IN THE SUPREME COURT
OF THE
STATE OF VERMONT

STAN BAKER and PETER HARRIGAN

vs.

STATE OF VERMONT and
TOWN OF SHELBURNE

NINA BECK and STACY JOLLES

vs.

STATE OF VERMONT and
CITY OF SOUTH BURLINGTON

LOIS FARNAHM and HOLLY PUTERBAUGH

vs.

STATE OF VERMONT and
TOWN OF MILTON

Supreme Court Docket No. 98-32

Appeal from
Chittenden Superior Court
Docket No. S1009-97CnC

BRIEF OF APPELLEE
STATE OF VERMONT

STATE OF VERMONT

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INTRODUCTION

Through mischaracterization and exaggeration of the State of Vermont's arguments, the Appellants' Brief (the "Brief") contends that Vermont's refusal to permit same-sex "marriages" places it alongside the Virginia of 1967, whose laws still reflected the vestiges of slavery, Jim Crow and racial bigotry. In fact, the Vermont of 1997 is one of the most tolerant states with regard to the rights of homosexuals. In the wake of the decision Baehr v. Lewin, 852 P.2d 44 (Haw. 1993),[1] Vermont, unlike the federal government and numerous other states, did not pass a so-called "Defense of Marriage" law denying the validity of same-sex "marriages" performed in other states. See, e.g., 28 U.S.C. §1738C; 13 Del. Code §101 (1996); Alaska Stat. Ann. §25.05.013 (1996); Utah Code Ann. §30-1-4 (1995). Vermont has passed a number of laws expressly prohibiting discrimination on the basis of sexual orientation. Vermont has no sodomy statute or other law regulating the intimate associations of consenting adults. Vermont does not prohibit homosexuals from adopting children. Despite this evidence, Appellants have used the Legislature's decision not to afford marital status to unions of the same sex to claim that Vermont's laws show contempt for the gay population and merely codify societal prejudices. To Appellants, extending marriage laws to cover same-sex unions would not even constitute a dramatic development. Brief at 6, 48-49. The State cannot agree.

Whether one is in favor of Appellants' position or that of the Appellees, it would be impossible to characterize permitting same-sex "marriages" as anything other than a

[1] This ruling remanded the case to the trial court where a trial was held on whether any of the state's interests were compelling. The trial court's ruling in favor of the plaintiffs is currently on appeal.

watershed change in the law. First, no country in the world currently permits marriages between members of the same sex. Wardle, International Marriage and Divorce Regulation and Recognition: A Survey, 29 Fam. L.Q. 497, 500 (1995); see Posner, Should There be Homosexual Marriage? And if so, Who Should Decide?, 95 Mich. L. Rev. 1578, 1585 (1997). Second, every court that has considered the issue in this country has rejected the claim that the refusal to permit members of the same sex to "marry" burdens a suspect class. See infra at Section IV(B). Third, nearly every court that has considered the issue in this country has concluded that refusing to extend marital status to same-sex unions does not constitute sex discrimination and does not violate the fundamental right to marry. See infra at Sections IV(A & C).

With those points in mind, it is important to note what this case is not about.

1. Vermont's statutes present no restrictions on family formation, no interference with family or commitment choices, and contain no prohibitions against sexual relations between consenting adults. The three pairs of Appellants in this case are free to live together, have consensual sexual relations, and raise children with each other. Under the rules of certain religions, they may even have their relationship sanctified in a religious ceremony. What Vermont law does not allow them to do is obtain a marriage license from the State. This is not a prohibition of any conduct of the Appellants.

