IN THE IOWA SUPREME COURT

Supreme Court No. 07-1499

District Court No. CV 5965

Katherine Varnum, et al.,

Plaintiffs – Appellees,

vs.

Timothy J. Brien, Polk County Recorder,

Defendant – Appellant.

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

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II. STATEMENT OF CASE

Although Defendant and his *amici* would treat this case as an abstract ideological debate, the district court had an opportunity to learn the real-life stories of the families at the heart of this lawsuit. Plaintiffs are six same-sex couples who have been denied the right to marry, and three of their children.[1] Each couple is in a loving long-term relationship. Three couples are raising their own children, and two intend to become parents. They hail from urban and rural commu-

[1] "Plaintiffs" or "Plaintiff couples" refers herein solely to the adult Plaintiffs. The Plaintiff children ("minor Plaintiffs," and together with the adults, "all Plaintiffs") challenge their exclusion from the rights, cost savings, benefits, status, dignity, and security conferred by the State on children of married parents under Iowa law. The district court did not find it necessary to reach the minor Plaintiffs' claims because "in granting relief to the adult Plaintiffs, the Court believe[d] it ... also satisf[ied] the concerns of the minor Plaintiffs." Slip 47, 49.

nities across Iowa and from diverse religious backgrounds. Some couples have joined together in religious ceremonies; others pledged their love and devotion in private commitment ceremonies. All were denied a marriage license by Polk County. *See* Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment ("SMF") Exs. 1-12.

The Plaintiffs. Kate (34) and Trish Varnum (43) live in Cedar Rapids and have been in a loving committed relationship for 7 years. Kate is a database manager at a phone company and Trish is an insurance company analyst. They are licensed foster parents and intend to adopt. "I want our child protected by law rather than by good intentions, and for that," states Trish, "we need to marry." SMF Ex. 1 ¶¶2-5; Ex. 2 ¶¶2-10.

Jen (37) and Dawn (39) BarbouRoske, from Iowa City, have been in a committed relationship since they fell in love at first sight 17 years ago. Their last name, BarbouRoske, melds their former last names. Jen, a registered nurse, and Dawn, a substitute teacher, are legal parents of minor Plaintiffs McKinley (9) to whom Jen gave birth after conceiving via artificial insemination with an unknown donor, and Breeanna (5), whom Jen and Dawn jointly adopted through foster care. They wish to marry in order to protect each other and their children. SMF Exs. 3-4.

McKinley was born eight weeks premature and spent almost a month in intensive care. Jen and Dawn had to leave her there just days after the birth to have an attorney draw up papers so Dawn would be legally recognized as McKinley's mother as well. By providing automatic parental rights for Dawn, mar-

riage would have spared them this anxiety during an already stressful time. SMF Ex. 3.

Jen and Dawn fear that McKinley and Breeanna will internalize the message that their family is not as worthy or permanent as other families, and that they and their parents do not deserve the support that other children and parents receive. A few years ago, McKinley was shocked and started to cry when she learned that Dawn and Jen were not married. It was hard for Jen and Dawn to explain to her that they were not permitted by their government to marry. It also pained them to be told by a teacher when visiting a potential pre-school that McKinley would not be allowed to speak about her family during the school's unit on families when children are asked to speak about their home lives. "One of the reasons we want to get married is for her sake," states Jen, "so that we can fulfill our children's highest hopes and dreams for us." SMF Exs. 3-4.[2]

David Twombley (66) and Larry Hoch (65), retirees after a combined 72 years as schoolteachers, have been together for 6 years and reside in Urbandale. They feel increasingly vulnerable as they age, worrying about respectful treatment in medical emergencies and access to pension benefits restricted to spouses. David and Larry also wish to express through marriage how much they mean to each other. David in particular has felt a sense of loss since childhood at being excluded from marriage, which is part of his value system about how couples demonstrate commitment. SMF Exs. 7-8.

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[2] Dawn also wishes to marry to protect her family in light of her blood relatives' hostility to her relationship with Jen. "I often worry that my brother, perhaps with the support of other family members, might try to do something to get custody of the children someday. Marriage would provide an additional layer of legal protection for us, and it also would help show my brother and other family members that we deserve to be treated as a family." SMF Ex. 4.

Jason Morgan (38) and Chuck Swaggerty (34) have been in a loving, committed relationship for 10 years, and live in Sioux City with their sons, Ta'John and Reed Swaggerty-Morgan, whom they recently adopted through Iowa's foster care system. Jason is an agent at a bank and until recently Chuck was a stay-at-home parent. When Chuck's mother died, Jason did not receive bereavement leave his employer automatically gives to spouses. Despite having given two days' advance notice, Jason was formally disciplined for attending the funeral and no one offered him condolences. "But as hurt as I was," states Jason, "I never believed that the problem was my particular bank. The problem was that society teaches people not to treat our relationship equally." SMF Exs. 5-6.

Bill Musser (50), and Otter Dreaming (50), from Decorah, have been together for 6 years. Otter is a church organist and piano teacher. Bill works as assistant to the executive director of Vesterheim Norwegian-American Museum. They have no health insurance. A shared family policy would be more affordable if they could marry. They intend to adopt children and yearn to marry "both for [their] own security and for that of the future children [they] hope to have." SMF Exs. 9-10.

Ingrid Olson (29) and Reva Evans (34) live in Council Bluffs, where they are raising their infant son, minor Plaintiff, Jamison Olson. Reva gave birth to Jamison after becoming pregnant via artificial insemination with an unknown donor and Ingrid adopted him. Ingrid, a federal employee, and Reva, a social worker, have been in a loving, committed relationship for 10 years and wish to marry to protect and shelter Jamison and future children. SMF Exs. 11-12.

The Importance of Marriage. Civil marriage in Iowa is the only gateway to an unparalleled array of rights, obligations and benefits that protect and provide shelter to married couples and their children. SMF 6-14; SMF App. A. These rights include:

- Authority to make what can be profound health care decisions for a spouse and hospital visitation;
- Authority to make what can be heart-wrenching decisions about burial, autopsies and disposition of remains;[3]
- Economic protections upon the death of a spouse, such as intestacy rights, ability to elect a forced share of deceased's estate, and homestead rights while the estate is settled;
- Standing to sue for wrongful death when a spouse is killed;
- Entitlement to workers' compensation benefits if a spouse dies in the workplace;
- Health insurance and pension benefits for spouses of public employees;[4]
- Entitlement to file joint tax returns, take spousal deductions on state income taxes and receive tax benefits when transferring or inheriting interests in property.[5]

Plaintiffs and minor Plaintiffs also are denied the presumption of parenthood afforded to married couples. They incur significant expenses to secure parent-child relationships that would be protected automatically if the parents were married. "Second-parent adoption" by one's partner, even where available,

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[3] As David Twombley put it, "Also disturbing to me is that, if one of us dies, the other won't have the right to claim the body or to make funeral arrangements under Iowa law because Iowa law does not consider us 'next of kin.' We would have to rely on the kindness of each other's relatives who could disrespect our wishes or even bar the survivor from attending the funeral altogether if they wanted to." SMF Ex. 7.

[4] David Twombley also worries about how to provide for Larry if he dies first, since Larry will have no access to David's Iowa Public Employees Retirement System benefits, which would go automatically to a spouse. SMF Ex. 7.

[5] Kate and Trish cannot afford to put Trish's name on the deed to their home or include her on their homeowners insurance policy because of potential tax consequences that would not apply if they were spouses. SMF Ex. 1.

is a lengthy, expensive and intrusive process during which the relationships between partner and child are at risk. For some, affording adoption is difficult. SMF Exs. 2-6, 9, 11-12; Ex. 21.[6]

Plaintiffs and minor Plaintiffs also suffer deprivation of privately conferred benefits and protections because they are not legally recognized families. The district court found as undisputed fact that "Plaintiffs are harmed in an infinite number of daily transactions as a result of being denied the right to marry, including transactions with employers, hospitals, courts, preschools, insurance companies, businesses such as health clubs, and public agencies including taxing bodies." Slip 23. Employee health insurance coverage may be available for a spouse, but not for a same-sex partner. Jason Morgan's employer, for example, offers only spousal insurance. Because he and Chuck, who was until recently a stay-at-home dad, cannot marry or afford private insurance, Chuck remained uninsured.[7] SMF 13-14; Exs. 5-6.

Some Plaintiffs with means try to cobble together what limited protections are available through legal documents, but these piecemeal efforts are costly and

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[6] "It ... saddens me to think about the amount of money we have had to spend because we cannot legally marry," states Reva Evans. "For example, if Ingrid and I had been able to marry, Jamison and I automatically would have been placed on Ingrid's insurance. Instead, we had to place Jamison on my own insurance, which was not as good, and which cost substantially more. In total, our inability to marry cost us $8500 in adoption and home study expenses and additional health insurance expenses for Jamison and me. We would have liked to save this money for Jamison's college fund, among other things." SMF Ex. 12.

[7] Jason explains how Chuck's lack of insurance contributed to the anxiety they struggled with as foster parents: "Parents who are fostering to adopt have a million worries. We prepare the children for unsupervised visits with the birth parent and worry that something might happen to them while they're out of our sight. We worry about what lies in the future for them if they are returned permanently to their birth parent and how we will feel now that we have come to love them so much. As a same-sex couple, we also have to deal with additional worries about how to care for Chuck if he gets sick and how to cobble together as many protections for the children as we can without marriage. This is highly stressful." SMF Ex. 5.

may be revoked by a court. Plaintiffs must take documents with them wherever they go and sometimes these documents are not respected.[8] It is impossible for Plaintiffs by any alternate means to come close to achieving the security and certainty that the law automatically affords to married spouses. SMF 6-14; Ex 22.

But marriage is not merely a bundle of legal rights and duties. For two people who have found joy in each other, it can be a definitive expression of love, devotion, and dedication. It allows each to honor the relationship of one to the other in a state-sanctioned way. Marriage also governs how couples fit into their communities, how they are perceived by colleagues, by friends, by family, by their children, and even by each other, conferring a sense of security, dignity, and respect. "Plaintiffs are continually reminded of their own and their family's second-class status in daily interactions in their neighborhoods, workplaces, schools, and other arenas in which their relationships and families are poorly or unequally treated, or are not recognized at all." Slip 22. Thus, denying marriage not only forecloses one of life's most personal choices, but stamps Plaintiffs and their children with a badge of inferiority, and deprives Plaintiffs of the most effective means to show one another and their communities that each has found the one person on earth who is inexpressibly precious and utterly irreplaceable.[9]

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[8] Jen BarbouRoske has a heart condition and, upon an emergency room visit, Dawn was told by a desk clerk despite her health care power of attorney that she could not be with Jen. "I felt then, and I still do today," states Dawn, "that it would have made a difference if I could have said, 'We're married.'" SMF Ex. 4. Trish Varnum also was forced to plead for Kate to be permitted in the room for a painful medical procedure that spouses routinely are permitted to attend even though the doctor performing the procedure was aware of Trish's health care power of attorney naming Kate as authorized to make medical decisions on her behalf. SMF Ex. 2.

