18. This court reviews de novo whether a justiciable controversy exists between the parties, and whether a district court has jurisdiction over a declaratory-judgment action. *Cincinnati Ins. Co. v. Franck,* 621 N.W.2d 270, 273 (Minn.App.2001).

***2** Under the act,

> In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and *if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.*

Minn.Stat. § 555.11 (2010) (emphasis added). Thus, the attorney general must be served and is entitled to be heard. But the state's participation or degree of involvement is discretionary with the state.

1 Appellants seek the issuance of marriage licenses. The local registrar is responsible for maintaining registration of vital statistics, including marriages. Minn.Stat. §§ 144.212, subds. 9, 10, .223 (2010). The local registrar issues marriage licenses. Minn.Stat. § 517.07 (2010). A justiciable controversy exists between appellants and respondent Alverson. The state does not issue marriage licenses. Thus, while the state was entitled to be heard because there is a constitutional challenge, it was within the state's discretion whether to exercise that right. The district court, therefore, appropriately dismissed the state.

Rule–12 dismissal

The district court dismissed the matter pursuant to Minn. R. Civ. P. 12.02(e). "When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes,* 744 N.W.2d 226, 229 (Minn.2008) (citing *Barton v. Moore,* 558 N.W.2d 746, 749 (Minn.1997)). "The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.,* 663 N.W.2d 550, 553 (Minn.2003) (citing *Marquette Nat'l Bank v. Norris,* 270 N.W.2d 290, 292 (Minn.1978)). Our standard of review is de novo. *Id.*

Single subject

We first address appellants' argument that MN DOMA violates the Single Subject Clause of the Minnesota Constitution. Under the Single Subject Clause, "[n]o law shall embrace more than one subject, which shall be expressed in its title." Minn. Const. art. IV, § 17. This requirement prevents the combining of unpopular laws and including them in an unrelated, but more popular, law. *Townsend v. State,* 767 N.W.2d 11, 13 (Minn.2009) (citing *The Debates and Proceedings of the Minnesota Constitutional Convention* 124, 262–63 (Francis H. Smith, reporter 1857)). A law will not violate the Single Subject Clause as long as all of its provisions "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.* (quotation omitted).

The challenged bill was:

***3** A bill for an act relating to human services;

> appropriating money; changing provisions for health care, long-term care facilities, children's programs, child support enforcement, continuing care for disabled persons; creating a demonstration project for persons with disabilities; changing provisions for marriage; accelerating state payments; [and] making technical amendments to welfare reform[.]

S.F.1908, third engrossment (1997). The district court determined that these provisions generally relate to families. We agree that these provisions fall under one general idea; it cannot be said that these are "wholly unrelated matters." *See Unity Church of St. Paul v. State,* 694 N.W.2d 585, 594 (Minn.App.2005) (stating that "provisions are not germane if they pertain to wholly unrelated matters"), *review dismissed* (Minn. June 9, 2005). Therefore, the district court did not err in determining that MN DOMA does not violate the Single Subject Clause of the Minnesota Constitution.

Freedom of conscience

2 3 We next address appellants' argument that MN DOMA violates their freedom-of-conscience rights under the Minnesota Constitution, claiming that they are not able to fully exercise their religion because even if they marry in a church, the state does not recognize their marriages. The district court determined that "the Minnesota Supreme Court has not offered guidance on the issue of religious freedom as it relates to same-sex marriage." Not relying on precedent, the district court then determined that "[t]he State's choice to recognize opposite-sex marriages performed in churches, but not same-sex marriages is a decision within the purview of the State's power to prohibit certain marriages without unconstitutionally interfering in religious freedoms."

Under the Minnesota Constitution, "interference with the rights of conscience [shall not] be permitted, or any preference be given by law to any religious establishment or mode of worship." Minn. Const. art. I, § 16. The Minnesota Constitution provides stronger protection for freedom of conscience than the United States Constitution. *Hill–Murray Fed'n of Teachers v. Hill–Murray High Sch.,* 487 N.W.2d 857, 864–65 (Minn.1992). Minnesota courts apply a four-part test to examine claims that state action violates a right to conscience. *Id.* at 865. This test considers whether the (1) belief is sincere; (2) state action burdens the belief; (3) state interest is overriding or compelling; and (4) state uses the least restrictive means. *Id.*

The district court's determination that appellants' beliefs are sincere is not challenged. The issue is whether the state action—the prohibition of same-sex marriage—burdens that belief. At least one of the three couples has been married in a church and there is no evidence that the state's failure to recognize same-sex marriages interferes with appellants engaging in a religious marital ceremony. Thus, the district court did not err in determining that the statute does not violate appellants' freedom-of-conscience rights.

Equal protection, due process, and freedom of association

***4** Finally, we address appellants' argument that MN DOMA violates their equal-protection, due-process, and freedom-of-association rights under the Minnesota Constitution. The district court dismissed these claims, relying on *Baker.* In *Baker,* a couple was denied a marriage license solely because they were of the same sex. 291 Minn. at 311, 191 N.W.2d at 185. The couple claimed that the statute prohibiting same-sex marriage violated the United States Constitution by depriving them of liberty without due process and denied them equal protection of the laws. *Id.* at 312, 191 N.W.2d at 186. The supreme court stated that:

> These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court.

Id. The supreme court determined that the marital "union of man and woman, uniquely involving [ ] procreation" is a "historic institution ... more deeply founded than the [ ] contemporary concept of marriage and societal interests" asserted by the appellants. *Id.* The supreme court concluded that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry [because] [t]here is no irrational or invidious discrimination." *Id.* at 313, 191 N.W.2d at 187.

The couple in *Baker* compared the denial of their request for a marriage license to an earlier marital restriction based merely on race. *Id.* at 314, 191 N.W.2d at 187. The supreme court concluded, without explanation, that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* at 315, 191 N.W.2d at 187. The supreme court held that the statute did not offend the Due Process or Equal Protection Clauses of the United States Constitution. *Id.* The supreme court further "dismiss[ed] without discussion [ ] additional contentions that the

statute contravenes the First Amendment and Eighth Amendment of the United States Constitution." *Id.* at 312 n. 2, 191 N.W.2d at 186 n. 2.

Appellants here argue that MN DOMA violates the Minnesota Constitution. The district court determined that MN DOMA does not violate the Minnesota Constitution, relying on *Baker,* stating that it had "no reason to believe that the result in *Baker* would have been different had the *Baker* [appellants] alleged violations of the Minnesota Constitution." But we do not agree that *Baker* forecloses an argument based on the Minnesota Constitution, and conclude that the district court inappropriately dismissed the matter on a rule–12 motion.

Equal protection

***5** We do not agree with the district court's reliance on *Baker* in disposing of appellants' equal-protection challenge. Under the Minnesota Constitution, "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. art. I, § 2. A statute may violate the Equal Protection Clause either by its express terms—a "facial" violation—or by its application—an "as-applied" violation. *State v. Richmond,* 730 N.W.2d 62, 71 (Minn.App.2007), *review denied* (Minn. June 19, 2007). A facial challenge "asserts that at least two classes are created by the statute, that the classes are treated differently under the statute, and that the difference in treatment cannot be justified." *In re McCannel,* 301 N.W.2d 910, 916 (Minn.1980).

4 Appellants argue that they are a suspect class because the law involves the fundamental right to marry. But even if appellants are not a suspect class, courts apply the rational-basis test to the challenged law, which under the Minnesota Constitution is a higher standard than that applied under the United States Constitution. *See State v. Benniefield,* 678 N.W.2d 42, 46 (Minn.2004) (applying rational-basis test when no suspect classification or fundamental right is involved). When applying rational-basis review under the Equal Protection Clause of the United States Constitution, courts determine "whether the challenged classification has a legitimate purpose and whether it was reasonable [for the legislature] to believe that use of the challenged classification would promote that purpose." *Gluba ex rel. Gluba v. Bitzan & Ohren Masonry,* 735 N.W.2d 713, 721 (Minn.2007). But a rational-basis analysis under the Minnesota Constitution requires that

> (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 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.

Id. The supreme court has stated that "[t]he key distinction between the federal and Minnesota tests is that under the Minnesota test we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires." *Id.* (quotation omitted).

The supreme court in *Baker* presumably determined that the statute did not violate the United States Constitution because it passed the rational-basis test, although the supreme court did not conduct an explicit analysis under any test. *See* 291 Minn. at 313–15, 191 N.W.2d at 187. The supreme court stated merely that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id.* at 313, 191 N.W.2d at 187. But an equal-protection challenge under the Minnesota Constitution requires more analysis than was provided by the *Baker* court. *See Gluba,* 735 N.W.2d at 721.

***6** While the district court stated that it had "no reason to believe that the result in *Baker* would have been different had the *Baker* [appellants] alleged violations of the Minnesota Constitution," it is unclear what test the *Baker* court applied. And even if the *Baker* court conducted a rational-basis examination of the statute, the rational-basis test under the Minnesota Constitution is different than the federal rational-basis test. *See id.* The district court was required to conduct an independent analysis of appellants' equal-protection challenge under Minnesota law before concluding whether a rule–12 dismissal was appropriate. Therefore, the district court erred in dismissing appellants' equal-protection claim.

Due process

5 Appellants next argue that MN DOMA violates the Due Process Clause of the Minnesota Constitution. The district court, again, determined that the statute does not violate the Minnesota Constitution, relying on *Baker,* assuming that the result in *Baker* would have been no different had the couple in *Baker* alleged violations of the Minnesota

Constitution.

