



IN THE IOWA SUPREME COURT

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

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

FINAL BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE COURT ERRED BY HOLDING IOWA CODE §595.2(1) UNCONSTITUTIONAL ON THE DUE PROCESS CLAIM THAT SAME SEX MARRIAGE IS A FUNDAMENTAL RIGHT AND APPLYING A STRICT SCRUTINY ANALYSIS

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Iowa Code §595.2

Iowa Code §595.19

Iowa Code §598.29

Iowa R. Evid. 5.802

Iowa R. Evid. 5.803

Iowa R. App. P. 14(f) (13)

**IV. THE COURT ERRED IN REFUSING TO ADMIT DEFENDANT'S
EXPERT WITNESSES AND ENTERING SUMMARY JUDGMENT FOR
PLAINTIFFS**

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Williams v. Hedican, 561 N.W.2d 817, 822-3 (Iowa 1997)

Iowa R. Evid. 5.702

STATEMENT OF THE CASE

Defendant Timothy Brien followed the explicit, unambiguous language of 595.2(1), Iowa Code when he denied marriage licenses to same sex couples who are Plaintiffs in this action. Section 595.2(1) states: "Only a marriage between a male and a female is valid." Plaintiffs and several of their children brought claims that the denial violated their constitutional rights. (App. 19, Amend. Pet.) Cross motions for summary judgment were resisted. The Trial Court held that the law violates the Equal Protection and Due Process clauses of the Iowa Constitution. (App. 1872, Ruling) The Court denied the separate claims of Plaintiffs' children and denied Defendant's Motion for Summary Judgment.

Defendant appealed (App.1934, Not. of App.) and, at his request, the Trial Court stayed judgment (Record) which had ordered Defendant to license same sex applicants.

STATEMENT OF THE FACTS

Defendant moved for summary judgment asserting that same sex couples do not have a fundamental right to marry for due process purposes. Defendant further claims Plaintiffs cannot establish a suspect classification or fundamental right for equal protection purposes. (App. 38, Def. MSJ)

Plaintiffs resisted and moved for summary judgment (App. 49-69, Pl. Resist. and MSJ) submitting volumes of material about themselves and discrimination against homosexuality. Defendant resisted asserting rational basis for the law and provided opposing affidavit evidence. The legislature could rationally believe, *inter alia*, that

promoting procreation and providing children with opposite sex parents are legitimate governmental interests. (App. 1473-1740, Def. Reply and Resist.)

The Court used a “strict scrutiny” analysis for purposes of due process and held that marriage is a fundamental right of same sex marriage applicants thereby placing the burden of proof on the Defendant. (App. 1914-1917, Ruling pp. 43-46). Without mentioning nearly all precedent directly on point and all recorded history, the Court held that the Defendant failed to meet his burden. (App. 1919-20, Ruling pp. 48-49).

Finding the law to be sex based for equal protection purposes, the Court used an intermediate level of scrutiny test and allocated the burden of proof to Defendant, held Defendant failed to establish the statute to be substantially related to an important state interest. (App. 1918, Ruling p. 47). The Court held that the law also failed the rational basis test. (App. 1920-21, Ruling p.49-50). In so ruling, the Court did not admit five of eight affidavits of Defendant’s expert witnesses, discounted one witness (App. 1877-78, 1885-86, Ruling pp. 6-8, 14-5) and did not address the testimony of another. (App. 1872, Ruling)

Defendant’s refusal to issue marriage licenses to Plaintiffs was not based on the personal circumstances of any of the Plaintiffs nor their children. The reason for refusing was legal, not factual. (App. 41, Def. Brien’s Aff.)

Defendant appealed and claims the Ruling does not correctly apply the constitutional analysis (rational basis) (App. 1921-22, Ruling 50-51), errs throughout in its allocation of burden of proof and errs in the refusal to admit his witnesses.

SUMMARY

Iowa's Marriage Licensing Scheme

That marriage has always been between a male and a female is conceded by Plaintiffs' own experts, George Chauncey. (App. 1286-87, Def. Ex. K, depo.12-13) and Nancy Cott, (App.1316-17, 1328-28, Def. Ex. L, depo. 60-61) The Iowa General Assembly has recognized and regulated the institution of marriage ever since the State's first code of laws was adopted in 1851 (and the Territorial laws did so from 1846 -1851). *See* Code of Iowa §§1463-1479 (1851).

Prior to 1998, the statute read: "A marriage between a male and a female each eighteen years of age or older is valid. A marriage between a male and a female either or both of whom have not obtained that age may be valid under circumstances prescribed in this section." §595.2, Iowa Code (1997).

In 1998, the General Assembly amended §595.2 in part, as follows:

1. Only a marriage between a male and a female is valid.
2. Additionally, a marriage between a male and a female is valid only if each is eighteen years of age or older. However, if either or both of the parties have not attained that age, then marriage may be valid under the circumstances prescribed in this section. . . .

The amendment also added a provision regarding foreign marriages:

A marriage which is solemnized in any other state, territory, county, or any foreign jurisdiction which is valid in that state, territory, county, or other foreign jurisdiction, is valid in this state if the parties meet the requirements for validity pursuant to section 595.2, subsection 1, and if the marriage would not otherwise be declared void.

§595.20, Iowa Code

As county registrar, the Defendant Recorder is duty bound to issue and maintain marriage certificates as provided in chapter 595 and §331.611, Iowa Code.

ROUTING STATEMENT

Defendant believes the Iowa Supreme Court should retain this case as it involves a substantial constitutional issue as to the validity of §595.2(1), Iowa Code, which is a case of first impression in Iowa.

I.

THE COURT ERRED BY HOLDING IOWA CODE §595.2(1) UNCONSTITUTIONAL ON THE DUE PROCESS CLAIM THAT SAME SEX MARRIAGE IS A FUNDAMENTAL RIGHT AND APPLYING A STRICT SCRUTINY ANALYSIS

STANDARD OF REVIEW: As constitutional issues are implicated, the Court considers the totality of the circumstances under a *de novo* review standard. *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255 (Iowa 2007), *State v. Groves*, 742 N.W.2d 90 (Iowa 2007). Error is preserved in the Defendant's Motion for Summary Judgment, Defendant's Resistance to the Plaintiffs' Motion for Summary Judgment, Defendant's Reply and Resistance, Supplemental Appendices and the Ruling. (App.38, 641, 648, 659, 1251, 1872)

ARGUMENT

SUMMARY JUDGMENT: Review of a grant of a Summary Judgment is normally for correction of errors at law but constitutional issues are reviewed *de novo*. *Kistler v. City of Perry*, 719 N.W.2d 804 (Iowa 2006).

The precepts for summary judgment are well established. Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Iowa R.Civ.P. 1.981(3); *Phipps v. IASD Health Services Corp.*, 558 N.W.2d 198, 201 (Iowa 1997). The court is to review the record in the light most favorable to the party opposing summary judgment. *Smith v. CRST Int'l, Inc.*, 553 N.W.2d 890, 893 (Iowa 1996). “A factual issue is ‘material’ only if the dispute is over facts that might affect the outcome of the dispute.” *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001).

Summary judgment for Defendant is appropriate where Plaintiff cannot provide a critical element such as having an expert witness in a medical malpractice case, *Thompson v. Embassy Rehabilitation and Care Center*, 604 N.W.2d 643 (Iowa 2000), or where no cause of action exists such as when a claim is brought on a non-existent public policy, *Lloyd v. Drake University*, 686 N.W.2d 225, 226 (Iowa 2004); where no duty is shown to exist as a matter of law; *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 650 (Iowa 2000); or where a matter is preempted. *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 196 (Iowa 1985).

The court is not to weigh credibility of witnesses in a summary judgment proceeding. *Bitner v. Ottumwa Comm. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996).

Plaintiffs’ alleged undisputed facts, anecdotal affidavits and witness affidavits are not material to the issues at hand because they do not affect the outcome of the legal issues as the only facts are legislative, not adjudicative. *RACI v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004), *Welsh v. Branstad*, 470 N.W.2d 644, 647-48 (Iowa 1991).

On this *de novo* review this Court should use the rational basis analysis on both due process and equal protection claims, properly allocate the burden of proof to Plaintiffs, accept Defendant's witnesses' statements and reverse the ruling which redefined marriage.

SUBSTANTIVE DUE PROCESS ANALYSIS: Statutes are presumed to be constitutional and the Trial Court erred at the threshold question.

The first step in analyzing a substantive due process challenge is to identify the nature of the individual right involved. If the asserted right is fundamental, we apply strict scrutiny analysis. We must then determine whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest. Alternatively, if we find the asserted right is not fundamental, the statute must merely survive the rational basis test. To withstand rational basis review, there must be a reasonable fit between the government interest and the means utilized to advance that interest. *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002) (other citations omitted) (Emphasis added).

In undertaking this analysis, we have "traditionally considered the federal and state due process provisions to be equal in scope, import, and purpose" and construed these provisions similarly. ...

In re Detention of Cabbage, 671 N.W.2d 442, 446 (Iowa 2003), *see also State v. Groves*, 742 N.W.2d 90, 91-92 (Iowa 2007) and *Glowacki v. State Board of Medical Examiners*, 501 N.W.2d 539, 541 (Iowa 1993).

...substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that "shock the conscience or otherwise offend ... judicial notions of fairness ... [and that are] offensive to human dignity." With the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked. Citing *Blumenthal*, 636 N.W.2d at 265 (citations omitted)

Bowers v. Polk County Board of Supervisors, 638 N.W.2d 682, 694 (Iowa 2003). The Statute is presumed to be constitutional and Plaintiffs have an onerous undertaking.

Defendant has no obligation to provide evidence of rational basis. *Heller v. Doe*, 509 U.S. 312, 113 S.Ct. 2637 (1993).

In *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005), the Court said: "... [t]he **challenger must refute every reasonable basis upon which the statute could be found to be constitutional.**" Furthermore, if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction."

To date, no federal or state appellate court of final jurisdiction has held same sex marriage to be a fundamental right. *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571 (September 18, 2007); *Andersen v. King Co.*, 158 Wash.2d 1, 138 P.3d 963, 987-89 (2006); *Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1, 6 (2006); *Standhardt v. Superior Court*, 77 P.3d 451 (Arizona App. 2003), *rev. denied* (Ariz. 2004); *In re Marriage Cases*, 49 Cal.Rptr.3d 675, (Cal.App. 1 Dist. 2006); *Citizens for Equal Prot. v. Bruning*, 368 F.Supp.2d 980, 999 (D.Neb.2005); and *see also In re Kandau*, 315 B.R. 123, 145-48 (Bkry. W.D. Wash. 2004) (upholding federal DOMA as rational). These cases will be analyzed in Issue II of this Brief.

Not even Massachusetts, the only state to permit same sex marriage, found a fundamental right to do so but relied upon the uniqueness of its constitution. *Goodridge v. Massachusetts*, 440 Mass. 309, 798 N.E.2d 941 (2003).

The alleged factual issues do not bar summary judgment for the Defendant because there is no fundamental right for a person of the same sex to marry and, as stated, there is a rational basis for the statute. Plaintiffs' lengthy statement of material

undisputed facts was resisted as being either factually disputed, not relevant to the legal issue, hearsay and argumentative. Many of the Plaintiffs' facts have nothing to do with marriage. (App. 648-654, Def. Resp. to Pls. Mat. Facts, p.7) Defendant also offered the Court certain disputed facts barring summary judgment supported by affidavits. The Defendant's witnesses Carlson, Hawkins, Nathanson, Quick, Rhoads, Somerville, Throckmorton, and Young, all of whom are eminently qualified to testify to opinions under Iowa R. Evid. 5.702 about the matters contained in their affidavits. (App. 655-1250, Def. State. of Facts Barring SJ, Def. Exs. A-H)

Defendant has offered several possible rational reasons for limiting marriage in Iowa to a male and female:

- promoting procreation because sex between a man and a woman produces wanted and/or accidental offspring;
- promoting child rearing by a father and a mother in a marital relationship which social scientists say with confidence is the optimal milieu for child rearing;
- promoting stability in opposite sex relationships;
- conserving financial resources of both the parents and the state; and
- promoting the integrity of traditional marriage in American culture.

The substance of Defendant's witnesses' testimony (except Throckmorton and Quick) described both the history and procreative nature of marriage (always between a man and a woman) and the advantage to children being born and raised by opposite sex parents. The affidavits also opine on the lack of adequate and reliable research to support the opinions submitted by Plaintiffs' witnesses (and the articles they rely upon). Further, Dr. Throckmorton has opined on the nature of homosexuality, the

difficulties in describing its characteristics and gave an opinion that it is not necessarily a behavior that cannot be changed.

Defendant also submitted “commentaries” (abstracts of depositions) about Plaintiffs’ witnesses’ deposition testimony to show the existence of disputed evidence when compared to the lengthy affidavits attached to the Plaintiffs’ Motion for Summary Judgment (App. 1251-1472, referred to in the Defendant’s Reply Brief as “Appendix to Defendant’s Statement of Disputed Facts”, pp. 48-59, but inadvertently labeled as Appendix to Defendant’s Reply Brief).

Amongst other things, the commentaries show that two of Plaintiffs’ witnesses actually spend very little time on same sex marriage, Cott (App. 1300-03, 1304-05, Def. Ex. L, depo.p. 6-9), Lamb (App. 1372, 1379-80, 1381-82, Def. Ex. 0, depo. 19-25). The Trial Court’s reliance on these witnesses indicates impermissible weighing of the evidence for credibility.

The Ruling excluded five of Defendant’s witnesses’ affidavits - Young, Nathanson, Somerville, Carlson and Rhoads. After recognizing the expertise of Hawkins, Quick and Throckmorton, the Ruling discounted the affidavit of Hawkins, accepted one statement of Dr. Throckmorton’s (App. 1899, Ruling p. 28, ¶62), and does not discuss Quick. (App.1876-80, Ruling p. 5-9) Plaintiffs did respond to all of the witnesses’ affidavits in their Reply Brief (App. 1476-81) indicating that they were not prejudiced over Defendant’s errors in the labels used on the various submissions.

Dr. Throckmorton’s affidavit was accepted for the opinion that “some kind of change in sexual behavior, desire and/or identity over time is not theoretically

unfounded or empirically unprecedented by at least some people.” (App. 1880 & 1899, Ruling p. 9 and 28).

Dr. Quick’s declaration was not utilized to directly support Defendant’s Motion for Summary Judgment but to show that Plaintiffs’ Statement of Undisputed Facts is in fact disputed because the validity of the research relied upon by Plaintiffs’ experts is controverted, if not fatally flawed. There is a significant question of fact barring Plaintiffs’ Summary Judgment Motion.

The essence of Dr. Quick’s declaration is that there is a recognized error rate in references in medical literature and these errors get perpetuated when quoted in subsequent publications. (App. 1773-1780, et seq., Amended Decl. p. 2 and App. 1738-1771, Addend. to Amend. with depo. Ex. 12). As it relates to this case, there are substantial errors in research relied upon by Plaintiffs’ witness, Dr. Lamb, and the errors are such as to really question the validity of Dr. Lamb’s opinions which appear to have been accepted by the Court without reservation. In addition, the controverted affidavit of Dr. Lamb should have caused the Court to not limit Dr. Hawkins’ testimony simply because he does not read Dr. Lamb. (App.1872, 1885-86, Ruling p.14-15). All of these affidavits will be discussed in more detail in Issue IV of this Brief.

The issue is whether the legislature could have used any of the aforesaid reasons for enacting the law and whether there is a reasonable fit between the interest and the law. These reasons are not only rational but compelling when viewed against

human history and the vast authorities cited in the cases rejecting same sex marriage. These rational interests have been discussed at length in various published articles.¹

The Ruling relies on *Sioux City Police Officer's Association v City of Sioux City*, 495 N.W.2d 687 (Iowa 1993) (municipal employees unsuccessfully challenged an anti-nepotism ordinance which prohibited the employment of married persons within the same department) (App. 1914, Ruling p. 43) for finding same sex marriage to be a fundamental right and putting the burden of proof on the Defendant. The Ruling cites *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) for “determining whether the statute in question had a fair and substantial relationship to a laudable legislative purpose.” *Id.* at 697. Reliance on *Zablocki* is misplaced because the subject marriage was between a man and a woman.

Moreover, the link between marriage and procreation discussed in *Zablocki* is explicit. The Court cited to extensive precedent including *Skinner v. Oklahoma, ex rel Williamson*, 316 U.S. 535, 62 S.Ct. 1110 (1942) for the premise that **marriage is fundamental to the very existence to the survival of the race.** *Zablocki*, at 680.

The Iowa case law supports preserving traditional marriage and cannot be said to have ever recognized same sex marriage as a fundamental right. See *Rogers v.*

¹ See Wardle, “*Multiply & Replenish*”: *Considering Same-Sex Marriage in Light of State interests in Marital Procreation*, 24 Harv. J.L. & Pub.Policy 771, 781 (2001); Stewart, *Marriage Facts*, 31 Harv. J.L. & Pub.Policy 1 (2008); *Genderless Marriage, Institutional Realities and Judicial Elision*, Monte Neil Stewart, Duke Journal of Constitutional Law and Public Policy, Vol. 1, January 2006; and the *State Interest in Marriage*, William C. Duncan, Ave Maria Law Review, V.

Webb, 558 N.W.2d 155, 157 (Iowa 1997) (preservation of marital relationship is a fundamental policy of this state).

In *Laws v. Griep*, 332 N.W.2d 339, 340-41(Iowa 1983), the Court rejected an argument that because co-habitation without marriage is pervasive in modern society, unmarried co-habiting persons should be accorded consortium rights of married persons, stating:

The policy of this state is that the *de jure* family is the basic unit of social order. The spouse is reflected in the statutes of the right to marry...It is reflected in the rule recognizing common law marriages. It is demonstrated by statutes defining the fights and responsibilities of husbands and wives toward each other and toward their children.... The policy favoring marriage is not rooted only in community mores. It is also rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.

