



**TESTIMONY IN SUPPORT OF THE PROPOSED STATE CONSTITUTIONAL
AMENDMENT DEFINING MARRIAGE AS ONE MAN AND ONE WOMAN**

Testimony of Jordan Lorence, Senior Counsel, Alliance Defense Fund,
before the West Virginia Legislature, Charleston, West Virginia, July 14, 2009

Introduction

Senator Snyder, Delegate Brown, and distinguished members of the committee. Thank you for this opportunity to address you today. West Virginia needs a state constitutional amendment defining marriage as the union of one man and one woman in order to protect its citizens from a state court edict redefining marriage to include same-sex couples. Courts in nine states have found a right to same-sex “marriage” in their respective state constitutions and then invalidated their state marriage laws. Although the West Virginia Legislature enacted a state Defense of Marriage Act statute (“DOMA”) in 2001, West Virginia statutes are still unclear on the definition of marriage and vulnerable to invalidation by state courts, as has happened in other states. To protect its current marriage statutes from the judicial activism other states have suffered, West Virginia citizens follow the example of 30 other states, and amend the state constitution to clarify the definition of marriage for purposes of state law.

I. Courts in Nine States Have Overturned Their State’s Marriage Laws

In at least nine other states since 1993, activists have convinced state courts to overturn their respective state’s marriage laws. Three of those state court decisions were reversed by higher appellate courts in those respective states (Maryland¹, New York² and Washington³). In three of

¹ A Maryland state trial court struck down the marriage laws as violating the state constitution. The highest court in the state, the Maryland Court of Appeals, overturned the decision in *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571 (2007).

the states, voters enacted state constitutional amendments overturning the courts' decisions redefining marriage to include same-sex couples (Alaska⁴, California⁵ and Hawaii⁶). Three states were ordered by their state supreme courts to grant marriage licenses to same-sex couples

² Two state trial courts invalidated the New York marriage laws based on the state constitution. The highest court in the state, the New York Court of Appeals, reversed those decisions in *Hernandez v. Roble*, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006).

³ Two state trial courts in Washington state ruled that the marriage laws violated the state constitution. The Washington Supreme Court overturned those decisions in *Andersen v. King County*, 158 Wash.2d 1, 138 P.3d 963 (2006).

⁴ In *Brause v. Bureau of Vital Statistics*, No. 3 AN-95-6562, 1998 WL 88743 (Alaska Superior Ct., Feb. 27, 1998), a state trial court ruled that there is a fundamental right to same-sex marriage. The court ruled that Alaska's marriage laws violated the right to privacy, the fundamental right to marry, and constituted sex discrimination. The decision was overturned by the voters by passage of a state constitutional amendment defining marriage, Alaska Const., Art. I, § 23 (1998).

⁵ The California Supreme Court declared the state marriage laws unconstitutional in *In re Marriage Cases*, 43 Cal.4th 757, 183 P.3d 384, 76 Cal. Rptr.3d 683 (2008), which the voters overturned when they approved a state constitutional amendment (Proposition 8) in November 2008. The California Supreme Court upheld the constitutional amendment in *Strauss v. Horton*, 46 Cal.4th 364, 207 P.3d 48 (Cal. 2009).

⁶ In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court held that there is no fundamental right to same-sex "marriage," but also held that the homosexuals' claim that the state marriage laws were unconstitutional sex discrimination was subject to a strict scrutiny test, with the burden of proof on the state. After remand and a trial, the trial court ruled in 1996 that Hawaii's marriage laws violated the state's Equal Rights Amendment. The decision, which was the catalyst for federal DOMA, was overturned by the voters when they approved a state constitutional amendment in 1998.

after those courts invalidated their state's marriage laws, (Connecticut,⁷ Iowa⁸ and Massachusetts⁹).

Without a state constitutional amendment, activists could file the same type of lawsuit in West Virginia state courts to strike down West Virginia's marriage laws.

