

EXHIBIT A

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1027

ED

FEB 10 1972

RICHARD JOHN BAKER, *et al.*
OFFICE OF THE CLERK
SUPREME COURT, U.S.
Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 10a-17a and 18a-23a.

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file this Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra*, pp. 1a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case¹

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18, 1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County² (T. 10).

¹ T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

² Appellant McConnell is also petitioner before this Court in *McConnell v. Anderson*, petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

The efforts of appellants to get married evidently precipitated the Regents' decision not to employ Mr. McConnell.

Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T. 1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.³

³ In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr. Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 16, Mr. Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as

How the Federal Questions Were Raised

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra*, pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra*, p. 12a), and to the Supreme Court of Minnesota (App. *infra*, p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But

to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); Finger, *Sex Beliefs and Practices Among Male College Students*, 42 *J. ABNORMAL AND SOCIAL PSYCH.* 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law.

Only then will the public perceive that homosexuals are not freaks or unfortunate aberrations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E. Westermarck, *2 Origin and Development of the Moral Idea* 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, *Homosexual Behavior Among Males* 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.*, at 17; see also W. James, *The Varieties of Religious Experience*, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra*, at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.*, at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homo-

sexuality causes earthquakes. H. Hart, *Law, Liberty and Morality* 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

"Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, *Crime and the Human Mind* 117 (1944), it is stated:

"All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scientific community when he wrote as follows in 1935:

"Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too." Reprinted in 107 Am. J. of Psychiatry 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, "a great injustice" to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.⁴ This Court's decision, therefore, would affect the marriage laws of virtually every State in the Union.

⁴ See, e.g., *Jones v. Hallihan*, W-152-70 (Ct. Apps. Ky. 1971).

I.

Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits

and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie v. Connecticut, supra*; *Loving v. Virginia, supra*; *Griswold v. Connecticut, supra*; *Skinner v. Oklahoma, supra*; *Meyer v. Nebraska, supra*. Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer v. Nebraska, supra*. In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the

relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination. With regard to the due process component, see *Boddie v. Connecticut, supra*; *Griswold v. Connecticut, supra* (all the majority opinions); *Meyer v. Nebraska, supra*. With regard to the equal protection component of this argument, see *Loving v. Virginia, supra*; *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Skinner v. Oklahoma, supra*; cf. *Reed v. Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving v. Virginia, supra*. Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. 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" (App., *infra*, pp. 20a-21a). On its face, however, Minnesota law neither

states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold v. Connecticut, supra.*

Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving v. Virginia, supra*; *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite

clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving v. Virginia*, 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently

denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving v. Virginia*, 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra*, p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race (see, e.g., *Loving v. Virginia, supra*; *McLaughlin v. Florida, supra*), has not yet been extended to classifications based upon sex (see *Reed v. Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro v. Thompson*, 394 U.S. 618 (1969). As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed v. Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971),

which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the

difference is drawn between same sex and different sex marriages.⁵

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. Connecticut, 381 U.S. 479, 491-492 (Goldberg, J., concurring); see also, *Mindel v. United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is

⁵ The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed v. Reed*, *supra*; *Loving v. Virginia*, *supra*; *McLaughlin v. Florida*, *supra*.

a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold v. Connecticut*, *supra*; *Loving v. Virginia*, 388 U.S. 1 (1967); cf. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold v. Connecticut*, *supra*.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

Statutes Involved

CHAPTER 517

[Minnesota Statutes]

517.01 MARRIAGE A CIVIL CONTRACT. Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.

517.02 PERSONS CAPABLE OF CONTRACTING. Every male person who has attained the full age of 21 years, and every female person who has attained the full age of 18 years, is capable in law of contracting marriage, if otherwise competent. A male person of the full age of 18 years may, with the consent of his parents, guardian, or the court, as provided in Minnesota Statutes, Section 517.08, receive a license to marry. A female person of the full age of 16 years may, with the consent of her parents, guardian, or the court, as provided in Minnesota Statutes, Section 517.08, receive a license to marry, when, after a careful inquiry into the facts and the surrounding circumstances, her application for a license is approved by the judge of the juvenile court of the county in which she resides. If the judge of juvenile court of the county in which she resides is absent from the county and has not by order assigned another probate judge or a retired probate judge to act in his stead, then the court commissioner or any judge of

district court of the county may approve her application for a license.

