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REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants Doris Anne Sadler, in her official capacity as Clerk of the Marion Circuit Court, and Sharon Dugan, in her official capacity as Clerk of the Hendricks Circuit Court, and Intervenor Steve Carter, in his official capacity as Attorney General of Indiana,¹ respectfully submit the following reply memorandum in support of their Motion to Dismiss.

SUMMARY OF THE ARGUMENT

Plaintiffs' entire theory of this case is that traditional state recognition of marriage between members of the opposite sex—which has been around for millenia—is nothing more than a manifestation of irrational animus against homosexuals. They declare that the rationales offered by the state for preserving in law the traditional form of marriage that has always existed in fact rest on “false premises or sheer bias” and is in their view an enforcement of “a perceived majoritarian desire to treat lesbian and gay Hoosiers as second class citizens.” (Pl. Mem. 5) Plaintiffs characterize the state’s arguments as “pretext,” “preposterous,” “a complete fiction,” “obvious gender stereotyping,” “resting on a foundation of naked bigotry” or as “desperate scare tactics” designed to “raise[] the specter of fear.” (Pl. Mem. 28, 30, 32, 38, 39) Finally, Plaintiffs assert that some of the state’s arguments “cast in sharp relief the negative animus which runs throughout the State’s brief.” (Pl. Mem. 31-32)

But while Plaintiffs attack traditional marriage as predicated (throughout all these millenia) on homophobic animus rather than legitimate social goals, they offer no coherent view of marriage that would extend to same-sex marriages but not to other intimate relationships. Why does the state recognize marriage at all? Why is two the magic number? Plaintiffs have no

¹ For ease of reference, this memorandum will refer to the Defendants and the Intervenor collectively as “the state” and will cite to Defendants’ and Intervenor’s earlier Memorandum in

coherent answer to these questions. They hope to succeed only by attacking the state's theories using vitriolic rhetoric.

The state, on the other hand, provides three alternative theories for marriage that justify excluding same-sex couples and larger groups from marital recognition and thereby render Section 31-11-1-1 invulnerable to Plaintiffs' attacks under Article 1, Sections 1, 12, and 23 of the Indiana Constitution. First, limiting state recognition of marriage to opposite-sex couples furthers the compelling government interest in promoting procreation in the optimal environment for child rearing. Such a limitation advances the state's objective of encouraging potentially procreative couples to marry, thereby providing stable homes and both male and female role models for society's children, and binding together the biological relationship that produces children. Second, state recognition of opposite-sex marriages fosters the state's preference for the traditional family model as the foundational unit for a free and ordered society. And finally, prohibition of same-sex marriage protects the sanctity of traditional marriage. Especially in light of the strong presumption of constitutionality that applies to Section 31-11-1-1, these justifications are more than sufficient to support the law.

Further, contrary to Plaintiffs' contention, Section 31-11-1-1 does not encroach upon any "core value" enshrined in Article 1, Section 1 of the Indiana Constitution. Section 1 analysis requires only a test for bare rationality—not the heightened scrutiny applicable in Section 9 cases—and permits government regulations tending to promote the peace, safety and well-being of Indiana citizens so long as the regulations bear a reasonable and substantial relationship to accomplishing their legislative purpose. *City of Indianapolis v. Clint's Wrecker Service, Inc.*,

Support of Defendants' Motion to Dismiss as "St. Mem." This memorandum will cite to Plaintiffs' Memorandum In Opposition To Motion to Dismiss as "Pl. Mem."

440 N.E.2d 737, 742 (Ind. Ct. App. 1982) (quoting *Crane Towing, Inc. v. Gorton*, 570 P.2d 428, 433 (Wash. 1977)). Section 31-11-1-1 is substantially related to the justifications outlined above. Plaintiffs' attempt to circumvent this rational basis analysis by asserting that the right to marry whomever one chooses is a "core value" protected by Section 1 must fail. The only core rights protected by the Indiana Constitution are those which originate from the express terms of the constitution or that may be implied therefrom. The Indiana Constitution does not protect the right to marry whomever one chooses, let alone the right to marry a member of the same sex.

