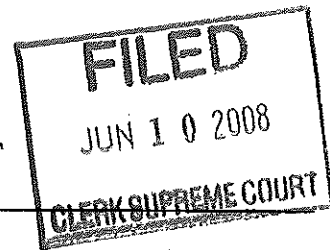


IN THE IOWA SUPREME COURT



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 AMENDED REPLY BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

**I. THE COURT ERRED BY HOLDING IOWA CODE §595.2(1)
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ARGUMENT

SUMMARY OF ARGUMENT: The Defendant's reply to Plaintiffs' brief is that there is simply no credible argument of a fundamental right or suspect class implicated in this case which requires strict or intermediate scrutiny. Plaintiffs' effort to redefine marriage, if successful, violates the separation of powers doctrine.

What is marriage? In *Goodridge v. Massachusetts*, 440 Mass. 309, 798 N.E.2d 941, 952 (2003), that state's high court, despite finding the marriage law unconstitutional, defined marriage thusly:

... The everyday meaning of "marriage" is "[t]he legal union of a man and woman as husband and wife," Black's Law Dictionary 986 (7th ed. 1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law. ... This definition of marriage, as both the department and the Superior Court judge point out, derives from the common law.

This definition is not quarreled with by any decision on point including California, *infra*. Even Plaintiffs' experts (Def. Commentaries, Ex. K Chauncey App. 1281-1282 and Ex. L Cott, App. 1300-1301) acknowledge that same sex marriage was not even theorized until very recent time (sixties according to Chauncey and the late 1980's according to Cott). Nonetheless, Plaintiffs argue that there is no difference between them and opposite sex married couples. In doing so, they ignore their own witnesses and the rest of recorded history which requires no experts or citations of authority beyond any of the cases cited herein.

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**

SUBSTANTIVE DUE PROCESS: The trial court bases its Ruling and the Plaintiffs base their brief upon the faulty premise that Plaintiffs have a fundamental right to same-sex marriage. Fundamental right law is discussed in Defendant's brief. Marriage as we know it is a fundamental right.

In *Bowers v. Polk County Board of Supervisors*, 638 N.W.2d 682, 694 (Iowa 2003) the Court stated:

...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....

"...[If] we find the asserted right is not fundamental, the statute must merely survive the rational basis test." *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).

The Statute is presumed to be constitutional and Defendant has no obligation to provide evidence of rational basis. *Heller v. Doe*, 509 U.S. 312, 113 S.Ct. 2637 (1993), *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255 (Iowa 2007).

The District Court's ruling relies on generic descriptions about the fundamental right of marriage (e.g. *Sioux City Police Officer's Ass'n v. City of*

Sioux City, 495 N.W.2d 687 (Iowa 1993) and applying strict scrutiny...” (App. 1916, Ruling, p.45) Once the court decided on strict scrutiny the outcome was predictable. “...To no one’s great surprise, classifications subject to strict scrutiny rarely survive the legal glare...” *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571, 603 (2007).

The trial court’s application of strict scrutiny relies on *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967) which involved race not gender nor sexual orientation. This approach has been rejected everywhere except California. Plaintiffs’ brief presents the case as if this Court is facing a dispute with the U.S. Supreme Court over the constitutionality of the Iowa marriage law in the sense experienced in *Racing Ass’n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004) (*RACI*). But there is no *RACI* parallel in this case. As Plaintiffs have written “Neither the U.S. Supreme Court nor Iowa courts have considered whether sexual orientation is a suspect classification.” (Pl. Brief, p. 30) (nor a fundamental right).

Plaintiffs’ brief ignored the decisions in other states on same-sex marriage due process claims. See *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); *Morrison v. Sadler*, 821 N.E.2d 15 (Indiana 2005); *Standhardt v. Superior Court*, 77 P.3d 451 (Az. App. 2003), *rev. denied* (Az. 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 Kandou*, 315 B.R. 123,

145-48 (Bkry. W.D. Wash. 2004). The cases will be referred to herein as “*Conaway* and the other cases”.

The trial court’s reliance on *Sioux City Police* is misplaced as it involved opposite sex marriage issues in a nepotism situation in a police department requiring a transfer of one spouse. The descriptions to marriage being a fundamental right are to a marriage between a male and female.

