IN THE SUPREME COURT OF IOWA

SUP. CT. NO. 07-1499
Dist. Ct. No. CV5965

KATHERINE VARNUM, ET AL.,

Plaintiffs/Appellees

vs.

TIMOTHY H, BRIEN, POLK COUNTY RECORDER

Defendant/Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE ROBERT J. HANSON

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND *AMICUS* BRIEF OF WOMEN'S RIGHTS ORGANIZATIONS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 6.18(1) of the Iowa Rules of Appellate Procedure, Legal Momentum; the Iowa Chapter of the National Organization for Women; the Council on the Status of Women at the University of Iowa; the Advisory Board of the Women's Resource and Action Center, University of Iowa; the Emma Goldman Clinic; and the Women's Cultural Collective (collectively, "*amici*") respectfully request leave to file the attached brief, in support of Appellees Katherine Varnum, *et al.,* to be considered in the above-captioned case.

A. Legal Momentum

Legal Momentum is the oldest legal advocacy organization in the United States dedicated to advancing the rights of women and girls. Since its founding in 1970, Legal Momentum has been a leader in establishing legal, legislative and educational strategies to secure equality and justice for women across the country. Legal Momentum views discrimination on the basis of sexual orientation as a form of sex discrimination. Legal Momentum is dedicated to the right of all women and men to live and work free of government-enforced gender stereotypes, and strongly supports the right of lesbians and gay men to be free from discrimination based on, among other things, gender stereotyping.

B. Iowa Chapter, National Organization for Women

The Iowa Chapter of the National Organization for Women ("Iowa NOW") is steadfast in its commitment to ending discrimination on the basis of gender, race, age, sexual orientation, economic status, or any other bias-based categorization

imposed on individuals or groups. In addition to advocating for economic justice and reproductive rights for women, Iowa NOW has called for an end to discrimination against gay men and lesbians in Iowa's civil marriage laws.

C. Council on the Status of Women at the University of Iowa

The Council on the Status of Women is an advisory body to the administration of the University of Iowa and an advocacy group for all women on campus. Consisting of university faculty, staff, students, and representatives of the university administration and programs, the mission of the Council on the Status of Women is to ensure an environment that supports the rights of all women at the University of Iowa. The council is committed to working in partnership with the University to develop policies that remove barriers to women's learning, professional growth, creativity, employment, and contributions to the institution and to the broader community.

C. Advisory Board of the Women's Resource and Action Center, University of Iowa

The Women's Resource and Action Center at the University of Iowa is a diverse community dedicated to fostering women's individual empowerment and systemic solutions to all forms of oppression. The Center leads and collaborates on projects that serve UI students, staff, faculty, and the greater community. The Advisory Board of the Women's Resource and Action Center is interested in the outcome of this case because the Board's role is to confront all forms of discrimination and oppression. This case directly impacts on the freedom and rights

of Iowa women and confronts the institutionalization of unfair sex-bases gender role expectations.

D. Emma Goldman Clinic

The Emma Goldman Clinic is a 35 year not-for-profit organization founded and operated by local women. The Clinic exists to empower people in all life stages through the provision of quality reproductive health care, active education and the promotion of individual voices in public policy. The Clinic believes that controlling an individual's body and health is integral to establishing the quality of life. The Clinic promotes participatory health care, informed decision making, client rights, advocacy for women, and expansion and support of reproductive choices. It acknowledges that oppression can be perpetuated on both the individual and institutional level and is committed to participating in the struggle to end all form of oppression based on ableism, ageism, body size, classism, ethnic origin, racism, religion, sexism, sexual identity or national origin. Institutionally, the Emma Goldman Clinic strives to increase economic, geographic, structural and language accessibility for the women it serves. It is actively committed to staff diversity in employment policies and practices and strives to provide an atmosphere in which diversity is acknowledged and celebrated. The Clinic offers non-judgmental quality health care services to all women. Its goals are inspired by a belief in the larger ideals of feminist philosophy: political, economic, and social equality. The Clinic's interest in this case is based upon these values.

E. Women's Cultural Collective

The Women's Cultural Collective is an Iowa women's organization which seeks to promote community building and to provide a safe atmosphere for lesbians while welcoming all women to attend its activities and events. Support for women's rights and of the right of same-sex couples to marry flows from the collective's commitment to its mission of providing a safe and affirming environment for women. Although not all women who participate with Women's Cultural Collective would necessarily choose to get married even as a same-sex couples, those participating today perceive the importance and justice of having that choice.

F. Interests of *Amici Curiae*

These proceedings raise important issues regarding improper sex stereotyping. *Amici* are dedicated to ending sex discrimination and achieving full equality for women and girls. Each *amicus* has extensive knowledge concerning issues of discrimination based on sex stereotypes. They have a particular interest in protecting women and men, including lesbians and gay men, from gender discrimination and gender-based stereotypes. *Amici* are uniquely situated to address the ways in which restricting marriage to different-sex couples relies on outmoded, stereotypical, and constitutionally impermissible conceptions of gender and why legislation based on gender stereotypes violates the Iowa Constitution.

For these reasons, *amici* have a substantial interest in the present case and are uniquely able to present needed insight into the crucial issue of how the marriage exclusion in Iowa Code section 595.2 constitutes impermissible sex discrimination.

