IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

No. 2632, September Term, 2018

&

No. 578, September Term, 2019

(Consolidated)

SCOTT SHERMAN,
APPELLANT

v.

MARTIN ROUSE,
APPELLEE

ON APPEAL FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY
THE HONORABLE KEVIN G. HESSLER

BRIEF OF AMICI CURIAE LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL CENTER FOR LESBIAN RIGHTS, GLBTQ LEGAL ADVOCATES & DEFENDERS, AND FREESTATE JUSTICE, INC.

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INTRODUCTION

Until very recently, the exclusion of same-sex couples from marriage in Maryland and across the country consigned those couples "to an instability many opposite-sex couples would deem intolerable in their own lives." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015). The State of Vermont was among the first jurisdictions to take steps to mitigate that instability and inequality by establishing civil unions for same-sex couples in 2000. In addition to Vermont residents who availed themselves of this first spousal status granted to same-sex couples, thousands of couples from other states flocked to Vermont, as well as to the subsequent states that established spousal statuses like civil unions, to obtain spousal protections for their relationships. Many Maryland same-sex couples were among them, seeking the protections for their families denied them at home. Maryland did not extend formal legal equality to same-sex couples until 2013, when the Civil Marriage Protection Act ("CMPA")[1] took effect, finally recognizing their right to marry, and it was not until *Obergefell* in 2015, striking down marriage bans nationwide, that the equal constitutional standing of same-sex families was finally recognized across the country.

The ability to dissolve the legally binding civil unions Maryland same-sex couples entered at a time when they were still excluded from marriage is a critical facet of that legal equality. Same-sex couples whose relationships have ended have the same need as different-sex couples to access this state's divorce laws to end their spousal relationships and obtain an equitable resolution of their financial affairs. Maryland's long history of

[1] 2012 Maryland Laws Ch. 2 (H.B. 438).

liberally extending comity to legal spousal relationships entered in other states ensures that access. Whether they moved to Maryland after living in a state that offered civil unions, like the Sherman-Rouse family, or left Maryland to obtain a civil union at a time they could receive no protections at home, Maryland's comity law and constitutional equality principles require that separated same-sex civil union partners be provided with a certain and appropriate forum to dissolve their spousal relationships and move on with their lives.

STATEMENT OF INTERESTS OF *AMICI CURIAE*

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and those with HIV through impact litigation, education, and public policy work. Lambda Legal has participated as party counsel or *amicus* in Maryland cases recognizing and protecting the relationships and families formed by same-sex couples, *see, e.g.*, *Conover v. Conover*, 450 Md. 51 (2016); *Port v. Cowan*, 426 Md. 435 (2012); *Conaway v. Deane*, 401 Md. 219 (2007), as well as in cases across the country addressing the rights of same-sex couples to marry and to equal recognition of their civil unions and marriages, including for purposes of dissolution. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010); *Alons v. Iowa Dist. Ct. for Woodbury County*, 698 N.W.2d 858 (Iowa 2005); *Neyman v. Buckley*, 153 A.3d 1010 (Penn. Super. 2016); *Dickerson v. Thompson*, 88 A.D.3d 121 (N.Y. App. Div. 2011).

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of LGBT people and

their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country, as well as participated as counsel in Maryland cases addressing recognition of out-of-state marriages of same-sex couples, *see, e.g. Port*, 426 Md. 435. NCLR has a particular interest in protecting the fundamental constitutional freedom to marry, and to secure the benefits and obligations that flow therefrom, including representing the Tennessee petitioners in *Obergefell*, 135 S. Ct. 2584 (2015), as well as the petitioners in *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

GLBTQ Legal Advocates & Defenders ("GLAD") is a legal rights organization that seeks equal justice for all persons under the law regardless of their sexual orientation, gender identity, or HIV status. Since 1978, GLAD has worked in New England and nationally through strategic litigation, public policy advocacy, and education. GLAD has a particular interest in the constitutional right to marry and protecting the benefits that flow from that right. GLAD has represented petitioners in cases addressing the right to marry including *Baker v. State*, 744 A.2d 864 (Vt. 1999), *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), and *Obergefell*, 135 S. Ct. 2584 (2015).

