IN THE COURT OF APPEALS OF MARYLAND

September Term, 2006

No. 44

FRANK CONAWAY, *et al.*,
Defendants-Appellants

v.

GINTANJALI DEANE, *et al.*,
Plaintiffs-Appellees

On Writ of Certiorari to the Court of Special Appeals of Maryland
(No. 2499, Sept. Term 2005)

Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Defendants-Appellants and Urging Reversal of the Decision of the Circuit Court for Baltimore City (No. 24-C-04-005390, Hon. M. Brooke Murdock, Judge)

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INTEREST OF THE *AMICUS*[1]

The Becket Fund is a nonpartisan and interfaith public-interest law firm that protects the free expression of all religious traditions. The Becket Fund is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of religious and other expressive organizations to pursue their missions without excessive government regulation and entanglement.

Our present brief addresses the impact that a wholesale change to the definition of marriage in law will have on religious liberty. The Becket Fund for Religious Liberty has dedicated significant resources to the study of these issues in a neutral, academic manner. For example, in December of 2005, the Becket Fund hosted a conference of noted first amendment scholars from across the political spectrum to assess the religious freedom implications of legalized same-sex marriage. The ultimate result of the conference was an anthology of scholarly papers to be published by an academic press.[2]

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[1] Pursuant to Maryland Rule 8-511, *amicus* has moved for leave to file this brief as *amicus curiae* in this case.

[2] Copies of drafts of the scholars' conference papers are available at http://www.becketfund.org/index.php/article/494.html

Although some of the scholars wholeheartedly support same-sex marriage and others oppose it, they all share one conclusion—legalized same-sex marriage will create an unprecedented level of legal confusion and corresponding litigation in public accommodation law, employment law, and over government funding.

STATEMENT OF THE CASE

Amicus adopt the statement of the Defendants-Appellants.

STATEMENT OF THE QUESTIONS PRESENTED

Will redefining the fundamental institution of marriage to include same-sex couples result in widespread legal confusion and risk pervasive church-state conflict?

STATEMENT OF FACTS

Amicus adopt the statement of facts of the Defendants-Appellants

SUMMARY OF ARGUMENT

On November 18, 2003, the Massachusetts Supreme Judicial Court decided *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), and unleashed an unprecedented wave of legal and political controversy that has now spread to Maryland. As of yet, no other state high court has followed Massachusetts' lead,[3] and, in order to avoid creating further legal turmoil, neither should the Maryland Court of Appeals.

The Circuit Court of Baltimore City struck down Maryland's marriage laws by holding that "the facts necessarily assumed by the Legislature to support [traditional marriage] exceed rational speculation." *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 *8 (Md. Cir. Ct., January 20, 2006). The instant brief provides significant evidence of the impact that a wholesale change to the definition of marriage in law will have on religious liberty and argues that these impacts must be considered soberly before spreading same-sex marriage beyond Massachusetts.[4]

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[3] *See e.g., Andersen v. King County*, 138 P.3d 963 (Wash. 2006), *Hernandez v. Robles*, 2006 WL 1835429 (N.Y. 2006).

[4] Even Massachusetts is reconsidering the wisdom of the *Goodridge* decision by efforts to amend the constitution to eliminate same-sex marriage. *See Schulman v. Attorney General*, 447 Mass. 189 (Mass. 2006) (allowing proposed constitutional marriage amendment petition to move forward).

The Becket Fund for Religious Liberty has dedicated significant resources to the study of these issues in a neutral, academic manner. In December of 2005, the Becket Fund hosted a conference of noted first amendment scholars from across the political and religious spectrum to assess the religious freedom implications of legalized same-sex marriage. The ultimate result of the conference was an anthology of scholarly papers to be published by an academic press.[5]

Although some of the scholars wholeheartedly support same-sex marriage and others oppose it, they all share one conclusion—legalized same-sex marriage will create an unprecedented level of legal confusion and consequent litigation in public accommodation and employment law, and over government funding with the only certainty being that they will challenge the workings of religious institutions like never before. Since this conclusion is supported by ample legal precedents it does not "exceed rational speculation" and should be made an explicit point of deliberation for the Court.

