No. A110811

STATE OF MINNESOTA
IN THE COURT OF APPEALS

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

Appellants,

V.

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

AND

STATE OF MINNESOTA,

Respondents.

MINNESOTA FAMILY COUNCIL'S AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

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INTRODUCTION

Respondents defend the district court's decision by focusing on the decisive impact of the State Supreme Court's decision in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971). While Respondents cogently outline *Baker*'s precedential import, Amicus Minnesota Family Council will aid this Court's review with a thorough discussion of the substance of Appellants' state constitutional claims, particularly their equal-protection and due-process challenges. To that end, Amicus explores the applicable law and relevant legal analysis in detail, discussing not only Minnesota precedent but also pertinent case law from other jurisdictions. This legal analysis, in short, will demonstrate that while *Baker* surely forecloses Appellants' claims, their allegations nevertheless lack merit even if this Court were to find *Baker*'s precedential force of limited value.[1]

ARGUMENT

I. The State Marriage Laws Do Not Violate Appellants' Rights of Equal Protection or Due Process under the State Constitution.

A. The State Supreme Court's Decision in *Baker v. Nelson* Mandates Dismissal of Appellants' Equal-Protection and Due-Process Claims.

The State Supreme Court's decision in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), mandates dismissal of Appellants' equal-protection and due-process claims. In *Baker*, the Court held that the state marriage laws "do[] not authorize marriage between persons of the same sex," *id.* at 312, 191 N.W.2d at 186, and that, by failing to

[1] No counsel for any party authored this brief in whole or in part, and no one other than Amicus or its counsel made any monetary contribution to the preparation or submission of this brief.

permit such marriages, those laws "do[] not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution," *id.* at 315, 191 N.W.2d at 187. Notably, the *Baker* Court rejected the argument that same-sex couples "are deprived of . . . due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment." *Id.* at 312, 191 N.W.2d at 186. The Court reached that conclusion because (1) "the right to marry without regard to the sex of the parties" is not a "fundamental right" and (2) "[t]he institution of marriage as a union of man and woman," which "uniquely involv[es] the procreation and rearing of children within a family," readily satisfies rational-basis review. *Id.* at 312-15, 191 N.W.2d at 186-87.[2] *Baker* thus squarely forecloses Appellants' equal-protection and due-process claims.

Appellants offer a few unpersuasive arguments to avoid *Baker*'s precedential control over their equal-protection and due-process claims. They argue, for instance, that *Baker* is not controlling because it addressed claims under the federal rather than the state constitution. (Appellants' Br. 23.) But the State Supreme Court has emphasized that it will not "cavalierly construe [the state] constitution more expansively than the United States Supreme Court has construed the federal constitution." *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004) (quotation marks omitted); *see also Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005); *State v. Carter*, 697 N.W.2d 199, 210 (Minn. 2005);

[2] While the *Baker* Court did not use the phrase "rational-basis review," its analysis leaves no doubt that the Court applied that standard. *See* 291 Minn. at 313-14, 191 N.W.2d at 187 (stressing that constitutional review tolerates classifications that are "imperfect," and rejecting the plaintiffs' argument that the marriage laws should be declared unconstitutional simply because the State "does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate").

State v. Wiegand, 645 N.W.2d 125, 132 (Minn. 2002); *State v. Fuller*, 374 N.W.2d 722, 726-27 (Minn. 1985). State courts thus "adhere to the general principle of favoring uniformity with the federal constitution," *Kahn*, 701 N.W.2d at 824; and they "will not construe [the] state constitution as providing more protection for individual rights than does the federal constitution" unless they first reach "a clear and strong conviction that there is a principled basis for greater protection of the individual civil and political rights of our citizens under the Minnesota Constitution." *Id.* at 824, 828. Here, no principled basis exists for departing from *Baker*'s construction of federal equal-protection and due-process rights, and Appellants have failed to allege—much less show—that the text or history of the relevant constitutional provisions or some "unique, distinct, or peculiar issues of state and local concern" warrant ignoring *Baker*. *See id.* at 829 (identifying these as factors to consider in this analysis).