DATED this 28th day of March, 2008

Respectfully submitted,

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AMICUS CURIAE BRIEF OF WOMEN'S RIGHTS ORGANIZATIONS

I. Identity and Interests of the *Amici Curiae*

This brief is filed on behalf of *amici curiae* Legal Momentum; the Iowa Chapter of the National Organization for Women; the Council on the Status of Women at the University of Iowa; the Advisory Board of the Women's Resource and Action Center; the Emma Goldman Clinic; and the Women's Cultural Collective. *Amici* are women's rights organizations dedicated to ending sex discrimination and achieving full equality for women. Each *amicus* has extensive knowledge concerning issues of discrimination based on sex stereotypes. They have a particular interest in protecting women and men, including lesbians and gay men, from sex discrimination and sex-based stereotypes. *Amici* are uniquely situated to address the ways in which restricting marriage to different-sex couples relies on outmoded, stereotypical, and constitutionally impermissible conceptions of gender and why legislation based on sex stereotypes violates the Iowa Constitution.

II. Introduction

Section 595.2 of the Iowa Code ("section 595.2"), as amended in 1998, states that "[o]nly a marriage between a male and a female is valid." This is an expressly sex-based classification, which denies a fundamental right to individuals on the basis of their sex. Each female plaintiff in this case is excluded from the joys, rights, commitments, privileges, and obligations of marriage to her beloved life partner because she is a woman. A man in her place would be allowed to marry. Each male plaintiff is likewise deprived of the same celebrated commitments and connections

with his beloved life partner because he is a man. A woman in his place would be allowed to marry. As a result of this facial discrimination – as the trial court properly held was a matter of undisputed fact – section 595.2 improperly gives legal voice to the sex stereotypes that men and women occupy inherently different roles in family and society, that men are not "real" men unless they are intimate with women, and that women are not "real" women unless they are intimate with men. Yet Iowa (and this Court) has been in the forefront of rejecting these same stereotypes in other contexts, such as child custody, alimony, and foster parenting.

Because it discriminates based on sex, the marriage exclusion of section 595.2 is subject to at least intermediate scrutiny under the Iowa Constitution. Thus, the exclusion of same-sex couples from marriage on the basis of sex can survive constitutional scrutiny only if the County can prove that it is substantially related to the achievement of important governmental objectives. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998). This standard cannot be met here, where the rationales advanced in support of the law are either unrelated to the exclusion of same-sex couples from the institution of marriage, or are themselves gender stereotypes regarding, for example, the roles of men and women in society and the household as husbands, wives, fathers, and mothers.

Nor is section 595.2 exempt from heightened scrutiny (intermediate or above) based on its purported "equal application" to men and women. A long line of cases in this Court and the U.S. Supreme Court has recognized that equal application does not justify discrimination with respect to rights held by individuals. *See, e.g., MRM,*

Inc. v. City of Davenport, 290 N.W.2d 338, 341 (Iowa 1980); *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L. Ed. 2d 1010, 1018 (1967). Here, each adult plaintiff has been deprived of the fundamental right to marry the spouse of his or her choice based on the suspect classification of sex. It does not matter that the statute punishes individuals of both sexes.

The stereotypes perpetuated by section 595.2's denial of marriage to same-sex couples harm all Iowans, not just those who are denied the right to marry based on their sex. The marriage exclusion gives inappropriate legal voice to the stereotypes that men and women naturally occupy different roles in family and society. The Court should affirm the decision of the trial court, hold the marriage exclusion in section 595.2 to be unconstitutional under the Iowa Constitution, and permit every Iowan the fundamental right to marry the individual of his or her choice.

III. The Marriage Exclusion Is A Sex-Based Classification That Must Satisfy Intermediate, If Not Strict, Scrutiny

A. Under The Equal Protection Clause Of The Iowa Constitution, At Least Intermediate Scrutiny Must Be Applied To Classifications Based On Sex

When, as here, a litigant raises an equal protection challenge based on the Iowa Constitution, "the level of scrutiny depends on the type of state statutory classification under attack." *Sherman*, 576 N.W.2d at 317. Sex-based classifications have been afforded "intermediate scrutiny," which requires an "exceedingly persuasive justification." *Id.* "To meet this burden, the party seeking to uphold the challenged classification must show that the classification serves ***important governmental objectives*** and that the discriminatory means employed are

substantially related to the achievement of those objectives." *Id.* (emphasis added).

In assessing whether an Iowa statute satisfies intermediate scrutiny, this Court may find federal case law persuasive. *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 4-5 (Iowa 2004). However, this Court alone may adjudicate constitutionality under the Iowa Constitution, which may offer greater protection for individual rights than the U.S. Constitution would. *Id.* at 6. Iowa's test is a "more searching application of the federal test, though couched in the same terms." *Johnson v. University of Iowa*, 408 F.Supp.2d 728, 750 (S.D. Iowa 2004). Thus, a statute that is constitutional under the Equal Protection clause of the U.S. Constitution may still violate the Iowa Constitution. *Racing Ass'n*, 675 N.W.2d at 6.