Id. at 341.

Recent due process cases cite *Washington v. Glucksburg* where the U.S.

Supreme Court said:

“Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those **fundamental rights and liberties which are, objectively, “deeply rooted in this Nation's history and tradition,”** *id.*, at 503, 97 S.Ct., at 1938 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) (“**so rooted in the traditions and conscience of our people as to be ranked as fundamental**”), and “**implicit in the concept of ordered liberty,**” such that “**neither liberty nor justice would exist if they were sacrificed,**” *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). **Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest.** *Flores, supra*, at 302, 113 S.Ct., at 1447; *Collins, supra*, at 125, 112 S.Ct., at 1068; *Cruzan, supra*, at 277-278, 110 S.Ct., at 2850-2851. **Our Nation's history, legal traditions, and practices thus provide the crucial “guideposts for responsible decision making,”...**”

521 U.S. 702, 721, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997)

In a sex offender residency case, the Iowa Supreme Court cited *Glucksberg* stating: ...“[W]e have traditionally followed the Court's guidance in determining which rights are deemed fundamental.” *State v. Seering*, 701 N.W.2d 655 (Iowa 2005). *See Cabbage*, at 447.

Despite the Plaintiffs' claims, it cannot be said that the ability to marry an individual of one's own sex is so plainly rooted in our nation's history as to constitute a fundamental right (a requisite to sustain Plaintiffs' due process claim). It cannot be said that without same sex marriage there would neither be civilization or progress and it certainly cannot be said to be fundamental to the survival of the race. Even according to Plaintiffs' experts, the idea of same sex marriage was not even in the consciousness of our people until the 1970-80's. (App. 1289, Def. Ex. K, Chauncey depo. 22 and App. 1319, Def. Ex. L, Cott depo. 69-70). Prohibitions against homosexual sodomy was only found to be unconstitutional in 2003. *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed 2d. 508 (2003).

The Iowa Supreme Court in a *de novo* review may find rational basis regardless of what the Trial Court did or did not do. Indeed, this Court could find reasons not heretofore articulated as discussed by the Ruling. (App. 1921, Ruling. p. 50) The Plaintiffs' witnesses have cited various authorities for the proposition that there are some 1000 benefits bestowed on married people. To the extent that these issues are financial, and many of them are, the legislature could rationally believe that it is the public's interest to not expend additional monies on relationships that do not naturally

procreate. (App. 460-468, Badgett Pls. Ex. 20, pp. 7-9) As noted by Plaintiffs' economist expert, Dr. Badgett, even if Iowa allows same sex couples to marry, they will not obtain the federal benefits under the Federal DOMA. (App. 466, *Id.* p.7). Nor would their marriage be recognized in the many states with DOMA or constitutional amendments, like neighboring Nebraska. Tax benefits granted married couples mean that the state collects less revenue from married couples than it does individuals. This, however, is a legislative decision. *Hernandez v. Robles*, 7 N.Y.3d 3338, 358, 821 N.Y.S.2d 770, 775-776, 855 N.E.2d 1, 6 (2006) (holding the question to be a legislative decision).

None of Plaintiffs' witnesses did the research pertaining to Iowa law referred to their affidavits with the exception of Mahleiro (App. 1402-04, Def. Ex. P compared to App. 492-95, Pl. Ex. 22) and Tharnish (App. 1465-66, Def. Ex.S compared to App. 485-488, Pl. Ex. 21). See Defendant's Summaries.

STRICT SCRUTINY: While Defendant should have no burden in this case, the State of Iowa does have a compelling governmental interest in maintaining the historical and traditional marriage norm (one between a man and a woman) for all the reasons supporting rational basis. The statute is narrowly drawn. It limits marriage only to people who can possibly naturally procreate. No same sex couples can further this interest (procreation and paternity) while every opposite sex couple does so either directly by having children or indirectly by minimizing the risk of children being born out of wedlock. See Defendant's Statement of Undisputed Facts and the discussion of Defendant's experts Young (App. 1179-1218, et seq., Def. Ex. H), Somerville (App.

871, Def. Ex. F) and Nathanson (App. 722, Def. Ex. C), Rhoads (App. 813, Def. Ex. E) and Hawkins (App. 694, Def. Ex. B). Preserving assets by not expanding benefits to people who cannot procreate can be a rational interest.

The Trial Court's discussion under due process on the law being over-inclusive/under-inclusive (App.1917, Ruling p. 46) is confusing, if even applicable. In any event, it raises the wrong questions because it proceeds from the wrong burden of proof allocation and ignores the presumption of constitutionality. The question is whether it is rational for the legislature to think that opposite sex marriage promotes the interest of procreation, not whether precluding gays and lesbians from marrying promotes heterosexual marriage. *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. App. 2005). It cannot be said that the legislature is acting arbitrarily or not acting rationally in thinking it promotes procreation by only allowing marriage between people who can procreate naturally.

II.

WHETHER THE COURT ERRED BY HOLDING IOWA CODE §595.2(1) UNCONSTITUTIONAL ON THE EQUAL PROTECTION CLAIM THAT SAME SEX MARRIAGE IS SEX BASED AND SUBJECT TO AN INTERMEDIATE SCRUTINY ANALYSIS

STANDARD OF REVIEW: See Issue I.

SUMMARY JUDGMENT STANDARDS: See Issue I.

The Trial Court erroneously held (App. 1918 & 1932, Ruling p. 47 & 61) that the statute is sex based and erred in not sustaining Defendant's Motion for Summary Judgment as a matter of law. The Court appears to have proceeded from the premise

that if Plaintiffs have been subjected to discrimination, they are a suspect class and Defendant has the burden of proof. (App. 1918-20, Ruling p. 47-49) Discrimination against a class in and of itself does not make the class suspect. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-14, 96 S.Ct. 2562 (1976); *Andersen v. King County*, 158 Wash.2d 1, 138 P. 3d 969, 981 (2006). Iowa's licensing scheme is not based upon sex or a suspect class triggering strict scrutiny analysis. It treats men and women alike. A man may marry a woman and a woman may marry a man. Neither gender is favored over the other.

EQUAL PROTECTION CLAIMS: Statutes enjoy a presumption of constitutionality. The first task in analyzing equal protection claims is to determine if a suspect class or fundamental right is involved. If not, rational basis is the test.

Under the rational basis standard, the classification of persons is constitutional if the classification is a reasonable one and operates equally upon all within the class. . . . In addition, **we will uphold a classification if we can reasonably conceive any state of facts to justify it.** . . . *Authorities cited* . . . Moreover, under the rational basis standard, a "statute enjoys a **presumption of constitutionality** which can only be overcome by proof that the law is patently arbitrary and bears no rational relationship to a legitimate governmental interest." *Miller v. Bd. of Med. Exam'rs*, 609 N.W.2d 478, 482 (Iowa 2000).

A classification is reasonable if it is "based upon some apparent difference in situation or circumstances of the subjects placed within one class or the other which establishes the necessity or propriety of distinction between them." A classification "does not deny equal protection simply because in practice it results in some inequality; practical problems of government permit rough accommodations...." *State v. Mann*, 602 N.W.2d 785, 792 (Iowa 1999) (citation omitted). When a statute involves classification of persons, the legislature has wide discretion in defining the limits of classes. *State v. Hall*, 227 N.W.2d 192, 194 (Iowa 1975).

Bowers v. Polk County Board of Supervisors, 638 N.W.2d 682, 689 (Iowa 2003)

No federal or state appellate court of final jurisdiction has found the denial of a same sex marriage license as a denial of equal protection of the law except Massachusetts (and Hawaii whose legislature obviated the need for a ruling on appeal by adopting a constitutional amendment).

Plaintiffs are not similarly situated to opposite sex couples. That is a matter of common knowledge. Plaintiffs, as couples, are not capable of procreating naturally and are not similarly situated to opposite sex couples who can naturally procreate.

Defendant has no burden to produce evidence to prove a rational basis.

... A legislature that creates these categories need not “actually articulate at any time the purpose or rationale supporting its classification.” ... *Authorities cited...* Instead, a classification “**must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.**” *Beach Communications, supra*, 508 U.S., at 315, 113 S.Ct. at 2101. (emphasis added).

A State, moreover, has no obligation to produce evidence to sustain the constitutionality of a statutory classification. “[A] legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.” *Authorities cited.*

Heller v. Doe by Doe, 509 U.S. 312,322, 113 S.Ct. 2637, 2643 (U.S. Ky. 1993); See also *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007).

Although this element of equal protection analysis does not require “proof” in the traditional sense, it does indicate that the court will undertake some examination of the credibility of the asserted factual basis for the challenged classification rather than simply accepting it at face value.

RACI v. Fitzgerald, 675 N.W.2d 1, 8 fn 4 (Iowa 2004)

In *Bowers, supra*, the court said: “**we will uphold a classification if we can reasonably conceive any state of facts to justify it.**” 638 N.W.2d at 689.

