

STATE OF INDIANA )  
 )  
COUNTY OF MARION )

IN THE MARION SUPERIOR COURT  
CIVIL DIVISION  
CAUSE NO. 49D13-0211-PL-001946

RUTH MORRISON and )  
TERESA STEPHENS, DAVID WENE )  
and DAVID SQUIRE, CHARLOTTE )  
EGLER and DAWN EGLER, )

Plaintiffs, )

v. )

DORIS ANNE SADLER, *in her* )  
official capacity as Clerk of the Marion )  
Circuit Court, SHARON DUGAN, *in her* )  
official capacity as Clerk of the )  
Hendricks Circuit Court, )  
KENNETH L. MILLER, *in his official* )  
capacity as Commissioner of the Indiana )  
Department of Revenue, )

Defendants, )

and )

STEVE CARTER, *in his official* )  
capacity as Attorney General for the )  
State of Indiana, )

Intervenor. )

FILED

JAN 13 2003

*Sharon Dugan*  
Clerk of Court

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Defendants Doris Anne Sadler, in her official capacity as Clerk of the Marion Circuit Court, Sharon Dugan, in her official capacity as Clerk of the Hendricks Circuit Court, Kenneth L. Miller, in his official capacity as Commissioner of the Indiana Department of Revenue, and Intervenor Steve Carter, in his official capacity as Attorney General of Indiana, submit the following memorandum in support of their motion to dismiss the Amended Complaint.

**STATEMENT OF FACTS ALLEGED IN THE AMENDED COMPLAINT**

Indiana Code Section 31-11-1-1 expressly prohibits marriage between persons of the same gender, specifically stating that “[o]nly a female may marry a male [and] [o]nly a male may marry a female.” *Id.* The law also provides that “a marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.” *Id.* In addition, only married couples are permitted to file joint state income tax returns. *See* Ind. Code § 6-3-4-2(d).

Plaintiffs are three same-sex couples who have entered into civil unions in the State of Vermont. (First Am. Compl. ¶ 1) All three couples live together, share joint finances, and hold themselves out to their family, friends and community as spouses in long-term, intimate, committed relationships. (First Am. Compl. ¶¶ 2-28) Ruth Morrison and Teresa Stephens reside in Marion County and established a civil union in the State of Vermont on October 30, 2000. (First Am. Compl. ¶¶ 2-3, 16) David Wene and David Squire also reside in Marion County and have been a couple for more than four years. (First Am. Compl. ¶¶ 4-5, 17) They established a civil union in the State of Vermont on December 13, 2000. (First Am. Compl. ¶ 22) Finally, Charlotte Egler and Dawn Egler reside in the Town of Camby in Hendricks

County and have been a couple for more than five years. (First Am. Compl. ¶¶ 6-7, 23) They established a civil union in the State of Vermont on July 5, 2000. (First Am. Compl. ¶ 28)

Under Vermont law, a civil union is a formalized legal relationship pursuant to which the parties are subject to the responsibilities of spouses and entitled to the benefits and protections accorded to spouses. *See* 15 V.S.A. §§ 1201(2), 1204(a). However, Vermont still only allows opposite-sex couples to establish formal marriages in that State. *See* 15 V.S.A. §§ 1201(4), 1204(a).

Against this backdrop, Plaintiffs make alternative claims. First, Plaintiffs claim that Indiana Code Section 31-11-1-1's prohibition against same-sex marriages violates Sections 1, 12 and 23 of Article 1 of the Indiana Constitution. (First Am. Compl. ¶¶ 59-64) As such, Plaintiffs seek a declaration that Indiana Code Section 31-11-1-1 violates the Indiana Constitution and injunctions directing Defendants Dugan and Sadler to issue marriage licenses to them. (First Am. Compl. ¶ 1) In the alternative, they seek a declaration that their Vermont civil unions are entitled to full faith and credit pursuant to Indiana Code Section 34-38-2-2 and a related injunction directing Defendant Commissioner Miller to permit them to file joint state income tax returns as spouses. (First Am. Compl. ¶65, Request for Relief ¶2)

#### **STANDARD FOR DISMISSAL UNDER RULES 12(B)(1) AND 12(B)(6)**

When confronted with a motion to dismiss under Rule 12(B)(1), a trial court “must decide upon the complaint, the motion, and any affidavits or other evidence submitted, whether it possesses the authority to further adjudicate the action.” *Winski Bros., Inc. v. Bayh*, 679 N.E.2d 912, 913 (Ind. Ct. App. 1997), *trans. denied*. Because this Court lacks subject matter jurisdiction over Plaintiffs' tax-related claims, those claims must be dismissed under Rule 12(B)(1).

A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a claim, not the facts supporting it. *Phelps v. Sybinsky*, 736 N.E.2d 809, 813 (Ind. Ct. App. 2000), *trans. denied*. The trial court must view the complaint in the light most favorable to the non-moving party, drawing every reasonable inference in that party's favor. *Town of Plainfield v. Town of Avon*, 757 N.E.2d 705, 710 (Ind. Ct. App. 2001), *trans. denied*. The trial court must dismiss "if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances." *Id.* Further, "when the validity of a statute is challenged, [the court] must begin with a 'presumption of constitutionality.'" *State v. Lombardo*, 738 N.E.2d 653, 655 (Ind. 2000) (quoting *State v. Downey*, 476 N.E.2d 121, 122 (Ind. 1985)). "The burden to rebut this presumption is upon the challenger, and all reasonable doubts must be resolved in favor of the statute's constitutionality." *Id.* Because Plaintiffs claim that Indiana affords full faith and credit to Vermont civil unions and, in the alternative, claim that Indiana's refusal to recognize such unions or same-sex marriages violates the Indiana Constitution, all fail as a matter of law regardless of the facts. Therefore, Plaintiffs' First Amended Complaint must be dismissed under Rule 12(B)(6).

### **SUMMARY OF THE ARGUMENT**

Plaintiffs have made two alternative claims for relief. First, they seek a declaration that Indiana Code Section 31-11-1-1 prohibiting same-sex marriages violates Article 1, Sections 1, 12, and 23 of the Indiana Constitution as well as injunctions directing Defendants Dugan and Sadler to issue marriage licenses to them. (First Am. Compl. ¶ 1) In the alternative, they seek a declaration that their Vermont civil unions are entitled to full faith and credit in Indiana and an injunction directing Defendant Commissioner Miller to permit them to file joint state income tax returns as spouses. (First Am. Compl. ¶65, Request for Relief ¶2)

Defendants address these claims in reverse order, however, because if Indiana were to accord full faith and credit to Plaintiffs' Vermont civil unions, there would be no need to take the additional step of analyzing whether marriage licenses should be issued to the Plaintiff couples. By way of comparison, where Indiana recognizes foreign marriages as a matter of comity, couples who marry out-of-state need not obtain separate marriage licenses in their Indiana counties of residence. *See Mason v. Mason*, 775 N.E.2d 706 (Ind. Ct. App. 2002).

Plaintiffs' claim for full faith and credit recognition of their Vermont civil unions fails for two reasons, however. First, this Court lacks subject matter jurisdiction over Plaintiffs' tax-related claims. Challenges to the State's tax laws must be brought before the Indiana Tax Court after all administrative remedies have been exhausted. *State v. Sproles*, 672 N.E.2d 1353, 1354-55 (Ind. 1996). As such, this Court cannot issue an injunction directing Defendant Commissioner Miller to permit Plaintiffs to file joint state income tax returns.