517.03 MARRIAGES PROHIBITED. No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse; excepting re-intermarriage between such parties; nor within six months after either was a party to a marriage which has been adjudged a nullity, excepting intermarriage between such parties; or between parties who are nearer than second cousins; whether of the half or whole blood, computed by the rules of the civil law; nor between persons either one of whom is imbecile, feeble-minded, or insane; nor between persons one of whom is a male person under 18 years of age or one of whom is a female person under the age of 16 years; provided, however, that mentally deficient persons committed to the guardianship of the commissioner of public welfare may marry on receipt of written consent of the commissioner. The commissioner may grant such consent if it appears from his investigation that such marriage is for the best interest of the ward and the public. The clerk of the district court in the county where the application for a license is made by such ward shall not issue the license unless and until he has received a signed copy of the consent of the commissioner of public welfare.

517.04 SOLEMNIZATION. Marriages may be solemnized by any justice of the peace in the county in which he is elected, and throughout the state by any judge of a court of record, the superintendent of the department for the deaf and dumb, in the state school for the deaf and blind,

or any licensed or ordained minister of the gospel in regular communion with a religious society.

517.05 CREDENTIALS OF MINISTER. Ministers of the gospel, before they are authorized to perform the marriage rite, shall file a copy of their credentials of license or ordination with the clerk of the district court of some county in this state, who shall record the same and give a certificate thereof; and the place where such credentials are recorded shall be endorsed upon and recorded with each certificate of marriage granted by a minister.

517.06 PARTIES EXAMINED. Every person authorized by law to perform the marriage ceremony, before solemnizing any marriage, may examine the parties on oath, which oath he is authorized to administer, as to the legality of such intended marriage, and no such person shall solemnize a marriage unless he is satisfied that there is no legal impediment thereto.

517.07 LICENSE. Before any persons shall be joined in marriage, a license shall be obtained from the clerk of the district court of the county in which the woman resides, or, if not a resident of this state, then from the clerk of the district court of any county and the marriage need not take place in the county where the license is obtained.

517.08 APPLICATION FOR LICENSE. Subdivision 1. Application for a marriage license shall be made at least five days before a license shall be issued. Such application shall be made upon a form provided for the purpose and shall contain the full names of the parties, their post office addresses and county and state of residence, and their full

ages. The clerk shall examine upon oath the party applying for license relative to the legality of such contemplated marriage and, if at the expiration of this five-day period, he is satisfied that there is no legal impediment thereto, he shall issue such license, containing the full names of the parties and county and state of residence, with the district court seal attached, and make a record of the date of issuance thereof, which license shall be valid for a period of six months. In case of emergency or extraordinary circumstances, the judge of the probate court, the court commissioner, or any judge of the district court, of the county in which the application is made, may authorize the license to be issued at any time before the expiration of the five days. If a male person intending to marry shall be under the age of 21 and shall not have had a former wife, such license shall not be issued unless the consent of the parents or guardians or the parent having the actual care, custody and control of said party shall be given under the hand of such parent or guardian and duly verified by an officer duly authorized to take oaths and duly attested by a seal, where such officer has a seal. Provided, that if there be no parent or guardian having the actual care, custody and control of said party, then the judge of the juvenile court, the court commissioner, or any judge of the district court in the county where the application is pending may, after hearing, upon proper cause shown, make an order allowing the marriage of said party. The clerk shall collect from the applicant a fee of \$10 for administering the oath, issuing, recording, and filing all papers required, and preparing and transmitting to the state registrar of vital statistics the reports of marriage required by this section. If the license should not be used within the period of six months

due to illness or other extenuating circumstances, it may be surrendered to the clerk for cancellation, and in such case a new license shall issue upon request of the parties of the original license without fee therefor. Any clerk who shall knowingly issue or sign a marriage license in any other manner than in this section provided shall forfeit and pay for the use of the parties aggrieved not to exceed \$1,000.