I. Legalizing Same-Sex Marriage Will Create the Risk of Civil Suits Against Religious Institutions That Refuse to Treat Legally Married Same-Sex Couples the Same as Legally Married Different-Sex Couples.

[5] Copies of all the scholars' conference papers are available at http://www.becketfund.org/index.php/article/494.html

A. *Religious institutions that disapprove of employees entering into same-sex marriages risk suits under employment anti-discrimination laws.*

If current trends persist, religious institutions that oppose same-sex marriage will soon face the circumstance where one of their employees obtains a legal marriage with a same-sex partner. For many religious institutions, an employee entering a same-sex marriage would be publicly repudiating the institution's core religious beliefs. These employers may well seek to terminate employees who reject their moral and religious teachings in such an open and enduring way. Terminated employees, in turn, might sue under employment anti-discrimination statutes, using a variety of theories such as discrimination based on sexual orientation,[6] sex, or marital status.[7]

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[6] Maryland and at least 16 other states provide such protection. MD. CODE Art. 49B § 16. *See* Lambda Legal, *Summary of States Which Prohibit Discrimination Based on Sexual Orientation* available at http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=185 (last visited on September 5, 2006).

[7] *See e.g., McClure v. Sports & Health Club*, 370 N.W.2d 844 (Minn. 1985) (holding that employer illegally discriminated on the basis of marital status when it refused to hire unmarried cohabiting applicants despite employer's sincere religious belief). Maryland and at least 20 states currently ban marital status discrimination in employment. *See* MD. CODE Art. 49B § 16; Unmarried America, *State Statutes Prohibiting Marital Status Discrimination in Employment* available at

If legalized same-sex marriage becomes more common, employees will likely ask their religious employers to extend spousal health and retirement benefits to those partners, just as they would to different-sex spouses. Some religious employers may be willing to overlook or ignore an employee's same-sex marriage, but may also refuse to subsidize it, or otherwise treat it as the equivalent of traditional marriage on religious grounds. Before *Goodridge*, courts generally did not require employers to extend benefits to same-sex partners, absent specific language on the issue in state and municipal anti-discrimination statutes. But the reasoning in those cases suggests that, after the redefinition of marriage by *Goodridge*, and now by the Circuit Court, those decisions refusing to extend spousal benefits will be reconsidered.

For example, in *Lilly v. City of Minneapolis*, a lesbian couple claimed that they were discriminated against because their single status, combined with their homosexual orientation, precluded them from ever receiving state employee spousal health benefits.[8] While the court found that the extension

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http://www.unmarriedamerica.org/ms-employment-laws.htm (last visited on September 5, 2006).

[8] *Lilly v. City of Minneapolis*, 1994 WL 315620, at *6 (Minn. Dist. Ct. 1994) (holding that not providing benefits to homosexual couples did not violate the Minnesota Human Rights Statute), *aff'd by* 527 N.W.2d 107 (Minn. Ct. App. 1995).

of such benefits was not required under the relevant anti-discrimination statutes, it noted that the question of marriage was at the heart of the dispute:

> Employers are particularly interested in whether the protection against discrimination in the workplace would change the marital status classification. Such a change would have a great impact on employer benefit plans, which might have to cover homosexual partners.

Id. at *9. Now that marriage may include same-sex couples, employers may be required to provide insurance to all "spouses"—both traditional and same-sex—to comply with state and municipal anti-discrimination laws.

B. *Religious institutions that disapprove of same-sex marriage risk suits under fair housing laws.*

Just as same-sex couples will seek employee spousal benefits from their religious employers, they will seek married benefits wherever else they are offered, such as at religious colleges and universities. Since most religious colleges and universities offer student housing (often subsidized) to married couples, conflict looms at those religious schools that oppose same-sex sexual conduct, and so would refuse in conscience to subsidize or condone homosexual cohabitation on their campus, whatever the legal status of the same-sex unions.