Second, Indiana's full faith and credit statute, Indiana Code Section 34-38-2-2, does not permit recognition of Vermont civil unions. That statute is evidentiary in nature and creates no substantive rights under which Plaintiffs are entitled to relief. Moreover, Indiana law expressly provides that "[o]nly a female may marry a male [and] [o]nly a male may marry a female." Ind. Code § 31-11-1-1. Thus, recognition of Plaintiffs' Vermont civil unions would violate Indiana's explicit public policy against same-sex marriage. Indiana courts do not apply the laws of other states if doing so violates Indiana public policy. Indeed, no other state has recognized Vermont civil unions as valid marriages or as anything else of legal significance. Even Vermont does not accord civil unions the same status accorded to marriages in that state and provides that only opposite-sex couples may establish a marriage. *See* 15 V.S.A. § 1201(4). Accordingly, there is no basis for allowing Plaintiffs to file joint

state income tax returns, as both state and federal tax laws permit only a “husband and wife” to file joint returns. *See* Ind. Code § 6-3-4-2(d); 26 U.S.C. § 6013.

Plaintiffs’ claim that Indiana’s law prohibiting same-sex marriage - Indiana Code Section 31-11-1-1 - is invalid under the Indiana Constitution also fails. That prohibition is valid under Article 1, Section 23 of the Indiana Constitution, which provides equal privileges for all citizens, because the law is substantially related to important governmental and societal interests such as promoting procreation and child rearing; promoting sound political ordering and fostering a free society; and protecting the integrity of traditional marriage. Further, all persons within the preferred class are treated equally, as are all persons within the disfavored class. Therefore, the law is valid under Indiana’s equal privileges doctrine. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

The prohibition against same-sex marriage is also valid under Article 1, Sections 1 and 12 of the Indiana Constitution. Section 1 requires only that a statute reasonably pursue a legitimate interest related to public health, peace, morals, education, good order or welfare and that the statute bear a reasonable and substantial relationship to accomplishing the legislative purpose. *City of Indianapolis v. Clint’s Wrecker Service, Inc.*, 440 N.E.2d 737, 741-42 (Ind. Ct. App. 1982) (quoting *Crane Towing, Inc. v. Gorton*, 570 P.2d 428, 433 (Wash. 1977)). Indiana’s prohibition against same-sex marriage easily passes this test as it is substantially related to the compelling legislative objectives outlined above: promoting procreation and child rearing; promoting sound political ordering and fostering a free society; and protecting the integrity of traditional marriage. These objectives further public peace, safety and welfare, and it is within the State’s police power to pursue them in this manner. Furthermore, Article 1, Section 12 provides no substantive guarantee that the State will

recognize same-sex marriages. The substantive rights asserted by Plaintiffs – *i.e.* the right of “privacy” and the “right to marry” – are not implicated in this case. However, even if these substantive rights exist and are implicated in this case, the prohibition on same-sex marriage still passes muster under Section 12’s rationality standard, as the law is rationally related to legitimate state objectives. *See McIntosh v. Melroe Co.*, 729 N.E.2d 972, 976 (Ind. 2000).

## ARGUMENT

### **I. This Court Has No Jurisdiction Over Plaintiffs’ Tax Claim**

Taxpayers are required to invoke administrative remedies before bringing challenges against the State’s tax laws. *State v. Sproles*, 672 N.E.2d 1353, 1354 (Ind. 1996). When those remedies have been exhausted, judicial review may be sought only in the Indiana Tax Court. *Id.* at 1355. The Tax Court’s enabling statute vests the court with “exclusive jurisdiction over any case that arises under the tax laws of this state and that is an initial appeal of a final determination” of the Department of State Revenue or the Indiana Board of Tax Review. Ind. Code § 33-3-5-2(a).

Because the purpose of the Tax Court is to consolidate tax-related litigation generally, the Indiana Supreme Court has broadly construed the Tax Court’s jurisdiction over tax-related cases. *Common Council of Hammond v. Matonovich*, 691 N.E.2d 1326, 1329 (Ind. Ct. App. 1998), *trans. denied*. Specifically, the Court has stated that “the Legislature intended that all challenges to the tax laws – regardless of the legal theory relied on – be tried in the Tax Court.” *Sproles*, 672 N.E.2d at 1357. As such, a case arises under the tax laws if: (1) an Indiana tax statute creates the right of action; or (2) the case principally involves collection of a tax or defenses to that collection. *Id.*

Here, Plaintiffs have based their claim for relief against Commissioner Miller upon their desire to file joint state income tax returns. (First Am. Compl. ¶ 55, Request for Relief ¶1) Indiana tax laws provide that “[w]here a joint return is made by husband and wife pursuant to the Internal Revenue Code, a joint return shall be made pursuant to this article.” Ind. Code § 6-3-4-2(d). The Internal Revenue Code states that “a husband and wife may make a single return jointly of income taxes under Subtitle A . . . .” 26 U.S.C. § 6013. Taken together, these statutes provide that only married couples may file a joint tax return. Plaintiffs have requested that this Court issue an injunction directing Commissioner Miller to permit the Plaintiff couples to file joint state income tax returns in light of their Vermont Civil Unions. (First Am. Compl. at 11.) Thus, Plaintiffs’ claim is a challenge to the manner of collection of a tax under Indiana tax statutes and therefore clearly “arises under” Indiana tax laws within the meaning of the Tax Court’s enabling statute.

Further, Plaintiffs’ claim is not yet even ripe for Tax Court review because Plaintiffs have not invoked administrative remedies that would lead to a final determination subject to appeal. *Sproles* expressly held that taxpayers may not bypass the administrative process and the Indiana Tax Court by filing an action in the circuit or superior courts. 672 N.E.2d at 1360. Although there are well-recognized exceptions to the general rule requiring exhaustion of administrative remedies where those remedies would be inadequate or futile, (*Ahles v. Orr*, 456 N.E.2d 425, 426 (Ind. Ct. App. 1983)), such exceptions exclude tax cases. *See Winski Bros., Inc. v. Bayh*, 679 N.E.2d 912, 913-14 (Ind. Ct. App. 1997), *trans. denied*. Even when making constitutional challenges to tax laws, Plaintiffs must exhaust all administrative remedies. *Sproles*, 672 N.E.2d at 1361. There are sound public policy reasons supporting this requirement, including preserving order in the tax collection process and providing the

Department of Revenue the opportunity to resolve the challenge on non-constitutional grounds. *Winski*, 679 N.E.2d at 914; *Felix v. Indiana Dept. of State Revenue*, 502 N.E.2d 119, 122 (Ind. Ct. App. 1986).

Accordingly, Plaintiffs must first invoke and exhaust their administrative remedies before they may bring their claims. Even then, this Court would not have jurisdiction over Plaintiffs' claim because "once taxpayers are forced into the administrative paths, the only court for review of the issue is the Tax Court." *Sproles*, 672 N.E.2d at 1358. It is a well-settled principle that tax matters must be heard before the Tax Court. *Zayas v. Gregg Appliances, Inc.*, 676 N.E.2d 365, 367 (Ind. Ct. App. 1997), *trans. denied*. As such, this Court does not have subject matter jurisdiction over Plaintiffs' tax-related claims and cannot grant an injunction directing Commissioner Miller to permit them to file joint state income tax returns.

## **II. Indiana's Full Faith And Credit Statute Does Not Permit Or Require Recognition Of Vermont Civil Unions**

Each of the same-sex couples in this case alleges that they established a civil union in the State of Vermont under the laws of that State. (First Am. Compl. ¶¶ 16, 22, 28) In their Fourth Claim for Relief the Plaintiffs incorrectly contend that "[p]ursuant to Indiana Code § 34-38-2-2, the Act of the Vermont Legislature declaring that parties to a civil union are included in the term 'spouse' is entitled to full faith and credit in Indiana" and that "Plaintiffs should be subjected to the responsibilities of and provided the benefits and protections of spouses under Indiana law, including the ability to file joint State tax returns as spouses." (First Am. Compl. ¶ 65)<sup>1</sup> These contentions are wrong because a) Indiana Code § 34-38-2-2

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<sup>1</sup> Plaintiffs' Fourth Claim for Relief also alleges that Indiana's "refusal to recognize the Plaintiffs as spouses is in violation of Article I, Section 23 of the Indiana

is an evidentiary statute and does not confer any substantive rights; b) Indiana courts are not required to apply the laws of other states if doing so violates Indiana public policy; c) no other state has recognized Vermont civil unions; and d) even if this court gave full faith and credit to Plaintiffs' Vermont civil unions, Plaintiffs still would not be able to file joint state tax returns because only a "husband and wife" may file joint state or federal tax returns, and Vermont civil unions are not "marriages" that establish a husband and wife relationship. Further, Indiana's refusal to recognize Vermont civil unions does not violate Article 1, Section 23 of the Indiana Constitution.

