IN THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
Civil Action, File Number CV 5965

Katherine Varnum, *et al.*,
Plaintiffs

vs.

Timothy J. Brien, in his official capacities as the Polk County Recorder and Polk County Registrar
Defendants

} Tender of Brief of *Amici Curiae* Professors of Law and History

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Come Now, the "Iowa Professors of Law and History," as *amici curiae* and do hereby tender their attached brief for benefit of the Court's deliberations in this matter.

WHEREFORE *Amici* Professors ask that their brief be filed and considered.

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} Brief of *Amici Curiae* Professors of Law and History

Before the Honorable Iowa District Court Judge Robert B. Hanson

/s/ by: Randall C. Wilson

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INTRODUCTION

This case calls on the State of Iowa to reaffirm its historic commitment to protecting the equality and individual liberties of *all* of its citizens, including its lesbian and gay male citizens. It requires this court to interpret Iowa's unique constitution with due respect for both text and tradition. The case must be analyzed against the backdrop of Iowa's leadership and courage in the areas of civil rights and family law, and the willingness of its courts to uphold constitutional mandates in the face of efforts to legislate prejudice and discrimination.

Plaintiffs seek nothing more than to share in the protections and responsibilities of civil marriage. As this brief demonstrates, a decision in their favor would be in the very best traditions of Iowa values and jurisprudence.

INTEREST OF THE AMICI

Amici are professors at Iowa institutions of higher education who care deeply about advancing equality and protecting the welfare of the citizens of Iowa. They represent a broad spectrum of expertise in the fields of law and history, including Iowa law and history. *Amici* present this brief to tell the story of Iowa's unique legal and social history, and to analyze the equality provisions of its constitution in the context of that history. This brief chronicles the state's devotion to the principles of equality and individual liberty, as well as its

courage to live up to those principles in the face of popular prejudice. *Amici* believe that a decision striking down the discriminatory exclusion of lesbian and gay couples from civil marriage is the only decision that would be consistent with Iowa's longstanding commitment to protecting civil liberties and with the precedents of its courts in safeguarding equality. A complete list of the *amici* is provided at Appendix A.

ARGUMENT

I. Iowa's Legal and Social History Demonstrates a Unique Commitment to Advancing Equal Rights and Protecting Individual Liberties.

Iowa is "the middle land."[1] Situated at a center point between the coasts, Iowa is identified in the American mind with strong values, civic responsibility, and common sense. Its history and culture encompass the traditionalism of a rural heritage, the restlessness and individualism of the American frontier, the dynamism of industry, and the vitality of urban life.

A bellwether by virtue of its presidential caucuses, Iowa is neither "red" nor "blue"; its modern politics are "a mixture of the traditional and the path-breaking."[2] Iowa's people – "somewhat conservative in their politics, usually liberal in their social thinking"[3] – are known for their commitment to family and

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[1] *See* DOROTHY SCHWIEDER, IOWA: THE MIDDLE LAND (1996).

[2] LELAND L. SAGE, A HISTORY OF IOWA 318 (1974).

[3] SCHWIEDER, *supra* note 1, at 324.

community. "While [Iowans] may be organized internally into different religious congregations, political parties, or business interests, it is our families and hometowns that have traditionally commanded Iowans' primary loyalties."[4]

Iowa is also known for another, perhaps less widely known characteristic, but one entirely in harmony with its values of family and community: a powerful commitment to the equality and inalienable rights of all people within its borders. This commitment, enshrined in Article I, § 1, of the state constitution,[5] has been given meaning by the opinions of Iowa's jurists, the foresight of its lawmakers, and the powerful personalities and national leaders Iowa has nurtured. Indeed, one scholar has argued that Iowa's record of protecting civil rights and civil liberties is unique in the Union.[6] The state seal, unchanged since 1847, proclaims a motto that looks both backward towards achievement and forward towards vigilance: "Our liberties we prize, and our rights we will maintain."

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[4] Tom Morain, *Introduction*, in OUTSIDE IN: AFRICAN-AMERICAN HISTORY IN IOWA, 1838-2000 xv, xvii (Bill Silag ed., 2001). Morain is former administrator of the State Historical Society of Iowa.

[5] "All men and women are, by nature, free and equal, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." IOWA CONST. art. 1, § 1.

[6] *See* Harlan Hahn, *Civil Liberties in Iowa*, 38 ANNALS OF IOWA 76 (1965).