No same sex decision in this country has held same sex marriage to be a fundamental right and it is simply an invalid argument to use *Loving* as authority to require strict scrutiny. See *Conaway* and the other cases hereinabove. California does not base its holding on being sex based but on sexual orientation discrimination. In doing so, however, it relies on *Loving* as authority for using strict scrutiny.

II.

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

EQUAL PROTECTION. Plaintiffs’ brief also relies on *Loving* to require heightened or intermediate scrutiny on the equal protection claim as opposed to rational basis. The Iowa Supreme Court has said that 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. The Court has said that it will “**uphold a classification if it can reasonably conceive any state of facts to justify it. . . .**”

Miller v. Bd. of Med. Exam'rs, 609 N.W.2d 478, 482 (Iowa 2000), *Bowers v. Polk County Board of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2003).

The trial court in this case had erroneously put the burden of proof on Defendant. The U.S. Supreme Court has said: “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.’**” *Heller v. Doe by Doe*, 509 U.S. 312, 322, 113 S.Ct. 2637, 2643 (1993). The Iowa courts have followed *Heller*. See *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255 (Iowa 2007), *RACI v. Fitzgerald*, 675 N.W.2d 7, 8 (Iowa 2004).

The trial court recites the need for legislation to treat alike all persons similarly situated when it concludes that it is the Plaintiffs' own sex that precludes them from marrying a person of their choosing and that this is a sex based classification that requires intermediate scrutiny. The Court did this without mentioning the relevant and directly applicable state case law and *Nebraska Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. 2006) where the 8th Circuit reversed the Federal District Court for Nebraska which had found First Amendment and equal protection violations in Nebraska's constitutional amendment that inserted a ban against the legislature permitting same sex marriage. The 8th Circuit said: (p. 866)

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. . . .

Plaintiffs' brief mentions their record as a distinguishing feature from other case law. (Pl. Br. P.43) That record, however must include witnesses' loss of credibility in their deposition testimony. (See Def. Commentaries Ex. J-S, App. 1252-1465). The trial court did not mention the depositions.

Dr. Lee Badgett's testimony involves no research regarding Iowa except extrapolation from census “micro use sample” (Def. Comment. Ex. J, App.1252) She opines that 1% of all couples in the United States are same sex partners. She cannot say how many children were born into opposite sex relationships. *Id.* Her economic research touted by Plaintiffs in the Statement of Material Fact is misrepresented by Plaintiffs. *Id.* See Def. Comment., App. 1252-1254.

Dr. George Chauncey is an activist in the cause before this court having authored an Amicus Brief in *Romer v. Evans* and *Lawrence v. Texas* and other cases. However, he acknowledges “marriage” has always been an opposite sex relationship. (Comment. Ex. K., App.1318) Chauncey's testimony, and that of Dr. Herek (Comment. Ex. M, App. 1329), surely would cause one to question how Plaintiffs are “similarly situated” to those Iowans who can marry given the difference gays have about monogamy from that of opposite sex couples.

Defendant's comments on both witnesses show that they ascribe the push for same sex marriage to be in response to the AIDS epidemic which evidenced different legal protection available to partners compared to married people. (Comment Ex. K & M, App. 1282, 1331-1332) Their testimony also reveals that the nature of the gay and lesbian relationships is not even agreed upon by same sex people and the definition of monogamy is not necessarily the same as that for opposite sex people. (Comment. Ex.K, App: 1281)

Dr. Herek (Comment. Ex. M, App.1329) is also involved in the California litigation as he has been here. Despite Plaintiffs many references to stigma and dignity harm in their pleadings and Statement of Undisputed facts, Dr. Herek has never heard the term dignity harm and opines that stigma has waned in recent years. *Id.* Dr. Herek's testimony does not support a claim of gays being similarly situated in terms of what monogamy means as gay relationships are not characterized by sexual exclusivity as it is for heterosexuals.