**A. Indiana Code Section 34-38-2-2 Is Evidentiary In Nature And Does Not Create Any Substantive Rights**

Article 38 of Title 34 of the Indiana Code is entitled "Evidence: Statutes and Laws." These statutes provide procedures for entering into evidence the laws of other states and countries. They do not purport to instruct Indiana courts regarding choice of law issues or application of the substance of the foreign laws. Indiana Code § 34-38-2-2, the statute on which Plaintiffs rely, provides as follows: "Every act of the legislature of any state or territory of the United States, certified by the secretary, and having the seal of the state or territory affixed to the act, is considered authentic and shall receive full faith and credit when offered in evidence in any court in Indiana."<sup>2</sup> The gist of this statute, and the rest of Chapter

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Constitution." (First Am. Compl. ¶ 67) This claim is wrong for the reasons stated in Part III below.

<sup>2</sup> This statute is part of Article 38, Chapter 2, entitled "Statutes and Laws of Other States and Countries." The other two statutes in this chapter provide as follows:

**34-38-2-1 Statute books; foreign states; United States territories**

(a) This section applies to the following:

(1) The printed statute books of the several states and territories of the United States, purporting to be printed under the authority of those states and territories;

2 of Article 38 (see footnote 2 below), is that the law of other states and countries must be offered into evidence in written form, either as the printed statute book, or a certified copy of a statute contained in a statute book. In this context, the “full faith and credit” statutory language simply applies to judicial recognition of the existence and content of the foreign law.

The only case that interprets this statute is *Morris v. State*, 273 Ind. 614, 406 N.E.2d 1187, 1192 (1980), where the Indiana Supreme Court held that under Indiana Code § 34-1-18-4 (now repealed, the predecessor statute of Indiana Code § 34-38-2-2), copies of laws passed by the Missouri legislature could be admitted into evidence where those copies were properly certified by the Secretary of State of Missouri and authenticated by the seal of that state. At issue was whether the copies of Missouri statutes were properly admitted into evidence, not whether the Indiana court was required to apply a Missouri law that conflicted with Indiana law.

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(2) A copy of any statute or any part of a statute contained in a statute book described in subdivision (1) that is accompanied by the certificate of the secretary of state, under seal of the state, certifying that:

(A) the copy is complete and correct;

(B) the statute book from which the copy is taken is deposited in the office of the secretary or in the state library; and

(C) the secretary of state believes the book was received under the authority of the state or territory purporting to have enacted the statutes.

(b) A statute book, a copy of a statute, or a copy of part of a statute described in subsection (a) is presumptive evidence in all courts of public or private legislative acts of the state or territory purporting to have enacted the statute.

**34-38-2-3. Laws of foreign countries**

The existence and tenor or effect of the laws of any foreign country may be proved as facts by parol evidence. However, if it appears that the law in question is contained in a written statute or code, the court may reject any evidence of the law that is not accompanied by a copy of the law as it appears in the written statute or code.

The Plaintiffs in this case are improperly asking this court to stretch the evidentiary requirements of Article 38 of Title 34 to choice of law issues. As shown below, Indiana doctrine regarding choice of law does not require Indiana courts to apply foreign laws when doing so violates the public policy of this state.

**B. This Court's Recognition Of The Vermont Civil Unions Would Violate The Public Policy Of Indiana**

The purpose of the full faith and credit doctrine is to preserve the rights guaranteed by the laws of one state by requiring their recognition and validity in all other states. *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941). This, in turn, is intended to enhance national unity by “alter[ing] the status of the several states as independent foreign sovereignties . . . and mak[ing] them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.” *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935). However, the doctrine does not provide an absolute and unqualified rule and there are limits on the extent to which one state may impose its laws on another. *Pink*, 314 U.S. at 210. The scope of the doctrine allows each state to retain a degree of control over matters which are “peculiarly its own.” *Id.*

Congress recognized this principle in the context of same-sex marriage laws when it passed the Defense of Marriage Act, reaffirming the power of the states to make their own decisions about marriage. The Act provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe, respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state, territory, possession or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C. This statute reaffirms a power traditionally held by the states and is enacted under Congressional power expressly granted by the U.S. Constitution. The Act advances compelling state interests in protecting federalism, ensuring state control over domestic relations, and avoiding interstate conflicts.

While a *marriage* valid where contracted is generally valid in Indiana (*see Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (Ind. 1951)), Indiana courts need not apply the statutes or legal relationships recognized in another state if doing so would violate the public policy of Indiana. *Ballard v. Board of Trustees of Police Pension Fund*, 452 N.E.2d 1023 (Ind. Ct. App. 1983), *rehearing denied*; *Maroon v. State Dept. of Mental Health*, 411 N.E.2d 404, 410 (Ind. Ct. App. 1980) (citing *State of Nevada v. Hall*, 440 U.S. 410 (1979)). *See also Schaffert v. Jackson National Life Ins. Co.*, 687 N.E.2d 230 (Ind. Ct. App. 1997), *trans. denied*. Recognition of the Vermont civil unions would blatantly violate the Indiana public policy enunciated at Indiana Code § 31-11-1-1: “A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.”

The public policy aspect of choice of law doctrine was discussed at length in the early case of *Wabash R. Co. v. Hassett*, 170 Ind. 370, 83 N.E. 705, 709 (Ind. 1908). Our Supreme Court held that Indiana courts may decline to apply other states’ laws but that this ability was not unlimited.

In reaching this conclusion we approve the modern and generally accepted doctrine that to justify our courts in refusing to enforce a right of action accruing under the laws of another state as against the policy of this state the prosecution of such action must appear to be against good morals or natural justice, or prejudicial to the general interests of the citizens of this state.

83 N.E. at 709. *Wabash Railroad* also stated that “[i]f the legislature, as it might have done, had spoken against the enforcement of foreign causes of action like this, the courts would

readily obey its mandate.” *Id.* Here, the Indiana legislature has spoken against the enforcement of marriages of persons of the same sex, and has even directed that such unions are “void in Indiana.” Ind. Code § 31-11-1-1(b). This court must “readily obey” the legislative mandate against recognizing and enforcing out-of-state same-sex unions.

More recently, *Maroon v. State* recognized the doctrine that Indiana Courts do not apply the laws of other states when contrary to public policy, but declined to follow it because it could not “find the public policy of Indiana to be violated by the application of the Illinois statutes at issue.” 411 N.E.2d at 410. “We leave the doctrine to its traditional application in cases dealing with, inter alia, gaming contracts, lotteries, and marriages within prohibited limits of consanguinity.” *Id.* at 412. Here, the issue is whether to recognize a same-sex union when the legislature has carefully spelled out Indiana’s public policy against recognizing such unions. The Vermont civil unions are in direct conflict with express Indiana policy.

The recent case of *Mason v. Mason*, 175 N.E.2d 706, 709 (Ind. Ct. App. 2002), expressly states that Indiana courts should not recognize same-sex marriages or similar relationships from other states. In *Mason*, the Court of Appeals acknowledged the doctrine that Indiana courts need not apply another state’s law if such law violates Indiana public policy, but held that a Tennessee marriage between first cousins was valid in Indiana, even though this state prohibits marriage between first cousins unless they are at least 65 years old. The applicable statute was Indiana Code § 31-11-8-3, which reads as follows:

A marriage is void if the parties to the marriage are more closely related than second cousins. However, a marriage is not void if: (1) the marriage was solemnized after September 1, 1977; (2) the parties to the marriage are first cousins; and (3) both of the parties were at least sixty-five (65) years of age when the marriage was solemnized.