In challenging private prejudice and arbitrary public restraints on individual dignity and accomplishment, Iowa has not been content to await the word of the federal courts, the deliberations of sister states, or the safety of national consensus. Twenty-six years before ratification of the Thirteenth Amendment, the Iowa Supreme Court declared that "no man in this territory can be reduced to slavery."[7] Eleven years before ratification of the Fourteenth Amendment, the state's constitution guaranteed African-Americans, on the same terms as all other citizens, the rights to life, liberty, and property.[8] Nearly a century before *Brown v. Board of Education*, Iowa rejected a "separate but equal" system of public education for African-American children.[9]

Iowa also was the first state to admit a woman to the practice of law and the home state of the nation's most heralded advocate for women's suffrage. In the darkest days of McCarthyism, it was the only state to defeat a legislative measure that would have imposed a teachers' loyalty oath.[10] Iowa has led other states in equal access to education and the reform of family law. Six Iowa cities, including its largest city and its state capitol, prohibit public and private employers from discriminating on the basis of sexual orientation, and the state is

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[7] *In re: Ralph* , 1839 WL 2764, at *6 (Iowa Terr. July 1839).

[8] SAGE, *supra* note 2, at 136.

[9] *See Clark v. Board of Directors*, 24 Iowa 266 (1868).

[10] *See* Arnold A. Rogow, *The Loyalty Oath Issue in Iowa, 1951*, 55 AM. POL. SCI. REV. 861 (1961).

one of only 13 to offer domestic partner benefits to state employees.[11] The University of Iowa's gay and lesbian student group was founded in 1970, making it one of the first such organizations on any American college campus,[12] and UI was one of the first institutions to add sexual orientation to its non-discrimination policy.

Iowa's longstanding commitment to equality, and to the use of law and public policy to advance rather than inhibit individual autonomy and dignity, provide powerful support to Plaintiffs' argument that they have an equal right under the Iowa constitution to the protections and responsibilities of civil marriage. The matter before this court transcends differing views about religion, politics, or other matters on which Iowans hold diverse views. It rests instead on first principles on which Iowans long ago found common ground: the value of family, and the right to live on equal terms as a member of one's community.

A. Early Influences

Its earliest settlers "brought to Iowa the idea that individuals possessed the right to govern their own lives,"[13] a value that would shape the state's commitments to tolerance, equality, and freedom of conscience. Abner

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[11] See searchable database of employers providing domestic partner benefits, *available at* http://www.hrc.org/workplace.

[12] *See* http://www.uiowa.edu/%7Eglbtau/history.html.

[13] Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 DRAKE L. REV. 593, 611 (1993).

Kneeland, a pioneer evangelist who "anticipated by a century opinions now held without opposition," settled in Iowa in 1839 after serving jail time in Massachusetts for blasphemy.[14] Following the 1844 murder of Joseph Smith, Jr., in Illinois, nearly 20,000 members of the Church of Jesus Christ of Latter-day Saints crossed into southern Iowa under the leadership of Brigham Young and established their first encampment west of the Mississippi in Lee County.[15] During its territorial years, a vigorous abolitionist movement planted the seeds for Iowa to become, by the end of the civil war, one of the Union's most racially egalitarian states.[16] Iowa passed one of the nation's first civil rights laws in 1884.[17]

When Iowa held its three constitutional conventions between 1844 and 1857, "natural rights and limited government … were already familiar phrases in America's political jargon."[18] The prevailing political philosophy of the times was captured by John Stuart Mill, whose essay *On Liberty* announced a simple

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[14] "Abner Kneeland," Dictionary of Unitarian Universalist Biography, *available at* http://www.uua.org/uuhs/duub/articles/abnerkneeland.html.

[15] State Historical Society of Iowa, Prairie Voices Iowa Heritage Curriculum Annotated Iowa History Timeline, *available at* http://www.state.ia.us/government/dca/shsi/education/heritage_curriculum/timeline/ iowa__timeline_page2.html.

[16] *See* Robert R. Dykstra, *White Men, Black Laws: Territorial Iowans and Civil Rights, 1838-1843*, 46 ANNALS OF IOWA 403 (1982).

[17] Acts of the Twentieth General Assembly, ch. 105, §§ 1-2 (1884).

[18] Kempkes, *supra* note 13, at 617.

but powerful limiting principle for government intrusion into private life: "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[19] "Mill explained that a civilized society actually benefited from diversity and that it therefore should not legally interfere with someone merely seeking to be different."[20] Government could reason, remonstrate, or seek to persuade, but could not compel a citizen to conform to the opinions of the majority.[21] As Mill put the point succinctly in Chapter 3,

> As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself.[22]

What Mill "was telling the world in 1859" about natural rights "could be heard in Iowa City" during the state's three constitutional conventions.[23] Much debate at the final convention in 1857 focused on Art. I, § 1, the first words of which were changed from "All men are, by nature, free and independent," to

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[19] JOHN STUART MILL, ON LIBERTY (1969), ch. 1, *available at* http://bartleby.com/130/1.html.

[20] Kempkes, *supra* note 13, at 618 (footnote omitted).

[21] *See* MILL, *supra* note 19.

[22] MILL, *supra* note 19, ch. 3, *available at* http://bartleby.com/130/3.html.

[23] Kempkes, *supra* note 13, at 620.

