

**IN THE COURT OF APPEALS  
STATE OF GEORGIA**

<b>SUSAN VATRICE BURNETT BURNS,</b>	)	
<b>APPELLANT</b>	)	
	)	
<b>VS.</b>	)	<b>CIVIL DOCKET</b>
	)	<b>NO.: A01A1827</b>
<b>DARIAN GREGORY BURNS,</b>	)	
<b>APPELLEE</b>	)	
_____	)	

**BRIEF OF AMICI CURIAE  
THE HONORABLE \_\_\_\_, \_\_\_\_, ETC.,  
MEMBERS OF THE LEGISLATURE OF THE STATE OF VERMONT**

**INTEREST OF AMICI**

Amici are Members of the Legislature of the State of Vermont who have been involved in the legislative and public debate surrounding the enactment of “civil unions.” 2000 Vermont Act 91 created a new status of civil unions by which same-sex couples can register to receive the benefits of marriage for purposes of Vermont law. From this vantage point, amici believe they are in a unique position to answer the question, Is a Vermont civil union the same as a marriage?

**SUMMARY OF ARGUMENT**

We write in reply to Appellant’s argument that in Vermont, a civil union is a marriage. Appellant has claimed that because she entered into a Vermont ? civil union? with her same-sex partner, ? [i]n the State of Vermont, Appellant and Debra Freer are married.? Appellant’s Brief at 6. But a civil union is not a marriage. The Vermont Supreme Court did not require that same-sex couples be treated as married in Baker v. Vermont, 744 A.2d 864 (Vt. 1999). The Vermont Legislature rejected same-sex ? marriage? when it created civil unions. Finally, Vermont law and scholarly commentary confirm that Vermont expects other states may not recognize civil unions.

To the extent that Appellant's argument is based on the idea that *in Vermont* a civil union is a marriage, Appellant's argument is mistaken and should be rejected by the Court of Appeals.

### **ARGUMENT**

#### **I. The Vermont Supreme Court, in Baker v. Vermont, 744 A.2d 864 (Vt. 1999), did not require that same-sex couples be given marital status.**

In 1999, the Vermont Supreme Court issued its decision in a case in which three same-sex couples had challenged the constitutionality of the state's marriage law because it defines marriage as the union of a man and a woman. Baker v. Vermont, 744 A.2d 864 (Vt. 1999). The relief requested by the plaintiffs was an order that the State issue marriage licenses to same-sex couples. The court rejected this remedy and declined to hold the marriage law unconstitutional. Id. at 867. Instead, the court held that under the unique "Common Benefits Clause" of the Vermont Constitution, same-sex couples were entitled to the benefits of marriage, not the status. Id. By making this distinction, the majority of the court specifically rejected the suggestion of one justice who would have held the marriage law unconstitutional and would have ordered marriage licenses issued to same-sex couples. Id. at 898 (Johnson, J., concurring and dissenting).

To underscore its distinction between marriage as a status (which the court did not require be opened-up to same-sex couples) and the benefits of marriage (which the court ordered the Legislature to make available to same-sex couples), the court stated: "We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, *rests with the Legislature.*" Id. at 867. (emphasis added.)

The court thus made clear that its mandate could be satisfied in a way that would not require redefining marriage or granting the equivalent of marital status to same-sex couples.

## **II. The Vermont Legislature did not create a marital status when it created civil unions.**

The Vermont House Judiciary Committee, which drafted the civil unions bill, did not treat marriage and civil unions as an equivalent status. Indeed, it specifically rejected the idea. In February 2000, it rejected a proposal to legalize same-sex “marriage” by a 8-3 vote.<sup>1</sup>

When the Committee approved the bill in March 2000, it made specific findings that a civil union is not and need not be a marriage. The Committee found that “Civil marriage under Vermont’s marriage statutes consists of a union between a man and a woman. This interpretation of the state’s marriage laws was upheld by the Supreme Court in *Baker v. State*.” H.B. 847, Sec. 1(4). They also found that “While a parallel system of civil unions does not bestow the status of civil marriage, it does meet the mandate of the Common Benefits Clause.” *Id.*, Sec. 1(15).