In a handful of states, courts have forced landlords to accept unmarried cohabitating couples as tenants despite strong religious

objections.[9] If *unmarried* couples cannot be discriminated against in housing due to marital status protections, legally *married* same-sex couples would seem to have comparatively stronger protection, as public policy tends to favor and subsidize marriage as an institution. But one need not argue by analogy to see what lies in store for religious schools that will not accept homosexual cohabitation.

The New York Court of Appeals decision in *Levin v. Yeshiva University*, 96 N.Y.2d 484 (N.Y. 2001), addressed the issue directly. In *Levin*, the court held that two lesbian students had stated a valid "disparate impact" claim of sexual orientation discrimination after the university refused to provide married student housing benefits to unmarried same-sex couples.[10]

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[9] *See Smith v. Fair Employment & Housing Comm'n*., 51 Cal.Rptr.2d 700 (Cal. 1996) (finding no substantial burden of religion in forcing landlord to rent to unmarried couples despite sincere religious objections because landlord could avoid the burden by exiting the rental business); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) *per curiam* (holding that compelling state interests support the prohibitions on marital status discrimination in housing over federal and state Free Exercise objections). *But see State by Cooper v. French*, 460 N.W.2d 2 (Minn.1990) (Holding state constitutional protection of religious conscience exempted landlord from ban against marital status discrimination in housing).

[10] Curiously, it does not appear that Yeshiva, a Jewish university, raised any religious liberty defenses.

Thus, the right of universities to give priority to married students was already being challenged as illegally discriminatory before *Deane v. Conaway*, and courts that follow the reasoning of the court below will be more willing to require religious schools to rent to married homosexual couples in states that also prohibit sexual orientation and marital status discrimination in housing under state law.

C. *Religious institutions that refuse to extend their services or facilities to same-sex couples on equal terms as married men and women risk suits under public accommodation laws.*

From soup kitchens, to hospitals, to schools, to counseling, to marriage services, religious institutions provide an awesome array of services and facilities to its members and to the general public. Traditionally religious institutions have enjoyed wide latitude in choosing what religiously motivated services and facilities they will provide and who precisely they will provide then to. However, the changing civil status regarding sexual orientation may require a reassessment of that understanding for three reasons.

First, more and more states are adding (by statute or by judicial determination) sexual orientation as a protected category in anti-discrimination laws. Second, houses of worship are facing increased risk of being declared places of public accommodation and treated no different than

a secular business. Finally, the advent of legal same-sex marriage sets the stage for widespread litigation against religious institutions that refuse to treat married same-sex couples as equal to married men and women. This risk is especially acute for those religious institutions that have very open policies concerning membership and service provision. Specifically, the more widely available to the public, the less "strictly religious," and the more similar to a commercial transaction are the services, the greater the risk that a service or facility will be regulated under public accommodation statutes. A few of the many religiously-motivated services that can potentially fall under this rubric include counseling services, soup kitchens, job training programs, health care services, day care, schooling, adoption services and conceivably even the use of wedding reception facilities.[11]

While nearly all states have laws banning sex discrimination in public accommodations, a subset, such as Maryland, explicitly protect sexual orientation and marital status as well.[12] Although some states exempt religious organizations from their anti-discrimination statutes generally,

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[11] *See e.g., Smith and Chymyshyn v. Knights of Columbus*, 2005 BCHRT 544(British Columbia Human Rights Tribunal, 2005) (fining Knights of Columbus for refusing to rent a hall for use for a same-sex couple's wedding reception).

[12] MD. CODE Art. 49B § 5.

more limit that exemption to only certain kinds of accommodations, or to only certain categories of discrimination. Other states, such as Maryland, have no religious exemptions at all.[13] Moreover, whatever protection governments may grant by statute can be taken away just as easily by statute, and the trend currently is to grant greater protection to homosexuals.

