IN THE SUPREME COURT OF IOWA

Katherine Varnum, et al. Plaintiffs/Appellees, **v.** **Timothy J. Brien, Polk County Recorder** Defendant/Appellant.	**Supreme Court No. 07-1499** District Court No. CV5965

Brief of *Amicus Curiae* Freedom to Marry In Support of Plaintiffs-Appellees

Appeal from The Iowa District Court in and for Polk County
The Honorable Robert J. Hanson, Judge

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STATEMENT OF INTEREST AND IDENTITY OF *AMICUS CURIAE*

Freedom to Marry is the gay and non-gay partnership working for marriage equality nationwide. Founded in 2003 and based in New York, Freedom to Marry brings together organizations – national and local, non-gay and gay, secular and religious – doing their part to end discrimination in marriage and assure equal protections and responsibilities for committed same-sex couples and their loved ones. Freedom to Marry has participated as *amicus curiae* in several cases brought by couples challenging their unfair exclusion from marriage.

Evan Wolfson is the founder and executive director of Freedom to Marry. He received his law degree from Harvard University in 1983 and has authored several works regarding the right to marry. *See, e.g.,* Evan Wolfson, *Why Marriage Matters: America, Equality, And Gay People's Right To Marry* (Simon & Schuster 2004); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. Rev. L. & Soc. Change 567 (1994). He submitted an *amicus curiae* brief to this Court in *In Re Marriage of Walsh*, 451 N.W.2d 492 (Iowa 1990) (striking restriction of a gay father's visitation in light of statutory goal of keeping children in close contact with parents).

Freedom to Marry can serve an important role in this case by providing independent comment as a friend of the Court in support of Appellees Katherine Varnum, et al. and affirmance of the District Court's ruling.

ARGUMENT

The Iowa Constitution, Which Places Its Highest Priority on Securing Individual Liberties and Uniform Application of Law, Renders Iowa Code Section 595.2(1) Unlawful Because That Statute Denies Iowans Their Fundamental Right to Marry and Choose Their Spouse.

Iowa's Constitution protects the freedom to marry as an inalienable personal right that cannot be restricted by legislative limitations based on characteristics such as race, religion, or sex. By striking Iowa Code section 595.2(1) as unconstitutional, this Court will remain true to its tradition of guaranteeing all Iowans equal exercise of fundamental rights. Only by holding that choice of one's partner in marriage cannot be restricted based on sex and by striking down the discriminatory restriction on the freedom to marry can this Court secure marriage as a fundamental liberty of all Iowans while protecting the essence of the institution for all.

From this Court's first reported opinion in *In re Ralph*, 1 Morris 1 (Iowa 1839), to this case, Iowans take comfort in knowing that when

> a legislative act is clearly and unmistakably unconstitutional, then the court must so declare. By common consent such a declaration is not deemed as usurpation by the court, but as a protest against usurpation already done. In such case the court furnishes the only means of authoritative protest possible to the body politic. The responsibility which thus falls upon the judicial branch is an extraordinary one. It is the duty of the court to meet it fully and fairly and without evasion.

State v. Fairmont Creamery Co., 133 N.W. 895, 897 (Iowa 1911). Here, this Court should act "fully and fairly and without evasion" to strike Iowa Code section

595.2(1)'s restriction as violating the Iowa Constitution by denying Iowans the equal freedom to marry.

A. Article I, Section 1 of the Iowa Constitution Puts Individual Freedoms First and Secures in Each Iowan His or Her Fullest Natural Rights.

In finding that fundamental rights of equality, freedom to marry, and freedom to choose a partner in marriage are secured by the Iowa Constitution and are violated by Iowa Code section 595.2(1), this Court should be guided by:

- The precise and expansive language of Article I, section 1;
- The intent of the drafters by making that section the first and foremost clause of the Iowa Constitution and the Iowa Bill of Rights; and
- The unswerving commitment of this Court to rely on independent state grounds under the Iowa Constitution to recognize and protect rights well ahead of other states and the U.S. Supreme Court.

Article I, section 1 of the Iowa Constitution provides as a matter of organic law that,

> [a]ll 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.