2. This lawsuit is not a benefits case. While the Legislature has crafted laws granting benefits to married couples, Appellants have not sued under any of those statutes. Instead, Appellants seek the State-conferred title of marriage. Rather than proceeding under a particular statute that grants certain benefits and claiming to be similarly situated to married couples, Appellants here challenge the status of marriage and contend that they meet all the

qualifications to be married. An example illustrates this point: In In re B.L.V.B., 160 Vt. 368 (1993), one member of the lesbian couple claimed she should be treated as if she were a step-parent and should come within the statute allowing adoption by step-parents, without terminating the parental rights of the natural parent. In essence, she claimed to be similarly situated to the married partner of a biological mother, even though she was not married. The Court agreed, but in doing so it did not rename the couple's relationship "marriage;" nor did it give the adopting woman the name "spouse." Instead, it gave the adopting woman the rights and responsibilities under that statute regarding step-parent adoptions. What Appellants ask the Court to do here is change the name of their relationship in order to use it as a mechanism for obtaining rights and obligations under hundreds of other statutes. Appellants cannot rely upon statutes that are not contested in this case as a basis to claim the right to marriage.[2]

STATEMENT OF THE CASE

In July, 1997, Plaintiffs-Appellants filed this action against the State of Vermont and three municipalities after they applied for and were denied marriage licenses on the ground that they were members of the same sex. The plaintiffs-Appellants' bare-bones Complaint contained no allegations concerning the Plaintiffs' family arrangements, personal history, or financial circumstances. Printed Case ("P.C.") 1-4. It did not even assert their sexual orientation. It simply claimed that they wished to marry, and that Vermont's marriage statutes should be interpreted to permit same-sex marriages. P.C. 2-3. If not so interpreted, they asserted, the statutes must be deemed unconstitutional under the Vermont Constitution.

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[2] Moreover, by using this approach the Appellants skirt the question of whether they are similarly situated to a married husband and wife under each of those other statutes. This avoids the difficult question of whether the purposes of each of those statutes apply with equal force to same-sex couples. The Court should not be misled into taking this short-cut; it may not lead to the same place for each of the hundreds of statutes relating to marriage.

On November 10, 1997, the State filed a motion to dismiss arguing that Vermont's marriage statutes authorized only marriages that were comprised of one man and one woman. P.C. 7-98. The State contended that those statutes did not burden a suspect class or impact a fundamental right. Under rational basis review, the statutes served a number of valid purposes. The Town of Shelburne and the City of South Burlington joined the State's motion. P.C. 99-102. The plaintiffs opposed the State's motion and filed a motion for judgment on the pleadings against the Town of Milton, which was the only party to have filed an answer. P.C. 103.

On December 19, 1997, the Superior Court, per Judge Leavitt, granted the State's motion to dismiss and denied the plaintiffs' motion for judgment on the pleadings. P.C. 254-70. The Court concluded that the statutes could not be construed to permit the issuance of marriage licenses to same-sex couples. Under rational basis review, the Court found that the statutes were constitutional on the ground that they furthered the State's interest in promoting the link between procreation and child rearing. The Town of Milton subsequently moved for judgment on the pleadings, which was granted. P.C. 271, 275. This appeal ensued.

Because this appeal arises on the granting of the Defendants-Appellees' motion to dismiss and motion for judgment on the pleadings, the only facts deemed established are those in the Complaint. The gratuitous "facts" provided by Appellants in their Statement of the Case and throughout the Brief are not part of the Complaint, not in evidence, and not facts permitted to be relied upon in this appeal.

ISSUES PRESENTED ON APPEAL

1. Whether the Superior Court correctly ruled that under Vermont's marriage laws, marriage license may only be issued to a man and a woman.

2. Whether the Superior Court correctly ruled that Vermont's marriage laws are constitutional under rational basis review.

3. Whether the Superior Court correctly ruled that Vermont's marriage laws are not subject to heightened constitutional scrutiny because they do not impact a fundamental right and do not burden a suspect class.

