IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

KATHERINE VARNUM, et al. Plaintiffs, v. TIMOTHY J. BRIEN, in his official capacities as the Polk County Recorder and Polk County Registrar, Defendant.	CASE NO. CV5965

REPLY IN SUPPORT OF
ALL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

I. Introduction

All Plaintiffs have demonstrated through their "Memorandum of Authorities in Support of All Plaintiffs' Motion for Summary Judgment and in Support of All Plaintiffs' Resistance to Defendant's Motion for Summary Judgment" (hereafter "Plaintiffs' Memo") and the supporting exhibits filed therewith that they are entitled to summary judgment on all of their claims under Article I §§ 1, 6 and 9 of the Iowa Constitution. Defendant attempts unsuccessfully to avoid this result by: 1) ignoring Iowa precedent and relying on inaccurate interpretations of federal cases and inapposite cases from other states; 2) attempting to recast the case as concerning whether marriage is beneficial to heterosexuals instead of addressing the constitutionality of the *exclusion* of gay and lesbian couples from marriage; and 3) trying to create the appearance of a dispute of material fact with voluminous submissions from purported experts who are not experts in disciplines relevant to this case, and whose opinions largely describe their idiosyncratic personal beliefs regarding marriage, which for the most part are neither factual nor material. To the extent that their affidavits do present facts or material expert opinion, they are not inconsistent with Plaintiffs' evidence. As a result, because there is no genuine issue of material fact, and because Plaintiffs have demonstrated their entitlement to a judgment as a matter of law, Plaintiffs' summary judgment motion must be granted and Defendant's denied.

II. Summary judgment should be granted in Plaintiffs' favor on all of Plaintiffs' claims because Defendant has failed to identify a genuine dispute with respect to any material fact underlying those claims.

Despite the vast volume of material submitted by Defendant's purported experts, Defendant has failed to identify any dispute with respect to any of the material facts contained in Plaintiffs' affidavits and their supporting expert affidavits. Plaintiffs do not dispute any of the facts in Defendant's Amended Statement of Undisputed Fact. Accordingly, there is no

impediment to granting Plaintiffs summary judgment. *See* Iowa R. Civ. P. 1.981; *Phillips v. Covenant Clinic,* 625 N.W.2d 714, 717 (Iowa 2001).

A. Most of Defendant's experts' testimony is not factual and is irrelevant to this case; the remainder is consistent with the evidence Plaintiffs have submitted.

As explained below, five of Defendant's purported experts (Paul Nathanson, Katherine Young, Margaret Somerville, Allan Carlson, and Steven Rhoads) are not scientists or medical or child welfare professionals in otherwise relevant fields, but instead are philosophers and hobbyists without empirical support for their notions. They do not even attempt to give opinions that can be described as "facts," nor do they claim to present the accumulated scientific findings or consensus of professionals in a particular field. Instead, they express solely their own personal views of marriage and child-rearing. Their personal ideologies are no more relevant than those of any other lay person with no personal stake in this case. As a result, to the extent that their personal opinions conflict with Plaintiffs' evidence, those opinions are not material and do not create any genuine issue of material fact. *See Fees v. Mutual Fire and Auto. Ins. Co.*, 490 N.W.2d 55 (Iowa 1992) (an issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit).[1]

While the three remaining purported experts for the Defendant (Alan Hawkins, Warren Throckmorten, and Sharon Quick) at least are professionals in potentially relevant fields

[1] Interestingly, through the testimony of his endorsed experts, the Defendant apparently concedes that no justification exists for denying same-sex couples the right to marry without, at a minimum, providing the protections and benefits marriage affords through some other vehicle, such as civil unions. Somerville Tr. at 41-42, 46, 130, 207, 233, 244-245; Nathanson Tr. at 27-28. While this may narrow the issues before the Court, Plaintiffs seek the same access to *marriage* that is available to different-sex couples, not some new, stigmatizing institution created for the sole purpose of continuing to treat them differently than heterosexuals. *See In re Opinion of the Justices*, 440 Mass. 1201, 1207, 802 N.E.2d 565, 570 (2004). It would no more provide equality for lesbians and gay men to relegate them to some separate institution than it would to tell another minority group that they cannot marry but only can enter civil unions or domestic partnerships. *See United States v. Virginia*, 518 U.S. 515, 551-54, 116 S.Ct. 2264, 2284-85, 135L.Ed. 2d 735, 762-64 (1996) (noting how separate institutions unconstitutionally deny equal access to the same history, traditions and prestige as is provided favored group); *In re Opinion of the Justices, supra*, 440 Mass. at 1206 n.3, 802 N.E.2d at 569 n.3 ("The history of our nation has demonstrated that separate is seldom,

(medicine, mental health, or child development), as additionally explained below, these individuals' views either do not conflict with Plaintiffs' evidence, or else these individuals expressly disavow personal knowledge of the specific information necessary for issuing an expert opinion relevant to this case. Consequently, to the extent that their opinions conflict with the evidence submitted by Plaintiffs, their testimony reflects solely their personal beliefs or expectations about what the applicable social science might reveal if they were better informed. Such testimony does not create a dispute with respect to any material fact.