Appellants also take senseless aim at the precedential value of the United States Supreme Court's decision to dismiss the appeal in *Baker* for want of a substantial federal question. *Baker v. Nelson*, 409 U.S. 810 (1972). (*See* Appellants' Br. 21.) But the precedential import of that decision is irrelevant because, unlike the federal and non-Minnesota courts that have considered that question (*see id.* at 23-24), the Minnesota Supreme Court's *Baker* decision is undoubtedly binding and controlling here.

Unable to avoid the precedential authority of *Baker*, Appellants resort to the extreme measure of morphing the nature of their claims on appeal. In their appellate brief, Appellants repeatedly discuss the question whether the State will recognize their foreign-created same-sex unions. (Appellants' Br. 22, 35.) But that claim was not

sufficiently raised in the amended complaint or asserted in the briefing below, and it is thus waived. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (noting that appellate courts "generally will not decide issues which were not raised before the district court"). The amended complaint and all the briefing below focused on Registrar Alverson's "denial of [Appellants'] applications for marriage licenses in Hennepin County." (Am. Compl. ¶ 1.)[3] Also, Appellants' amended complaint expressly identifies the purported source of their equal-protection and due-process injuries as "the Registrar's refusal to grant them marriage licenses."[4] Tellingly, the amended complaint never claims that Appellants' alleged injuries result from the State's refusal to recognize their foreign-created same-sex unions, and two of Appellants have not even entered such a foreign union (although they claim that they plan to do so soon). This Court should thus reject Appellants' belated efforts to change the nature of their claims on appeal[5] and decline to depart from *Baker* on this improper basis.[6]

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[3] The "factual allegations" section of the amended complaint exclusively discusses the legal requirements for obtaining a marriage license or entering a civil marriage in this State as well as Appellants' unsuccessful efforts to complete this process. (*See* Am. Compl. ¶¶ 8-16.)

[4] *See* Am. Compl. ¶ 21 ("Plaintiff couples have been denied their fundamental due process rights *through the Registrar's refusal to grant them marriage licenses*") (emphasis added); *id.* at ¶ 33 ("*As a result of the Registrar's enforcement of Minnesota law prohibiting same sex marriage*, . . . Plaintiff couples have been denied their right to equal protection under the Minnesota Constitution.") (emphasis added).

[5] Appellants stretch their effort to alter their claims to the extreme, arguing that Registrar Alverson, who they voluntarily selected as a defendant in this lawsuit, "is not a proper party." (Appellants' Br. 18.)

[6] Even if Appellants had properly raised the question whether the State must recognize their foreign-created same-sex unions, that issue does not justify departing from *Baker*'s holding on the equal-protection and due-process claims. After all, if the government's refusal to issue marriage licenses to same-sex couples does not violate equal protection or

B. Appellants' Equal-Protection Claim Fails as a Matter of Law.

Courts use the rational-basis standard to review equal-protection challenges under the state constitution "unless the challenge involves a suspect classification or a fundamental right." *State v. Garcia*, 683 N.W.2d 294, 298 (Minn. 2004). Appellants' equal-protection claim does not involve a fundamental right, nor do the challenged marriage laws draw a distinction based on a suspect classification; hence, rational-basis review applies here.

1. The State Constitution Does Not Recognize a Fundamental Right to Marry a Person of the Same Sex.

The State Supreme Court in *Baker* squarely rejected the argument "that the right to marry without regard to the sex of the parties is a fundamental right of all persons" under the federal constitution. 291 Minn. at 312, 191 N.W.2d at 186. That same conclusion, as explained herein, applies under the state constitution.

Fundamental rights under the state constitution are "[t]hose which have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms." *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (quoting *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987)). In determining the contours of a state fundamental right, courts look to the "structure and history of the Minnesota Constitution" as well as "applicable case law." *Skeen*, 505 N.W.2d at 315.

