Case No. 05-2604

IN THE UNITED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CITIZENS FOR EQUAL PROTECTION, INC., et al.,

Appellees

v.

ATTORNEY GENERAL JON BRUNING, in his official capacity, and
GOVERNOR DAVE HEINEMAN, in his official capacity

Appellants

Brief of *Amici Curiae* United Families International and The Center for Arizona Policy In Support of Appellants' Petition for Reversal of the Judgement Below

---

Marriage Law Foundation
Monte N. Stewart
William C. Duncan
251 West River Park Drive, Suite 175
Provo, Utah 84604
Telephone: 801-227-7878
Facsimile: 801-227-7882

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, the undersigned states that none of the *amici* is a corporation that issues stock or has a parent corporation that issues stock.

____

Marriage Law Foundation
By: William C. Duncan
Counsel for *Amici Curiae*

Dated: 9 September 2005

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT I

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CONSENT 1

INTRODUCTION AND INTEREST OF AMICI 1

ARGUMENT 3

I. THE *CEP* DECISION IS SIMPLY WRONG ABOUT THE SCOPE AND EFFECT OF THE NEBRASKA MARRIAGE AMENDMENT 3

II. THE NEBRASKA MARRIAGE AMENDMENT DOES NOT INFRINGE A RIGHT TO INTIMATE ASSOCIATION 12

CONCLUSION 16

TABLE OF AUTHORITIES

Constitutional Provisions

UNITED STATES CONSTITUTION, Amendment I . . . . passim

ALASKA CONSTITUTION art. I, § 25 (Michie 2004) 2

ARKANSAS CONSTITUTION amend. 83 (Michie 2005) 2

GEORGIA CONSTITUTION art. I, § IV, ¶ I (Supp. 2005) 2

HAWAII CONSTITUTION art. I, § 23 (Michie Supp. 2004) 2

KANSAS CONSTITUTION art. 15, § 16 (Supp. 2005) 2

KENTUCKY CONSTITUTION § 233a (Michie Sp. Supp. 2004) 2

LOUISIANA CONSTITUTION art. XII, § 15 (West Supp. 2005) 2

MICHIGAN CONSTITUTION art. I, § 25 (West Supp. 2005) 2

MISSISSIPPI CONSTITUTION art. IV, § 263A (2005) 2

MISSOURI CONSTITUTION art. I, § 33 (West Supp. 2005) 2

MONTANA CONSTITUTION art. XIII, § 7 (Supp. 2005) 2

NEBRASKA CONSTITUTION art. I, § 29 (2001) . . . . passim

NEVADA CONSTITUTION art. 1, § 21 (Michie Supp. 2003) 2

NORTH DAKOTA CONSTITUTION art. XI, § 28 (Supp. 2005) 2

OHIO CONSTITUTION art. XV, § 11 (Anderson 2004) 2

OKLAHOMA CONSTITUTION art. II, § 35 (West 2005) 2

OREGON CONSTITUTION art. XV, § 5a (Supp. 2005) 2

UTAH CONSTITUTION art. I, § 29 (Supp. 2005) 2

Statutes

California Family Code §§297-299.6 7

2000 Vermont Act 91 7

Cases

Baker v. Vermont, 744 A.2d 864 (Vt. 1999) 7-8

Citizens for Equal Protection v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) . . .
passim

Cody v. Hilliard, 304 F.3d 767 (8th Cir. 2002) 11

Flaskamp v. Dearborn Public Schools, 385 F.3d 935 (6th Cir. 2004) 13

Harris v. McRae, 448 U.S. 297 (1980) 14

Lofton v. Secretary of Dept. Of Children & Family, 358 F.3d 804 (11th Cir. 2004),
rehearing en banc denied 377 F.3d 1275, *cert denied* 125 S.Ct. 869 14

Lyng v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, 485 U.S. 360 (1988) 14

Mullins v. State of Oregon, 57 F.3d 789 (9th Cir. 1995) 14

New York v. Ferber, 458 U.S. 747 (1982) 10

Norwood v. Harrison, 413 U.S. 455 (1973) 14

Roberts v. United States Jaycees, 468 U.S. 607 (1984) 14

United States v. DeLeon, 330 F.3d 1033 (8th Cir. 2003) 10

United States v. Balsys, 524 U.S. 666 (1998) 11

Other Authorities

William C. Duncan, *Revisiting State Marriage Recognition Provisions,* 38 CREIGHTON L. REV. 233 (2005) 6

William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation,* 82 OREGON L. REV. 1001 (2003) 10

NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION (6th Ed. 2000) 10

Monte Neil Stewart and William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 BYU L. Rev. 555 15

Monte Neil Stewart, *Judicial Redefinition of Marriage*, 20 Canadian J. Family L. 11 (2004) 15

CONSENT

All parties have consented to the filing of this brief *amici curiae*.