[9] David Twombley states, "I have strong values, and marriage is one of those values .... I understand that marriage is not necessarily for everyone, but I think it is very important, both for me and for society. All my life I have suppressed the feeling of loss at being unable to marry someone I love. I feel an especially pronounced sense of longing when we attend other peoples'

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The Lawsuit. Iowa Code § 595.2(1) (1998) ("Only a marriage between a male and a female is valid"), as amended in 1998 (the "marriage ban"[10]), prohibits any individual from marrying a partner of the same sex. The Polk County Recorder and employees (collectively "Defendant") are charged by Iowa Code § 144.9 (1970) to accept or deny applications for marriage licenses and to enforce Iowa Code § 595.2(1). Defendant denied Plaintiffs' requests for marriage licenses, citing "gender restrictions" in Iowa law or that the couple was of the same sex. SMF Exs. 1-12. Plaintiffs otherwise met all legal requirements to marry in Iowa. SMF Exs. 1-12; ¶¶ 18-19.

Plaintiffs filed suit in Polk County District Court, challenging the marriage ban under the liberty and equality guarantees of the Iowa Constitution. The ban directly and substantially infringes Plaintiffs' fundamental right to marry and all Plaintiffs' rights to privacy and of familial association. It also unconstitutionally discriminates against Plaintiffs based on sex and sexual orientation and against minor Plaintiffs based on their parents' sex, sexual orientation, and marital status.

After the parties had engaged in extensive discovery, Defendant moved for summary judgment, arguing that constitutionality of the marriage ban must be reviewed under rational basis analysis and that the ban serves various hypothe-

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—continuation
weddings. I would like to be a role model for marriage as my parents were for me." SMF Ex. 7 ¶¶ 12, 14.

[10] As used herein, "marriage ban" encompasses not only Iowa Code § 595.2(1) and Iowa Code § 595.20 (1998), but its effect on hundreds of benefits, responsibilities and protections under Iowa statutes and rules for which marriage serves as the gateway. *See* SMF 6-14; SMF App A. Though Iowa Code § 595.2(1) itself does not expressly mention children, the provision's profound exclusionary effect on laws protecting and benefiting children is significant to the claims of the minor Plaintiffs and the legion harms they suffer as a result of their parents' exclusion from marriage.

sized governmental interests, including promoting procreation and promoting childrearing by heterosexual biological parents. Slip 45-46, 50-61. Plaintiffs resisted and cross-moved for summary judgment.

No reference to evidence submitted by either party is necessary to affirm the district court's determination that Plaintiffs are entitled to summary judgment as a matter of law. The marriage ban serves an illegitimate purpose – to disadvantage gay and lesbian Iowans – and therefore is unconstitutional under any standard of review. Additionally, as a matter of law none of Defendant's purported governmental interests are sufficient to justify the marriage ban under even the lowest level of scrutiny applicable under the Iowa Constitution. The district court correctly pointed out that there is no logical connection between the marriage ban and procreation or childrearing. Slip 46, 48, 56, 58-60. Excluding gay and lesbian couples from marriage has no impact on heterosexuals' procreative choices, or on the number of children raised by biological and/or heterosexual parents. Moreover, different-sex couples may marry regardless of presumed childrearing abilities or intent or ability to procreate, but all same-sex couples are prohibited from marrying even though many, including three of the Plaintiff couples, procreate and rear their own children. Thus, there is a logical disjunct between the marriage ban and Defendant's purported government interests, and the ban is at the same time extremely over- and under-inclusive. Consequently, affirmance is warranted even without reference to any evidence.

However, Plaintiffs also introduced conclusive evidence demonstrating that Defendant's purported interests have no basis in fact and the ban therefore cannot withstand even the lowest level of scrutiny on this ground as well. Plain-

tiffs' experts – scientists Defendant acknowledges are at the top of their respective fields in child developmental psychology, mental health, and sociology (Defendant's Reply Brief in Support of Summary Judgment 50) – testified through affidavits and by deposition that neither parental sexual orientation nor gender has any effect on children's adjustment. Relying upon more than 50 years of empirical research, leading medical, mental health and child welfare professional organizations have confirmed that lesbian and gay parents are as effective as heterosexual parents in rearing well-adjusted children, and repudiated notions that children need biological or different-sex parents to adjust well. SMF ¶¶ 57-68; SMF Ex. 13 ex. c; Defendant's Response to Plaintiff's Statement of Material Facts ("Def. Resp.") ¶ 57. Moreover, Iowa courts, agencies, and officials who license foster parents long have recognized that gay men and lesbians are good parents. SMF ¶¶ 54-55; SMF Ex. 21; Def. Resp. ¶¶ 54-55.

Defendant countered with affidavits of purported experts offering opinions on various social science topics. However, five of Defendant's witnesses are not social scientists but philosophers and hobbyists who do not offer empirical support for their notions, but instead describe idiosyncratic personal opinions. They do not claim to present accumulated scientific findings or consensus of professionals in any field. The district court correctly concluded that they were unqualified to offer expert opinions and excluded their testimony. After examining the remaining admissible evidence, the court correctly found no dispute of material facts in the parties' tendered proof, granted Plaintiffs summary judgment, and ordered marriage licenses issued to Plaintiffs. Slip 9, 61-62.

In the end, Defendant's purported justifications based upon childrearing could not withstand the scrutiny of reality: Iowa has the same interest in the welfare of children of same-sex parents as it does the welfare of other children. McKinley and Breeanna BarbouRoske, Jamison Olson, and Reed and Ta'John Swaggerty-Morgan are not unusual. More than 5800 same-sex couples live in Iowa – in every county – and as many as 37% of these are rearing children. SMF Ex. 20. Denying these families the protection of our state's marriage law deprives them of dignity and forces them to spend more money, take more risks, suffer more uncertainty and endure more hardship than other families – while doing nothing to promote childrearing by different-sex couples. The district court correctly concluded that the marriage ban violates the liberty and equality guarantees of the Iowa Constitution. The judgment should be ***affirmed***.

III. ROUTING STATEMENT

The Supreme Court should retain this case because it involves a substantial issue regarding the constitutionality of a statute, a significant issue of first impression that is of great public importance.

IV. ARGUMENT

A. STRIKING DOWN IOWA'S MARRIAGE BAN IS CONSISTENT WITH THIS COURT'S HISTORY AND TRADITION.

Protecting individual constitutional rights is the quintessential purpose of judicial review in a democratic system. Some here urge this Court to avoid wading into a politically charged arena and to dodge constitutional issues. Yet this Court well knows, and its rich history bears out, that treating public reaction as an element of substantive constitutional interpretation runs contrary to Iowa's storied tradition of protecting personal liberty and equality and of remedying injustice at

home long before other jurisdictions even recognized the inequality at work.

Iowa's judicial independence and its respect for equality and individual rights date predate statehood. *See, e.g., In re Ralph*, Morris 1, Bradf. 3 (Iowa 1839). For well over a century, Iowa's courts have vindicated constitutional rights and personal dignity for the unpopular in cases involving hotly-debated social issues that only in retrospect have been recognized universally as undeniable, often acting long before other states or federal courts were willing to take an equally principled position.[11] *See, e.g., Clark v. Bd. of Sch. Dir.*, 24 Iowa 266 (1868) (racial segregation in education); *Cole v. Cole*, 23 Iowa 433 (1867) (gender-neutral rule in custody decisions); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (striking down sodomy laws); *In re Marriage of Kramer*, 297 N.W.2d 359 (Iowa 1980) (effect of biracial relationships in custody determinations).

Once again, this Court is called upon to exercise its unique duty and to invoke Iowa's tradition of independence to protect the state constitutional freedoms of all people by striking down Iowa's marriage ban.

B. THE DISTRICT COURT CORRECTLY RULED THAT EXCLUDING SAME-SEX COUPLES FROM MARRIAGE DENIES CONSTITUTIONALLY-PROTECTED LIBERTY AND PRIVACY.

Standard of Review and Preservation of Error: The standard of review for constitutional issues is de novo. Claims of error have been preserved.

[11] While Iowa courts consult and often follow instructive federal precedents, the protections of equality, liberty, and privacy in Article I of the Iowa Constitution are more broadly protective of individual freedoms than the Fourteenth Amendment. *See, e.g., Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999).

1. Iowa's Constitution Protects The Autonomy Of Exercising Personal Choice In Marriage As A Fundamental Right, Free Of Governmental Interference.

The right to marry long has been guarded as a fundamental right because deciding whether and whom to marry is the quintessential kind of personal matter in which the government should have little say. "Marriage is one of the basic civil rights of humankind," *Locke v. Locke*, 263 N.W.2d 694, 696 (Iowa 1978). Iowa courts consistently have recognized the right to marry as shielded by the right of privacy under IOWA CONST. art. I, § 9.[12] *See, e.g., Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687, 695 (Iowa 1993); *Sanchez v. State*, 692 N.W.2d 812 (Iowa 2005); *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003); *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682 (Iowa 2002); *State v. Hartog*, 440 N.W.2d 852, 855 (Iowa 1989).[13]

Appreciating that the right to make personal decisions central to marriage would be hollow if the government dictated one's marriage partner, courts have placed special emphasis on protecting one's free choice of a spouse. *E.g.*,

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[12] Plaintiffs also make an independent claim that they have been denied the right to marry in violation of the Inalienable Rights clause of Article I § 1 IOWA CONST. art. I, § 1, which provides protections additional to Iowa's due process clause in IOWA CONST. art. I, § 9. Memorandum of Authorities in Support of All Plaintiffs' Motion for Summary Judgment and In Support of All Plaintiffs' Resistance to Defendant's Motion for Summary Judgment ("MSJ") 26-32; *See also* Br. *Amicus Curiae* Freedom to Marry In Support of Plaintiffs-Appellees.

[13] In evaluating claims under § 9, this Court looks to federal substantive due process analyses insofar as they may "prove helpful" in applying § 9, but has made clear that "those interpretations do not bind us." *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001). In Iowa, substantive due process is most protective in deeply personal realms, including those relating to family and home. *Callender*, 591 N.W.2d at 190 ("'Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."). Section 9 guards a fundamental right to privacy that respects "the right of individuals to make family and reproductive decisions based on their current views and values." *In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003).

Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 958 (Mass. 2003) (striking down a ban on marriages of same-sex couples, and explaining the "right to marry means little if it does not include the right to marry the person of one's choice"); *Perez v. Sharp*, 198 P.2d 17, 25 (Cal. 1948) (striking down anti-miscegenation law in first ruling of its kind, and affirming right to choose marriage with one person who is "irreplaceable"). Further, fundamental rights recognized in one set of circumstances do not "disappear simply because they arise in another set of circumstances involving consenting adults that have not traditionally been embraced." *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999) (unwed father has a significant liberty interest in establishing paternity of child born into marriage between mother and husband). The due process clause exists to protect nonconforming choices in creating family or entering into intimate relationships. *Id.* ("'liberty' must include freedom not to conform").

Plaintiffs' liberty interests in marital autonomy are no different from other people's interests. Indeed, Plaintiffs' relationships share the most celebrated hallmarks of relationships sanctioned with marriage. They find the "light" of their life and want to build their lives together, SMF Exs. 1 ¶6;5; 11 ¶10, including making a home together, SMF Ex. 5 ¶11, and perhaps converting to another faith to share a religious community together, SMF Ex. 1 ¶8. They want to convey their values through a commitment by marriage, SMF Exs. 7 ¶12;9 and blend their lives with extended family, SMF Exs. 11-12.