It is equally clear that Section 31-11-1-1 does not violate Article 1, Section 12 of the Indiana Constitution. Section 12's substantive rights protection imposes at most a standard of bare rationality. Even if the substantive rights claimed by Plaintiffs exist, Section 31-11-1-1 passes muster under Section 12 as it is rationally related to legitimate state objectives.

Finally, the state's prohibition on same-sex marriage is valid under Article 1, Section 23 of the Indiana Constitution. As with challenges under Sections 1 and 12, there is no heightened scrutiny in the context of Section 23 challenges. Rather, the question is whether the distinction is "reasonably related to inherent characteristics which distinguish the unequally treated class." *Collins v. Day*, 644 N.E.2d 72, 89 (Ind. 1994). Here the inherent differences between same-sex and opposite-sex couples are directly tied to the justifications for Section 31-11-1-1.

Time and again, Plaintiffs ask the irrelevant question of how the state's interests are served by excluding same-sex couples from marriage. What has apparently never occurred to Plaintiffs, however, is that traditional marriage arose to vindicate social interests that have nothing to do with animus against same sex couples, but that also are not furthered by same-sex marriage. Marriage law does not exist to discriminate against homosexuals or same-sex couples. It exists for other entirely legitimate reasons that do not happen to include same-sex couples.

ARGUMENT

I. Three Alternative Justifications Shield Section 31-11-1-1 Against Attack Under Article 1, Sections 1, 12, And 23.

The state's opening memorandum outlined three alternative government interests that can justify Section 31-11-1-1 and render it invulnerable to Plaintiffs' constitutional attacks.

Plaintiffs' arguments in response have not negated these justifications, and no amount of social science evidence can help them.

A. Section 31-11-1-1 Vindicates the Compelling Government Interest in Promoting Procreation and Child Rearing in an Environment Where Both Biological Parents are Present.

First, as explained in detail in the state's opening memorandum, restricting state recognition of marriage to opposite-sex couples primarily promotes the compelling government goal of promoting procreation in the best environment for raising children. 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." Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J. L. & Pub. Pol'y 771, 789 (2001); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J. L. & Pol. 581, 593 (1999) ("The primary social function of marriage is rearing children.").

And, notwithstanding Plaintiffs' attempts to denigrate the thoughtfulness of those courts that disagree with their views, several courts in the United States have recognized this principle. *See, e.g., Singer v. Hara*, 11 Wash. App. 247, 259, 522 P.2d 1187, 1195 (1974), *reh'g denied* (stating 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"). The *Singer* opinion actually reflects a great deal of thought about this issue and even rebuts Plaintiffs' argument that, because not all marriages result in children, and because children can be raised by those who are not their parents, there is no reason to restrict marriage to opposite-sex unions:

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.

Other courts in the United States have also embraced this rationale. See *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982) ("state has a compelling interest in encouraging and fostering procreation of the race"); *Goodridge v. Department of Pub. Health*, 2002 WL 1299135, at *13 (Mass. Super. May 7, 2002), *appeal pending*, No. SJC-08860 (Mass) ("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."); *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") (Ferren, J., concurring and dissenting); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old

as the book of Genesis.”). By contrast, the best authority that Plaintiffs have to rely upon aside from the Vermont Supreme Court is a Superior Court of Justice of *Ontario*, which is not even a court of last resort. See Pl. Mem. 25-27 (citing *Halpern v. Attorney General of Canada*, 215 D.L.R. (4th) 233 (Sup. C.J. Div. Ct. 2002) and *Baker v. State*, 744 A.2d 864 (Vt. 1999)).