INTRODUCTION AND INTEREST OF AMICI

Amicus curiae United Families International (UFI), a non-sectarian 501(c)(3) public charity founded in 1978 and based in Gilbert, Arizona, seeks to maintain and strengthen the family in the United States and other countries. UFI has been granted official consultative status at the United Nations as a non-governmental organization and has participated in UN conferences. UFI is committed to supporting those measures that maintain and strengthen the family and has, for this reason, supported efforts to amend state constitutions to reaffirm the legal definition of marriage as the union of a man and a woman. UFI and its members actively supported many of the recently approved state marriage amendments.

Amicus curiae The Center for Arizona Policy is a non-profit, tax-exempt research, education, and advocacy organization that exists to promote public policy supporting and strengthening Arizona's families. In 1996, the Center's General Counsel helped draft, and testified in support of, Arizona Revised Statute § 25-101 (popularly known as the Arizona Defense of Marriage Act), a law designed to protect the definition of marriage in Arizona law. The Center supports

the right of states to amend their constitutions to protect the institution of marriage from redefinition.

The decision of the court below calls into question the constitutional validity of many or all of the eighteen state marriage amendments ratified to date[1] and, correspondingly, the authority of citizens to enact amendments protecting marriage from redefinition. *Amici* believe that the decision below is unsupportable and that Nebraska's marriage amendment and those in other states are consistent with federal constitutional guarantees.

Because the district court was clearly intent on ruling in favor of the plaintiffs on whatever constitutional arguments they might raise (no matter how contradictory), the lower court's decision advances a number of disparate theories, each assertedly requiring a holding of unconstitutionality. But each of those theories is insupportable. The briefs of the State of Nebraska and the various *amici*

---

[1]ALASKA CONST. art. I, § 25 (Michie 2004); ARK. CONST. amend. 83 (Michie 2005); GA. CONST. art. I, § IV, ¶ I (Supp. 2005); HAW. CONST. art. I, § 23 (Michie Supp. 2004); KAN. CONST. art. 15, § 16 (Supp. 2005); KY. CONST. § 233a (Michie Sp. Supp. 2004); LA. CONST. art. XII, § 15 (West Supp. 2005); MICH. CONST. art. I, § 25 (West Supp. 2005); MISS. CONST. art. IV, § 263A (2005); MO. CONST. art. I, § 33 (West Supp. 2005); MONT. CONST. art. XIII, § 7 (Supp. 2005); NEB. CONST. art. I, § 29 (2001); NEV. CONST. art. 1, § 21 (Michie Supp. 2003); N.D. CONST. art. XI, § 28 (Supp. 2005); OHIO CONST. art. XV, § 11 (Anderson 2004); OKLA. CONST. art. II, § 35 (West 2005); OR. CONST. art. XV, § 5a (Supp. 2005); UTAH CONST. art. I, § 29 (Supp. 2005).

supporting the State's position, taken together, will so demonstrate. For its part, this brief focuses on just this: the district court's holding that the Nebraska marriage amendment impinges plaintiffs' right of intimate association.

ARGUMENT

The first portion of the district court's decision concludes that Nebraska's marriage amendment infringes plaintiffs' right of intimate association implicit in the First Amendment. *Citizens for Equal Protection v. Bruning*, 368 F. Supp. 2d 980, 995 (D. Neb. 2005) (hereafter *"CEP"* or "the *CEP* decision"). This conclusion is fatally flawed for two reasons. First, it rests on a false assertion regarding the scope and effect of the marriage amendment. Second, it misapprehends the nature of the right of intimate association.

