

No. 11-0114

In the Supreme Court of Texas

State of Texas,

Petitioner,

v.

Angelique S. Naylor and Sabina Daly,

Respondents,

On Petition for Review from the
Third Court of Appeals in Austin, Texas

BRIEF OF THE HONORABLE DANIEL H. BRANCH AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

Last week, Respondents filed a brief arguing that Texas’s traditional marriage law is unconstitutional. What’s more, they further argued that the Attorney General of Texas does not even have the right to appear in court to defend that law on behalf of the people of Texas. In other words, Respondents maintain that courts, like the two courts below, can effectively strike down Texas law as unconstitutional—*without anyone ever being able to stand up for Texas law*.

These arguments demand a response. Accordingly, I submit this *amicus curiae* brief, based on two longstanding interests as a member of the Texas House of Representatives. First, I am co-author of Texas’s constitutional amendment defining marriage as the union of one man and one woman. H.J.R. 6, 79th Leg., R.S., 2005. Second, I am the author of legislation to guarantee what should have already been obvious to the courts below: the right of the Texas Attorney General to defend Texas laws, including its marriage law, against constitutional attack. H.B. 4293, 81st Leg., R.S., 2009 (attached as Exh. A).

ARGUMENT

As Respondents’ brief last week confirms, opponents of the traditional institution of marriage seek to attack the people of Texas in two distinct—and equally troubling—ways: They wish to attack both our democratic system of government, and our adversarial system of justice.

Opponents of traditional marriage know that Texans believe strongly in the traditional institution of marriage—so Respondents cannot achieve their goals at the ballot box. They also know that they are wrong as a matter of constitutional law—so Respondents also cannot achieve their goals in this Court.¹

Accordingly, the only way that Respondents can try to impose their vision upon the people of Texas is to trample upon both the legislative process by which Texas laws are supposed to be written, and the adversarial judicial process by which constitutional disputes are supposed to be resolved.²

Put simply, this lawsuit demonstrates that opponents of traditional marriage want to exclude the people of Texas from the legislative process—and then they want to exclude the legal representative of the people of Texas, the Attorney General of Texas, from the judicial process.

¹ See, e.g., *Baker v. Nelson*, 409 U.S. 810 (1972) (rejecting Fourteenth Amendment challenge to Minnesota traditional marriage law); *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting) (“The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their ‘historic and essential authority to define the marital relation,’ may continue to utilize the traditional definition of marriage.”) (citation omitted); see also *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 681 (Tex. App.—Dallas 2010, pet. filed) (upholding Texas marriage law against constitutional attack, and observing that the Fourteenth Amendment has “never before construed as a charter for restructuring the traditional institution of marriage by judicial legislation”); *Mireles v. Mireles*, No. 01-08-00499-CV, 2009 WL 884815, at *2 (Tex. App.—Houston [1st Dist.] Apr. 2, 2009, pet. denied) (mem. op.); *Littleton v. Prange*, 9 S.W.3d 223, 226 (Tex. App.—San Antonio 1999, pet. denied).

² See, e.g., *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (“[O]ur adversarial system of justice . . . is premised on the well-tested principle that truth—as well as fairness—is ‘best discovered by powerful statements on both sides of the question.’”); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (“The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.”).

* * *

I have been concerned about the possibility of such litigation tactics by opponents of traditional marriage throughout my career in the Texas House of Representatives—and since well before the initiation of this lawsuit. So I have undertaken various efforts to combat such tactics here in Texas.

First, after the Massachusetts Supreme Judicial Court struck down that state's traditional marriage law as unconstitutional under the Massachusetts Constitution, *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), I co-authored a state constitutional amendment to codify the traditional definition of marriage as the union of one man and one woman into the Texas Constitution. H.J.R. 6, 79th Leg., R.S., 2005.

That was the only way to ensure that such litigation could not succeed as a matter of state constitutional law here in Texas. I soon became concerned that that would not be enough, however. As further litigation by traditional marriage opponents unfolded across the country, I became increasingly concerned that our state needed to do more to ensure the protection of the traditional institution of marriage here in Texas.