B. The 1998 Amendment To The Freedom And Equality Clause Of The Iowa Constitution Makes Strict Scrutiny Appropriate

Article I, section 1 of the Iowa Constitution, generally known as the Freedom and Equality clause, states 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." The words "and women" were added to the Freedom and Equality clause by the people of Iowa in 1998. This Court has not addressed the appropriate level of scrutiny for sex-based classifications since this amendment was made. However, it is understood that when the constitution (like a statute) is revised, that revision signifies a change in the law. *Rants v. Vilsack*, 684 N.W.2d 193, 199 (Iowa 2004) (Iowa Constitution construed under the same rules applied to statutes); *State v. Snyder*, 634 N.W.2d 613, 615 (Iowa 2001) (amendments

to statute create presumption that changes were intended). In light of the amendment's now-express guarantee of equality to each man ***and woman***, and the presumption that the amendment changes the law, it is appropriate for the Court to apply ***strict*** scrutiny to sex-based classifications in Iowa law, rather than the intermediate scrutiny that was applied prior to the 1998 amendment.[1] Under strict scrutiny, a statute must be "narrowly tailored to further a compelling government interest. *In the Interest of A.W.*, 741 N.W.2d 793, 810-811 (Iowa 2007). Classifications under this standard are "presumptively invalid and can be upheld only on an extraordinary justification." *Sherman*, 576 N.W.2d at 317. Although strict scrutiny is the correct test, even under intermediate scrutiny, the plaintiffs prevail.

C. The Marriage Exclusion Is The Type Of Classification Based On Sex That Has Been Rejected By Iowa Courts

1. Iowa's Marriage Law Embodies A Sex-Based Classification That Impermissibly Endorses Sex Stereotypes

Prior to 1998, section 595.2 read in relevant part that "[a] marriage between a male and a female each eighteen years of age or older is valid." In 1998, the General Assembly amended the relevant portion of section 595.2 to read "***[o]nly*** a marriage between a male and a female is valid." (emphasis added). Thus, whereas the pre-1998 statute identified marriage ***inclusively*** (without comment on the validity of a marriage between two people of the same sex), the 1998 revision defined marriage

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[1] Applying strict scrutiny to sex-based classifications would achieve the called-for change without going as far as the equal rights amendment that Iowa voters rejected in 1980 and 1992. *See National Elec. Contractors Ass'n v. Pierce County*, 667 P.2d 1092, 1102 (Wash. 1983) (Washington ERA "is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny'").

exclusively: all marriages that did not involve both a man and a woman were invalid.

The current marriage statute thus indisputably includes an express sex-based exclusion. This law made explicit that an adult man who wished to marry another adult man could not do so, purely because of his sex. Likewise, the law made explicit that an adult woman who wished to marry another adult woman could not do so, purely on the basis of her sex. On its face, this is a sex-based classification.[2]

This sex-based classification has improperly legitimized various sex stereotypes centering around the assumption that men and women fulfill such inherently different roles in family and society that no marriage could be complete without one member of each sex. These stereotypes include the assumptions that husbands and wives contribute differently to the household (for example, as breadwinner or homemaker), that mothers and fathers fulfill different parenting roles, and that the institution of marriage is necessary to protect vulnerable women.

These stereotypes are so integral to the exclusion of same-sex couples from marriage that the County has advanced them as (circular) justifications for

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[2] *See, e.g. Baehr v. Lewin*, 852 P.2d 44, 64 (1993) ("[the Hawaii marriage statute], on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex"); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J, concurring) ("[O]ur marriage statutes . . . create a statutory classification based on the sex of the two people who wish to marry . . . . As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex"); *Hernandez v. Robles*, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, C.J., dissenting) ("The exclusion of same-sex couples from civil marriages . . . discriminates on the basis of sex . . . . [A] woman who seeks to marry another woman is prevented from doing so on account of her sex—that is, because she is not a man. If she were, she would be given a marriage license to marry that woman.").

maintaining the exclusion. The County has argued that marriage (as a different-sex institution) has "five universal functions," including "(2) providing children with at least one parent of each sex whenever possible . . . (4) bringing men and women together for both practical and symbolic purposes; and (5) providing men with a stake in family and society." (Appellant's Proof Br. at 45-46 (citing the (excluded) expert report of Katherine Young)). Thus, the County endorses the view that men and women naturally occupy different parenting and family roles, and that without the institution of marriage, fathers would wantonly abandon the vulnerable mothers of their children. The County also argues, without foundation, that "typical male and female parenting styles each contribute uniquely to the healthy development of children" (Order at p. 8 (describing the (excluded) expert report of Dr. Steven Rhoads)), indicating the County's acceptance of the stereotype that male and female parenting styles are inherently different and necessary to child development – notwithstanding that Iowa law has rejected this stereotype, as discussed below.[3]

The marriage exclusion also enacts into law the sex stereotype, as one court explained in the context of an employment case, "that 'real' men should date women, not other men." *Centola v. Potter,* 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *See also Heller v. Columbia Edgewater Country Club,* 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (explaining in employment discrimination context that a woman who "is

[3] Acceptance of sex stereotypes has been embedded in many of the decisions of other state courts rulings denying marriage equality for same sex couples, undermining their persuasive force in those other states and in Iowa. *See* Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30:2 Harv. J. L. & Gender 461 (2007) (discussing sex stereotypes adopted by state courts).