Nothing in the state constitution expressly or implicitly recognizes a fundamental right to marry a person of the same sex. Nor does such a novel right find any support in

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due process, then neither can the government's refusal to recognize such foreign-created unions.

the structure or history of the state constitution or the applicable case law. Indeed, the most applicable precedent—*Baker*—expressly refused to acknowledge such a right under the federal constitution.

Notably, most state courts that have faced this issue under their own constitutions have found no fundamental right to marry a person of the same sex. *See, e.g.*, *Conaway v. Deane*, 932 A.2d 571, 627 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 978 (Wash. 2006) (plurality); *Morrison v. Sadler*, 821 N.E.2d 15, 32-33 (Ind. Ct. App. 2005); *Standhardt v. Superior Court*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003).

Appellants nevertheless attempt to invoke the longstanding fundamental right to marry. (Appellants' Br. 34.) But the State Supreme Court has demonstrated that when determining whether an equal-protection claim implicates a fundamental right, it is necessary to carefully formulate the right at issue. *See Skeen*, 505 N.W.2d at 314-15 (distinguishing between the "fundamental right to a 'general and uniform system of education'" and an alleged right to the "financing of the public schools"); *see also Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997) (analyzing fundamental rights "require[s] . . . a 'careful description' of the asserted fundamental liberty interest"). The carefully formulated right at issue here, then, is not the well-established right to marry, but a novel claim to "marry" a person of the same sex. That asserted right, as discussed above, is simply not fundamental, for it finds no support—either explicitly or implicitly—in the state constitution.

Nor is Appellants' alleged right to marry a person of the same sex supported by the United States Supreme Court decisions upon which they rely. (*See* Appellants' Br. 33-35.) The Court's decisions addressing the right to marry concern governmental barriers to entering a marriage between one man and one woman, and they acknowledge that the right "enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species." *Conaway*, 932 A.2d at 619.[7] None of those cases involve what is at issue here: an attempt to force the State to change its definition and fundamental structure of marriage.

2. The State Marriage Laws Do Not Draw a Distinction Based on a Suspect Classification.

Appellants claim that the marriage laws distinguish between persons based on their sexual orientation and that sexual orientation constitutes a suspect or quasi-suspect classification under Minnesota law. (Appellants' Br. 15, 25-29.) But no state authority supports that unfounded assertion, and Appellants do not even pretend that there is any. Instead, Appellants discuss a letter expressing the views of President Barack Obama's administration on whether sexual orientation constitutes a suspect or quasi-suspect classification under federal law. Yet the Obama administration's legal opinion on that question is directly contradicted by *every federal appellate court that has addressed the issue*—all of which (including the Eighth Circuit) have held that sexual orientation is not

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[7] *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[Marriage is] the foundation of the family and of society, without which there would be neither civilization nor progress."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is . . . fundamental to our very existence and survival."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

a suspect or quasi-suspect classification under federal law.[8] And at least six of the federal circuits have affirmed or reaffirmed that conclusion following the United States Supreme Court's 2003 decision in *Lawrence v. Texas*, so Appellants' suggestion that this "circuit court authority . . . does not survive . . . *Lawrence*" is simply incorrect. Therefore, federal law does not support—but, in fact, belies—a finding that sexual orientation is a suspect or quasi-suspect classification.[9]

The unanimity of federal circuit precedent on this suspect-classification question is no accident, for the question whether sexual orientation satisfies the requirements of suspect or quasi-suspect status is not even a close one. As an initial matter, sexual orientation is a complex and amorphous phenomenon that defies consistent and uniform definition. Well-respected researchers have thus concluded that "[t]here is currently no

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[8] *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (refusing to apply "heightened scrutiny" to a classification based on sexual orientation); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc) (same); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (same); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) (same); *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997) (same); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002) (same); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006) (same); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (same); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 (10th Cir. 2008) (same); *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (same); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (same); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same); *see also Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (not applying strict scrutiny to classification based on sexual orientation).