In *Mason* the husband and wife were first cousins under the age of 65, and their marriage was valid under Tennessee law. The Court held that “Indiana’s recognition of the existence of a foreign marriage is a matter of comity,” and that comity “represents a willingness to grant a privilege, not as a matter of right, but out of deference and good will.” *Id.* The court went on to say that “[a]s a matter of comity, Indiana can choose to recognize Tennessee marriages between first cousins, even though such a marriage could not be validly contracted between residents of Indiana.” *Id.* This conclusion was possible, however, only because “no statute such as Indiana Code section 31-11-1-1(b) exists to establish that a marriage such as John and Bonnie’s violates Indiana public policy.” *Id.* The *Mason* decision instructs that, notwithstanding any general deferential principles of comity, Indiana courts cannot recognize or enforce the civil unions of the Plaintiffs in this case because of Indiana Code § 31-11-1-1, which states clearly and emphatically that Indiana’s public policy limits marriage to one male and one female.

### C. No Other State Has Recognized Vermont Civil Unions

Same-sex couples in other states have tried without success to have state courts recognize their Vermont civil unions. In *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) *reconsideration denied* (copy attached), the Georgia Court of Appeals affirmed a trial court ruling that a divorced, noncustodial mother who had her children for visitation while she was cohabiting with her same-sex partner with whom she had registered a Vermont civil union was in contempt of court for violating an order that prohibited visitation with either parent if the parent was living with someone to whom they were **not** married or closely related. The trial court held that a Vermont civil union is not the same as a marriage, that the visitation restriction was valid, and that Susan was in violation of the order and in contempt of court.

A three-judge panel of the Georgia Court of Appeals unanimously affirmed, holding that even in Vermont a civil union is not the same as marriage. The court stated that “[E]ven if Vermont had purported to legalize same-sex marriages, such would not be recognized in Georgia,” citing Georgia’s statutory statement of the state’s public policy “to recognize the union only of man and woman,” and the statutory declaration that “no marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage.” *Id.* at 49. Citing the federal Defense of Marriage Act, 28 U.S.C. § 1738C, the Georgia appellate court declared that “Georgia is not required to give full faith and credit to same-sex marriages of other states.” *Id.*

What constitutes a marriage in the State of Georgia is a legislative function, not a judicial one, and as judges we are duty bound to follow the clear language of the statute. The Georgia Legislature has chosen not to recognize marriage between persons of the same sex, and any constitutional challenge to Georgia’s marriage statute should be addressed to the Supreme Court of Georgia.

*Id.* The Georgia court also observed that Susan’s arguments ignored her role in creating the consent decree, and that she waived any right to have her civil union recognized as a “marriage” for purposes of being with her partner during her children’s visitation.

Similarly, in *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct.), *cert. granted*,<sup>3</sup> 806 A.2d 1066 (Conn. 2002), the Appellate Court of Connecticut affirmed the dismissal for lack of subject matter jurisdiction of a petition for dissolution of a Vermont civil union. The trial court dismissed the petition, relying on Connecticut General Statutes § 45a-727a(4), which

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<sup>3</sup> On September 19, 2002, the Supreme Court of Connecticut granted plaintiff’s petition for certification for appeal, limited to the following issue: “Did the Appellate Court properly conclude that the trial court had no subject matter jurisdiction to dissolve a civil union entered into pursuant to the laws of Vermont?” However, Plaintiff Glen Rosengarten passed away in early November and the status of the appeal may now be in doubt. See Lindsay Faber, *Attorneys Hope Death of Plaintiff Won’t End Gay Divorce Lawsuit*, Greenwich Time, Nov. 9, 2002, available at <http://www.greenwichtime.com>.

provides that ‘the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman,’ and the Federal Defense of Marriage Act. 802 A.2d at 174. Rosengarten argued that Connecticut General Statutes § 46b-1(17), which granted the Superior Court subject matter jurisdiction over “all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court” gave the Superior Court jurisdiction because the dissolution of a Vermont civil union is a matter relating to family relations. *Id.* But the Appellate Court confirmed that “this civil union is not a marriage recognized under [Connecticut law] because it was not entered into between a man and a woman . . . [n]or is it a marriage under our sister state of Vermont’s definition of marriage . . . because it too limits the definition of marriage to those entered between ‘one man and one woman.’” *Id.* at 175. The court found nothing in the text of the Connecticut statutes or court rules or legislative history or common law that would justify extending family relations or family matters jurisdiction of the Connecticut courts to dissolve same-sex Vermont civil unions. *Id.* at 175-78. Thus, the court concluded that “a civil union is not a family relations matter and, therefore, the [trial] court was correct in determining that it had no subject matter jurisdiction to dissolve the civil union. . . .” *Id.* at 184.

**D. Vermont Civil Unions Are Not Marriages, So There Is No Basis For Recognizing Them Or Allowing Plaintiffs To Be Able To File Joint State Tax Returns Based On Them**

Plaintiffs contend that because they are considered “spouses” in Vermont, they “should be subjected to the responsibilities of and provided the benefits and protections of spouses under Indiana law, including the ability to file joint state tax returns as spouses.” (First Am. Compl. ¶ 65) This contention is flawed because a Vermont civil union is not analogous to an

Indiana marriage. A Vermont civil union is not even analogous to a Vermont marriage. Indeed, the Vermont statute that establishes civil unions provides that only opposite sex couples may establish a marriage. *See* 15 V.S.A. § 1201(4); First Am. Compl. ¶ 42. Accordingly, to the extent Indiana law limits certain benefits and protections to *married* persons, such law would not extend to members of same-sex unions, even if their Vermont civil unions were accepted in Indiana.

This point is illustrated perfectly by the Plaintiffs' desire to file joint state tax returns. State and federal tax laws permit a "husband and wife" to file joint tax returns, which limits such filing to married persons. Indiana tax laws provide that "[w]here a joint return is made by *husband and wife* pursuant to the Internal Revenue Code, a joint return shall be made pursuant to this article." Ind. Code § 6-3-4-2(d)(emphasis added). The Internal Revenue Code states that "*a husband and wife* may make a single return jointly of income taxes under Subtitle A . . ." 26 U.S.C. § 6013(emphasis added). The Plaintiffs in this case are not husbands and wives even under the laws of Vermont. It does not matter, therefore, whether Indiana recognizes their Vermont civil unions because such relationships are not "marriages" and are not eligible for any state protections and benefits limited to married persons. Accordingly, Plaintiffs' Fourth Claim for Relief does not state a claim for which relief may be granted.

**E. Refusal To Recognize Vermont Civil Unions Is Valid Under The Indiana Constitution**

Plaintiffs contend that if, in fact, Indiana does not recognize Vermont Civil Unions under Indiana Code Section 34-38-2-2, such non-recognition violates Article 1, Section 23 of the Indiana Constitution. (First Am. Compl. ¶ 67) For the reasons stated in Part III, *infra*, however, this Court should also reject that claim. Refusing to recognize Vermont Civil

Unions is entirely valid because that is how the state pursues its legitimate and compelling interests in promoting procreation and child rearing; promoting sound political ordering and fostering a free society; and protecting the integrity of traditional marriage. If the State is not required to issue marriage licenses to same-sex couples, neither is it required to recognize same-sex relationships simply because they are recognized in another state.

### **III. Indiana Law Prohibiting Same-Sex Marriages Is Perfectly Valid Under Article 1, Section 23 Of The Indiana Constitution**

Article 1, Section 23 of the Indiana Constitution provides: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.” Under equal privileges doctrine, a governmental preference is constitutional if it (1) is “reasonably related to inherent characteristics which distinguish the unequally treated classes,” and (2) is “uniformly applicable and equally available to all persons similarly situated.” *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). Indiana courts must accord the challenged preference a presumption of constitutionality, and the challenger bears the burden “to negative every conceivable basis which might have supported the classification.” *Id.* (quoting *Johnson v. St. Vincent Hospital, Inc.*, 273 Ind. 374, 404 N.E.2d 585, 597 (Ind. 1980)).