attracted to and dates other women" does not conform with the "stereotype of how a woman ought to behave). Homosexuality has been, and continues to be, viewed as a gender transgression, and fear of gender nonconformity is closely tied to anti-gay sentiment. Such stereotypes range from Phyllis Schlafly's famous admonition that marriage for same-sex couples would lead to "degradat[ion]" of women's homemaker and other traditional gender roles within families, to more subtle forms of stereotyping, such as the stigmatizing of gay men as "effeminate" or of lesbians as "masculine." Schlafly, The Power of the Positive Woman 85-90 (1977); Koppelman, *Romer v. Evans and Invidious Intent*, 6 Wm. & Mary Bill Rts. J. 89, 129 (1997) (identifying link between homosexuality and stigmatization for gender-inappropriateness). Numerous studies have observed the connections between anti-gay sentiment and strongly-held beliefs in gender stereotypes,[4] and the facts of discrimination suits from across the country reflect the connection between the

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[4] *See, e.g.* Dunbar et al., *Some Correlates of Attitudes Toward Homosexuality,* 89 J. Social Psychology 271 (1973) (subjects "who were most prejudiced against homosexuals . . . held stronger stereotypes of masculinity and femininity"); Herek, *Heterosexuals' Attitudes toward Lesbians and Gay Men: Correlates and Gender Differences* 25 J. Sex Research 451 (1988) (hostility toward gay men and lesbians "is associated with traditional attitudes about gender- and family-roles"); Kite & Whitley, *Sex Differences in Attitudes Toward Homosexual Persons, Behaviors, and Civil Rights*, 22 Personality & Social Psychology Bulletin 336 (1996) ("[B]oth women's and men's negative attitudes toward homosexuality are strongly associated with support for traditional sex roles."); Morrison et al., *Gender Stereotyping, Homonegativity, and Misconceptions about Coercive Behavior Among Adolescents*, 28 Youth & Society 351 (1997) (finding a correlation in adolescents between homophobia and sex-stereotypic beliefs and a correlation between homophobia and a belief that sexual coercion is normative rather than anomalous); Hicks & Lee, *Public Attitudes Toward Gays and Lesbians: Trends and Predictors*, 51 J. Homosexuality 57 (2006) ("[r]espondents were more anti-gay if they . . . believed that a woman's place is in the home rather than supporting equality between the sexes.").

perception of an individual as homosexual and the use of sex-stereotyping epithets. *See, e.g., Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (harassing comments by female employer to female employee perceived as lesbian included "I thought you were the man" and "I thought you wore the pants"); *Menchaca v. American Medical Response of Illinois, Inc.*, 2002 WL 48073, at *3 (N. D. Ill. Jan. 14, 2002) (comments that fired employee was a "f***ing dyke" and a "pit bull dyke" were admissible in sex discrimination case because they reflected attitude that employee "was too 'tough' and thus did not conform to traditional sexual stereotypes"); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 870 (9th Cir. 2001) (harassers referred to male plaintiff perceived as gay as "she" and "her," mocked plaintiff "for walking and carrying his serving tray 'like a woman,' and taunted [plaintiff] as, among other things, a 'faggot' and a '... female whore'").

The trial court recognized the presence of these stereotypes in section 595.2:

> Sex-role conformity remains embedded in Iowa marriage law. As a condition of marriage in Iowa, male Plaintiffs must confirm to the State's view that men should fall in love with, be intimate with and marry only women, while female Plaintiffs must conform to the State's view that women should fall in love with, be intimate with and marry only men. In fact, these are old and overbroad stereotypes that do not reflect the diversity of individual men and women.

(Order, ¶ 110.)

As Appellees and other *amici* explain in detail, marital status in Iowa confers numerous rights and responsibilities unavailable to those who are unmarried. But marriage is more than a collection of rights and duties. It is a lawfully conferred symbol of maturity and adulthood, commitment, mutuality, fidelity, and honor. *See*

Turner v. Safley, 482 U.S. 78, 95-96, 107 S.Ct. 2254, 2265, 96 L. Ed. 2d 64 (1987) (describing the "expressions of emotional support and public commitment" attendant on marriage as "an important and significant aspect of the marital relationship."). By placing marital status out of reach for individuals who defy sex stereotypes by wishing to marry others of the same sex, the state reinforces those sex stereotypes, and penalizes individuals both legally and socially for their non-conformity. In the words of the Massachusetts Supreme Judicial Court:

> Civil 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 . . . . Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Goodridge, 440 Mass. at 322.

Set against (and excluded from) the dense symbolism of permanence and maturity that marriage enjoys, same-sex partnerships become improperly branded as immature and temporary – something to "grow out of." As the Ontario Court of Appeal recognized, "[d]enying same-sex couples the right to marry perpetuates the . . . view . . . that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships." *Halpern v. Canada (Attorney General),* 225 D.L.R. (4th) 529, 559 (2003) (O.A.C.). In denying same-sex couples the right to marry, the state inaptly embraces and espouses that those who reject sex stereotypes

– in this case, that men must only be intimate with women, and women must only be intimate with men – are not worthy of respect and recognition as mature adults.

2. Iowa Law Firmly Rejects Sex-Based Classifications Of The Sort Section 595.2 Embodies

Iowa recognizes that the sex classification and sex stereotypes promoted by section 595.2 have no place in the law. In particular, this Court's substantial precedent in the area of family law has emphasized that it is both unconstitutional and unwise for the state to use sex stereotyping in making rules concerning marriage and custody. For example, this Court held that it would be unconstitutional for courts to consider gender when assessing which spouse should receive alimony upon dissolution of a marriage. *See In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa 1992) (ordering wife to pay alimony to husband when wife was primary wage earner in family and husband was responsible for primary child care). Rather, the Court held, alimony must be awarded with care to avoid sexual stereotypes. *Id.* To take sex or sex stereotypes into account would rely on an outdated conception of marriage that treats sexes differently by assuming, for example, that men occupy the primary breadwinning role in a household or that women are financially dependent on men. *See, e.g., Id.* at 608-610 (recognizing family's choice to have female primary breadwinner and male primary caregiver).