"All men are, by nature, free and *equal*." Echoing concepts not only from Mill but from political philosophers such as Hobbes, Locke, and Rousseau, a Bill of Rights committee of the 1857 convention stressed that while some autonomy is relinquished when civil societies are formed, the rights to life, liberty, and property "are not taken away when men associate themselves into governmental organizations."[24] Another delegate argued that its citizens desired Iowa to have "the best and most clearly defined Bill of Rights" of any state.[25] He added,

> The annals of the world … furnish many instances in which the freest and most enlightened governments that have ever existed upon earth, have been gradually undermined, and actually destroyed, in consequence of the people's rights not being guarded by written constitutions.[26]

The primacy of an individual's ability to chart his or her life, free from arbitrary or unjustified government restraints, was not, in Iowa, merely a passing enthusiasm of the mid-19th century. This principle would ring out in "[o]ne of the most important cases decided by the [Iowa Supreme] Court in the early years of the new century,"[27] involving the state government's attack on the corporate existence of the Amana Society. The Society was a religious settlement whose members believed in the communal ownership of property – a belief sharply at

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[24] JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 245 (1857)

[25] *Id*. at 100.

[26] *Id*.

[27] RICHARD, LORD ACTON & PATRICIA NASSIF ACTON, TO GO FREE: A TREASURY OF IOWA'S LEGAL HERITAGE 200 (1995).

odds with prevailing common-law views `regarding property. Invoking the "spirit of tolerance and liberality which has pervaded our institutions from the earliest times,"[28] Justice Ladd explained that the purposes of the state's corporate laws had to be balanced against the Society members' right to religious freedom:

> Certain it is that the status of the individual members [of the Amana Society] is not in accordance with prevailing American ideals. . . . But in this country all opinions are tolerated and entire freedom of action allowed, unless this interferes in some way with the rights of others. Each individual must determine for himself what limit he shall place upon his aspirations…. Under the blessings of free government, every citizen should be permitted to pursue that mode of life which is dictated by his own conscience.[29]

B. Legal and Social Equality

While pledges of equality in the laws and constitutions of other states and the federal government took decades to bear fruit, in Iowa such guarantees were given meaning early on through challenges to injustice in the courts, in the public square, and in everyday life. A series of decisions by its Supreme Court spanning more than a century made Iowa among the most innovative and proactive states in upholding the civil rights of racial minorities. *See* Part II.A, *infra*. The state's history also is distinguished by important advances in equal rights for women.

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[28] *State v. Amana Society*, 132 Iowa 304, 319 (1906).

[29] *Id*. at 317.

Two important measures of a state's commitment to equality are the openness of its public higher education system and of its legal bar to all qualified applicants. On both counts, Iowa has been an exemplar for the nation.

Iowa has been "a true pioneering State in making available what the [Northwest] Ordinance of 1787 called 'the means of education' to all persons, regardless of sex or race."[30] In 1857, the University of Iowa became the first state university in the country to open its degree programs to women.[31] The state's history also "records a string of firsts in providing educational opportunities for African Americans, at times when other states and universities were unwilling to open their doors to former slaves and their descendants."[32]

Iowa also has been a beacon for equality in providing access to the bar. The University of Iowa law school was one of the first to accept an African-American student.[33] The Iowa State Bar Association admitted African-American members long before the American Bar Association followed suit.[34] What would

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[30] ENCYCLOPEDIA OF IOWA 75 (1995).

[31] *Id*.

[32] Dennis J. Shields, *A View From the Files: Law School Admissions and Affirmative Action*, 51 DRAKE L. REV. 731, 732 (2003).

[33] *Id*.

[34] ACTON, *supra* note 27 at 233.

become the National Bar Association, the nation's oldest and largest organization for African-American attorneys, was founded in Des Moines in 1925.[35]

Iowa admitted Arabella Mansfield, the first woman in the United States to practice law, to its bar in 1869 – a "dramatic first" that stood "in great contrast to the position taken in other states."[36] A year later, the General Assembly removed the words "white male" from the statute governing qualifications to practice law.[37] And the first woman admitted to practice before the United States federal courts was reportedly Emma Haddock, of Iowa City, in 1875.[38] Three years later, the state supreme court appointed Haddock to examine law students for admission to the bar.[39]

This early elimination of critical gender barriers evinces what Jennie McCowen, one of the first women to graduate from the University of Iowa Medical Department, described in 1884 as "the progressive and liberal attitude of the State toward women"[40]:

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[35] *Id.*; Shields, *supra* note 32, at 732.

[36] ACTON, *supra* note 27, at 132.

[37] *Id*.

[38] Jennie McCowen, *Women in Iowa*, in 3 ANNALS OF IOWA (October 1884), *available at* http://iagenweb.org/history/annals/oct1884.htm; Ellen A. Martin, *Admission of Women to the Bar*, 1 CHICAGO LAW TIMES (Catharine V. Waite, ed., 1887), *available at* http://womenslegalhistory.stanford.edu/articles/chicagotimes.pdf.

[39] Martin, *supra* note 38.

[40] McCowen, *supra* note 38.