Subd. 2. On or before the 11th day of each calendar month, the clerk of the district court shall prepare and transmit to the state registrar of vital statistics, on a form prescribed and furnished by the state registrar of vital statistics, a certified summary of the identifying information and statistical data concerning persons for whom certificates of marriage were filed in the office of the clerk of the district court during the previous month. The state registrar of vital statistics shall prepare and maintain a state-wide index of such identifying information and compile therefrom data for statistical purposes.

Subd. 3. The personal information necessary to complete the report of marriage shall be furnished by the applicant prior to the issuance of the license. The report shall contain only the following information:

- (a) Personal information on bride and groom.
 1. Name.
 2. Residence.
 3. Date and place of birth.
 4. Race.
 5. If previously married, how terminated.
 6. Signature of applicant and date signed.

(b) Information concerning the marriage.

1. Date of marriage.
2. Place of marriage.
3. Civil or religious ceremony.

(c) Signature of clerk of court and date signed.

517.09 SOLEMNIZATION. In the solemnization of marriage no particular form shall be required, except that the parties shall declare in the presence of a person authorized by section 517.04 to solemnize marriages, and the attending witnesses that they take each other as husband and wife. In each case at least two witnesses shall be present besides the person performing the ceremony.

517.10 CERTIFICATE; WITNESSES. The person solemnizing a marriage shall prepare under his hand three certificates thereof. Each certificate shall contain the full names and county and state of residences of the parties and the date and place of the marriage. Each certificate shall also contain the signatures of at least two of the witnesses present at the marriage who shall be at least 16 years of age. The person solemnizing the marriage shall give each of the parties one such certificate, and shall immediately make a record of such marriage, and file one such certificate with the clerk of the district court of the county in which the license was issued within five days after the ceremony. The clerk shall record such certificate in a book kept for that purpose.

517.11, 517.12 [Repealed, 1951 c 700 s 5]

517.13 PENALTY FOR FAILURE TO DELIVER AND FILE CERTIFICATE. Every person solemnizing a marriage who shall neglect to make and deliver to the clerk a certificate thereof within the time above specified shall forfeit a sum not exceeding \$100, and every clerk who neglects to record such certificate shall forfeit a like sum.

517.14 ILLEGAL MARRIAGE; FALSE CERTIFICATE; PENALTY. If any person authorized by law to join persons in marriage shall knowingly solemnize any marriage contrary to the provisions of this chapter, or wilfully make any false certificate of any marriage, or pretended marriage, he shall forfeit for every such offense a sum not exceeding \$500, or may be imprisoned not exceeding one year.

517.15 UNAUTHORIZED PERSON PERFORMING CEREMONY. If any person undertakes to join others in marriage, knowing that he is not lawfully authorized to do so, or knowing of any legal impediment to the proposed marriage, he shall be guilty of a gross misdemeanor; and, upon conviction thereof, punished by imprisonment of not more than one year, or by a fine of not more than \$500, or by both such fine and imprisonment.

517.16 IMMATERIAL IRREGULARITY OF OFFICIATING PERSON NOT TO VOID. No marriage solemnized before any person professing to be a judge, justice of the peace, or minister of the gospel shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed officer or person; provided, the marriage is consummated with the full belief on the part of the persons

so married, or either of them, that they have been lawfully joined in marriage.

517.17 SOLEMNIZING UNLAWFUL MARRIAGES. Every minister or magistrate who shall solemnize a marriage when either party thereto is known to him to be under the age of legal consent, or to be an idiot or insane person, or a marriage to which, within his knowledge, a legal impediment exists, shall be guilty of a gross misdemeanor.