[9] Registrar Alverson incorrectly asserts that "several Circuit Courts of Appeals have held that classifications based on sexual orientation are subject to strict scrutiny." (Alverson Br. 11.) While a few circuits, such as the Second, have yet to address that issue—thus leaving it an open question for now—no circuit-court decision has ever found that sexual orientation is a suspect or quasi-suspect classification.

scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual." Lisa M. Diamond & Ritch C. Savin-Williams, *Gender and Sexual Identity*, *in* Handbook of Applied Developmental Science 101, 102 (Richard M. Lerner et al., eds. 2003). In this respect, sexual orientation differs markedly from other classifications—race, sex, alienage, and illegitimacy—that the courts have afforded heightened protection.

Nor does sexual orientation satisfy two of the essential requirements for receiving heightened scrutiny under equal-protection analysis: (1) political powerlessness; and (2) immutability. First, individuals who identify as homosexuals are not "politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985); *see also Skeen*, 505 N.W.2d at 314 (finding that the plaintiffs did "not qualify as a suspect class" because they could not show that "they ha[d] been relegated to a position of political powerlessness").[10] Such individuals wield tremendous political power: nationally, for instance, they have successfully lobbied for the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; and locally, they have convinced legislators to pass sexual-orientation nondiscrimination laws, *see* Minn. Stat. § 363A.02(a). It thus cannot be said that this group lacks an ability to attract the attention of lawmakers.

Second, sexual orientation is not "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality).

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[10] Appellants correctly assert that "total powerlessness is not the test." (Appellants' Br. 28.) The test is whether they have an ability to attract the attention of lawmakers.

The American Psychiatric Association indeed acknowledges that "there are no replicated scientific studies supporting any specific biological etiology for homosexuality." American Psychiatric Association, *Sexual Orientation*, http://www.healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx (last visited Aug. 15, 2011). And the empirical evidence leaves no doubt that sexual orientation can shift over time and in fact does so for a significant number of individuals: a comprehensive University of Chicago study, for instance, found that only 20 percent of men and 10 percent of women who have had *any* same-sex intimate partners since age 18 have had *only* same-sex intimate partners since that age. *See* Edward O. Laumann, *The Social Organization of Sexuality: Sexual Practices in the United States* 310-12 (1994). For these reasons, heightened scrutiny does not apply to Appellants' equal-protection claim.

3. The State Marriage Laws Satisfy Rational-Basis Review.

The *Baker* Court, as previously mentioned, applied rational-basis review to the state laws limiting marriage to unions between one man and one woman. In so doing, that Court rejected the contention that "restricting marriage to only couples of the opposite sex is *irrational* and invidiously discriminatory." 291 Minn. at 312, 191 N.W.2d at 186 (emphasis added). That conclusion is binding here, and this Court should thus hold that the state marriage laws satisfy rational-basis review.

The government's purpose for regulating marriage—and the universally recognized animating purpose for that institution—has always been to encourage commitment in sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. *See id.*

("The institution of marriage as a union of man and woman[] uniquely involv[es] the procreation and rearing of children within a family"). In particular, through the institution of marriage, the government seeks to further society's interest in increasing the likelihood that children will be born and raised in stable and enduring family units by the mother and father who brought them into the world. This is known as the government's interest in promoting responsible procreation and childrearing. *See Morrison*, 821 N.E.2d at 24-26, 29-31 (explaining that governmental interest).[11]

Unable to effectively refute the rationality of this governmental interest, Appellants attempt to obfuscate the government's purpose for enacting the challenged marriage laws, asserting that those laws' purposes are "the promotion of heterosexuality over homosexuality[] and the raising of children of heterosexual marriage in accordance with claimed 'Judeo-Christian' principles." (Appellants' Br. 32.) That, however, is a gross distortion of the relevant governmental interests, and the record nowhere suggests that those are the State's interests. On the contrary, the record shows that the "governmental interest" underlying the challenged marriage laws is the goal of "directing naturally procreative relationships between one man and one woman into . . . committed