Under the Minnesota Constitution, the government cannot deprive a person of "life, liberty, or property without due process of law." Minn. Const. art. 1, § 7. If a fundamental right is implicated, the state must show a legitimate and compelling interest in abridging that right. *Boutin v. LaFleur,* 591 N.W.2d 711, 716 (Minn.1999). But if a fundamental right is not implicated, "judicial scrutiny is not exacting and substantive due process requires only that the statute not be arbitrary or capricious; in other words, the statute must provide a reasonable means to a permissible objective." *Id.*

Appellants claim that the government cannot deprive them of their fundamental right to marry without showing that this denial is narrowly tailored to serve a compelling state interest. But even if the right to marry is not considered a fundamental right, appellants should have been granted an opportunity to show that MN DOMA is not a reasonable means to its stated objective—to promote opposite-sex marriages to encourage procreation. The district court failed to conduct an appropriate analysis under the Minnesota Constitution; therefore, appellants' due-process claim on a rule–12 motion was improperly dismissed.

Freedom of association

6 Appellants next argue that MN DOMA violates the freedom-of-association provision of the Minnesota Constitution. The district court determined that the statute does not violate the Minnesota Constitution, relying on *Baker.* The district court stated that "[w]ere this [c]ourt to conclude that [appellants] could be entitled to relief under a freedom of association theory, this would be in direct contravention of the clear holding in *Baker.*" The district court apparently relied on a footnote in *Baker* in which the supreme court stated: "We dismiss without discussion [appellants'] additional contentions that the statute contravenes the First Amendment and Eighth Amendment of the United States Constitution." 291 Minn. at 312 n. 2, 191 N.W.2d at 186 n. 2.

***7** Under the Minnesota Constitution, "The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people." Minn. Const. art. 1, § 16. Appellants argue that they have an inherent pre-constitutional right of familial association. They argue that this is especially true of appellant minor child; that this child has an inherent right to establish a family relationship. "Choices about marriage, family life, and the upbringing of children are among associational rights [the Supreme] Court has ranked as of basic importance in our society ." *M.L.B. v. S.L.J.,* 519 U.S. 102, 116, 117 S.Ct. 555, 564, 136 L.Ed.2d 473 (1996) (quotation omitted). The Supreme Court has determined that these rights are protected by the Fourteenth Amendment to the United States Constitution. *Id.* Appellants argue that these rights are also the inherent rights protected in the Minnesota Constitution. Although the *Baker* court did not address this issue, the district court relied on *Baker* in concluding that appellants' freedom-of-association rights were not violated. The district court failed to provide an analysis of this claim and inappropriately dismissed it on a rule–12 motion.

Conclusion

This matter came before the district court on respondents' motion to dismiss for failure to state a claim upon which relief can be granted. The district court appropriately dismissed the state as a party to the lawsuit; thus, we affirm that decision. Because the district court appropriately analyzed two of appellants' claims, we affirm the district court's determinations that MN DOMA does not violate the Single Subject or Freedom of Conscience Clauses of the Minnesota Constitution. But the district court improperly relied on *Baker* in analyzing appellants' remaining claims; therefore, the district court erred in dismissing appellants' equal-protection, due-process, and freedom-of-association claims on the merits at this stage in the proceedings.

The district court failed to address appellants' challenges under the Minnesota Constitution. A proper analysis is necessary especially because the Minnesota rational-basis test for determining whether equal-protection rights have been violated is more stringent than the federal test. Additionally, the supreme court in *Baker* specifically stated that there was no guidance from decisions from the United States Supreme Court regarding whether the right to marry if a fundamental right of *all persons* and whether restricting marriage based solely on sex is "irrational and invidiously discriminatory." 291 Minn. at 312, 191 N.W.2d at 186. But since *Baker* was decided in 1971, the United States Supreme Court has issued decisions providing guidance on these issues. For example, in *Romer v. Evans,* the Supreme Court determined that a state law that prohibited government action designed to protect homosexual persons from discrimination violated the equal-protection clause because the law treated homosexual persons unequal to everyone else. 517 U.S. 620, 624, 635, 116 S.Ct. 1620, 1623, 1629, 134 L.Ed.2d 855 (1996). The Supreme Court stated that the law imposed a disadvantage "born of animosity toward the class of persons affected." *Id.* at 634, 116 S.Ct. at 1628. The Court instructed that "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.*

(quotation omitted). Thus, the Supreme Court has provided guidance since *Baker* indicating that moral disapproval of a class because of sexual orientation cannot be a *legitimate* government purpose that equal-protection requires. We reverse and remand the district court's dismissal pursuant to rule 12.02(e) for further proceedings consistent with this opinion.

***8 Affirmed in part, reversed in part, and remanded.**

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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-081116

Douglas Benson, Duane Gajewski, Jessica Dykhuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman,

Appellants,

vs.

Jill Alverson, in her official capacity as the Hennepin County Local Registrar, and State of Minnesota,

Respondents.

BRIEF OF RESPONDENT JILL ALVERSON

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TABLE OF AUTHORITIES

CONSTITUTION AND STATUTES

FACTUAL BACKGROUND

On March 6, 2009, agents of Respondent Jill Alverson denied Appellants marriage licenses because the applications indicated that they were for individuals of the same sex. Addendum at 13-14. The Amended Complaint alleges that Respondent Alverson's agents acted in compliance with Minnesota state law when they denied Appellants' marriage license applications. Addendum at 12-13. Accordingly, there is no dispute that Respondent Alverson's agents denied Appellants marriage licenses, or that their actions were ministerial and not policy related in anyway.

It is also undisputed that Minnesota law prohibits marriages between persons of the same sex. Section 517.01 of Minnesota Statutes states: "Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential." Section 517.03 of Minnesota Statutes also states:

> "(a) The following marriages are prohibited
>
> . . . .
>
> (4) a marriage between persons of the same sex."

As the local registrar for the County of Hennepin, Respondent Jill Alverson merely has a ministerial role in following Minnesota state law directives in administering Minnesota's laws related to marriage and specifically with respect to issuing Minnesota marriage licenses. *See* Minn. Stat. §§ 144.213 – 144.214. Thus, the Amended Complaint challenges Minnesota's laws and not the specific actions of Ms. Alverson's agents.

The Amended Complaint seeks as declaration that "Minnesota's prohibitions on marriages by same sex couples. . . are invalid and unconstitutional under the Minnesota

Constitution." Addendum at 29. Specifically, Appellants assert that Minnesota laws violate five separate provisions of the Minnesota Constitution:

(1) due process of law, Minn. Const. Art. I, section 7 (Count I);

(2) single subject provision; Minn. Const. Art. IV, section 16 (Count II);

(3) equal protection of law, Minn. Const. Art. I, section 2 (Count III);

(4) freedom of conscience, Minn. Const. Art. I, section 16 (Count IV); and

(5) freedom of association, Minn. Const. Art. I, section 1, 2, and 16 (Count V).

The Prayer for Relief states that the relief requested is to strike down Minnesota's ban on same sex marriage. In addition, Plaintiffs seek extraordinary declaratory relief "that any further provision of Minnesota law related to who may marry, who is a spouse, husband, or wife, who receives the benefits and/or obligations of marriage, and similar provision [of state law] are to be interpreted in a gender-neutral manner, without distinction between opposite sex couples and same sex couples." Addendum at 29. This prayer for relief relates to 515 different Minnesota laws that Plaintiffs assert discriminate against same-sex couples. Addendum at 10. Respondent Alverson plays virtually no role in administering any of these 515 laws.

The State of Minnesota and Respondent Alverson responded to the Amended Complaint by filing motions to dismiss pursuant to Minnesota Rules of Civil Procedure 12.02. The district court granted these motions. The district court concluded that Counts I, III, and V of the Amended Complaint, alleging Minnesota's laws violated due process, equal protection, and freedom of association, failed as a matter of law based on *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). Addendum at 6-8 and 14-15. The district court

also concluded that Minnesota's Defense of Marriage Act, Minn. Stat. § 517.03, subd. 1(4), ("MN DOMA") did not violate Minnesota's single-subject constitutional provision. (Count II) Addendum at 8-10. Finally, the court concluded that MN DOMA does not unconstitutionally interfere with or infringe upon religious freedoms. (Count IV) Addendum at 10-14.

SUMMARY ARGUMENT

Appellants' lawsuit raises important constitutional issues that have broad and significant state-wide implications. Appellants seek to strike down Minnesota's law prohibiting same sex individuals from obtaining a marriage license. The issue of whether same-sex couples should be provided the same ability to obtain a marriage license as opposite-sex couples has been hotly debated in Minnesota and throughout the nation. Respondent Alverson is named in this case because she is required by Minnesota state law to only issue marriage licenses to opposite sex couples. She, and those that work for her, perform the ministerial function of issuing state marriage licenses. In other words, Respondent Alverson has been named in this suit because, as the local registrar, she implements the State of Minnesota's marriage requirements.

Because Respondent Alverson is merely an agent of that State of Minnesota executing the state's policy, in this litigation she joins the substantive arguments made by the State of Minnesota regarding the constitutionality of Minnesota's laws prohibiting same sex marriage. In addition, because the State of Minnesota is also arguing that it is not a proper party to this action, Respondent Alverson briefly responds to each of the substantive arguments made by Appellants.