DISCUSSION OF SAME SEX MARRIAGE LITIGATION

The Ruling of the Iowa District Court cites only one of the same sex marriage decisions rejecting the claims, *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005), and then does so dismissively. (App.1925-26, Ruling 54-55) Generally, other jurisdictions which have reviewed the question uphold the traditional man/woman marriage mold. See *Andersen, Hernandez, Standhardt, Conaway, In re Marriage Cases, Bruning and Kandu, supra*.

At the present time, only one state, Massachusetts, allows same sex marriage. *Goodridge v. Massachusetts, supra*. Vermont and New Jersey court decisions lead to their state legislators allowing civil unions but, like Massachusetts, these decisions are distinguishable from the majority of cases and from the law of Iowa.

A decade of legislation, both federal and state, and over thirty years of litigation in multiple jurisdictions have re-confirmed that marriage is still seen as a state sanctioned civil contract between a man and a woman. *See generally*, Annotation, *Marriage Between Persons of the Same Sex - - United States and Canadian Cases*, 1 A.L.R. Fed.2d 1 (2006) and *Non-Recognition of Same Sex Marriages*, 38 Creighton Law Review 365, 374 (2005).

MINNESOTA: One of the first actions asserting the right to same sex marriage arose in Minnesota in 1971. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972) where the Court said: “The due process clause of the Fourteenth Amendment is not a charter for restructuring [the institution of marriage] by judicial legislation.” *Id.* at 186.

HAWAII: In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), a plurality of the Hawaii Supreme Court held that the state's constitution did not give rise to a fundamental right for persons of the same sex to marry. *Id.* at 57. Although yet to be imitated by any appellate tribunal, the court determined the statute created a sex-based classification thereby subject to strict scrutiny equal protection analysis. *Id.* at 60, 67. The court remanded the matter for consideration of compelling state interests. *Id.* at 67.

Following remand, but before a subsequent appeal was adjudicated, the citizens of Hawaii ratified a state constitutional amendment that authorized the state legislature to limit marriage to opposite sex couples.

DOMA: In 1996, the United States Congress enacted legislation that expressly confirmed that marriage is limited to opposite sex couples. *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (DOMA), 1 U.S.C.A. §7 and 28 U.S.C.A. §1738C. Forty-one states currently have statutory Defense of Marriage Acts. Three of those states have statutory language that pre-dates DOMA (enacted before 1996) defining marriage as between a man and a woman. Twenty-seven states have defined marriage in their constitutions. Six states have no provision prohibiting same sex marriage. *See Same Sex Marriage*, National Conference of State Legislatures (January 19, 2006 Last Update: June 2007) www.ncsl.org/programs/cyf/samesex.htm. (Iowa's "DOMA" was enacted in 1998, at Iowa Code §§ 595.2 and .20) *See also Creighton Law Review, supra.*

VERMONT: In *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864 (1999), the Vermont Supreme Court considered the rights of same sex couples, not from a classic due

process or equal protection perspective, but on the basis of the unique “Common Benefits Clause” of the Vermont Constitution. It has no presumption in favor of the constitutionality of a Vermont statute as there is in Iowa. *Seering*, at 661. To the contrary, *Baker* holds that there is a core presumption of inclusion of all members of the Vermont community in the provision of protections, benefits and security of a challenged law. 744 A.2d at 879. Employing this analysis, **Vermont declined to hold that “the denial of a marriage license operates per se to deny constitutionally-protected rights ...”** (*Id.* at 886) but deferred to the legislature which, rather than affording the right to marry, enacted a “civil union” statute. Vt. St. Ann. 15, §§1201-1207.

MASSACHUSETTS: The Massachusetts Supreme Court in *Goodridge, supra*, by a 4-3 majority, held that the state had not shown a rational basis for the law on either due process or equal protection claims. In doing so, however, the Court exclaimed its constitution and history to be different from the federal constitution. The Court did not view sexual orientation as a suspect class but relied on its unique constitutional language.² **However, the majority opinion recognized marriage had always been between a man and a woman as derived from English Common law.**

² *Goodridge* recites that the Massachusetts Constitution protects personal liberties more zealously than the Federal Constitution, p. 959. After reciting that the Plaintiffs’ challenge was based both on equal protection and due process grounds and reciting the usual precepts about what standard of review to apply, 960-961 the Court held, without a formal declaration as to which standard of analysis should be followed, that the law does not survive rational basis review and said that therefore it did not need to consider strict scrutiny p. 961.

NEW JERSEY: In *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196, 207 (2006) the New Jersey Supreme Court's ruling, mirroring Massachusetts, reversed the New Jersey Court of Appeals and found a denial of equal protection to deny same sex marriage. **In doing so, however, it held that same sex marriage is not so deeply rooted to be a fundamental right.**

The Court said while its constitution does not say anything about equal protection, previous New Jersey Supreme Court decisions had read such a right into its Article I §1.³ The Court found that the State (as opposed to the Plaintiff having the burden of proof) did not show a need for disparate treatment. **However, the state did not raise procreation as a rational basis and the Supreme Court did not rule on this reason for a rational basis.** The decision was then sent to the legislature with the directive to implement a statute that gave gays and lesbians the same rights of heterosexuals. The legislature enacted a law granting civil unions.

APPELLATE CASES NOT PERMITTING SAME SEX MARRIAGE

The highest state courts of Arizona, Washington, New York, Indiana and Maryland have all found procreation and traditional marriage concepts to be a rational basis for sustaining the constitutionality of statutes substantially similar to Iowa. None of them found a fundamental right to same sex marriage for due process purposes.

³ "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." While that clause is nearly the same as the Iowa Constitution, Iowa has both due process and equal protection clauses. The Iowa Art. 1 §1 clause is equated with the protections of due process and equal protection in the 14th Amendment to the Federal Constitution. Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 Drake Law Review 593, 635(1986)

Nor did any of them find suspect class for equal protection purposes. The Eighth Circuit did not find suspect classification and rejected any equal protection violation in the Nebraska constitutional amendment.

ARIZONA: In *Standhardt v. Superior Court*, 77 P.3d 451 (Arizona App. 2003), *rev. denied* (Ariz. 2004), a three-judge panel held that the plaintiffs did not have a fundamental due process right under either the federal or state constitutions to enter into a same sex marriage. *Id.* at 454-460, citing *Washington v. Glucksberg, supra*.

Standhardt expressly rejected Plaintiffs' contention that *Lawrence v. Texas, supra*, recognized entry into same sex marriages as a fundamental right (*Id.* at 456-57) and noted that *Lawrence* specifically holds that "...it does not involve whether the government must give formal recognition to any relationship that any homosexual person seeks to enter." *Lawrence*, 123 S.Ct. at 2484.

Standhardt also rejected that *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967) (the miscegenation case) supports a finding that same sex marriage is a fundamental right because it is "**...implicit in *Loving* and predecessor opinions is the notion that marriage, often linked to procreation, is a union forged between one man and one woman.** 388 U.S. at 12, 87 S.Ct. 1817... **that decision was anchored to the concept of marriage as a union involving persons of the opposite sex....**". (Emphasis added). *Standhardt*, at 458.

The Arizona Petitioners did not argue suspect class and *Standhardt* rejected the equal protection argument that same sex marriage is a fundamental right deeply rooted in the country's history. *Id.* at 464.

WASHINGTON: In *Andersen v. King County*, 158 Wash.2d 1, 138 P.3d 963 (2006), the Washington Supreme Court applied a rational basis test. In finding no fundamental right, the Court said:

... the legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children's biological parents. Allowing same-sex couples to marry does not, in the legislature's view, further these purposes....

Andersen, at 969.

MARYLAND: In *Conaway v. Deane, supra*, (Maryland 9/18/2007), the Plaintiffs raised equal protection, substantive due process, invasion of privacy, violation of the state's ERA, and autonomy and intimate association claims. The Trial Court relied only on the ERA claim in entering judgment. *Id.* at 583. The Maryland Court of Appeals (its highest court) reversed and said the purpose of the ERA was to remedy the long history of subordination of women to men and to place both on equal ground. (*Id.* at 591). Further, it said the statute did not separate men and women into discreet classes for the purpose for granting benefits to one class at the expense of the other. *Id.* at 597-8.

Maryland (unlike the Iowa District Court) found persuasive the case law from other jurisdictions (*Id.* at 598-9) and held the trial court's reliance on *Loving v. Virginia* was misplaced. *Id.* at 600-602. **The court said the plaintiffs were not being denied entry into a marital relationship because of their sex but because of**

the recognized definition of the relationship as one that may be entered into only by two persons who are members of the opposite sex. *Id.* at 602.

The court rejected that sexual orientation is a suspect or quasi-suspect class, noting that *Lawrence* did not declare gays, lesbians and bisexual persons to be sexual based classifications (*Id.* at 608, fn 47) and rejected the claim that the Petitioners were politically powerless as to be entitled to extraordinary protection from the “majoritarian political process”. *Id.* at 611.

Conaway also rejected the claim that the right to marry encompasses the “right to marry a person of one’s choosing”. *Id.* at 619 The Maryland Plaintiffs did not raise the question of immutability of sexual orientation (nor was it raised in Iowa) and the Court declined to address further the suspect class question. *Id.* at 619, 624. “Immutability” defines a human characteristic determined solely by accident of birth. *Id.* at 614.