[11] Prominent legal sources throughout history have acknowledged this purpose of marriage. *See, e.g.*, 1 William Blackstone, Commentaries *410 (stating that marriage laws "prescrib[e] the manner in which th[e] natural impulse" to "multiply [the species]" will "be confined and regulated," and that the relationship of "parent and child" is "consequential to that of marriage, being its principal end and design"); John Locke, Second Treatise of Civil Government §§ 78-79 (1690) (stating that "the end" of the marital union is "not [merely] procreation" but "the nourishment and support of the young ones . . . who are to be sustained by those that [be]got them").

union[s] so that the children born of th[ose] relationship[s] will be raised by their own married mother and father." (Prichard Aff. in support of Mot. to Intervene ¶ 52.)

Elsewhere, in another attempt to obscure the relevant issues, Appellants assert that "marriage's *secular* purposes [encompass] commitment, mutual caring, intimacy, and peaceful co-existence and pursuit of happiness and meaning in the home and community." (Appellants' Br. 50.) But even if many individuals privately hold some or all of these purposes for their own marriages, none of those purposes remotely captures the government's interest in the public institution of marriage.

With that governmental purpose in mind, the analytical focus shifts to the rational-basis test under the state constitution. That standard requires (1) that "[t]he distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial," (2) that "the classification must be genuine or relevant to the purpose of the law," meaning that "there must be an evident connection" between the law's classification and its purpose, and (3) that "the purpose of the statute must be one that the state can legitimately attempt to achieve." *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991). The State Supreme Court "has not been consistent in explaining whether the rational basis standard under Minnesota law, although articulated differently, is identical to the federal standard or represents a less deferential standard under the Minnesota Constitution." *Id.* at 889. "The key distinction between the federal and Minnesota tests is that under the Minnesota test [courts] have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires," *Garcia*, 683 N.W.3d at 299 (quotation

marks omitted); other than that, the state standard is a differently worded test that, like its federal counterpart, "require[s] a reasonable connection between the . . . effect of the challenged classification and the statutory goals," *id.*; *see also In re Estate of Turner*, 391 N.W.2d 767, 770 n.2 (Minn. 1986) (noting that the federal and state tests are simply "different ways of stating the same analysis").

Appellants nevertheless wrongly assert that the state rational-basis standard "requires the same . . . 'substantial' relationship between the legislative means and [the] purpose of the examined law as the heightened scrutiny test" requires. (Appellants' Br. 31.) In truth, however, the fit between legislative means and ends under the state test is deferential like the differently worded federal standard, mandating only that the classification be "relevant to the purpose of the law" and that "an evident connection" exists between the means and ends. Appellants have thus failed to demonstrate that the state rational-basis standard is akin to heightened scrutiny.

The marriage laws readily satisfy the applicable three-part rational-basis standard. First, the biological distinctions that separate couples included within the marriage laws (opposite-sex couples) from couples excluded (same-sex couples) are genuine and substantial. Sexual relationships between opposite-sex couples have a normative procreative capacity, and only those relationships provide children with their mother and father. Same-sex couples, in contrast, can neither procreate without intervention by a person of the opposite sex nor give children a home with both their mother and father.

These significant and unavoidable biological distinctions, quite plainly, provide a natural and reasonable basis for the challenged marriage laws.[12]

Second, an evident connection exists between the statutes' challenged classification and their purpose. The government's purpose for marriage, as discussed above, has always been to further society's interest in increasing the likelihood that children will be born to and raised by the couples who brought them into the world in stable and enduring family units. Because only sexual relationships between men and women can produce children, such relationships have the potential to further—or harm—this interest in a way, and to an extent, that other types of relationships do not. Sexual relationships between individuals of the same sex neither advance nor threaten the State's interest in responsible procreation in the same manner, or to the same degree, that sexual relationships between men and women do.[13]

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[12] "The guarantee of equal protection of the laws requires that the state treat all similarly situated persons alike. It does not require the state to treat things that are different in fact or opinion as though they were the same in law." *State v. Behl*, 564 N.W.2d 560, 568 (Minn. 1997) (citation omitted). "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *see also Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 481 (1981) (stating that constitutional principles of equal protection "surely do[] not require a State to pretend that demonstrable [physiological] differences between men and women do not really exist."); *Miller v. Albright*, 523 U.S. 420, 445 (1998) ("[B]iological differences between . . . men and . . . women provide a relevant basis for differing rules").