Witness Dr. Lamb has acknowledged that he spends very little time on same sex issues. (Comment. Ex. O, App. 1372, 1373-1374). While he discounts the value of having one's biological parents raise them, he had previously written the opposite opinion. *Id.* Dr. Lamb believes that children do better with two parents than one in the home, but his opinion about whether the mother or father is present is not informative because of the lack of studies on same sex parents. *Id.* His testimony shows his affidavit opinions are based on studies of few children raised

by gays and lesbians. He did not even write his affidavit. (Depo. 93-94, App.1399-1400)

The parties agree that Iowa, as well as the federal government and other states, have given many benefits to marriage. There is no argument that children are best served by having two loving and responsible parents raising them. However, Plaintiffs seek to have this Court establish that the courts and not the legislature should make public policy for the State of Iowa by redefining marriage to be something totally different from what it has ever been.

Plaintiffs assert that states which have not granted marriage to same sex people are mistaken and doomed to a "legal dustbin". (Pl. Brief, p. 22) Plaintiffs' brief seeks to restate the issues (pp. 15-24 and throughout) to fit their theme that *Loving* and *Lawrence v. Texas*, 598 U.S. 558, 123 S.Ct.2472 (2003) compel the striking down of the nation's marriage laws, state by state.

Lawrence, however, did nothing more than say the private lives of gays should be free of government intervention, i.e. be left alone. 539 U.S. at 578, 123 S.Ct. at 2484. The concurrence of Justice O'Connor points out that, unlike *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976), the Texas law criminalized only homosexual sodomy. That is why it was struck down, plain and simple. Justice O'Connor said: (539 U.S. at 585, 123 S.Ct. at 2487-88)

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of

marriage. Unlike the moral disapproval of same-sex relations---the asserted state interest in this case---other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

It is sophistry to argue that *Lawrence* has any application to same sex marriage notwithstanding the dissent by Justice Scalia which can only be cynicism.

Defendant, one of 99 Iowa county recorders, is a mere stake holder and not a policy maker. Nonetheless, he has offered several reasons providing rational basis for the law which reasons have been accepted by most courts facing this issue which include procreative marriage and optimal responsible parenting settings.

Conaway v. Dean and the other cases.

In *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1 (2006), the New York Court of Appeals held that 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. *Id.* p. 7. It also said:

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.

Although proponents argued to the contrary citing conflicting research, the New York court rejected the arguments: (p. 8)

Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific evidence to support it. Even assuming no such evidence exists, this reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the common-sense premise that children will do best with a mother and father in the home. (*See Goodridge*, 798 N.E.2d at 979-980 [Sosman, J., dissenting]) And a

legislature proceeding on that premise could rationally decide to offer a special inducement, the legal recognition of marriage, to encourage the formation of opposite-sex households.

Defendant specifically asked the trial court to adopt the reasoning of *Hernandez v. Robles* but the Ruling does not even mention the case (see Amendment, App. 1735-1737).

In *Conaway v. Deane*, the plaintiffs raised equal protection, substantive due process, privacy, the ERA autonomy and intimate association claims but the trial court relied only on the ERA claim in entering judgment. *Id.* p. 583. *Conaway* held that the statute did not draw an invidious sex based distinction in violation of the Maryland Equal Rights Amendment, that sexual orientation was not a suspect or quasi-suspect classification for purposes of equal protection challenge nor is there a fundamental right to marry another person of the same sex under the due process provision of the Maryland Declaration of Rights (Maryland state constitution) and that a rational basis existed for the statute prohibiting same sex marriages.

The defendant in *Conaway* did not file affidavits supporting their motion for summary judgment. The plaintiffs supplemented their summary judgment motion with affidavits from some of the same witnesses found in the case now before this court, Nancy Cott and M. Lee Badgett. *Id.* p. 584.

Conaway found that the marriage statute does not separate men and women into discreet classes for the purpose for granting to one class of benefits at the expense of the other opposite sex class. Therefore, it did not discriminate on the basis of sex. *Id.*, pp. 597-8.