Iowa also took the lead regarding child custody, rejecting the common law to adopt a gender-neutral "best interests" of the children rule in 1867. *Cole v. Cole,* 23 Iowa 433, 1867 WL 355, *7 (Iowa 1867) (nevertheless including sex stereotypes in its analysis). In 1974, the Court questioned the constitutionality of the commonplace

presumption that custody of children of a tender age should be assigned to the mother, and held that such a presumption is neither necessary nor useful in assessing the best interests of children. *In re Marriage of Bowen*, 219 N.W. 683, 688 (Iowa 1974). In Iowa, therefore, mothers and fathers are presumed to be equally capable of nurturing and providing for children. *Id.*

Furthermore, Iowa permits same-sex couples (including several of the plaintiff couples in this action) to act as foster parents, which demonstrates not only that Iowa recognizes the fitness of same-sex couples for parenting (as the parties and other *amici* in this action will undoubtedly discuss in greater detail), but also that Iowa recognizes that men and women do not contribute inherently different qualities to child-rearing. *See also Schott v. Schott*, 744 N.W.2d 85, 88-89 (Iowa 2008) (declining to void second parent adoption by same-sex couple, without setting general rule for second parent adoptions in Iowa). By accepting that a child may thrive with parents of the same sex, Iowa has rejected the sex stereotype that mothers and fathers occupy necessarily different parenting roles.

Iowa family law has also steered clear of the sex stereotype that men should only be intimate with women and that women should only be intimate with men. This is evident from cases in which Iowa courts have declined to consider a parent's sexual orientation in assessing custody or visitation rights and obligations. *See, e.g. In re Marriage of Wiarda*, 505 N.W.2d 506, 508 (Iowa Ct. App. 1993) (disruptive nature of mother's post-marital relationship would be the same "whether Sally's friend were a man or a woman"; granting extended custodial visitation to mother in a

same-sex relationship and holding trial court was proper in not taking mother's same-sex relationship into account in assigning custody); *In re Marriage of Cupples*, 531 N.W.2d 656, 657 (Iowa Ct. App. 1995) (parent's sexual orientation should be treated as "nonissue" for custody purposes); *Hodson v. Moore*, 464 N.W.2d 699, 701 (Iowa Ct. App. 1991) (granting custody to mother in a same-sex relationship and conferring equal weight to mother's same-sex relationship as to father's concurrent out-of-wedlock relationship for custody purposes); *Hartman by Hartman v. Stassis*, 504 N.W.2d 129, 133-34 (Iowa Ct. App. 1993) (rejecting, in paternity and child support action, relevance of allegations that mother's purpose for entering into sexual relationship with father was to bear and raise a child in a same-sex environment).

Family law is not the only context in which sex stereotyping arises, nor is it the only context in which "equal protection under the law" demands that laws be free of sex stereotyping in origin and application. In a line of cases spanning from *Frontiero v. Richardson*, 411 U.S. 677, 685, 935 S.Ct. 1764, 1769, 36 L. Ed. 2d 583, 591 (1973) (presumption of dependency of female military spouses violated equal protection when it was based on "gross, stereotyped distinctions between the sexes"), to *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 2274, 135 L. Ed. 2d 735, 750 (1996) (exclusion of women by state military academy violated equal protection because it "rel[ied] on overbroad generalizations about the different talents, capacities, or preferences of males and females"), the U.S. Supreme Court has made clear that classifications based on gender stereotypes violate the U.S. Constitution's Equal Protection Clause.

The U.S. Supreme Court has also explicitly identified sex stereotyping as a form of sex discrimination. For example, in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L. Ed. 2d 268 (1989), the Court recognized that it was sex discrimination in violation of Title VII to deny a woman employment advancement on the basis that she was too "masculine." "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250. *See also Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 118 S.Ct. 998, 140 L. Ed. 2d 201 (1998) (harassment of, or discrimination against, a man for failing to meet "masculine" gender stereotypes violated sex discrimination laws).

Iowa's "more searching analysis" must be at least as protective as the U.S. Supreme Court's in recognizing that sex stereotypes cannot serve as the basis for a law, in light of the similarities between the Equal Protection Clause of the U.S. Constitution and article I, section 6 of the Iowa Constitution. *Racing Ass'n.*, 675 N.W.2d at 4-5. Of course, a rationale that does not satisfy intermediate scrutiny will not satisfy strict scrutiny either. Thus, in evaluating the sex-based classification in the section 595.2, this Court must reject rationales for the law that are based on sex stereotypes. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 726, 102 S.Ct. 3331, 3336, 73 L. Ed. 2d 1090, 1098 (1982) (scrutiny of law must be through "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper role of men and women").

3. Equal Application Of The Law Does Not Justify Sex Discrimination

The County has argued that section 595.2 does not discriminate on the basis of sex because it discriminates against both sexes equally. (Appellant's Proof Brief at p. 23.) This misconstrues Iowa sex discrimination law and the nature of the rights protected by Iowa's Equal Protection clause.