Accordingly, in March 2009—several months before this lawsuit was filed in December 2009, and in close consultation with Attorney General Abbott's office—I authored legislation to guarantee the people of Texas the right to defend

our state's constitutional definition of marriage against claims of unconstitutionality under the Fourteenth Amendment of the U.S. Constitution. H.B. 4293, 81st Leg., R.S., 2009 (attached as Exh. A).

My legislation was based on a simple premise: The Attorney General of Texas should have the right to defend Texas's defense of marriage law—and any other Texas law—against constitutional attack.

To be sure, this legislation should not have been necessary—just as our state constitutional amendment should not have been necessary. It should have already been obvious, prior to 2005, that nothing in the Constitution prohibits the traditional definition of marriage. Likewise, it should have already been obvious, prior to 2009, that the state's general intervention law, codified in Rule 60 of the Texas Rules of Civil Procedure, guaranteed the right of the Attorney General of Texas to defend all Texas laws against constitutional attack.

But I feared that activist courts would ignore the Constitution and strike down traditional marriage laws regardless—and that the only way to ensure that the people of Texas at least had the right to defend the traditional institution of marriage against constitutional attack was to enact a specific and explicit guarantee that the Attorney General of Texas has the right to defend all Texas laws against constitutional attack in court.

H.B. 4293 passed the House—thanks in no small measure to helpful testimony from General Abbott’s office.³

Unfortunately, the legislation did not pass the Senate in 2009. Based on internal conversations, it appeared that some people simply did not share the same fear that General Abbott and I had—that some courts might be so aggressive that they would not even allow the Attorney General of Texas the right to appear in court to defend the constitutionality of Texas laws. To some, we were essentially “crying wolf.”

But then, several months later, this litigation was initiated. And in the months that followed, both courts below did exactly as General Abbott and I feared. Not only did they refuse to enforce Texas marriage laws, they did not even allow the Attorney General the opportunity to intervene in the litigation to defend the constitutionality of Texas law.

Accordingly, the Legislature passed legislation similar to H.B. 4293 in the following session. *See* TEX. GOV’T CODE § 402.010 (Texas Attorney General has the right to “notice” and “intervention in litigation” in any “action in which a party . . . challeng[es] the constitutionality of a statute of this state”). And General Abbott has of course recognized the significance of that legislation to this case.

³ *See* Testimony from the Office of the Attorney General on H.B. 4293, House Judiciary & Civil Jurisprudence Committee (April 6, 2009), *available at* <http://www.capitol.state.tx.us/tlodocs/81R/witlistbill/html/HB04293H.htm>.

As General Abbott has made clear, this legislation “affirm[s] the unique role played by the Attorney General when the constitutionality of state law is questioned.” Brief of the State of Texas, at 14. It “demonstrate[s] that the Legislature intends for courts to be solicitous of the Attorney General’s views when the constitutionality of state law comes into question.” *Id.* Accordingly, “the Attorney General’s office has inherent authority to intervene in constitutional cases under Rule 60 by virtue of its unique justiciable interest in defending Texas law.” Reply Brief of the State of Texas, at 9.

As a member of the Texas House of Representatives—and as a Texan—I agree strongly with General Abbott’s request for relief from this Court: “This Court should confirm what the Legislature plainly assumed when it enacted section 402.010: The State has an inherent right to intervene under Rule 60 when the constitutionality of Texas law is questioned.” *Id.* at 10.

* * *

If opponents of traditional marriage want to convince the people of Texas that Texas law should be changed, they can do so in good faith, by proceeding under the system established by our Constitution for amending Texas law and for ensuring its legality. The tactics being used here, by contrast, are precisely the opposite of what our system provides: They ensure that there will be no one in this case who can fight for and defend the state’s defense of marriage law against

constitutional attack. Under Respondents' view, the courts below can effectively strike down Texas law as unconstitutional, *without anyone ever being able to stand up for Texas law*. That cannot possibly be right. Whatever one's position on the issue of marriage, surely we can all agree that the people of Texas deserve a voice—in the legislative process, and in the courts as well.