Conaway holds that the purpose of the Maryland ERA was to remedy the long history of subordination of women to men and to place men and women on equal ground as pertains to the enjoyment of basic legal rights under the law. *Id.* p. 591. *Conaway*, at 602, rejected *Lawrence and Loving* reciting **“that the plaintiffs were not being denied entry into a marriage 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.”**

Parenthetically, the California Supreme Court while finding a fundamental right for gays and lesbians to marry, did not find the law to discriminate on account of sex or gender. (*In Re Marriage Cases, supra.*, pp. 9-10)

Conaway rejected the claim of political powerlessness. *Id.* p. 611. It is noteworthy that Maryland, like Iowa, as of 2007 has laws which prohibit discrimination based on sexual orientation in the areas of public accommodation, employment, education and housing. *Id.* pp. 611-612. Iowa Code Chapter 216 was amended to add gender identity and sexual orientation to the list of protected people along with the proviso that the amendment did not extend to marriage. Acts 2007 (82 G.A.) ch. 191, S.F. 427 §1. The Iowa trial court Ruling has not considered the Amendment and overruled a motion to amend the Defendant’s Resistance to Summary Judgment as moot. (Order denying Motion to Amend, App. 1871)

The same arguments appear in *Conaway* that have been presented in this case which is a request by the plaintiffs to have a finding that the right to marry encompasses the right to marry a person of one’s choosing. *Id.* p. 619.

The Maryland court noted that even though the legal landscape surrounding the rights of homosexual persons is evolving there is no fundamental right requiring the state to sanction same sex marriage. *Id.* In so holding, the court cited *Washington v. Glucksberg*, 521 U.S. 702, 711, 117 S.Ct. 2258, 2263 (1997) which stated, in part:

We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices. "[T]he primary and most reliable indication of [a national] consensus is ... the pattern of enacted laws)." But we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended" . . . By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.

The concept of same sex marriage is just simply not part of the nation's history, legal traditions and practices.

Immutability of sexual orientation was not raised in the Maryland briefing and the court declined to address the issue of defining the group as a suspect class. *Id.* pp. 615-616. Plaintiffs' witness, Dr. Herek, testified the source of sexual orientation is unknown. (Comment. Ex. M, App.1329-1331)

IOWA JUDICIAL HISTORY REGARDING BLACK AMERICANS

Plaintiffs' brief analogizes to Iowa judicial history of guaranteeing equal protection and substantive due process for black Americans. Analogies to cases dealing with race and opposite sex marriages upon which Plaintiffs rely have been rejected by other courts. *Conaway* and other cases. Defendant well appreciates the Iowa court's progressive role in aiding black Americans as discussed by the

Plaintiffs and supporting *Amici*. However, there is nothing in *Loving* or *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) or *Brown v. Topeka Board of Education*, 344 U.S. 141, 73 S.Ct. 124, 97 L.Ed. 152 (1952) that is credibly applicable in this case.

This is because the histories of black Americans simply are not remotely the same as Plaintiffs. The Constitutions of the United States and the state of Iowa do not mention homosexuality. However, the U. S. Constitution had to be amended to “free the slaves” (13th Amendment) and remove the 3/5ths rule that excluded slaves in the determination of the number of Representatives to be elected to Congress (14th Amendment §2 and Art. II §2).

The Iowa Constitution also had to be amended in 1868 and 1880 to remove the word “white” in order to allow black Americans the ability to vote and determine who could serve in the legislature and the militia. *Amendments, Constitution of the State of Iowa*, Code of Iowa at p. lxxvii. The Plaintiff’s expert Nancy Cott certainly did not equate slavery to being homosexual. She used slavery as a metaphor but said this would be a poor analogy. (Comment. Ex. L, App. 1300-1301, Cott Depo. 37-40, App. 1311) She also denied being an expert on gays & lesbian mothers. *Id.*

IOWA’S SODOMY CASE

Plaintiffs cite *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (Pl. Brief, pp. 16 and 22) about Iowa being ahead of the nation on personal liberties. The 5-4 decision, however is quite limited. *Pilcher* involved a conviction of nonconsensual

sodomy between opposite sex persons (fellatio). The reversal was based on the 14th Amendment and not the Iowa Constitution. The decision did not throw out the sodomy law on its face but “as applied”. *Pilcher* said it did not “. . .intimate any view of the constitutionality of the statute as applied in any other factual situation.” *Id.* p. 360. The case did not involve homosexual activity. *Id.* p. 352

Pilcher shows the history of marriage as being inculcated with procreation and raising children. The dissent points out that the “privacy right” as of that time was applicable in the marital relationship (*Id.* p. 365) citing *Roe v. Wade*, 410 U.S. 113, 152-153, 93 S.Ct. 705, 726 (1973).