II. West Virginia's Marriage Laws Are Vulnerable To Legal Challenge.

Because West Virginia's Constitution lacks a definition of marriage, its marriage laws are vulnerable to the same sort of legal challenge that activists have brought in the nine states mentioned above.

Current West Virginia statutes do not directly define marriage as the union of one man and one woman, but only implicitly do so in an indirect manner. In the West Virginia Domestic Code, there are references to husband and wife,¹⁰ but no definitional section to limit marriage to one man and one woman. In 2001, the legislature passed the Defense of Marriage Act (DOMA).¹¹ By its own plain language, that statute is exclusively limited to preventing West

⁷ Connecticut Supreme Court in *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (2008).

⁸ Iowa Supreme Court in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

⁹ Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 440 Mass. 30, 798 N.E.2d 941 (2003).

¹⁰ See W. Va. Code Ann. § 48-1-221 (2001) ("A divorce is established by the order of a family court or circuit court that changes the status of a husband and wife from a state of marriage to that of single persons."); W. Va. Code Ann. § 48-2-401 (2001) ("Celebration or solemnization of a marriage means the performance of the formal act or ceremony by which a man and woman contract marriage and assume the status of husband and wife."); W. Va. Code Ann. § 48-2-404 (2001) (Sample ceremony vows outlined uses a man and a woman for persons repeating the vows.).

¹¹ See W. Va. Code Ann. § 48-2-603 (2001).

Virginia from recognizing out-of-state unions between persons of the same-sex that are labeled “marriages.” It reads:

A public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state.¹²

What this statute does not do is explicitly define marriage for purposes of West Virginia law and marriages entered into within the state of West Virginia. This is a dangerous ambiguity that proponents of same-sex “marriage” could exploit through litigation as they have in other states. Those who successfully challenged California’s DOMA (Proposition 22) attempted to take advantage of a similar ambiguity, also arguing that the law applied only to out-of-state same-sex “marriages.” A constitutional amendment will resolve that ambiguity.

Therefore, it is wholly inadequate to say something like, “West Virginia does not need a state constitutional amendment defining marriage as one man and one woman, because state statutes already say that.” First, the state laws are not as clear as they could be in defining marriage for purposes of West Virginia law. Activists could exploit this gap created by the ambiguity in state law to bring a lawsuit.

Second, if the state marriage statutes allegedly violate the state constitution, as the activists claim, then the people must amend the state constitution in order to maintain the traditional definition of marriage. If they don’t, then state citizens must wait for the outcome of a lawsuit that the activists will likely bring challenging the state’s marriage laws, and gamble that the state courts would uphold the traditional definition of marriage as constitutional. A state constitutional

¹² W. Va. Code Ann. § 48-2-603 (2001).

amendment now would preempt that kind of lawsuit by precluding the opportunity for judicial activism on the definition of marriage that other states have endured.

III. West Virginia’s Marriage Statutes Could Be Struck Down By State Residents Using the Reasoning Of The Massachusetts Supreme Judicial Court In *Goodridge*.

If state residents bring a lawsuit challenging West Virginia’s marriage laws, the courts could use the reasoning followed by the Massachusetts Supreme Court in *Goodridge v. Department of Public Health*. Before *Goodridge*, Massachusetts’ marriage laws were similar to West Virginia’s statutes.

In *Goodridge*, the Massachusetts Supreme Court held that the state did not have a rational basis for restricting marriage to opposite sex couples and that the restriction violated the state’s equal protection clause.¹³ The Massachusetts Supreme Court included a lengthy discussion of marriage and its benefits and responsibilities and stated that “[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”¹⁴ Marriage was not defined in Massachusetts’ Constitution so its Supreme Court defined it for all purposes of state law. A state constitutional amendment defining marriage as only one man and one woman would prevent this type of legal challenge to West Virginia’s marriage laws.

