IN THE SUPREME COURT OF IOWA

SUPREME COURT CASE NO. 07-1499

KATHERINE VARNUM, et al. Plaintiffs-Appellees, v. **TIMOTHY J, BRIEN,** in his official capacities as the Polk County Recorder and Polk County Registrar Defendant-Appellant.	)	On Appeal from the Iowa District Court for Polk County Case No. CV5965 The Honorable Robert B. Hanson, presiding

AMICUS CURIAE PROOF BRIEF IN SUPPORT OF THE PLAINTIFFS-APPELLEES BY THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, JOAN AND LYLE MIDDLETON CENTER FOR CHILDREN'S RIGHTS, DRAKE LEGAL CLINIC, AND PEDIATRICIANS AND FAMILY PHYSICIANS

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Application for admission *pro hac vice* pending

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INTRODUCTION AND SUMMARY OF ARGUMENT

As will be demonstrated in this brief, Iowa's prohibition of marriage between same-sex couples is detrimental to the interests of children of same-sex parents. Iowa's statutory exclusion of marriage for same-sex partners discriminates against both the partners and their children. For children in particular, the ban on their parents' marriage creates instability in determining parentage; and, if both of a child's parents are not legally recognized, the child may suffer the loss of a vital source of emotional and psychological support, as well as a host of financial benefits provided by the lost parent. In addition, children of same-sex couples are socially illegitimate: they recognize they and their parents are treated as second-class citizens. There is no satisfactory explanation for their parents' right to marriage being outlawed.

The right to marry is itself more than the sum of the property and financial rights that attend its legal status. The social recognition and creation of community created by civil marriage are irreplaceable. The right to marry a person of one's choice is the signal right at stake, and there can be no substitute for it.

One of the legitimate purposes of marriage remains the creation of an optimal environment for the rearing of children. When viewed from the perspective of its childrearing function, marriage cannot legitimately or rationally be denied to same-sex partners. Tradition does not justify excluding same-sex partners or their children from participation in the civil institution of marriage.

These amici curiae support the Plaintiffs-Appellees' challenge to Iowa's exclusion of same-sex couples from the fundamental right to marry.

ARGUMENT

I. CHILDREN ARE HARMED BY THEIR PARENTS' NOT BEING ALLOWED TO MARRY.

A. Thousands of Children Reared by Same-Sex Couples in Iowa Are Affected.

The number of same-sex households across the United States totaled 594,391 in the U.S. Census 2000.[1] This total represents a 314 percent increase from ten years earlier.[2] In the 2000 Census, Iowa had 3,698 same-sex unmarried households; and, of these households, 60.9 percent of them included children and there were 2,796 children.[3] These statistics likely under-report the number of children of same-sex couples in Iowa because: (1) people may under-report their same-sex orientation and (2) the statistics are now at least eight years out of date. Surveys of same-sex couples taken after the 2000 census indicate that at least 16-19% of same-sex couples did not identify themselves as such in the census, and recent reports from the Census Bureau's

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[1] U.C. Census Bureau, Census 2000 Summary File 1. www.census.gov/prod/2003pubs/censr-5.naf.

[2] David M. Smith and Gary J. Gates, "*Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households*," a Human Rights Campaign Report, August 22, 2001. www.hrc.org.

[3] U.S. Census, *supra.*

2005 American Community Survey shows that more than 5,800 same-sex couples live in Iowa.[4]

Seventy-four percent (74%) of same-sex couples want to be legally married.[5] All of the children whose parents want to marry deserve the same legal protections and other positive effects afforded children of marriage. Previously, children in same-sex households were predominantly born of a prior heterosexual relationship of one or both members of the same-sex couple. Increasingly, same-sex couples are making an affirmative decision to co-parent from the outset with their partner, either by adoption or by a variety of methods of medical assistance. Inherent in this decision is the intention and commitment of both parents to assume the responsibilities and rights of parenting the children, regardless of whether their family remains intact. It is difficult to ensure that their children are afforded the legal benefits of two parents unless the parents are entitled to marry. Yet, to date, Iowa has excluded their parents from marriage. In doing so, Iowa has worked significant harm on them, as well as on their parents, as detailed herein.

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[4] Affidavit of M.V. Lee Badgett, research director of the Williams Institute on Sexual Orientation Law and Public Policy at UCLA School of Law, Exhibit 20 in Support of Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment (hereafter "Plaintiffs' Statement of Material Facts.")