RIGHTS OF CHILDREN

Plaintiffs recital of *Callender v. Skiles*, 591 N.W.2d 182, 190-91 (Iowa 1999) (Pl. B., fn 11, p. 16) does not support their position as *Callender* relied on procedural due process deficiencies in finding a right to be heard on the parental rights challenge of a putative father. The case did not reach the substantive due process issues which were left to be dealt with by the trial court on remand.

Parenthetically, *Callender*, a paternity case, is noteworthy here because the issue presented there is very similar to the testimony offered, in part, by Defendant’s witness, Dr. Margaret Sommerville. App. 1064-1074. The decision recited the challenger’s argument as follows: (p. 189)

He further points out it is in Samantha's best interest to know her biological father and the policy of promoting family stability cannot outweigh his right to challenge paternity in this situation. We believe the proper analysis first requires consideration of Charles' procedural due process rights under the Iowa Constitution. . . .

Dr. Sommerville has opined that public policy should disfavor same sex marriage because in permitting such unions, it would be the state encouraging the creating of children by artificial insemination in same sex situations where the children are designed to not know their biological parent(s). Her affidavit and supporting material discusses different situations that have not been considered by Plaintiffs or the trial court. (App. 871)

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

IV.

THE COURT ERRED IN REFUSING TO CONSIDER DEFENDANT'S WITNESSES

Defendant Recorder argues that its witnesses should have been considered as their reasoning is something that the legislature could believe as being part of the purpose in preserving procreative marriage which is a rational basis for the law. Again, in addition to the threshold legal issues involved, there are factual disputes creating a question of fact barring summary judgment for Plaintiffs. *Grovijon v. Virjon, Inc.*, 643 N.W.2d 200 (Iowa 2002).

The Defendant's witnesses rejected by the trial court, for the most part, are testifying to the nature of marriage as well as preserving the optimal mileau for raising children. (App. 1201-1210, Dr. Young; App. 722-723, Dr. Nathanson); Dr. Sommerville and the others (App.701, Dr. Hawkins; App.813-820, Dr. Rhoades)

are saying that it is preferable for children to have two parents of the opposite sex raise children. If that is what the legislature could have been thinking, is that not rational?

However, even if the court were to not consider Defendant's witnesses, the same information presented by the Plaintiffs has been rejected by the other state courts weighing in on this subject as being inconclusive. *Conaway* and other cases. Moreover, all of the rendered decisions have accepted that marriage as we know it has been tied to procreation and raising children. This includes California.

The concepts advanced by Defendant's witnesses have been advanced in articles such as *Wardle, "Multiply & Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv.J.L. & Policy 771 (2001) where eight social interests favoring opposite sex marriage are identified: (pp. 779-80)

(1) safe sexual relations; (2) responsible procreation; (3) optimal child rearing; (4) healthy human development; (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers; (6) securing the stability and integrity of the basic unit of society; (7) fostering civic virtue, democracy, and social order, and (8) facilitating interjurisdictional capability.

These concepts are similar to what witnesses, Drs. Young and Nathanson, have submitted as the basic functions and features of marriage. See also *Genderless Marriage, Institutional Realities and Judicial Elision*, Monte Neil Stewart, Duke Journal of Constitutional Law and Public Policy, Vol. 1, January 2006; *State Interest in Marriage*, William C. Duncan, Ave Maria Law Review, V.

In *Marriage and the Law-A Statement of Principles*, Institute for American Values and Institute for Marriage and Public Policy (2006), p. 18-19, the following comments are found:

We do not all agree substantively on the issue of whether the legal definition of marriage should be altered to include same-gender couples. ... p. 18.