CONCLUSION

For the reasons stated herein, and in briefing previously filed by the Texas Attorney General, this Court should reverse the Third Court of Appeals and hold that (1) the Texas Attorney General has the right to intervene in this lawsuit, and (2) Texas laws defining the institution of marriage as the union of one man and one woman are constitutional.

DATED: August 6, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word-count limits specified by the Texas Rules of Appellate Procedure. This brief contains 1,628 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 6, 2013, true and correct copies of the this brief were served by electronic filing and certified mail, return receipt request, on the following counsel of record:

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Exhibit A

A BILL TO BE ENTITLED

AN ACT

relating to notice to the attorney general of an action, suit, or proceeding challenging the validity of a Texas statute or rule.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter A, Chapter 402, Government Code, is amended by adding Section 402.010 to read as follows:

Sec. 402.010. CHALLENGES TO VALIDITY OF STATE STATUTE OR RULE. (a) For purposes of this section, "state agency" means a board, commission, department, office, court, or other agency that:

(1) is in the executive or judicial branch of the government of this state;

(2) was created by the constitution or a statute of this state; and

(3) has statewide jurisdiction.

(b) In an action, suit, or proceeding, whether original or appellate, in which a party or amicus curiae asserts a challenge to the validity of a state statute or a rule adopted by a state agency, the party asserting the challenge shall give written notice of the challenge to the attorney general if the state, a state agency, or a state officer or employee in the officer's or employee's official capacity is not a party to the action, suit, or proceeding.

(c) An action, suit, or proceeding in which notice to the attorney general is required under this section is an action, suit, or proceeding in which a party or amicus curiae asserts that a state

1 statute or rule conflicts with:

2 (1) the constitution of the United States or of this
3 state;

4 (2) federal law or is preempted by federal law; or

5 (3) a statute of this state, in the case of a challenge
6 to a rule of a state agency.

7 (d) The notice required by Subsection (b) must identify:

8 (1) the challenged statute or rule;

9 (2) the nature of the challenge;

10 (3) the court in which the challenge is pending; and

11 (4) the style and number of the action, suit, or
12 proceeding in which the challenge is pending.

13 (e) At the time the pleading or other document challenging
14 the validity of a statute or rule is filed, the notice required by
15 Subsection (b) must be:

16 (1) sent to the attorney general by certified or
17 registered mail, or electronically to an e-mail address designated
18 by the attorney general for purposes of this section; and

19 (2) filed with the court in which the challenge is
20 asserted.

21 (f) If a party or amicus curiae challenging the validity of
22 a state statute or rule fails to give notice to the attorney general
23 as required by this section, the court in which the challenge is
24 asserted shall give notice of the challenge to the attorney
25 general. Notice given to the attorney general by a court under this
26 subsection must comply with the notice requirements of Subsection
27 (d) and be given in the manner required by Subsection (e)(1). The

1 court may reject, but may not sustain, a challenge to which this
2 section applies before the attorney general has received notice
3 under this section and the state has been allowed to proceed, if it
4 so chooses, under Subsection (g).

5 (g) In an action, suit, or proceeding to which this section
6 applies, the state may intervene for the presentation of evidence
7 otherwise admissible under the rules of evidence and for briefing
8 and argument on the question of the validity of the challenged
9 statute or rule. The court shall grant a motion of the state to
10 intervene if the motion is filed not later than the 60th day after
11 the date the attorney general receives notice under this section.

12 (h) This section and the state's intervention under this
13 section do not constitute a waiver of sovereign immunity.

14 SECTION 2. Section 402.010, Government Code, as added by
15 this Act, applies only to a pleading or other document filed in an
16 action, suit, or proceeding on or after the effective date of this
17 Act. A pleading or other document filed in an action, suit, or
18 proceeding before the effective date of this Act is governed by the
19 law in effect at the time the pleading or other document was filed,
20 and that law is continued in effect for that purpose.

21 SECTION 3. This Act takes effect immediately if it receives
22 a vote of two-thirds of all the members elected to each house, as
23 provided by Section 39, Article III, Texas Constitution. If this
24 Act does not receive the vote necessary for immediate effect, this
25 Act takes effect September 1, 2009.