ARGUMENT

Respondent Alverson asserts that the Court should affirm the district court's dismissal of this suit as a matter of law. Because the district court dismissed Petitioners' claims as a matter of law, pursuant to Minn. R. Civ. P. 12.02(e), this Court's review of the district court's holdings is de novo. *See Bahr v. Capella University*, 788 N.W.2d 76, 80 (Minn. 2010)

Before reaching the merits of this appeal, it is important for the Court to understand the role of the local registrar as is relates to the laws related to who is allowed to marry in the state of Minnesota. The actions that are required to be taken by local registrars related to marriage licenses and marriage certificates are proscribed in detail in state law and enforced by the State Registrar. *See, e.g.*, Minn. R. 4601.0300 (the local registrars must "comply with the procedure established by the state registrar.")

Pursuant to Minn. Stat. § 517.07, before "any persons are joined in marriage, a license shall be obtained from the local registrar of any county." The form of the application for marriage is dictated by Minn. Stat. § 517.08. Included in the required form is "the full names of parties and the sex of each party." Minn. Stat. § 517.08, subd. 1a(1). The parties seeking a license must pay a fee for the marriage license. The fee is $115, unless the parties have undergone 12 hours of premarital education in which case the fee is $40. The fee is collected by the local registrar. The county keeps $25 of the fee collected and the remainder is sent to the State of Minnesota. *Id.* § 517.08, subd. 1c(a) and (b).

After a marriage license is obtained, the parties must have the marriage solemnized. *See* Minn. Stat. § 517.09. The person solemnizing the marriage creates a certificate regarding the marriage and provides this to the local registrar who then has an obligation to record this marriage. *See* Minn. Stat. § 517.10. The local registrar then must report this data to the State Registrar. *See* Minn. Stat. § 144.223. The data required to be collected and transmitted to the State Registrar includes personal information on the bride and groom.

Respondent Alverson, the local registrar, has no authority to defy state law, to make or influence state policy, or even the authority of the State Registrar. See *State ex rel. Clinton Falls Nursery Co., v. Steele County Bd. Of Com'rs*, 232 N.W. 737, 738 (Minn. 1930) (holding that an official "charged with the performance of a ministerial duty [is] not . . . allowed to question the constitutionality of such a law"); *Mower County Board v. Board of Trustees of PERA*, 136 N.W.2d 671, 675-76 (Minn. 1965) (concluding that the County Board did not have standing to challenge the constitutionality of certain provisions of PERA that imposed a ministerial duty on the County); *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 472-476 (Cal. 2004) (holding that county recorder, who is charged with the ministerial duty of enforcing a California's marriage statute, does not possess the authority to disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional). Accordingly, because she is acting as an agent of the State of Minnesota and performing a ministerial role proscribed by state law, Respondent Alverson believes it is appropriate to primarily rely upon the

arguments made by the State of Minnesota regarding the constitutionality of Minnesota's marriage laws.

Accordingly, for the reasons identified by the State of Minnesota in its brief and the reasons highlighted below, Respondent Alverson respectfully requests that the Court affirm the district court's decision dismissing all claims against Respondent Alverson as a matter of law.

I. THE LAWS OF THE STATE OF MINNESOTA BAN SAME-SEX MARRIAGE, THESE LAWS HAVE NOT BEEN STRUCK DOWN OR CALLED INTO QUESTION BY A MINNESOTA COURT AND RESPONDENT ALVERSON COMPLIED WITH THESE LAWS.

Appellants have challenged the constitutionality of Minnesota's laws prohibiting same sex marriage on several grounds. It is undisputed that Minnesota law prohibits marriages between persons of the same sex. Section 517.01 of Minnesota Statutes states: "Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential." In addition, Section 517.03 of Minnesota Statutes states that "a marriage between persons of the same sex" is "prohibited." Minn. Stat. § 517.03(a)(4).

Approximately 40 years ago, the Minnesota Supreme Court addressed a challenge to Minnesota law prohibiting same sex marriage. In *Baker v. Nelson*, the petitioners argued that they were entitled to a marriage license under Minnesota Statute § 517.08, and, alternatively, that Minnesota's law, which permitted only opposite-sex marriages denied them due process and equal protection under the United States Constitution. 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed by* 409 U.S. 810 (1972). The trial

court denied relief, and the Minnesota Supreme Court affirmed. The Minnesota Supreme Court concluded that the Minnesota law prohibited same sex marriage and stated: "[w]e hold . . . that Minn. St. c. 517 does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited." Id. at 186. The Court also held that this prohibition on same-sex marriages did not violate petitioners' due-process and equal-protection rights. *Id.* at 185-87. In denying the relief requested the Court stated:

> The constitutional challenges [identified by Petitioners] have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court. The institution of marriage as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family is as old as the book of Genesis.

Id. at 186. The Court went on to state that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id.* at 187. The Court concluded by stating definitively: "We hold, therefore, that Minn. St. c. 517 does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution." *Id.* On further appeal to the United States Supreme Court, the Court dismissed the appeal "for want of a substantial federal question." 409 U.S. at 810.

During the past several years there have been a number of cases decided outside of Minnesota regarding the constitutionality of same sex marriage. *Compare Perry v. Schwartzenager*, 704 F.Supp. 2d 921, 995-96 (N.D. Cal. 2010) (holding that California's ban on same sex marriage violated due process and equal protection provisions of the

U.S. Constitution), *stay granted,* 2010 WL 3212786, (9th Cir., Aug. 16, 2010); *Varnum v. Brien*, 763 N.W. 2d 862, 907 (Iowa 2009) (holding that Iowa's ban on same sex marriage violated the equal protection provisions of the Iowa Constitution); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431 (Conn. 2008) (holding that Connecticut's ban on same sex marriage violated the equal protection provisions of the Connecticut's Constitution); *with Citizens for Equal Prot. v. Bruning,* 455 F.3d 859, 866 (8th Cir. 2006) (holding Nebraska constitutional amendment limiting marriage to a man and a woman did not violate Equal Protection Clause or First Amendment); *Hernandez v. Robles,* 855 N.E.2d 1, 6 (N.Y. 2006) ("By limiting marriage to opposite-sex couples, [the State] is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and Men are treated alike-they are permitted to marry people of the opposite sex, but not people of their own sex."); *Andersen v. King Co.,* 138 P.3d 963, 987-89 (Wash. 2006) (holding that the state DOMA does not discriminate on the basis of sex and cataloging the various cases from other jurisdictions interpreting their own equal rights amendments).

However, the law in Minnesota has not changed. Minn. Stat. §§ 517.01 and .03 are presumed to be constitutional. *See State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004). Because of this presumption courts "will strike down a statue as unconstitutional only if absolutely necessary." *State v. Cox*, -- N.W.2d --, 2011 WL 2340533 at *2 (Minn. June 15, 2011). The Minnesota Supreme Court's decision in *Baker,* although not direct controlling precedent for a challenged based on the Minnesota Constitution, holds that Minnesota's law only recognizing marriage between a man and a woman does not violate

the U.S. Constitution. Thus for Appellants to prevail on the constitutional claims that are found in both the U.S. and Minnesota constitutions, this Court would need to find that even though more than 40 years ago the Minnesota Supreme Court held Minnesota's laws did not violate the U.S. Constitution, these laws violate Minnesota's constitutional provisions protecting these same rights. In light of the extremely similar constitutional provisions, the district court properly determined that *Baker* compels dismissal of three of Appellants' claims. The district court also properly determined that Appellants other claims failed as well.

II. THE DISTRICT COURT'S CONCLUSION THAT APPELLANTS' CLAIMS FAILED AS A MATTER OF LAW WAS SOUND.

A. The District Court Correctly Held that Minnesota's Prohibition on Same-Sex Marriage Does Not Violate Minnesota's Constitutional Provisions on Equal Protection or Due Process of Law.

This Court should affirm the district court's decision that Appellants' claims predicated on due process and equal protection fail as a matter of law. Count I of the Complaint alleges Minnesota's prohibition on same sex marriages violates Article I, Section 7 of the Minnesota Constitution, which states in part "[n]o person shall . . . be deprived of life, liberty, or property without due process of law. . ." Count III alleges Minnesota's prohibition on same sex marriage violates Article I, Section 2 of the Minnesota Constitution, which states in part "[n]o member of this state shall … be deprived of any rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

The district court held that *Baker v. Nelson* clearly disposed of these equal protection and due process claims. Addendum at 6-8. The district court stated that even though *Baker* was based on the U.S. Constitution, *Baker* was binding precedent on lower courts and there was no basis to conclude the Minnesota Supreme Court would analyze the equal protection and due process provisions of the Minnesota Constitution more broadly than these same provisions in the U.S. Constitution with respect to same sex marriage. Addendum at 6-8. The district court stated that "[a] fair reading of *Baker* demonstrates that the Minnesota Supreme Court was not sympathetic to the *Baker* plaintiffs' claims." Addendum at 8. Recognizing that *Baker* was not based on the Minnesota Constitution, the district court concluded by stating specifically, that *Baker* compelled dismissal of these claims because the Minnesota "Supreme Court had not reached 'a clear and strong conviction that there is a principled basis for greater protection' of same-sex couples under the State Constitution." Addendum at 8 (citing *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005)). Accordingly, the district court concluded that based on the *Baker* decision, Appellants claim predicated on the equal protection and due process clauses of the Minnesota Constitution failed as a matter of law. The district court's legal analysis and conclusion on these counts is sound.