[5] As reported in "*Same-Sex Marriage: Mental Health Perspectives,*" Psychiatric Times, August 1, 2006.

B. Legal Parentage for Children of Same-Sex Couples Is More Precarious than for Children of Marriage.

Children born within a marriage enjoy a favored state. They are legitimate. Iowa Code §598.31 They automatically have two parents who are legally recognized as such. Iowa Code §598.31 Both parents owe these children a duty of support, and the parents owe each other a duty of support. Iowa Code §252A.3 If one parent dies, that loss is mitigated by the fact that there is a remaining parent to care for these children; and these children may inherit from the deceased parent. If the parents of these children divorce, both are liable for the financial support of these favored children. Iowa Code §252A.3(7) A host of financial benefits, such as Social Security benefits and health insurance coverage are available from both parents. These rights and obligations – and consequent benefits for children – are so deeply ingrained in our culture that they are taken for granted by heterosexual couples who marry.

When a married couple in Iowa conceives a child through donor insemination, the child at birth automatically has two parents, without the need for an adoption proceeding. *In re Marriage of Schneckloth*, 320 N.W.2d 535, 536 (Iowa 1982).

The situation is entirely otherwise for children born to same-sex couples who want to but cannot legally commit to marry each other. Does the State of Iowa value these children less? Probably not intentionally, but the harms to these children are among the more detrimental consequences of not permitting their parents to marry.

For starters, these children are illegitimate. They have only one recognized parent unless adopted by a "second-parent adoption," resulting in a court order of adoption.[6] Couples may adopt a child not born to either of them through either a private adoption agency or through an independent adoption, in which the birth mother relinquishes the child to an attorney without formal agency involvement.[7] The adoption process entails the completion of a favorable home study performed by a licensed professional accepted by the court; and, after placement, the court will generally need three post-placement reports.[8] Plaintiffs-Appellees to this action experienced the adoption process as "intrusive," "disturbing," and "emotionally invasive" as well as expensive.[9] Had she been allowed to marry her partner, Plaintiff-Appellee Jennifer BarbouRoske would not have been required to leave her prematurely-born infant to see an attorney to initiate an adoption proceeding: her partner would automatically have been recognized as her infant's other parent. Once an adoption is completed, Iowa treats a child's relationship to her adoptive parents in the same manner as a biological relationship. Iowa Code §633.223, *In the*

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[6] Affidavit of Deborah M. Tharnish, Iowa attorney, Exhibit 21 to Plaintiffs' Statement of Material Facts, paragraphs 4 and 5.

[7] *Id.*, paragraph 3.

[8] *Id.*, paragraph 8.

[9] Affidavit of Jennifer BarbouRoske, Exhibit 3 to Plaintiff's Statement of Material Facts, paragraph 11; Affidavit of Reva Evans, Exhibit 12, paragraphs 20-21 and 23.

Matter of the Adoption of A.J.H. 519 N.W.2d 90, 92 (Iowa 1994). The adoption process costs range from over $2,600 to nearly $6,000.[10]

For some of the Plaintiffs-Appellees, adoption is a two-step process, further attenuating dual parental recognition. Plaintiffs-Appellees Jason Morgan and Chuck Swaggerty are foster parents for two children whom they wish to adopt. They were informed by the Department of Human Services that only one of them will be permitted to adopt these children, forcing them to choose who will be the legal parent and then later seek a second-parent adoption.[11] Their choice of who will be the initial legal parent will be dictated by health insurance coverage, and the couple will bear the expense of two, separate adoption proceedings.[12]

Plaintiff-Appellee Ingrid Olson was "deeply hurt that I had to go through the financially and emotionally draining process of adopting our very own baby despite our having planned jointly to bring Jamison into the world, and despite our being equal parents from the beginning."[13] Ingrid's partner Reva Evans, who delivered their child Jamison by caesarean section was troubled about Ingrid's inability to make any medical decisions for her during a frightening

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[10] *Id.*, paragraphs 8-11.

[11] Affidavit of Jason Morgan, Exhibit 5 to Plaintiffs' Statement of Material Facts, paragraph 24.

[12] *Id.*, paragraph 25.