> In no state has it been more freely conceded that human interests are not one but many, and that the work of the world, broad and varied, must fall not upon one sex, nor upon one class, but that each individual, in return for benefit received, is in honor bound to bear his or her share of the burden.[41]

Dr. McCowen documented Iowa women registering patents, producing art and literature, and practicing medicine and law. Women were employed in virtually every line of work – in most cases with "no difference in the salaries paid men and women for the same grade of work."[42]

This spirit must also have inspired Carrie Chapman Catt, who grew up near Charles City and would become the most important force in the American movement for women's suffrage.[43] First elected president of the National Woman Suffrage Association in 1900, Catt criss-crossed the nation and provided indefatigable leadership to the movement for the 19th Amendment, which was finally ratified in 1920 and gave all women the equal right to vote.[44]

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[41] *Id*.

[42] *Id.*

[43] State Historical Society of Iowa, Prairie Voices Iowa Heritage Curriculum Annotated Iowa History Timeline, *available at* http://www.state.ia.us/government/dca/shsi/education/heritage_curriculum/timeline/iowa__timeline_page3.html.

[44] *See generally* NATE LEVIN, CARRIE CHAPMAN CATT: A LIFE OF LEADERSHIP (2006).

C. Reform of Family Law

In the regulation of marriage and family life, which in our federal system is uniquely the province of the states, Iowa has been a model for the principle that family law must first and foremost serve the goals of individual autonomy, dignity, and security. In 1970, when the issue was still highly controversial, Iowa became one of the first two American states to "[lead] American family law jurisprudence into a new era"[45] by allowing couples to divorce without proving fault by one spouse. "The no-fault revolution was grounded on the premise that the legal dissolution of a marriage should be granted solely on a factual finding that the marriage is irretrievably broken."[46] Iowa also was one of the first ten states to protect a married woman from forcible rape by her husband.[47]

Iowa has a long tradition of upholding equality in the fundamental right of civil marriage. It eliminated its short-lived law banning interracial marriage in 1851 (the ban had been part of the Territorial Laws of 1839-40), making it the third state to reject so-called anti-miscegenation laws.[48] Iowa's closest neighbors

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[45] Bradley A. Case, *Turning Marital Misery Into Financial Fortune: Assertion of Intentional Infliction of Emotional Distress Claims By Divorcing Spouses*, 33 J. OF FAMILY L. 101, 101 (1994-95). *See also* Jack W. Peters, *Iowa Reform of Marriage Termination*, 20 DRAKE L. REV. 211 (1971).

[46] Case, *supra* note 45, at 101.

[47] *See* Martin D. Schwartz, *The Spousal Exemption for Criminal Rape Prosecution*, 7 VT. L. REV. 33, 41 (1982).

[48] *See* table at http://www.lovingday.org/map_access.htm.

took many years to follow suit: such bans fell in Illinois in 1874; in South Dakota in 1957; in Nebraska in 1963; and in Missouri not until 1967, after the Supreme Court finally struck down all remaining miscegenation laws in *Loving v. Virginia*.[49]

II. Iowa's Judiciary Has Played a Paramount and Courageous Role in Protecting Equality and Liberty.

From its earliest days, the Iowa judiciary has played a preeminent and indispensable role in protecting the state constitution's guarantees of freedom, equality, and inalienable rights. This tradition of judicial leadership and independence is so essential to the state's history that the Iowa Judicial Branch devotes a section of its web site to the state's early civil rights cases.[50] "Like the courts of today," the Judicial Branch explains, "the early Iowa courts were sometimes called upon to decide cases that involved volatile social or political controversies of the time. . . . These decisions demonstrate legal foresight as well as a deep and abiding respect for the values enshrined in our Constitution and

[49] 388 U.S. 1 (1967); *see* table at http://www.lovingday.org/map_access.htm.
[50] Iowa Judicial Branch, *Early Civil Rights Cases*, *available at* http://www.judicial.state.ia.us/Public_Information/Iowa_Courts_History/Civil_Rights/.

Bill of Rights."[51] This history sheds valuable light on the role of the judiciary in deciding whether state officials may exclude same-sex couples from the protections and responsibilities of marriage.

A. Enforcing Civil Rights

In its very first decision, the Iowa Supreme Court considered the case of Ralph, a former Missouri slave whose master, Jordan Montgomery, allowed him to go to Dubuque to earn money to buy his freedom.[52] After Ralph had been in Iowa for five years, Montgomery sent agents into the state to reclaim him by force. The Supreme Court held that since Montgomery had given Ralph permission to resettle in Iowa, the former slave could not be labeled a fugitive. Although the court ruled that Ralph was obligated to pay the $550 Montgomery had demanded for his freedom, such a debt could not form a basis on which any "man in this territory can be reduced to slavery."[53] The case of Ralph stands in sharp contrast to the infamous *Dred Scott* decision 18 years later,[54] in which the U.S. Supreme Court ruled that even in free states, slaves had no legal claim to freedom.

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[51] *Id*.