Appellants make several arguments challenging this portion of the district court's order. First, Appellants argue that the Court should employ heightened scrutiny when analyzing this question. App. Brief at 24-29. Appellants base this argument primarily on a letter from U.S. Attorney General Eric Holder to Speaker of the U.S. House of Representatives John Boehner dated February 23, 2011, in which the Attorney General

indicates that pursuant to 28 U.S.C. § 530D, the U.S. Department of Justice ("DOJ") will not defend several cases challenging Section 3 of the U.S. Defense of Marriage Act ("U.S. DOMA"). Appendix at 25. The letter points out that the DOJ will not defend U.S. DOMA in circuits in which there is no precedent on whether heightened scrutiny or rational basis should be used when reviewing claims based on sexual-orientation classifications. Attorney General Holder's letter states specifically that the DOJ believes strict scrutiny should apply and that U.S. DOMA does not satisfy strict scrutiny and therefore, the DOJ will no longer defend U.S. DOMA. The letter also states, however, that if the district court determines that rationale basis review should apply, the DOJ will inform the court that "consistent with the position [the DOJ] has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under [a rational basis] standard." Appendix at 33.

Unlike the authority granted to the U.S. Department of Justice pursuant to 28 U.S. § 530D, Respondent Alverson does not have authority to independently determine what Minnesota laws she will follow or whether Minnesota's laws violate the Minnesota Constitution. *See State ex rel. Clinton Falls Nursery Co., v. Steele County Bd. Of Com'rs*, 232 N.W. 737, 738 (Minn. 1930); *Mower County Board v. Board of Trustees of PERA*, 136 N.W.2d 671, 675-76 (1965).

While Attorney General Holder and several Circuit Courts of Appeal have held that classifications based on sexual orientation are subject to strict scrutiny, the Minnesota Supreme Court has not. Neither the Minnesota Supreme Court, nor the U.S. Supreme Court has held that sexual orientation classifications are subject to heightened

scrutiny. In fact, unlike the First and Second Circuit Courts of Appeals (which are the circuits at issue in Attorney General Holder's letter), the Eighth Circuit Court of Appeals has held that under the U.S. Constitution, sexual orientation classifications are subject to rational basis scrutiny. See *Citizens for Equal Prot. v. Bruning,* 455 F.3d 859, 866 (8th Cir.2006), *reh. and reh. en banc denied* (Aug 30, 2006). In addition, while *Baker* does not explicitly articulate a standard of review, the court applied a rational basis test. *See Baker*, 191 N.W.2d at 187 (stating "there is no irrational or invidious discrimination" and "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."). Accordingly, *Baker* compels this Court to apply a rational basis standard of review. Thus, the DOJ's decision not to defend U.S. DOMA, where the relevant appellate authority had not determined what standard of review applied, does not compel a different outcome here. Both the Minnesota Supreme Court and the Eighth Circuit have concluded that rational basis is the appropriate standard of review. Absent different direction from the Minnesota Supreme Court, the law in Minnesota is that sexual orientation classifications are subject to rational basis review.

Second, Appellants argue that even if a rational basis test is applied their claim does not fail as a matter of law. Appellants cite a number of cases from other jurisdictions in which courts have concluded that even under a rational basis test that laws prohibiting same sex marriage are unconstitutional. App. Brief at 29-30. Appellants also cite *State v. Russell*, for the proposition that Minnesota has a stricter rational basis test than that required by the U.S. Supreme Court. 477 N.W.2d 886, 889 (Minn. 1991). The

Baker court, however, applied a rational basis review and concluded that Minnesota's prohibition on same sex marriages did not violate the Due Process Clause or the Equal Protection Clause of the U.S. Constitution. Because, the Minnesota Supreme Court has not reached "a clear and strong conviction that there is a principled basis for greater protection of the individual civil and political rights of Minnesota's citizens under the state constitution" with respect to same sex marriage, the district court was bound to follow *Baker*. *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005). Similarly, this Court is required to follow *Baker* and affirm the district court's dismissal of Counts I and III of Appellants' Amended Complaint.

For the reasons detailed in the State of Minnesota's Brief (which Respondent Alverson hereby incorporates by reference) and the reasons highlighted above, Respondent Alverson asserts the district court's decision dismissing Counts I and III is sound and should be affirmed.

B. The District Court Correctly Held that Minnesota's Prohibition on Same-Sex Marriage Does Not Violate Minnesota's Constitutional Provision on Freedom of Association.

The district court properly concluded that Appellants' claim (Count V) that Minnesota's prohibition on same sex marriages violates Article I, Section 16 of the Minnesota Constitution failed as a matter of law. Appellants allege that these laws violate their freedom of association; not just their right to free exercise of religious beliefs (Count IV, which is discussed below). Article I, Section 16 does not specifically enumerate freedom of association as a right. Courts have recognized freedom of association as derivative of first amendment rights under the U.S. Constitution. *See e.g.,*

Metro Rehab. Svs., Inc. v. Westberg, 386 N.W.2d 698, 700 (Minn. 1986). While freedom of association is mentioned in several Minnesota cases, there are no cases indicating that the right to freedom of association is an independently recognized right under the Minnesota Constitution.

Regardless of whether this right is found in the Minnesota Constitution, the district court's decision denying this claim as a matter of law was sound. In *Baker*, the Minnesota Supreme Court disposed of all first amendment claims without discussion. 191 N.W.2d at 186, n.2. As freedom of association is derivative of rights in the First Amendment, *Baker* compels dismissal of this claim as a matter of law. Accordingly, for this reason and those articulated by the State of Minnesota in its Brief (which Respondent Alverson hereby incorporates by reference), this Court should affirm the district court's denial of Count V as a matter of law.

C. The District Court Correctly Held that Minnesota's Prohibition on Same-Sex Marriage Does Not Violate Minnesota's Constitutional Provision on Freedom of Conscience.

The district court properly concluded that Appellants' claim that Minnesota's prohibition on same sex marriages infringed upon Appellants' ability to freely exercise their religion in violation of Article I, Section 16 of the Minnesota Constitution failed as a matter of law. Addendum at 10-14. The Minnesota Supreme Court has stated that to determine whether government action violates this provision, the Court examines: (1) whether the belief is sincerely held; (2) whether the state action burdens the exercise of religious beliefs; (3) whether the state interest is overriding or compelling; and (4) whether the state uses the least restrictive means. *See Hill-Murray Fed'n of Teachers v.*

Hill-Murry High Sch., 487 N.W.2d 857, 865 (Minn. 1992). The district court concluded that *Baker* did not compel dismissal of this claim. Addendum at 13-14. However, the district court concluded that as a matter of law, Appellants did not satisfy the second prong of the *Hill-Murray* test. Addendum at 13-14. This conclusion is well-founded.

There is no dispute that Minnesota's prohibition of same-sex marriages does not prohibit religious ceremonies between same sex individuals. Instead, Appellants claim that by only recognizing marriages between a man and a woman, Minnesota's laws burden their exercise of religion. App. Brief at 48. Thus, as the district court found, the relevant inquiry is whether Minnesota's laws prohibiting same-sex marriage burden individuals' right to exercise religious beliefs that approve of same-sex marriage. Addendum at 13. In other words, by recognizing some marriages in state law, does the State violate an individual's right to exercise his or her religion if it fails to recognize marriages that the individual's religion recognizes?

The district court concluded that this did not violate Article I, Section 16 of the Minnesota Constitution and concluded by stating:

> The State's choice to recognize opposite-sex marriages performed in churches, but not same-sex marriages is a decision within the purview of the State's power to prohibit certain marriages without unconstitutionally interfering in religious freedoms. The Court is unable to conclude that any state action has burdened the exercise of religious beliefs through the enactment and enforcement of the State DOMA.

Id. at 13-14. This is a sound conclusion.

Accordingly, for these reasons and those articulated by the State of Minnesota in its Brief (which Respondent Alverson hereby incorporates by reference), Respondent Alverson asserts the Court should affirm dismissal of Count IV as a matter of law.

D. The District Court Correctly Held that Minnesota's DOMA Does Not Violate Minnesota's Single-Subject Constitutional Provision.

Finally, the Court should affirm the district court's holding that Senate File No. 1908 (1997) encompassed a single subject and did not violate Art. IV, § 17 of the Minnesota Constitution. "The [Single Subject and Title Clause] is construed liberally and laws will meet the requirements of the clause so long as all of the provisions within 'fall under some one general idea, [are] 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.'" *Townsend v. State,* 767 N.W.2d 11, 13 (Minn. 2009) (quoting *Johnson v. Harrison*, 50 N.W. 923, 924 (Minn. 1891)). In *Townsend*, the Court found that a provision changing the requirement for post conviction relief petitions was sufficiently related to public safety to satisfy the Single Subject clause. *Id.* at 14. The Court stated "[a]lthough it is certainly a wide-ranging bill, the various sections 'fall under some one general idea.'" *Id.* at 13-14 (quoting *Johnson*, 50 N.W. at 924).

Minnesota's DOMA was part of Senate File No. 1908 (May 17, 1997), which is titled:

> A bill for an act relating to human services; appropriating money; changing provisions for healthcare, long-term care facilities, children's programs, child support enforcement, continuing care for disabled persons; creating a demonstration project for persons with disabilities; changing provisions for marriage; accelerating state payments; making technical reform to welfare reform . . .

(emphasis added). The district court concluded that the general subject of Senate File No. 1908 is that of families and children. Addendum at 10. This conclusion is well-founded. Consistent with construing the single-subject provision liberally, Senate File No. 1908, while obviously reaching a number of areas, meets the constitutional test of falling under one general idea. Accordingly, for this reason and for those articulated by the State of Minnesota in its Brief (which Respondent Alverson hereby incorporates by reference), the Court should affirm the district court's holding dismissing Appellant's single-subject argument as a matter of law.

CONCLUSION

For the foregoing reasons and for the reasons articulated by the State of Minnesota in its Brief, Respondent Alverson respectfully requests the Court affirm the district court's dismissal of all claims against Respondent Alverson.