This initial provision of the state constitution, known as the "inalienable rights clause," *Midwest Check Cashing, Inc. v. Richey*, 728 N.W.2d 396, 403 (Iowa 2007), makes personal liberties, equality under the law, and pursuit of liberty, safety and happiness the preeminent rights of ***all*** Iowans. "Appearing, as it does, at the very threshold of the Iowa Bill of Rights, that constitutional safeguard is thereby

emphasized, and shown to be paramount." *Hoover v. Iowa State Highway Comm'n*, 222 N.W. 438, 439 (Iowa 1928)*; see also* Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 Drake L. Rev. 593, 631 (1993) (hereafter "*Kempkes*").

The inalienable rights provision represents the framers' intent that the people of this progressive State would enjoy rights even more encompassing than those set forth in the earlier Declaration of Independence. *Kempkes*, 42 Drake L. Rev. at 635-36. Further, as this Court has noted, "[t]he constitutional right to life and liberty and to acquire, possess and enjoy property is not a mere glittering generality without substance or meaning." *State v. Osborne*, 154 N.W. 294, 300 (Iowa 1915).

The protections of Article I, section 1 are sweeping, as evidenced by its language invoking the values of life, liberty, property, safety and happiness. This Court has frequently cited Article I, section 1 in cases involving speech, segregation, property rights and economic regulation.[1] The section is no less important to preclude government intrusion in matters involving family and personal relationships.[2] *See State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (in which this

[1] *See e.g., Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 177 (Iowa 2004) (state regulation must protect interests of the public generally as opposed to those of a particular class, and the means used must be reasonably necessary and not unduly oppressive); *Gibb v. Hansen*, 286 N.W.2d 180, 186 (Iowa 1979) (weighing collective benefit against specific restraint on individual liberty where Article I, section 1 right to pursue and obtain safety is at issue).

[2] The Kentucky constitution, like many other state constitutions, incorporates an inalienable rights clause providing guarantees similar to those of Iowa Constitution Article I, section 1. Applying its own inalienable rights clause in a challenge to that state's anti-sodomy law,

(footnote continued)

Court acted to protect the guarantee of choice in family and personal relationships and overturned Iowa's anti-"sodomy statute"); *In re Marriage of Cupples*, 531 N.W.2d 656 (Iowa 1995) (upholding the custody rights of a lesbian mother); *In re Marriage of Kraft*, No. 99-1719, 2000 WL 1289135 (Iowa Ct. App. Sept. 13, 2000) (unpublished) (affirming a gay father's visitation rights).[3]

Iowa's long reliance on independent state grounds for vigorous defense of individual rights demonstrates that the District Court correctly ruled that Iowa Code section 595.2(1) violates the Iowa Bill of Rights.[4]

(footnote continued from previous page)

the Kentucky Supreme Court held that "[i]t is not within the competency of the government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society." *Commonwealth v. Wasson*, 842 S.W.2d 487, 494-495 (Ky. 1992).

[3] Article I, section 6 of the Iowa Constitution includes a "privileges and immunities" clause and an "equality" clause that overlap Article I, section 1 in their text and that should supplement it in application. The purpose of the privileges and immunities clause "is to prevent the state from denying its citizens the privileges and immunities of national citizenship." *Perkins v. Bd. of Supervisors*, 636 N.W.2d 58, 72 (Iowa 2001). Accordingly, where a statute such as that under review in this case creates a classification of persons singled out for different treatment (here, based on their sex and sexual orientation, and that of their beloved), the law should be reviewed under an analysis fashioned under the inalienable rights clause of Article I, section 1 and the privileges and immunities clause of Article I, section 6 of the Iowa Constitution. *See generally Perkins*, 636 N.W.2d at 72-3.

[4] This case can and should be decided strictly under the Iowa Constitution as determined by this Court in its independent review. As this Court has said, although "[w]e have an interest in harmonizing our constitutional decisions with those of the Supreme Court when reasonably possible, . . . we recognize and will jealously guard our right and duty to differ in appropriate cases." *State v. Olsen*, 293 N.W.2d 216, 219-20 (Iowa 1980); *McClure v. Owen*, 26 Iowa 243 (1868); *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 5 (Iowa 2004); *Bierkamp v. Rogers*, 293 N.W.2d 577, 579 (Iowa 1980).