As mentioned earlier, the more private organizations, even religious ones, appear "open to the public" the greater the risk of the organization being declared a public accommodation.[14] As an example of these dangers, consider *Gay Rights Coalition of Georgetown University Law Center v. Georgetown* University, 536 A.2d 1 (D.C. Ct. App. 1987) (*en banc*). In that case, the D.C. court of appeals held that while the D.C. Human Rights Act, a public accommodations statute, did not require the university to give homosexual groups "university recognition," it nevertheless required the university to allow them equivalent access to *all* university facilities.

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[13] For a complete listing of state antidiscrimination codes *see* brief *amicus curiae* of the Becket Fund for Religious at 4 n.5 in *Boy Scouts v. Wyman*, No. 03-956 (2004) available at http://www.becketfund.org/litigate/boyscoutsvwyman-amicus.pdf.

[14] MD. CODE Art. 49B § 5(f) ("The provisions of this section shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishments are made available to the customers or patrons of an establishment within the scope of this section.").

The court reasoned that the ability of the university, a private religious actor, to express a point of view on homosexuality was absolute; thus, it could not be compelled to give the groups official recognition. However, the ability to act consistently with one's religious beliefs was considered a different matter altogether. The university's Free Exercise objections to giving equal access to homosexual groups were dismissed because the court found that eradicating bias against homosexuals represented a compelling government interest.

D. *Religious institutions that publicly express their religious disapproval of same-sex marriage risk potential lawsuits.*

Suits under (increasingly numerous) state hate crimes laws are also potential avenues of civil or criminal liability for religious institutions that actively preach against homosexual marriage.[15] Suits against religious speech are no longer theoretical. In *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), a plaintiff sued her church for stating that homosexuality is a sin, idolatrous, and incompatible with Scripture, after a parish meeting was called in response to discovery of

[15] Massachusetts' hate speech law makes it unlawful to "intimidate" another person in the "exercise or enjoyment" of the right to be free from sexual orientation discrimination in employment and housing, but currently exempts religious institutions. MASS. GEN. LAWS 151B § 4(4)(A) and MASS. GEN. LAWS 151B §§ 1(5), 4(18).

the plaintiff's recent civil commitment ceremony with her homosexual partner. To the extent American courts look to precedents abroad regarding banning objectionable religious speech, they will find much support for strong regulation from Canada,[16] Britain,[17] Australia[18] and until recently, could look to criminal sanctions in Sweden.[19]

II. Legalizing Same-Sex Marriage Will Create the Risk That Government Will Strip Its Benefits from Religious Institutions That Refuse to Treat Legally Married Same-Sex Couples the Same as Legally Married Different-Sex Couples.

As discussed above, same-sex marriage risks creating extensive litigation over the use of state anti-discrimination statutes in directly *regulating* the policies of religious institutions regarding sexual orientation

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16 *See Stacey v. Kenneth Campbell et al*., 2002 B.C.H.R.T. 35 (2002) (Where a pastor was sued under hate crimes law and brought before the British Columbia Human Rights Tribunal for "express[ing] his view of religious teachings concerning homosexuality" in a paid newspaper ad.).

17 *See* Racial and Religious Hatred Bill, Bill 11-E (Printed June 9, 2005) (England) (outlawing "stirring up hatred against a person" on religious or racial grounds).

18 *See Islamic Council of Victoria v. Catch the Fire Ministries*, VCAT No. A392/2002 (Vict. Civ. Adm. Trib. December 17, 2004) (finding pastor liable for "vilifying" Islam during a religious seminar).

19 *See Riksåklagaren* v. *ÅG*, No. B-1050-05, Högsta Domstolen [Supreme Court], Nov. 29, 2005 (Sweden). (overturning Swedish Pentecostal minister's sentence to prison for "inciting hatred" against homosexuals after reciting Biblical condemnations of homosexuality in a sermon).

issues. A separate question is whether governments must provide *funding and access to programs* to religious organizations they might consider liable under anti-discrimination statutes (but for religious exemptions, if any). Governments will argue that they cannot support or even be associated with "discriminatory" organizations when providing government services and may move to ban such subsidies and cooperation.