For the following reasons, under any conceivable state of facts, Indiana Code § 31-11-1-1 satisfies this standard. The Plaintiffs have therefore failed to state an Article 1, Section 23 claim on which relief can be granted.

#### **A. The Law Prohibiting Same-Sex Marriages Is Substantially Related To Several Important Governmental And Social Interests**

This statutory distinction between same-sex couples and opposite-sex couples for purposes of marriage is valid so long as it is “reasonably related to inherent characteristics

which distinguish the unequally treated classes.” *Collins*, 644 N.E.2d at 80. The relevant “inherent characteristics” are those of the underlying bases for different statutory treatment. *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 981-82 (Ind. 2000). The legislature is entitled to great deference when this Court analyzes what relevant inherent characteristics underlie the legislative distinctions. In the area of marriage law in particular, deciding upon proper social policy is a matter for the legislature, not the courts. *Sweigart v. State*, 213 Ind. 157, 12 N.E.2d 134, 138 (1938); *Phillips v. Wisconsin Personnel Commission*, 482 N.W.2d 121, 124 n.1 (Wis. Ct. App. 1992) (“‘Creation’ of verification and registration systems designed to facilitate the extension of state employee benefits to the employees’ unmarried companions . . . is precisely the type of action committed to the legislature, as the policymaking branch of government. It is beyond all powers of this or any other court.”).

For at least three reasons, the State’s classification between same-sex and opposite-sex couples is valid under this standard (this is not meant to be an exhaustive list):

1. **Promoting procreation and child rearing**: The government’s interest in regulating marriage is largely based on the idea that the purpose of marriage is procreation. Scholars recognize that “[t]raditional male-female marriage is the institution that has functioned most consistently to facilitate, support, and protect responsible human procreation.” Lynn D. Wardle, “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J. Law & Pub. Policy 771, 784 (2001); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 Journal of Law & Politics 581, 593 (1999) (“The primary social function of marriage is rearing children.”). It follows that government may therefore confer recognition on opposite-sex marriages, which may produce children, but not confer recognition on same-sex marriages, which cannot, on

their own, produce children. Wardle, "*Multiply and Replenish*," *supra*, at 784 ("Society has compelling interests in protecting the social institution that has best furthered social interests in procreation, in maintaining the clear social identity of that institution, and in preserving the linkage that institution forges among sex, procreation, and child rearing.") Traditional marriage and procreation of natural offspring supplies an environment for raising children that same-sex marriage cannot match: "The natural commitments, restraints, complementarity, and shared responsibilities of traditional marriage create the best environment into which offspring may be born." *Id.* at 789.

Courts have recognized this principle. In *Singer v. Hara*, 11 Wash. App. 247, 259, 522 P.2d 1187, 1195 (1974), *rehearing denied*, the court stated that Washington's policy limiting marriage to males and females "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." Recognizing the reality that procreation is not the basis for every marriage, the court explained that it remains the paramount governmental interest:

This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.

*Id.*

Numerous courts have recognized that the state purpose of furthering procreation is at least rational, if not compelling. *Adams v. Howerton*, 486 F.Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9<sup>th</sup> Cir. 1982) ("state has a compelling interest in encouraging and fostering procreation of the race"); *Singer*, 522 P.2d at 1197 (characterizing this interest as "of basic importance in our society"); *Dean v. District of Columbia*, 653 A.2d 307, 337

(D.C. 1995) (finding that this “central purpose ... provides the kind of rational basis ... permitting limitation of marriage to heterosexual couples”). Just this year, a Massachusetts trial court, in affirming the denial of marriage licenses to same-sex couples, noted that “because same-sex couples are unable to procreate on their own and therefore must rely on inherently more cumbersome means of having children, it is also rational to assume that same-sex couples are less likely to have children or, at least, to have as many children as opposite-sex couples.” *Goodridge v. Dep’t of Pub. Health*, 2002 WL 1299135, \*13 (Mass. Super. 2002), *appeal pending*, No. SJC-08860 (Mass).

Recent Supreme Court doctrine also bolsters this compelling governmental interest in opposite-sex marriage. In *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), the plaintiff challenged the rules for citizenship which impose different burdens of proof upon unwed mothers and unwed fathers to prove their relationship to the child. In affirming the disparate treatment of men and women under the citizenship requirements, the Court articulated two “important governmental objectives” which strongly support the rationality of Indiana’s marriage law. *Id.* at 62.

The first of these interests is “the importance of assuring that a biological parent-child relationship exists.” *Id.* It is significant that *Nguyen* arose in the context of an unwed father. Both Indiana law and federal law presume a biological relationship where a child is born to married parents. Ind. Code §§ 31-14-7 *et seq.*; 42 U.S.C. § 666(a)(5)(G). This presumption is justified insofar as marriage carries with it a tradition and expectation of monogamy and fidelity. While children may occasionally result from extramarital liaisons or donor-enabled assisted reproductive technology, the vast majority of children born within marriage are

biologically related to their mother's husband. Though admittedly less than perfect, marriage is a reliable indicator of the biological relationship between parent and child.<sup>4</sup>

Not only is marriage an important indicator of the biological connection between parent and child, but to fulfill this purpose marriage is properly limited to the union of one man and one woman. Ind. Code § 31-11-1-1. Every child has exactly one mother and one father. Thus, marriage recognizes and protects the one male-one female union—the only union that can produce children. Extending marriage to same-sex couples would do nothing to further this important governmental objective, in that children of same-sex couples are necessarily unrelated to at least one of their parents. At the same time, a state's desire to protect the biological relationship between parents and children does not require a state to outlaw adoptions or otherwise to prevent parents from raising children to whom they are not biologically related. It does, however, allow the State to express a preference for biological parents "whom our society [has] always presumed to be the preferred and primary custodians of their minor children." *Reno v. Flores*, 507 U.S. 292, 310 (1993). This policy supports a marriage law which is not only limited to male-female couples, but which also extends the plenary benefits of marriage to couples willing to undertake a legal and financial commitment to each other and to their children.

The second important interest that the Supreme Court held was furthered by the citizenship rule is an interest in "the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that

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<sup>4</sup> Moreover, the presumption of a biological relationship where a child is born to married parents furthers the government's important interest in protecting the integrity of the family unit by "excluding inquiries into the child's paternity that would be destructive of family integrity and privacy." *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989)

is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.” *Nguyen*, 533 U.S. at 64-65.

Here too, marriage plays an important role in ensuring the stability of the relationship between children and their biological parents. Each year, state and federal agencies spend millions of dollars in care for children who have never known their fathers. In the State of Indiana during the year 2000 alone, more than 30,000 children – 35% of all babies born in Indiana that year – were born to unwed mothers. National Vital Statistics Report, Vol. 50, No. 5, at 49 (Feb. 12, 2002), *available* at [http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50\\_05.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_05.pdf). In the same year, thirty-five percent of the babies born in Indiana were born to unwed mothers. *Id.* More than any other relationship, marriage provides children with the greatest likelihood of being raised in a stable home by their biological parents. At minimum, marriage provides a means by which a child’s father can be legally identified and held accountable for the care and protection of his child.

Considering marriage’s central purpose of furthering procreation, it is perfectly rational for Indiana to permit marriage between opposite-sex couples, who are at least theoretically capable of procreation on their own, but not between same-sex couples, who are not. As above, recognition of same-sex marriage would do little to further this governmental objective. To the contrary, every child raised by a same-sex couple has been deprived of the opportunity to develop “real, everyday ties” with at least one of his or her biological parents. *Nguyen* at 64. Thus, same-sex marriages “generally do not advance the social interest in responsible procreation; rather, they impair the integrity of the institution that has best been

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(upholding a California statute creating a presumption that the child born to a married

able to further the social interests in responsible procreation.” Wardle, “*Multiply and Replenish*,” *supra*, at 797.