They too desire deeply that their lifetime commitment be understood fully by others, in a way that only the word "married" conveys, and especially at those moments in life that give many of us the most meaning, or when we are in great-

est need. For instance, they fear being considered legal strangers in hospitals, having to worry, for instance, about whether the other parent could step in to support the mother or child after a birth. SMF Exs. 1-4, 7-8, 10-12. They desire that when a child becomes a part of the family there is the security of a marriage between the two parents, that the child understands that his or her parents value commitment through marriage, and that the family is worthy of respect. SMF Exs. 3-4; 5; 10. They too wish to avoid the potential financial catastrophe of having no family health insurance for lack of a marriage. SMF Exs. 5-6; 9; 12. They have an interest in avoiding the degradation of not knowing whether one still has a job after taking bereavement leave for the death of a life partner's mother, SMF Ex. 5, or whether one can claim the body of a deceased loved one or make funeral arrangements, SMF Exs. 7, 9. Plaintiffs' liberty interests in deciding whom to marry without government interference are just as profound as for other individuals.

2. In Keeping With The Right To Autonomy In Deciding Whether And Whom To Marry, Iowa Imposes Almost No Restrictions On Different-Sex Adults Who Wish To Marry.

Consistent with the autonomy protected by the right of privacy, Iowa strongly respects the freedom to choose whether and whom to marry and all but stays out of this decision for different-sex couples. A person may marry someone of a different sex who is of a different religion, despised by one's parents, a deadbeat, has a criminal record, or a history of abuse. Whether one chooses to marry a scoundrel or a saint, the Iowa Constitution's liberty guarantee allows all adults to decide for themselves.[14]

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[14] Defendant and *amici* raise a slippery slope argument about polygamy, as other states have argued before in defending against claims by minorities for the right to marry. *E.g.*, *Perez v. Sharp*, 198 P.2d 17, 46 (Cal. 1948) (Shenk, J., dissenting) (comparing ban on interracial marriage *continued—*

Iowa also permits spouses to determine for themselves the *purposes* marriage serves and the form it takes. Motivations to marry run from the cynical and practical – immigration or tax consequences, convenience, money, needing spousal health insurance – to the romantic and sublime. A couple *may* have children, but they need not and often do not.[15] Spouses need not pass a fertility test, intend to procreate, be of childbearing age, have any parenting skills, or account for any history of childrearing or child support. Thus, in deference to personal autonomy, Iowa minimally regulates entry into marriage and the shape it takes for any two persons. *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994) (freedom of personal choice in family matters a fundamental liberty interest); *In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2003) ("[D]ecisions about marriage ... have lifelong consequences for a person's identity and sense of self."). Lesbian and gay Iowans share the same birthright to liberty and autonomy in exercising the right to marry.

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to bans on incest, bigamy and polygamy). Prohibitions on polygamy do not bar exercise of the fundamental right to marry the person of one's choice, but instead more than one person. Thus, the extent of the deprivation is less than the outright denial here. Additionally, in a challenge to a ban on polygamy, the government would have a vast set of interests to assert that are different from those asserted here, such as issues with respect to consent and how spousal and parental rights and presumptions should operate. *E.g.*, *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (government justified in prohibiting polygamy in part because it "has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage").

[15] That the right to marry is not conditioned on procreation was recognized in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (marriage a fundamental right for prisoners even though some may never have an opportunity to "consummate" the marriage; "important attributes" of marriage include that it is an "expression ... of emotional support and public commitment," and for some, an "exercise of religious faith as well as an expression of personal dedication," "a precondition to the receipt of government benefits ..., property rights ..., and other, less tangible benefits" such as "legitimization of children born out of wedlock").

3. Rights Do Not Lose Their Fundamental Character When Excluded Persons Step Forward To Demand Them.

The district court correctly rejected Defendant's shell game of reframing the fundamental right to marry as a "new" right of "same-sex marriage." Slip 44. That game invokes tradition to label as "new" any minority's claim to fundamental rights long exercised by others. This Court has explained that due process protections "should not ultimately hinge upon whether the right sought to be recognized has been historically afforded . . . [Iowa's] constitution is not tied merely to tradition, but recognizes the changing nature of society." *Callender*, 591 N.W.2d at 190-92.[16]

The scope of a fundamental right is defined by attributes of the right itself, and not by the people who seek to exercise it or who have been excluded from doing so in the past. Iowa courts have rejected attempts to reframe claimed fundamental rights and liberty interests in narrow actor-based ways that lose sight of

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[16] Defendant and opposing *amici* argue that marriage is unchangeable, when in fact it has undergone significant changes over time, including the elevation of women from mere chattel to equal partnership with their husbands, and the fall of anti-miscegenation laws. Through court decisions and legislation, marriage laws are virtually unrecognizable from their common-law counterparts. SMF Ex. 19. As with many deeply ingrained assumptions about the nature and effects of marriage that have given way over time, the Court here is asked to consider the exclusion of same-sex couples in light of refined understandings of the values at the foundation of our constitutional order. For as much as marriage has changed, the profound liberty interests in marriage have *not* changed, and are shared by all individuals. Where such liberty interests are at stake, "history and tradition are the starting point but not in all cases the ending point" of the analysis. *State v. Seering*, 701 N.W.2d 655, 664 (Iowa 2005), quoting *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (citation omitted); *Callender*, 591 N.W.2d at 182 ("Our constitution is not merely tied to tradition, but recognizes the changing nature of society"), citing *Redmond v. Carter*, 247 N.W.2d 268 (Iowa 1976). "The mere fact that a practice is ancient does not mean it is embodied in the constitution." *State v. Reyes*, 744 N.W.2d 95, 102 (Iowa 2008). As the U.S. Supreme Court recently observed, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579. Iowa courts have not hesitated to take into account society's maturation with respect to understandings of fairness and equality. *See, e.g., Miller v. Boone County Hosp.*, 394 N.W.2d 776, 776, 780 (Iowa 1986) (invalidating statute even under rational basis review because the "traditional interests put forth as justification" for the law were "totally lacking in substance in today's circumstances," and quoting Justice O. Holmes: "the present has a right to govern itself").

the underlying privacy concerns at stake. Thus, in *Callender*, this Court did not redefine or diminish the right at stake (*e.g.*, as a right to "adulterous father parenthood"), as Defendant seeks to do here. Rather, the Court recognized the broader formulation of "fundamental interests in family and parenting," *id* at 190; *see also Howard*, 661 N.W.2d at 183 (Iowa 2003) (framing liberty interest as "parental autonomy" in light of trend toward broader definitions of family rather than "divorced parents' rights"); *Pilcher*, 242 N.W.2d at 358-59 (departing from leading U.S. Supreme Court precedent to frame liberty interest as autonomy in intimate matters rather than sodomy).[17] Similarly in federal law, the fundamental right could no more be a right to "same-sex marriage" than the right in *Loving v. Virginia*, 388 U.S. 1 (1967), was the right to "interracial marriage," or the right in *Zablocki v. Redhail*, 434 U.S. 374 (1978), was "deadbeat parent marriage," or the right in *Turner v. Safley*, 482 U.S. 78 (1987), was "prisoner marriage."

To frame the liberty interest so narrowly that it applies only to those whose interest was protected in the past would divide the humanness of individuals in different-sex couples from those in same-sex couples, or individuals in couples of the same race from interracial couples. Plaintiffs are no less human. It is an un-

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[17] Thus, this Court avoided the error of the U.S. Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), corrected in *Lawrence v. Texas*, 539 U.S. 558 (2003). The *Bowers* Court had recast the right at stake in a challenge by a gay man to Georgia's sodomy statute as a claimed "fundamental right" of "homosexual sodomy," Bowers, 478 U.S. at 191, and then rejected as "facetious" the idea that such a right is "deeply rooted in this Nation's history and tradition." *Id.* at 194. In setting aside this ruling in *Lawrence*, the Supreme Court held that its prior constricted framing of the issue in *Bowers* "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said that marriage is just about the right to have sexual intercourse."). Some state courts addressing bans on marriage of same-sex couples have made the same mistake *Bowers* made, and those mistakes will wind up in the same legal dustbin of history.

disputed fact that their "inability to marry their chosen partners is a painful frustration of their life goals and dreams, their personal happiness and their self-determination." Slip 23.[18]

4. The Marriage Ban Fails Strict Scrutiny and Offends Human Dignity.

A law infringing a fundamental right has no presumption of constitutionality and is subject to strict scrutiny. *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004). The government has the burden to prove that the infringement is "narrowly tailored to serve a compelling state interest." *In re Detention of Williams,* 628 N.W.2d 447, 452 (Iowa 2001). Here, the district court correctly held that Defendant made no attempt to meet his burden of showing both a compelling interest furthered by the ban and that an absolute ban on marriages is narrowly tailored. Slip 46. The marriage ban also "shocks the conscience or otherwise offends judicial concepts of fairness and human dignity." *In re K.M.*, 653 N.W.2d 602, 607 (Iowa 2002). As demonstrated above in the discussion of Plaintiffs' interests, the undisputed evidence shows humiliating unfairness and loss of dignity in being denied access to the right to marry and to countless rights, obligations and protections. The marriage ban accordingly violates the liberty, privacy, and familial association guarantees contained in IOWA CONST. art. I § 9.[19]

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[18] Defendant and amici resort to federal law in an attempt to create a false conflict, and rely on *Washington v. Glucksberg*, 521 U.S. 702 (1997) (no fundamental right to assisted suicide). But that opinion validates this Court's approach in *Callender*. The *Glucksberg* Court focused on liberty interests shared by *all* individuals, rather than just individuals in the majority, and found that the liberty interest advanced for assisted suicide was not grounded sufficiently in history. It is entirely different, and contrary to *Callender*, to describe the liberty interest so narrowly that it excludes a *group of individuals* from sharing a liberty interest. Fundamental rights are by their essence protective of liberty interests shared by all, so to define them to exclude a minority mocks the nature of fundamental rights.

[19] The marriage ban also impermissibly interferes with minor Plaintiffs' fundamental rights of *continued—*

C. THE DISTRICT COURT CORRECTLY RULED THAT THE MARRIAGE BAN DENIES PLAINTIFFS EQUAL PROTECTION.

Standard of Review and Preservation of Error: The standard of review of constitutional issues is de novo. Claims of error have been preserved.

Reinforced by IOWA CONST. art. I, § 1 ("All men and women are, by nature, free and equal"), IOWA CONST. art. I, § 6 cements Iowa's commitment to equality:

> All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

Because the marriage ban discriminates against Plaintiffs on the basis of both sex and sexual orientation without furthering any compelling, substantial or legitimate interest, it violates Iowa's equality guarantee.[20]

1. The Marriage Ban Impermissibly Discriminates On The Basis Of Sex and Fails Heightened Scrutiny.

The district court correctly held that the marriage ban on its face and as applied, discriminates on the basis of sex. The court found that "[e]ach Plaintiff would have been able to marry his or her partner had the Plaintiff been of a different sex," and ruled that the "Plaintiffs' own sex precludes them from marrying an individual of their choosing." Slip 39, 47. *See also Baehr v. Lewin*, 852 P.2d

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familial association and privacy, without any legitimate, important or compelling justification. *F.K. v. Iowa Dist. Ct for Polk County*, 630 N.W.2d 801, 808 (Iowa 2001) (recognizing child's liberty interest in familial association protected by due process clause). Minor Plaintiffs raised this violation below, MSJ 101-02, but because the district court granted relief to the parents, it found it unnecessary to reach the children's claims.