B. Iowa Code Section 595.2(1) Violates Article I, Section 1 of the Iowa Constitution, Which Guarantees the Right to Marry.

The right to marry is implicit in Article I, section 1's guarantee that "[a]ll men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of . . . pursuing and obtaining safety and happiness."

A correct understanding of the right to marry begins with a focus on how that legal right relates to the liberties and happiness the Iowa Constitution secures and the choices it protects. As with any fundamental freedom, the right to marry cannot be secured fully unless it is secured for all, equally. As established below, the right to marry lacks essential meaning unless a person is free to choose a marital partner irrespective of his or her sex, or that of his or her spouse.

This Court has previously explained why the freedom to marry must be understood as a protected "inalienable right," holding that "[m]arriage is one of the 'basic civil rights of man' fundamental to our very existence." *See Bearbower v. Merry*, 266 N.W.2d 128, 130 (Iowa 1978) (quoting *Loving v. Virginia*, 388 U.S. 1 (1967)); *see also Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687, 695 (Iowa 1993) ("[marriage] has long been recognized as . . . . essential to the orderly pursuit of happiness of free men"); *accord Perez v. Sharp*, 32 Cal. 2d 711, 714 (Cal. 1948) (discriminatory restrictions on marriage unconstitutional because "[m]arriage is . . . something more than a civil contract subject to regulation by the state; it is a fundamental right of free men").

Other states also have underscored the central role of the freedom to marry in the pursuit and enjoyment of safety and happiness. For example, the Massachusetts Supreme Judicial Court held that "[c]ivil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003). The reason the freedom to marry is so fundamental for both gay and non-gay people is that marriage "fulfils yearnings for security, safe haven, and connection that express our common humanity." *Id.*

In addition, the U.S. Supreme Court has explained,

> [m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

For the vast majority of individuals in our society, marriage is the single most important social, as well as legal, institution. "More than 90 percent of Americans rate having a happy marriage as a very important life goal, generally the most important goal in life." Linda J. Waite & Maggie Gallagher, *The Case for Marriage* 3 (2000). A substantial majority of all adults choose to marry at some point in their lives. *See* Matthew D. Bramlett & William D. Mosher, Centers for Disease Control,

Division of Vital Statistics, *First Marriage Dissolution, Divorce, and Remarriage: United States,* Advance Data from Vital and Health Statistics, No. 323 (May 31, 2001).

The institution of marriage, both in its meaning to the couple and in its treatment by the broader society, contributes to the quality and stability of relationships. *See* Waite & Gallagher, *supra*, at 18-23; Steven L. Nock, *Marriage as a Public Issue,* The Future of Children 13, 17-21 (Fall 2005). "Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the [state] identifies individuals, provides for the orderly distribution of property, [and] ensures that children and adults are cared for . . . ." *Goodridge*, 798 N.E.2d at 954.

For most people, "marriage is . . . primarily a symbolic statement of commitment and self-identification." Kenneth L. Karst, *The Freedom of Intimate Association,* 89 Yale L.J. 624, 651 (1980); *see also* David B. Cruz, *Just Don't Call it Marriage: The First Amendment and Marriage as an Expressive Resource,* 74 S. Cal. L. Rev. 925, 928 (2001) ("Civil marriage is a unique symbolic or expressive resource, usable to communicate a variety of messages to one's spouse and others, and thereby to facilitate people's constitution of personal identity"). However, beyond its symbolic role of reinforcing the life commitment of two partners, marriage serves needs crucial to individual fulfillment in our society.

In *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), the U.S. Supreme Court identified four distinct attributes "sufficient to form a constitutionally protected marital relationship." These include: (1) the function of marriages as "expressions of emotional support and public commitment"; (2) the "spiritual significance" of marriage in "many religions" and the fact that "the commitment of marriage may be an exercise of religious faith"; (3) the expectation of consummation; and (4) the fact that "marital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock)." *Id.* These attributes or elements of marriage are so important the Court held even incarcerated felons may not be arbitrarily denied the freedom to marry. Gay men and lesbians share "the same mix of reasons" as everyone else for valuing, needing, and wanting the freedom to marry. *See Baehr v. Miike,* No. 91-1394, 1996 WL 694235, *18 (Haw. Cir. Ct. Dec. 3, 1996).