[13] Affidavit of Ingrid Olson, Exhibit 11 to Plaintiffs' Statement of Material Facts, paragraph 22.

time, as well as by the delay inherent between Jamison's birth and the time it took for Ingrid to become Jamison's second parent.[14]

Children of same-sex couples whose parents lack the sophistication, financial resources, resolve and/or persistence to perfect a second-parent adoption have only one legal parent, leaving them vulnerable to losing one of the persons they know as a parent due to death, break-up of the couple, immigration problems, or serious illness.

This vulnerability is unthinkable for married couples, but it is a harsh reality for same-sex parents. The consequences to their children are likewise harsh. A child whose second parent is not recognized may be separated from him or her involuntarily in the event of the recognized parent's death or disability and forced into foster care, thus jeopardizing that child's security and stability.

If and to the extent that one of a child's same-sex parents is not legally recognized, the harm to the child is not only the deprivation of that parent's care and companionship, it is also the deprivation of the financial support and attendant benefits such as health and life insurance and Social Security benefits that harms the child. Although Iowa provides statutory duties of child support for parents, a child whose second parent is not recognized is deprived of support from that person. The interdependency of parents and arrangement of

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[14] Affidavit of Reva Evans, Exhibit 12 to Plaintiffs' Statement of Material Facts, paragraph 15.

their lives so as to allow one parent to be the primary income earner and the other the primary care giver can have devastating financial consequences if the primary income earner is found not to be the child's parent. This vulnerability would be substantially lessened if the partners were simply accorded the right of every other adult in our society to marry the person of his or her choice.

C. Children Are Adversely Affected Socially by their Parents' Inability to Marry.

Iowa's statutory limitation on marriage to opposite-sex couples has the effect of stigmatizing children of same-sex couples, who cannot help but wonder why their parents are not allowed to marry. In the history of this country, only one other group of people has been denied altogether the right to marry: African-American slaves. Even prisoners are entitled to marry. *Turner v. Safley* (1987) 482 U.S. 78, 95-96,Children of same-sex couples are literally illegitimate. Regardless of whether their parents form families that are indistinguishable in their habits from what their community regards as normal, children of same-sex couples do not enjoy equal treatment due to societal disapproval of their parents' sexual orientation.[15] Given the venerated status of

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[15] According to a national survey conducted in 2000, 74 percent of lesbians, gay men and bisexuals reported having been subject to verbal abuse because of their sexual orientation and 32 percent reported being the target of physical violence. Henry J. Kaiser Family Foundation, *Inside-Out: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's View on Issues and Policies Related to Sexual Orientation* (2001) pp. 3-4 (www.kff.org/kaiserpolls).

marriage in our society,[16] the fact that their parents are "outlaws" in marriage is especially stigmatizing. Even civil unions or registered domestic partnerships formed in another state confer only second-class citizenship, a kind of netherland between singlehood and the unattainable state of "marriage."[17] The First Interim Report of the New Jersey Civil Union Review Commission reports a variety of deleterious effects on children of same-sex couples from the inability of their parents to marry. Section 5, www.NJCivilRights.org/curc.

When the 8-year-old child of Plaintiffs-Appellees BarbouRoske learned that her parents were not allowed to marry, she "was shocked and started to cry," and one of her mothers found it difficult to explain to her why she could not marry.[18]

As noted by the Supreme Judicial Court of Massachusetts in permitting marriage for same-sex partners:

> Marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the

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[16] "Marriage is a coming together for better or worse, hopefully enduring, and intimate to the point 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* (1965) 381 U.S. 479, 486.

[17] Michael S. Wald, "*Same-Sex Couple Marriage: A Family Policy Perspective*," 9 Va. J. Soc. Policy & Law 291.

[18] Affidavit of Jennifer BarbouRoske, Exhibit 3 to Plaintiffs' Statement of Material Facts, paragraph 13.

> enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage. *Goodridge v. Dept. of Pub. Health* (2003) 798 N.E.2d 941, 957.

There is simply no good answer to a child's question of why his or her parents cannot marry.

II. THE RIGHT TO MARRY *PER SE* CREATES BENEFITS THAT SHOULD BE AVAILABLE TO SAME-SEX PARTNERS AND THEIR CHILDREN.

Civil marriage by itself– the status and the title – conveys benefits to couples that are not replicated by civil commitment ceremonies, civil unions, registered domestic partnership or any other institution. Marriage is an expression of emotional support and public commitment, with spiritual significance; these features are by themselves sufficient to form a constitutionally protected status. *Turner v. Safley* (1987) 482 U.S. 78, 95-96 (granting prisoners the constitutional right to marry).