[52] *In re: Ralph*, 1839 WL 2764 (Iowa Terr. 1839). *See also* SCHWIEDER, *supra* note 1, at 68-69.

[53] *In re: Ralph*, 1839 WL 2764, at *6.

[54] *See Dred Scott v. Sandford*, 60 U.S. 393 (1856).

On the question of "separate but equal" systems of education, the Iowa Supreme Court was nearly a century ahead of its federal counterpart in declaring segregated schools to be intolerable and contrary to law. The 1868 case, *Clark v. Board of Directors*,[55] concerned Susan B. Clark, a 12-year-old girl who had been denied admission to Muscatine Grammar School No. 2 because of her race. The court said the local school board had no authority to deny African-American children the right to equal education merely because "public sentiment in their district is opposed to the intermingling of white and colored children."[56] To do so "would be to sanction a plain violation of the spirit of our laws [and] tend to perpetuate the national differences of our people and stimulate a constant strife."[57] Not until *Brown v. Board of Education*[58] would the U.S. Supreme Court locate the federal constitutional principles and summon the courage to reach the same conclusion.

Constitutional scholar Suzanna Sherry cites *Clark*[59] as a prominent example of one of the noblest yet most fragile traditions of American self-government: judges willing to assert their independence when fidelity to the law

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[55] 24 Iowa 266, 1868 WL 145 (1868).

[56] 1868 WL 145, at *6.

[57] *Id*.

[58] 347 U.S. 483 (1954).

[59] Suzanna Sherry, *Independent Judges and Independent Justice*, 61 LAW & CONTEMP. PROBS. 15, 18 (Summer 1998).

and constitutional principles requires it, even when doing so runs "contrary to both popular sentiment and legislative will."[60] Sherry argues that such courageous and independent judges have been "vindicated by history."[61]

> We do not praise the majority in *Plessy v. Ferguson*, which upheld segregation in 1896, or the majority in *Korematsu v. United States*, which affirmed the internment of Japanese-Americans in 1944. We admire instead the Justices who dissented in each of those cases. . . . So when we try to achieve a balance between independence and accountability, we should be careful not to be blinded by present passions. What we might today think is excessive judicial activism and insufficient accountability might in a hundred years be viewed as a shining example of judicial courage.[62]

In the same vein, the Iowa Judicial Branch explains how judicial independence gives courts the freedom to render fair and impartial decisions "without yielding to political pressure or intimidation."[63]

> Although it may be appropriate for politicians to consider public opinion and the views of special interest groups when drafting laws and regulations, it is never appropriate for judges to do so when deciding cases. Judges must remain impartial. In this respect, the judiciary is very different from the other two branches of government. Judges are

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[60] *Id.* at 15.

[61] *Id.* at 19.

[62] *Id.*

[63] Iowa Judicial Branch, *Judicial Independence*, *available at* http://www.judicial.state.ia.us/Public_Information/About_Judges/Judicial_Independence_and_Accountability/.

> accountable to the Constitution and the law—not political pressure.[64]

Five years after *Clark*, the Iowa Supreme Court considered the case of Emma Coger, a mixed-race woman who had been forcibly removed from a steamboat dining cabin reserved for whites.[65] In holding that Coger was entitled to the same rights and privileges as white passengers, the court invoked the federal Civil Rights Act of 1866 and the Fourteenth Amendment, but ultimately rested its conclusion on Art. I, § 1 of the Iowa Constitution:

> The decision is planted on the broad and just ground of the equality of all men before the law, which is not limited by color, nationality, religion or condition in life. This principle of equality is announced and secured by the very first words of our State constitution which relate to the rights of the people, in language most comprehensive, and incapable of misconstruction, namely: "All men are, by nature, free and equal."[66]

The Iowa Supreme Court's "fundamental concern for equal treatment for all"[67] also led to breakthroughs for women. As early as 1869, it ruled that women could not be denied the right to practice law. As a result, Arabella

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[64] *Id*.

[65] *Coger v. Northwestern Union Packet Co.*, 37 Iowa 145, 1873 WL 368 (1873).

[66] 1873 WL 368 at *5. As the Iowa Judicial Branch notes on its web site, "[t]he same conclusion" about equal access to places of public accommodation "was not reached by the U.S. Supreme Court until *Heart of Atlanta Motel, Inc. v. United States*[, 379 U.S. 241] (1964), a case that upheld the 1964 Civil Rights Act." Iowa Judicial Branch, *Early Civil Rights Cases*, *supra* note 50.

[67] Iowa Judicial Branch, *Early Civil Rights Cases*, *supra* note 50.

Mansfield became the first woman admitted to the bar in any state of the Union[68] – three years before the U.S. Supreme Court would rule that women did *not* have a right to practice law under the federal Constitution.[69] The Iowa judiciary also was one of the first to hold that the Nineteenth Amendment, in extending to women the right to vote, made them eligible for jury service as well.[70] Seven years after amendment was ratified in 1920, Iowa was still among only a minority of states where women served on juries.[71]

In 1949, the Iowa Supreme Court returned to the issue of racial equality in *State v. Katz*.[72] The case involved two African-American Des Moines residents who had been refused ice cream at a downtown soda fountain.[73] The store manager was tried and convicted under a state statute originally passed in the late 1880s making it a crime to refuse service on the basis of race. The Supreme Court affirmed the conviction. As one authority on Iowa's African-American

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[68] *Id*.