The *Conaway* defendants offered **two primary governmental interests at stake: . . (1) maintaining and promoting its police powers over the traditional institution of marriage and its binary, opposite sex nature and (2) . . . in encouraging marriage between two members of the opposite sex, a union that is uniquely capable of producing offspring within the marital unit. *Conaway*, at 630.**

The court held that the state's asserted interest in fostering procreation is one of the most important of the fundamental rights (*Id.* at 630) and rejected the over-inclusive and under-inclusive argument. (App. 1927, Ruling p. 56) *Id.* at 631-33.⁴

Conaway holds the fundamental right to marriage and its ensuing benefits are conferred on opposite sex couples, not because of a distinction between whether various opposite sex couples actually procreate, but because the possibility of procreation exists and said that as long as the legislature has not acted wholly unreasonably in granting recognition it could not substitute its judgment for that of the legislative bodies. *Id.*

OREGON: The Oregon Supreme Court reversed a trial court finding of unconstitutional denial of a marriage license by finding that a constitutional amendment by a voter's referendum (while an appeal was pending) barred marriage to anyone other than a man and a woman. In *Li v. State and Multnomah County*, 338 Or. 376, 110 P.3d 91 (2005), the court said that in reviewing voter initiated measures, it only seeks to discern the intent of the voters, and it found no ambiguity in the measure which was to limit marriage to a man and a woman. *Li* held that ... **"The marriage relation, affecting the whole public, and being an institution of society, affecting more deeply than any other the foundations of social order and public morals, has always been under the control of the legislature."** *Id.* at 391.

⁴ Because the court found the state's interest in fostering procreation sufficient to sustain the law it did not address the other justification about maintaining the police power over the traditional social institution of marriage. *Id.* at 634. The Maryland court discussed at length statistics about the gradual erosion of the traditional nuclear family. *Id.* at 632-633. The court said that any inquiry into the ability or willingness of a couple actually to bear a child during marriage would violate the fundamental right to marital privacy recognized in *Griswold*, 381 U.S. at 484-486, 493, 85 S.Ct. at 1681.

NEW YORK : On July 6, 2006, in *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1 (2006), the New York Court of Appeals resolved four different appeals consolidated before it by holding that the same sex Plaintiffs were not denied equal protection nor due process under the state constitution. Like Polk County, Iowa, New York trial courts found the law to be unconstitutional. The Court said:

First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships....There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule-some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes-but the Legislature could find that the general rule will usually hold.⁵

Hernandez, 855 N.E.2d 1, 7.

New York rejected the claims that the law is sex based for purpose of equal protection analysis, stating “**Women and men are treated alike-they are permitted to marry people of the opposite sex, but not people of their own sex.**” *Hernandez*.

⁵ Plaintiffs, and *amici* supporting them, argue that the proposition asserted is simply untrue: that a home with two parents of different sexes has no advantage, from the point of view of raising children, over a home with two parents of the same sex. Perhaps they are right, but the legislature could rationally think otherwise.

To support their argument, plaintiffs and *amici* supporting them refer to social science literature reporting studies of same sex parents and their children. Some opponents of same sex marriage criticize these studies, but we need not consider the criticism, for the studies on their face do not establish beyond doubt that children fare equally well in same sex and opposite sex households. What they show, at most, is that rather limited observation has detected no marked differences. More definitive results could hardly be expected, for until recently few children have been raised in same sex households, and there has not been enough time to study the long-term results of such child-rearing.

v. Robles, at 10-11. *Hernandez* also rejected the arguments about the law being over-inclusive and under-inclusive. *Id.* at 11-12.

NEBRASKA: In *Nebraska Citizens for Equal Protection, Inc. v. Bruning*, 368 F.Supp.2d 980 (D.Neb. 2005), the Federal District Court found First Amendment and equal protection violations in Nebraska's constitutional amendment that inserted a ban against the legislature permitting same sex marriage. The District Court relied on *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620 (1996) (Colorado constitutional amendment infringed on the fundamental right of gays and lesbians to participate in the political process). *Bruning* was reversed however in 455 F.3d 859 (8th Cir. 2006) where the 8th Circuit said:

If sexual orientation, like race, were a “suspect classification” for purposes of the Equal Protection Clause, then Appellees' focus on the political burden erected by a constitutional amendment would find support in cases like *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). But the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes. . . .

Bruning, 455 F.3d at 866.

Bruning addresses all of the arguments raised by Plaintiffs and is consistent with *Andersen, Standhardt, Sadler, Hernandez and Conaway, supra*.

INDIANA: In Indiana, the same sex challenge was based, *inter alia*, on alleged violations of the Equal Privileges and Immunities Clause of Article 1 §23 of the Indiana Constitution. Although the Indiana constitutional review may be more restrictive than other states, *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005), the

opinion placed the burden on the challengers and sustained the law on the rational basis of promoting responsible procreation.⁶

CALIFORNIA: In California, the Court of Appeals resolved six consolidated appeals from different trial courts, *In re Marriage Cases*, 49 Cal.Rptr.3d 675 (Cal.App. 1 Dist. 2006), where it essentially followed the rationale from the majority of the cases discussed here, i.e. there is rational basis in maintaining the traditional marriage and procreation. The majority decision discussed California's long standing efforts to curb discrimination against gays and lesbians but distinguished the concept of fundamental rights being based upon historical notions from the relationships of same sex persons. The majority opinion left the issue to the people's referendum and the legislature. The case is pending review in the California Supreme Court. 53 Cal.Rpt. 3d 317 (12-20-06).

RE-DEFINING MARRIAGE: The Iowa District Court, erroneously relying on *Loving v. Virginia, supra*, and *Sioux City Police Officers v. City of Sioux City, supra*, has redefined marriage in Iowa and created a new fundamental right contrary to *Glucksberg, supra*. See also *Cubbage*, at 447. (App. 1915-16, Ruling pp. 44-45) As *Loving* was decided on race discrimination only, and *Sioux City* involved heterosexual

⁶ The State of Indiana has a legitimate interest in encouraging opposite sex couples to enter and remain in, as far as possible, the relatively stable institution of marriage for the sake of children who are frequently the natural result of sexual relations between a man and a woman. ... Extending the benefits of civil marriage to same sex couples would not further the State's interest in "responsible procreation" by opposite sex couples. The differentiation between opposite sex and same sex couples in Indiana marriage law is based on inherent differences reasonably and rationally distinguishing the two classes: the ability to procreate "naturally." *Morrison v. Sadler*, 821 N.E.2d 15, 30-31 (Ind. 2005)

marriage, these cases do not form the basis to usurp the legislature's authority to define marriage.

The District Court found the Iowa law to be sex based for Equal Protection purposes (App. 1918, Ruling p. 47) and held the law to an intermediate level of scrutiny standard without discussing any of the relevant case law from states where they refused to find the law was sex based. The Trial Court's reliance on *MRM, Inc. v. Davenport*, 290 N.W.2d.338, 340-41 (Iowa 1980) is totally misplaced as that case involved unrelated subject matter and was not even resolved on equal protection (which was held to have been inadequately raised on appeal.)

POLITICAL POWER AND DISCRIMINATION: The Ruling errs in finding the Plaintiffs are politically powerless and the absence of law remedying discrimination on sexual orientation. (App. 1913-14, Ruling p. 42, ¶117-120) The Ruling ignored the 2007 Iowa legislation which amended Chapter 216, Iowa Code, by extending civil rights protection to include sexual orientation, which includes homosexuality and bisexuality. 82nd G.A. Senate File 427 (2007) (App. 1871, Order denying Motion to Amend for Mootness, 8-30-07). The findings about political power and discrimination (App. 1913, Ruling p. 42) are completely inconsistent with the history of the Iowa Supreme Court which has not denied gays and lesbians meaningful relationships with their children following divorce, from allowing gay/lesbians to be foster parents, to adopt or otherwise be included in the lives of their children from heterosexual

relationships. (App. 1928, Ruling p. 57).⁷ The Ruling acknowledges this precedent but comes to the wrong conclusion. *See also Schott v. Schott*, 2008 W.L. 162242 (Iowa Sup. Ct. 1/18/08)(second parent adoption).

III.

THE COURT ERRED IN HOLDING IOWA CODE §595. 2(1) UNCONSTITUTUIONAL UNDER BOTH DUE PROCESS AND EQUAL PROTECTION CLAIMS WHEN APPLYING THE RATIONAL BASIS ANALYSIS

STANDARD OF REVIEW: See Issue I.

The Trial Court conceded that if a statute does not make a suspect classification or involve a fundamental right, (App. 1921, Ruling p. 50) the statute must be analyzed by the rational basis test, i.e. the state does not need to produce reasons for enacting or justifying the legislation nor does the state need to produce legislative history to justify a law. *State v. Seering*, 701 N.W.2d 655(Iowa 2005), *RACI v. Fitzgerald*, 675 N.W2d 1, 8-9 (Iowa 2004), *Glowacki v. State Board of Medical Examiners*, 501 N.W.2d 539, 541 (Iowa 1993).