I.
THE *CEP* DECISION IS SIMPLY WRONG ABOUT THE SCOPE AND EFFECT OF THE NEBRASKA MARRIAGE AMENDMENT

In order to reach its conclusion that the Nebraska Marriage Amendment infringed plaintiffs' right of intimate association (and in fact, to conclude that the amendment violated any constitutional guarantees), the district court first had to adopt an extraordinarily broad (and mistaken) reading of the amendment. Thus, in the section of the *CEP* decision addressing plaintiffs' First Amendment claims, it characterizes the amendment as going "far beyond merely defining marriage as

between a man and a woman." *CEP* at 995. As the proffered "proof" of this assertion, the decision lifts certain phrases out of their context in the amendment's second sentence. It then posits that the scope and supposed effect of each isolated phrase is as broad as all outdoors – but does so in ways contrary to both common sense and governing rules of construction. We so show in the following paragraphs, but first, sensibly, we set out the amendment's actual language: "Only a marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." Neb. Const., Art. I, sec. 29.

The first misconstruction centers on the phrase "other similar same-sex relationship." Focusing on this phrase, the *CEP* decision says that the amendment "potentially prohibits or at least inhibits people, regardless of sexual preference, from entering into numerous relationships or living arrangements that could be interpreted as a same-sex relationship 'similar to' marriage." *CEP* at 995. Then further: "Because the identifying incidents of marriage vary, numerous living arrangements can be interpreted as 'similar to' marriage." *Id*. at 995. In an effort apparently to be more concrete, the decision asserts: "Many social or associational arrangements run the risk of running afoul of the broad prohibitions of Section 29.

Among the threatened relationships would be those of roommates, co-tenants, foster parents, and related people who share living arrangements, expenses, custody of children, or ownership of property." *Id.* at 995. Thus, in the *CEP* decision's formulation, Section 29 could affect (by prohibiting outright or at least inhibiting entry into) a wide variety of living arrangements involving any two people, regardless of their relationship or sexual orientation, if these people (1) live together, (2) share custody of a child, or (3) co-own property. This is so because, so the decision would have it, any of these three attributes constitute a relationship "'similar to' marriage."

A broader or more expansive reading of the amendment really could not be formulated. But that reading is wrong (indeed, indefensible), first because it is unsupported by the text of the amendment. The amendment does not "prohibit" or "inhibit" people from living in any kind of arrangement they choose. Rather it steers the State *qua* State away from the conferral of legal status or legal sanction relative to any arrangement that, if given such legal status or legal sanction, would amount to a marriage-substitute (as is the case with a Vermont civil union or a California domestic partnership). This is clear from a fair reading of the language.

That the amendment addresses state action, not private arrangements, appears from the use in the amendment of *marriage*, *valid* (twice), *recognized*

(twice), and *the uniting*. The creation of a civil marriage (*the uniting* and *marriage*) is a quintessential state act. WalMart does not do it. The ACLU does not do it. Individuals *qua* individuals do not do it. Even a church does not create a civil marriage unless, quite frankly, it does so as an agent of the state in compliance with certain state-mandated procedures (e.g., the marriage license). (If it were otherwise, civil marriages between same-sex couples and civil polygamous marriages would already abound.) And determining validity (*valid*) and legally recognizing arrangements (*recognized*), especially in the civil marriage context, likewise fall within the State's exclusive powers. *Valid* is a word of art in the civil marriage world. *Recognition* is likewise a word of art in the law of civil marriage, particularly that part dealing with conflicts of laws. *See* William C. Duncan, *Revisiting State Marriage Recognition Provisions,* 38 CREIGHTON L. REV. 233, 261-262 (2005) (describing the use of the terms *valid* and *recognized* in state marriage statutes and amendments). Again, WalMart cannot recognize (in the legal sense the word is used in the context of the amendment) a same-sex couple's Massachusetts marriage or validate any personal wedding ceremony the couple might choose to conduct in Nebraska. So the language of the amendment, fairly read as a whole and not piecemeal, shows it to be addressing state action, not private arrangements.