[69] *Bradwell v. Illinois*, 83 U.S. 130 (1872).

[70] *State v. Walker*, 192 Iowa 823, 836 (1921).

[71] Burnita Shelton Matthews, *The Woman Juror*, 15 WOMEN LAWYERS' J. (April 1927), *available at* http://womenslegalhistory.stanford.edu/articles/juror.htm.

[72] 241 Iowa 115 (1949).

[73] *See* Ronald N. Langston, *Iowa's record on rights precedes landmarks*, DES MOINES REGISTER, Nov. 21, 1999, *available at* http://desmoinesregister.com/extras/civilrights/iowalegacy.html; Shirley Salemy, *Activists keep alive memory of Iowa's civil-rights pioneers*, DES MOINES REGISTER, June 21, 1998, *available at* http://desmoinesregister.com/extras/civilrights/katz.html.

history has written, the state's civil rights pioneers not only "had the courage and conviction to challenge injustice," they also "found support in Iowa's institutions," including her courts.[74]

B. Rejecting Regressive and Outdated Laws

For almost a century and a half, on fundamental issues of law concerning marriage, children, family relations, and privacy, Iowa courts have not hesitated to break – and to do so boldly – from outdated and oppressive legal regimes clung to by other states.

As far back as 1867, the Iowa Supreme Court abandoned "the harsh common law rule that a father was entitled to absolute custody of his children in the event of a divorce."[75] Instead, in *Cole v. Cole* it articulated the question that today frames every case involving children: "what does the best interest of [the] child require?"[76] The court awarded custody of the couple's 13-year-old son to his disabled mother because "the evidence showed that the father was often drunk and violent and that best interests of the child would be served in his mother's care."[77] In breaking with a hoary common law command, the court

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[74] Langston, *supra* note 73. In a similar public accommodations case, an Iowa federal court held in 1954 that the state's Civil Rights Act, first enacted in 1884, protected an African-American woman's right to gain admission to a public ballroom. *Amos v. Prom, Inc.*, 117 F. Supp. 615 (N.D. Iowa 1954).

[75] ACTON, *supra* note 27, at 133.

[76] 23 Iowa 433, 1867 WL 355, at *8 (1867).

[77] ACTON, *supra* note 27, at 133.

stressed its duty to decide the case based on what "humanity, common reason and the best interests of society demand[]."[78] Later Iowa decisions continued to recognize a more equal role for women in marriage.[79]

In 1956, the Iowa Supreme Court held that a wife could bring a cause of action for loss of consortium against a defendant who had negligently injured her husband.[80] At common law, only a husband was allowed to bring a loss of consortium action – a rule based on what the court excoriated as the "hollow, debasing, and degrading philosophy" that a wife's legal personality was merged with that of her husband.[81] Even by 1956, the general rule among states was that a wife could bring such an action only where her husband had been intentionally injured. In extending a cause of action for negligent injury as well, the court acknowledged that it was rejecting "the great weight of authority" from other states, but it deemed such authority worthy of support only when it "can stand the scrutiny of logic and sound reasoning in the light of present day standards and ideals. . . . When the reason for the rule ceases, so should the rule."[82]

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[78] *Cole*, 1867 WL 355, at *7.

[79] *See*, *e.g.*, *Johnson v. Barnes*, 69 Iowa 641 (1886) (both parents responsible for support of a child); *Niemeyer v. Chicago, B&Q Ry. Co.*, 143 Iowa 129 (1909) (in a personal injury action, married woman may sue for her own lost earnings); *Reid v. Reid*, 216 Iowa 882 (1933) (wife has capacity to enter into a contract with her husband).

[80] *Acuff v. Schmit*, 248 Iowa 272 (1956).

[81] *Id*. at 280.

[82] *Id*. at 280-81 (citations and quotation marks omitted).

In 1980, the Iowa Supreme Court held that a child custody order could not be modified merely because the custodial parent was in an interracial relationship[83] – four years before the U.S. Supreme Court would reach the same conclusion on federal grounds.[84] "Community prejudice," the Iowa court declared, "cannot be permitted to control the makeup of families."[85]

The Iowa Supreme Court has applied that principle to the question of sexual privacy as well. It held in 1976 that the state's sodomy law, as applied to the private consensual conduct of an opposite-sex couple, violated the federal Constitution's equal protection guarantee by criminalizing conduct for unmarried persons that was not criminalized for married couples.[86] (The sodomy law was repealed in its entirety in 1978.) In this respect, the Iowa Supreme Court was ahead of the U.S. Supreme Court by 25 years: it was not until *Lawrence v. Texas*[87] in 2003 that the U.S. Supreme Court finally struck down (on federal due process principles) the 14 remaining state sodomy laws, including 10 that applied both to same- and opposite-sex couples.