[20] Discrimination based on sex and based on sexual orientation are closely related. Iowa courts have recognized the overlapping nature of different grounds of discrimination without taking an either/or approach. *See, e.g., Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193, 205 (Iowa Ct. App. 2006) (objection based on race to peremptory strike of juror preserved objection based on national origin as well because "Race, national origin, and ethnicity are all fluid concepts .... Whether the jurors were black because of their race or national origin, we decline to venture a guess") (citations omitted).

44, 64 (Haw. 1993). A prohibition on marrying someone of the same sex is a facial sex-based classification. *Cf. M.R.M., Inc. v. City of Davenport*, 290 N.W.2d 338, 340-341(Iowa 1980) (regulation "prohibiting any person from administering a massage to a person of the opposite sex obviously [is] a classification based on sex and potentially suspect"). In addition, because Plaintiffs were denied marriage licenses because of "gender specifications" in the Iowa Code, the marriage ban discriminates as applied. SMF Exs. 1-12.

With discrimination obvious on the face of the statute and in application, there is no need to search for discriminatory purpose. Nevertheless, the district court's findings of undisputed fact evince the statute's impermissible purpose of blocking departures from sex stereotypes:

- "[L]esbian and gay people have been subjected to discrimination, harassment and misunderstanding because they are perceived as departing from the gender roles expected of each sex," Slip 39;
- The treatment is based in part on "fear or discomfort with gay people's perceived departures from sex role norms," Slip 40; and
- "Sex-role conformity remains embedded in Iowa marriage law. As a condition of marriage in Iowa, male Plaintiffs must conform 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 men. In fact, these are old and overbroad stereotypes that do not reflect the diversity of individual men and women," Slip 40.[21]

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[21] Other judges have noted the sex stereotyping underlying the discrimination based on sex in excluding same-sex couples from marriage. *See, e.g., Goodridge*, 798 N.E.2d at 973 (Greaney, J., concurring) (The court must "confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage."); *Baker v. State*, 744 A.2d 864, 906 (1999) (Johnson, J., concurring in part, dissenting in part) ("[T]he sex-based classification contained in the marriage laws is ... a vestige of sex-role stereotyping.").

Plaintiffs do not advocate that traditional roles for men and women within marriage be discarded, as many married men and women find happiness framing marriage around such roles at least to some degree; women may take pride in culinary or childrearing skills, and men may enjoy breadwinning. However, most spouses also deviate from sex stereotypes at least a little; husbands may play some role in childrearing, for example. What is important is that government

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Rationales cited by Defendant and *amici* in an effort to justify the marriage ban further demonstrate that the law is based on unlawful stereotypes. *See, e.g.*, Def. Br. 45 (marriage functions to "provid[e] men [but not women] with a stake in family and society"); Br. of United Families Int'l et al. 12 (marriage necessary to bind father to wife and children and impose responsibilities of fatherhood); Br. of *Amicus Curiae* James Q. Wilson et al. at 24 (marriage necessary to link fathers to children).

In Iowa, sex stereotypes are a form of unlawful sex discrimination and courts have sought to weed out such discrimination in marriage and in other arenas.[22] *See In re Marriage of Hansen*, 733 N.W.2d 683, 693, 700 (Iowa 2007) (because family structures have become more diverse and many spouses do not adopt "'traditional' roles" in childrearing, courts adjudicating child custody must avoid gender bias and advance "gender neutral goals of stability and continuity with an eye toward providing the children with the best environment possible for their continued development and growth"), *see also Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981); *In re Marriage of Fennell*, 485 N.W.2d 863, 864 (Iowa Ct. App. 1992) (court careful to avoid sexual stereotypes in appeal by working mother of custody award to stay-at-home father); *Kramer*, 297 N.W.2d at 361 ("[N]o assumptions are warranted based on the gender of parent or child");

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cannot enforce conformity with traditional sex stereotypes and that spouses are free to shape their roles within marriage as they choose. Although Iowa's marriage laws historically assigned rigid sex roles to men and women in marriage, Iowa has since rejected such discrimination. SMF Ex. 19; MSJ 71-74; Slip 38.

[22] Iowa's refusal to give effect to sex stereotypes finds support as early as 1873. *Coger v. The Nw. Union Packet Co.*, 37 Iowa 145 (1873) ("neither womanly delicacy nor unwomanly courage has any thing to do with ... legal rights and the remedies for their deprivation").

Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 521-22 (1990) (affirming finding of sex discrimination in case of policy adduced as "direct evidence of sexual stereotyping" that barred women but not men from jobs stocking shelves).[23]

Defendant raises the familiar "equal application" argument – that the statute does not discriminate because it "treats men and women alike," as a "man may marry a woman and a woman may marry a man." Def. Br. 23. Iowa has rejected this argument. "Judicial inquiry under the Equal Protection Clause ... does not end with a showing of equal application among the members of a class defined by the legislation." *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980), citing *McLaughlin v. State of Fla.*, 379 U.S. 184, 191 (1964) (race) and *M.R.M., Inc.*, 290 N.W. 2d at 340 (sex). Moreover, the "equal application" argument has lived lives before in civil rights cases, with courts eventually rejecting what first was accepted. For example, in *McLaughlin*, the U.S. Supreme Court overruled *Pace v. Alabama*, 106 U.S. 583 (1883) (enhanced penalties for sex by interracial couple not race discrimination because all who committed it, white and black, were treated alike), holding that a race-related anti-cohabitation law was an unconstitutional racial classification *even though the law applied equally to white and black persons. McLaughlin*, 379 U.S. at 192.[24]

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[23] Similarly, federal law has rejected stereotypical assumptions that women cannot handle conventional military training, *U.S. v. Virginia*, 518 U.S. 515 (1996), that men cannot be nurses, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982), and that children are entitled to social security benefits only when fathers but not mothers are unemployed, *Califano v. Westcott*, 443 U.S. 76 (1979).

[24] *See also Bob Jones Univ. v. U.S.*, 461 U.S. 574, 605 (1983) (prohibition on men and women of different races associating or marrying unconstitutional despite equal application); *Loving*, 388 U.S. at 8, 12 n.11 ("[T]he fact of equal application does not immunize the statute" even "assuming an even-handed state purpose to protect the 'integrity' of all races"). The "equal appli-

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The teaching of *McLaughlin* is not limited to race-based discrimination even in federal courts. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139, 140-42 & n.13 (1994) (striking down peremptory challenges based on gender-based assumptions as to *both* sexes: "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.").[25]

All sex-based classifications in laws are inherently suspect and subject to at least heightened scrutiny. *Sanchez*, 692 N.W.2d at 817.[26] The district court properly determined that Defendant failed to meet his burden of proof that there are at least important state interests at stake, or that any such interests are at

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cation" approach also ignores that for purposes of equal protection analysis, the proper focus is upon each *individual's* right to equal protection. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("the marital couple is ... an association of two individuals each with a separate intellectual and emotional makeup").

[25] While it is true that some courts in states without such strong state law precedent rejecting the "equal application" argument have held that marriage bans do not constitute sex discrimination, those opinions make the same mistake as did subsequently overruled *Pace v. Alabama*. Iowa should, as it so frequently has in the past, point the way.

[26] Plaintiffs contend that strict scrutiny is appropriate for sex-based classifications under the Iowa Constitution in light of the 1998 amendment altering Article I § 1 to read: "All men ***and women*** are by nature free and equal" (emphasis added). *See* MSJ 74-76. This clause has an interpretive influence on the Constitution as a whole. *See* Part C(3), *infra*. Iowa has not considered whether this amendment warrants a change in the level of scrutiny applicable to sex-based classifications.

A constitutional amendment is presumed to effect a change in the law. *State v. Snyder*, 634 N.W.2d 613, 615 (Iowa 2001); *Estate of Thomann*, 649 N.W.2d 1, 4 (Iowa 2002) (each addition is presumed made for a reason, and not redundant or irrelevant). The vast majority of states with equal rights amendments use a more rigorous standard of review for sex-based classifications than intermediate scrutiny. *See, e.g., Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 533 (Cal. 1971); *Daly v. DelPonte*, 624 A.2d 876, 883 (Conn. 1993); *People v. Ellis*, 311 N.E.2d 98 (Ill. 1974); *Tyler v. State*, 623 A.2d 648, 651 (Md. 1993); *Commonwealth v. King*, 372 N.E.2d 196, 206 (1977); *In re McLean*, 725 S.W.2d 696, 698 (Tex. 1987). Both the Iowa Constitution's express guarantee of equality to each man and woman and increasing societal and judicial recognition of the invidious nature of sex-based classifications justify application of strict scrutiny.

least substantially related to excluding same-sex couples from marriage. Slip 47-49.

2. The Marriage Ban Impermissibly Discriminates On The Basis Of Sexual Orientation.

a) The Sexual Orientation Classification Is Subject To And Fails Heightened Scrutiny.

In addition to constituting sex discrimination, Iowa's marriage ban discriminates based on sexual orientation. The ban excludes those Iowans who are drawn to marry a partner of the same sex. As same-sex attraction is the key feature of choosing to marry a person of the same sex, a law barring exercise of that choice targets lesbian and gay people on its face. To avoid conceding this classification, Defendant ignores the core, ordinary meaning of sexual orientation, and that whom one would marry is in part an expression of sexual orientation. Like the Texas law outlawing sexual intimacy only between persons of the same sex, the marriage ban is aimed at "conduct [here, choosing to marry someone of the same sex] that is closely correlated with being homosexual" and therefore is "directed at gay persons as a class," and properly is read as disparately treating gay and lesbian people on its face and directly discriminating on the basis of sexual orientation. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring on equal protection grounds); *see also, e.g., Gryczan v. State*, 942 P.2d 112, 120 (Mont. 1977).

This Court should hold sexual orientation to be a suspect classification. "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities, and which may call for a correspondingly

more searching judicial inquiry." *U.S. v. Carolene Products*, 304 U.S. 144, 152 (1938). Describing the common link among suspect classifications of race, alienage and national origin, the Supreme Court has explained that "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest," that laws containing such classifications "are deemed to reflect prejudice and antipathy." Such laws are to be subjected to strict scrutiny for this reason and because such discrimination is unlikely soon to be rectified by legislative means. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Neither the U.S. Supreme Court nor Iowa courts have considered whether sexual orientation is a suspect classification.[27] In deciding this, this Court would look first to federal law, though presumably reserving the right to use different tests or applications of the federal factors as justified by Iowa constitution. *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (2004) ("*RACI II*"). Federal courts do not have a rigid test to establish the suspectness of a classification. Sexual orientation-based classifications satisfy the two central criteria always considered by the U.S. Supreme Court, as well as two additional factors sometimes evaluated, but not required in the analysis.