We do agree, however, that the basic understanding of marriage underlying much of the current same-sex marriage discourse is seriously flawed, reflecting all the worst trends in marriage and family law generally....We invite advocates of same-sex marriage who genuinely believe that two parents are better than one to develop public arguments for same-sex marriage that do not disparage connecting mothers and fathers to their children as an important social norm. p. 18

Courts that have moved to same-sex marriage display a distressing tendency to first reduce marriage to a legal construct, unrelated to any natural, biological or sexual realities, such as the generation of children or the gender asymmetry in parenting.... p. 18

ARTICLE I, SECTION 1

Plaintiffs' brief mentions Article I §1 of the Iowa Constitution at various places in its brief including page 17, fn 12 and page 24, fn 20. Plaintiffs cite no authority holding that sections 6 and 9 of Article I exist to cement Section 1. The trial court did not rely on Article I §1 in its decision. Defendant states that there is no clearly defined distinction between the protections afforded under Article I §1 from that afforded in §§ 6 and 9 that can uphold the Ruling.

Plaintiffs' assertion (Pl. brief, p. 24) that that Iowa's marriage law violates the Constitution on the basis of sex lacks supporting case law. Not even California (*In Re Marriage Cases*, May 15, 2008) accepted a sex classification as the basis for challenging the law.

Plaintiffs' cites Article I §1 at pages 47-49 and footnotes 38-39. The authorities, however, do not elevate the section to something more than the equal protection and due process clauses. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 176 (Iowa 2004) holds that Section 1 serves to preserve pre-existing common law rights (the right to acquire, possess and enjoy property). *Gacke* involved a statute which gave a private neighboring property owner immunity from suit for its interference with the ability to enjoy over property free of stench from manure.

Gacke does nothing to elevate same sex marriage to a common law right Plaintiffs cite *Kempkes, The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 Drake L. Rev. 593. However, a full reading of that article displays plenty of reasons to question Plaintiffs' reliance on it. *Kempkes'* historical analysis could and should lead one to conclude that the authors of the Iowa Constitution were far less concerned with individual liberties other than the right to be left alone and to be allowed to pursue one's economic interests. *Id.* pp. 612-614. *Kempkes* opines that Section 1 has been equated to the due process and equal protection clauses in the 14th Amendment to the U.S. Constitution. *Kempkes*, p. 633, fn 221. *Bruning, supra*, clearly shows that same sex marriage has not been recognized by the federal judiciary.

Plaintiffs' brief, Issue IV, B, part 2, pp. 19-20, discusses the right to choose who to marry and cites *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) which held prison inmates should be able to marry. In denouncing procreation as an imperfect basis for marriage, Plaintiffs quote a phrase from *Safley* about all of the important

attributes of marriage and the “less tangible benefits of marriage such as legitimization of children born out of wedlock”. Pl. Br., fn 15.

This footnote argument ignores the context of the *Safley* quotation. It does not say that consummation or procreation is not important. To the contrary, the court said that most inmates will be released and that the marriages are formed in the expectation that they ultimately will be fully consummated. *Safley*, at 97, and 107 S.Ct. at 2254. Defendant would simply say that *Safley*, like the *Pilcher* case, contains unique facts and it does nothing to aid the Plaintiffs.

STRICT SCRUTINY AND SEX BASED CLASSIFICATIONS

Plaintiffs’ brief argues for the application of strict scrutiny but this is not a sex based law. None of the cases dealing with this topic has so held, not even California, *infra*. See, *Hernandez, Conaway, supra* and the other cases.

UNDER-INCLUSIVE/OVER-INCLUSIVE

The Ruling commented on the subject of whether the marriage is over-inclusive or under-inclusive and found it is both. (App. 1917, Ruling p. 46 [due process] and App. 1930, Ruling p. 59 [equal protection])

In Plaintiffs’ brief, p. 34-35, they argue over-inclusive and under-inclusiveness but do not mention that such analysis is usually received for strict scrutiny. *RACI v. Fitzgerald, supra* at p. 10, *Bierkamp v. Rogers*, 293 N.W.2d 577, 584 (Iowa 1980). *Bierkamp* cites *McGinnis v. Royster*, 410 U.S. 263, 93 S.Ct. 1055 (1977) (a statute need not have a rational basis in its primary interest but only some interest – even a subordinate purpose. *Id.*, 410 U.S. 276, 278) *McGinnis* said

the Equal Protection Clause does not countenance speculation probing into the purpose of the legislation to defeat the statute given the burden of proof. *Id.* *Ames Rental Property Ass'n v. City of Ames*, 736 N.W.2d 255 (Iowa 2007) holds Iowa law requires “some reasonable basis” but no more.