Additionally, many government-funded programs require that the recipients be organized "for the public good," or that they not act "contrary to public policy." Thus, religious institutions that refuse to approve, subsidize, or perform state-sanctioned same-sex marriages could quickly lose their access to public fora, government funding, or tax exemptions. In states where courts and legislatures cannot force religious groups to accept same-sex marriage norms, revocation of privileges may prove just as effective. The potential losses of current government benefits are large enough currently, but they only stand to grow in light of the increasing cooperation between faith-based organizations and state and federal governments through health, education, and "charitable choice" programs.

A. *Religious institutions that refuse to recognize same-sex marriages risk losing their traditional tax-exempt status.*

Since the overwhelming majority of religious institutions are tax-exempt, the potential exists for staggering financial loss from state or federal

retaliation against religious institutions that support traditional marriage through their policies. In *Bob Jones v. United States*, 461 U.S. 574 (1983), a religious university that banned interracial dating and marriage as part of its admissions policy lost its tax exemption, even though the policy stemmed directly from sincerely held religious beliefs. In affirming the IRS decision, the Supreme Court reasoned that,

> [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."

Id. at 604. Suits may soon arise arguing that houses of worship that hold fast to traditional marriage are, as in *Bob Jones*, "so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred," and must therefore have their state and federal tax exemptions revoked. However, state and federal taxing authorities need not go so far to instill conformity through fear. The mere potential for losing tax-exempt status would force many religious institutions to conform rather than risk losing

their ability to provide desperately needed social and spiritual services.[20]

B. *Religious institutions that refuse to recognize same-sex marriages risk exclusion from competition for government-funded social service contracts.*

Where houses of worship may not be targeted as such, their religiously affiliated social service organizations might be. As it stands, religious universities, charities and hospitals receive significant government funding, but that funding may one day be stripped away through lawsuits or decisions of regulatory bodies.

In *Grove City College* v. *Bell*, 465 U.S. 555 (1984), a religious college was denied *all* federal student financial aid for failing to comply with Title IX's written anti-discrimination affirmation requirements even though there was *no evidence* of actual discrimination.[21] Religious universities that reject same-sex marriage are open to similar attacks against their state education funding, especially since states are demonstrably more likely to include

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[20] "[P]rivate churches losing their tax exemptions for their opposition to homosexual marriages . . . are among the very dangers from the left against which I warned." Richard A. Epstein, *Same-Sex Union Dispute: Right Now Mirrors Left*, WALL ST. J., July 28, 2004 at A13.

[21] The U.S. Congress has since provided a legislative correction to the Department of Education's and the Supreme Court's application of Title IX. *See* CIVIL RIGHTS RESTORATION ACT OF 1987, 20 U.S.C. § 1687.

sexual orientation and marital status protections in their anti-discrimination statutes.

A related concern exists for religious institutions in the adoption context. Will state governments force religious institutions to place orphan children under their care within same-sex "families?" It has already happened. In Massachusetts, Catholic Charities, a large religious social service organization, is being forced to place foster children in their care with homosexual couples in violation of their religious beliefs in order to comply with the state's nondiscrimination laws. The punishment for noncompliance is loss of their state adoption agency license.[22]

Finally, gay rights advocates have successfully fought and won legal battles by using city laws that require outsourced government service providers not to discriminate because of sexual orientation.[23] Cooperation with government service agencies, if done on or through houses of worship,

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[22] Patricia Wen, *Archdiocesan agency aids in adoptions by gays; Says it's bound by antibias laws*, Boston Globe, October 22, 2005 (reporting on Catholic Charities having to "choose between its mission of helping the maximum number of foster children possible [hundreds of adoptions] and conforming to the Vatican's position on homosexuality.").

[23] *See Under 21 v. New York*, 126 Misc. 2d 629 (N.Y. Spec. Term 1984) (Noting that funds cannot be used to support or encourage the discrimination on the basis of sexual orientation by others in the context of private providers of government services.).

religious hospitals, or religious schools, may run afoul of these local anti-discrimination laws if the houses of worship receive government funding and can be cast as government "contractors."