FreeState Justice, Inc. is Maryland's statewide legal advocacy organization that seeks to improve the lives of LGBTQ people in Maryland. FreeState Justice advocates for LGBTQ Marylanders by combining direct legal services with education and outreach to ensure that the LGBTQ community in Maryland receives fair treatment in the law and in society. FreeState Justice's predecessor, Equality Maryland, played an integral role in

advocating for the passage and subsequent enactment of Maryland's Civil Marriage Protection Act of 2012. FreeState Justice represents same-sex couples in a variety of family law matters, including divorce and parenting proceedings in Maryland, and has an interest in the full legal recognition of the relationships of same-sex couples in Maryland.

STATEMENT OF THE CASE

Amici incorporate by reference the Statement of the Case, Questions Presented and Statement of Facts set forth in the Appellant's Brief.

ARGUMENT

I. CIVIL UNIONS OFFERED SAME-SEX COUPLES A STEP TOWARD THE FULL RECOGNITION OF AND PROTECTIONS FOR THEIR RELATIONSHIPS NOW RECOGNIZED AS A CONSTITUTIONAL RIGHT.

In 1999, the Vermont Supreme Court ruled that denying same-sex couples the "statutory benefits, protections, and security incident to marriage" violated state constitutional equality guarantees. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). In response, the Vermont legislature enacted the first civil union statute, conferring all of the "substantive rights and obligations" of marriage, while denying the status of marriage. 15 V.S.A. §1204.

At that time, Vermont civil unions were the only state-recognized commitment available to same-sex couples. Thousands of same-sex couples from around the country, including Maryland, traveled to Vermont seeking the most robust protections and recognition they could obtain. Between 2000 and 2009, nearly 9,000 civil unions were established in Vermont, only 18% of which were entered by Vermont residents. *See* M.V.

Lee Badgett & Jody Herman, The Williams Institute, *Patterns of Relationship Recognition by Same-Sex Couples in the United States* (Nov. 2011), p. 4, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf.

Subsequently, Colorado, Connecticut, Hawaii, Illinois, Delaware, New Jersey, New Hampshire, and Rhode Island also created civil union statuses, while California, Nevada, Oregon, Washington, and the District of Columbia established parallel spousal statuses using the terminology of "domestic partnership." *See*, *e.g.*, Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 Temp. L. Rev. 47, 54-55 (2014); Nat'l Conf. of State Legs., *Civil Unions & Domestic Partnership Statutes*, (Nov. 18, 2014), http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx.

States eventually came to recognize that civil unions and domestic partnerships did not provide full equality. Legislatively or judicially, they began granting full marriage rights, concluding that "creation of a second, separate legal entity for same sex couples" reflected "an official state policy that that entity is inferior to marriage, and that the committed relationships of same sex couples are of a lesser stature than comparable relationships of opposite couples." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 475 (Conn. 2008); *see also Garden State Equality v. Dow*, 82 A.3d 336, 368-69 (N.J. Super. Ct. Law Div. 2013) (civil unions failed to accord equality); *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass. 2004) (granting same-sex couples civil unions instead of marriage would defy constitutional equality mandate). States took different approaches

regarding the continuation of civil unions and comprehensive domestic partnerships once marriage became available to all couples regardless of their sex, but all continued to recognize couples in undissolved civil unions or comprehensive domestic partnerships either as married or in a legal status conferring all the rights of marriage. *See* Feinberg, 87 Temple L. Rev. at 55.[2]

With the advent of marriage equality in Maryland in 2013 and the end of marriage bans nationwide in 2015, same-sex families finally had full legal recognition and "equal dignity in the eyes of the law." *Obergefell,* 135 S. Ct. at 2608. The Circuit Court's decision in this case erroneously denied that equal recognition to Mr. Sherman, Mr. Rouse, and other same-sex couples who entered civil unions before Maryland and the nation ended their exclusion from marriage, leaving them bound in a relationship with enormous legal and other consequences.

II. CIVIL UNIONS CREATE A RECOGNIZED SPOUSAL RELATIONSHIP WITH THE SAME SUBSTANTIVE RIGHTS AND OBLIGATIONS AS MARRIAGE.

In establishing civil unions, the Vermont legislature's intent "was to create legal equality between relationships based on civil unions and those based on marriage." *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 968 (Vt. 2006). The statute granted same-sex couples access to a legal spousal relationship that provided them with all of the same "substantive rights and obligations" as marriage, 15 V.S.A. §1204, defining the parties as

[2] Vermont law is clear that civil unions remained in effect after the passage of marriage equality. *See Solomon v. Guidry*, 155 A.3d 1218, 1219-1220 (Vt. 2016).