C. The Right to Marry Guaranteed by Article I, Section 1 Extends to All Iowans Including Gay Men and Lesbians.

Article I, section 1 guarantees *all* Iowans the right to marry when it explicitly provides "*[a]ll* men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of . . . pursuing and obtaining safety and happiness." (Emphasis provided). Plaintiffs do not ask this Court to "create" or "recognize" a right to "same-sex" marriage – they simply seek to exercise the right

to marry granted all Iowans under the state constitution, with the same rules, responsibilities, and respect, and without unwarranted restriction by the government.

Marriage is no less important to gay and lesbian Iowans than to anyone else. Like all Iowans, gay men and lesbians grow up and internalize major cultural goals with deep historical meaning, including the social value placed on being married to attain love, intimacy, and authentic selfhood. Gilbert Herdt & Robert Kertzner, *I do, but I can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States*, 3 Sexuality Research and Social Policy: Journal of NSRC 33, 39 (2006). Seventy-four percent of gay or lesbian couples want to be legally married. Arline Kaplan, *Same-Sex Marriage: Mental Health Perspectives,* Psychiatric Times (Aug. 1, 2006.) Consistent with these internalized values and goals, more Iowans disclose on government surveys that they are living in same-sex relationships. The number of Iowa same-sex couples reported in government surveys rose to more than 5,800 in 2005, up from 3,698 in 2000. *See* The Williams Institute – UCLA School of Law, *Census Snapshot – Iowa* (2007), available at http://www.law.ucla.edu/williamsinstitute/publications/IowaCensusSnapshot.pdf.

The State's intrusion on Plaintiffs' exercise of their right to marry flies in the face of this Court's acknowledgment that freedom of choice in family matters is a well-recognized "fundamental liberty interest" under the Iowa Constitution. *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999) (citing *In the Interest of*

A.M.H., 516 N.W.2d 867, 876 (Iowa 1994)*; see also In the Interest of K.M.*, 653 N.W.2d 602, 607 (Iowa 2002) ("Normally, there is no justification for the State's interference in the private relations of a family"); *Olds v. Olds*, 356 N.W.2d 571, 574 (Iowa 1984) ("common law . . . demonstrates a respect for family privacy and parental autonomy" is "a fundamental liberty interest that is protected against unwarranted state intrusion").

The significance of freedom of choice in family matters traces to the natural rights guarantees of Article I, section 1. The chair of the committee assigned to draft this provision noted during the 1857 constitutional debates that "the object we have in view is to protect every man in the enjoyment of the largest liberty consistent with his duties to civil government." 1 *The Debates of the Constitutional Convention of the State of Iowa* 102 (W. Blair Lord rep.) (Davenport, Luse, Lane & Co. 1857). This sentiment reflects an understanding among the State's early leaders that a leading principle of republican government is "the least possible restraint upon the mind, person, energy and industry of every man, consistent with the rights of his fellow men." 1 *Messages and Proclamations of the Governors of Iowa*, 426-27 (Benjamin F. Shambaugh, ed., 1903). There is no "gay exception" to these

bedrock principles that can justify the denial of the freedom to marry to, and the harms exclusion inflicts on, Iowa's same-sex couples.[5]

Despite Defendant's assertion to the contrary, marriage is not "defined" by who is excluded from it. Article I, section 1 guarantees all Iowans the right to marry. Implicit in that right is the right to choose one's marital partner, regardless of whether the person selected happens to be of the same or different sex. Because gay and non-gay Iowans share the same interest in marriage and what it means and brings under the law, denying the freedom to marry is an intolerable abridgement of Plaintiffs' inalienable rights under the Iowa Constitution.

D. The Freedom to Marry Cannot Be Afforded Fully and Equally Without Protecting All Iowans' Choice of Partner in Marriage.