517.18 MARRIAGE AMONG QUAKERS; BAHAI'S; HINDUS; MUSLIMS. All marriages solemnized among the people called Friends or Quakers, in the form heretofore practiced and in use in their meetings, shall be valid and not affected by any of the foregoing provisions; and the clerk of the meeting in which such marriage is solemnized, within one month after any such marriage, shall deliver a certificate of the same to the clerk of the district court of the county where the marriage took place, under penalty of not more than \$100, and such certificate shall be filed and recorded by the clerk under a like penalty; and, if such marriage does not take place in such meeting, such certificate shall be signed by the parties and at least six witnesses present, and filed and recorded as above provided under a like penalty, and marriages may be solemnized among members of the Baha'i faith by the Chairman of an incorporated local Spiritual Assembly of the Baha'is, according to the form and usage of such society, and marriages may be solemnized among Hindus or Muslims by the person chosen by a local Hindu or Muslim association, according to the form and usage of their respective religions, but in the presence of at least two witnesses be-

sides the person performing the ceremony, and who shall issue and record a certificate thereof as provided by Minnesota Statutes 1945, Section 517.10.

517.19 ILLEGITIMATE CHILDREN. Illegitimate children shall become legitimized by the subsequent marriage of their parents to each other, and the issue of marriages declared null in law shall nevertheless be legitimate.

Alternative Writ of Mandamus

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Petitioners Richard John Baker and James Michael McConnell show to the Court as follows:

1. That on or about May 18, 1970, petitioners applied for a marriage license at the Hennepin County Courthouse in Minneapolis, Minnesota pursuant to Minnesota statutes, section 517.08.

2. That on the above date both petitioners had attained the full age of 21 years; that neither petitioner had a husband or wife living nor had either been divorced from a former spouse within six months; that petitioners were not related to each other nearer than second cousins; that neither petitioner was a mentally deficient person committed to the guardianship of the commissioner of public welfare.

3. That on the above date, application forms were furnished to petitioners pursuant to Minnesota Statutes, section 517.08, subdivisions (1) and (3), and that petitioners completed said forms, paid the fee required by law, and attested to the truthfulness of all answers in the furnished forms.

4. That on the above date, pursuant to Minnesota Statutes, section 517.08, subdivision (3), petitioners were not questioned as to which physical sex classification they belonged.

5. That on the above date, defendant Gerald R. Nelson, Clerk of Hennepin County District Court, accepted the petitioners' applications for a marriage license which petitioners had duly and truthfully completed.

6. That the refusal of Clerk Gerald R. Nelson to issue the marriage to petitioners violated Minnesota Statutes, sections 517.02 and 517.08, subdivision (3), and was therefore an unlawful act.

7. That in the alternative, the refusal of Clerk Gerald R. Nelson to issue the marriage license to petitioners violated the First Amendment, the Eighth Amendment, the Ninth Amendment and the Fourteenth Amendment of the United States Constitution.

WHEREFORE: Gerald R. Nelson, Clerk of District Court of Hennepin County, is hereby commanded to issue to Richard John Baker or James Michael McConnell on or before the 22 day of December, 1970 a marriage license or show cause before Special Term Judge Donald T. Barbeau, on the 22 day of December, 1970 at 9:30 a.m./p.m. at the Hennepin County Courthouse why he has not done so, and that he then and there make his return to this writ, with his certificate thereon of having done as commanded.

Signed: /s/

Donald T. Barbeau
District Court Judge

Dated this 10 day
of December, 1970

Order Quashing the Writ

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

File No. 672384

 RICHARD JOHN BAKER and JAMES MICHAEL McCONNELL,
Plaintiffs,

vs.

GERALD R. NELSON,

Defendant.

The above entitled matter came on before the undersigned, one of the Judges of the above named Court, on January 8, 1971, on the motion of plaintiffs for the issuance of an alternative writ of mandamus to require defendant, Clerk of District Court of Hennepin County, to issue a marriage license to plaintiffs.

R. Michael Wetherbee, Esq., appeared for and on behalf of plaintiffs and in support of said motion. George M. Scott, County Attorney of Hennepin County, by David E. Mikkelsen, Esq., Assistant County Attorney, appeared for and on behalf of defendant, and in opposition thereto.