Marriage is universally recognized, understood and respected. "Marriage commands greater respect from popular opinion and implies a greater commitment than 'living together.' The position of legal marriage above comparable relationships resists toppling. Contestation over same-sex marriage has, ironically, clothed the formal institution with renewed honor."[19]

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[19] Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000) Harvard University Press.

Each of the Plaintiffs-Appellees in this action is as personally committed to his or her partner as any legally married spouse. Many of them have participated in a commitment ceremony, exchanged rings, and made promises of lifelong devotion to the other. But none of them can hold himself or herself out as being married. Paradoxically, since Iowa recognizes common law marriages, they would all now be married but for the fact that their chosen and irreplaceable life partner is a member of the same sex.

Each of them experiences the sting of not being able to marry or to tell their employer, friends, family, health care provider – or children – that they are married. David Twombley wrote: "All my life I have suppressed the feeling of loss at being unable to marry someone I love."[20] Otter Dreaming wrote: "(o)ur inability to marry creates a context in which other people can continue to denigrate our relationship."[21] While being prepared for surgery, Katherine Varnum was asked to disclose her marital status, about which she wrote: "The right answer is not 'single,' yet I couldn't answer 'married.' There was no way for me to indicate who Trish is in my life. I need to know that other people will recognize her as the most important person in my life...."[22] Jennifer

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[20] Affidavit of David Twombley, Exhibit 7 to Plaintiffs' Statement of Material Facts, paragraph 14.

[21] Affidavit of Otter Dreaming, Exhibit 10 to Plaintiffs' Statement of Material Facts, paragraph 10.

[22] Affidavit of Katherine Varnum, Exhibit 1 to Plaintiffs' Statement of Material Facts, paragraph 13.

BarbouRoske's young daughter burst into tears when she learned her mothers weren't married, about which Jennifer wrote: "(s)he couldn't understand why her parents were being treated unequally. One of the reasons we want to get married is for her sake – so we can fulfill our children's highest hopes and dreams for us."[23] Similar reports of confusion as to marital status, discrimination by employers and dismay of children at learning the law precluded their parents from marrying were recorded in the First Interim Report of the New Jersey Civil Union Review Commission dated February 19, 2008, following the first year of New Jersey's Civil Union Act. www.NJCivilRights.org/curc.

A commitment ceremony, registered domestic partnership or civil union is not accorded the sanctity, *gravitas* or social respect of marriage. As discussed above, Plaintiffs-Appellees in this action and their children, as well as their families, recognize commitment ceremonies, or civil unions as inferior to marriage, as indeed they are.

> "(S)tigmatization of homosexuality is perpetuated by discrimination in marriage denial and that, in turn, perpetuates a vicious circle. Because they are not being allowed to marry, same-sex couples often experience commitment ambiguity marked by uncertainty about the extent of mutual obligations in the relationship; uncertainty about the recognition of the partnership by family,

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[23] Affidavit of Jennifer BarbouRoske, Exhibit 3 to Plaintiffs' Statement of Material Facts, paragraph 13.

> friends, and others; and uncertainty about when the relationship is over."[24]

"What gay couples cannot get is legal and social recognition of their relationships."[25] Marriage, like no other institution, creates kinship. Granted, anyone can declare that any other person is a member of his or her family; but nothing unites two unrelated families as does a marriage. Weddings are public events that pull together not only the individuals to be married, but also their extended relatives. Weddings thus introduce the newly-created families and announce to the community the couple's deep commitment to each other.

> Marriage confers status: to be married, in the eyes of society, is to be grown up. Marriage creates stakes: someone depends on you. Marriage creates a safe harbor for sex. Marriage puts two heads together, pooling experience and braking impulsiveness. Of all the things a young person can do to move beyond the vulnerability of early adulthood, marriage is far and away the most fruitful. We all need domesticating, not in the veterinary sense but in a more literal, human sense: we need a home. We are different people when we have a home: more stable, more productive, more mature, less self-absorbed, less impatient, less anxious. And marriage is the great domesticator.[26]

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[24] *Same-Sex Marriage: Mental Health Perspectives,* Psychiatric Times, August 1, 2006 . See also Gilbert Herdt and Robert Kertzner, "*I Do, But I Can't: The Impact of Marriage Denial on the Mental Health & Sexual Citizenship of Lesbians and Gay Men in the United States,*" 3 J. Sexuality Res. & Soc. Pol'y. 33 (2006).