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Date: August 10, 2011

No. A11-081116

STATE OF MINNESOTA
IN COURT OF APPEALS

Douglas Benson, Duane Gajewski, Jessica Dykhuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman,

Appellants,

vs.

Jill Alverson, in her official capacity as the Hennepin County Local Registrar, and State of Minnesota,

Respondent.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,574 words. This brief was prepared using Microsoft Word 2003, Times New Roman font face size 13.

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Date: August 10, 2011

STATE OF MINNESOTA

FILED

DISTRICT COURT

COUNTY OF HENNEPIN

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FOURTH JUDICIAL DISTRICT

BY _____ DEPUTY
HENN CO. DISTRICT COURT ADMINISTRATOR

Douglas Benson, Duane Gajewski, Jessica Dykjuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman,

Plaintiffs,

vs.

Jill Alverson, in her official capacity as the Hennepin County Local Registrar, and the State of Minnesota,

Defendants.

ORDER

Court File No. 27 CV 10-11697

The above-entitled matter came duly on for hearing before Judge Mary S. DuFresne on December 10, 2010.

APPEARANCES:

Peter Nikitas, Esq., appeared for Douglas Benson, Duane Gajewski, Jessica Dykjuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman.

Dan Rogan, Assistant Hennepin County Attorney, appeared for Jill Alverson.

Alan Gilbert, Solicitor General for the State of Minnesota, appeared for the State.

Based upon the evidence adduced, the argument of counsel, and all of the files, records, and proceedings herein,

IT IS ORDERED:

1. The State of Minnesota is **DISMISSED** from this lawsuit. The caption of this case shall be amended to read:

Douglas Benson, Duane Gajewski, Jessica Dykjuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman,

Plaintiffs,

vs.

Jill Alverson, in her official capacity as the Hennepin County Local Registrar,

Defendant.

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2. Defendants' joint motion to dismiss the Complaint is **GRANTED**. The Complaint is hereby **DISMISSED WITH PREJUDICE**.

3. The attached Memorandum of Law is hereby incorporated into this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Mary S. DuFresne

Dated: March 7, 2011

Mary S. DuFresne
Judge of District Court

MEMORANDUM OF LAW

FACTS

Plaintiffs are three same-sex couples and the minor child of one couple. (Cmplt. ¶ 1). The three couples each sought a marriage license from Hennepin County. The County denied the couples' applications for licenses presumably pursuant to the State's Defense of Marriage Act, which prohibits marriage between persons of the same sex. *See* Minn. Stat. §§ 517.01, 517.03, Subd. 1(4) (2010) (the State's "DOMA"). Plaintiffs filed suit against Jill Alverson, the Hennepin County Local Registrar, asking the Court to declare the State's DOMA unconstitutional. Hennepin County filed a motion to dismiss based on Plaintiffs' alleged failure to join an indispensible party, namely, the State of Minnesota. Plaintiffs then served this action on Minnesota's attorney general and joined the State as a party to the case. Defendants now jointly move for dismissal of this case on the merits. Additionally, the State argues that it is not a proper party to this suit.

ISSUES

Is the State of Minnesota a proper party to this suit? Have Plaintiffs stated a claim upon which relief may be granted in claiming that the State's DOMA violates certain constitutional principles?

ANALYSIS

I. The State is not a proper party to this lawsuit.

Plaintiffs argue that the State is a proper party, relying on three theories: 1) the State is a proper party pursuant to the Uniform Declaratory Judgments Act, 2) the local registrar is controlled by the State Registrar, and 3) the State is the creator and enforcer of all laws, including 515 separate laws that Plaintiffs allege discriminate against same-sex couples, creating a legal interest in this lawsuit.

The Uniform Declaratory Judgments Act, Minnesota Statutes Chapter 555, grants Courts the authority to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. Minn. Stat. § 555.01 (2010). Thus, the defendants in this case may not object to Plaintiffs' Complaint solely on the ground that it prays for declaratory relief. *See id.* The Act is clear about which parties must be joined in an action for declaratory relief:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

Minn. Stat. § 555.11. Here, the State's Attorney General must be served with a copy of the proceeding and is entitled to be heard. The State need not and should not be a party to the case.

Plaintiffs have not demonstrated that the State has or claims any interest which would be affected by the prayed-for declaration. In *Clark v. Pawlenty*, the Petitioner sued then-Governor Tim Pawlenty and the Secretary of State seeking an election ballot correction. *See* 755 N.W.2d 293 (Minn. 2008). Specifically, the petitioner requested that the "incumbent" designation, be removed from alongside Justice Lorie Gildea's on statewide election ballots. *See id.* at 298. The *Clark* Court concluded that Governor Pawlenty was not a proper party to the lawsuit because he had no authority over the creation or preparation of the election ballots. *Id.* at 299. The Governor's role in this context was to appoint judges and justices between election periods. The Petitioner did not seek to bar the Governor from filling judicial vacancies in the future. *Id.* In contrast, the Secretary of State was a proper defendant because he provided the challenged ballot information to all 87 county auditors. *Id.* The Court also

observed that this was an office for which voting is conducted statewide and for which the secretary of State provided the challenged ballot information to all county auditors. *See id.*

In this case, the State of Minnesota, generally, is not the entity that creates or prepares marriage licenses. Minnesota Statutes Section 517.07 requires marrying couples to obtain a marriage license from the local registrar of any county within Minnesota. The local registrars maintain data on marriages and report that data to the state registrar. *See* Minn. Stat. § 144.223. This report, however, takes place *after* the marriage has been solemnized.

In sum, the relief that Plaintiffs seek would be provided by the local registrar, and not the State of Minnesota. The State is not a necessary party to this action and the Court will grant the State's motion to dismiss. The Local Registrar also seeks dismissal, arguing that it is not in a position to defy Minnesota's Defense of Marriage Act. Like the Secretary of State in *Clark*, the Local Registrar is the office that would provide the relief that Plaintiffs seek. Without a doubt, the Local Registrar is the correct Defendant in this case.

II. The law requires dismissal of this case on its merits.

Plaintiffs filed the instant case challenging the State's Defense of Marriage Act (DOMA). The State's DOMA is contained in Minnesota Statutes Sections 517.01 and 517.03. The State's DOMA provides that lawful marriage may be contracted only between persons of the opposite sex and that marriages between persons of the same sex are prohibited. *See* Minn. Stat. §§ 517.01, 517.03, Subd. 1(4)(a). Marriages entered into by persons of the same sex that are recognized in another state or foreign jurisdiction are void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this State. Minn. Stat. § 517.03(a)(4)(b). The DOMA became State law in 1997. Plaintiffs challenge the State law, arguing that it violates Plaintiffs' rights to due process, equal protection, religious freedom, and freedom of association. Plaintiffs also contend that the DOMA violates the

single-subject clause because the DOMA was enacted as part of a larger bill arguably encompassing many topics.

A claim is sufficient against a motion to dismiss based on failure to state a claim upon which relief can be granted if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded. *Northern States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). The only factual information presented is that which is disclosed by the pleadings as a whole. *Id.* The Court may, however, consider an entire written contract when the complaint refers to the contract and the contract is central to the claims alleged. *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). The Court must accept the facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff. *Pullar v. Indep. Sch. Dist.* No. 701, 582 N.W.2d 273, 275-76 (Minn. Ct. App. 1998). At this stage of litigation, it is immaterial whether the plaintiff can prove the facts alleged. *See Martens v. Minnesota Mng. & Mfg.*, 616 N.W.2d 732, 739-40 (Minn. 2000). "Because of the minimal formal requirement of notice pleadings and the liberal interpretation of pleadings under the rules, a motion to dismiss for [failure to state a claim upon which relief can be granted] will rarely be granted." David F. Herr & Roger S. Haydock, *Minnesota Practice* § 12.9 (2008).

A. *Baker v. Nelson* clearly disposes of Counts I and III of the Complaint.

The first count of the Complaint alleges a violation of the due process provision of Article I, Section 7 of the Minnesota Constitution. This provision reads,

> No person shall be held to answer for a criminal offense without due process of law, and no person shall be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law....

The third count of the Complaint alleges a violation of Article I, Section 2 of the Minnesota Constitution, which reads as follows:

> No member of this state shall be disfranchised or deprived of any rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.

The Minnesota Supreme Court held that the prohibition against same-sex marriage in Minnesota does not offend the due process or equal protection clauses of the United States Constitution in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971). This, of course, is binding precedent on this Court and this Court is not free to ignore it. Plaintiffs argue that the instant lawsuit should be analyzed as though this precedent is not binding because Plaintiffs bring their lawsuit under the Minnesota State Constitution rather than Federal law. This argument is unavailing.

"It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution." *Kahn v. Griffin*, 701 N.W.2d 815, 827 (Minn. 2005) *quoting State v. Fuller*, 374 N.W.2d 722, 727 (Minn. 1985). The highest court of this state is the "first line of defense for individual liberties within the federalist system." *Kahn*, 701 N.W.2d at 828 *citing Fuller*, 374 N.W.2d at 726. When the state Supreme Court reaches "a clear and strong conviction that there is a principled basis for greater protection of the individual civil and political rights of Minnesota's citizens under the state constitution, [the high court] does not hesitate to interpret the state constitution to independently safeguard those rights." *Kahn*, 701 N.W.2d at 828.