History of Discrimination: The federal test always asks whether members of a group historically have been subjected to "purposeful unequal treatment" because of the characteristic or burdened with disabilities "on the basis of

[27] In *Romer v. Evans*, 517 US 620 (1996), the U.S. Supreme Court decided that the challenged law did not have even a rational basis and therefore did not need to decide if a higher level of scrutiny generally is required for sexual orientation discrimination. The rejection of heightened scrutiny for such classifications by lower federal courts has rested largely upon *Bowers*, 478 U.S. 186 which has now been repudiated by *Lawrence v. Texas*, 539 U.S. 558, 584 (2003). *See, e.g., Richenberg v. Perry*, 97 F.3d 256, 260 & n.5 (8th Cir. 1996).

stereotyped characteristics not truly indicative of their abilities." *See, e.g., Cleburne*, 473 U.S. at 441. Defendant has admitted and the district court found undisputed that there is a long history of discrimination against gay and lesbian people both nationally and in Iowa. Slip 40-42; Def. Resp. ¶ 95; SMF Ex. 23 No. 13 (as qualified).[28]

Trait Unrelated To Abilities: The federal test also always asks whether the trait defining the class affects individual ability to perform in society. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1983). If not, laws classifying on this basis more likely "reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Cleburne,* 473 U.S. at 440. Defendant admits and has not disputed Plaintiffs' evidence that there is no correlation between sexual orientation and ability to perform and participate in society, a point widely accepted. Def. Resp. ¶ 50; SMF Ex. 23 No. 14.

Relative Political Powerlessness: A third factor that sometimes has been considered or mentioned but never held essential (and was not considered with respect to race, ethnicity, illegitimacy or sex), is whether the group has sufficient political power relative to others such that the political process provides adequate protection. *See, e.g., Foley v. Connelie*, 435 U.S. 291, 294 (1978) (non-citizen "aliens ... have no direct voice in the political processes"). Lesbians and gay men face significant obstacles in achieving protection from discrimina-

[28] Lesbian and gay people long have been subject to purposeful unequal treatment including discrimination in private employment, public accommodations, and housing, exclusion from the military and other public sector employers, laws criminalizing intimate relationships, prohibitions on service to or congregation in bars or other public places, immigration exclusions, harassment, physical assaults and threats, property damage, prohibitions on gay characters in television and films, and past classification of homosexuality as a mental disorder and "treatments" such as electroshock and aversion therapies. Slip 40-42; SMF Ex. 18.

tion through the political process and have little representation among decision makers. *See Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of writ of *certiorari*) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena"); *See also* Slip 43.[29]

Immutability: At times courts have noted the unfairness of imposing burdens on traits out of an individual's control. *E.g., Frontiero,* 411 U.S. at 682 ("[s]ince sex ... is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility....'") (citation omitted). However, a characteristic's "immutability" is not a necessary factor in establishing suspectness. *Cleburne*, 473 U.S. at 442-43 n.10. Alien status, illegitimacy, religion, and other factors are suspect despite either their potential for change or "an element of voluntariness." *Nyquist v. Mauclet*, 432 U.S. 1, fn.11 (1977) (resident aliens).[30] Contrary to Defendant's claim, Def. Br. 31, Plaintiffs submitted undisputed evidence below that sexual orientation – whether hetero-

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[29] Defendant argues that gay and lesbian Iowans are politically powerful because the legislature recently added sexual orientation to the State civil rights statute. Def. Br. 35. If Defendant were correct that passage of protective legislation shows that a group is not politically powerless, then courts would not have been able to find race and sex suspect classifications.

[30] Moreover, even if "immutability were a requisite factor rather than merely one measure of a trait's centrality to personhood, the question is not "whether one is born with it," but whether government reasonably may require one to change it to obtain equal treatment. The answer as to sexual orientation – whether heterosexual or homosexual – must be no. *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093-94 (9th Cir. 2000) (sexual orientation and identity immutable because so fundamental to one's identity that a person should not be required to abandon them) *overruled in part on other grounds by Thomas v. Gonzalez*, 409 F.3d 1177 (9th Cir. 2005). SMF Ex. 15.

sexual or homosexual – is immutable. Slip 27-29; SMF Ex. 15. Defendant admits that "one's sexual orientation is highly resistant to change." SMF Ex. 23 No. 15; Def. Resp. ¶ 47. Attempts to change sexual orientation (which are not even considered as to heterosexuals) are "ethically suspect," and frequently cause affirmative harm. SMF Ex. 15 ¶21. In no sense is a person "responsible" for sexual orientation nor should a person be required to try to change it in order to gain equality.

For these reasons, sexual orientation should be deemed a suspect class. *See Watkins v. U.S. Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J. concurring). In the alternative, it should be deemed quasi-suspect.[31] For the reasons stated in Part IV.B.4, *supra*, the marriage ban's sexual orientation-based classification cannot survive any form of heightened scrutiny and is unconstitutional.

b) The Marriage Ban Fails Even Rational Basis Review.

Defendant asks that Plaintiffs' claims be tested under a standard of rational basis review he asserts properly is borrowed either from federal law or from some out-of-state courts. Def. Br. 22-35, 38-41. Defendant contends that the marriage ban is constitutional because it arguably bears a rational relationship to hypothetical state interests, and that the trial court improperly scrutinized Defendant's asserted government purposes for credibility. Def. Br. 38. Defendant is wrong for at least three reasons.

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[31] The legal distinction between suspect and quasi-suspect classes generally turns on the degree to which there might be appropriate legislation based on the classification. *Cleburne*, 473 U.S. at 440-41. The quasi-suspect designation is used where the Court is only prepared to say the "factor generally provides no sensible ground for different treatment." *Id.* at 441. The Court should go at least this far.

First, Iowa law requires application of a stronger rational basis test in all cases, one at least as rigorous as that applied to discriminatory taxation in *RACI II*. Under Iowa's standard, Defendant's hypothesized justifications for the marriage ban are insufficient on their face because they are too attenuated from the law as written, severely over- and under-inclusive, and countered by conclusive evidence. Second, even federal law provides for more active rational basis review than Defendant admits, especially in cases that involve personal relationships or illegitimate purposes. Third, the marriage ban serves only the illegitimate government purpose of making gay people unequal to everyone else and therefore does not survive any standard of review.

Defendant has identified the following hypothetical state interests relating to childrearing: promoting procreation (Def. Br. 9, 21-22, 40, 43); promoting childrearing by a father and a mother (Def. Br. 9); promoting childrearing by biological parents (Def. Br. 9, 30); promoting stability and healthy family relationships in opposite sex relationships where children may be born (Def. Br. 15, 21, 31-32, 53); and communicating to heterosexual parents and prospective parents that their traditional long-term relationships are uniquely important (Def. Br. 53). Defendant also asserts that the exclusion promotes "the integrity of traditional marriage" (Def. Br. 15, 21, 30), and conserves state resources (Def. Br. 15, 20-21). All are inadequate under both federal rational basis analysis and the more rigorous form of rational basis review performed under Article I § 6.

In applying rational basis analysis under Iowa's Constitution, this Court employs federal rational basis test elements differently in light of state constitutional traditions and text. *RACI II* at 7. First this Court requires a "plausible pol-

icy reason for the classification," a reason that is not only legitimate, but "credible," and "worthy of belief." *Id* at 7. It also must be "realistically conceivable," a test that "rejects a purely superficial analysis" and implies permission "'to probe to determine if the constitutional requirement of some rationality in the nature of the class singled out has been met.'" *Id.* at 8 & n.3. The Court "must then decide whether this reason has a basis in fact." *RACI II* at 8 & n.4. Although this analysis does not require "proof" in the traditional sense, the Court nevertheless performs "some examination of the credibility of the asserted factual basis for the challenged classification rather than simply accepting it at face value." *RACI* II at 8 n.4; *Ames Rental Property Ass'n v. City of Ames,* 736 N.W.2d 255, 259 (Iowa 2007). While legislative judgments generally are presumed to be supported by facts, this is not the case when facts judicially known or proved preclude that possibility. *Ames,* 736 N.W.2d at 259-60.

This Court next considers whether "the relationship between the classification ... and the purpose of the classification is so weak that the classification must be viewed as arbitrary." *RACI II* at 8. There must be a fit between classification and purpose that is not "attenuated." *Id.* "[If] a classification involves extreme degrees of overinclusion and underinclusion in relation to any particular goal, it cannot be said to reasonably further that goal.'" *Id.* at 10, citing *Bierkamp,* 293 N.W.2d at 581; *Ames,* 736 N.W.2d at 260. More generally, this Court has stated that, in determining the arbitrariness or reasonableness of a classification, "we must take into consideration matters of common knowledge and common report and the history of the times." *RACI II* at 10.

In assessing Defendant's purported state interests relating to child wel-

fare, the proper focus is on marriage as defined by Iowa law, not on Defendant's conception of what marriage *should* embrace. Iowa law imposes no statutory requirement relating to procreation but permits virtually any two unmarried, different-sex Iowa adults to marry, including the sterile, the infertile, the elderly, those uninterested in sex, and the intentionally childless. *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (encouraging procreation not a rational basis for marriage since "the sterile and the elderly are allowed to marry"). Iowa also does not prevent child abusers, child support deadbeats or violent felons from marrying. Clearly, Iowa's marriage laws are not based on which people will provide an optimal environment for children.

Meanwhile, Iowa *excludes* from marriage gay and lesbian parents who:

- procreate via assisted reproduction and have children born into their relationship, such as Jen and Dawn BarbouRoske, Ingrid Olson, and Reva Evans (SMF Exs. 3-4, 11-12);
- have children from a previous different-sex relationship, such as Larry Hoch (SMF Ex. 8);
- have adopted children, such as Jen and Dawn BarbouRoske, Jason Morgan, and Chuck Swaggerty (SMF Exs. 3-6); or
- are parenting foster children after being licensed by the State. Jen and Dawn BarbouRoske, Jason Morgan, Chuck Swaggerty, Kate and Trish Varnum, Bill Musser, and Otter Dreaming all have parented foster children or currently are licensed foster parents intending to adopt (SMF Exs. 1-6, 9-10).

Iowa already has determined that those who build families by adoption or foster care, including several Plaintiff couples, can and do provide an optimal environment for childrearing. Slip 30; SMF Exs. 1-6, 11-12, 21. Iowa recognizes that sexual orientation is irrelevant to one's ability to parent, and acknowledges and respects all parent-child bonds. Def. Resp. ¶ 57; SMF Ex. 23; *see, also, e.g., In*

re Marriage of Kraft, 2000 WL 1289135 (Iowa Ct. App. 2000). Under Iowa law, family rights and ties are not diminished by arising outside the majority norm. "[T]he traditional makeup of the family" has "changed in recent generations," but "[t]he nontraditional circumstances in which parental rights arise do not diminish the traditional parental rights at stake." *Callender*, 591 N.W.2d at 191; *see, also, In re Marriage of Hansen*, 733 N.W.2d at 693, 700.[32] Thus, purported legislative purposes relating to heterosexual procreation and childrearing are too attenuated to justify the marriage statute as written and applied. *RACI II* at 11-14. The classification is so grossly over- and under-inclusive that it "cannot be said to reasonably further th[ose] goal[s]." *Bierkamp*, 293 N.W.2d at 584; *RACI II* at 10-12.