"spouses" and requiring them to be responsible for, and to support one another, "to the same degree and in the same manner as married persons." 15 V.S.A. §1201(2); 1204(b)-(c).[3]

States across the country recognized this spousal status and its attendant protections, including states that did not establish civil unions or domestic partnerships. For example, many states have recognized the legal parentage of both spouses of children born during their civil union. *See, e.g.*, *Legg v. Commonwealth*, 500 S.W.3d 837 (Ky. App. 2016); *Hunter v. Rose*, 975 N.E.2d 857 (Mass. 2012); *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010); *Appel v. Celia*, 98 Va. Cir. 140, 2018 WL 6794551 (Va. Cir. Ct. 2018). States have also required civil union spouses to dissolve their spousal relationship before entering into a new marriage. *See Elia–Warnken v. Elia*, 972 N.E.2d 17, 22 (Mass. 2012). In fact, since the Supreme Court's decision in *Obergefell*, no state has refused to recognize civil unions as the legal equivalent of a marriage or to afford civil union spouses the same legal rights and protections given to marital spouses under state law.

The federal government also recognizes civil unions in some significant contexts, including establishing entitlement to Social Security spousal benefits, Soc. Sec. Admin., Program Operations Manual System, GN 00210.004 Same-Sex Relationships - Non-

[3] The same is true of the statutes establishing parallel spousal statuses in other states. *See, e.g.*, 13 Del. Code Ann. § 212 (parties to a civil union "shall have all the same rights, protections and benefits, and shall be subject to the same responsibilities, obligations and duties under the laws of this State … as are granted to, enjoyed by or imposed upon married spouses."); N.J. Stat. Ann. § 37:1-31 ("Civil union couples shall have all of the same benefits, protections and responsibilities under law … as are granted to spouses in a marriage.").

Marital Legal Relationships (Feb. 10, 2016); and certain Veteran's benefits, Dep't of Veterans Affairs, VA Handbook 5009/6, Transmittal Sheet, Employee Benefits, 1-6 (June 16, 2014).

As the parties' story illustrates, Maryland courts also have extended spousal protections to parties to a civil union. Mr. Rouse's access to stepparent adoption to secure his relationship with the parties' older son was based on that court's recognition of the parties' spousal relationship. (E-22, 54-61). Having received the benefits and protections of his spousal status, Mr. Rouse must now also be subject to its responsibilities.

Maryland's recognition of those spousal rights and obligations comports with the judicial mandate that led Vermont to create civil unions and to provide civil union spouses with exactly the same protections given to married spouses. As Vermont law makes clear, that equal treatment includes the protections of domestic relations law, including applying "separation and divorce," "property division and maintenance" to the spouses in a civil union. *See* 15 V.S.A. §1204(d). By denying civil union partners the certainty of the same forum, process, and remedies to end and unwind their relationships that are available to married couples, the Circuit Court's decision disregards the very purpose of civil unions and the scope of the protections expressly given to civil union spouses under Vermont law. It also perpetuates the insecurity and indignities that the Supreme Court found unconstitutional in *Obergefell*, depriving some Maryland families of their right to equal protection under the laws.

III. MARYLAND SAME-SEX COUPLES ARE ENTITLED TO DISSOLVE THEIR CIVIL UNIONS UNDER THE DIVORCE PROVISIONS OF THE FAMILY LAW ARTICLE.

Contrary to the Circuit Court's opinion, applying the Family Law Article's divorce provisions to same-sex couples seeking to end their civil union is both permissible and necessary. Telling these couples that their legal unions are not on a par with others and denying them decrees of divorce and its attendant financial and property protections runs afoul of equality principles and established comity jurisprudence.

A. Maryland should apply comity to civil unions consistent with the reasoning and analysis of *Port v. Cowan* and similar case law from across the country.