Paul Nathanson (Def. Ex. C) is a "researcher" in "Religious Studies" whose work is in the field of comparative religion. Defendant designated him as an expert in the relation between religion and society; ethics; pop culture; and gender ("especially maleness/masculinity"). *See* Defendant's Designation of Expert Witnesses (hereafter "Def. Wit. Designation") at ¶4. Katherine Young (Def. Ex. H.), a professor of "Religious Studies," works with Dr. Nathanson in the field of comparative religion. She has been designated as an expert in "comparative religion, ethics, methodology, and gender" (Def. Wit. Designation at ¶9), and Defendant offered her testimony about the institution of marriage "from a cross-cultural perspective and in light of new reproductive technologies and the rights of children." *Id.* Even if Drs. Nathanson and Young were to qualify as experts in their own field – comparative religion – their views are irrelevant here because Plaintiffs seek access in this case only to *civil* marriage, and not religious approval of their marriages. *See* Plaintiffs' Memo at 3, fn.3. Neither Dr. Nathanson nor Dr. Young claim expertise or have been designated as experts in the fields of child development, psychology, psychiatry, or sociology, or the quality or methodology of research in these fields. Young Tr. at 15-16, 29-31; Def. Ex. H, p. 42; Nathanson Tr. at 5-6; Def Ex. C, Ex. 1. Opinions they express

---

if ever, equal."). This apparent concession by Defendant seriously undermines his attempts to defend the exclusion of same-sex couples from *all* that marriage provides.

that appear to reach conclusions about extant social science or the quality of research concerning family structures, child development, parenting, relationships, or other areas studied by social scientists are their own personal views as lay persons and accordingly can be disregarded as irrelevant. *Tappe v. Iowa Methodist Medical Center,* 477 N.W.2d 396, 402 (Iowa 1991) ("It is not enough . . . that a witness be generally qualified in a field of expertise; the witness must also be qualified to answer the particular question propounded"), citing *Ruden v. Hansen,* 206 N.W.2d 713, 717 (Iowa 1973); *Tiemeyer v. McIntosh,* 176 N.W.2d 819, 824 (Iowa 1970).

Margaret Somerville (Def. Ex. F) is an ethicist who claims expertise in "ethical aspects of new technoscience, in particular, new reproductive technologies and their impact on social values, including in the context of marriage," and on what she refers to as "the cultural meaning, symbolism and moral values that traditional marriage places around the inherently procreative male/female relationship, thereby protecting that relationship and the children that result from it." Def. Wit. Designation at ¶6. Dr. Somerville specifically eschews reliance on empirical science, preferring to draw conclusions based on emotion and intuition, "especially moral intuition." Somerville Tr. at 41, 59-63, 119. She also has had no training in empirical research methodology of any sort, let alone in the fields of child development, psychology (aside from one undergraduate course 44 years ago), psychiatry, or sociology, generally. Somerville Tr. at 15-16, 24, 47-48, 59, 111, 144-45, 191. She has not performed any empirical research herself and proclaims ignorance of social science findings in these fields or the quality of studies performed in these fields. Somerville Tr. at 23-24, 41, 59, 111, 137. Her personal views about the philosophy of marriage and reproductive technologies – which she acknowledges are specific to her and do not represent a consensus view, even among fellow ethicists (Somerville Tr. at 47-48, 87-88) – are irrelevant to this case.

Allan Carlson (Def. Ex. A), who claims to be a historian of sorts, is president of an ideological think-tank he founded that receives funding from private donations and neoconservative foundations. Def. Ex. A, p. 7. Dr. Carlson has never been a full professor at an academic institution and his professional experience, with the exception of two years as lecturer at Gettysburg College, consists exclusively of fund-raising and private study at socially conservative advocacy organizations. *Id.* Although Dr. Carlson has been designated as an expert in "the history and public purposes of marriage in the United States and on family structures and family policy," *see* Def. Wit. Designation at ¶1, he is not a psychologist, psychiatrist, sociologist, or medical or mental health professional, and has no formal training in any type of empirical social science (Carlson Tr. at 10:13-11:4, 29:11-16). Regardless of whether he constitutes an expert in U.S. history (which Plaintiffs dispute), his opinions on social science findings are outside his area of alleged expertise and can be disregarded as immaterial because they too reflect solely his personal opinions as a lay person.