Additionally, Defendant's hypothesis that children do better when raised by married different-sex biological parents is simply not *relevant* to the classification because lesbian and gay people's marriages will not alter the number of children available to be raised in these allegedly finer homes. With or without their parents' marriages, Jamison Olson, McKinley and Breeanna BarbouRoske, and Ta'John and Reed Swaggerty-Morgan will continue to be loved and raised by *their own parents*, and not by married heterosexual couples. And regardless of whether same-sex couples marry, heterosexuals will have the same access to marriage, and the same opportunities and incentives to procreate or adopt. *See*

[32] This Court has recognized that "changes in the underlying circumstances" can "allow [the Court] to find a statute no longer rationally relates to a legitimate government purpose" even if it might have been considered to have had one originally. *State v. Groves*, 742 N.W.2d 90 (Iowa 2007); *Bierkamp*, 293 N.W.2d at 581 (changes in underlying circumstances may "vitiate any rational basis" and "the passage of time may call for a less deferential standard of review as the experimental or trial nature of legislation is less evident").

generally Alons v. Iowa Dist. Ct. for Woodbury Cty, 698 N.W.2d 858, 870 (Iowa 2005) (rejecting claim that recognition of a same-sex couple's civil union "would dilute the value of traditional marriage long recognized by this state" or have other adverse impact on heterosexual couples' marriages).

Defendant's childrearing purported state interests also contradict Iowa public policy by privileging: 1) children of heterosexuals over those with gay parents, and 2) those children who have a biological connection to both parents over adopted children who do not. Iowa and federal law reject differential treatment of adoptive and biological children, *see Smith v. Org. of Foster Families for Equality and Reform,* 431 U.S. 816, 845 n. 51 (1977) (Stewart, J., concurring); Iowa Code § 633.223 (1963); *In re Adoption of A.J.H.*, 519 N.W. 2d 90, 92 (Iowa 1994). Iowa values equally all children regardless of whether adopted, whether raised by biological parents, whether conceived "naturally," as Defendant puts it, through intercourse or instead through assisted reproduction, whether raised by heterosexuals or by gay parents. It is arbitrary in the extreme for the State to fulfill its compelling governmental interest in providing permanent homes for children through adoption, *In re L.M.*, 654 N.W.2d 502, 505-06 (Iowa 2002), and then deny these children the protections that marriage would bring to their new family. *Lewis v. Harris*, 908 A.2d 196, 217 (N.J. 2006). The State does not advance its interest in child welfare by making "the task of child rearing for same-sex couples ... infinitely harder by their status as outliers to the marriage laws." *Goodridge,* 798 N.E.2d at 963; *see also Baker v. State,* 744 A.2d 864, 882 (Vt. 1999).

Moreover, there simply is no "basis in fact," *RACI II* at 15, for the assumption that children do better when raised by a different-sex couple than with a same-sex couple in marriage. Slip 30-33; MSJ 76-93; SMF Ex. 13. Defendant argues that "social scientists say with confidence" that a home with a married mother and father is the "optimal milieu for childrearing," and inexplicably claims that if Plaintiffs were to marry it could harm their own children and others (Def. Br. 15, 47). However, Plaintiffs submitted conclusive evidence below, which Defendant was unable to dispute, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents, and that it is the *uniform* opinion of all mainstream psychological, pediatric, and child welfare professional organizations that sexual orientation is irrelevant to parenting ability and child development. SMF Ex. 13.[33] Defendant's childrearing justifications for the marriage ban are not "realistically conceivable," *see RACI II* at 7.

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[33] The American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the National Association of Social Workers, the Child Welfare League of America, and the North American Council on Adoptable Children, are unanimous in their conclusion that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents. SMF Ex. 13, Ex. 13 exhibit C. Numerous studies of children raised by gay and lesbian parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals, show that children raised by lesbian and gay parents are as successful as children raised by heterosexual parents. SMF Ex. 13. No credible evidence suggests otherwise. SMF Ex. 13. Furthermore, over 50 years of research into nontraditional families demonstrates that a child does not need both a male and a female role model in the home in order to adjust well. SMF Ex. 13.

Indeed, Defendant acknowledges that "[n]othing about a parent's sex or sexual orientation affects either that parent's capacity to be a good parent or a child's healthy development ('adjustment')," and that "[l]esbian and gay persons have the capacity to raise healthy and well-adjusted children." Def. Resp. ¶ 57; SMF ¶ 57. Defendant's own witness conceded that he is unaware of any study on gay or lesbian parenting that shows harm to children. *See* Hawkins Tr. 111:1-8. Additionally, Defendant's witness clarified that the portion of his affidavit describing the superiority of biological married parents – which is almost identical in wording and sources to the Brief *Amicus Curiae* of James Q. Wilson et al. at 18-24 – relied solely on studies comparing *heterosexual* married biological parents with *heterosexual* divorced, single, cohabiting, or stepparents, and therefore was neither intended to suggest that biological parents are superior to adoptive parents, nor to compare gay or lesbian parents to heterosexual parents. Hawkins Tr. 111:5-

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Defendant's next purported State interest – protecting the integrity of traditional marriage – is legally deficient because it does not express an interest independent of the State's desire to discriminate. *Romer v. Evans*, 517 U.S 620, 635 (1996); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881-82 (1985). A desire to promote marriage in its traditional form or to communicate to heterosexuals that their relationships are uniquely important merely *restates* a desire to prefer heterosexual relationships, rather than offering an "independent . . . legislative end" for the line drawn by the legislature. *Cf. id.* at 633; *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) ("'[P]reserving the traditional institution of marriage' is just a kinder way of describing the State's [stated interest in] *moral disapproval* of same-sex couples [and is therefore illegitimate]."). Such a circular explanation was rejected in *RACI II* as a justification for taxing riverboats less than racetracks: "the legislature wanted to aid 'the financial position of the riverboats.'" *RACI II* at 12-13 ("A lower tax *always* benefits the financial situation of the taxpayer subject to the lower rate. Obviously more is required: there must be some reasonable distinction" between the two classes in the law).[34]

—*continuation*
8;129:19-130:9. Studies of heterosexual divorced parents or stepparents say nothing about development outcomes of children of gay/lesbian parents who jointly plan to create a family, because the children in stepparent families often have been through a divorce or death of a parent (both of which may affect child development), and the quality of a stepparent's relationship with the child may be affected by when in the child's development the stepparent becomes part of the family. SMF Ex. 13.

[34] Defendant also asserts that the classification in the marriage ban perhaps was intended to conserve state and private resources. Defendant does not explain how or why that would be true or even "realistically conceivable." Undisputed evidence below established that allowing same-sex couples to marry would *save* the State money. SMF Ex. 20. Cost savings logically follow from more marriages because marriage requires each spouse to support the other, and increases the likelihood of their care being paid for by the couples' shared resources and spousal benefits, rather than by public programs. In any event, "a State may not accomplish ... a [cost savings] purpose by invidious distinctions between classes of its citizens." *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

Moreover, even under federal rational basis analysis, in a case such as this, federal courts apply a more searching form of review similar to the analysis that this Court explained should be done in all cases in *RACI II*. At the very least, in the presence of an illegitimate purpose, federal courts reduce deference given to other facially legitimate grounds for the classification and examine whether they are pretexts for discrimination. *See, e.g., Cleburne*, 473 U.S. at 471-72.[35] Additionally, federal courts engage in especially "searching review of the fit between the purported justification and the legislated classification under the Fourteenth Amendment when the law inhibits personal relationships." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). This case calls for an especially meaningful demonstration of rationality and fit, given Iowa's commitment to pluralism in family life. *Callender*, 591 N.W.2d 182.

Rather than rely on Iowa constitutional law and apt federal precedents, Defendant asks this Court instead to apply an incorrect, diluted standard of review advanced in certain out-of-state marriage cases. Def. Br. At 25-35. Defendant's apparent argument is that other states have rejected challenges to their marriage bans, so this Court need not consider what Iowa's Constitution re-

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[35] Legislative deference is based on the assumption that, "absent antipathy," the democratic process can be expected to rectify any unfairness in time. *Vance v. Bradley*, 440 U.S. 93, 97, 171 (1979); *see also Ames Rental Property Ass'n*, 736 N.W.2d 255, 263 (Iowa 2007). Where antipathy *is* present, however, the reason for deference dissipates and courts require "substantiation" of the interest articulated by the government. *Cleburne*, 473 U.S. at 449. In such cases, courts do not accept at face value other facially legitimate grounds offered for the classification, but test their credibility in a less deferential way. *See, e.g., id.* at 471-72. Further, courts may not hypothesize "any conceivable" legitimate purpose that might support the legislation but consider only the interests identified by government, which prevents the judiciary from imagining away illegitimate government action. *See, e.g., Romer*, 517 U.S. at 633, 635. *Romer* likewise acknowledged that moral disapproval of gay or lesbian individuals gives rise to "no legitimate state interest" that can be given weight in reviewing a law's constitutionality. *Id.* at 632; *See also Lawrence*, U.S. 539 at 559 (similarly confirming the impermissibility of government objectives grounded in negative beliefs about a particular group, no matter how deeply held).

quires. *See* Def. Br. 28-35. However, the cases Defendant cites turned on constitutional standards, provisions and traditions different from those cherished in Iowa, and diverged from settled Iowa and federal equal protection jurisprudence.[36] Each applied an inverted form of rational basis analysis that focused on the benefit to the *included* group rather than the adequacy of the rationale for *excluding* the other group, and/or "tested" the governmental justifications for the classification on so lenient a basis as to amount to no review at all. *See, e.g., Hernandez v. Robles,* 855 N.E.2d 1 (N.Y. 2006).

The courts in these cases ruled that a government interest in sheltering children conceived irresponsibly through heterosexual liaisons justifies excluding gay people and their children from marriage because gay and lesbian individuals cannot conceive by "accident." *See, e.g., Morrison v. Sadler,* 821 N.E.2d 15 (Ind. Ct. App. 2005). Thus, even while acknowledging that many same-sex couples give birth to and raise children, these courts narrowed the state's purpose for

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[36] For example, cases from New York and Washington are inapposite because, in contrast to what this Court has said about the breadth of the equality and due process guarantees of the Iowa Constitution, the high courts of these states in those cases declined to find that their state constitutions contained any broader guarantee of equality or liberty than the Fourteenth Amendment. *Compare, e.g., Hernandez,* 855 N.E.2d at 9, 14, *with Callender,* 591 N.W.2d at 191. Washington courts apply an independent state analysis under the state equality guarantee only where the challenged law "grants a privilege or immunity to a minority class, i.e., in the event of positive favoritism." *Andersen,* 138 P.3d at ¶¶15-29. By contrast, Iowa has never imposed such a requirement because the framers of Iowa's Constitution *were* concerned with discrimination against minorities, as evidenced in the debates of the Constitutional Convention of 1857, and by adoption of a revised Art. 1 § 1, which has no analogue in the Washington Constitution. Also, the Washington court declined to extend broader rights under the state due process clause, for example, unless the case met the requirements of a specific formalistic test. *See Andersen,* 138 P.3d at 971. Indiana has a unique form of rational basis review, which considers only whether "the disparate treatment accorded by the legislation" relates to "inherent characteristics which distinguish the unequally treated classes." *Morrison,* 821 N.E.2d at 21. Indiana's jurisprudence has only one standard and requires no consideration of the nature of the affected right, the nature of the classification, the purposes for a legislative classification or the burdens it imposes. The test could not be more lenient or farther afield from Iowa's rational basis doctrine. *See also,* All Plaintiffs' Resistance to Defendant's Motion for Summary Judgment ("Resistance") 9-18.

marriage to providing a supposedly optimal environment for raising children born of unplanned heterosexual pregnancies.