Plaintiffs argue that promoting procreation and child rearing is simply a pretext for Section 31-11-1-1 and is not the actual purpose behind the law. (Pl. Mem. 16) First, however, the tests for constitutionality under Article 1, sections 1, 12, and 23 simply do not permit courts to consider such arguments. There is no test asking what the “actual” purpose of a statute is, *i.e.*, what individual legislators actually had in mind when they voted for it, as distinguished from the conceivable justifications for a statute. As Plaintiffs’ own authority makes clear, the legitimate purposes upon which a legislative classification may be based are not limited to those set forth in the legislation itself; rather, they may include rationales and interests reasonably relied upon by the government during litigation. *Dvorak v. City of Bloomington*, 702 N.E.2d 1121, 1125 (Ind. Ct. App. 1998). Indeed, many statutes are not accompanied by statements of purpose, and there is no published legislative history for Indiana statutes. Thus, to inquire into the General Assembly’s *actual* purposes would impose a standard hardly any statute could pass.

It is therefore baseless for Plaintiffs to argue that the only justifications possible for any law pertaining to marriage are enshrined in Indiana Code Section 31-10-2-1. That statute addresses all of Title 31, is not directed specifically at Section 31-11-1-1, and in no way precludes other explanations for Section 31-11-1-1. There is no rule, constitutional or otherwise, holding that the General Assembly must pick one purpose as if it were one fixed star in the universe, and then conform all legislative enactments to it. Plaintiffs’ citations to *Sue Yee Lee v. Lafayette Home Hospital, Inc.*, 410 N.E.2d 1319 (Ind. Ct. App. 1980) and *Duda v. New Prairie*

United School Corp., 224 N.E.2d 327 (Ind. Ct. App. 1967), in this regard are highly misleading. Far from employing a doctrine that has any application to evaluating the constitutional justifications for a statute, those cases merely decided whether statutes applied to a given set of circumstances and engaged in the unremarkable task of discerning the legislature’s intentions in that regard. *See Sue Yee Lee*, 410 N.E.2d at 1324 (“this maxim is applied as an aid in the construction of statutes”) (emphasis added). But while the legislature’s actual intentions are obviously critical in the context of statutory construction and application, they are not critical when the inquiry is whether a statute has any rational justification. The import of the doctrine mentioned in *Dvorak* is that statutes may be upheld based on rational justifications that are first offered during litigation, regardless of what other statutes say and regardless of whether the General Assembly has expressed the justification for the statute as part of the statute itself.

In any event, even if Section 31-10-2-1 did establish the permissible range of purposes for Section 31-11-1-1, it supports, rather than undermines, the government’s justifications for Section 31-11-1-1. Section 31-10-2-1 states that the purpose of the family law title is to “recognize the importance of family and children in our society,” and to “recognize the responsibility of the state to enhance the viability of children and family in our society.” Ind. Code § 31-10-2-1 (1) & (2). That is exactly the government’s justification for Section 31-11-1-1. By promoting procreation and child rearing in the traditional family unit, Section 31-11-1-1 recognizes the importance of family and children in society and enhances the viability of Children and family in society. It is hard to imagine a more direct relationship between Section 31-10-2-1’s statement of purposes and Section 31-11-1-1.²

² Significantly, in *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. 2002), *cert. granted* 806 A.2d 1066 (Conn. 2002), the court concluded that a Vermont civil union—the same-sex

Plaintiffs also argue that promoting procreation cannot justify Section 31-11-1-1 because there was no concern about underpopulation when the General Assembly passed the law in 1997. This argument mischaracterizes the government’s position as well as ignores the overall context in which the General Assembly enacted Section 31-1-1-1. The government has never suggested that Section 31-11-1-1 was intended as a remedy for underpopulation, and indeed the relative level of population has nothing to do with Section 31-11-1-1. The state’s interest is not so much in ensuring that married couples procreate, but rather in encouraging potentially procreative couples to marry, providing stable homes and both male and female role models for society’s children. Thus, procreation is central to the government’s interest in marriage, but not necessarily linked to the population levels. Moreover, through laws which attach both benefits and responsibilities to traditional marriage, the state strengthens and reinforces the biological family structure, minimizing future need for administrative and judicial intervention through foster care, adoption, and other state aid.