Because "[t]he essence of the right to marry is freedom to join in marriage with the person of one's choice," *Perez*, 32 Cal.2d at 717, Iowa Code Section 595.2(1) is a direct and unconstitutional interference with the fundamental right to marry. The statute denies Iowans their choice of a marital partner based on their sex

[5] As one commentator notes,

> [o]ne of the reasons marriage appears to matter to spouses in shaping their conduct is that society regards marriage as the ultimate marker of commitment and permanence . . . . Couples who are excluded from marriage, therefore, must construct their relationship . . . in the face of state-backed norms denigrating the seriousness and substantiality of all non-martial relationships. In this sense, the state's exclusion of some persons from marriage . . . may not simply deny them a positive benefit, but do them a distinct harm.

David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption,* 51 Vill. L. Rev. 891, 910 (2006).

or the sex of their beloved, the person "irreplaceable" to him or her. As the Supreme Court of California held in the first case striking down race restrictions on marriage, sixty years ago this year, "[h]uman beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Id.*

Choice is no less central or important in marriage than in any other family matter. *See Callender*, 592 N.W.2d at 190; *see also In re the Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003) (Iowans have the right "to make family and reproductive decisions based on their current views and values"); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) for the proposition that choices regarding family matters, including marriage, are "central to the liberty protected by the Fourteenth Amendment" and "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," and explaining "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state").

As the institution has evolved, marriage in America today is:

> *about* choice, whether it be the choice to "make it official" with your beloved and to accept the protections and responsibilities that come with the decision; the choice to work at your marriage and make it rewarding and good; the choice to betray or divorce a spouse; or the choice to avoid the institution of marriage altogether.

Wolfson, *Why Marriage Matters* at 6 (emphasis added). "[T]he decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge*,

798 N.E.2d at 955. "The one most clearly established feature of the constitutional freedom of intimate association is the freedom to marry, which radically restricts the state's power to withhold the status of marriage from a willing couple." Karst, *The Freedom of Intimate Association*, 89 Yale L. J. at 652.

In appropriate deference to choice in family matters, the Iowa Code places few restrictions on Iowans' choice of spouse. Virtually all adults are able to marry the person of their choice without regard to race, color, national origin, religion, age, income, education, health, ability or desire to procreate or raise children, or even – due to the U.S. Supreme Court's ruling in *Turner v. Safley* – status as an incarcerated felon. *See also* Andrea Clausen, *Marriage of Same-Sex Couples in Iowa*: *Iowa Code § 595.2(1) is Not Constitutional Under the Iowa Constitution Article I, §§ 1, 6 and 9*, 6 J. Gender, Race & Just., 451, 461-62 (2002). There is likewise no justification for the different-sex restriction on Iowans' choice of a partner in marriage. Whereas at one time the law imposed different roles, and granted different rights, on the basis of each spouse's sex, *see* Affidavit of Nancy C. Cott, District Court Record,[6] Iowa was among the state leaders in erasing these sex-based distinctions. The sex of spouses is today immaterial to their legal obligations

[6] Most strikingly, married couples were deemed to be a single entity in which one partner – the woman – had no legal individuality apart from her husband. *See* Affidavit of Nancy C. Cott at ¶¶ 22-24. We in Iowa have come a long way.

and benefits, and to the meaning of marriage under the law. *Id*. at ¶¶ 26-34; Wolfson, *Why Marriage Matters* at 63-65.

In marriage, gay and lesbian Iowans, just like others, "seek . . . societal acknowledgment of the humanity and normative goodness that they believe inheres in . . . their relationships." Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 Geo. L.J. 1871, 1930 (1997). By denying these committed Iowa couples the freedom to marry, the State devalues their families both practically and symbolically. *See* Mary Ann Case, *Marriage Licenses*, 89 Minn. L. Rev. 1758, 1775 (2005). Ultimately, the message sent to couples, their children, and the community is that the lives and love of gay and lesbian Iowans, and their committed marital unions, are less important or substantial than those permitted by Iowa Code section 595.2(1), and not worthy of legal acknowledgment as marriage. *See Lewis v. Harris*, 908 A.2d 196, 226-27 (N.J. 2006) (Poritz, C.J., dissenting).