Steven Rhoads (Def. Ex. E) is an economist who has been designated as an expert in what Defendant terms "the significance of marriage in an overall scheme of laws and public policy founded in an accurate understanding of biological differences between men and women, the ways in which typical male and female parenting styles each contribute uniquely to the healthy development of children, and related matters." *See* Def. Wit. Designation at ¶5. However, Dr. Rhoads acknowledges that he has no formal training in any physical science, let alone fields such as psychology, psychiatry, evolutionary biology, endocrinology, or sociology. Rhoads Tr. at 87:16-88:21. He acknowledges that his study of parenting styles and differences between men and women constitutes "wander[ing] into other people's territories" (Rhoads Tr. at 16:14), and admits that his views are contrary to those of mainstream psychologists, psychiatrists,

and child development experts (Rhoads Tr. at 23:3-8). As such, the opinions he offers reflect solely his eccentric personal ideology and can be disregarded as irrelevant.

Alan Hawkins (Def. Ex. B) is a professor of "Family Life" at Brigham Young University, and has been designated as an expert in "the importance of two-parent families and healthy marriages for adults, children, and communities, and related matters." *See* Def. Wit. Designation at ¶3. While Defendant has proposed that Dr. Hawkins also testify concerning alleged "weaknesses in, and lack of maturity of the body of existing scientific studies of same-sex parenting," *id.,* Dr. Hawkins made clear in deposition that he has not read the vast majority of the studies concerning gay and lesbian parenting, and has performed no related research himself. Hawkins Tr. at 33:3-13; 98:16-110:25. In fact, he was unaware of the existence of many recently-published studies cited by Plaintiffs' expert Michael Lamb. *Id.* at 98:16-110:25. Consequently, by his own admission, he is not able to evaluate the body of social science concerning gay and lesbian parenting generally, or to issue an opinion as to the reliability of their methodology of the majority of these studies. *Id.* His testimony thus does not conflict with Plaintiffs' evidence.

Warren Throckmorten (Def. Ex. G) has a degree in counseling and is an associate professor of psychology at a college in Pennsylvania. Def. Ex. G, p. 4. Regardless of whether he constitutes an expert in psychology, which Plaintiffs do not concede, the views he expresses in his affidavit do not conflict with Plaintiffs' evidence. *See* Pl. Ex. 15; Pl. Ex. 1 at ¶13; Pl. Ex. 2 at ¶6; Pl. Ex. 3 at ¶6; Pl. Ex. 4 at ¶6; Pl. Ex. 5 at ¶¶6-8, 12; Pl. Ex. 6 at ¶7; Pl. Ex. 7 at ¶11; Pl. Ex. 8 at ¶13; Pl. Ex. 9 at ¶7; Pl. Ex. 10 at ¶7; Pl. Ex. 11 at ¶10; Pl. Ex. 12 at ¶12.

Sharon Quick (Def. Ex. D) is a retired anesthesiologist and critical care doctor whose hobby in retirement consists of locating what she terms "citation errors" in articles concerning

gay and lesbian parenting published by major child development journals. Quick Tr. at 25:16-28:16. She claims self-taught expertise in "reference accuracy and quality of scientific research and reporting," which she acknowledges is not a recognized field of expertise, *see* Def. Wit. Designation at ¶7; Quick Tr. at 129:5-8 ("There is no acknowledged field of reference accuracy that I know of... it doesn't even really fall under scientific methodology..."). She is not an expert in designing studies or in scientific methodology. Quick Tr. at 73:3-21. She concedes that there is "not a uniform definition" for the type of errors she claims to have identified in the review articles on which she opines in her affidavit (Quick Tr. at 127:4-8), and that medical journals uniformly have rejected publishing her writings in this area (Quick Tr. at 54:16-58:14). Dr. Quick has received no formal training in developmental psychology or sociology (Quick Tr. at 39:22-40:1), has participated in only one empirical research study herself – a study in anesthesiology concerning the effects of cocaine on guinea pigs (Quick Tr. at 34:5-7) – and has published no articles in peer-reviewed journals (Quick Tr. at Ex. 1) or been a peer reviewer for any journal (Quick Tr. at 73:25-74:4). Dr. Quick's primary interest is the accuracy of citations in two survey articles that Plaintiffs do not cite or otherwise offer as evidence, and on which Plaintiffs do not rely. Quick Tr. at 19:4-23:10, 25:10-28:25; 99:15-104:6.[2] Because she is not an expert in a relevant field, her views of the reliability of studies performed in the fields of child development, psychiatry, or psychology, like the views of Defendant's other purported experts, are simply irrelevant to this case.[3]

---

[2] Dr. Quick refers to citations in Ellen C. Perrin, M.D. & the Committee on Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, *Technical Report: Co-Parent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 339 (February 2002), and James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 Pediatrics 349 (2006).

[3] It is, perhaps, not surprising that Defendant has chosen to rely upon religious, philosophical and ideological justifications to support the marriage exclusion. The team of experts endorsed by the Defendant actually were assembled by attorneys for the County's shadow law firm, the Alliance Defense Fund ("ADF"). *E.g.*, Carlson Tr. at 18:13-15; Young Tr. at 20:118-51:122; Somerville Tr. at 28; Rhoads Tr. at 82:4-8; Quick Tr. at 12:19 –13:24,

B. None of the statements in Defendant's "Statement of Material Facts in Dispute Which Bar Plaintiffs' Motion for Summary Judgment" present a genuine dispute of material fact because they: 1) are not factual; 2) do not conflict with Plaintiffs' evidence; or 3) misrepresent testimony that actually is consistent with Plaintiffs' evidence.