In *MRM*, this Court recognized that a sex-based classification is suspect regardless of whether it is applied equally against both sexes. 290 N.W.2d at 341 (prohibition on administering massage to someone of opposite sex was "obviously a classification based on sex and potentially suspect"). The rights protected by Iowa's Equal Protection Clause, like those protected by the Equal Protection Clause of the U.S. Constitution, are afforded to individuals, not to groups. Thus, if an individual is denied equal protection on the basis of his or her sex, it is irrelevant how the remainder of his or her group is treated in comparison to another group.

The U.S. Supreme Court – which offers less substantive protection in interpreting the U.S. Constitution than this Court does in interpreting the Iowa Constitution – rejects the "equal application" argument, and has done so since 1948. In *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L. Ed. 1161 (1948), the Court explained, "[t]he rights established [by the Equal Protection Clause] are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* at p. 22. The U.S. Supreme Court similarly rejected

the "equal application" theory in holding that Virginia's anti-miscegenation law unconstitutionally impinged on individuals' right to marry the spouse of their choice and worked an "invidious discrimination," despite the law's purported "equal" application to different races. *Loving*, 388 U.S. at 10-11; 87 S.Ct. at 1823.

Shelley and *Loving* are part of a long line of U.S. Supreme Court cases that reject the "equal application" theory. *See McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L. Ed. 2d 222 (1964) (striking down law prohibiting cohabitation by interracial couples; discriminatory law cannot be saved merely because it "applie[s] equally to those to whom it [is] applicable"); *Shaw v. Reno,* 509 U.S. 630, 650, 113 S.Ct. 2816, 125 L. Ed. 2d 511 (1993) ("racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally"); *Johnson v. California*, 543 U.S. 499, 505-506, 125 S.Ct. 1141, 160 L. Ed. 2d 949 (2005) (reaffirming that "equal application" does not justify classification by suspect class and stating, "[w]e rejected the notion that separate can ever be equal – or neutral – 50 years ago in *Brown v. Board of Education* . . . and we refuse to resurrect it today"); *Parents Involved in Community Schools v. Seattle School Dist.*, _ U.S. _, 127 S.Ct. 2738, 2747, 168 L. Ed. 2d 508 (2007) (rejecting "equal application" in school quota case because "at the heart of the [U.S.] Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class").

The U.S. Supreme Court has recognized that the "equal application" argument is inappropriate in the sex discrimination context just as in the race discrimination

context. In *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L. Ed. 2d 89 (1994), the Court struck down sex-based peremptory challenges made in jury *voir dire* notwithstanding that such challenges could be applied equally against men and women. *Id.* at 146; *see also id.* at 152-53 (conc. opn. of Kennedy, J.) ("The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups . . . .").

Like the U.S. Supreme Court cases discussed above, this is a case about individuals: individuals who are legally barred from marrying the spouse of their choice, purely on the basis of their sex. The current marriage statute harms each such individual, denying each one equal protection under the Iowa Constitution. Because Iowa's Constitution must provide the same or greater substantive protection than the federal Constitution, the equal application argument must likewise be rejected here.

IV. The Marriage Exclusion's Sex-Based Classification Is Not "Substantially Related To" Any "Important Governmental Objective"

A. The Classification At Issue Is The Exclusion Of Individuals From The Institution Of Marriage On The Basis Of Sex

Iowa has had a marriage statute, which has permitted different-sex couples to marry, since its earliest days of statehood. Iowa Code ch. 85, §§ 1473-1479 (1851). In 1998, the state added to the statute a sex-based classification that (while it may have been implicit in the law prior to 1998) made explicit the exclusion of individuals from the institution of marriage on the basis of sex.

The state's rationales for making marriage a state institution are not at issue in this litigation. What is at issue is the exclusion of same-sex couples from that

institution on the basis of sex. Scrutiny of a classification, be it under rational, intermediate, or strict scrutiny, requires justification of *that classification* – here, the exclusion of individuals from marriage on the basis of sex – not justification of the law itself (i.e., the marriage statute more generally). *Sherman,* 576 N.W.2d at 317 (burden is on the party seeking to uphold a challenged classification to prove that the "discriminatory means employed" are substantially related to an important governmental objective). As this Court explained in *Racing Association*, "the classification must relate to the purpose of the law, which may be either the elimination of a public mischief or the achievement of some positive public good." 675 N.W.2d at 14 (internal quotation marks omitted). Thus, the County bears the burden of establishing not that *marriage itself* is substantially related to an important governmental objective, but that *the exclusion of individuals from marriage on the basis of sex* is substantially related to an important governmental objective. *Id.*; *Sherman*, 576 N.W.2d at 317. This distinction is important because, as this Court has explained, discrimination "often [] accompanies a legitimate purpose, appearing incidentally or as an unwanted byproduct." *Ladd v. IowaWest Racing Ass'n*, 438 N.W.2d 600 (Iowa 1989). Unjustified discrimination is impermissible even if it appears in an otherwise-laudable context.

B. The County's Asserted Basis For Excluding Individuals From The Institution Of Marriage Is Not Substantially Related To An Important Governmental Objective

According to the County, the legislature could have based section 595.2's sex-based classification on any one of five rationales:

1) promoting procreation because sex between a man and a woman produces wanted and/or accidental offspring;
2) promoting child rearing by a father and a mother in a marital relationship;
3) promoting stability in opposite sex relationships;
4) conserving financial resources of both the parents and the state; and
5) promoting the integrity of traditional marriage in American culture.