Conaway, p. 631, rejected the plaintiffs’ over-inclusive and under-inclusive argument that the law is not related rationally to the governmental objective of fostering optimal relationships for procreation. Plaintiffs argued it is over-inclusive because children may be brought into same sex relationships through alternative methods of conception, i.e., surrogacy, artificial insemination, in vitro fertilization and adoption. They argued that it is under-inclusive because not all opposite sex choose to bear children or are able to do so because of infertility or otherwise.

Conaway said the fundamental right to marriage conferred on opposite sex couples not because they actually procreate but whether 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. *Conaway*, p. 633. *Conaway*, like many other cases, held classifications can have a reasonable basis even if not made with mathematical nicety or because it results in some equality. 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 v. Connecticut*, 381 U.S. 479, 484-486, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965).

The Iowa Plaintiffs' argument about stereotyping (Pl. Brief, p. 25) is not supported by analogies to dissolution of marriage cases. There is no credible evidence of any purpose to stereotype in the Iowa marriage law and the claims should be rejected just as the Washington court did in *Anderson v. King Co.*, 158 Wash. 2d 1, 138 P.3d 963 (2006). The claim is at odds with Plaintiffs' reference to Iowa's history of allowing adoptions, child custody, visitation and foster parenting by gays and lesbians. Brief, p 26. It is at odds with the 2007 amendment to Chapter 216 making sexual orientation a protected group in the areas of employment, public accommodations, etc.

There are a variety of assertions in Plaintiffs' brief that are simply inaccurate. Plaintiffs have not offered any evidence of immutability. If it has such evidence, it neither plead it nor expressly said it. Couching contentions in language such as it does in its brief and statement of facts, Pl. Brief, p. 32-33, is the only "shell game" in this case (to borrow Plaintiffs' phrase, *Id.* p. 21). Plaintiff uses "ability to perform" (*Id.* p.31) What does that mean? Plaintiffs' expert Dr. Herek admits the origins of sexual orientation are not known. (Comment. Ex. M, App. 1329-1331, 1363)

Notwithstanding Plaintiffs' brief, pp. 32-33, immutability has not been raised before the trial court. Plaintiffs know how to say immutable. Nor was it raised in the Washington, Arizona, New York or Maryland cases.

At Plaintiffs' brief, p. 33, they again challenge Defendant's proffered rational basis. These are not arguments peculiar to Iowa. They are the very essence

of all the cases Plaintiffs cite which define the fundamental right of marriage and rational used by the majority of states dealing with same sex marriage.

Plaintiffs urge *RACI* on this court now as if Defendant's articulated rational basis has never before been argued. This entire subject has been well settled by the other courts and Plaintiffs have not offered a good reason to reject those opinions.

Plaintiffs write that Iowa does not prevent child abusers, child support deadbeats or violent felons from marrying as an argument that the marriage law is not based on which people provide optimal environments for children. Pl. Brief, p. 36. Such persons may not be prevented from marrying in the first place but Iowa does deal with all these people in the legal system daily to protect children. The argument is emotional but baseless. It also suggests that only heterosexuals can be criminals, abusers and deadbeat parents. The insinuation deserves no response.

Plaintiffs' brief disperses accusations that Defendant's case is moral based. Plaintiffs confuse culture, history and religious beliefs. Defendant has addressed that his witnesses testified from historical and anthropological research, not a matter of faith. App. 656. Even Plaintiffs' witness, Dr. Cott (Comment. Ex. L, App. 1317), acknowledges that while marriage is a Christian model lodged deep in our culture and political theory, the American monogamous marriage is not solely based on a religious concept. *Id.*

In Plaintiffs' brief, pp. 36-45, they argue that Iowa's real reason for the law serves an illegitimate purpose. *Id.* pp. 43-44 but they simply cite to *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996), which involved a totally different situation

than the Iowa law. Plaintiffs do not address the 8th Circuit decision in *Bruning* which distinguishes *Romer* from the Nebraska situation. *Bruning* shows that Iowa's law is not comparable to the Colorado constitutional amendment. What Colorado did was to prevent gays and lesbians even trying to gain change through the political process. The Iowa legislation does not remotely approach that scenario.