ARGUMENT

I. UNDER VERMONT STATUTES, MARRIAGE LICENSES MAY ONLY BE ISSUED TO A MAN AND A WOMAN

Contrary to Appellants' novel approach, virtually all accepted canons of statutory interpretation support the conclusion that marriage licenses may only be issued to a man and a woman. The plain meaning of the language in the marriage statutes, 18 V.S.A. §§5131 and 5137, conclusively establishes that marriages have always meant a union of a man and a woman. The many related statutes which stand in pari materia with §§5131 and 5137, give further confirmation that the legislative intent was to encompass only opposite-sex couples within marriage. The legislative history of Vermont's marriage laws reveals the same intent. Lastly, as properly understood there is no constitutional conflict with the State's construction of the statute. Therefore, the Superior Court correctly dismissed the Appellants' cause of action under Count I because it fails to state a claim on statutory grounds.

A. Appellants Advocate A Novel Theory Of Statutory Construction Without Any Support In Vermont Law.

Ignoring the plain wording of the marriage statutes, the related statutes which stand in pari materia with them, and the legislative history, Appellants contend that Vermont's marriage laws permit town clerks to issue marriage licenses to two people of the same sex. The premise of their argument is that this Court should eschew the express language of Vermont's marriage laws and virtually every rule of statutory construction in favor of the

"underlying purpose" of those laws, as divined by the Appellants. Appellants employ a nascent theory of statutory construction to advance their claim. This theory rejects the use of the canons of construction in favor of a "purposive" approach. Such analysis appears to have two steps: (1) determine (from what, it is unclear) the legislative purpose, and (2) construe the statutory words to conform to the purpose. The Appellants' approach is antithetical to this Court's accustomed and settled process of statutory interpretation.

Intimating that the Court already employs this theory, Appellants do not disclose the novel nature of their approach. Instead, they selectively quote from Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47 (1986), for the proposition that it is only the legislative purpose, and not the Legislature's intent, that matters. They leave out the portion of the same case, which held as follows:

> The first recourse in applying a statute is to examine the plain meaning of the language in light of the statute's legislative purpose and in terms of its impact on the factual circumstances under consideration. If that plain language resolves the conflict without doing violence to the legislative scheme, there is no need to go further, always bearing in mind that the paramount function of the court is to give effect to the legislative intent. Thus it is apparent that all rules of construction rely on a determination of legislative intent or purpose. That intent is most truly derived from a consideration of not only the particular statutory language, but from the entire enactment, its reason, purpose and consequences.

Lubinsky, 148 Vt. at 49-50. Although the Court speaks of both legislative intent and purpose, Appellants choose only to focus on purpose. "Intent" refers to the legislative intentions at the time the statute was enacted. "Purpose" is a more malleable concept. It might encompass whatever the Appellants suggest—unconfined by the expressions of legislative intent revealed through the words of the statute and other interpretive tools.

But this Court has not rejected examinations of statutory language; nor has it rejected examination of statutes in pari materia. Lubinsky points to both of these as tools for use in

determining the legislative intent. Recent cases of this Court have reiterated the Court's continued adherence to the accepted canons of statutory construction. See Merkel v. Nationwide Insur. Co., 693 A.2d 706 (Vt. 1997) ("Our goal in interpreting a statute is to discern and implement the intent of the Legislature."); Secretary, Agency of Natural Resources v. Upper Valley Landfill Corp., 705 A.2d 1001, 1009 (Vt. 1997) ("Our primary task in construing a statute is to give effect to the intent of the Legislature. To determine legislative intent, we review the history and the entire framework of the statute."). Indeed, this Court has held that where a statute's meaning is clear, that legislative choice controls—even where sound policy might dictate a contrary interpretation. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451, 456 (1980).

Reliance on Lubinsky is also misplaced where, as here, there is disagreement on the purpose of the statute. In Lubinsky, the Court specifically noted that there was no disagreement on the basic purpose of the law. 148 Vt. at 50. Since the State disagrees with the Appellants' postulation of the purpose of the marriage licensing statutes, the Court must look to the language of the statute and legislative history to determine its purpose. Appellants' approach ignores these sources in order to give them the freedom to interpret the law in light of the purpose they choose. They cannot, however, stake any claim to unique knowledge of the legislative purposes behind the marriage laws. Indeed, the rules of statutory construction were devised, in part, to help determine the legislative purposes behind statutes.