(Appellant's Proof Brief at p. 15.) The County bears the burden of establishing that its rationales are "important governmental objectives" ***and*** that "the discriminatory means employed" – that is, the exclusion of individuals from the marriage on the basis of sex – is "substantially related to" those proffered objectives. *Sherman*, 576 N.W.2d at 317; *see also Racing Ass'n*, 675 N.W.2d at 14. Each of the County's rationales fails to meet at least one of these criteria.

Three of the County's rationales (nos. (1) promoting procreation, (3) promoting stability in different-sex relationships, and (4) conserving parental and state financial resources) fail the "substantial relation" prong. Even assuming that each is an important governmental objective, each fails because – while each can be said to support encouraging marriage among different-sex couples – none of them supports *excluding* individuals from marriage on the basis of sex.[5] On the contrary, excluding individuals from marriage on the basis of sex is at best irrelevant to these governmental objectives, and at worst, counterproductive. To the extent that

[5] The logical fallacy of relying upon such rationales has been observed by many, including Chief Judge Judith Kaye of the New York Court of Appeals: "while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the exclusion of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone." *Hernandez v. Robles*, 855 N.E.2d 1, 30 (2006) (Kaye, C.J., dissenting).

permitting different-sex couples with children to marry conserves parental and state resources, permitting same-sex couples with children to marry would do even more to conserve the same resources. Because these three rationales fail to support the challenged classification, under *Sherman* and *Racing Association*, none of them can support its constitutionality.

Furthermore, the concept of "responsible procreation," which is implicit in the County's first and second proffered rationales ((1) promoting procreation and (2) promoting child rearing by a mother and a father), signifies the County's approval of the sex stereotypes that marriage is required to protect vulnerable women from irresponsible men who would, without the legal bond of marriage, abandon the mothers of their children. This rationale is discussed in the County's proof brief, and the expert report of Katherine Young, which the County argues should have been admitted by the trial court. (Appellant's Proof Brief, pp. 45-46.) Like other sex stereotypes, this rationale cannot serve as the basis for the sex-based classification in section 595.2, as it relies on the assumption that women are likely to be dependent upon men for financial security and that men, simply by virtue of their gender, will not be connected to their children emotionally or financially without being bound to them by marriage. Moreover, even if it did not rely on gendered distinctions between mothers and fathers, this rationale could not serve as a basis for section 595.2's sex-based classification because, as discussed above, it supports only the *inclusion* of different-sex couples within the institution of marriage, but not the *exclusion* of same-sex couples from the institution on the basis of their sex.

The County's remaining two rationales (nos. 2 and 5) – "promoting child-rearing by a mother and a father in a marital relationship" and "preserving the integrity of traditional marriage in American culture" – cannot qualify as "important governmental interests" because they are based, at least in part, on sex stereotypes that have been rejected by this Court. Naturally, the state has an interest in children growing up in stable and loving households, and one common configuration of such a household includes a mother and father in a marital relationship. That is to be encouraged. But reliance on this rationale to *exclude* same-sex couples from the institution of marriage (notwithstanding that many same-sex couples are parents in the state of Iowa) is necessarily based on the stereotyped view that families with mothers and fathers are somehow "better" for child welfare than families with same-sex parents. This has been discredited by social science research[6] – but even more importantly, it is an unconstitutional sex stereotype that Iowa has rejected time and again. Iowa has rejected the stereotype that mothers and fathers have different parenting roles by repudiating the presumption that mothers should get custody of

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[6] *See, e.g.*, Am. Psychol. Ass'n, *APA Policy Statement: Resolution on Sexual Orientation, Parents, and Children* (2004) ("[R]esearch has shown that adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."); E. C. Perrin & Comm. on Psychol. Aspects of Child & Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341, 341 (2002) ("Children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual."); Stacey & Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159, 176 (2001) ("[E]very relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment.").

young children; Iowa permits and even celebrates same-sex couples as foster parents; and Iowa has permitted second-child adoptions by same-sex partners.[7] *See, e.g. Bowen*, 219 N.W.2d at 688 (eliminating custody presumption); Order at 57 ("Defendant [County] admits that lesbian and gay individuals have been licensed by the State of Iowa and have served the State of Iowa as foster parents."); *see also* Clayworth & Jacobs, *Two views, two stories: Gay marriage*, Des Moines Register, Feb. 10, 2008 (same-sex Iowa couple awarded "Foster Parents of the Year" by the Iowa Foster and Adoptive Parents Association in 1996); *Schott*, 744 N.W.2d at 88-89 (declining to void second parent adoption by same-sex couple).

Lastly, the County's proffered rationale of "promoting the integrity of traditional marriage in American culture" is based on the sex stereotype that men and women have inherently different roles in a marriage. Preserving marriage does not have to mean preserving unconstitutional stereotypes, and Iowa has been at the forefront in rejecting tradition as a basis for discrimination. Iowa eliminated its anti-miscegenation law in 1851, while more than a century later, many states still clung to the philosophy that the term "marriage" could not be used to refer to the union of individuals of different races.[8] Over time, society's understanding of marriage has

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[7] In fact, preventing those state-approved same-sex parents from marrying tends to frustrate Iowa's stated goals of promoting and preserving stable families, especially where children are involved. Assuming that marriage is the best means to "effectively secure the care, nurture and education of the children" as stated in *McKee v. Reynolds*, 26 Iowa 578, 1869 WL 298, * (1869), then all parents should be permitted to marry; the only reason not to permit them is based on sex stereotypes.

