



# North Dakota House of Representatives

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## Minority Leader

**COMMITTEES:**  
Finance and Taxation

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Madam Chairwoman and Members of the Senate Judiciary Committee:

As a State Representative for District 43 in Grand Forks and the House Minority Leader, I write to oppose HCR 3013 in the strongest possible terms. North Dakota must be a welcoming place for *all* its current and future residents. This resolution offers the opposite message, telling thousands of our neighbors that they are not fully welcome in this state. I urge a strong rejection of this damaging resolution because it ignores the rule of law, disregards a binding United States Supreme Court opinion grounded in the dignity of all Americans, and sends a harmful and gravely wrong message to gay and lesbian North Dakotans.

As an initial problem, HCR 3013's own words call for the Legislative Assembly to ignore the rule of law completely. The resolution proclaims that the "Legislative Assembly rejects the United State Supreme Court decision in *Obergefell v. Hodges*."<sup>1</sup> But we, as the Legislative Assembly, have no right, ability, or authority to reject a Supreme Court decision interpreting the federal constitution. The principle of judicial review dates back over 220 years to the landmark *Marbury v. Madison* decision of 1803. Because of it, the Supreme Court is the final arbiter of federal constitutionality. To "reject" the Court's *Obergefell* decision is not something the Legislative Assembly gets to do; the rule of law compels us to abide by it unless and until it is overturned in the normal course of federal litigation. This is true even when we disagree with a Court ruling. Thus, the only thing passing this resolution would reject is the very concept of the rule of law, and I strongly urge the Senate to reject that dangerous approach.

But we also do not need to lean on broader ideals like the rule of law to dismiss this resolution, because *Obergefell* and the concepts of liberty and individual rights enshrined therein should be affirmed on their own merits. However, I suspect most legislators have not taken the time to read Justice Anthony Kennedy's majority opinion in the case. I would encourage everyone to do so. If one is going to vote to "reject" a legal opinion, the least one can do is to read it first.

In *Obergefell*, Justice Kennedy, writing for the Court, starts by describing the underlying facts of the plaintiffs' cases challenging then-existing state laws that denied them marriage equality. James Obergefell, the

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<sup>1</sup> The HCR also fundamentally misunderstands that federal courts only consider actual cases or controversies, meaning the courts only adjudicate cases wherein a named plaintiff with a cognizable legal harm has brought a lawsuit against a named defendant who might be legally liable for that harm. Our federal courts do not issue advisory opinions in which they offer legal analysis and conclusions on a hypothetical question. Yet HCR 3013 seemingly calls on the Supreme Court to do just that by "urg[ing]" it to overturn the *Obergefell* ruling, apparently hoping that the Court will materialize such a ruling out of thin air notwithstanding there being no active case before it. If the Legislative Assembly wants the Court to reconsider any ruling, an HCR is not the vehicle to do so. Rather, an actual case must be filed in federal court, at which point the Legislative Assembly (or an individual legislator) could file a "friend of the court" amicus curiae brief advocating for overturning binding precedent. But as it stands, the Supreme Court's only appropriate response to HCR 3013 would be to summarily disregard it.

named lead plaintiff, had been in a committed relationship with his partner, John Arthur, for over 20 years. In 2011, Arthur was diagnosed with ALS (Lou Gehrig's Disease), leading to the couple's desire to marry before the disease took Arthur's life. They traveled from their home state of Ohio (where same-sex marriage was illegal) to Maryland (where it was legal) to wed, holding their ceremony inside a medical transport plane parked on a Baltimore airport tarmac because Arthur was too infirmed to relocate elsewhere. Upon Arthur's passing, however, Ohio refused to list Obergefell as the surviving spouse on the death certificate, an indignity Justice Kennedy described as the state requiring the loving couple to "remain strangers even in death." Kennedy went on to describe two other plaintiffs: one a lesbian couple who had adopted three children but could only list one woman on each birth certificate issued in their state and another a gay couple whose marriage was not recognized in the state they lived in to allow one spouse to continue serving his country in the Army Reserve.

Against this factual backdrop, Justice Kennedy eloquently laid out why the United States Constitution protects everyone's fundamental right to marry whomever they choose. "[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy," he wrote, observing that "decisions concerning marriage are among the most intimate that an individual can make." Grounding his analysis in all individuals' inherent dignity, Kennedy wrote "[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." Putting legal analysis into personal terms, Kennedy noted that "[m]arriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other." For these reasons, the Court held that "it would disparage [same-sex couples'] choices and diminish their personhood to deny them [the] right [to marry]," particularly because the "cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties."

In especially moving concluding remarks, Kennedy wrote the following, which ought to guide our Assembly's actions on this resolution:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Justice Kennedy's stirring words—with their focus on dignity—also closely match the reality I personally experience when I think of the gay and lesbian community in my district, city, and state. When I am home in Grand Forks, I shop at LGBT-owned small businesses; I litigate legal cases with and against LGBT attorneys; gay and lesbian law enforcement officers keep my community safe; gay and lesbian teachers educate my children in public school; when I am sick, LGBT doctors and nurses care for me in the emergency room; and when I look out the window of my own home, I see my next-door neighbors, a gay couple whose marriage to each other looks indistinct from my own marriage to my wife. Likewise, when I have the honor of serving here at the Capitol, I have the pleasure of serving alongside LGBT legislators, staff, lobbyists, and state employees—each of whom do their jobs with distinction and many of whom are married to same-sex partners.

This resolution is a shameful attack on these individuals and on all gay and lesbian North Dakotans who simply want to wed whomever they choose. The resolution sends the message that gay and lesbian families are unwanted and unwelcome in our great state. Can you imagine the message it broadcasts to any LGBT family considering relocating to North Dakota? If basic human decency is not enough of a reason to defeat this resolution, perhaps its detrimental impact on our workforce crisis is.

On a final personal note, I had the pleasure of living and working in Washington, D.C., when the Supreme Court issued its *Obergefell* decision in 2015, coincidentally just months after my own wedding. It was a jubilant day in the District, with spontaneous celebrations springing up outside the White House. On my daily commute home from work, I made a point of walking by the White House to experience this joy first-hand. For over a decade now, I have kept on my phone the photo I took that evening as a proud reminder that love wins.



Let that be true in North Dakota, too. Let us affirm the dignity of all North Dakotans. Let us send the message, loud and clear, that North Dakota stands for marriage equality and embraces the powerful mantra that, in fact, love is love. This committee can and should do that by recommending a "do not pass" on HCR 3013, and the Senate should soundly defeat this resolution.