Likewise, a fair reading of the amendment shows that it reaches state-sanctioned arrangements that, with that sanction, amount to a marriage-equivalent. In other words, besides the state-action requirement, an arrangement, to be prohibited by the amendment, must also walk, talk, and act like a marriage. The amendment's use of *civil union* makes this clear. In December 1999, the Vermont Supreme Court mandated that state's legislature to either redefine marriage so as to encompass same-sex couples or to give such couples a marriage-equivalent. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). The legislature chose the latter, which became law in June 2000. 2000 Vt. Act 91. That marriage-equivalent, of course, was labeled *civil union*. And it may be thought that the amendment's use of the alternate descriptive for a marriage-equivalent, *domestic partnership,* was extraordinarily prescient. After all, the next state legislature to create a marriage-equivalent, California's in 2004, dubbed it *domestic partnership*. Cal. Fam. Code §§297-299.6. But this really was not a matter of prescience. *Domestic partnership*, like *civil union,* also came from the pre-amendment Vermont experience. The Vermont Supreme Court in *Baker* spoke of proposed legislative arrangements "typically referred to as 'domestic partnership' . . . acts, which generally establish an alternative legal status to marriage for same sex couples, impose similar formal requirements and limitations, create a parallel licensing or

registration scheme, and extend all or most of the same rights and obligations provided by law to married partners." *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999).

So the Nebraska citizens in November 2000, in voting on the amendment, clearly had from the Vermont experience a concrete basis for understanding the phrases *civil union* and *domestic partnership* to mean a legislatively created marriage-equivalent. In turn, there could have been no ambiguity about the third descriptive in the amendment, *similar same-sex relationship,* where *similar* refers to and only to *civil union* and *domestic partnership.* Thus, the amendment, by its plain language, with that plainness amplified by the vivid historical context, reaches only those arrangements that are state-recognized or state-sanctioned and that walk, talk, and act like a marriage.

One of the *CEP* decision's fundamental errors in this context is in ignoring that marriage in our society and in our laws is like a big laundry basket filled with all kinds of articles of clothing. The *CEP* decision says in effect that the laundry basket contains a pair of socks and, therefore, the amendment prohibits or inhibits unmarried folks from putting on a pair of socks. But of course that argument is silly exactly because simple common sense knows that a pair of socks is not a full laundry basket. The socks that the *CEP* decision focused on were living together

(apparently in the roommate sense), co-owning property, and joint child custody; in the decision's view, each of these arrangements was "similar to" marriage. But of course millions of unmarried persons jointly own property without the slightest notion that the resulting relationship is a marriage-equivalent. Likewise college students would be startled to be told that their roommate arrangements were a marriage-equivalent. Moreover, child custody orders are routinely made by courts precisely because a marriage has been dissolved or because the parents never married in the first place. Certainly such orders do not recreate the marriage post-divorce or operate to "marry" the unwed father and mother.

The *CEP* decision's "inhibition" argument is equally misguided. To "inhibit" personal choices as to household companions, etc., the amendment would have to penalize those choices in some way. Certainly the withholding of state sanction does not rise to the level of a penalty. And experience shows that many personal choices are not accorded any legal status without those choices being at all "inhibited." Cohabitation, for example, involves a choice to live together. Since the couple choosing to cohabit do not marry, there is no state involvement in the choice. The evidence is that the absence of state sanction for that relationship does not inhibit a couple's choice to create it. Millions of couples in our country co-habit despite (or perhaps because of) the lack of formal legal

recognition of their relationship. *See* William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation,* 82 OREGON L. REV. 1001, 1003 & 1017-1024 (2003) (noting Census estimates of 5.5 million cohabiting couples and surveying limited recognition of unmarried couples in the law).

The *CEP* decision's analysis is also fatally flawed because it fails to abide by settled rules of statutory construction; indeed, the decision's approach is exactly opposite what those rules direct. Most obvious is the decision's inversion of the well settled rule that a federal court, when construing a state or federal enactment, will to the greatest extent reasonably possible, construe it so as to avoid constitutional infirmity. *New York v. Ferber*, 458 U.S. 747, 769 (1982) (holding New York child pornography statute not overbroad for First Amendment purposes; in such situations, a federal court "should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction."); *United States v. DeLeon*, 330 F.3d 1033, 1035-1036 (8th Cir. 2003) (holding that amendments to sentencing guidelines did not apply retroactively so as to avoid conflict with Ex Post Facto and Due Process clauses; "It is a 'cardinal principle' that courts shall construe statutes to avoid constitutional difficulties."); NORMAN J. SINGER, 2A STATUTES AND STATUTORY