The Court having heard the evidence adduced and the arguments of counsel, and on all the files, records and

proceedings herein, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the alternative writ of mandamus be and the same hereby is quashed.

IT IS FURTHER ORDERED That the defendant, Gerald R. Nelson, Clerk of District Court in and for the County of Hennepin, Minnesota, is specifically ordered not to issue a marriage license to the petitioners Richard John Baker and James Michael McConnell.

BY THE COURT,

/s/ TOM BERGIN
Judge

Dated: January 8, 1971

Amended Order, Findings and Conclusions

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

File No. 672384

RICHARD JOHN BAKER and JAMES MICHAEL McCONNELL,
Plaintiffs,

vs.

GERALD R. NELSON,
Defendant.

The above entitled matter came on before the undersigned, one of the Judges of the above named Court, on Friday, January 29, 1971, on the motion of Plaintiffs requesting that Findings of Fact be specifically set forth, together with Conclusions of Law, and that the same be incorporated into the Order of the Court issued in the above entitled matter on January 8, 1971, which Order quashed the Alternative Writ of Mandamus and directed the Defendant, Gerald R. Nelson, specifically to not issue a marriage license sought by the Petitioners.

R. Michael Wetherbee, Esquire, appeared for and on behalf of the Plaintiffs and in support of said motion. George M. Scott, County Attorney for Hennepin County

by David E. Mikkelson, Assistant County Attorney, appeared for and on behalf of the Defendant.

The Court having heard the evidence, arguments of counsel, and on all the files, records and proceedings herein, the Court hereby grants the motion of the Plaintiffs and directs that the following Findings of Fact and Conclusions of Law be incorporated into and made a part of the earlier Order of this Court in this matter dated January 8, 1971:

FINDINGS OF FACT

1. That on or about May 18, 1970, petitioners applied for a marriage license at the Hennepin County Courthouse in Minneapolis, Minnesota pursuant to Minnesota Statutes, Section 517.08.
2. That the petitioners-plaintiffs, Richard John Baker and James Michael McConnell, were both of the male sex and that they presented themselves to the Clerk of District Court as such in making their application for marriage license.
3. That on the above date both petitioners had attained the full age of 21 years; that neither petitioner had a husband or wife living nor had either been divorced from a former spouse within six months; that petitioners were not related to each other nearer than second cousins; that neither petitioner was a mentally deficient person committed to the guardianship of the commissioner of public welfare.
4. That on the above date, application forms were furnished to petitioners pursuant to Minnesota Statutes, Sec-

tion 517.08, subdivisions (1) and (3), and that petitioners completed said forms, paid the fee required by law, and attested to the truthfulness of all answers in the furnished forms.

5. That on the above date, defendant Gerald R. Nelson, Clerk of Hennepin County District Court, accepted the petitioners' applications for a marriage license, however, the said defendant, Gerald R. Nelson, subsequently refused to issue such marriage license on the grounds that there was a legal impediment to such contemplated marriage in that both parties were of the same sex. Such denial to issue the marriage license was based in part on an opinion of the County Attorney of Hennepin County which had been requested by said defendant, Gerald R. Nelson.

Based upon the foregoing Findings of Fact, the Court does hereby make the following

CONCLUSIONS OF LAW

1. That the refusal of the Defendant, Gerald R. Nelson, Clerk of Hennepin County District Court, to issue the marriage license to the Plaintiffs Richard John Baker and James Michael McConnell was not a violation of Minnesota Statutes, Chapter 517.

2. That such refusal to issue the marriage license applied for by the Plaintiffs was not in violation of the First, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States.

IT IS THEREFORE ORDERED That the foregoing Findings of Fact and Conclusions of Law be incorporated into and made a part of the Order of this Court heretofore made in the above entitled matter and dated January 8, 1971.