IV. West Virginia’s Marriage Laws Could Be Challenged By State Residents Who Obtain Same-Sex Marriage Licenses In Other States.

Without a state constitutional amendment defining marriage, West Virginia may also face legal challenges to its marriage statutes by West Virginia residents who obtain marriage licenses for their same-sex relationships in other states where it is legal, such as the nearby states in New

¹³ *Goodridge*, 798 N.E.2d at 948.

¹⁴ *Id.* at 968.

England, or Iowa, or one of the foreign countries where it has been legalized.¹⁵ For example, on July 31, 2008, Massachusetts Governor Deval Patrick signed a new law that permits residents from all 50 states to attain a same-sex “marriage” license from Massachusetts.¹⁶ A same-sex couple residing in West Virginia could travel to Massachusetts or Connecticut to acquire a marriage license, and then bring it back to West Virginia with a lawsuit challenging the state’s marriage laws. Or a couple from Iowa or Vermont could move to West Virginia, establish residency and then file a lawsuit seeking state recognition of their out-of-state marriage license. A state constitutional amendment defining marriage would prevent that from happening.

V. West Virginia’s Marriage Laws Could Be Challenged By State Residents Trying To Enforce a Same-Sex “Divorce” Decree.

Another pathway to court-ordered same-sex “marriage” would be through same-sex “divorce” cases brought in West Virginia. States without a constitutional amendment that defines marriage are currently fighting the same-sex “divorce” battle. For example, in *Chambers v. Ormiston*,¹⁷ two women acquired a marriage license from the State of Massachusetts, brought it to Rhode Island, and demanded that Rhode Island law recognize it because Rhode Island had no law specifically outlawing same-sex “marriage” even though Rhode Island law clearly defined marriage as only one man and one woman. By a narrow 3 to 2 margin, the Rhode Island Supreme Court chose to not recognize the purported “marriage” of the two women. In other words, although Rhode Island law was clear, there were still two judges who were willing to rewrite Rhode Island law as they saw fit.

¹⁵ Canada, Belgium, the Netherlands, Norway, South Africa, and Spain also permit same-sex “marriage.”

¹⁶ See <http://www.lawlib.state.ma.us/2008/07/1913-law-repealed.html>.

¹⁷ *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007).

Another example is found in *O’Darling v. O’Darling*.¹⁸ In *O’Darling*, a plaintiff asked a court in Oklahoma to grant a “divorce” or “annulment” from an alleged same-sex “marriage” from Canada.¹⁹ Oklahoma has a constitutional amendment defining marriage as the union of one man and one woman, and limits the recognition of any marriage to that definition.²⁰ Oklahoma also has a statute limiting the recognition of any marriage to a man and a woman.²¹ This case was dismissed because the court could not grant a divorce when it could not recognize the “marriage.” There is no doubt that the strong marriage laws, which include a constitutional amendment, assisted the judge in making a firm and speedy decision. Same sex couples from West Virginia will or already have acquired marriage licenses from one of the New England states or Iowa, and more will likely be acquired. It is only a matter of time before these relationships, and the demand for their legal recognition, will spill over into West Virginia courts. It is really just a matter of time before a West Virginia court is presented with a request to recognize a same-sex “marriage” or declare its marriage laws unconstitutional. Without a constitutional amendment in place, these laws could be struck down by a court, or repealed by a misguided legislature.

VI. State Laws Granting Rights Based On “Sexual Orientation” Have Been Used By Courts To Find A State Constitutional Right To Same-Sex “Marriage.”

¹⁸ See *O’Darling v. O’Darling*, Case No. FD-2006-2820, Dist. Ct. Tulsa County.

¹⁹ *Id.*

²⁰ Okla. Const. art. 2, § 35.

²¹ 43 Okla. Stat. Ann. Title 43 § 3.1 (1997).