CONSTRUCTION 72, §45:11 (6th Ed. 2000) ("[I]f the language of the constitutional provision is ambiguous, then ordinary rules employed in statutory construction must be applied to ascertain the intent."). It is fair to say that the *CEP* decision did not honor this well settled principle. Indeed, it is fair to say that at every opportunity the decision construes the amendment so as to place it in harms way, that is, so as to make it the easiest possible target of each of the plaintiffs' numerous federal constitutional challenges.

The *CEP* decision's violations of the rules of statutory construction do not end there. It is well settled that a federal court will read legal provisions in context and give effect to all their parts. *U.S. v. Balsys*, 524 U.S. 666, 673 (1998) (invoking "the cardinal rule to construe provisions in context"); *Cody v. Hilliard*, 304 F.3d 767, 776 (8th Cir. 2002) ("[s]tatutes are to be interpreted as a whole"). As demonstrated above, the *CEP* decision does just the opposite: it takes words and phrases out of context, refuses to accord words and phrases their plain meaning, and ignores the evident understanding of those words and phrases held by those who enacted the measure (here an overwhelming majority of Nebraska voters).

The *CEP* decision is simply wrong about the scope and effect of the Nebraska marriage amendment. Once the amendment is given a fair and sensible

reading, one that aims to preserve rather than undermine its constitutionality and one that honors the evident understanding of those who enacted it, the amendment readily survives a federal constitutional "intimate association" challenge (and, indeed, all the other challenges thrown at it).

II.
THE NEBRASKA MARRIAGE AMENDMENT DOES NOT INFRINGE A RIGHT TO INTIMATE ASSOCIATION

After erroneously erroneous reading the Nebraska marriage amendment, the CEP decision goes on to hold that the amendment infringed plaintiffs' rights of expressive and intimate association. As other briefs submitted to this Court demonstrate, this conclusion as it relates to expressive association is implausible. This brief demonstrates the same relative to the intimate association claim.

The *CEP* decision's analysis proceeds in this fashion. First it reviews the sparse Supreme Court case law discussing the intimate association right. *CEP* at 992-993. Next, relying on its prodigiously broad interpretation of the amendment, the decision baldly concludes that "Section 29 burdens rights of intimate association." *Id*. at 995. Then later the decision states that "many" of the relationships it asserts would be affected by the Nebraska marriage amendment are

> constitutionally protected at some point along the spectrum from the most hallowed and intimate to the most trivial. Without determining where on this spectrum a potential domestic partnership, civil union

> or other 'same-sex' relationship would fall, let it suffice to say that associations or living arrangements affected by Section 29 are closer to the end of the continuum that deserve Constitutional protection.

Id. at 995-996. This language marks the end of the decision's analysis of the right of intimate association.

The decision's analysis is wrong in two ways. First, it proceeds on the erroneous premise that the amendment prohibits or inhibits same-sex couples from forming intimate relationships. As demonstrated in the previous section, the amendment does no such thing. All it does is prevent the State *qua* State from legally validating or recognizing such private arrangements. Second, the CEP decision is wrong as a matter of law in holding that the federal constitutional right of intimate association invalidates a measure that does not prohibit or inhibit a particular intimate association but only declines to legally validate or recognize it. A straightforward review of the law on intimate association makes this plain.

Only those measures that prevent or constitute state interference in a protected intimate relationship run afoul of the right to intimate association; measures that simply decline government sanction or other benefits do not. "Government action has a 'direct and substantial influence' on intimate association 'only where a large portion of those affected by the rule are absolutely or largely prevented from [forming intimate associations].'" *Flaskamp v.*