Mr. Sherman's brief addresses the comity, jurisdictional, and other principles supporting the application of Maryland's divorce laws to dissolve his civil union and assess support and division of property. *Amici* agree with those arguments. Maryland has a long history of extending comity to valid foreign marriages in the context of a divorce action. *See, e.g., Port*, 426 Md. at 442-446; *Henderson v. Henderson*, 199 Md. 449, 457–58 (1952); *Fensterwald v. Burk*, 129 Md. 131, 137–38 (1916). This Court need look no further than *Port* to conclude that the Circuit Court had the authority to grant the relief requested by the Appellant. Both marriages and civil unions are contracts that create legally enforceable spousal relationships subject to divorce, equitable property division, and spousal maintenance. *See Port*, 426 Md. at 444, n.12. Comity requires recognition of civil unions even though they could not have been entered in Maryland. *Id.* at 444-447. And Maryland has no statutory prohibition or public policy barring their recognition *See Port*, 426 Md. at 445-449.

Even before passage of the CMPA, the *Port* Court found that a same-sex couple's 2008 California marriage was entitled to comity under Maryland law and was neither repugnant to the public policy of Maryland nor expressly prohibited by statute. *See Port*, 426 Md. at 447-449. All the more so, after the passage of the CMPA and the Supreme Court's decisions in *Windsor* and *Obergefell* holding unconstitutional governmental discrimination against the relationships of same-sex couples, *see Windsor*, 570 U.S. at 774-75; *Obergefell*, 135 S. Ct. at 2607-08, Maryland law requires recognition of same-sex couples' spousal relationships, including those obtained through civil unions at a time when marriage was not available in this state. Following *Port's* analysis, Maryland residents who entered into Vermont civil unions are entitled to the uniform application of comity to their legal spousal relationships, and they are entitled to obtain full relief in divorce actions.

The Superior Court of Pennsylvania reached the same conclusion in *Neyman v. Buckley*, 153 A.3d 1010 (Penn. Super. 2016). Neyman appealed the Family Court's dismissal of her divorce action seeking the dissolution of her Vermont civil union. *See id*. at 1011. The court considered whether comity mandated recognition of a civil union as the legal equivalent of marriage for dissolution under the Divorce Code. *See id*. at 1014-17. Explaining that Pennsylvania had a strong public policy favoring the recognition of marriages and finding no public policy exception preventing Pennsylvania from recognizing the civil union, the Court held the civil union was the legal equivalent of marriage under the Pennsylvania Divorce Code. *See id.* at 1011, 1017-19.

Both the *Port* and *Neyman* courts emphasized that recognizing the spousal relationships formed by same-sex couples when they were barred from marrying at home

"promotes uniformity in the recognition of the marital status" and instills stability in "one of the most important of human relations," *Port*, 426 Md. at 445 (quotation omitted), honoring the expectations of the parties that they would be subject to the full range of spousal rights and protections. *See Neyman*, 153 A.3d at 1019. Further, the *Neyman* court recognized that "declining to acknowledge the parties' civil union as the equivalent of marriage would essentially penalize the parties simply for their same-sex status because the Vermont civil union statute explicitly granted same-sex couples equivalent rights to those only available to opposite-sex couples through marriage at that time." *Id*.

Other courts across the country have concurred, recognizing out-of-state civil unions under principles of comity for purposes of dissolution. *See, e.g.*, *O'Reilly-Morshead v. O'Reilly-Morshead*, 163 A.D.3d 1479 (N.Y. App. Div. 2018) (extending comity to civil union in dissolution action); *Dickerson v. Thompson*, 73 A.D.3d 52 (N.Y. App. Div. 2010)(same). Like the Circuit Court, some other courts have emphasized that parties to these spousal relationships need a judicial remedy to dissolve that relationship. *See, e.g.*, *Dickerson v. Thompson*, 88 A.D.3d 121, 125-26 (N.Y. App. Div. 2011). In the absence of such a remedy, these couples remain subject to all of the rights and obligations of their spousal relationship, including the legal inability to marry a new spouse. "[I]n the absence of a judgment granting a dissolution," civil union couples "continue to be interminably bound as partners to the union." *Dickerson*, 88 A.D.3d at 125.

In addition to violating the equal treatment required by *Obergefell*, denying civil union partners a way to dissolve their spousal relationship also violates the constitutionally protected right to access the courts to obtain a divorce. In *Boddie v. Connecticut*, the

Supreme Court struck down a court filing fee effectively blocking access to divorce for indigent spouses, concluding that "a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 401 U.S. 371, 376, 383 (1971). Even more starkly here, denying the parties' access to the divorce process raises precisely these constitutional concerns.