Most of the statements in Defendant's "Statement of Material Facts in Dispute Which Bar Plaintiffs' Motion for Summary Judgment" are not factual, but simply reflect the personal lay opinions of philosophers and hobbyists whose views are immaterial and therefore insufficient to create a dispute with respect to any material fact. The few statements in this document that appear to be factual do not actually conflict with Plaintiffs' evidence. One statement, purportedly drawn from the affidavit of one of Plaintiff's experts, misrepresents testimony and therefore does not present a disputed material fact either.

Specifically, statements numbered 1, 3-9, 12, 16, 18-22, and 24 are not factual.[4] They consist almost entirely of the immaterial personal opinions of Defendant's purported experts. Some appear to derive from study of comparative religion (Statements 1, 3-7, and 12), a field that is irrelevant to this case. All lack any empirical basis, are incapable of being proved or disproved, and reflect solely the ideology and peculiar world view of the speaker. They do not

---

74:16-18. Founded in 1994 by the late Bill Bright (founder of Campus Crusade for Christ), the late Larry Burkett (founder of Crown Financial Ministries), Dr. James Dobson (founder and chairman of Focus on the Family), Dr. D. James Kennedy, (founder of Coral Ridge Ministries), and the late Marlin Maddoux (host of the "Point of View" radio program), ADF is an organization whose mission is aggressively to promote a conservative Christian worldview. www.alliancedefensefund.org. It follows that many of the witnesses it has provided for the County claim expertise in disciplines such as "comparative religion" and "comparative ethics" or in no recognized discipline at all ("reference citation errors"). Unqualified to attack directly the empirical research relevant to social science and child development, these alleged experts have executed affidavits crafted by Attorney Chris Stovall and ADF that attempt to attack the mainstream scientific consensus obliquely, through artful nuance. Closer examination, reveals however that these individuals are simply spokespeople for conservative religious doctrine. While their views are, no doubt, sincerely held, they are immaterial to the constitutional analysis required of the Court.

[4] For example, Statement 1 reads: "The primary focus of gay marriage is on the adults, not the children," citing to the affidavit of purported expert Paul Nathanson. To the extent that this vague statement has any meaning at all and is intended to summarize what civil marriage means to all, most, or even some same-sex couples, it reflects solely Dr. Nathanson's personal opinion on the matter and derives from his background in comparative religion and pop culture. Therefore, this statement fails to create a dispute with respect to any material fact.

reflect any form of consensus in any relevant social science field or, for that matter, purport to describe accumulated findings accepted by a majority of mainstream professionals in *any* field. *See, e.g., Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 533 (Iowa 1999) (in determining whether to admit expert testimony, courts may consider: 1) whether the theory or technique constitutes scientific knowledge that can and has been tested; 2) whether it has been subjected to peer review or publication; 3) the known or potential rate of error; and 4) whether it is generally accepted with the relevant scientific community).

Other statements (Statements 2, 10-11, 13-15, 17) at least purport to be factual, but nonetheless also create no impediment to summary judgment. Plaintiffs do not dispute Statement 2 ("Gay couples choose to bring children into the relationship by way of adoption or other means"), which equally describes how non-gay couples choose to bring children into their families. Statements 10 and 11, as qualified by Dr. Hawkins during his deposition, also are not inconsistent with evidence submitted by Plaintiffs. *See* Pl. Ex. 13. at ¶¶20-23; 43-45.[5] During his deposition, Dr. Hawkins explained that these statements refer solely to comparisons between married heterosexual parents, on the one hand, and unmarried *heterosexual* cohabitants, single *heterosexual* parents, and *heterosexual* step-families on the other. Hawkins Tr. at 129:19-130:9. In making these statements, Dr. Hawkins stated that he did not rely on any study that involved

---

[5] Statement 10 reads: "Social science literature demonstrates that children who are reared by a married mother and father have more positive outcomes on a wide variety of important factors compared to children in other adequately studied family structures, and these outcome differences exist even when controlling statistically for important socio-demographic differences between children reared in different family structures."

Statement 11 reads: "Children reared in a stably married family are likely to do better on various measures of educational attainment; exhibit fewer behavioral problems including conduct disorders, alcohol and drug abuse and juvenile delinquency; will not be as likely to engage in criminal behavior as adults; engage in sexual relations as teenagers and to experience an unwed pregnancy; have a decreased risk for mental/emotional illness; have a decreased risk of physical illness and infant mortality; experience decreased risk of suicide; have a greater average life expectancy; likely to benefit from high levels of parental investment, commitment, and closeness (particularly with their fathers); be victims of physical and sexual abuse; experience higher levels of family stability as adults, including a decreased divorce rate."

gay or lesbian parents. *Id.* Thus, Dr. Hawkins acknowledged that these statements say nothing about the relative parenting abilities of gay and lesbian parents, or relative outcomes for their children. *Id.*; *see also id.* at 111:5-8. Consequently, neither statement contains facts material to this lawsuit.