[8] *See, e.g., State v. Gibson*, 1871 WL 5021 at *10, 36 Ind. 389, 10 Am. Rep. 42 (1871) (upholding Indiana anti-miscegenation statute as a representation of

changed, and with it, the definition of marriage. Now it is unthinkable for marriage to be defined to exclude interracial couples.

Similarly, there was a time when the term "marriage" (in Iowa and elsewhere) meant the legal incapacitation of the wife: married women could not exercise individual rights, hold property, earn money, or deny their husbands access to their bodies. (Order, ¶ 99); *Thompson v. Thompson*, 218 U.S. 611, 614-15, 31 S.Ct. 111, 54 L.Ed. 1180 (1910) ("generally speaking, the wife was incapable of making contracts, of acquiring property or disposing of the same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other."); *see also Acuff v. Schmit*, 348 Iowa 272, 277-80, 78 N.W.2d 480, 483-85 (1956) (permitting a spousal cause of action for loss of consortium by women despite "almost total lack of precedent" because common law rules precluding such an action reflected an "archaic" and "hollow, debasing, and degrading philosophy"). Now (aside from the marriage exclusion), Iowa has not only gotten out of the business of enforcing gender stereotypes through its laws and rulings related to marriage, but also has disallowed such stereotypes as impermissible under the Iowa Constitution. *See, e.g.*, *Bethke*, 484 N.W. at 608 (presumption that husband would owe alimony to wife upon marital dissolution was unconstitutional

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"undeniable fact" of nature); *Jones v. Lorentzen*, 441 P.2d 986, 989 (Okla. 1965) (upholding Oklahoma anti-miscegenation law based on "great weight of authority" from other states); *Jackson v. City & County of Denver*, 124 P.2d 240, 241 (Colo. 1942) (same for Colorado); *Perez v. Sharp*, 198 P.2d 17, 22 (Cal. 1948) (recognizing that anti-miscegenation laws were based on historically "assumed" view that interracial marriages were "unnatural").

under Iowa Constitution); *see also Bowen*, 219 N.W.2d at 688 (eliminating presumption in favor of custody with the mother); *Acuff*, 78 N.W.2d at 484 (Iowa men and women can enter into contracts (since 1851) and sue or be sued without joining their spouses (since 1857)). Without interference from the state, modern marriages range from households where a man is the primary breadwinner, to households where a woman is the primary breadwinner, to households where men and women share in parenting and financial responsibilities.[9] *See In re Marriage of Hansen*, 733 N.W.2d 683, 693 (Iowa 2007) ("Increasingly in Iowa and across the nation, our family structures have become more diverse. While some families function along traditional lines with a primary breadwinner and primary caregiver, other families employ a more undifferentiated role for spouses or even reverse 'traditional' roles.") The state has no role in defining how Iowa households arrange themselves, nor should it. Preserving the definition of marriage as a different-sex institution – in light of the discriminatory nature of that definition as based on sex stereotypes and the history of marriage as a living, changing institution – cannot be an important governmental objective. It cannot even provide a rational basis.

[9] In opposition, the National Legal Foundation has analogized marriage to chemistry, arguing in its *amicus* brief that the union of two men or two women could not be called a "marriage" as a matter of language, just as the union of two chlorine molecules could not be called "salt" as a matter of chemistry. As demonstrated above, however, the definition of marriage has changed before, and will undoubtedly change again, as the English language is rich and flexible. Moreover, chemistry's definition of "salt" cannot be contrary to the Iowa Constitution. The marriage exclusion in section 595.2 can be, and is.

C. Because The Sex-Based Classification In Section 595.2 Cannot Satisfy Intermediate Scrutiny, It Cannot Satisfy Strict Scrutiny

As discussed above, the standard for strict scrutiny is more stringent than that for intermediate scrutiny. Because the sex-based classification in section 595.2 cannot satisfy intermediate scrutiny, for the reasons discussed in section III(B), *supra*, it cannot satisfy strict scrutiny.

V. Conclusion

When, as here, a law violates the Iowa Constitution, it is the responsibility of this Court to declare it so. For the reasons stated above, the marriage exclusion of section 595.2 is an unconstitutional sex-based classification, which promotes sex stereotypes. Because the sex-based classification of section 595.2 is not substantially related to important governmental interests, this Court should affirm the decision of the trial court, and hold the marriage exclusion in section 595.2 to be unconstitutional under the Iowa Constitution, and allow every Iowan the fundamental right to marry the individual of his or her choice.

DATED this 28th day of March, 2008

Respectfully submitted,

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PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned hereby certifies that I served (2) copies of the attached **Motion to File *Amicus* Brief and *Amicus* Brief of Women's Rights Organizations** on all required parties by placing the same in the U.S. Mail, postage prepaid on March 28, 2008, as addressed as follows:

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The undersigned further certifies that on March 28, 2008, I will file this document by mailing 18 copies of it to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

Dated this 28th day of March, 2008

Richard M. Simon