Because Iowa Code section 595.2(1) deprives gay and lesbian Iowans of the right to marry the partner of their choice, stigmatizing and harming them and their loved ones, it violates the Iowa Constitution's core guarantee that every citizen of this State is endowed with the freedom to pursue and obtain safety and happiness, including through marriage.

E. Iowa Code Section 595.2(1) Further Violates Article I, Section 9 of the Iowa Constitution, Which Also Guarantees Every Iowan the Right to His or Her Choice of Marital Partner.

Article I, section 9, the due process clause of the Iowa Constitution, provides yet another basis for striking down the statute's invasion of Iowans' freedom to marry. Like Article I, section 1, section 9 is a guarantee of substantive rights. Further, Article I, section 9 supplements the inalienable rights clause, because substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Sanchez v. State*, 692 N.W.2d 812, 819 (Iowa 2005) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

In the context of Article I, section 9 cases, as elsewhere, this Court has consistently recognized that "[m]arriage is one of the basic civil rights of humankind." *Locke v. Locke*, 263 N.W.2d 694, 696 (Iowa 1978); *see also Bearbower*, 266 N.W.2d at 130 ("There is no dispute among members of this court concerning the role of marriage in our social structure"); *Sioux City Police Officers' Ass'n*, 495 N.W.2d at 695; *State v. Hartog*, 440 N.W.2d 852, 855 (Iowa 1989).

The right to marry, like all other fundamental rights, belongs equally to all Iowans. The fact that gay and lesbian couples have been denied their freedom to marry does not justify *continuation* of the denial of that liberty and right – this Court has never allowed a history of discrimination or exclusion to trump constitutional liberties and today's imperatives of equality and inclusion.

Marriage is not defined by who is included or excluded. "To define the institution of marriage by the characteristics of those to whom it has always been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question. . . ." *Goodridge*, 798 N.E.2d at 972-73 (Greaney, J., concurring). Because "the present has a right to govern itself," this Court has steadfastly maintained that "a continual reexamination of rationales and principles . . . is necessary in constitutional decisionmaking." *Miller v. Boone Cty. Hospital*, 394 N.W.2d 776, 780 (Iowa 1996) (citation omitted).

Thus, for example, when this Court held that a putative father has a right to challenge paternity under Iowa's due process clause, it did not find a new fundamental right, but merely applied a previously identified fundamental right to a new set of circumstances:

> If we recognize parenting rights to be fundamental under one set of circumstances, those rights should not necessarily disappear simply because they arise in another set of circumstances involving consenting adults that have not traditionally been embraced. Instead, we need to focus on the underlying right at stake. The nontraditional circumstances in which parental rights arise do not diminish the traditional parental rights at stake.

Callender, 591 N.W.2d at 190.

This Court has long recognized the principle that due process requires attention to the realities of the present day and the need for change. *See In the Interest of A.M.H.*, 516 N.W.2d at 870 ("Due process is flexible and calls for such procedural protections as the particular situation demands"); *Bearbower*, 266

N.W.2d at 129 ("Of course it is our duty to monitor and interpret the common law, and to abandon antiquated doctrines and concepts"); *Redmond v. Carter*, 247 N.W.2d 268, 273 (Iowa 1976) ("A constitutional provision does not stop the clock").

In this regard, in *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 266 (Iowa 2007), Justice Wiggins cogently observed in dissent that:

> [a]lthough the majority may classify these examples of overinclusive and underinclusive applications of the ordinance as extreme, they do so in the context of social norms as they existed thirty-three years ago when the Supreme Court decided *Belle Terre*. In that era the typical household consisted of a mother, a father, and children, with one breadwinner and one vehicle. In today's society this is no longer the case . . . . The simple fact is that in today's modern society the overinclusive and underinclusive examples identified in this dissent and by other courts that have found similar ordinances unconstitutional are closer to the norms than to the extremes.[7]

Marriage in America continues to serve many (though not all) of the same functions it always has – functions that gay and non-gay Iowans alike value and need. Nevertheless, marriage, like the typical household makeup, has undergone major changes over time. As the District Court found,

[7] As discussed above, this Court has a strong history of identifying fundamental rights even when other courts have failed to do so. In *Pilcher*, for example, where the Court ruled that Iowa's sodomy statute unconstitutionally violated the Plaintiff's right to privacy, this Court conducted its own analysis and reached a conclusion opposite of a U.S. Supreme Court opinion issued less than two months earlier. It would be another 27 years before the U.S. Supreme Court would catch up to the leadership of this Court, acknowledging error. *See Lawrence*, 539 U.S. 558.