The Plaintiffs, on one hand congratulate Iowa's progressive past and then accuse it of ugliness while ignoring the 2007 statutory amendment to Chapter 216 extending protection from discrimination for gays and lesbians.

Plaintiffs' discussion at page 39 and footnote 33 about Dr. Hawkins suggests that because he does not read Dr. Lamb, he is unqualified to testify. It certainly appears that the trial court has weighed Hawkin's testimony not for admissibility but for credibility. By any measure, that is an abuse of discretion. See Defendant's brief.

On the eve of finishing this brief, the California Supreme Court issued *In re Marriage Cases*, ___ Cal.Rptr.3d ___, 2008 WL 2051892 (Cal. May 15, 2008). By its own admission the decision is quite different from the other states that have already addressed the validity of state laws against their respective constitutions. (*Id.* p.2) California already had a comprehensive Domestic Partnership Law that affords all of the rights of married opposite sex people except the name "marriage." The issue before that court was whether withholding the word "marriage" violated the constitution.

The 4-3 decision is premised on miscegenation case law. *Perez v. Sharp*, 32 Cal.2d 711 (1948) and *Loving, supra* together with *Lawrence v Texas*. *Id.* pp 8-9. The opinion acknowledges that marriage has been between a man and a woman. *Id.* p. 23 and that all case law finding marriage to be a fundamental right connected marriage to procreation and raising children. *Id.* pp. 72-79.

Justice Baxter dissented, referring to the decision as judicial fiat which violates the separation of powers doctrine. *Id.* pp. 1, 4-5, and the reasoning “legal jujitsu”, *Id.* p. 7 concluding no equal protection violation when the law is facially neutral. pp. 20-21.

SEXUAL ORIENTATION AS A SUSPECT CLASSIFICATION

The dissent is fully responsive to the Iowa Plaintiffs’ claim that sexual orientation is a suspect classification. Pl. Brief, pp. 29-31 and emphasizes the majority’s acknowledgement that its conclusion about sexual orientation being a suspect classification contravenes the existing body of law. *Id.* p. 22 (referring to page 95, fn 60) The dissent, pp. 23-26, also dismisses the idea of political powerlessness, particularly in California, and concludes that when an issue is before the court for the first time, it cannot ignore reality, reciting: (*Id.* p.25)

If such a profound change in this ancient social institution is to occur, the People and their representatives, who represent the public conscience, should have the right and the responsibility, to control the pace of that change through the democratic process. . . . The majority’s decision erroneously usurps it.

CLAIMS OF THE CHILDREN PLAINTIFFS:

The Ruling found the Plaintiff's children have no separate claim from that of their parents. Ruling, p. 46, App.1917. Defendant has addressed those claims in his Resistance to the Amendment of the Petition to include the children (Record), his Reply Brief and Brief Resisting Plaintiff's Summary Judgment (App. 3306) and in the Answer to Amended Petition and Summary Judgment responses. App. 45. The essence of Defendant's response is that the children have no standing and no fundamental rights greater than those of their parents and no basis for a suspect classification claim entitling them to heightened scrutiny. Def. Reply Brief p.61, App. 3366. See *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1762 (1973).

The children's claim is but an abstract desire, not a protectable right arising to a due process violation. *State v. Cronkhite*, 613 N.W.2d 664 (Iowa 2000) and *Bowers*, supra. None of Plaintiff's authorities involve same sex marriage or children of homosexuals. Analogies cannot be successfully argued to create rights apart from those of the parents so as to compel the relief sought in this case.

CONCLUSION

Defendant incorporates the California dissent and all of his briefing both before this Court and the trial court in response to Plaintiff's brief. Upon such arguments, Defendant asks this Court to reverse the trial court and sustain the Defendant's Motion for Summary Judgment.

Respectfully submitted,

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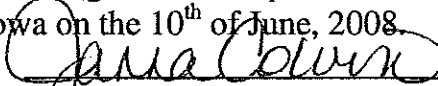
CERTIFICATE OF FILING

I hereby certify that on the 10th day of June, 2008, eighteen copies of Appellant's Final Reply 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 10th 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 Reply Brief was the sum of 4404

Signature: 