Before the 1990s, there was no reason for the General Assembly, or the legislature of any other state, to be concerned with specifically limiting marriage to the context of opposite-sex couples. All marriages were between opposite-sex couples, so there was never reason to worry that society’s interests in promoting procreation and child rearing in the context of the traditional family unit could suddenly be threatened. Indeed, Indiana’s relative level of population up to that time arose in a context where all marriages were *in fact* between opposite-sex couples even if that circumstance were not clearly mandated or delineated by a state statute.³

alternative to marriage—was not even a “family relationship” and that Connecticut courts therefore had no jurisdiction to dissolve such civil unions.

³ Of course, there has been no assertion that same-sex couples were permitted to obtain marriage licenses before the General Assembly enacted Section 31-11-1-1 in 1997.

In 1993, however, the Hawaii Supreme Court decided that the Hawaii Constitution required recognition of same-sex marriages. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Suddenly, the prospect arose whereby other states without laws that specifically foreclosed recognition of same-sex marriages might have to recognize same-sex marriages solemnized in Hawaii by virtue of the national full faith and credit command. *See* U.S. Const. art. IV., § 1; 28 U.S.C. § 1738. To help protect against this eventuality, in 1996 Congress passed, and President Clinton signed, the Defense of Marriage Act (DOMA), which permits states to refuse to recognize same-sex marriages solemnized in other states. 28 U.S.C. § 1738C. Following the enactment of the DOMA, the Indiana General Assembly enacted Section 3-11-1-1 in 1997 in order to make it clear that Indiana did not recognize same-sex marriages and to guard against the possibility that the state might have to recognize same-sex marriages solemnized in other states.⁴

In this context, it is obvious that, when the General Assembly enacted Section 31-11-1-1, it was concerned with promoting procreation and child rearing within a specific context, namely a male/female family unit, which has always been the state's argument. (*See* St. Mem. 19-24) There was no need for such legislation before the 1990s because everyone understood marriage to mean opposite-sex unions only. Only when challenges to that accepted understanding appeared on the horizon was it necessary for the General Assembly to take action. Thus, contrary to Plaintiffs' suggestion concerning underpopulation, Section 31-11-1-1 is not remedial legislation designed to address some social problem that was already manifest or to change

⁴ Meanwhile, the citizens of Hawaii amended their state Constitution in 1998 in order to override the decision in *Baehr*. *See* Haw. Const. Art. I, § 23. The citizens of Hawaii have therefore reaffirmed that their state does not recognize same-sex marriages. However, in 1999, the Vermont Supreme Court held that Vermont had to afford same-sex couples some state recognition for their domestic partnerships, a decision that precipitated a new Vermont statute recognizing "civil unions," including those of Plaintiffs in this case. *See Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); 15 V.S.A. §§ 1201-1207.

society. Rather, it is prophylactic legislation designed to protect the social order that governed at the time of its enactment (which, for purposes of Plaintiffs' argument, is the social order that produced the relative level of population in 1997). This is a legitimate goal that has no relation whatever to the relative level of population. It would be legitimate even if by some objective measure Indiana were *over* populated.

Plaintiffs also miss the point when they argue that “[i]t simply defies logic to suggest that either lesbian and gay couples or heterosexual couples will bear more children if the former are excluded from civil marriage.” (Pl. Mem. 24) The Plaintiffs approach the issue from the wrong perspective. No one has argued that prohibiting same-sex marriages promotes procreation and child rearing. Rather, the state argues that recognizing opposite-sex marriages promotes procreation and child rearing in the best possible context, and that this justification does not exist for recognizing same-sex marriages.

The state's policies with respect to adoptions by same-sex and opposite-sex couples, or custody by divorced parents with same-sex domestic partners, are irrelevant here. Plaintiffs point to laws concerning these issues and conclude that “Indiana law in no way favors conception through sexual intercourse as the method for becoming a parent.” (Pl. Mem. 21) However, just because marriage law bestows recognition on opposite-sex couples, the only couples who have even a chance to procreate on their own, does not mean that the law must also burden adoptive or surrogate parenthood.⁵ In other words, while the General Assembly may