OVER-INCLUSIVE/UNDER-INCLUSIVE: However, the Ruling holds that the law is not related rationally to the governmental objective of fostering optimal relationships for procreation because it is at once over-inclusive and under-inclusive.

⁷ As stated by the District Court Ruling, p. 57: See, *Marriage of Kraft*, 2000 WL1289135 (Iowa Ct. App. 2000)(Streit, J)(refusing to limit gay ex-husband's visitation and refusing to require dissolution decree to spell out details of how and when ex-husband could speak to children about his sexual orientation.; *In re Marriage of Cupples*, 531 N.W.2d 656 (Iowa Ct. App. 1995)(treating parent's sexual orientation as a "nonissue"); *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990)(restriction on visitation with gay father "times when 'no unrelated adult' is present" is inappropriate in light of statutory goal of keeping children in close contact with both parents); *Hodson v. Moore*, 464 N.W.2d 699 (Iowa Ct. App. 1993); *In re Marriage of Wiarda*, 505 N.W.2d 506, 508 (Iowa Ct. App. 1993); See also *Hartman by Hartman v. Stassis*, 504 N.W. 2d 129, 133-34 (Iowa Ct. App. 1993) (rejecting, in a paternity and child support action, relevance of allegations that mother fraudulently entered sexual relationship with putative father for the purpose of raising child in a lesbian relationship).

(App. 1927, Ruling p. 56)(over-inclusive because children may be brought into same sex relationships through alternative methods of conception; under-inclusive because not all opposite sex couples choose to bear children or are able to do so because of infertility or otherwise). (App. 1927, Ruling p. 56)

Defendant disputes the Trial Court's approach to applying the over-inclusive and under-inclusive dichotomy. (App. 1929-30, Ruling p. 58-9) The Court cited *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980) which involved the Iowa Guest Statute. (App. 1924-25, Ruling p. 53-4). The *Bierkamp* court noted that over-inclusive and under-inclusive dichotomy is normally reserved for strict scrutiny analysis but found it applicable because of the extremity involved.

Bierkamp is instructive in the present case as it followed the analysis from other jurisdictions in striking down the statute. The Ruling, however, not recognizing and rejecting the cases from New York and Washington, did not dismiss their treatment of the over-inclusive/under-inclusive argument.

The Maryland Court has expressly rejected this argument. Requiring a pre-marital fertility test of opposite sex couples in Iowa would violate privacy rights. *Conaway v. Deane*, at 633.

Courts are compelled under a rational basis to accept a legislature's generalizations, even when there is an imperfect fit between means and ends. *Heller v. Doe*, 509 U.S. at 321, 113 S.Ct. at 2643, *Conaway*, at 633-4. Procreation, traditional marriage and children being raised by their biological parents are not only rational reasons, they are obvious. As said in *Hernandez*, "intuition and experience suggests

that a child benefits from having before his or her eyes, every day, living models of what both a man and woman are like”. *Id.* at 7.

Although the Ruling acknowledges *RACI v. Fitzgerald, supra*, for burden of proof purposes, (App. 1921 & 1926, Ruling pp. 50 and 55) the Ruling is contrary to *RACI* as it does not recognize the difference between legislative and adjudicative facts. (App.1926, Ruling p. 56).

However, the *RACI* court was reviewing legislative facts and giving them its own assessment of credibility.

Our court does not accept the economic development of river communities and the promotion of riverboat history as a rational basis for the legislature's distinction between excursion boats and racetracks. Although these are laudable legislative goals, **“the legislative facts on which the classification is apparently based [cannot] rationally [be] considered to be true by the governmental decision maker,”** as required by the Court's articulation of the rational basis test. . . . We note initially that excursion boat gambling was never anticipated as solely a “river” activity so as to promote “river communities”. . . . (emphasis added)

RACI v. Fitzgerald, at 9-10. See also *McMurray v. City Council of West Des Moines*, 642 N.W.2d 273 (Iowa 2002).

The Court did not say economic development could not be a natural goal—it simply said the legislative history proved otherwise. Even though the Trial Court acknowledged that the Defendant does not have the burden of proof, it is obvious that the Trial Court imposed it on the Defendant. App. 1925-26, Ruling pp. 55-56).

Defendant has no burden to produce evidence to sustain the constitutionality of a statutory classification. The authorities only require a reasonable, conceivable statement of facts. Legislative decisions are not subject to court room fact finding.

Heller v. Doe, supra. As stated in *Heller*, equal protection does not require proof in the traditional sense. See also *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007).

In *RACI*, the Iowa Court observed the rational basis standard is so highly deferential that the Court usually utilizes federal constitutional review standards and held, “We will uphold a classification if we can reasonably conceive any state of facts to justify it.” 675 N.W.2d at 8 fn 4, 9-10.

That kind of fact finding activity is a far cry from what is presented in this case under §595.2, Code of Iowa. Traditional marriage existed before the Iowa General Assembly first regulated it. Under the weight of authority, no scrutiny above rational basis should be employed. See *Standhardt, Andersen, Hernandez and Conaway, supra.* That Iowa may view procreation as a vital element of marriage is also evidenced by §598.29, Iowa Code, which permits a marriage to be annulled if a party was impotent at the time of marriage. Iowa law does regulate marriage between competent parties in other respects such as polygamy, consanguinity and bigamy. These sections pre-existed the 1998 Amendment. §595.19, Iowa Code.

The Trial Court’s reading of *Lawrence v. Texas* (the dissent) ignores the entire body of law defining the burden of proof and the entire paradigm of judicial restraint. This Court should exercise its *de novo* review and uphold the statute on a rational basis by placing the burden on the Plaintiffs to overcome the question of constitutionality beyond a reasonable doubt. *In re Detention of Cubbage, supra*, (due process); and *Bowers, supra*, (equal protection).

In *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470 (Iowa 1983), the Court refused to extend the protections of the Iowa Civil Rights Act to transvestites. The court noted that it is for the legislature to determine what is a protected class and not the court by "judicial fiat."

The United States Supreme Court has held:

Moreover, because **we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.** . . . *Authorities cited* . . . Thus, the absence of "'legislative facts' " explaining the distinction "[o]n the record," . . . *Authorities cited* . . . has no significance in rational-basis analysis. . . . *Authorities cited* . . . (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decision maker actually articulate at any time the purpose or rationale supporting its classification"). . . . *Authorities cited* . . . **In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.** . . . *Authorities cited*. . . .⁸

F.C.C. v. Beach Communications, 508 U.S. 307, 113 S.Ct. 2096 (1993).

Defendant is not required to produce "objective evidence" or data to withstand a constitutional challenge. *Norland v. Grinnell Mut. Reinsurance Co.*, 578 N.W.2d 239, 242 (Iowa 1998), *McMahon v. Iowa Dept. of Transp.*, 522 N.W.2d 51, 57 (Iowa 1994). Plaintiff has the burden to show that there is no conceivable state of facts that could justify the statute. *West Des Moines State Bank v. Mills*, 482 N.W.2d 432, 436 (Iowa 1992).

⁸ This standard of review is a paradigm of judicial restraint. In refusing to find unconstitutional a mandatory retirement age law for foreign service personnel, the U.S. Supreme Court said (in referring to it rational basis review): "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 942-943, 59 L.Ed.2d 171 (1979) (footnote omitted).

The wealth of judicial authority articulating the importance of procreation in marriage was ignored by the District Court.

Long ago, in *Maynard v. Hill*, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888), the Court characterized marriage as “the most important relation in life,” *id.*, at 205, 8 S.Ct., at 726, and as **“the foundation of the family and of society, without which there would be neither civilization nor progress,”** *id.*, at 211, 8 S.Ct., at 729. In *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Court recognized that the right “to marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause, *id.*, at 399, 43 S.Ct., at 626, and in *Skinner v. Oklahoma ex rel. Williamson*, *supra*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), **marriage was described as “fundamental to the very existence and survival of the race,** 316 U.S. at 541, 62 S.Ct. at 1113.

Zablocki, 434 U.S. at 680.

The District Court’s Ruling pp. 43-47 (App. 1914-18) indicates a reliance on case law to utilize principles from cases that never pertained to same sex relationships. *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976)(opposite sex fellatio); *Loving v. Virginia*, *supra*, (race). *Callender v. Skiles*, 591 N.W.2d 182, 192 (Iowa 1999) (right of a putative father to procedural protection establishing his paternity) actually supports the link between procreation and marriage. *Lawrence*, while it concerned homosexuals, is about a right to be free from governmental intrusion, not about recognizing or regulating a relationship.

The Court had no reliable evidence for the assertions contained in paragraph 30 of the Ruling about the amendment to Chapter 595 was response to the Hawaii court case and being done to ensure that gays and lesbians are treated unequally to everyone else in Iowa with respect to their relationships. (App.1892, Ruling p. 21). The remarks

could only be said to be based on newspaper accounts submitted by Plaintiffs. (App. 49, Pls. MSJ) The Defendant objected on hearsay. Iowa R. Evid. 5.802 and 5.803 (App.648-654, Def. Resist. to. Pls. Mat. Facts) The Court struck the affidavit of John Schmacker (App. 402-09, Pls. Ex. 17). If not admissible at trial, the evidence is not admissible on summary judgment. *Id.*, Iowa R. App. P. 14(f) (13), *Des Moines Indep. Comm. School v. Des Moines Reg. & Trib Co.*, 487 N.W.2d 666 (Iowa 1992). *See McCarney v. Des Moines Register*, 239 N.W.2d 152 (Iowa 1976).