[25] Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (2000), Doubleday.

[26] Jonathan Rauch, *Gay Marriage* (2004) Times Books, Henry Holt and Company, LLC.

Marriage provides "a critical form of social insurance,"[27] in that it creates a duty of each married partner to care for the other when ill, which in turn lessens the duty of the State to do so.

There is a substantial body of research that indicates married couples enjoy greater physical and emotional health and longevity than do either single people or cohabiting couples.[28] As observed by Professor Pepper Schwartz in her affidavit, "in our society the role that most frequently provides a strong positive sense of identity, self- worth and mastery is marriage."[29] "(R)esearch also shows that cohabitation itself is a different institution than marriage, with different expectations and effects on the individual. For both of these reasons, cohabitation does not confer the same kind of health benefits to either men or women as does marriage."[30] It is partly the commitment to be the "first

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[27] Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective,* 9 Va. J. Soc. Policy & L. 291 (Fall 2001)

[28] *See*, for example, Waite and Gallagher, *supra;* Catherine E. Ross and John Mirowsky, "*Family Relationships, Social Support and Subjective Life Expectancy*," Journal of Health and Social Behavior, vol. 43, no. 4 (December 2002), pp. 469-489; Shelia R. Cotton, "*Marital Status and Mental Health Revisited: Examining the Importance of Risk Factors and Resources*," Family Relations, vol. 48, no. 3 (July 1999), pp. 225-233; and Robin M. Mathy and Barbara A. Lehmann, "*Public Health Consequences of the Defense of Marriage Act for Lesbian and Bisexual Women: Suicidality, Behavioral Difficulties, and Psychiatric Treatment*," Feminism & Psychology (2004) 14:187, http://fap.sagepub.com.

[29] Afffidavit of Dr. Pepper Schwartz, Exhibit 14 to Plaintiffs' Statement of Material Facts, paragraph 20, citing W.R. Grove et al., *The Effect of Marriage on the Well-Being of Adults: a Theoretical Analysis,* 11 J.Fam.Issues 4, 16 (1990).

[30] Waite & Gallagher, *supra.*

responder" and companion through illness, life crises, and the debility of aging that may explain this research.

This case calls upon this Court to answer what are the minimum constitutionally-guaranteed attributes or rights that are embodied in the constitutional right to marry. They include: 1) the ability to "marry," to participate in the same ceremony, license and attendant social, psychological and health benefits as any other individual; 2) the ability to marry the person of one's choice; and 3) the ability to participate in the rights and obligations of marriage as defined by the State. Iowa has thus far barred same-sex couples from all of these attributes and rights.

The first two of these guarantees are but two expressions of the same right and should be inextricably bound to each other. The argument that gays or lesbians can marry a person of the opposite sex affords them only the opportunity to form a sham marriage. This argument dishonors the institution of marriage itself and discredits the fundamental issue of choice. Anyone advancing that argument need only ask himself what it would feel like to be able to marry only someone he would never choose to marry. As demonstrated above, marriage *per se* (as distinguished from the attendant legal rights and responsibilities or a relationship of some other name, such as domestic partnership or civil union) confers unique benefits. The ability to make the commitment of marriage, even when one or both of the spouses cannot consummate the marriage or otherwise live together as a married couple, is

constitutionally protected. *Turner v. Safely supra.* California recognized that the fundamental component of choosing one's marital partner is part of this constitutional protection. *Perez v. Sharp* (1948) 32 Cal.2d 711, 725 (recognizing the importance of an individual being able to marry the person "of his choice and that person to him may be irreplaceable").

III. THERE IS NO RATIONAL JUSTIFICATION FOR LIMITING MARRIAGE TO OPPOSITE-SEX COUPLES.[31]

A. To the Extent the Purposes of Marriage Are Related to the Rearing of Children, It is Irrational to Limit Marriage to Opposite-Sex Couples.