Some were disappointed with the civil union bill precisely because it did not confer marital status. The one committee member who voted against the bill, Representative Mackinnon, did so because it was not marriage, which he felt was the only constitutionally correct thing to do.<sup>2</sup> Beth Robinson, co-counsel for plaintiffs in the *Baker* case, characterized the civil unions bill as a step forward while recognizing it was not all the plaintiffs had sought.<sup>3</sup>

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<sup>1</sup>See Jack Hoffman, “Panel Backs Domestic Partnership,” *Rutland Herald* 1 (February 8, 2000).

<sup>2</sup>See Jack Hoffman, “House Panel Approves Bill on Civil Unions,” *Rutland Herald* 1 (March 2, 2000).

<sup>3</sup>See Lois R. Shea, “Vermont Panel OK’s Civil Unions for Gays,” *Boston Globe* B1 (March 2, 2000).

In case there was any doubt about the difference between civil unions and marriage, the House made it crystal clear. During the debate on the House floor, Representative Dean Corren proposed an amendment to legalize same-sex marriage.<sup>4</sup> The House voted it down 125 to 22.<sup>5</sup>

In the Legislative Findings accompanying the civil unions law, the legislature states: "Civil marriage under Vermont's marriage statutes consists of a union between a man and a woman." 2000 Vt. Act 91, §1(1). The findings also note that "a system of civil unions does not bestow the status of civil marriage." 2000 Vt. Act 91, §1(10). Later, in the definitions section, the law provides that, "Marriage means the legally recognized union of one man and one woman." 15 Vt. Stat. Ann. §1201(4). By contrast, a valid civil unions requires that the parties "[b]e of the same sex and therefore excluded from the marriage laws of this state." 15 Vt. Stat. Ann. §1202.

The other co-counsel for the plaintiffs recently stated that "While civil unions are a step forward in terms of providing a system of protections and responsibilities for same-gender couples and their families, they ultimately fall short of the comprehensive protections and responsibilities afforded by marriage."<sup>6</sup> This is indeed the case. The Legislature created two different statuses under Vermont law: marriage (the union of a man and a woman) and civil unions (a status by which same-sex couples can register for access to marital benefits).

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<sup>4</sup> *Journal of the House*, March 16, 2000.

<sup>5</sup> *Id.* The same day, the House approved the civil unions bill 76 to 69. *Id.* The Senate approved the House version with a few minor changes 19-11. *Journal of the Senate*, April 18, 2000. The House subsequently approved the Senate version 79-68. *Journal of the House*, April 25, 2000.

<sup>6</sup> Mary Bonauto, "Testimony of Gay & Lesbian Advocates & Defenders in Support of H 5608 (Marriage) and H 5590 (Civil Unions)," State of Rhode Island House of Representatives Committee on the Judiciary (March 21, 2001) available at <[www.glad.org](http://www.glad.org)>.

### **III. Vermont law and scholars expect that other states may not recognize civil unions.**

Nothing in the implementation and interpretation of the Vermont civil union law indicates that Vermont expects other states to recognize civil unions as marriages, or at all.

The Vermont Guide to Civil Unions published by the Vermont Secretary of State consistently compares civil unions to marriages but never conflates the two categories.<sup>7</sup> The official civil union license states explicitly, "This license authorizes the establishment of a civil union IN VERMONT ONLY of the above named parties by any person duly authorized to certify a civil union." Application for Review (February 8, 2001), Exhibit B (*emphasis in original*). This clearly puts the parties on notice that a civil union may only be valid in Vermont.

The Vermont Department of Banking, Insurance, Securities and Health Care Administration recently published information for parties to a civil unions which notes that "as of this writing, federal laws and the laws of other states may not recognize civil unions. Therefore, civil union partners may not receive the benefits provided to married couples under federal law or the laws of other states."<sup>8</sup>

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<sup>7</sup> Office of the Secretary of State, The Vermont Guide to Civil Unions available at <[www.sec.state.vt.us/pubs/civilunions.htm](http://www.sec.state.vt.us/pubs/civilunions.htm)>.