**2. Promoting sound political ordering and fostering a free society:**

Another governmental interest that is yet even more fundamental –and compelling—also underlies the restriction against same-sex marriages: the protection and promotion of the traditional family, headed by a husband and wife, as a foundational political unit in a free and democratic society. Contrary to Plaintiffs’ conception of marriage law (which, they suggest, must permit anyone to marry “the person of his or her choice,” *see* First Amended Complaint ¶ 34), state government regulation of marriage does not simply arise from an interest in regulating individual behavior. Rather, “regulation of marital status has always been a fundamental element in helping humane society induce the behavior needed for social as well as individual survival.” Hafson, *The Constitutional Status of Marriage*, *supra*, at 470.

Socially, the needs of a free and open democratic society depend on marriage and family as traditionally conceived and practiced: “The unarticulated policy roots of family law are also related to the political ends of democracy, because it is primarily through the family bonds that both children and parents learn the attitudes and skills that sustain an open society.” *Id.* As one scholar puts it, “[h]eterosexual marriage appears to provide the strongest and most stable companionate unit of society, and the most secure setting for intergenerational transmission of social knowledge and skills.” Wardle, “*Multiply and Replenish*,” *supra*, at 780. As a result, “[h]eterosexual marriage arguably provides the best seedground for democracy, the most important schoolroom for self government, the most important

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woman living with her husband is a child of the marriage).

wellspring of (and testing ground for) civic virtue, and the most valuable unit of social organization.” *Id.* at 780-81.

To be more particular, the traditional family fosters a sense of voluntary duty reflected in the husband-wife marital commitment and their unquestioning devotion to their natural children. This family tradition “is a prerequisite to a successful individual tradition. Through the commitments of marriage and kinship both children and parents experience the need for and the value of authority, responsibility, and duty in their most pristine forms.” Bruce C. Hafen, *The Constitutional Status of Marriage*, 81 Mich. L. Rev. 463, 476. This tradition is critical because “a sense of voluntary duty is the lifeblood of a free society.” *Id.* Thus, “the family in a democratic society not only provides emotional companionship, but is also a principal source of moral and civic duty.” *Id.* at 477. The traditional family is also important to a free, open and democratic society because it provides for natural mediation between the individual and the state. *Id.* at 479. It is the source of personal meanings and personal values in our lives, without which “the political order becomes detached from the values and realities of individual life.” *Id.* “An inherent connection thus links the pattern of domestic regulation to the structure of political freedom.” *Id.*

These precepts find a home in judicial doctrine at all levels. The Supreme Court has itself recognized the connection between marriage and free society, referring to traditional marriage over 100 years ago as “the foundation of the family and society, without which there would be neither civilization nor progress.” *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Justice Holmes observed that “some form of permanent association between the sexes” is one of the rudimentary characteristics of civilization. Oliver Wendell Holmes, Jr. *Natural Law*, 32 Harv. L. Rev. 40, 41 (1918). Other courts have also recognized that “the structure of

society itself largely depends upon the institution of marriage . . . . The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.” *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976). The Indiana Supreme Court long ago observed that “[i]n every enlightened government [marriage] is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern.” *Noel v. Ewing*, 9 Ind. 37, 1857 WL 3556 \*8 (1857). According to *Noel*, marriage “giv[es] character to our whole civil polity.” *Id.*

Just as important, there is no basis for compelling the assumption that same-sex marriages would provide a comparatively valuable bedrock for a free and open society. The connection between traditional opposite-sex marriages and sound social ordering goes back to the natural link between such marriages and procreation. See Wardle, “*Multiply and Replenish*,” *supra*, at 794. It is the natural bond between parents and their biological offspring that provides the best environment for passing along the traditions of duty and responsibility so critical to democratic society. See *id.* at 789, 797; Hafetz, *The Constitutional Status of Marriage*, *supra*, at 470 n.28, 474-77.

This does not mean that families with adopted children or marriages where only one partner is a biological parent of children in the family should be prohibited because they do not feature all of the social benefits of traditional two parent families. See Wardle, “*Multiply and Replenish*,” *supra*, at 809, 811. Nor does it mean that opposite-sex couples who cannot or wish not to have children must be deprived of the right to marry lest they not fully contribute to the democratic ideal. *Id.* at 800–803. What it means instead is that the American tradition—indeed all of Western Civilization—has long recognized that the values necessary for the continuation of free society and democracy are best fostered in the context

of families where two parents raise their natural offspring. Article 1, section 23 does not require a perfect fit between the end to be achieved and the line drawn by the legislature. The General Assembly is entitled to great deference as it assesses the social policies at stake and decides upon the means to achieve them. *Collins*, 644 N.E.2d at 80. *Noel* recognized that deferring to the legislature with respect to the regulation of marriage is a necessary consequence of recognizing the importance of marriage to the social structure: “The sovereign power may, by general enactment, regulate and mold [the couple’s] relative rights and duties at pleasure.” *Noel*, 9 Ind. 37, 1857 WL 3556 at \*8.

Rejecting the General Assembly’s choice of a foundational family model for society in this instance, moreover, may undermine the General Assembly’s long-accepted ability to order society through other marriage regulations. The prohibitions against polygamy and endogamy, for example, might be vulnerable to attack if the prohibition against same-sex marriage is declared invalid. One commentator observes that “[t]he Equal Protection argument for same-sex marriage also applies to polygamy. The ban on polygamy discriminates not only against religions that approve polygamy, but also bisexuals, who cannot act on their sexual preference within marriage unless they can have multiple spouses.” George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 *Journal of Law & Politics* 581, 628 (1999). So too with endogamy: “the main arguments for endorsing gay marriage—individual autonomy in intimate affairs and validation of loving relationships—also apply to endogamy.” *Id.* at 631. See also William N. Eskridge, Jr., *The Case for Same-Sex Marriage* (1996) at 151 (arguing that bans on same-sex marriage are unconstitutional and acknowledging that the author remains “open to the argument” that restrictions against endogamy are also unconstitutional). Same-sex marriage, polygamy, and endogamy all

clearly have to do with the social order. Choosing to permit or restrict each reflects a choice of what political and social organizing principle should be followed. The principle that underlies Plaintiffs' argument—that an individual should be permitted to marry “the person of his or her choice” (First Am. Compl. ¶ 34)—would undercut prohibitions against endogamy and polygamy were it to carry the day here.

To be sure, the Indiana General Assembly is free, if it wishes, to reject the notion that to promote traditional opposite-sex marriages is to promote the foundations of free society and democracy. But nothing in the Indiana Constitution forces the General Assembly or the people of Indiana to reject this understanding. It would be farcical to suggest that a founding document ratified in 1851 somehow lay the seedbed for a right to same-sex marriage and a concomitant rejection of the political model—the traditional family headed by a one-man, one-woman marriage—that had fostered the development of the free and open society that led to that very constitutional moment in the first place.

In short, the Indiana General Assembly is entitled to promote the model for social and political ordering that it believes will best provide for the perpetuation of liberty. *See* Preamble to the Constitution of the State of Indiana (announcing that the Constitution is ordained “To the end that . . . liberty be perpetuated”). Plaintiffs can provide no basis for concluding that the model the General Assembly has chosen—the protection of opposite-sex marriages and the rejection of same-sex marriages—is invalid.

3. **Protecting the integrity of traditional marriage:** *Goodridge* affirmed Massachusetts's rational bases for maintaining the traditional definition of marriage because it held that the Massachusetts Constitution “does not guarantee the fundamental right to marry a person of the same sex. Same-sex marriage is not deeply rooted in the

Commonwealth's history and tradition." 2002 WL 1299135 at \*12. Indeed, same-sex marriage is not deeply rooted in *any* state's history and tradition, but traditional marriage quite obviously is. Because traditional marriage is an important foundational unit in a free and democratic society, "there is great danger if its meaning and definition become ambiguous." Wardle, "*Multiply and Replenish*," *supra*, at 780.