One of the core purposes of civil marriage is to encourage people to enter into a long-term stable relationship if they have children, since children need stable environments and generally benefit from having two parents to care for them.[32] The economic interdependence of marriage fosters child-rearing in ways that maximize parental involvement in their children's lives better than can a single caretaker.[33] As set forth above, several thousand same-sex

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[31] Amici do not suggest that rational basis rather than strict scrutiny should be the basis for this Court's resolution of the Constitutional issues involved. Amici adopt and defer to the arguments of the parties challenging the marriage exclusion on that score. Amici only assert that even the minimum standard of rational basis is not met by perpetuating a prohibition on marriage to same-sex couples. It should be noted, however, that under federal equal protection standards, differential treatment of children based upon their parents' unmarried status triggers heightened scrutiny, under which the state must show *at least* that the classification is substantially related to an important and legitimate state interest. *Pickett v. Brown*, 462 U.S. 1,8 (1983).

[32] Michael S. Wald, *supra*.

[33] *Id.*

households in Iowa have children, and many, if not most, of these couples wish to marry. Children are already an abundant presence in same-sex households: that many of them are conceived through medical assistance rather than "procreation" does not in any way provide a reason to treat them in any way differently from children who are conceived as a consequence of sexual intercourse, especially since many children born in marriages today are themselves either adopted or conceived through medical assistance.

As set forth above, the constitutional right to marry a person of one's choice is unrelated to the ability to consummate that relationship sexually. *Turner v. Safely, supra.* As also set forth above, the rights of parentage and child custody are nowhere near as secure for same-sex partners or their children as for spouses, and the alternative family unit of two domestic partners with adopted children is not the same as a family formed by marriage. Marriage is as vital an institution as it ever has been; and same-sex couples should be allowed to participate in it.

Two of the states that found a rational basis for denial of the right to marry for same-sex couples are Washington and New York. The high court in each of those states found rationales for prohibiting marriage between same-sex partners in childbearing and childrearing. When examined in terms of their effect on children, the flimsiness of their rationales is apparent. The New York decision rests on "the undisputed assumption that marriage is important to the welfare of children" and posits that the legislature could rationally conclude that

it is more important to promote stability in opposite-sex couples than in same-sex couples because opposite-sex couples can procreate through sexual intercourse. *Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1. Amici submit that the mode of becoming parents (whether by sexual intercourse, medically-assisted reproduction or adoption) should not dictate who is permitted to join in marriage. Iowa law does not distinguish between adoptive and biological parents in determining the rights and obligations of parents. Iowa Code §633.223. Likewise, Iowa treats a child born to a married couple through donor insemination the same as a child born biologically to that couple. *In re Marriage of Schneckloth, 320 N.W.2d 535, 536 (Iowa 1982)*. Nor does Iowa discriminate in child custody awards based on the sexual orientation of the parents. See, e.g., *In re Marriage of Wiarda,* 505 N.W.2d 506, 508 (Iowa Ct. App. 1993) (court's physical custody decision not based on mother's same-sex relationship); *In re Marriage of Cupples,* 531 N.W.2d 656, 657 (Iowa App. 1995) (treating parent's sexual orientation as a "nonissue"). From the perspective of fostering a stable environment for the parentage and rearing of children, it would appear inconsistent with Iowa's policies to prohibit same-sex parents from marrying each other.

While Amici readily accept that marriage is important to the welfare of children, it simply does not follow rationally that children of same-sex couples be banned from living in a married family while children of opposite-sex couples are not subject to this ban. This ban perpetuates illegitimacy among a

class of children – those born to same-sex couples – to the detriment of these children. From the perspective of existing children and well as those who will be born in the future to same-sex couples, such reasoning cannot be regarded as even remotely conducive to promoting the welfare of children.

The court in *Hernandez* found a second rational basis: "it is better, other things being equal, for children to grow up with both a mother and a father." *Id.,* at 4. Such reasoning runs contrary to existing legal policies of Iowa, as stated above. Nor does it withstand scrutiny. The affidavit of Dr. Michael E. Lamb concludes from a large body of research: "There is nothing about the sex or sexual orientation of a parent that affects that parent's capacity to be a good parent or affects a child's healthy development. There is also no empirical support for the notion that children need both male and female role models in their homes to adjust well."[34] As succinctly stated by the New York Chief Judge in her dissent: "The State's interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses." *Hernandez* at 32.