[13] When "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, [courts] cannot say that the statute's classification . . . is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974); *see also Vance v. Bradley*, 440 U.S. 93, 109 (1979) (stating that a law may "dr[aw] a line around those groups . . . thought most generally pertinent to its objective"); *Board of Trustees v. Garrett*, 531 U.S. 356, 366-67 (2001).

Third, the purpose of the marriage laws—promoting the best interests of children by helping to bind them to their own mother and father—are compelling interests that the State can legitimately attempt to achieve. *See Maryland v. Craig*, 497 U.S. 836, 852-53 (1990) ("[A] State's interest in safeguarding the physical and psychological well-being of [children] is compelling") (alterations and quotations omitted). More specifically, not only does the State have a legitimate interest in promoting the biological ties between children and parents,[14] the State also has a legitimate interest in encouraging parents to raise children in the optimal family setting, which is a home headed by a child's own married mother and father.[15]

Notably, a host of federal and state court decisions have held that "laws defining marriage as the union of one man and one woman . . . are rationally related to the government interest in 'steering procreation into marriage'" and "encourag[ing] procreation to take place within the socially recognized unit that is best situated for raising children." *Bruning*, 455 F.3d at 867.[16] This Court, like the Court in *Baker*,

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[14] *See* Article 7 of the Convention on the Rights of the Child, United Nations (September 2, 1990) ("The child shall . . . , as far as possible, [have] the right to know and be cared for by his or her parents").

[15] *See* Kristen Anderson Moore et al., *Marriage From a Child's Perspective*, Child Trends Research Brief 6 (2002) ("Research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage."); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, & Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003) ("The advantage of marriage [to a child] appears to exist primarily when the child is the biological offspring of both parents.").

[16] *See, e.g., In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 677-78 (Tex. Ct. App. 2010); *Conaway*, 932 A.2d at 630-34; *Hernandez*, 855 N.E.2d at 7-8; *Andersen*, 138 P.3d at 982-85; *Morrison*, 821 N.E.2d at 24-26, 29-31; *Standhardt*, 77 P.3d at 462-63; *Singer*

should adhere to this long line of precedent and find that the state marriage laws satisfy rational-basis review.[17]

C. Appellants' Due-Process Claim Fails as a Matter of Law.

The *Baker* Court rejected a due-process challenge under the federal constitution to the state laws limiting marriage to opposite-sex couples, and in doing so, the Court stressed that "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by judicial legislation." 291 Minn. at 312-13, 191 N.W.2d at 186. Because it is well-established—indeed Appellants expressly admit (Appellants' Br. 34)—that the state due-process provision is coextensive with the federal due-process provisions, *see Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988), Appellants' state due-process challenge, like the plaintiffs' federal due-process claim in *Baker*, should fail here.

Appellants' due-process claim fails for another reason. On appeal, they base their due-process claim exclusively on their belief that the State will not recognize their foreign-created same-sex unions (rather than on Registrar Alverson's refusal to issue a

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v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308-09 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145-47 (Bankr. W.D. Wash. 2004).

[17] Appellants contend that a few recent trial-court decisions questioning the validity of the federal Defense of Marriage Act ("DOMA") should revive their equal-protection claim. (Appellants' Br. 17, 29-30.) But a far greater number of courts have already upheld marriage statutes—including federal DOMA—as a matter of law. *See supra* fn. 16. And critically, all the trial-court decisions questioning federal DOMA—none of which have been affirmed on appeal—were issued while under the Obama administration's defense, which, from the beginning, has senselessly disavowed Congress's stated purpose of "encouraging responsible procreation and childrearing." (*See* Appellants' Br. 28.)