<sup>8</sup>Vermont Department of Banking, Insurance, Securities and Health Care Administration, Information for Civil Union Partners in Vermont available at <[www.bishca.state.vt.us/consumpubs/civiluguideweb.htm](http://www.bishca.state.vt.us/consumpubs/civiluguideweb.htm)>.

A number of legal experts who support same-sex marriage agree that civil unions are not likely to be valid in other states. Professor David Chambers states: "[A]t this point, you should assume that civil unions celebrated in Vermont will have no legal effect in other states."<sup>9</sup> Others have pointed out that because the law distinguishes clearly between marriage and civil unions, this will be the likely result:

[B]y avoiding labeling the result marriage, the state has deprived couples who are civilly united from being able to argue that other states are required to recognize their status under the settled principles of comity that states follow in recognizing out-of-state marriages, although there is nothing to stop civilly-united couples from attempting to gain recognition of their new status in other states by arguing that comity should apply to this situation.<sup>10</sup>

Professor Barbara Cox, who has written extensively on interstate recognition of same-sex marriages concedes that the extraterritorial effect of Vermont civil unions is in doubt: "[S]ame-sex couples who enter into civil unions in Vermont are unsure whether those unions will be recognized outside Vermont."<sup>11</sup> Professor Cox notes that Vermonters who contract a civil union then move to a different state may not have that union recognized elsewhere and adds that,

*This uncertainty is even greater for non-Vermont couples who travel to Vermont, enter into civil unions, and then return to their domiciles. By requiring same-sex couples to enter into civil unions instead of marriages, Vermont has increased the uncertainty that out-of-state same-sex couples would have faced concerning the interstate recognition of their marriages.*<sup>12</sup> (emphasis added)

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<sup>9</sup>David L. Chambers, "What's It Really Mean? Legal Consequences of Civil Union? Out in the Mountains 18 (June 2000).

<sup>10</sup> Art Leonard, "Vermont Enacts Civil Union Law for Same-Sex Partners? Lesbian/Gay Law Notes 73 (May 2000).

<sup>11</sup>Barbara J. Cox, "Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal 25 Vt. L.Rev. 113, 136 (2000).

<sup>12</sup>Id. at 137.

Professor Cox is candid in noting the reason for the uncertainty: a civil union is not a marriage:

Had Vermont given same-sex couples the right to marry by including them within their marriage statutes, the portability of their marriages still would have been more uncertain than the marriages of opposite-sex couples due to the homophobia of the courts and the availability of the public policy exception which permits courts to refuse to recognize marriages that they find to be "odious." But with the right to marry, same-sex couples would have had hundreds of cases in which courts recognized marriages from another state available for use as precedent. While this case law should remain available for use by same-sex couples when arguing that their civil unions are substantially equivalent to marriages, its precedential value is less certain because those cases apply to marriages, not civil unions.<sup>13</sup>

She adds, "Even if Vermont had provided its citizens with the right to marry, their legal status would have been unclear once they left that state's borders. With civil unions that status is all the more indefinite."<sup>14</sup>

In other words, Vermont agencies responsible for implementing the civil unions act have put parties on notice that their license may not be valid in another State, and even legal scholars who *support* same-sex marriage believe that States are unlikely to recognize civil union licenses.

### **CONCLUSION**

The Vermont civil unions law clearly distinguishes between a marriage and a civil union, and Vermont agencies and legal scholars doubt that civil unions will be recognized as valid by other States. Amici therefore respectfully urge this Court to reject the Appellants' novel and unfounded claim that a Vermont civil union is a "marriage" for purposes of Georgia law.

Respectfully submitted,

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<sup>13</sup>Id. at 140.

<sup>14</sup>Id. at 142.

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