This framing turns rational basis review on its head, and abdicates any meaningful analysis at all. Iowa and federal rational review standards require that the law's classification *excluding* same-sex couples and their children from marriage and its benefits have some reasonable fit with the purported government objective. Iowa does *not* merely examine whether allowing different-sex couples to marry is rationally related to a *preference* for different-sex couples in Iowa; the State cannot justify adverse treatment of some people simply by recasting it as a preference for everyone else. *RACI II* at 13 (a desire to benefit financially one group over another cannot justify a taxation scheme). Both Iowa and federal law demand more. All families – regardless of whether their children are planned or unplanned, biological or adopted – equally deserve security and government-provided protections. Government cannot privilege the needs of unplanned children over others simply because of the accident of their birth.

Moreover, the out-of-state cases Defendant cites all arose without the benefit of the fully-developed evidentiary record here. *See, e.g., Conaway v. Deane*, 932 A.2d 571, 615, 631 (Md. 2007) (no evidence presented on the nature of sexual orientation, for example); *Andersen v. King*, 138 P.3d 963, 974 (Wash. 2006). In contrast, Plaintiffs here submitted conclusive evidence that the district court found undisputed demonstrating the Defendant's purported child welfare interests unworthy of belief.

In the end, under both federal and Iowa rational basis review, the law must be struck because its sole true purpose is illegitimate. Under any standard of re-

view, including under Iowa and federal rational basis, the Court must determine as a threshold matter whether a classification serves an illegitimate purpose. *Fed. Land Bank of Omaha v. Arnold,* 426 N.W.2d 153, 156 (Iowa 1988); *RACI II* at 8. All ***classifications*** drawn by the law (in contrast to the law itself) must serve a legitimate state interest. *RACI II* at 7. Illegitimate purposes include animus against, negative attitudes toward or fear of a group of people, *Romer,* 517 U.S. at 634; *Cleburne*, 473 U.S. at 448; moral disapproval of a group, *Lawrence,* 539 U.S. at 582; a purpose to disadvantage one group, or to make one group unequal to everyone else, *RACI II* at 15; *Romer,* 517 U.S. at 634; or a bare desire to harm a politically unpopular group, *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Such purposes alone explain passage of the marriage ban.

In 1998, Iowa already permitted different-sex couples to marry. These couples and their families *already had* the ability to obtain the benefits of marriage. The district court found it undisputed that the legislature passed §§ 595.2(1) and (20) in response to a high court decision in marriage litigation brought by same-sex couples in Hawaii. Slip 21; *see, also, Baehr,* 852 P.2d 44; SMF 6, App B to SMF. The new provisions reflected the legislature's intent to disadvantage gay and lesbian Iowans by telling them they could not enter a valid marriage in Iowa or even in another jurisdiction, expecting to return to Iowa and be considered legally married, as other Iowa couples do. SMF 6; SMF App B; MSJ 76-79. Defendant now posits other hypothesized reasons why the State might have wanted to limit marriage to different-sex couples, but never addresses the illegitimacy of its motives in passing new exclusionary legislation

emphasizing that "only" different sex marriages would be valid. The law should be struck down as a matter of law under any standard of review as fatally infected by the illegitimate purpose of making gay people unequal to other Iowans. *RACI II* at 16; *Lawrence*, 539 U.S. at 558.[37]

3. The Minor Plaintiffs Are Unconstitutionally Injured By The Marriage Ban, Which Fails Heightened Scrutiny.

As with the minor Plaintiffs' fundamental rights argument, the district court granted relief to the parents, and therefore found it unnecessary to reach the children's claims. The marriage ban impermissibly classifies children on the bases of their parents' sex, sexual orientation and unchangeable marital status, denying minor Plaintiffs the dignity, legitimacy, security, support and protections available to children whose parents can marry. The State's differential treatment of children based upon their parents' status must be at least substantially related to a legitimate governmental interest, *State ex rel. Rake v. Ohden*, 346 N.W.2d 826, 829 (Iowa 1984). Iowa mirrors, at a minimum, federal law, which holds that disparate treatment of children of unmarried parents based on the conduct or status of their parents violates the equal protection guarantees of the U.S. Constitution. *See, e.g., Levy v. Lousiana*, 391 U.S. 68, (1968) (invalidating provision denying children of unmarried parents the right to claim for wrongful death); *Go-*

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[37] "[E]ven under the rationality test, the legislature is not entitled to pick out a group it disfavors, declare that group to be different, and then impose a special [] burden on the disfavored group." 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 18.3(e), at 244 (3d ed.1999); *RACI II* at 16. When a law singles out a class of citizens for disfavored treatment, even under the most lenient federal equal protection standard courts apply rational basis review with skepticism, and demand "substantiation" of the reasons for treating the class differently. *Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 448; *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001); *Plyler v. Doe*, 457 U.S. 202, 228-29 (1982) (rejecting hypothetical justifications for law excluding undocumented children as unsupported by record evidence); *U.S. Dept. of Agric.*, 413 U.S. at 536-37 (1973); Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 Ky. L.J. 591, 628-31 (1999-2000).

mez v. Perez, 409 U.S. 535, 538 (1973) ("A State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally"). Under federal law, as in Iowa, differential treatment of children based upon their parents' conduct or status triggers heightened scrutiny. *Pickett v. Brown*, 462 U.S. 1, 7-8 (1983). As discussed in Part IV.B.4, *supra*, Defendant failed to meet this burden. MSJ 93-101.

4. This Court Should Embrace a Balancing Test for Equality Claims Under Article I § 6; the Marriage Ban Fails Under This Analysis As Well.

This Court repeatedly has left open "the possibility that there may be situations where differences in the scope, import, or purpose of the [federal and state equal protection guarantees] warrant divergent analyses." *RACI II* at 5. Laws such as the marriage ban, which impair the individual freedom and equality that the framers of Iowa's Constitution most sought to protect and that do so in one's most intimate life, warrant judicial review more nuanced than the extremes of a simplistic tiered approach allow. This case offers Iowa an opportunity to refine its equal protection analysis as other states have done in explicitly adopting a balancing test to permit a fuller "understanding of the clash between individual and government interests." *Planned Parenthood of Cent. N.J. v. Farmer,* 165 N.J. 609, 632 (N.J. 2000) (rejecting the formalism and inflexibility of federal tiered equal protection analysis).

In crafting an independent equal protection analysis, this Court could adopt a test weighing the importance of a credible governmental interest against the significance of the right or privilege that is burdened by the challenged government classification. *See, e.g., Greenberg v. Kimmelman,* 99 N.J. 552, 567

(N.J. 1985) (New Jersey courts consider the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction); *State v. Ostrosky*, 667 P.2d 1184, 1192-093 (Ak. 1983) (In Alaska, "[i]n contrast to the rigid tiers of federal equal protection analysis ... [our] standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme"); *Baker*, 744 A.2d at 873 (adopting balancing test under state constitution's common benefits clause). Such a test might require weighing the following factors: 1) the importance of a credible state interest proferred to justify a challenged classification, which also involves consideration of whether the classification at issue actually serves the government interest or suffers from extreme degrees of over or under inclusion; against 2) the significance of the right or privilege that is accorded or denied by the classification.

Iowa's constitutional text and history merit this approach. The Iowa Constitution contains two substantive guarantees of equality predating both the Fourteenth Amendment and application of the federal Bill of Rights to the States. Article I § 1 ("Rights of Persons") leads off the Constitution and its Declaration of Rights, acting as both a stand-alone guarantee and an interpretive device enhancing an understanding of the constitutional provisions that follow. "Appearing, as it does, at the very threshold of the Iowa Bill of Rights, that constitutional safeguard is thereby emphasized and shown to be paramount." *Hoover v. Iowa State Highway Comm'n*, 222 N.W. 438 (1928); *see, also, id.* at 59 (Section 1 "was to

be enforced by the judiciary").[38] Additionally, Article I § 6 (the "Privileges and Immunities" or "Equal Protection" Clause) shelters Iowans from discriminatory deprivations of fundamental rights and from arbitrary or invidious distinctions among persons. From its earliest decisions, this Court has called upon the language of both sections in enforcing meaningful equality for all persons and a vigorous defense of the rights of personhood. *See Coger v. The Nw. Union Packet Co.*, 37 Iowa 145 (1873); MSJ 13-33; Part IV.A, supra.

This Court already has employed a form of balancing in assessing equality claims under Iowa's constitution in various contexts, and therefore a more explicit adoption of a balancing analysis finds support in existing decisional law. For example, even when engaging in tiered equal protection analysis under the Iowa Constitution, this Court has broken from federal law to insist that a claimed governmental interest be realistic and grounded in fact, and has weighed the importance of the government interest against the burden imposed by a classification on the challengers, which is not a feature of any level of federal tiered equal protection analysis. *See, e.g., Ames,* 736 N.W.2d 255 (refusing to strike down zoning ordinance after performing thorough analysis of governmental interests for credibility and taking into account the minimal burdens imposed by the ordinance's flexible and expansive definition of family); *In re A.W.*, 741 N.W.2d 793, 810-12 (Iowa 2007) (using strict scrutiny to review a racial classification and

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[38] The framers of Iowa's Constitution amended the original wording of Article I § 1 ("free and independent" to "free and equal") in an effort to "put upon record every guarantee that could be legitimately placed in there in order that Iowa ... might ... have the best and most clearly defined Bill of Rights." Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight,* 42 Drake L. Rev. 593, 626-7 (1993). The bill of rights committee chair reported that it was the will of the "large majority" of Iowans to "see our constitution contain every guarantee for freedom that words can express." *Id.* at 627 & n. 195.

weighing the burden placed on children as a result of the classification). Iowa courts also use a similar balancing analysis for claims brought under Article I § 1.[39] At a minimum, when a plaintiff asserts an interest that is singularly profound and involves intimate familial ties, a balancing analysis is warranted that takes into account the plaintiff's "significant hardship." *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 178 (Iowa 2004); *see, also,* Br. *Amicus Curiae* of Jean Love et al.