No one would debate that one of the purposes behind marriage laws is the recognition of committed relationships. Appellants' conclusion that this is the only intent that may be accorded to the Legislature conflicts with the tenets of statutory construction and amounts to conjecture. Writers have pointed to numerous purposes behind marriage laws. See, e.g.,

Schneider, The Channelling Function in Family Law, 20 Hofstra L. Rev. 495, 521 (1992) [hereinafter "Schneider, Channelling"]. One of the principal historical purposes behind marriage laws has been the regulation of sexual and procreative relations. Because the pairing of a man and a woman is the only union that has the capability to produce in offspring, the legal system surrounds it with protections and strictures that encourage stability and provision for the children.

Appellants contest this, since they point out that same-sex couples can have children too. They go so far as to suggest that the word "procreation," does not mean to beget or bring forth offspring. Instead they contend it means child rearing. Brief at 12 n.13. Appellants dismiss the biological union of the sexes as a type of primitive and technical precursor to raising children. Their protestations to the contrary, it is still necessary to have an ovum and a sperm in order to create a child. Same-sex couples simply cannot procreate on their own. They need to obtain the missing gamete from someone of the opposite sex.

Marriage laws have always been society's way of regulating sexual and procreative relations. In choosing among societal units, the Legislature could rightly see the opposite-sex couple as the only one capable of procreation on its own and thus the one most likely to result in offspring.[3] As such it is the societal group best-suited to receiving the status of marriage

[3] Appellants attempt to show that American married couples are more and more often childless. Their interpretation of their own exhibit is incorrect. Compare Brief at 32 n.27, with Appellants' Appendix 23; see also U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States (117th ed. 1997) Table 68. The census material they cite for figures on "married couples with children" refers to couples who were living with children under the age of 18 at the time of the census. It did not include couples who were parents but whose children were grown and living out of the house. Thus, couples with grown children living elsewhere were included in the category "married couples without children."

with the benefits and rules that accompany it.[4] It is that purpose, among other things, that is ignored by Appellants' approach.

B. The Meaning Of The Term Marriage And The Legislature's Use Of Gender-Based Language In The Marriage Statutes Shows That The Legislature Contemplated Marriage Only Between A Man And A Woman.

The first principle of statutory construction is to look at the plain meaning of the words chosen by the Legislature. Smith v. Town of St. Johnsbury, 150 Vt. 351, 355 (1988). As this Court noted just months ago, "we presume the Legislature intended language to carry its plain, ordinary meaning." Upper Valley Landfill Corp., 705 A.2d at 1009. The Court takes this position "because [it] presume[s] the Legislature used the language advisedly." State v. DeRosa, 161 Vt. 78, 80 (1993). The Court is, thus, not at liberty to make law by finding a meaning not reflected in the plain language of the statute. Each of the courts that has been faced with a challenge by same-sex couples to its marriage statutes has uniformly held that "marriage," as that term is used in marital statutes, is now, and has traditionally been, defined as a union between the sexes. Dean v. District of Columbia, 653 A.2d 307, 312-16 (D.C. App. 1995); Baehr v. Lewin, 852 P.2d at 56-57; Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185, 185-86 (Minn. 1971), appeal dismissed for lack of substantial federal question, 409 U.S. 810 (1972); De Santo v. Barnsley, 328 Pa. Super. 181, 476 A.2d 952, 953 (1984); Singer v. Hara, 11 Wash. App. 2d 247, 522

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[4] Likewise, the Legislature has not granted the status of marriage to other people who live together. When Appellants claim that the exclusion of same-sex couples from marriage is equivalent to an exclusion of homosexual couples, they are adding a gloss to the statutes that is not there. See Brief at 2 n.1. Importantly, the statute also prohibits marriages between heterosexuals of the same-sex who may choose to live together in a non-sexual relationship for mutual support, both emotional and financial.