marriage license to them). (Appellants' Br. 35.) But even if Appellants had not waived this foreign-marriage-recognition issue by failing to raise it below, *see supra* at Section I.A., a State's decision not to recognize its residents' foreign-created unions does not raise due-process or other constitutional questions; instead, it implicates issues of state sovereignty, conflict of laws, public policy, and comity—none of which Appellants even mention. *See Laikola v. Engineered Concrete*, 277 N.W.2d 653, 656 (Minn. 1979) ("[E]ven if the parties entered into a [foreign] marriage, it will not be recognized [in Minnesota] if such marriage violates a strong public policy of the state."); Joseph Story, Commentaries on the Conflict of Laws 197 § 112 (Elibron Classics 2005) (1846) ("[A] party, who is domiciled here, cannot be permitted to import into this [jurisdiction] a [marriage] law peculiar to his own case, and which is in opposition to those great and important public laws[] which our Legislature has held to be [e]ssentially connected with the best interests of society").[18] Therefore, Appellants' exclusive reliance on the foreign-marriage-recognition question—an issue that does not raise due-process concerns—dooms this claim.

II. Appellants Lack Standing to Raise their Single-Subject Claim.

Appellants lack standing to assert their belated single-subject challenge to the legislative procedure used to enact the 14-year-old State DOMA.[19] "Under the standing

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[18] The state marriage statutes and the *Baker* decision plainly proclaim the State's strong public policy against recognizing foreign-created same-sex unions. *See also Lilly v. City of Minneapolis*, 527 N.W.2d 107, 112-13 (Minn. Ct. App. 1995). So even if Appellants had properly raised a foreign-marriage-recognition challenge, their claims would fail.

[19] Not only are Appellants without standing to raise their single-subject claim, their ability to assert that long-overdue challenge might also be precluded by the equitable

requirement, a party must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant and that the injury fairly can be traced to the challenged action and *is likely to be redressed by a favorable decision.*" *In re Application of Crown CoCo, Inc.*, 458 N.W.2d 132, 135 (Minn. Ct. App. 1990) (quotation marks omitted; emphasis added). Here, as previously explained, Appellants' only properly raised injury is Registrar Alverson's "denial of [their] applications for marriage licenses in Hennepin County." (Am. Compl. ¶ 1.) But striking down the State DOMA will not redress that asserted injury, for the pre-State DOMA law in Minnesota—both statutory and case authority—would still have required Registrar Alverson to deny Appellants' applications for marriage licenses.[20] Consequently, Appellants do not have standing to challenge the procedural validity of the State DOMA.

CONCLUSION

For the foregoing reasons, Amicus Minnesota Family Council supports Respondents' position in this case and respectfully requests that this Court affirm the district court's judgment dismissing Appellants' claims.

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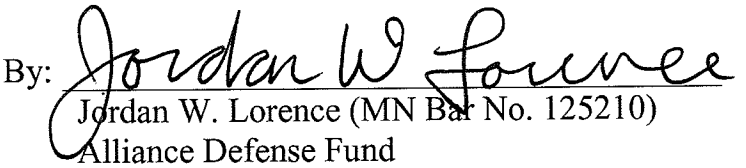
doctrine of laches. *See Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008) (noting that laches forecloses claims by "one who has not been diligent in asserting a known right").

[20] *See Baker*, 291 Minn. at 312, 191 N.W.2d at 186 (holding that the state marriage laws "do[] not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited"); *Lilly*, 527 N.W.2d at 112-13 ("[T]he law of the State of Minnesota states very clearly that marriage must be between a man and a woman."); Minn. Stat. § 363A.27(4) ("Nothing in this chapter shall be construed to authorize the recognition of or the right of marriage between persons of the same sex"); State Br. 24-25 ("In 1977, the Minnesota Legislature codified the holding in *Baker* by amending [S]ection 571.01 to provide explicitly that '[m]arriage . . . is a civil contract between a man and a woman").

Respectfully submitted this the 16th day of August, 2011.

By: 

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Notary Public

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Expires 05/31/2013