Lawmakers in West Virginia should be alert to the fact that when states enact laws granting rights based on “sexual orientation,” appellate courts in a number of those states have used those statutes to find a state constitutional right to same-sex “marriage.” Therefore, state lawmakers should be wary to enact legislation adding “sexual orientation” to laws such as those prohibiting “hate crimes” or banning discrimination in employment, public accommodation, adoption, selection of foster parents, etc. Here is a list of the state supreme courts that have used laws banning discrimination on the basis of “sexual orientation” as the wedge to declare that the state constitution requires legal recognition for same-sex “marriage” or same-sex “civil unions:”

Massachusetts - the Massachusetts Supreme Judicial Court in its landmark 2003 decision finding a state constitutional right to same-sex “marriage,” relied on the fact that state law banned “sexual orientation” discrimination in various areas of law as a basis for its decision.²²

California – the California Supreme Court, in its 2008 decision that was later overturned by the voters in November 2008, referred to the state’s laws barring sexual orientation discrimination to buttress its conclusion that “homosexual orientation” is not a “constitutionally legitimate basis” for limiting marriage to one man and one woman.²³

Iowa – in its sweeping decision invalidating the state marriage laws in 2009, the Iowa Supreme Court invoked state laws prohibiting “sexual orientation” discrimination as “express[ing] a desire to remove sexual orientation as an obstacle to the ability of gay and lesbian people to achieve their full potential.”²⁴

²² *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 967-68 (Mass. 2003).

²³ *In re Marriage Cases*, 183 P.3d 384, 429 (Cal. 2008), *superseded by constitutional amendment*, Art. I, sec. 7.5 (enacted in November 2008).

²⁴ *Varnum v. Brien*, 763 N.W.2d 862, 891 n. 19.

New Jersey – the New Jersey Supreme Court in 2006 referred to the state’s laws forbidding discrimination based on “sexual orientation” as evidence of an “evolving expansion of rights” that compelled some form of legal recognition for same-sex partnerships, such as civil unions or same-sex “marriage.”²⁵

Connecticut – the Connecticut Supreme Court, in its 2008 decision finding a state constitutional right to same-sex “marriage,” based its decision partially on the fact that Connecticut banned “sexual orientation” discrimination in various statutes.²⁶

Vermont - the Vermont Supreme Court, in its 1999 decision finding a state constitutional right to same-sex “civil unions” or “marriage,” referred to state laws banning discrimination based on “sexual orientation” as supporting its conclusion that the state constitution prohibited the state legislature from limiting the benefits and privileges of marriage to those composed of one man and one woman.²⁷

Therefore, lawmakers in West Virginia should avoid adding “sexual orientation” provisions to the state code, lest they trigger a constitutional challenge to the state marriage laws.

VII. A State Constitutional Amendment Would Prevent The Legislature From Redefining Marriage.

The West Virginia Legislature in the future would not be able to redefine marriage by rewriting the marriage statutes if the voters approved a state constitutional amendment defining

²⁵ *Lewis v. Harris*, 908 A.2d 196, 212-215 (N.J. 2006).

²⁶ *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 435 (Conn. 2008). *See also id.* at 447-48, 451-52 for additional references to state antidiscrimination laws banning discrimination based on “sexual orientation.”

²⁷ *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

marriage as one man and one woman. In 2009, the state legislatures in Vermont, Maine²⁸ and New Hampshire approved laws redefining marriage to include same-sex couples. The proposed state constitutional amendment would restrain the Legislature from doing so here, and also restrain the Legislature from altering the definition of marriage in any other way (e.g., under the proposed marriage definition amendment, the Legislature could not legalize polygamy or give legal recognition to polygamous marriages legally entered into in other countries).

CONCLUSION

To fully protect West Virginia's definition of marriage as one man and one woman in state law, West Virginia must adopt a constitutional amendment that clearly defines marriage and is not susceptible to either judicial attacks or legislative amendments. The people of West Virginia should be allowed to vote on this matter.

²⁸ Maine voters are seeking a referendum to repeal their legislature's redefinition of marriage.