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[83] *In re: Marriage of Kramer*, 297 N.W.2d 359 (Iowa 1980).

[84] *See Palmore v. Sidoti*, 466 U.S. 429 (1984). *See also* Kim Forde-Mazrui, *Black Identity and Child Placement: the Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 931 n.35 (1994).

[85] *Kramer*, 297 N.W.2d at 361.

[86] *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976).

[87] 539 U.S. 558 (2003).

The Iowa Supreme Court once again took a practical and independent course when in 1981 it abolished the common law cause of action for "alienation of affections."[88] Casting aside generations of legal cant, the court called such a cause of action "useless as a means of preserving a family" as well as "demean[ing to] the parties and the courts."[89] The court observed that while the action had been abolished by legislative action in 18 states and the District of Columbia, its decision would make Iowa only the second state to do so by judicial decision.[90] Nonetheless, the court rejected the notion that such a change must "come from the legislature rather than from the courts,"[91] noting that it is the duty of the courts "to monitor and interpret the common law, and to abandon antiquated doctrines and concepts."[92] Those words apply to the letter to this case.

III. In Light of Iowa History and Jurisprudence, this Case Requires Rigorous Scrutiny Under Article I, § 1 of the Iowa Constitution.

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[88] *Fundermann v. Mickelson*, 304 N.W.2d 790, 791 (Iowa 1981).

[89] *Id*. at 791.

[90] *Id*. at 792.

[91] *Id.* at 793.

[92] *Id*. (citation omitted).

For more than a century and a half, the touchstone of Iowa's commitment to the equality and inalienable rights of all persons has been found in the very first words of its constitution: "All men and women are, by nature, free and equal, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."[93] "Appearing, as it does, at the very threshold of the Iowa Bill of Rights," the Iowa Supreme Court has observed, "[this] constitutional safeguard is thereby emphasized and shown to be paramount."[94]

This commitment to equality and inalienable rights cannot be reconciled with Defendant's policy, pursuant to Ia. Code § 595.2(1), of excluding same-sex couples from the protections and responsibilities of civil marriage. *First*, Defendant's policy squarely implicates Article I, §1's inalienable rights provision, because it denies Plaintiffs "the freedom to marry [which] has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness [by] free men."[95] *Second*, the policy implicates Article I, § 1's equality provision, because it is an unvarnished affront to equality in the most basic

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[93] IOWA CONST. art. 1, § 1.

[94] *Hoover v. Iowa State Highway Commission*, 222 NW 438, 439 (Iowa 1928).

[95] *Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687, 695 (Iowa 1993) (quoting *Loving*, 388 U.S. at 12).

sense: Ia. Code § 595.2(1) singles out same-sex couples as unworthy and undeserving of a basic civil right, and uses the power of the state to enforce invidious discrimination. Just as surely as the exclusion of Susan B. Clark from Muscatine Grammar School No. 2 could not be justified under the constitution merely because "public sentiment" was "opposed to the intermingling of white and colored children,"[96] the exclusion of Plaintiffs from the protections and responsibilities of civil marriage cannot be justified on the *ad hoc* and insubstantial grounds which Defendant has offered.

When a legislative act is challenged under Article I, § 1, a court applies a two-pronged balancing test. First, the act must be "reasonably necessary" for the accomplishment of a purpose which serves "the interests of the public generally, as distinguished from [the interests] of a particular class."[97] Second, the act must not be "unduly oppressive upon individuals."[98] In other words, the gravamen of the analysis is "whether or not the collective *benefit* [provided by the challenged act] *outweighs* the specific *restraint*" the act works against the liberty of targeted individuals.[99]

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[96] *See Clark*, 24 Iowa 266, 1868 WL 145, at *6.

[97] *Gacke v. Pork Xtra, LLC.*, 684 N.W.2d 168, 177 (Iowa 2004).

[98] *Id.*

[99] *Id.* (emphasis added) (quoting *Benschoter v. Hakes,* 8 N.W.2d 481, 485 (Iowa 1943)). *See also id.* (quoting *Steinberg-Baum & Co. v. Countryman*, 77 N.W.2d 15, 19 (Iowa 1956)) (Article I, § 1 prohibits the legislature from enacting "restrictions" on individual rights "that are prohibitive, oppressive or highly injurious").

The exclusion of Plaintiffs from civil marriage fails both prongs of this test. As Plaintiffs demonstrate in their summary judgment brief, Ia. Code § 595.2(1)'s restraint on equal marriage rights is not "reasonably necessary" to the accomplishment of any legitimate legislative purpose. Defendant has presented no persuasive evidence that excluding same-sex couples from civil marriage prevents any harm to the "public generally," or in any way improves the public's health, safety, welfare, or quality of life.[100] Rather, Defendant merely speculates that the legislature "*may have* been concerned with" or "*could have* conceived of" objectives such as "promoting procreation" or "promoting stability in opposite sex relationships."[101] As Plaintiffs demonstrate in their brief, these supposed purposes are largely cliches; to the extent they amount to legitimate legislative purposes, Ia. Code § 595.2(1) does nothing to advance them.