⁵ The Plaintiffs assert that the state's policy of subsidizing adoption, but not biological procreation, somehow expresses a preference for adoption over biological procreation. (Pl. Mem. 22) To put it mildly, this argument misses the point of subsidizing adoption, which is not to subsidize procreation, but to subsidize those who are willing to care for children when natural parents do not or cannot. Without such subsidies, the state might have to care for more abandoned children itself. The General Assembly has determined that there is no comparable

believe that while the traditional family context is the best environment for procreating and for raising children, it also may rationally understand that such arrangements do not always work and may provide for or permit other family arrangements. *Cf. Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (observing that issues in the same field of concern “may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.”). The General Assembly is allowed to prefer and recognize traditional opposite-sex marriages because those are the only environments that produce children without participation by outsiders and because it believes such environments to be the best for procreating and raising children. Nothing about adoption law or surrogate parenthood undermines the legitimacy of that preference.⁶ Again, the point is to encourage potentially procreative couples to marry and thereby prefer that context for procreation and child rearing, not to create a rigid construct that permits only one type of family unit.

In addition, the state’s recognition of opposite-sex marriages even where couples cannot or do not wish to procreate does not undermine the notion that marriage recognition exists to

need to subsidize procreation itself, whether it occurs within marriage or otherwise. Indeed, subsidizing procreation would very likely add to the cost of subsidizing adoptions.

⁶ *In Re the Adoption of M.M.G.C. et al.*, ___ N.E.2d ___, 2003 WL 1228087 (Ind. Ct. App. March 18, 2003), which permits a second-parent adoption by a member of a same-sex couple without terminating the first-parent’s rights, also has no bearing on this issue. Even if the General Assembly has written the adoption laws to accommodate two adoptive parents of the same sex, neither of which is a biological parent of the adopted child, that does not hamstring the General Assembly from recognizing opposite-sex marriage but not same-sex marriage as a means of promoting procreation and child rearing in a context where both natural parents will raise the child. Adoption law provides for when the state’s preferred model for procreation and child-rearing fails. “Alternate arrangements, such as adoption, arise not primarily in deference to the emotional needs or sexual choices of adults, but to meet the needs of children whose biological parents fail in their parenting role.” Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 788 (2002). Accordingly, there is no point in judging the validity of marriage laws against the backdrop of adoption laws.

promote procreation and child rearing in the traditional family context. It would obviously be a tremendous intrusion on individual privacy to inquire of every couple that wished to marry whether they could procreate or whether they intended to procreate. The state is not required to go to such extremes simply to prove that the purpose behind government recognition of marriage is to promote procreation and child rearing in the traditional family context. It suffices to observe that only members of the opposite sex have even a chance at procreating, so it is fair to limit marriage to opposite-sex unions as an initial matter, regardless whether there are further regulations of marriage among members of the opposite sex.

It is also irrelevant whether Indiana's historic fault-based divorce law permitted divorce based on a spouse's unwillingness or inability to procreate. While a justification for state recognition of marriage is to promote procreation and child rearing in the traditional family context, it is permissible for other social reasons for the state to enact high barriers to divorce that do not include inability or unwillingness to have children. And even at that, impotence, adultery, and abandonment were grounds for divorce. *See* former Ind. Code §31-1-12-3 (Burns Indiana Statutes, 1972). While these are obviously not perfect proxies for sterility or unwillingness to procreate, they and other grounds for divorce do suggest a legislative preference with ending marriage only where the attributes that make traditional families preferred environments for procreating and raising children cease to exist.

Plaintiffs also argue that same-sex couples may fulfill some of the policies that inform the state's family law provisions. It makes no difference for purposes of evaluating the justification for marriage recognition, however, whether same-sex couples may in fact provide adequate, even healthy and prosperous, environments for children they have adopted or produced through artificial means of reproduction. Plaintiffs' evidence and arguments concerning the suitability of

same-sex homes for child rearing, while perhaps relevant if the General Assembly were to try to prohibit same-sex couples from rearing children, does not negate the General Assembly's ability to recognize opposite-sex marriages because those are the only environments where couples may procreate on their own without participation by outsiders, or because it wishes to promote traditional families as the best context for procreating and raising children. Plaintiffs' evidence may be relevant to a political debate over whether the General Assembly should do as it has done, but this Court simply does not sit to revisit controversial political debates or to second-guess the General Assembly. This Court may only decide whether there was a conceivable rational basis for the General Assembly to do what it did. Given the fact that opposite-sex couples are the only couples that can procreate on their own, no amount of proof concerning the suitability of same-sex homes for raising children can undermine the rationality of Section 31-11-1-1.