In *Baker v. Nelson*, a same-sex couple sued the Hennepin County Registrar after the Registrar denied the couple a marriage license on the sole basis that the individuals were of the same sex. Much the same as the Plaintiffs in this case, the *Baker* plaintiffs argued that Minnesota's law prohibiting same-sex marriage violated the couple's fundamental right to marry. The *Baker* Court discussed the effect of *Loving v. Virginia*, in which the United States Supreme Court struck down Virginia's statute prohibiting interracial marriages. In response to

Loving, the *Baker* Court stated, "But in commonsense and in constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." 291 Minn. at 315, 191 N.W.2d at 314.

In response to *Baker*, Plaintiffs argue that thirty years have passed since *Baker* and legal issues related to sexual orientation are now "substantial federal questions." Certainly, the Minnesota Supreme Court is free to overrule its opinion in *Baker v. Nelson*. Until such time, however, *Baker* remains binding precedent on this Court. Furthermore, Plaintiffs have not demonstrated that this Court has any authority to ignore *Baker* and afford same-sex couples greater or different protections than the federal constitution provides. A fair reading of *Baker* demonstrates that the Minnesota Supreme Court was not sympathetic to the *Baker* plaintiffs' claims. The Supreme Court has not reached "a clear and strong conviction that there is a principled basis for greater protection" of same-sex couples under the State Constitution. This Court has no reason to believe that the result in *Baker* would have been different had the *Baker* plaintiffs alleged violations of the Minnesota Constitution. The law in the State of Minnesota is that a ban on same-sex marriage is constitutional and this Court "...must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question." Minn. R. Jud. Conduct 2.2 at cmt. 2. Certainly, the Court cannot ignore the *Baker* opinion on the basis that "times have changed." Times may have changed, but the law has not.

B. Senate File No. 1908 encompassed a single subject.

Count II of the Complaint alleges a violation of Minnesota's single-subject constitutional provision. The relevant section reads, "No law shall embrace more than one subject, which shall be expressed in its title." Minn. Const. Art. IV, § 17. This provision has two purposes. *Johnson v. Harrison*, 47 Minn. 575, 577, 50 N.W. 923, 924 (1891). The first is to prevent so-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. *Id.* The second is "to prevent surprise and fraud upon the people and the legislature by including provisions in a bill whose title gives no intimation of the nature of the proposed legislation, or of the interests likely to be affected by its becoming a law." *Id.* The term "subject," however, in the constitutional provision, is to be given a broad and extended meaning so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. *Id.* "All that is necessary is that act should embrace some one general subject." *Id.* A common thread that is only a mere filament will still pass constitutional muster. *See Assoc. Builders and Contracters v. Ventura*, 610 N.W.2d 293, 302 (Minn. 2000). In *Associated Builders*, an amendment to the prevailing wage law providing that prevailing wages must be paid in all construction or remodeling projects of educational facilities exceeding $100,000 was found to violate the single-subject clause because the amendment bore no relation to its bill: the 1997 omnibus tax bill relating to tax relief and reform. *See, generally, id.* Yet in *Townsend v. State*, the Supreme Court held that an amendment to the Postconviction Relief Act contained in a bill entitled, "An act relating to public safety...[and] imposing criminal and civil penalties" did not violate the single-subject clause. 767 N.W.2d 11, 14 (Minn. 2009). In *Townsend*, the Petitioner challenged an amendment which added a time requirement for postconviction relief petitions and provided that petitions may not be based on grounds that could have been raised on direct appeal. *Id.* at 13. The Court concluded that the post-conviction amendment related to public safety as well as criminal and civil penalties. *Id.* "Although it is certainly a wide-ranging bill, the various sections 'fall under some one general idea.'" *Id.* at 13-14, *quoting Johnson*, 47 Minn. at 577, 50 N.W. at 924.

The challenged bill in this case is entitled:

> A bill for an act relating to human services; appropriating money; changing provisions for health care, long-term care facilities, children's programs, child support enforcement, continuing care for disabled persons; creating a demonstration project for persons with disabilities; changing provisions for marriage; accelerating state payments; making technical amendments to welfare reform....

Senate File No. 1908 (May 17, 1997). The bill takes in a number of considerations, but these considerations cannot be said to be of separate subjects in the Constitutional sense. The general subject is that of families and children. While some of the issues may be connected to the general subject by only a mere filament, this is all that is required.

Furthermore, were this Court to find otherwise and strike down the 1997 DOMA as offensive to the single subject constitutional provision, the opinion in *Baker v. Nelson* would remain and the Count could still deny same-sex couples marriage licenses. In some ways, the DOMA is duplicative of *Baker*. The Court cannot make a finding that the 1997 DOMA violates the single-subject provision of Minnesota's constitution.

C. The DOMA does not unconstitutionally interfere with or infringe upon religious freedoms.

Count IV of the Complaint alleges a violation of the freedom of conscience provision of the Minnesota Constitution. In the Complaint, Plaintiffs include three affidavits from religious leaders indicating that each church supports same-sex marriage and performs same-sex marriage ceremonies in the church. Plaintiffs argue they are not fully able to exercise their religion because even if they marry in their church, the marriage is not recognized by the State.

The relevant constitutional provision reads,

> 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, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Minn. Const. Art. I, § 16. Minnesota's Constitution provides greater protection of religious liberties to its citizens than the Federal Constitution. *See Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 865 (Minn. 1992). "Whereas the first amendment establishes a limit on government action at the point of *prohibiting* the exercise of religion, [Minnesota's Freedom of Conscience provision] precludes even an *infringement* on or an *interference* with religious freedom." *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990). "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." *Id.* Minnesota's Constitution confers affirmative rights in the area of religious worship, while the federal provision merely attempts to restrain governmental action. *Id. quoting* Fleming & Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 Hamline L. Rev. 51, 67 (1984).

Defendants contend that *Baker v. Nelson* disposes of Plaintiffs' Freedom of Conscience claim. This Court cannot fully agree. In *Baker*, the Minnesota Supreme Court did not address any issues concerning religious freedom. The *Baker* Court may have been referring to religious freedom issues, among other issues, in footnote two of the opinion, which reads, "We dismiss without discussion petitioners' additional contentions that the statute contravenes the First Amendment and Eighth Amendment of the United States Constitution." 291 Minn. at 312, 191 N.W.2d at 186, n.2. Considering that the Minnesota Supreme Court has not offered guidance on the issue of religious freedom as it relates to same-sex marriage, and that the Minnesota Constitution offers greater protection of religious freedom than the federal provision, this Court opines that it may not be bound by existing precedent relating to

Plaintiffs' freedom of conscience claim. The Court must still resolve the question of whether Plaintiffs have stated a claim upon which relief may be granted.

To determine whether government action violates an individual's right to religious freedom, this Court asks: (1) whether the belief is sincerely held; (2) whether the state action burdens the exercise of religious beliefs; (3) whether the state interest is overriding or compelling; and (4) whether the state uses the least restrictive means. *Hill-Murray*, 487 N.W.2d at 865.

As to the first question, for purposes of evaluating this motion to dismiss, the Court concludes that Plaintiffs have properly alleged sincerely held beliefs that same-sex marriages are allowed or encouraged within certain faiths and denominations. "It is not the province of the court to examine the reason of religious beliefs or to resolve purely religious disputes." *Hill-Murray*, 487 N.W.2d at 865 *citing Serbian & Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). "It is, however, proper for the courts to inquire as to whether a belief is held in good faith." *Id. citing In re Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1963). Plaintiffs have properly alleged that their beliefs at issue are held in good faith.

The second question asks whether state action burdens the exercise of religious beliefs. Here, Plaintiffs ask the Court to accept the allegation that the State's refusal to acknowledge a same-sex marriage infringes on or interferes with the Plaintiffs' religious freedoms. To help determine what exactly constitutes a burden on the exercise of religious beliefs, the Court will examine one of the leading, on-point cases on the subject of burdens on religious freedoms. In *Hill-Murray Federation of Teachers v. Hill-Murray High School*, the employer, a religious institution, contended it was exempt from compliance with the Minnesota Labor Relations Act, which requires the parties to endeavor in good faith to reach an agreement with respect to rates of pay, rules or working conditions in the place of employment. 487 N.W.2d at 866. The

employer argued that negotiations about conditions of employment would lead to negotiations about religion, which would compel the school to negotiate and compromise its doctrinal positions. *Id.* The Minnesota Supreme Court found this interference was "remote" and an insufficient basis to exempt the employer from regulatory laws of the State. *See id.* The Court held that matters of religious doctrine and practice at a religiously affiliated school are intrinsically inherent matters of managerial policy and therefore non-negotiable. *Id.* Terms and conditions of employment that are not doctrinally related are negotiable and the Minnesota Labor Relations Act did not excessively burden the employer's religious beliefs. *Id.* The employer retained the power to hire employees who met their religious expectations, to require compliance with religious doctrine, and to remove any person who fails to follow the religious standards set forth. *Id.* The employer did not establish that "this minimal interference excessively burden[ed] their religious beliefs." *Id.*

The situation is similar here. With the DOMA intact, Churches retain the power to perform religious ceremonies sanctioning same-sex relationships as well as the freedom to reject same-sex relationships. Plaintiffs retain the ability to participate in same-sex marriage ceremonies. Plaintiffs have the ability to fully exercise their religious freedoms, without interference or infringement. The State, on the other hand, retains its ability to withhold approval of certain religious ceremonies, without an effect on religious freedoms. For one example, the State may hold regular business hours on any number of religious holidays without running afoul of the freedom of conscience clause. The State's choice to recognize opposite-sex marriages performed in churches, but not same-sex marriages is a decision within the purview of the State's power to prohibit certain marriages without unconstitutionally interfering in religious freedoms. The Court is unable to conclude that any state action has burdened the exercise of religious beliefs through the enactment and enforcement of the State

DOMA. Plaintiffs have failed to state a claim upon which relief can be granted because they have not properly alleged that state action burdens the exercise of religious beliefs. Count IV of the Complaint must be dismissed.