BY THE COURT,

/s/ TOM BERGIN
Tom Bergin
Judge of District Court

Dated: January
29, 1971

have used the term in any different sense. The term is of contemporary significance as well, for the present statute is replete with words of heterosexual import such as "husband and wife" and "bride and groom" (the latter words inserted by L. 1969, c. 1145, § 3, subd. 3).

We hold, therefore, that Minn. St. c. 517 does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited.

2. Petitioners contend, second, that Minn. St. c. 517, so interpreted, is unconstitutional. There is a dual aspect to this contention: The prohibition of a same-sex marriage denies petitioners a fundamental right guaranteed by the Ninth Amendment to the United States Constitution, arguably made applicable to the states by the Fourteenth Amendment, and petitioners are deprived of liberty and property without due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment.²

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.

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of

² We dismiss without discussion petitioners' additional contentions that the statute contravenes the First Amendment and Eighth Amendment of the United States Constitution.

children within a family, is as old as the book of Genesis. *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. ed. 1655, 1660 (1942), which invalidated Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds, stated in part: "Marriage and procreation are fundamental to the very existence and survival of the race." This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.

Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. ed. 2d 510 (1965), upon which petitioners rely, does not support a contrary conclusion. A Connecticut criminal statute prohibiting the use of contraceptives by married couples was held invalid, as violating the due process clause of the Fourteenth Amendment. The basic premise of that decision, however, was that the state, having authorized marriage, was without power to intrude upon the right of privacy inherent in the marital relationship. Mr. Justice Douglas, author of the majority opinion, wrote that this criminal statute "operates directly on an intimate relation of husband and wife," 381 U. S. 482, 85 S. Ct. 1680, 14 L. ed. 2d 513, and that the very idea of its enforcement by police search of "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives * * * is repulsive to the notions of privacy surrounding the marriage relationship," 381 U. S. 485, 85 S. Ct. 1682, 14 L. ed. 2d 516. In a separate opinion for three justices, Mr. Justice Goldberg similarly abhorred this state disruption of "the traditional relation of the family—a

relation as old and as fundamental as our entire civilization." 381 U. S. 496, 85 S. Ct. 1688, 14 L. ed. 2d 522.³

The 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. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the *Griswold* rationale, the classification is no more than theoretically imperfect. We are reminded, however, that "abstract symmetry" is not demanded by the Fourteenth Amendment.⁴

Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. ed. 2d 1010 (1967), upon which petitioners additionally rely, does not militate against this conclusion. Virginia's anti-miscegenation statute, prohibiting interracial marriages,

³ The difference between the majority opinion of Mr. Justice Douglas and the concurring opinion of Mr. Justice Goldberg was that the latter wrote extensively concerning this right of marital privacy as one preserved to the individual by the Ninth Amendment. He stopped short, however, of an implication that the Ninth Amendment was made applicable against the states by the Fourteenth Amendment.

⁴ See, *Patson v. Pennsylvania*, 232 U. S. 138, 144, 34 S. Ct. 281, 282, 58 L. ed. 539, 543 (1914). As stated in *Tigner v. Texas*, 310 U. S. 141, 147, 60 S. Ct. 879, 882, 84 L. ed. 1124, 1128, 130 A. L. R. 1321, 1324 (1940), and reiterated in *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 540, 62 S. Ct. 1110, 1113, 86 L. ed. 1655, 1659, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

was invalidated solely on the grounds of its patent racial discrimination. As Mr. Chief Justice Warren wrote for the court (388 U. S. 12, 87 S. Ct. 1824, 18 L. ed. 2d 1018):

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942). See also *Maynard v. Hill*, 125 U. S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."⁵

Loving does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in common sense 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.

We hold, therefore, that Minn. St. c. 517 does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.

Affirmed.

⁵ See, also, *McLaughlin v. Florida*, 379 U. S. 184, 85 S. Ct. 283, 13 L. ed. 2d 222 (1964), in which the United States Supreme Court, for precisely the same reason of classification based only upon race, struck down a Florida criminal statute which proscribed and punished habitual cohabitation only if one of an unmarried couple was white and the other black.

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