Permitting same-sex marriage might lead to ambiguity in the meaning of marriage by undermining the institution of marriage as a life-long commitment. If same sex marriage were permitted, nothing would prevent heterosexual same-sex couples (such as roommates or close friends) from marrying for such less important reasons as mere companionship, short-term convenience, or financial interest, thereby undermining the importance and integrity of the institution itself. Similarly, if the opposite-sex restriction were deemed irrational, the polygamy, affinity, and consanguinity restrictions would be vulnerable to challenge as well. Although it is true that the strength and integrity of traditional marriage has already been undermined by other societal trends and legal developments such as the "sexual revolution," the easier availability of divorce, and the increased prevalence of out-of-wedlock births, such considerations should make states all the more wary of subjecting the institution of marriage to the additional risks of the radical and untested inclusion of same-sex couples.

Scholarship provides solid justifications for these concerns and for the need to protect traditional marriage. One author writes that "[t]raditional marriage is a public good. That is, it benefits not only married couples and their children but also generates positive externalities, or benefits to others. Men and Women who marry and stay married encourage others to do likewise, to the profit of society." Dent, *The Defense of Traditional Marriage*, *supra*, at 599. In light of this social good, government is well justified in recognizing and

encouraging traditional marriage but not same-sex marriage. “As social esteem for marriage and parenting declines, so does citizens’ willingness to assume these roles. Validation of same-sex marriage would accelerate this decline.” *Id.* at 601. The Court should not second-guess the judgment of the General Assembly to promote and protect traditional marriage by means of refusing to afford state recognition for same-sex marriages. *See Collins*, 644 N.E.2d at 80.

**B. Given These Important Interests, The Refusal To Recognize Same-Sex Marriages Passes Both Parts Of The *Collins* Test**

Once the Court accepts the interests outlined above as legitimate (indeed, compelling) state interests, the relationship between the legal classifications (same-sex and opposite-sex couples) and the inherent characteristics of the classes follows. *See Collins*, 644 N.E.2d at 80. Recognizing opposite-sex marriages promotes the state’s interests in child procreation and rearing, in preserving traditional marriage, and in promoting opposite-sex marriage as the traditional foundational unit of a free and open society. Recognizing same-sex marriages does not. The classes are thus distinguishable based on inherent characteristics, the law is reasonably related to those distinct inherent characteristics, and the first part of *Collins* is satisfied with respect to the same-sex/opposite-sex marriage classification.

Furthermore, all persons within the preferred classification of opposite-sex couples are treated equally. The law, for example, does not prohibit a homosexual from marrying a member of the opposite sex. Likewise, all within the disfavored class are treated equally. The law does not permit a heterosexual to marry a member of the same sex. Homosexuals and heterosexuals are treated the same. Same-sex marriages are not recognized for legitimate reasons. The second part of *Collins* is therefore also satisfied.

**IV. The Restriction Against Same-Sex Marriage Is Also Valid Under Article 1, Sections 1 And 12 Of The Indiana Constitution**

For the same reasons that Section 23 does not prohibit the General Assembly from recognizing opposite-sex marriages but not same-sex marriages, Plaintiffs' claims that Sections 1 and 12 prohibit Indiana Code § 31-11-1-1 also must fail. The statute is presumed constitutional and Plaintiffs bear the burden of rebutting this presumption. *Lombardo*, 738 N.E.2d at 655. Plaintiffs cannot meet that burden here regarding any facts. That is, under no set of facts is the statute invalid under either Section 1 or Section 12, so, as with Plaintiffs' Section 23 claims, these claims must be dismissed.

**A. Article 1, Section 1 Requires Only That A Statute Reasonably Pursue A Legitimate Interest Related To Public Health, Peace, Morals, Education, Good Order Or Welfare**

Article 1, Section 1 of the Indiana Constitution sets forth the general rights of individuals to "life, liberty and the pursuit of happiness." The Indiana Supreme Court has said that Section 1, like the remainder of the Indiana Bill of Rights, merely expresses an overall design to protect the "natural rights" of citizens. *See, e.g., Price v. State*, 622 N.E.2d 954, 958-59 & n.4 (Ind. 1993). In reviewing Section 1 claims, courts must "examine the text and history to determine whether a given interest is of such a quality that the founding generation would have considered it fundamental or 'natural.'" *Id.* at n.4. Indiana courts will recognize only those rights "which have their origin in the express terms of the constitution or which are necessarily to be implied from those terms." *O'Brien v. State*, 422 N.E.2d 1266, 1270 (Ind. Ct. App. 1981).

With this understanding of the limits of the Indiana Constitution's protections in mind, it is simply unfathomable that a constitutional text written in 1851 could have protected a right to same-sex marriage, notwithstanding its general protections of liberty and the pursuit of

happiness. Indeed, the 1850 Constitutional Convention *voted down* a provision that would have precluded the General Assembly from passing a law “impairing the unity and sacredness of the marriage relation.” Convention Journal, 896. Further, the Indiana Supreme Court itself has held that “there is no constitutional provision protecting the marriage itself” (*Noel v. Ewing et al.*, 9 Ind. 37, 1857 WL 3556, \*8 (1857)), and when Indiana courts speak of the “right to marry,” they speak only of a right (to the extent it exists) recognized by the Fourteenth Amendment, not a right protected by the state constitution. See, e.g., *Indiana High School Athletic Assoc. v. Raike*, 164 Ind. App. 169, 181, 329 N.E.2d 66, 74-75 (1975) (collecting federal cases concerning federal constitutional right to marry and concluding that “there is no conclusive United States Supreme Court holding that the right to marry is a fundamental right”).<sup>5</sup> If the framers of the Indiana Constitution would not enshrine any such protection even for traditional marriage, then they clearly left the door open for statutory regulation of (indeed refusal to recognize) same-sex marriage.

More broadly, Indiana Courts have never understood Article 1 to provide a guarantee that individuals may constitute a law unto themselves and thereby engage in whatever activities they deem to be the “pursuit of happiness.” Rather, in light of Section 1’s express provision

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<sup>5</sup> Plaintiffs have not asserted in this case a right to same-sex marriage under the U.S. Constitution. However it is worth noting that the Supreme Court refused to review the Minnesota Supreme Court’s determination that any right to marry under the U.S. Constitution does *not* extend to same-sex marriages. *Raker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). When the Court dismisses for want of a substantial question, it affirms the lower court judgment (though not necessarily its reasoning) on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (citing *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959) (Brennan, J. memorandum) (“Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case...”)); see also *Mandel v. Bradley*, 432 U.S. 173 (1977) (providing that dismissals for want of a substantial federal question affirm the judgment of the court below and “prevent lower courts from coming to opposite conclusions on the precise issues presented...”).

that government may act to advance “peace, safety, and well-being,” the Indiana Supreme Court has permitted government regulations—even those that curb some individuals’ pursuits of happiness—that reasonably achieve those ends. *See Whittington v. State*, 669 N.E.2d 1363, 1368 (Ind. 1996). In applying Section 1, it is critical to understand that “[t]he purpose of state power . . . is to foster an atmosphere in which individuals can fully enjoy that measure of freedom they have not delegated to government.” *Id.* And when reviewing the state’s use of the police power, “we must accord ‘considerable deference’ to the judgment of the legislature, inasmuch as the decision as to what constitutes a public purpose is first and foremost a legislative one.” *Id.* at 1369 (quoting *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)).

The power of the General Assembly to act notwithstanding the general liberty protections of Section 1 must be broad. Otherwise individuals might claim protected liberty rights to engage in prostitution, drug use, public nudity, professional gambling, or any number of other traditionally prohibited actions that, for some, may be part of the pursuit of happiness. *See* Ind. Code § 35-45-4-2 (prohibiting prostitution); Ind. Code §§ 35-48-4-6 to -7, -11 (prohibiting possession of marijuana and other controlled substances); Ind. Code § 35-45-4-1(a)(3) (prohibiting public nudity); Ind. Code § 35-45-5-3 (prohibiting professional gambling); *cf. State v. Levitt*, 246 Ind. 275, 203 N.E.2d 821, 824 (1965) (“[N]o right, constitutional, fundamental or otherwise, is absolute and unlimited in this society of ours—not even life and personal liberty—if we are to live with our neighbors.”); *State v. Buxton*, 238 Ind. 93, 148 N.E.2d 547 (1958) (“[T]he safety of the people is the first law of the land and will prevail as against private rights provided by the constitution” as long as encroachment on private rights is “reasonable and necessary”).