The Washington Supreme Court found its rational basis for limiting marriage to opposite-sex couples by stating its legislature was entitled to believe that the limitation "furthers the well-being of children by encouraging families where children are reared in homes headed by the children's biological parents." *Anderson v. King County* (Wash. 2006) 138 P.3d 963. This reasoning

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[34] Exhibit 13 to Plaintiffs' Statement of Material Facts, paragraph 11.

should make even the married parents of adopted children anxious for their privacy. Like the high court in New York, the Washington high court perpetuated disparate treatment of children based on their parents' marriage status and mode of conception. This reasoning is not consistent with Iowa's nondiscriminatory policies toward parentage and child custody.

If the State of Iowa considers the welfare of children as part of its purposes for maintaining civil marriage, then it must acknowledge that the welfare of children would be served by allowing same-sex couples to participate in marriage, and that the welfare of Iowa children would be disserved by preserving the existing prohibition. The effect of the existing ban on marriage between same-sex couples is to deprive children of same-sex couples of the status, dignity, "legitimacy" and protections of marriage.

B. Tradition Does Not Provide a Rational Basis for Denying Marriage to Same-Sex Couples.

The issue at stake in this action is the fundamental right of marriage – the right to marry a person of one's choice – and not "same-sex marriage." In its landmark case overturning California's ban on interracial marriage, the California Supreme Court defined the constitutional right involved as that of marrying the person of one's choice. *Perez v. Sharp, supra.* The Court in *Perez* recognized that the right involved is that of individuals, not that of groups. If the right of marriage is to remain meaningful, it must include the right to choose one's partner. That right is illusory if it could only be exercised by a gay man to marry a woman, or a lesbian woman to marry a man: these are not

choices either would voluntarily make. Iowa acted earlier than California in removing the impediments to marriage between persons of different races in 1851. Iowa Code ch. 85, §§1463-1479. Iowa was only the third state in this country to do so, acting more than a century ahead of the U.S. Supreme Court's ruling that such bans were unconstitutional. *Loving v. Virginia*, 388 U.S. 1 (1967).

One of the arguments used to justify existing bans on marriage for same-sex couples is tradition. Reliance on tradition cannot overcome constitutional scrutiny. If courts were to decide constitutional issues based on the way things have traditionally been, then African-Americans would still be prohibited from marrying white Americans, married women would not be entitled to own property or to manage marital property, and child custody would still be based on sex-role stereotypes.

The structure of families today bears little relation to "traditional" families at earlier points in time. Men and women have equal rights in property ownership and management In a majority of families both spouses are employed. Children in many marriages are born through donor insemination or other forms of medically assisted reproduction. The right of divorce is universal, often without fault, and spouses readily avail themselves of this right. While it is true that traditional marriage did not include same-sex spouses, the open recognition of same-sex relationships without criminal penalty is

relatively new, as is recognition of parentage and child custody rights with same-sex parents. As society develops, so too must the law.

V. CONCLUSION.

Only by extending the right to marry to same-sex couples can Iowa accord the full range of legal rights and benefits of marriage to their children. As a result of the statute challenged in this case, the children of same-sex couples and their parents continue to be harmed and discriminated against both legally and socially. For all of the foregoing reasons, Amici respectfully request that this Court affirm the fundamental right of persons to marry the person of their choice and strike down the statute that denies that right to Plaintiffs-Appellees. It matters deeply.

VI. DISCLAIMER.

This Brief represents the views of the National American Academy of Matrimonial Lawyers and the other sponsors. This Brief does not necessarily reflect the views of any judge who is a fellow of the AAML. No inference should be drawn that any judge who is a Fellow of the AAML participated in the preparation of this brief or reviewed it before its submission. The AAML does not represent any party in this matter other than itself, is receiving no compensation for acting as Amicus, and has done so *pro bono publico.*

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* See Next Page - **Pediatricians and Family Physicians**

Pediatricians and Family Physicians

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 5,792 words up to and including the signature lines that follow the brief's conclusion.

I declare under the penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 26, 2008.

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CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Application to File Amicus Curiae Proof Brief and Amicus Curiae Proof Brief was served on the following parties:

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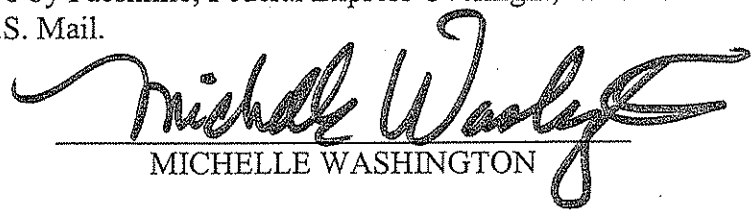

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