Moreover, the public purposes for restraining Plaintiffs' freedom to marry which Defendant has attempted to articulate are drastically outweighed by the oppressiveness of that restraint. Plaintiffs' submissions provide compelling evidence of the serious injuries that both adult couples and their children suffer when they are denied the protections and responsibilities of civil marriage. In short, a proper analysis under Article I, § 1 compels the conclusion that Ia. Code

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[100] *See* Def. Br. at 49-50.

[101] *Id*. (emphasis added).

§ 595.2(1) is not reasonably necessary to promote any public interest, and it works undue oppression and injury against the individuals it targets for discrimination.

Although the Iowa Supreme Court has described the Article I, § 1 analysis as "highly deferential" to the legislature in the context of restraints on *property* interests,[102] case law, history, and the constitution itself all support a higher and more searching standard of review when a legislative act restrains a *fundamental personal liberty* interest, such as each Plaintiff's interest in marrying the only person with whom they share a committed intimate relationship.

First, as a matter of constitutional structure, because this case concerns not property but rather the state's treatment of a discrete category of persons, it implicates not only the inalienable rights provision of Article I, § 1, but the equality provision as well. As far back as *Clark* in 1868[103] and *Coger* in 1873,[104] the Iowa Supreme Court has invoked Article I, § 1's equality guarantee to condemn invidious discrimination; more recently, the court cited the "freedom and equality" guaranteed by Article I, § 1 in upholding the constitutionality of

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[102] *See Gacke*, 684 N.W.2d at 177 (nuisance action against operator of hog confinement facilities); *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (Iowa 1995) (statute regulating partition fences).

[103] 24 Iowa 266, 1868 WL 145, at *2 (invoking "the principle of equal rights for all, upon which our government is founded").

[104] 37 Iowa 145, 1873 WL 368, at *5 (explaining that the court's decision rested on the "principle of equality [that] is announced and secured by the very first words of our State constitution").

Iowa's Civil Rights Act.[105] Thus, the values protected by the equality provision should inform the overall balancing test under Article I, § 1: when an act affirmatively legislates inequality between groups of people in the exercise of protected liberties, a court should regard that act as, by definition, unduly oppressive. Analyzed in this way, any conceivable public benefit provided by Ia. Code § 595.2(1) cannot possibly outweigh the oppression it works by legislating inequality for a particular class of persons in their exercise of a fundamental right.[106]

Second, the Iowa Supreme Court recently reaffirmed the principle that deference to the legislature is not appropriate where an act offends the constitution's fundamental principles of equality: "[O]ur obligation not to interfere with the legislature's right to pass laws is no higher than our obligation

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[105] *Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758, 765 (Iowa 1971).

[106] For the same reasons, Ia. Code § 595.2(1) also should be struck down because it violates the equal protection provision of the Iowa constitution found in Article I, § 6.

Just as under Article I, § 1, the reasonable necessity of a legislative act must be balanced against its potential to oppress individuals, the Iowa Supreme Court has indicated that a similar balancing of interests should be undertaken when a legislative act is challenged under Article I, § 6. *See Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 9 (Iowa 2004) (explaining that although a court will normally uphold "desirable legislative goals," § 6 is violated if such goals are achieved "through wholly arbitrary classifications or otherwise invidious discrimination") (quoting *Fed. Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 156 (Iowa 1988)). Applying the same balancing test under § 1 and § 6 assures a consistent analytical framework for equality claims. Moreover, it recognizes that the equality guarantee is not limited to a single provision, but rather is a value that pervades the constitution. *See id.* (explaining that "meaningful review of social and economic legislation is mandated by our constitutional obligation to safeguard constitutional values by ensuring all legislation complies with those values").

to protect the citizens from discriminatory class legislation violative of the constitutional guaranty of equality of all before the law."[107]

Finally, rigorous scrutiny of the invidious discrimination legislated by Ia. Code § 595.2(1) would be in the best traditions of the history and jurisprudence discussed in Parts I-II, *supra*. What is past is prologue, and just as other courts have done at critical points in Iowa's history, this court should uphold the "principle of equal rights for all upon which our government is founded."[108] Ia. Code § 595.2(1) offends this principle, and must be struck down.

CONCLUSION

In light of the history and jurisprudence discussed above, *amici curiae* urge this court to hold that Ia. Code § 595.2(1) violates the Iowa Constitution.

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Respectfully submitted,

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[107] *Racing Ass'n,* 675 N.W.2d at 16 (quoting *Sperry & Hutchinson Co. v. Hoegh*, 65 N.W.2d 410, 419 (Iowa 1954)).

[108] *Clark*, 24 Iowa 266, 1868 WL 145, at *2.

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