Even if the legislature was prompted to amend the chapter in 1998 by the Hawaii case recognizing same sex marriage, it cannot be said that the threshold requirement of one male and one female changed from 1846 to present. Nor can it be said beyond a reasonable doubt that there is no rational basis for the law.

It is apparent that the Ruling required Defendant to produce “objective evidence” or data to withstand the equal protection challenge. That is not required and constitutes error. *Norland, supra*, at 242. Experts are not required to testify to an absolute certainty. The Court improperly made creditability determinations for admissibility. *Williams v. Hedican*, 561 N.W.2d 817, 823 (Iowa 1997).

To say that Iowa has no real concern with procreation is wrong. Iowa has a declining birth rate that is evidenced by Defendant’s Exhibit I (App. 1248-50), a report of births and out of wedlock births from the State of Iowa Department of Public Health. The Iowa population has grown by about 300,000 since 1951, but the birth rate has dropped by 42% from 66,123 to 38,368. At the same time, out of wedlock

births have grown from 1,062 to 11,895, or about 1/3 of all live births. (App. 1248-50, Def. Ex. I, Vital Statistics Rec).

The Iowa law does not interfere with the Plaintiffs' ability or rights to parent their children. No one is attempting to interfere with the relationship between the Plaintiffs and their children. Nothing in the statute prohibits the Plaintiffs from marrying a person of the opposite sex. No fundamental right of parenting is involved. No constitutional violation has been shown beyond a reasonable doubt.

IV.

THE COURT ERRED IN REFUSING TO ADMIT DEFENDANT'S EXPERT WITNESSES AND ENTERING SUMMARY JUDGMENT FOR PLAINTIFFS

STANDARD OF REVIEW: While evidentiary rulings are generally reversed only for abuse of discretion, the rejection of expert witness' affidavits when constitutional issues are involved should be reviewed *de novo*. *In re Detention of Hodges*, 689 N.W.2d 467 (Iowa 2004), *Norland v. Grinnell Mut. Reinsurance Co.*, 578 N.W.2d 239 (Iowa 1998), *Lumbermens Mut. Cas. Co. v. Dept. of Revenue and Fin.*, 564 N.W. 2d 430 (Iowa 1997).

PRESERVATION: Defendant's Resistance to Summary Judgment, Response to Undisputed Facts, Reply Brief and Ruling. Defendant originally offered no experts in support of its Motion as it views (then and now) this case to involve a question of law. The Court denied Defendant's Motion to Stay Discovery (App. 42) and the parties then stipulated to a briefing and discovery schedule. (App. 44, Rev. Sch.Order).

Plaintiffs filed expert witness affidavits. (App. 70-530, Pls. State. of Mat. Facts)

Defendant filed a Resistance and affidavits. (App. 648-1472)

The Ruling refused to consider five of Defendant's witnesses (Carlson, Somerville, Young, Nathanson and Rhoads) who were offered on the question of rational basis, accepted without comment the evidence of Dr. Throckmorton, discounted the testimony of Dr. Hawkins and made no comment about Dr. Quick. The Court (App. 1876-80, Ruling p. 5-9) cited generally to *Leaf v. Goodyear*, 590 N.W.2d 525 (Iowa 1999) (and referred to *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993) and *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999)). Iowa Rule of Evidence 5.702 has codified Iowa's liberal approach to the admissibility of expert testimony. *Williams v. Hedican*, 561 N.W.2d 817, 822-3 (Iowa 1997). Neither *Daubert* nor *Kumho* have been adopted by Iowa and the liberal rule remains intact. *State v. Stohr*, 730 N.W.2d 674, 676 (Iowa 2007).

The Trial Court erroneously viewed the Defendant's experts as if they were testifying regarding complicated scientific concepts. The Defendant's witnesses have the type of specialized knowledge anticipated by the Rule and are qualified to provide opinion on the questions in this case. Experts can be qualified by knowledge, skill, experience, training or education and they can testify in the form of an opinion or otherwise. Iowa R. Evid. 5.702, *Williams*, at 822-24.

Defendant views the issue addressed to the above witnesses to be the existence of reasons to treat opposite sex people differently than same sex people, i.e. a rational basis for the law. Defendant's witnesses have offered many admissible and well

reasoned opinions about the institution of marriage (reasons why the legislature may not want to recognize same sex marriage). These are set forth in the witnesses' affidavits, Def's Ex. A through H. (App. 659-1247) In particular, Dr. Katherine Young stated: (App. 1179-88, Def. Ex. H pp. 1-2)

[M]arriage has not one but five universal functions (1) complimenting nature with culture; (2) providing children with at least one parent of each sex whenever possible; (3) providing them with their biological parents whenever possible; (4) bringing men and women together for both practical and symbolic purposes; and (5) providing men with a stake in family and society.

Dr. Katherine Young's qualifications are set forth in her affidavit and curriculum vitae. (App. 1181-86, 1219-47, Def.Ex. H) Dr. Young states that comparative religion is empirical and as a secular social science approach to religion, it is not a theological or faith based one. (App. 1186-87, Def. Ex. H pp. 8-9; App. 1738, 2nd Supp. to Reply Brief and Resist. to MSJ).

Dr. Young says that longitudinal studies are needed that compare same sex parenting and opposite sex parenting to really know how same sex marriage would affect children and in the absence of such studies to redefine marriage now is a massive experiment. (App. 1213, Def. Ex. H pp. 35) Dr. Young's conclusions are set forth at pages 35 through 40 of her affidavit. (App. 1213-1218)

Some of Dr. Young's work has been done with **Dr. Paul Nathanson** who also holds a doctorate in Comparative Religion. His separate work is found in his affidavit. (App. 722-23, Def. Ex. C) Dr. Nathanson's specialty is more in western civilization, and he has dealt more with men than with women. He is gay and does not support gay marriage although he would support civil unions without parenting. Dr. Nathanson's

article is very relevant to the subject of rational basis. His opinions are not faith based either. (App. 722, Def. Ex. C) Defendant has submitted the whole of “Gay Marriage in Canada: the Future of an Experiment” as part of Dr. Nathanson’s affidavit, which addresses the benefits to children in having two opposite sex parents. His affidavit disputes the factual statement upon which Plaintiffs rely that there are societies in history for which gay marriage is the norm. There is not one single precedent in which gay marriage has been the norm. (App. 735, Def. Ex. C p. 14)

Dr. Nathanson and Dr. Young state:

There is something wrong, though, with the idea that any society can endure without public support for heterosexual bonding. Every society has maintained the cultural mechanisms that provide it. These have always been associated with public legitimacy ... public recognition ... and thus public accountability. It has always been fostered by inducements, whether social ..., economic..., religious..., or a combination of them. So deeply embedded in consciousness are these that few people are consciously aware of them.

The Future of an Experiment, p. 47 Katherine K. Young and Paul Nathanson, published by McGill-Queen’s University press. 2004 in a book called *Divorcing Marriage*, edited by Daniel Cere and Douglas Farrow. App. 754.

Defendant’s witnesses offer from a historical and social science perspective that: Plaintiffs are not similarly situated to opposite sex couples and their “marriages” would be a harm to both the institution of marriage as we know it and to children who may be raised in those relationships; there is no historical right involved; and the adult Plaintiffs seek benefits to themselves that may very well harm the minor children not to mention yet unborn children.

These reasons advanced by Defendant's witnesses very credibly dispute the conclusions offered by Plaintiffs' witnesses, creating at least a dispute of facts barring Plaintiffs' Motion for Summary Judgment.

The reasons offered by every witness has a well reasoned scientific or historical explanation and is buttressed by ethics based on reasoning and logic, not religious. Plaintiffs' position is novel, inherently risky and not well founded in history. The claims are not well suited to resolution in a court of law, particularly if fact finding is necessary and should be deferred to the legislature. *Heller v. Doe*, at 322.

Margaret Somerville, LLB, a licensed pharmacist and lawyer with a doctorate from the Postgraduate Institute of Comparative Law, McGill University, Montreal, Canada, has offered an affidavit. (App. 871, Def. Ex. F) She founded the Center for Ethics in Law and Medicine at McGill University in Montreal and teaches there. She has published extensively on new technologies and the ethical impact they have on culture, law and medicine. In Defendant's Statement of Material Facts in Dispute the following statements are attributed to Somerville: Redefining marriage to include same sex couples would undermine the roles of the institution of marriage. It would undermine marriage's ability and society's capacity to protect the inherently procreative relationship and the children who result from it. Redefining marriage would have an impact on the affiliative rights of children to the relationships with their biological parents. (App. 656, Defendant's State. of Mat. Facts in Dispute, ¶8-9) The foregoing is an abstract from what appears in her affidavit, particularly her

incorporation of “The Case Against Same-Sex Marriage” presented to the Canadian Parliament. (App. 872, 1014-24, Def. Ex. F, p.2, Ex.2, pp. 143-153).