Finally, it is simply not true that the "Supreme Court squarely rejected the proposition that excluding people from marriage is related to the State's interests concerning the conception of children . . ." (Pl. Mem. 24), or that such a proposition has anything to do with Section 31-11-1-1. Once again, of course, Plaintiffs address the wrong issue. The issue is not whether "excluding people from marriage" promotes procreation, but whether the state's interest in promoting procreation in the traditional family context justifies marriage between opposite-sex couples but not same-sex couples.

Further, the case on which Plaintiffs rely for this particular position, *Miller v. Morris*, 386 N.E.2d 1203, 1205 (Ind. 1979), actually underscores the validity of the state's point. *Miller* invalidated a prohibition on the ability of those who had not paid child support to engage in traditional opposite-sex marriages. *Miller* rejected the notion that such a regulation vindicates

government interests in responsible child rearing because, even if they could not marry, the couple that wished to marry likely would procreate on their own in any event. Thus, “preventing a contemplated marriage may only result in children being born out of wedlock.” *Id.* at 1205. The reference to wedlock, of course, was a reference to the only sort of wedlock Indiana has ever known *i.e.*, opposite-sex wedlock. The statute in *Miller* was invalid precisely because it eroded the state’s interest in promoting procreation in the context of a traditional family headed by an opposite-sex couple. The trouble with the statute in *Miller* was that opposite-sex couples can procreate on their own even if not married. The trouble for Plaintiffs here is that same-sex couples cannot procreate on their own, even if married. If anything, *Miller* held that promoting procreation in the traditional marital setting *is* the bedrock of Indiana marriage law.

B. Section 31-11-1-1 Vindicates the Government Interest in Promoting the Traditional Family as the Bedrock of Free Society

The state’s preference for the traditional family headed by members of the opposite sex is expressed throughout Indiana law, including adoption and parental rights laws. *See, e.g.*, Ind. Code § 31-10-2-1(6) (“It is the policy of this state . . . to . . . remove children from families only when it is in the child’s best interest or in the best interest of public safety.”) As our Supreme Court has pointed out, there is an “important and strong presumption that a child’s interests are best served by placement with the *natural parent[s]*.” *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002) (emphasis added). This presumption is so strong that it must be “clearly and convincingly overcome by evidence proving that the child’s best interests are substantially and significantly served by placement with another person.” *Id.* *See also Browder v. Harmeyer*, 453 N.E.2d 301, 308 (Ind. App. 1983) (holding that because “the right to family integrity is recognized in Indiana . . . a showing of unfitness is required before breaking up the *natural* family,” but not for terminating the parental rights of a non-biological parent). The law thus

generally prefers the traditional family as the bedrock for our free society, and the justification for doing so through the adoption and parental rights laws can also justify Section 31-11-1-1. Opposite-sex marriage makes possible the circumstance where opposite-sex couples not only produce children, but also then form natural families as the basic units of our free society. Same-sex marriage would not do the same.

Plaintiffs say this argument is a “thinly veiled implication . . . that a woman cannot develop commitment or responsibility without a man to guide her, and vice versa,” and that this amounts to “obvious gender stereotyping.” (Pl. Mem. 30) But if the state’s supposed stereotyping features a “vice-versa” dimension, as Plaintiffs state, what could the supposed gender stereotypes be? Of course, there is no stereotyping of either sex, and Plaintiffs’ “a woman needs a man like a fish needs a bicycle” (or a man so needs a woman) argument does not respond to the state’s actual position. The state is arguing that the General Assembly could reasonably conclude, based on the history of Western Civilization, that society benefits from having families headed by opposite-sex couples, and that therefore it should bestow government recognition on opposite-sex marriages. This is not the same as arguing that individual actualization of any sort is dependent upon one’s relationship with a member of the opposite sex, and it is not the same as arguing that “only opposite-sex couples are capable of developing the civic virtues which are the goal of marriage.” (Pl. Mem. 30) Indeed, the state has expressly disclaimed any such obviously erroneous argument. (St. Mem. 26-27) Plaintiffs cannot refute the history of Western Civilization that justifies the General Assembly’s preference for the traditional family, headed by members of the opposite sex, as the basic living unit in our free society.