Dearborn Public Schools, 385 F.3d 935, 942 (6th Cir. 2004) (bracketed material in original, citation omitted). In the same vein, the purpose of the right of intimate association is "to protect covered relationships from unwarranted state interference." *Roberts v. United States Jaycees*, 468 U.S. 607, 619 (1984). And the failure to formally endorse a personal choice is not at all the same as prohibiting, interfering with, or otherwise burdening that choice. *Harris v. McRae*, 448 U.S. 297 (1980) (government refusal to subsidize the exercise of a constitutional right does not amount to a violation of the right); *Lyng v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW*, 485 U.S. 360, 365-366 (1988) (failure to provide food stamps to families with a household member on strike was not a "direct and substantial" interference with family living arrangements); *Norwood v. Harrison*, 413 U.S. 455 (1973). "A negative right to be free of governmental interference in an already existing familial relationship does not translate into an affirmative right to create an entirely new family unit out of whole cloth." *Mullins v. State of Oregon*, 57 F.3d 789, 794 (9th Cir. 1995); *cf. Lofton v. Secretary of Dept. Of Children & Family*, 358 F.3d 804, 812-815 (11th Cir. 2004), *rehearing en banc denied* 377 F.3d 1275, *cert denied* 125 S.Ct. 869 (right of "family integrity" does not compel government to provide for same-sex couple adoption).

The Nebraska marriage amendment does not interfere with or intrude itself into the activities of same-sex couples in forming or maintaining intimate relationships. It does say that the State of Nebraska will not affirmatively sanction such relationships. Under settled law defining the right of intimate association, the amendment therefore is not at all violative of that federal constitutional right.

To hold otherwise is tantamount to rendering unconstitutional a fundamental policy (enshrined in many laws) of 46 states. Prior to Vermont's Civil Union Act of 2000, a fundamental policy of all 50 states was the same: to sanction (that is legally recognize and approve) one and only one sexually based relationship (legally defined as such) and that was the legal marriage between one woman and one man. The gay/lesbian rights movement, of course, has wanted that policy changed and has succeeded in changing it in Vermont, Massachusetts, California, and Connecticut. But the other 46 states continue to pursue that fundamental public policy, and eleven of them have now placed the policy in their respective state constitutions.[2] Yet the "logic" of the *CEP* decision and of the

---

[2] For explications of the strong, even compelling, public interests advanced by that policy in general and by the preservation of man/woman marriage in particular, *see* Monte Neil Stewart, *Judicial Redefinition of Marriage*, 20 Canadian J. Family L. 11, 41-85 (2004), available on-line at www.manwomanmarriage.org; Monte Neil Stewart and William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 BYU L. Rev. 555, 588-595 available on-line at www.manwomanmarriage.org.

plaintiffs' arguments in this case necessarily renders that fundamental policy constitutionally infirm. For that "logic" says, in its essence, that for a state not to sanction, not to formally validate or recognize, a same-sex couple's choice to enter into an intimate relationship is to "prohibit" and "inhibit" and interfere with that relationship in a way that violates the federal constitutional protection accorded some intimate relationships. But, as already demonstrated, that "logic" is contrary to the law defining the scope of that protection.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the *CEP* decision and uphold the Nebraska marriage amendment.

____

Marriage Law Foundation
By: William C. Duncan
Counsel for *Amici Curiae*

Dated: 9 September 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,544 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14 point Times New Roman font.

____
Marriage Law Foundation
By: William C. Duncan
Counsel for *Amici Curiae*

Dated: 9 September 2005

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2005, I served the foregoing Brief of *Amici Curiae* United Families International and The Center for Arizona Policy in Support of Appellants' Petition for Reversal of the Judgement Below by causing two copies to be mailed to:

Amy A. Miller
941 O Street
Lincoln, Nebraska 68508

Robert F. Bartle
Bartle & Geier
1141 H Street
P.O. Box 83104
Lincoln, Nebraska 68501-3104

David Buckel
Lambda Legal Defense & Education Fund, Inc.
Suite 1500
120 Wall St
New York, New York 10005-2317

James D. Esseks
Sharon M. McGowan
Tamara Lange
The American Civil Liberties Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Fred B. Chase
Lambda Legal
3500 Oak Lawn Avenue
Suite 500
Dallas, Texas 75219

Matt McNair, Chief Deputy Attorney General
Dale A. Comer, Assistant Attorney General
State of Nebraska Attorney General
PO Box 98920
2115 Capitol Bldg
Lincoln, Nebraska 68509-8920

____

Marriage Law Foundation
By: William C. Duncan
Counsel for *Amici Curiae*

Dated: 9 September 2005