Plaintiffs also do not dispute Statement 13 ("Families with two parents are better for children than one parent") to the extent that it refers simply to the fact that, on average, children in one-parent families are more likely to have adjustment difficulties than children in two-parent families. Pl. Ex. 13 at ¶20. Additionally, Statement 17 ("Some kind of change in sexual behavior, desire and/or identity over time is not theoretically unfounded or empirically unprecedented for at least some people") is not inconsistent with Plaintiffs' evidence. *Cf.* Pl. Ex. 15 at ¶¶20-21.

Defendant cites to the affidavit of Paul Nathanson for Statements 14 and 15. These statements purport to be conclusions with respect to social science concerning gay and lesbian parenting and concerning adoption and biological parenthood. Dr. Nathanson does not claim to be an expert in either area and has not been designated as such (*see* Part IIA, *supra*), and therefore these statements do not constitute expert opinions, but simply his personal views. Consequently, they too are not material.

Plaintiffs dispute Statement 23 ("The phenomenon of stigma claimed by Plaintiffs to [be] experienced by gays and lesbians by virtue of their sexual orientation has been caused or substantially aggravated by the AIDS epidemic"). The record lacks any evidence for this notion. Strangely, Defendant cites to the affidavit of Dr. Gregory Herek, one of Plaintiffs' experts, as support for this statement. Dr. Herek made no such statement anywhere in his affidavit. In fact, in his deposition testimony, he expressly disagreed with Defendant's unsupported theory to this

effect repeatedly. Herek Tr. at 67:3-69:13; 81:6-89:2. There thus is no dispute in the record on this point either.

Finally, Statement 24 is insufficient to create a dispute with respect to a material fact because it consists solely of a legal argument, and not a fact. [6] Defendant cites to no authority in the record for this proposition, and it should be disregarded.

The document Defendant submitted entitled "Defendant's Response to Plaintiffs' Statement of Material Facts," in which Defendant responds line-by-line to Plaintiffs Statement of Material Facts, often by answering simply "denied," or "denied for lack of knowledge," also does not suffice to create a dispute with respect to any material fact. For example, Defendant "denied" or "denied for lack of knowledge" all of the facts contained within the adult Plaintiffs' affidavits despite acknowledging in his Reply Brief that Defendant does not dispute their sincerity, and has introduced no evidence to suggest that the adult Plaintiffs are not telling the truth about their own lives and the harms they and their children have experienced. *See* Reply Brief in Support of Motion for Summary Judgment and Defendant's Resistance to Plaintiffs' Motion for Summary Judgment ("Def. Reply") at 34. In order to demonstrate a disputed issue of material fact, Defendant must introduce evidence that conflicts with the evidence submitted by Plaintiffs. Simply "denying" the contents of Plaintiffs' testimony is insufficient. Iowa R. Civ. P. 1.981(5) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered.")

---

[6] Statement 24 reads: "The everyday meaning of 'marriage' is '[t]he legal union of a man and woman as husband and wife,[']a definition of marriage which derives from the common law."

III. Plaintiffs' experts qualify as experts under Iowa law.

Defendant challenges the expertise or credibility of Plaintiffs' experts, and has attached a series of biased, inaccurate, and often incomprehensible commentaries to their deposition testimony. With the exception of the commentary concerning Dan Johnston's testimony,[7] all of Defendant's commentaries should be struck, or at least disregarded, due to their highly inaccurate and misleading characterizations of the deposition transcripts. These commentaries are not proper evidence and add nothing to the Court's understanding of each expert's deposition testimony, which speaks for itself.

Defendant claims that four of Plaintiffs' experts (John Schmacker, Dan Johnston, Sharon Malheiro, and Deborah Tharnish) are not true experts, either for lack of alleged experience in their respective fields, or because they do not have PhDs. Def. Reply at 48-50. Iowa law does not require a witness to have a particular level of education in order to qualify as an expert, but permits expert testimony based on an expert's experience. Iowa R. Evid. 5.702 (witness may be qualified as an expert "by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise"); *see also State v. Buller*, 517 N.W.2d 711 (Iowa 1994)

---

[7] Although Defendant's commentary concerning Dan Johnston's testimony is as inaccurate and misleading as the others, Plaintiffs submit an alternative summary of Mr. Johnston's testimony instead of asking that Defendant's version be struck. Because of the personal nature of some of the questions that were asked of Mr. Johnston during his deposition, Plaintiffs' counsel consented to Defendant's submission of a commentary on Dan Johnston's testimony in lieu of submission of the entire transcript in the understanding that Plaintiffs' counsel would dispute any inaccuracies in this Reply Memorandum. A response to Defendant's commentary on Mr. Johnston is attached as Ex. A.