> [m]arriage in the United States is virtually unrecognizable from its earlier common law counterpart, having undergone radical, unthinkable changes in laws governing who may marry, when marriages may end, and the legal significance and consequences of marriage for the individuals involved.

District Court Opinion at ¶ 98.

In the due process context, as elsewhere, it is not right to exclude Iowans seeking to exercise and share in a fundamental right based on narrow, under-inclusive, or preconceived notions inconsistent with how people live today, or how the law has changed. For example, nothing in Iowa's modern marriage laws restricts marriage to those who are fertile or desire to procreate, or justifies denying the freedom to marry based on whether or not people have or wish to have children.[8] Indeed, in affirming the right of even incarcerated felons to marry, the U.S. Supreme Court has recognized the value of marriage even to individuals who may never have the opportunity to live together, raise children or even consummate their relationship. *See Turner*, 482 U.S. at 95-96. At the same time, those who wish to procreate outside of marriage today have a wide array of legitimate and well-accepted options not previously available or socially acceptable.

In applying Article I, section 9, as with Article I, section 1, this Court should take note of "modern society," and even more important, the shared aspirations and

[8] Of course, many same-sex couples in Iowa are in fact raising children. Those couples and their children share the same needs and desires as other Iowans for the safety-net, security, and dignity marriage can bring to protect their families.

realities of all Iowans today, and recognize what marriage in American law and under the Iowa Constitution is now: an expression of emotional support and public commitment, a spiritual and – for some – religious statement, and a precondition to an enormous array of rights and benefits uniquely available to those who choose (and are allowed) to partake. *See Callender*, 591 N.W.2d at 191 (this Court will not abide abridgement of Iowans' freedom "by requiring specific approval from history before protecting anything in the name of liberty"). In denying gay and lesbian Iowans the right to participate in marriage, Iowa Code section 595.2(1) without reason, and unconstitutionally, deprives them of their most fundamental due process rights.

F. Defendant's Purported Rationale for Denying the Right to Marital Choice Do Not Withstand Scrutiny Under Either Article I, Section 1 or Article I, Section 9.

In cases like this involving the fundamental liberty of choice in family matters, this Court has appropriately applied a strict scrutiny analysis. *Santi v. Santi*, 633 N.W.2d 312, 318 (Iowa 2001) ("We are convinced that the nature of the liberty interest impacted here – the decision by fit, married parents to oppose visitation by third parties outside their nuclear family – is one that, in Iowa, has historically been protected by the highest level of scrutiny").

Under the separate but similar analyses developed under Article I, sections 1 and 9, the Court first considers whether the statute "significantly interfere[s] with the decisions to enter the marriage relationship . . . ." *Sioux City Police Officers'*

Ass'n, 495 N.W.2d at 695 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)). Iowa Code section 595.2(1) does not just significantly interfere with that decision, but acts as a complete bar by prohibiting each gay and lesbian Iowan from marrying the precious and irreplaceable partner of his or her choice.

The Court then considers whether the statute at issue is unduly oppressive, or put another way, "whether [it] is narrowly tailored to serve a compelling state interest." *State v. Groves*, 742 N.W.2d 90, 93 (Iowa 2007). As Plaintiffs and other amici establish, the stated goals of Iowa Code section 595.2(1) fail even to bear any rational relationship to the statute.[9]

The justifications conjured up by Defendant remain disconnected with the shared purposes and scope of marriage today and fail to satisfy the heavy burden imposed on the government when it interferes with a fundamental right, such as the freedom to marry.