Here, the marriage ban cannot survive a balancing analysis. For the reasons stated above in Part IV.C.2.b, Defendant's proferred state interests either are not legitimate, not credible, or not served by the marriage ban. However, even if they were, a desire to encourage procreation by heterosexuals, for example, cannot justify shutting out McKinley and Breeanna BarbouRoske, Jamison Olson, and Ta'John and Reed Swaggerty-Morgan from the legitimacy and economic and legal security they would obtain if their parents could marry. It cannot justify forcing Dawn to live with the fear that, absent marriage, someone might find a way to challenge her legal relationship to her daughters. It cannot justify

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[39] Plaintiffs also challenge the marriage ban as a violation of the freedom and equality and inalienable rights clauses of Article I § 1. MSJ 16-31. This Court has employed two tests for claims brought under the inalienable rights clause. The first, dating back to this Court's earliest cases, resembles the analysis employed by the U.S. Supreme Court in *Romer,* and invalidates the marriage ban because the ban effects a literal denial of equal protection to lesbian and gay Iowans and their children. MSJ 16-26. The second, for claims brought under the inalienable rights clause, is a balancing test: First, a court must determine whether the legislature's objectives serve the interests of the public generally and whether the law is reasonably related to those objectives. *Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168, 177-78 (Iowa 2004). If so, the court weighs whether the means employed are "reasonably necessary" and not "unduly oppressive," which turns on "whether the collective benefit outweighs the specific restraint of individual liberty." *Id.* at 176. Here, the right to marry is recognized in Iowa as a core aspect of liberty and "*essential to the orderly pursuit of happiness by free men.*" *Sioux City,* 405 N.W.2d at 695 (emphasis added). Defendant has pointed to no collective benefit from the marriage ban. Moreover, for the reasons described in Part IV.C.2.b, *supra*, Defendant's asserted interests are not served by the ban. Even if they were, the means employed are unduly oppressive to Plaintiffs.

David's fear that if Larry dies first, David may be excluded from Larry's funeral, or that if David dies first, Larry will suffer financial hardship because he cannot access David's pension. The harms suffered by Plaintiffs range from birth (presumptions of parenthood, legitimacy, and favorable rules for adoption) to death (bereavement leave and health care decision-making); from work (access to health insurance) to home (taxation and property); from good times (automatic recognition of how much members of a couple mean to each other) to bad (protections for spouses and children in divorce). Because the interests proferred by Defendant are vastly outweighed by these dignitary and tangible injuries, the marriage ban is unconstitutional under the equality guarantee embodied in Article I §§ 1 and 6.

D. THE DISTRICT COURT'S EXCLUSION OF OPINIONS FROM DEFENDANT'S PURPORTED EXPERTS WAS NOT AN ABUSE OF DISCRETION; NO ISSUE OF MATERIAL FACT EXISTED.

Standard of Review and Preservation of Error: Appellees disagree with Appellant's position on the standard of review. The exclusion of Defendant's expert witnesses did not involve constitutional issues and will not be overturned absent an abuse of discretion. *State v. Brown*, 470 N.W.2d 30, 32 (Iowa 1991). Whether there is an issue of material fact precluding summary judgment is reviewed on error. *Hoffnagle v. McDonalds Corp.*, 522 N.W. 2d 642, 643 (Iowa 1995).

The trial court excluded opinion testimony concerning aspects of social science and child development proffered by five of Defendant's witnesses because these individuals lack expertise as scientists or medical or child welfare

professionals in relevant fields.[40] Slip 5-9. Rather, they are philosophers and hobbyists without empirical support for their notions. The court exercised its gate keeping role appropriately by excluding evidence that would not be admissible at trial from summary judgment consideration, Iowa R. Civ. P. 1.981(5) ("affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein"), and therefore did not abuse its discretion.

The Iowa Rules of Evidence provide: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." Iowa R. Evid. 5.402. In *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 533 (Iowa 1999), this Court held that, although trial courts are not required to apply *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), "[they] may find it helpful, particularly in complex cases, to use one or more of the relevant *Daubert* 'considerations' in assessing the reliability of expert testimony." These considerations include: 1) whether the evidence is scientific knowledge that can be and has been tested, 2) whether the evidence has been subject to peer review, 3) the known or potential error rate, and 4) general acceptance in the relevant scientific community. *Daubert*, 509 U.S. at 593-94.

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[40] Importantly, the only relief available to Defendant if he succeeds on appeal is remand for trial on issues shown to have been disputed properly on summary judgment. In this event, the Court should guide the district court first by addressing the unresolved claims of the minor Plaintiffs. Because, as Defendant admits, "Iowa has the same interest in the welfare of children of same-sex parents as it does the welfare of other children", SMF Ex 23, No. 6, any justification for the ban that relies upon the protection of children must necessarily address the deprivation the minor Plaintiffs suffer as a result of the marriage ban.

Iowa trial courts have broad discretion to admit or exclude expert testimony and their decisions will not be disturbed absent manifest abuse of that discretion. *Brown*, 470 N.W.2d at 32. The complaining party has the burden to show abuse of discretion. *State v. O'Neal*, 303 N.W.2d 414, 420 (Iowa 1981). "To establish an abuse of discretion, it must be shown that it was exercised on untenable grounds or was clearly erroneous." *Brunner v. Brown*, 480 N.W.2d 33, 37 (Iowa 1992). The district court's action will not be reversed "as long as there is some support in the record." *Hunter v. Bd. of Tr. of Broadlawns Med. Ctr.*, 481 N.W.2d 510, 519 (Iowa 1992).

Defendant acknowledges that the excluded purported experts intended to testify from a "social science perspective" (Def. Br. 47). Because they were not social scientists or otherwise qualified to discuss social science research, the trial court properly exercised discretion in excluding them. Their proposed testimony was largely personal and not expert in nature. *Tappe v. Iowa Methodist Med. Ctr.*, 477 N.W.2d 396, 402 (Iowa 1991) ("It is not enough . . . that a witness be generally qualified in a field of expertise; the witness must also be qualified to answer the particular question propounded").

Thus, it was entirely within the district court's discretion and proper to exclude social science opinions offered by an ethicist lacking training in empirical research methodology who eschews reliance on empirical science, preferring to draw conclusions based on emotion and intuition, "especially moral intuition." (Somerville.) Similarly, the court was within its discretion to find that witnesses learned only in comparative religion and pop culture offered opinions irrelevant to scientific inquiry concerning the effect excluding same-sex couples from marriage

has from the perspective of child development, psychology, psychiatry or sociology. (Young and Nathanson.) Finally, the court properly excluded social science opinions for lack of required expertise from an historian and an economist about how biological differences between men and women contribute to healthy child development. (Carlson and Rhoads.) As in the case as Defendant's other excluded witnesses, neither purported to offer views shared even by members of their own fields. In short, the court properly rejected opinions based solely on eccentric personal ideology as irrelevant. *Tappe*, 477 N.W.2d at 402.[41]

Having identified the evidence that meets the admissibility standards under Iowa law, the court properly determined there is no dispute with respect to a material fact barring summary judgment for Plaintiffs in this case.[42] Indeed, Defendant admits that there are no adjudicative facts in dispute. Def. Br. 12. On appeal, Defendant seeks a second bite at the apple, suggesting somewhere in

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[41] Defendant and *amici* also argue that the social science evidence in this case constitutes "legislative" and not "adjudicative" evidence and therefore that "the rules governing admissibility of expert testimony do not apply," that Defendant's experts should have been permitted to testify regardless of their qualifications, and that this Court should consider the excluded individuals' proferred testimony. *See* Legislators' Brief at 5, 23-24. They cite no support for this notion. Regardless of whether the social science facts here are legislative or adjudicative, expert witness qualification requirements remain the same. Testimony by non-scientists cannot elucidate the teachings of current social science research on a particular topic, and the district court properly exercised its discretion in finding Defendant's witnesses unqualified.

[42] The court did not strike the opinions of three of Defendant's experts, but they did not create an issue of fact precluding summary judgment. *See Fees v. Mutual Fire and Auto. Ins. Co.*, 490 N.W.2d 55 (Iowa 1992) (an issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit). **Hawkins** admitted he had not read the vast majority of the studies concerning gay and lesbian parenting, had performed no related research himself, was unaware of the existence of many recently-published studies cited by Plaintiffs' expert Michael Lamb and, by his own admission, could not evaluate the body of social science concerning gay and lesbian parenting generally. Hawkins Tr. 33-34, 37, 69, 90-111. **Throckmorten** acknowledged that changing one's sexual orientation is difficult and, at times, attempting it can be harmful, Def. Rep. Brief Ex. G. – a view that does not conflict with Plaintiff's evidence. SMF Ex. 15. **Quick**, whose hobby in retirement consists of locating "citation errors" in articles concerning gay and lesbian parenting published by major child development journals, offered her self-taught expertise concerning the accuracy of citations in two survey articles on which Plaintiffs did not rely. Def. Rep. Brief Ex. D; Quick Tr. at 19-23; 25-28; 39-40; 99-104; 129. Thus, her opinions, even if accurate, created no dispute.

the voluminous record an issue of fact could be identified or manufactured. Yet, it was Defendant's obligation to point to the evidence in the record that disputes Plaintiffs' evidence; simply writing "denied" next to a factual allegation is inadequate. Iowa R. Civ. P. 1.981(5); *Fogel v. Tr. of Iowa College*, 446 N.W. 2d 451, 454 (Iowa 1989). Courts are not expected to pore through deposition transcripts and expert witness reports in search of a dispute with respect to a material fact. Defendant must identify portions of the record on which he relies on to give Plaintiffs an opportunity to challenge and the court an opportunity to determine their admissibility. Defendant did not.

V. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the judgment of the district court striking down the Iowa Marriage ban as unconstitutional should be ***affirmed***.[43]

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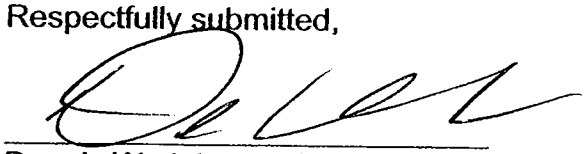
[43] This Court should reject any argument that a legislative scheme short of marriage would cure the constitutional infirmity here. Any legal status other than marriage, whether civil unions, domestic partnerships or some thing else, cannot provide full equality – both legally and practically. A separate status created solely for same-sex couples sets them apart as different and inferior. *See Opinion of the Justices*, 802 N.E.2d 565, 570 (Mass. 2004); *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) ("separate but equal" inherently unequal); *Alons v. Iowa Dist. Ct. for Woodbury Cty.*, 698 N.W.2d 858, 870 (Iowa 2005) (noting distinction between marriage and civil union, and rejecting argument that adjudication of civil union dissolution had anything to do with marriage); *See also* Brief of *Amicus Curiae* of MassEquality, et al.; MSJ 103-04.

Respectfully submitted,



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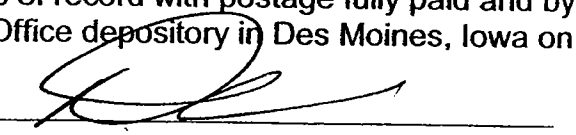
VI. CERTIFICATE OF FILING

I hereby certify that on the 28th day of March, 2008, copies of Appellees' Brief were hand delivered to the Iowa Supreme Court, Des Moines, Iowa, 50319.

VII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true copies of the foregoing brief were served on each of the parties of record by enclosing the same in an envelope addressed to each such party listed below at his address as disclosed by the pleadings of record with postage fully paid and by depositing said envelope in a U.S. Post Office depository in Des Moines, Iowa on March 28, 2008.

Signature: 

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VIII. COST CERTIFICATE

This is to certify that the true and actual cost of printing the foregoing Appellees' Brief was the sum of $_____.

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