Plaintiffs have designated Mr. Johnston as an expert in anti-gay bias and discrimination in Iowa, and on efforts by the gay community to exercise political power. Plaintiffs' Designation of Expert Witnesses at ¶8. Defendant argues that Dan Johnston does not qualify as an expert based on his statement during deposition that he was unsure of whether he qualifies as a traditional expert, but instead offers his personal experiences as a gay political figure in Iowa. Def. Reply at 48. Mr. Johnston's own assessment of whether he feels himself to be an expert witness is irrelevant; the determination of whether he is an expert is exclusively for the Court. *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 657 (Iowa 1969) (that a witness does not believe himself qualified does not mean he should not be accepted as expert: court determines fact of capacity to testify).

(practical experience suffices). Because of their unique professional and personal experiences, these witnesses qualify as experts and, Plaintiffs submit, would assist the Court as trier of fact.[8]

While conceding that the remainder of Plaintiffs' experts are "undoubtedly experts" "all at the top of their fields of expertise," Defendant argues that they are "advocates," and should be disregarded (Def. Reply at 49-50, 69). Plaintiffs object to the characterization of their experts as "advocates" but, even if they were, being an advocate does not disqualify a person as an expert or render that person's testimony untrue. *State v. Bokmeyer Bros.,* 187 Iowa 1312, 175 N.W. 78 (Iowa 1919) (expert witnesses qualified although not disinterested).

IV. Defendant incorrectly claims that Iowa courts have not adopted an independent and more stringent standard for rational basis review than that applied by federal courts.

Defendant would have this Court apply only federal law, claiming that Iowa has adopted no independent standard for rational basis analysis under Art. I § 6 of the Iowa Constitution.[9] Specifically, Defendant argues that the Iowa Supreme Court, in breaking with the U.S. Supreme Court in *Racing Ass'n Of Central Iowa v. Fitzgerald,* 675 N.W.2d 1 (Iowa 2004), (*"RACI II"),* did no more than weigh "legislative facts" differently under a form of rational basis analysis identical to federal jurisprudence (*see* Def. Reply at 11-13; 28 (citing *RACI II* and claiming that the federal standard of review "is the same standard of review normally relied upon by the Iowa

---

[8] Unlike Defendant's purported experts, who offer solely abstract philosophy, Messrs. Johnston and Schmacker relate concrete examples drawn from their own lives as gay Iowans active in public life, describe specific instances of anti-gay bias and discrimination, and detail efforts by the gay community in Iowa to participate in the political process. Because they lived through these experiences firsthand, they therefore are uniquely qualified to describe them. Ms. Tharnish and Ms. Malheiro have performed significant legal work on behalf of gay and lesbian couples and on this basis are qualified to offer their expertise on the nature of legal protections available to these couples, their limitations, and the legal fees involved in procuring them. *See Parrish v. Denato,* 262 N.W.2d 281 (Iowa 1978) (attorney qualified as an expert to talk about average cost of legal work).

[9] Defendant incorrectly asserts that Plaintiffs have provided little discussion of the errors in cases that upheld exclusionary marriage statutes in other jurisdictions. Def. Reply at 5. In Plaintiffs' Resistance, Plaintiffs discussed al length why these cases were incorrectly decided and, in any event, are inapposite here, given Iowa's unique body of constitutional law.

Supreme Court")). Defendant further claims that, "What the Iowa Court did was to make different 'fact' findings for the purpose of the statute compared to the findings made by the U.S. Supreme Court. . . . The court was reviewing *legislative facts* and giving them its own assessment of credibility." Def. Reply at 11-12 (emphasis in original). Defendant concludes that "the upshot of *RACI* . . . is that rational basis review may be a 'fact based' inquiry when those facts are legislative facts that are apparent from the legislation itself, companion legislation or common knowledge." Defendant is able to reach this conclusion only by ignoring the plain language of *RACI II.*

The language in the *RACI II* decision expressly shows that the Iowa Supreme Court was deliberate in its development of a more stringent rational basis test, and not simply reaching a different result under an identical test.[10] The Court began with a lengthy discussion of its "constitutional obligation as the highest court of this sovereign state to determine whether the challenged classification violates Iowa's constitutional equality provision," noting that "the *meaning of the Iowa Constitution* is preeminently a question to be decided by the Supreme Court of Iowa, and not by some other court." *RACI II* at 4-5 (citation omitted) (emphasis added). The Court then considered two alternative ways of conducting an independent review under the Iowa equal protection guarantee: 1) applying "federal principles independently;" or 2) adopting a separate analysis based on the unique text and history of the Iowa Constitution. While choosing not to adopt a unique analysis in *RACI II* because it had not been briefed by the litigants in that