For instance, prohibition of marriage by partners of the same sex cannot be argued to promote procreation; keeping some Iowa couples from matching their commitment in love with a commitment under the law does nothing to enhance

[9] Under the rational basis test, a law is invalid if the relationship between the classification it imposes and the articulated legislative purpose is "so weak the classification must be viewed as arbitrary or capricious." *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d at 259 (citing *Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 8). Higher levels of scrutiny apply here. Fundamental rights implicated in this case require that the state interest be compelling and that the regulation be narrowly tailored, impose the least restrictive imposition on freedoms and in fact achieve the articulated state interest. Irrespective of the level of review, the reasons articulated by Defendant do not withstand scrutiny.

procreation by other couples. Moreover, under Iowa law, the sterile, the elderly, the infirm, the dying, and those non-procreatively inclined are allowed to marry. *See* Mark Strasser, *Lawrence, Same-Sex Marriage and the Constitution: What is Protected and Why*?, 38 New Eng. L. Rev. 667, 675 (2004). Only Iowa's same-sex couples – even when they are in fact *raising* children – are excluded from marriage. *Id*. ("The point is not merely that those who do not and will not have children are allowed to marry, but that the state is precluding individuals from marrying who are having and raising children"); *accord Schott v. Schott*, 744 N.W.2d 85 (Iowa 2008) (reversing district court's decision invalidating second-parent adoption by lesbian partner of children conceived naturally and via artificial insemination).

Nor can the challenged statute be justified on the basis that it promotes child-raising by a father and a mother. Such a purported justification does not reflect the State's actual policies toward child-raising, which routinely and appropriately (given the solid evidence on gay parenting and the best interests of children[10]) allow and even encourage single-and same-sex parenting. *See Hodson v. Moore*, 464 N.W.2d 699, 700 (Iowa Ct. App. 1990) (awarding custody to lesbian mother regardless of fact that if placed with father the child would be raised by a heterosexual couple); *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992)

[10] At ¶¶ 64-95 of its Ruling, the District Court made a substantial number of well-supported findings based on the undisputed facts that Iowa's interest in the children of lesbian and gay parents is as great as in the welfare of any other children and that children of gay and

(footnote continued)

(concluding that mother's relationship with a lesbian partner did not impair her ability as a parent). Moreover, even assuming that promotion of a particular parental configuration were a legitimate and sufficient state goal, excluding same-sex couples from marriage and punishing their children for having the "wrong kind" of parents would in no way advance that goal or better any other Iowa couples or children.

Other rationale put forth by the State fail under both common sense and the evidence. For instance, just as dissolution of a same-sex union in no way harms different-sex couples' marriages, the exclusion of gay and lesbian Iowans from marriage does nothing to benefit different-sex relationships. *See Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 87 (Iowa 2005).

"[D]ecisions about marriage . . . have life-long consequences for a person's identity and sense of self." *In re Marriage of Witten*, 672 N.W. 2d at 778. All Iowans have a fundamental right to make their own decisions about marriage, including the choice of a spouse. Section 595.2(1) unjustifiably restricts that right and therefore violates Article I, sections 1 and 9. The statute's infringement on this cherished and fundamental right to marry is untenable under the Iowa Constitution and the precedents of this Court.

(footnote continued from previous page)

lesbian parents are as well adjusted and successful as other children. *See*, *e.g.*, District Court Order, ¶ 64, 74. *See generally*, *Why Marriage Matters*, pp. 73-102.

CONCLUSION

For the reasons stated in the District Court Ruling, Appellees' Brief and this *Amicus* Brief, the District Court correctly entered summary judgment in favor of Katherine Varnum and the other named Plaintiffs in this litigation. Accordingly, the District Court's Ruling should be affirmed.

Dated: March 27, 2008.

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Certificate of Filing

The undersigned hereby certifies that on the 27th day of March, 2008 he/she will file by personally delivering 18 true copies of this Brief of *Amicus Curiae* Freedom to Marry to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, 50319, in accordance with Iowa Rule of Appellate Procedure 6.31.

Certificate of Service

The undersigned hereby certifies that in compliance with Iowa Rule of Appellate Procedure 6.31, he/she served the foregoing Brief of *Amicus Curiae* Freedom to Marry this 27th day of March, 2008 by mailing (via U.S. mail) two (2) true copies of the Brief of *Amicus Curiae* Freedom to Marry with full postage prepaid to each of the following attorneys of record at the addresses shown:

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