D. *Baker v. Nelson* compels dismissal of Plaintiffs' freedom of association claim.

The Complaint's final count alleges the State's DOMA violates the Plaintiff's constitutional right to freedom of association. "Constitutional freedom of association protects the right of an individual to associate with others for the purpose of expressing and advancing ideas and beliefs." *Metro. Rehab. Svs., Inc. v. Westberg*, 386 N.W.2d 698, 700 (Minn. 1986) *citing NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170 2 L.Ed.2d 1488 (1958). This is referred to as "freedom of expressive association." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 3250 (1984). Freedom of association also encompasses "freedom of intimate association." *See id.* Freedom of intimate association affords "the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* "The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those relationships that attend the creation and sustenance of a family..." *Id.* One of these relationships is marriage. *Id., citing Zablocki v. Redhail*, 434 U.S. 374, 383-386, 98 S.Ct. 673, 679-681, 54 L.Ed.2d 618 (1978).

Freedom of association is not mentioned in the text of either the federal of state constitution. *Metro. Rehab. Svs.*, 386 N.W.2d at 700. In federal courts, the right has been recognized as a derivative of first amendment guarantees. *See id.* Plaintiffs bring this claim under our State Constitution. No cases indicate that the right of freedom of association is independently recognized under the State constitution. Unlike protections for religious

freedom, case law does not establish that the State provides any greater protections for freedom of association than the federal Constitution. The Court observes that in *Baker v. Nelson*, the Court summarily disposed of all first amendment claims without discussion. 291 Minn. at 312, 191 N.W.2d at 186, n.2. Freedom of Association comes under the purview of the First Amendment. Furthermore, the Court must observe that the *Baker* Court opined that marital restrictions "based upon the fundamental difference in sex," did not invoke constitutional protections. *See id.* at 315, 187. Were this Court to conclude that Plaintiffs could be entitled to relief under a freedom of association theory, this would be in direct contravention of the clear holding in *Baker*. The Court must dismiss Count Five of the Complaint.

CONCLUSION

The State of Minnesota is not a proper party to this action and is dismissed from this lawsuit. Bearing in mind that a statute is presumed constitutional, the Court has concluded that the bill which encompassed the State DOMA does not violate the single-subject clause of the State Constitution, and that Plaintiffs have failed to demonstrate that the State DOMA infringes on or interferes with religious freedoms. As to the remaining counts, this Court is compelled to dismiss the instant action on the merits based upon binding precedent set forth in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971). Same-sex marriage will not exist in this State unless and until the Minnesota Supreme Court overrules its own decision in *Baker*, or the State Legislature repeals the State DOMA.

M.S.D.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Douglas Benson, Duane Gajewski, Jessica Dykhuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman, Plaintiffs, vs. Jill Alverson, in her official capacity as the Hennepin County Local Registrar, and State of Minnesota, Defendants.	**D.C. No. 27-Cv-10-11697** **DEFENDANT JILL ALVERSON'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Plaintiffs' lawsuit raises important constitutional issues that have broad and significant state-wide implications. Plaintiffs seek to strike down Minnesota's law prohibiting same sex individuals from obtaining a marriage license. In addition, they seek declaratory relief regarding 515 other Minnesota laws that provide benefits or obligations to individuals related to their marital status – including laws related to state and local government employee benefits, income taxes, insurance, and healthcare. Defendant Jill Alverson was named in this lawsuit because her department performs ministerial duties in Hennepin County regarding Minnesota's marriage laws. Defendant Alverson does not have any discretion to alter or change Minnesota's laws with respect to who is entitled to a marriage license.

The Defendant State of Minnesota has brought a motion to dismiss this case and has argued that Plaintiffs' case should be dismissed because their claims are not

supported by existing precedent. *See* State's Memo at 7-13. Defendant Alverson acts as an agent of the State of Minnesota when issuing marriage licenses. Because Defendant Alverson performs a ministerial duty on behalf of the State of Minnesota, she seeks dismissal from this lawsuit on the same grounds as the State, as her role is simply to follow Minnesota law and the rules of the Minnesota State Registrar.

FACTUAL BACKGROUND

Defendant Jill Alverson was served with the Amended Complaint in this matter on June 15, 2010. The Amended Complaint alleges that Plaintiffs are six gay and lesbian Minnesota residents who comprise three same-sex couples. Compl. ¶ 1. The Amended Complaint alleges that on March 6, 2009, an agent or employee of Defendant Jill Alverson's denied Plaintiffs marriage licenses because the applications indicated that they were for individuals of the same sex. Compl. ¶¶ 13-16. The Amended Complaint alleges that Defendant Alverson's agents acted in compliance with Minnesota State law when they denied Plaintiffs' marriage license applications. Compl. ¶¶ 11, 15. There is no dispute that Defendant Alverson's agents denied Plaintiffs marriage licenses, or that her action was ministerial and not policy related in anyway.

It is undisputed that Minnesota law prohibits marriages between persons of the same sex. Section 517.01 of Minnesota Statutes states: "Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential." Section 517.03 of Minnesota Statutes states:

"(a) The following marriages are prohibited

. . . .

(4) a marriage between persons of the same sex."

As the local registrar for the County of Hennepin, Defendant Jill Alverson merely has a ministerial role in following Minnesota state law directives in administering Minnesota's law related to marriage and specifically with respect to issuing Minnesota marriage licenses. The Complaint challenges Minnesota's laws and not the specific actions of Ms. Alverson's agents.

The Complaint seeks as declaration that "Minnesota's prohibitions on marriages by same sex couples. . . are invalid and unconstitutional under the Minnesota Constitution." Specifically, Plaintiffs assert that Minnesota laws violate five separate provisions of the Minnesota Constitution:

(1) due process of law, Minn. Const. Art. I, section 7 (Count I);

(2) single subject provision; Minn. Const. Art. IV, section 16 (County II);

(3) equal protection of law, Minn. Const. Art. I, section 2 (Count III);

(4) freedom of conscience, Minn. Const. Art. I, section 16 (Count IV); and

(5) freedom of association, Minn. Const. Art. I, section 1, 2, and 16 (Count V).

The Prayer for Relief states that the relief requested is to strike down Minnesota's ban on same sex marriage. In addition, Plaintiffs seek extraordinary declaratory relief "that any further provision of Minnesota law related to who may marry, who is a spouse, husband, or wife, who receives the benefits and/or obligations of marriage, and similar provision [of state law] are to be interpreted in a gender-neutral manner, without distinction between opposite sex couples and same sex couples." Compl., Prayer for

Relief par. 3. This prayer for relief relates to 515 different Minnesota laws that Plaintiffs assert discriminate against same-sex couples. Compl. ¶ 4. Defendant Alverson plays virtually no role in administering any of these 515 laws.

PROCEDURAL HISTORY

Plaintiffs served the original Complaint on May 7, 2010. This original Complaint only identified Jill Alverson as a defendant. On June 15, 2010, Defendant Alverson filed a motion to dismiss Plaintiffs' Complaint for failure to join an indispensible party – the State of Minnesota. This motion was based on the fact that the Complaint sought to broadly strike down numerous state statutes and because Defendant Alverson merely acts as an agent of the State Registrar. Pursuant to Minn. Stat. § 555.11, "[w]hen declaratory relief is sought, all person shall be made parties who have or claim any interest which would be affected by the declaration." In response to this motion, later the same day, Plaintiffs amended their Complaint and named the State of Minnesota as a defendant. Based on this action, Defendant Alverson withdrew her motion to dismiss for failure to join an indispensible party. On July 1, 2010, the State of Minnesota filed its own motion to dismiss the Amended Complaint. It is based on two separate grounds. First, the State of Minnesota argues that it is not a proper party to Plaintiffs' lawsuit. Second, the State argues that existing precedent does not authorize the relief requested. Finally, on July 28, 2010, the Minnesota Family Council moved to intervene, the Plaintiffs opposed this intervention, and on October 29, 2010, the Court heard arguments related to the Minnesota Family Council's motion to intervene.

ARGUMENT

Defendant Alverson seeks dismissal from this suit because her office performs a ministerial duty of enforcing Minnesota's marriage laws. As the local registrar, she acts solely as an agent of the State Registrar. Defendant Alverson has no authority to defy state law, to make or influence state policy, or even the authority of the State Registrar. The State of Minnesota has filed a motion to dismiss this action as a matter of law and has argued that existing precedent does not support Plaintiffs' claims. *See* State's Memo at 7-13. Because Defendant Alverson is the agent of the State Registrar, the Court should dismiss her from this case for the same reasons identified by the State of Minnesota in its motion to dismiss.

While Defendant Alverson asserts she should be dismissed for the same reasons as the State of Minnesota, it is important for the Court to understand the ministerial nature of Defendant Alverson's duties.

I. The Laws of the State of Minnesota Ban Same-Sex Marriage and These Laws Have Not Been Struck Down Or Called into Question By a Minnesota Court.

Plaintiffs have challenged the constitutionality of Minnesota's laws prohibiting same sex marriage on several grounds. It is undisputed that Minnesota law prohibits marriages between persons of the same sex. Section 517.01 of Minnesota Statutes states: "Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential." In addition, Section 517.03 of Minnesota Statutes states that "a marriage between persons of the same sex" is "prohibited." Minn. Stat. § 517.03 (a)(4). Plaintiffs seek a

declaration that these statutes are unconstitutional. They are seeking a declaration that the state laws prohibiting same sex marriage violate several provisions of the Minnesota Constitution and that the Court declare that 515 other state statutes related to marriage be construed to recognize same-sex marriages.