[10] Other courts have recognized that the Iowa Supreme Court in *RACI II* developed "a more searching application of the federal [rational basis] test" that governs application of rational basis analysis under the Iowa Constitution. *Johnson v. University of Iowa,* 2004 WL 3643862, No. 3-03-CV-10062 (S.D. Iowa 2004) (analyzing *RACI* II) (unpublished and attached as Ex. B); *see also Hawkeye Commodity Promotions, Inc. v. Miller*, 432 F.Supp.2d 822, 858 fn. 15 (N.D.Iowa 2006) (Iowa Supreme Court in *RACI II* applied "a rational basis standard that is inconsistent with [United States] Supreme Court precedent;" noting distinctions between federal rational basis analysis and *RACI II's* requirements that state interests be "realistically conceivable," "have a basis in fact," and be "credible," and that unlike in federal courts, the Iowa Supreme Court "will undertake some examination of the credibility of the asserted factual basis for the challenged classifications rather than simply accepting it at face value").

particular case, the Court left open the possibility that one would be developed in future cases.

The Court next went into great detail in describing how, when Iowa courts apply the elements of the federal rational basis test, they must do so in a more searching way. *See* Plaintiffs' Memo at VB1, pp. 81-82 (describing *RACI II's* more searching form of review). Finally, the Court explicitly acknowledged that it was breaking from federal rational basis analysis by considering whether the challenged classification was over- or under-inclusive, even though such a consideration generally is applied only as part of a strict scrutiny analysis by federal courts. *RACI II* at 8; *see also, id.* at 27-28 (explaining that *RACI II* majority opinion shows that equal protection analyses of Iowa and U.S. Supreme Courts differ from each other) (Cady, J., dissenting).[11]

Most noteworthy is that the Iowa Supreme Court reached a different result from the *unanimous* U.S. Supreme Court in the very same case – a case that involved the constitutionality of taxation legislation, which usually enjoys a strong and rarely overcome presumption of constitutionality. In doing so, the Court expressed disapproval of federal courts' rubber-stamp approach to rational basis analysis in tax cases by approvingly quoting commentators who have stated that state courts must increase equal protection scrutiny under state constitutions to fill the void left by federal courts. *See RACI II* at 13, n.5 (citing *U.S. Supreme Court Update,* 13 J. Multistate Tax'n & Incentives (RIA) 42 (September 2003) to the effect that "[F]ederal equal protection challenges to state tax statutes are likely to fail unless the tax classification involves a protected class or discrimination against out-of-state taxpayers," and the "Supreme Court uses [the] rational basis test 'when it finds no basis for giving truly independent examination to a

---

[11] Defendant incorrectly claims that "strict scrutiny . . . is the only time that over-inclusion and under-inclusion consideration become [sic] relevant." Def. Reply at 48. As *RACI II* and *Bierkamp v. Rogers,* 293 N.W. 2d 577, 581 (Iowa 1980) make clear, this is not true under Iowa's courts' application of rational basis review.

governmental classification")). The Court continued:

> Institutional rather than analytic reasons appear to have prompted the broad exclusion of state tax and regulatory measures from the reach of the equal protection construct fashioned by the federal judiciary. This is what creates the disparity between this construct and a *true conception of equal protection,* and thus substantiates the claim that *equal protection is an underenforced constitutional norm.*" *Id.* [citing Sager, Lawrence Gene, *Fair Measure: The Legal Status of Underenforced Constitutional Norms,* 91 Harv. L. Rev. 1212, 1218 (1978)]; *see also* Brennan, 90 Harv. L. Rev. 489, 503 (1977) ("*With federal scrutiny diminished, state courts must respond by increasing their own.*").

RACI II at 13, n.5.

Given this context, *RACI II* unquestionably cannot be read, as Defendant would have it, to reflect solely the Iowa Supreme Court's differing fact-finding concerning the specific legislative facts in that particular case rather than application of a more stringent rational basis test. By considering and reserving the right to develop an alternative structure for equal protection analysis, by stressing its sole obligation to interpret the state constitution, and by disapproving of federal courts' underenforcement of equal protection norms, the Iowa Supreme Court indisputably demonstrated that it was not simply applying routine federal equal protection analysis to reach a different result, but that it was establishing a floor for rational basis review in Iowa that is higher than in federal courts and that must be applied in this case if the Court applies rational basis review (as opposed to the higher standards Plaintiffs contend are appropriate here).

In arguing repeatedly that the briefing in this case easily could be substituted for the briefing in any other marriage case around the country, and that Iowa law is no different from that of federal or other jurisdictions (*see, e.g.,* Def. Reply at 18 ("there is little in this Iowa litigation that differs from the efforts in the other states," and Iowa case law "does not show a change in the body of law that has been shaped in other states")), Defendant ignores more than just the standard in *RACI* II; Defendant gives short shrift to the vast body of Iowa constitutional

law diverging from federal law in granting broader protections under the state constitution, and dating back over a hundred and fifty years (*see* Plaintiffs' Memo at I, pp. 13-15). The Court should resist Defendant's invitation to reject Iowa's unique constitutional traditions and jurisprudence.

V. Plaintiffs are entitled to summary judgment even under rational basis review, if that standard of analysis is applied correctly.