C. *Religious institutions that refuse to recognize same-sex marriages risk exclusion from government facilities and fora.*

Religious institutions will likely face challenges to their equal access to a diverse array of public subsidies on the one hand, and access to forums where they may freely discuss their religious beliefs on the other. A useful parallel is the retaliation the Boy Scouts of America continue to face over their membership criteria. The Boy Scouts' requirement that members believe in God and not advocate or engage in homosexual conduct has resulted in numerous lawsuits by activists and municipalities seeking to deny the Boy Scouts *any* access to state benefits and public fora.

For example, the Boy Scouts have lost long-standing leases of city campgrounds,[24] lost berthing rights given to "public interest" groups at a city marina, [25] lost equal access to public after-school facilities (later restored),[26]

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[24] *See Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (revoking use of publicly leased park land based to avoid violating the Establishment Clause based on the Scout's required belief in God).

[25] *See Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Scout's exclusion of atheists and homosexuals.

and have had the right to participate in state charitable fundraising programs attacked and revoked.[27] The escalating harassment confronting the Boy Scouts is merely a foretaste of what awaits religious organizations that take similar stands against homosexual conduct and same-sex marriage.

These religious organizations must either change their policies and messages concerning same-sex issues or risk an avalanche of lawsuits and targeted exclusions from public privileges and benefits.

D. *Religious institutions that refuse to recognize same-sex marriages risk exclusion from the state function of licensing marriages.*

Religious institutions may soon face a stark choice: either abandon their religious principles regarding marriage or be deprived of their ability to perform legally recognized ones. As courts, like the court below, push the civil definition of marriage into greater conflict with the religious definition, controversy will inevitably grow over exactly *how* a civil marriage is solemnized, and exactly *who* can do the solemnizing.

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[26] *See Boy Scouts of America, South Florida Council v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (preliminarily enjoining a school board from excluding Boy Scouts from school facilities based on their anti-gay viewpoint).

[27] *See Boy Scouts of America v. Wyman*, 335 F.3d 80 (2nd Cir. 2003) (holding that the Boy Scouts may be excluded from the state's workplace charitable contributions campaign for denying membership to homosexuals).

If clergy act "in the place of" civil servants when marrying couples, they may soon be regulated just like civil servants. Vermont has already held that the free exercise rights of town clerks are not violated if they are fired for refusing to participate in the issuance of civil union licenses to same-sex couples for religious reasons.[28] Already, at least 12 dissenting Massachusetts justices of the peace have been forced to resign for refusing to perform same-sex marriages, despite the fact that they were perfectly willing and able to perform traditional marriages.[29] Since clergy fulfill an important civil role when solemnizing marriages, there may be a strong movement to strip all non-conforming clergy of their civil marriage functions over Free Exercise objections in light of the Vermont and Massachusetts experience.

Some state legislation prohibits officials conducting marriage ceremonies from discriminating in certain ways. The Texas Family Code, for example, forbids persons authorized to conduct a marriage ceremony – including clergy – "from discriminating on the basis of race, religion, or

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[28] *Brady v. Dean*, 173 Vt. 542, 547 (2001).

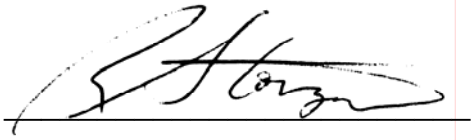
[29] Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004.

national origin."[30] Marriage codes such as Texas' could easily be amended to include a prohibition on discrimination based on sex or sexual orientation and made to apply to *all* persons authorized to solemnize civil marriage.

CONCLUSION

The outcome of the kinds of lawsuits described in this brief, in Maryland or any other state, would be a matter for the courts to decide. But that is precisely the problem. If this honorable Court affirms the lower court's decision it would face a new wave of church-state litigation; if it reversed, it would not. For all the above reasons, the decision of the Circuit Court for Baltimore City should be reversed.

Respectfully submitted September 5, 2006,



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This brief was printed in a 14-point Times New Roman font.

[30] Tex. Fam. Code. § 2.205.