The Circuit Court's decision fails to address these serious constitutional concerns. While recognizing that the parties needed a remedy, the opinion speculates in a footnote that it might be obtained through declaratory relief, and simultaneously denies this family access to the full range of divorce protections anticipated by both the Maryland Family Law Article and the Vermont civil union statute. As the Maryland courts have recognized, Maryland's provisions regarding maintenance and an equitable property distribution are intended "to ease the transition for the parties from the joint married state to their new status as single people living apart and independently," *Simonds v. Simonds*, 165 Md. App. 591, 605 (2005) (quotation omitted), and are "grounded in the duty of each spouse to contribute his or her best efforts to the marriage for the benefit of the family unit." *Unkle v. Unkle*, 305 Md. 587, 595–96 (1986). These protections apply equally to couples in a civil union.

Comity requires more than a mere declaration dissolving the spousal status between the parties. In *O'Reilly-Morshead*, the New York appellate court addressed whether it was error to treat property acquired after the spouses' 2003 Vermont civil union as non-marital property and therefore not subject to equitable distribution. 163 A.D.3d at 1479-1480. The

court concluded that comity required recognition not only of the civil union itself, but also of the property rights arising from that spousal status. The court held that because the consequences of the spouses' legal relationship included that they would receive "all the same benefits, protections, and responsibilities under [Vermont] law ... as are granted to spouses in a civil marriage," including rights with respect to "divorce ... and property division (§ 1204[d])," comity required the recognition of the property rights arising from the Vermont civil union. *Id.* at 1481-82. The court found that recognizing these spousal protections was consistent with the public policy of New York because the "laws of Vermont and New York both 'predicate [ ] [property rights] on the objective evidence of a formal legal relationship,' *i.e*., the legal union between the parties." *Id.* at 1482.

Maryland's comity jurisprudence, as articulated in *Port*, leads to the same result. Whether viewed as extending comity to the parties' spousal status and applying the full range of the Family Law Article's divorce provisions, or extending comity to the civil union statute's dissolution provisions, the parties are entitled to a judgment ending their spousal relationship and a determination of maintenance and an equitable property division.[4] Depriving the parties of these protections violates both the principles of comity and constitutional law.

[4] Even if, *arguendo*, the Court concludes that the Family Law Article does not apply directly to this family, the Circuit Court can nonetheless exercise its equity jurisdiction to grant the same relief. *See* Md. Code Ann., Fam. Law § 1-201 (granting equity court jurisdiction over divorce); *Conover v. Conover*, 450 Md. 51, 82 (2016) (noting Chancery Court's broad equitable power "to fashion appropriate relief" to protect families and children).

B. Maryland is the appropriate and only state able to provide full relief to Maryland residents seeking to end their civil unions.

No other court can provide Mr. Sherman the relief to which he is entitled. Although the parties established the civil union in Vermont, they cannot dissolve it there. Vermont does allow non-residents who had entered into civil unions there access to its state's courts, but only if: (1) the parties' legal residences do not recognize the civil union for dissolution purposes, 15 V.S.A. § 1206(b)(2), and (2) there are no minor children or property or other disputed issues. *See id.* at § 1206(b)(3), (4). Because these parties have children and unresolved property issues, Vermont is not an option for them. Thus, the Circuit Court's failure to extend comity to their spousal relationship of sixteen years leaves Mr. Sherman without any remedy. Moreover, even if these provisions did apply, no Marylander should have to incur additional expense, burden, and uncertainty of litigation in a distant forum.

CONCLUSION

The Circuit Court's failure to apply comity to the parties' civil union and consider the relief sought by Mr. Sherman in the context of ordinary divorce proceedings denies same-sex couples equal access to Maryland courts for full redress; it subjects them to a separate second-class status for taking advantage of the only option available to them when they entered it; it stigmatizes and demeans their legal spousal relationship; it violates their settled expectations; and it sends the unconstitutional message that these couples' commitments were less meaningful and their families less worthy than those of couples able both to marry and to divorce with the aid of the Family Law Article if their relationships end.

Amici ask this Court to reverse the Circuit Court's opinion, and remand this matter for further divorce proceedings, including on Appellant's claims for an equitable distribution of property and maintenance.

Respectfully submitted.

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,860 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

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Sandy E. James

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of _____, 2019, a copy of the foregoing Brief of *Amici Curiae* was mailed via First Class mail, postage prepaid, and sent via email to:

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