Given the issue of rational basis, (legislative facts) the Trial Court erred in refusing her testimony. This Court should accept the same on its *de novo* review of the entire circumstances of this constitutional challenges.

Alan J. Hawkins, Ph.D., is a faculty member at BYU, Provo, Utah, Dr. Hawkins was a visiting scholar with the Administration for Children and Families at the United States Department of Health and Human Services in 2003 – 2004. (App. 694, Def. Ex. B) His qualifications include extensive research in published articles on marriage and divorce. He has produced 500 “pages” of summaries of topics related to marriage and divorce from empirical studies and scientific materials. Although the District Court “admitted” the testimony of Dr. Hawkins, it did not accept the conclusion which Hawkins’ testimony would have provided. (App. 1887, Ruling p.16). Dr. Hawkins opined:

A social scientist can state with considerable confidence that heterosexual marriage is the family structure and married mother/father child-rearing is the child-rearing mode optimal for child, adult, and social well-being. Scholars understand that there are highly functioning families across a range of different family structures. But, on average, other adequately studied family forms do not yield the same level of positive outcomes.

(App. 701, Def. Ex. B p. 8 #4d)

Give his experience and knowledge and the entirety of his affidavit, the reason for limiting Dr. Hawkins testimony (App. 1885-26, Ruling p.14-15) is an abuse of discretion (if that were the standard).

Steven Rhoads, Ph.D., has had his Ph.D. in government since 1972 from Cornell and a Masters in Economics, and he has been a full-time professor since 1986 at the Woodrow Wilson Department of Government and Foreign Affairs, University of Virginia. He has published extensively in economics, comparable pay and public policy, including a book *Taking Sex Differences Seriously*, published by Encounter Books (2004). He teaches sex, gender and public policy and other subjects. (App. 814-15, Def. Ex. E). He is qualified under Iowa R.of Evid. 5.702 by education, training, experience and knowledge to express the opinions contained in his affidavit. (App. 815, Def. Ex. E)

Dr. Rhoads' affidavit testimony states: ... the optimum environment for child development (physically, psychologically, and socially) is in a family headed by the child's married biological mother and father.... (App. 814-15, Def. Ex.E p. 2, ¶ 9) What Dr. Rhoads offers is an opinion that given the optimal outcomes of the traditional family, and public policy should not encourage a family unit that cannot replicate that structure. (App. 815, *Id.* p. 3 ¶11).

Warren Throckmorton, Ph.D., Clinical Psychologist, a faculty member of Grove City College, Grove City, PA., who works with gender identity problems. Dr. Throckmorton would testify that homosexuality is not as clear cut as race or gender, that some kind of change in sexual behavior, desire and/or identity over time is not theoretically unfounded or empirically unprecedented. Further, he states that as a characteristic, homosexuality is difficult to define and the studies are not a good quality of science. He states: "Sexual orientation as a construct lacks conceptual

clarity and precision of definition.” (App. 1125, Def. Ex. G p. 2) The Court admitted this affidavit. (App. 1880, Ruling p. 9)

Alan Carlson, Ph.D. is the President of the Howard Center for Family, Religion and Society, International Secretary, World Congress of Families, Rockford, Illinois. He is a historian in Modern Europe. Dr. Carlson would testify to the following (as evidence of a rational basis): Traditional marriages

- (a) encourage the responsible procreation and optimal rearing of children;
- (b) create the vital connection of the sexual and the economic as the basis of the private home;
- (c) bind the marital couple to five concentric rings of community—unborn children, kin, neighborhood, faith communities, and the nation;
- (d) build a zone of liberty and autonomy which makes a free and ordered society possible; and
- (e) shape the unique character of the American nation-state.

(App. 661, Def. Ex. A p. 2.) The Ruling rejected this testimony. (App. 1879, Ruling p. 8) Dr. Carlson’s testimony is relevant, as he is qualified and his testimony should be accepted. Again, admissibility and weight are two different things. The Court weighed the witnesses’ testimony, particularly Dr. Carlson. (App. 1878-79, Ruling p.7-8) That is wrong as a matter of law and abuse of discretion. *Williams*, at 823.

Sharon Quick, M.D. is both a Board certified Pediatrician and Pediatric Anesthesiologist in Washington state who is retired from clinical practice. She has tendered extensive affidavit testimony to oppose Plaintiffs’ Motion for Summary Judgment. The Ruling (App. 1880) admitted her affidavit, but made no mention of the content. A Motion to Amend the affidavit was denied for mootness on August 30,

2007. (App. 1871). No explanation was provided. In this *de novo* review, the Court should accept both the original declaration along with the supplements.

The essence of Dr. Quick's declaration is that there is a recognized error rate in references in medical literature. (App.1805, Am. Decl.p. 2). Quotation accuracy is said to be how correctly an article cites its footnoted sources without necessarily analyzing the strength of the supporting evidence in the original source. The reviews and surveys of reference accuracy in bio-medical literature indicate quotation error rates from zero to 44% with a median rate of 20%. *Id.* A Technical Report (TR) published in 2002 in Pediatrics has been used as evidence for a policy statement supporting the practice of same sex, co-adoptions and to influence policies of other medical organizations, decisions and legislative and judicial proceedings. It was used as a citation and in testimony to the Joint Committee on the Judiciary in Massachusetts in the debate over same sex marriage and even in the Petitioners' brief in *Lawrence v. Texas* and various amicus briefs filed in other courts. Dr. Quick reported that the TR has 67% error rate which has been perpetuated in a special article (SA) published in the July 2006 issue of Pediatrics. (App. 1806, *Id.* p.3). She opines that the SA holds that research shows no significant differences between children of homosexual and heterosexual persons. Dr. Quick concludes that the proposition is scientifically invalid to the extent that it relies on the technical report.

Dr. Quick's direct observations on Dr. Lamb's affidavit certainly demonstrates that Dr. Lamb's reliance on some research is misplaced. (App. 1773-80, Def. Am. Decl., depo. Ex. 12) If any of these issues were being subjected to the typical

courtroom fact finding methodologies, there would be a dispute of fact on Dr. Lamb's testimony that there is no difference in the outcome of children raised in non traditional families.

Conclusion

It is apropos to note the following from the New York court:

It is true that there has been serious injustice in the treatment of homosexuals also, a wrong that has been widely recognized only in the relatively recent past, and one our Legislature tried to address when it enacted the Sexual Orientation Non-Discrimination Act four years ago (L 2002, ch 2). But the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

Hernandez v. Robles, 7 N.Y.3d 338, 361, 821 N.Y.S.2d 770 (New York 2006).

Recent and reliable precedent makes it clear that the states have the right to regulate who may enter the marital relationship and because the Plaintiffs' claims do not concern fundamental rights or suspect classifications, only a rational basis test is required. The Plaintiffs must overcome the presumption of constitutionality and show the absence of a rational relationship to a legitimate government interest beyond a reasonable doubt. Procreation and rearing children has been and remains the essential feature of marriage and the State's interest in regulating it and encouraging procreative marriage is rational. *Conaway v. Deane*, *supra*.

The state has no burden at all. *Heller v. Doe by Doe*, 509 U.S. 312,322, 113

S.Ct. 2637, 2643 (U.S. Ky. 1993); *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007). However, to the extent that it even has a burden of articulating a reason for legislature not permitting a same sex marriage, it has done so. By legally sanctioning heterosexual relationships through marriage, the legislation communicates to parents and prospective parents that their traditional and long-term, committed relationships are uniquely important as a public concern. The state has a legitimate interest in “promoting healthy family relationships that enable children to become well-adjusted, responsible adults”.

If the Court concludes that the statute warrants a higher degree of scrutiny than rational basis, it cannot be said that the Iowa law does not serve important governmental objectives and that the classification is not substantially related to achieving those objectives. The Plaintiff same sex couples are not similarly situated to opposite sex couples, and the statute could not be more narrowly drawn.

The classification is consistent with the history and tradition of the State of Iowa and the Nation and cannot be heard to shock the conscience or offend traditional notions of fairness or be offensive to human dignity. Denying the constitutional challenge in this case will not destroy liberty and justice.

RELIEF REQUESTED: The Ruling should be reversed and the petition dismissed in deference to the legislative process.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Defendant hereby requests oral argument.

CERTIFICATE OF FILING

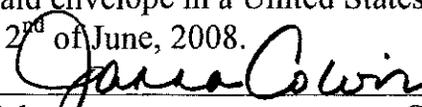
I hereby certify that on the 2nd day of June, 2008 copies of Appellant's Final Brief were hand delivered to the Court and address listed below:

Iowa Supreme Court
Des Moines, Iowa 50319

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true copies of the foregoing instrument was served upon each of the parties of record in the above entitled cause by enclosing the same in an envelope addressed to each such party listed below at his address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa on the 2nd of June, 2008.

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CERTIFICATE OF COSTS

This is to certify that the true and actual cost of printing the foregoing Appellant's Final Brief was the sum of 6060.

Signature: _____