Approximately 40 years ago, the Minnesota Supreme Court addressed a challenge to Minnesota law prohibiting same sex marriage. In *Baker v. Nelson*, the petitioners argued that they were entitled to a marriage license under Minnesota Statute § 517.08, and, alternatively, that a law permitting only opposite-sex marriages denied them due process and equal protection under the United States Constitution. 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed by* 409 U.S. 810 (1972). The trial court denied relief, and the Minnesota Supreme Court affirmed. The Minnesota Supreme Court concluded that the Minnesota law prohibited same sex marriage: "We hold . . . that Minn. St. c. 517 does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited." *Id.* at 186. The Court also held that this prohibition on same-sex marriages did not violate petitioners' due-process and equal-protection rights. *Id.* at 185-87. In denying the relief requested the Court stated:

> The constitutional challenges [identified by Petitioners] have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court. The institution of marriage as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family is as old as the book of Genesis.

Id. at 186. The Court went on to state that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id.* at 187. The Court concluded by stating definitely: "We hold, therefore, that Minn. St. c. 517 does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution." *Id.* On further appeal to the United States Supreme Court, the Court dismissed the appeal "for want of a substantial federal question." 409 U.S. at 810.

During the past several years there have been a number of cases decided outside of Minnesota regarding the constitutionality of same sex marriage. *See e.g. Perry v. Schwartzenager*, 704 F.Supp.2d 921,995-96 (N.D. Cal. 2010) (holding that California's ban on same sex marriage violated due process and equal protection provisions of the U.S. Constitution), *stay granted,* 2010 WL 3212786, (9th Cir., Aug. 16, 2010); *Varnum v.* Brien, 763 N.W. 2d 862, 907 (Iowa 2009) (holding that Iowa's ban on same sex marriage violated the equal protection provisions of the Iowa Constitution); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431 (Conn. 2008) (holding that Connecticut's ban on same sex marriage violated the equal protection provisions of the Connecticut's Constitution); *but see Hernandez v. Robles,* 855 N.E.2d 1, 6 (2006) ("By limiting marriage to opposite-sex couples, [the State] is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and Men are treated alike-they are permitted to marry people of the opposite sex, but not people of their own sex."); *Andersen v. King Co.,* 138 P.3d 963, 987-89 (2006)

(holding that the state DOMA does not discriminate on the basis of sex and cataloging the various cases from other jurisdictions interpreting their own equal rights amendments).

However, the law in Minnesota has not changed. Minn. Stat. § 517 is presumed to be constitutional. *See State v. Tennin,* 674 N.W.2d 403, 407 (Minn. 2004). The Minnesota Supreme Court's decision in *Baker,* although not direct controlling precedent for a challenged based on the Minnesota Constitution, holds that Minnesota's law only recognizing marriage between a man and a women does not violate the U.S. Constitution. For the reasons discussed below, Defendant Alverson is bound to follow state law and the direction of the State Registrar.

II. Local Registrar Acts as Agent of the State Registrar.

Pursuant to Minn. Stat. § 144.213, the Minnesota Commissioner of Health has established the Office of the Minnesota State Registrar. Each county in the State of Minnesota has a local registrar appointed by the county board. *Id.* § 144.214. The Office of the State Registrar coordinates the work of local registrars and is responsible for the administration and enforcement of the laws governing local registrars. *Id.* § 144.213, subd. 2. Neither a county board, nor the local registrar has discretion related to the official duties of the local registrar. A local registrar who neglects or fails to discharge their duties may be relieved of their duties by the State Registrar, who may then appoint a successor to serve as the local registrar. *Id.* § 144.214. The actions that are required to be taken by local registrars related to marriage licenses and marriage certificates are proscribed in detail in state law and enforced by the State Registrar. *See, e.g.,* Minn. R.

4601.0300 (the local registrars must "comply with the procedure established by the state registrar.")

Pursuant to Minn. Stat. § 517.07, before "any persons are joined in marriage, a license shall be obtained from the local registrar of any county." The form of the application for marriage is dictated by Minn. Stat. § 517.08. Included in the required form is "the full names of parties and the sex of each party." Minn. Stat. § 517.08, subd. 1a(1). The parties seeking a license must pay a fee for the marriage license. The fee is $115, unless the parties have undergone 12 hours of premarital education in which case the fee is $40. The fee is collected by the local registrar. The county keeps $25 of the fee collected and the remainder is sent to the State of Minnesota. *Id.* § 517.08, subd. 1c(a) and (b).

After a marriage license is obtained, the parties must have the marriage solemnized. *See* Minn. Stat. § 517.09. The person solemnizing the marriage creates a certificate regarding the marriage and provides this to the local registrar who then has an obligation to record this marriage. *See* Minn. Stat. § 517.10. The local registrar then must report this data to the State Registrar. *See* Minn. Stat. § 144.223. The data required to be collected and transmitted to the State Registrar includes personal information on the bride and groom.

Thus, as a matter of law, when acting as a local registrar, Defendant Jill Alverson is acting as an agent of the State Registrar. The State Registrar and state law prohibit Defendant Alverson, or any local registrar, from granting marriage licenses to same-sex couples. In addition, Defendant Alverson does not have legal authority to decline to

enforce state law. In Minnesota, the general rule is that a public official charged with the performance of a ministerial duty is not allowed to question the constitutionality of a statute. This general rule has been applied in numerous cases where the interests of the public official are not directly impacted.

The seminal case on this subject is *State ex rel. Clinton Falls Nursery Co., v. Steele County Bd. Of Com'rs,*. 232 N.W. 737 (Minn. 1930). In this case, the Minnesota Supreme Court was presented with the question whether the County could challenge the constitutionality of a statute in a mandamus action. In denying the County's constitutional challenge of the matter the Court stated:

> The better doctrine supported by the weight of authority is that an official so charged with the performance of a ministerial duty will not be allowed to question the constitutionality of such a law. This rule is based largely upon governmental policy. It rests upon the theory that the court should accept as final the acts of the legislature and discourage attacks upon them except where necessary to protect the private interests of the individual asserting invalidity and peculiarly and particularly affected thereby. Officials acting ministerially are not clothed with judicial authority. To permit them to refuse to perform their duty on the ground that the commanding law is unconstitutional would be a dangerous practice, in that they who have only ministerial duties would be raising questions affecting the rights of third persons while they themselves would have no direct interest in the question and could not in any event be made responsible.'

232 N.W. at 738 (emphasis added).

Similarly, in *Mower County Board v. Board of Trustees of PERA*, 136 N.W.2d 671 (1965), the Court concluded that the County Board did not have standing to challenge the constitutionality of certain provisions of PERA that imposed a ministerial duty on the County. In its decision, the Court stated:

> It would seem, then, that this is a case where public officials should not be permitted to hamper the progress of governmental administration by refusing to perform a duty they find objectionable or disagreeable.
>
> . . . .
>
> To permit public officials who have no duty to interpret or administer a law endowed with the presumption of constitutionality to assail that law as an excuse for their own failure or refusal to act under a statute clearly imposing only ministerial obligations would result in chaos.'

Id. at 675-76. *See also Lockyer v. City and County of San Francisco*, 95 P.3d 459, 472-476 (Cal. 2004) (holding that county recorder, who is charged with the ministerial duty of enforcing a California's marriage statute, does not possess the authority to disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional).

III. Defendant Alverson Should be Dismissed from This Case.

The Minnesota Legislature enacted laws which prohibit same-sex individuals from obtaining marriage licenses. This law is presumed to be constitutional. *See State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004). Defendant Alverson has no legal authority to ignore this law, but rather she is compelled to comply with it at the direction of the State Registrar. *See Clinton FallsNursery Co.*, 232 N.W. at 738; *Mower County Board,* 136 N.W. at 675-76. In the motions before the Court, the State of Minnesota has argued that the Plaintiffs' claims should be dismissed because existing legal precedent does not support the relief they are requesting. *See* State's Memo at 7-13. Because Defendant Alverson performs a ministerial duty on behalf of the State of Minnesota, she incorporates the State of Minnesota's legal arguments regarding these precedents and seeks dismissal on the same basis.

Defendant Alverson believes that the State Defendants are better positioned to defend the constitutionality of these particular laws for several reasons. First, as discussed above, Defendant Alverson is an agent of the State Registrar and acting pursuant to the procedures the State Registrar has enacted. Second, this case challenges the constitutionality of Minnesota's laws related to who has the legal right to marry in Minnesota (not just in Hennepin County) and it challenges 515 additional state laws, most of which Ms. Alverson has no role in enforcing. The Complaint does not allege that Ms. Alverson did anything other than apply the law. Accordingly, Defendant Alverson does not have any unique legal position and will instead rely upon the arguments made by the State of Minnesota regarding the constitutionality of these laws. Third, this suit obviously has statewide implications and the State and the Attorney General have a significant interest in its outcome. In fact, pursuant to Minn. Stat. § 8.01, the Minnesota Attorney General is obligated to appear for the state "in all causes in the supreme and federal courts wherein the state is directly interested; also in all civil causes of like nature in all other courts of the state whenever, in the attorney general's opinion, the interests of the state require it." For these reasons, Defendant Alverson simply incorporates herin the State's legal argument supporting dismissal and seeks dismissal on this basis.

CONCLUSION

For the foregoing reasons, Defendant Alverson respectfully requests the Court grant her motion to dismiss.

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