Plaintiffs are entitled to summary judgment even under the lowest level of scrutiny applied under the Iowa and federal Constitutions. *See* Plaintiffs' Memo at VB1-2, pp. 80-93; Plaintiffs' Resistance at 8-9. The marital exclusion falls under any form of rational basis review for three reasons: 1) the exclusion serves only the illegitimate purpose of making gay people unequal to everyone else (*see* Plaintiffs' Memo at VA, pp. 76-79; Resistance at 8-9); 2) even federal law provides for more searching review in cases that involve personal relationships or illegitimate purposes (*see* Plaintiffs' Memo at VA, pp. 78-79, VB, pp. 90-92; Resistance at 8-9); and 3) under the *RACI II* standard applicable to rational basis review in Iowa, which is stronger than the federal standard, Plaintiffs have submitted conclusive evidence that Defendant's hypothesized justifications for the marriage exclusion are insufficient because they are too attenuated from the law as written, are severely over- and under-inclusive, and are not plausible or based in fact (*see* Plaintiffs' Memo at VB, pp. 80-85; Resistance at 8-9).

Defendant repeatedly attempts to frame this case as about whether marriage is good for *heterosexuals*. *See, e.g.,* Def. Reply at 30 ("The marriage law . . . simply says that where a man and a woman marry each other, they create a relationship which may intentionally or accidentally, procreate and create children and that is an institution which needs to be protected by law"). Plaintiffs are not challenging whether there are reasons for Iowa to allow heterosexual couples to marry; rather, Plaintiffs contend that it violates Iowa's Constitution for the State to

exclude same-sex couples from doing so as well. Appropriate Iowa and federal rational basis review standards require that the law's classification *excluding* same-sex couples and their families from marriage have some reasonable fit with the purported government objective. *See* Resistance at 11-18. As Plaintiffs already have explained, Defendant cannot justify a discriminatory law simply by recasting it as a preference for everyone but the minority burdened by the exclusion. *Id.*

Defendant identified "promoting procreation" as a purported state purpose for the marriage exclusion in Defendant's original brief and reiterates it in his reply (Def. Br. at 49-50; *see, also,* Def. Reply at 21 ("There are rational reasons for Iowa wanting to privilege procreative marriage"). Defendant appears to be asserting that excluding gay and lesbian couples from marriage somehow causes a greater number of Iowa children to be born, claiming that "a replacement birth rate is not academic" (Def. Reply at 21), urging that Iowa has a unique "concern with procreation" because of the "declining birth rate" (Def. Reply at 20), and even resorting to such hyperbole as "The very survival of mankind depends on it" (Def. Reply at 47).

Plaintiffs have demonstrated that the marital exclusion cannot be upheld as serving procreation because the exclusion of same-sex couples from marriage in no way advances the alleged goal of promoting procreation, and is both grossly over- and under-inclusive (*see* Plaintiffs' Memo at VB2, pp. 83-89; Resistance at 8-9; *RACI II* at 10). As Plaintiffs already have explained, there is no basis for believing that, if gay and lesbian couples continue to be prevented from marrying, Iowans will have more children than if those couples are allowed to marry. The exclusion of same-sex couples from marriage will not affect the procreative, childrearing or marriage decisions of any heterosexuals, and Defendant has submitted no evidence to suggest that permitting gay people to marry would affect their procreative or childrearing decisions,

either. *See Alons v. Iowa Dist. Ct for Woodbury Cty.*, 698 N.W.2d 858, 870 (Iowa 2005) (court decisions with regard to same-sex couples' relationships have no effect on other peoples' marriages). In addition, there is no Iowa requirement that couples intend or are able to procreate in order to obtain a marriage license; people who physically are unable to procreate (i.e., the sterile and women past menopause) may marry; and same-sex couples are excluded from marriage even though they do procreate. *Id.*

Notably, Defendant's suggested rationale contradicts its own witness, Allan Carlson, who expressly acknowledges that current marriage laws cannot be justified based on a purported state interest of promoting procreation: "[M]arriage is not just about procreation, and indeed it is not necessarily about procreation at all." Carlson Tr. at 137:17-19; *see also* 61:6-69:14 (stating that "the contraceptive revolution of the 1960s," and the privacy line of cases beginning with decisions in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) "severed" the "expectation of procreation within marriage" that "had been part of the law to a considerable degree before then").

Defendant also proposed in his original brief that the marital exclusion purportedly serves the state interest of promoting healthy childrearing in three ways: 1) by promoting child rearing by a father and a mother in a marriage relationship; 2) by promoting stability in opposite sex relationships where children may be born; and 3) by promoting healthy family relationships that enable children to become well-adjusted, responsible adults (Def. Brief at 49-50).

Plaintiffs made clear in their original brief that these purported justifications for the marriage exclusion are inadequate because such childrearing concerns do not explain why the State of Iowa at present allows *only* different-sex couples and *not* same-sex couples to marry –