More precisely, a two-part test governs whether a law runs afoul of Section 1: (1) Does the law tend to promote the health, peace, morals, education, good order and welfare of the people? (2) If so, does the law bear a reasonable and substantial relationship to accomplishing the legislative purpose? *City of Indianapolis v. Clint's Wrecker Service, Inc.*, 440 N.E.2d 737, 741-42 (Ind. Ct. App. 1982) (quoting *Crane Towing, Inc. v. Gorton*, 570 P.2d 428, 433 (Wash. 1977)); *see also Dep't of Financial Institutions v. Holt*, 231 Ind. 293, 301, 108 N.E.2d 629, 633 (1952) (observing that freedoms protected by Section 1 "may be restricted by legislation constituting a proper exercise of the police powers of the state in protecting the public health, safety, morals, and welfare").<sup>6</sup> This is a test for bare rationality. As long as the law rationally serves a legitimate legislative end, it cannot be struck down as invalid under Section 1. Indeed, the Supreme Court has typically invalidated laws in light of Section 1 where, for example, the General Assembly has acted "arbitrarily," *i.e.*, where "[t]he public has no legitimate interest" (*see id.*, 231 Ind. at 303, 305, 108 N.E.2d at 634-635), or where the law in question "has no relation whatever to the protection of the public health, morals, safety, or welfare" (*Kirtley v. State*, 227 Ind. 175, 182, 84 N.E.2d 712, 715 (1949)).

Indiana's prohibition against same-sex marriage easily passes this test. It is substantially related to the compelling legislative objectives discussed in detail in Part III. A., *supra*: promoting procreation and child rearing; promoting sound political ordering and fostering a free society; and protecting the integrity of traditional marriage. These goals easily fit the description of being for the "peace, safety and well-being" of society and of promoting the "public health, morals, safety, or welfare." Indiana Code § 31-11-1-1 is thus by no means

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<sup>6</sup> It is important to observe that the law need only relate to the State's asserted interests; contrary to Plaintiffs' suggestion in the First Amended Complaint, it need not somehow be

arbitrary or untethered to any legitimate public interest. It is thus a legitimate use of the police power, and Plaintiffs' claim under Section 1 must fail as a matter of law, regardless whether pursuing happiness and liberty for them would mean engaging in same-sex marriages. To conclude otherwise would be to give absolute primacy to the individual will over legitimate—indeed compelling—regulations of the social order. Neither the text nor the context of Section 1 supports such an extreme understanding of the individual rights protected by that provision.

**B. Article 1, Section 12 Does Not Provide A Substantive Guarantee That The State Will Recognize Same-Sex Marriages**

Finally, Plaintiffs assert that Indiana Code Section 31-11-1-1 violates Article 1, Section 12 of the Indiana Constitution. Section 12 provides as follows:

All courts shall be open; and every person, for injury done to him in his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay.

On its face, Section 12 provides protection for remedies and procedures in the event of injuries to person, property or reputation, *i.e.*, by “due course of law.”

Plaintiffs, however, do not claim that the statutory prohibition of same-sex marriage deprives them of any legal process. Rather, they claim that that Section 12 “guarantees the privacy of Indiana’s citizens, which includes the right to marry” and that Indiana Code Section 31-11-1-1 “unnecessarily invades this zone of privacy . . . .” First Amended Complaint ¶ 62. The due course of law clause, similar to its federal 14<sup>th</sup> Amendment due process counterpart, does protect substantive rights at some level. *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 976 (Ind. 2000). But no substantive rights protected by the Indiana

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“necessary to further” those interests, to the extent that “necessary” contemplates some

Constitution are at stake here, and even if any such rights were at stake, the General Assembly nonetheless had sufficient justifications for enacting Section 31-11-1-1 to overcome those rights.

**1. No constitutionally protected rights are at stake**

Plaintiffs' claim must fail because the substantive rights they assert—*i.e.* the right of “privacy” and the “right to marry”—are not implicated in this case. As discussed in Part IV.A., *supra*, when Indiana courts are asked to find new substantive rights in the Indiana Constitution, they must examine the text and history of the Indiana Constitution to determine whether the founders thought the asserted right was a “natural” right entitled to constitutional protection. With respect to the asserted right to same-sex marriage, the answer to that question must obviously be “no,” not least because the founders apparently refused to provide such protection even for traditional marriage. This analysis applies with equal force to Plaintiffs' Section 12 claims. Merely relocating the asserted substantive right from Section 1 to Section 12 does not give it any additional legitimacy. There is still no text or history to support the Plaintiffs' assertions.

Moreover, the vague notion of a right to “privacy” seems especially out of place in this case. Plaintiffs do not simply wish for the government to leave them alone or not to collect or publicize information about them, which is the typical “privacy” complaint. *See, e.g., Washington v. Glucksburg*, 521 U.S. 707 (1997) (rejecting argument that right to privacy precludes government from banning physician-assisted suicide); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that right to privacy precludes government bans on abortions); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that right to privacy precludes government bans on sales

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higher burden. See First Amended Complaint ¶ 55.

of contraceptives to non-married people); *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946) (evaluating assertion that right of privacy precludes police from retaining fingerprints and photographs following acquittal).

Instead, Plaintiffs demand affirmative government recognition and acceptance of their relationships, announced through a public act and a public document. This is the antithesis of privacy. What the plaintiffs seek is not *privacy*, but public recognition bestowed by the government. Thus, it does not even meet the terms of the general constitutional right that the Plaintiffs invoke. In any event, it is simply implausible that a court can divine from the Indiana Constitution a right of privacy or right to marry that could encompass the right to a State-recognized same-sex marriage.

**2. Even if protected rights are at stake, Section 31-11-1-1 passes muster**

Second, even if protected rights were at stake, the Section 12 standard for overcoming Plaintiffs' supposed privacy and marriage rights is easy for the State to meet. *McIntosh* describes this standard as follows:

[I]n general this doctrine imposes the requirement that legislation interfering with a right bear a rational relationship to a legitimate legislative goal, but does not preserve any particular remedy from legislative repeal. \*\*\* [T]here is no state constitutional 'substantive' due course of law violation [if the] legislation has been held to be . . . rationally related to a legitimate legislative objective.

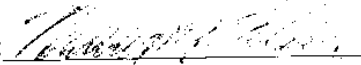
729 N.E.2d 972, 976. The standard, then, is one of bare rationality. For the reasons stated above in Part III, even if the substantive rights claimed by the Plaintiffs exist, Section 31-11-1-1 is rationally related to legitimate state objectives of promoting procreation and child rearing; promoting sound political ordering and fostering a free society; and protecting the integrity of traditional marriage. Plaintiffs have failed to meet their burden in rebutting the

presumption of constitutionality accompanying Section 31-11-1-1. *See Lombardo*, 738 N.E.2d at 655. The law is therefore valid and Plaintiffs' complaint fails to state a claim on which relief may be granted.

**CONCLUSION**

For the foregoing reasons, this Court should dismiss the First Amended Complaint.

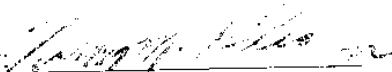
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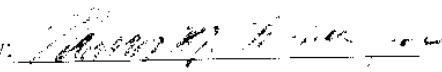
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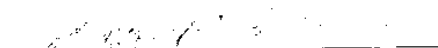
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**CERTIFICATE OF SERVICE**

I do hereby certify that I caused a copy of the foregoing document to be served upon the following counsel of record by United States mail, first class, postage prepaid,

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