C. Section 31-11-1-1 Protects the Sanctity of Traditional Marriages.

Finally, Section 31-11-1-1 protects traditional marriages by rejecting same-sex marriages as a departure from historical traditions of marriage. The General Assembly may have rationally believed that, by definition, members of the opposite sex are the only pairing that can properly enter into a state of “marriage.” Other state courts are in accord with this belief. *See Burns v. Burns*, 560 S.E.2d 47, 48-49 (Ga. Ct. App. 2002) (finding a same-sex “union” not the same as marriage); *Rosengarten v. Downes*, 802 A.2d 170, 175 (Conn. App. Ct.), *cert. granted*, 806 A.2d 1066 (Conn. 2002) (finding that a civil union is not a marriage recognized under Connecticut law because it was not entered into between a man and a woman). If so, it would undermine the meaningfulness and sanctity of opposite sex marriages to recognize same-sex marriages as well.

D. Defendants Have Not Posited a Coherent Alternative Theory for Marriage.

The only theories of marriage that Plaintiffs offer are incoherent and do not justify recognition for some intimate relationships but not others, such as polygamous relationships. Plaintiffs say that “marriage law is calculated to encourage long term, stable units. *** This is especially true for couples with children because children need stable care giving.” (Pl. Mem. 35) They say that “marriage law facilitates the sharing of economic lives.” And they say that “marriage laws enhance the emotional commitment the couples make which, in turn, contributes to the emotional well-being of the individuals involved.” (Pl. Mem. 36) Finally, they assert that “the imposition of legal responsibilities and duties encourages people to be concerned to the concerns and well being of others . . . thereby developing values important to sustaining democratic principles.” (Pl. Mem. 36)

First, of course, Section 31-11-1-1 is entitled to a strong presumption of constitutionality, and the issue in this case is whether the government can posit a legitimate theory of marriage that

excludes same-sex unions (which it has done), not whether Plaintiffs can posit a theory of marriage that would include same-sex unions. The choice of which theory to vindicate belongs to the General Assembly, not to Plaintiffs and not to courts. *See, e.g., Sweigart v. State*, 213 Ind. 157, 165, 12 N.E.2d 134, 138 (1937) (“The regulation of marriage and divorce has been fully recognized as a matter within the *exclusive* of the legislatures of the states”) (emphasis added).

But even aside from that, none of Plaintiffs’ theories of marriage contains a principle that would include members of the same sex but still limit marriage to *couples*. Each theory could be used to justify not only marriages between same-sex and opposite-sex couples, but also marriages with more than two partners. What would be the government objective vindicated by the recognition of marriages between same-sex couples and opposite-sex couples, but not larger groups? Plaintiffs do not say.

The state’s theories for marriage, by contrast, focus on the uniqueness of the male-female couple for purposes of procreating and rearing children and establishing the traditional building blocks of society, and thereby include an inherent limitation on the types of relationships deserving of state recognition as “marriage.” After all, “[m]arriage is not primarily a way of expressing approval for an infinite variety of human affectional or sexual ties; it consists, by definition, of isolating and preferring certain types of unions over others.” Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 781-82 (2002). If the state’s justifications are illegitimate, then there is nothing left to support the state’s interest in sanctioning marriage as a special relationship. All relationships would be on equal footing. “If marriage is just another word of an intimate union, then the state has no legitimate reason to insist that it even be intimate, unless the couple, or the quartet, want it so. For the

individual to be truly free to make unconstrained relationship choices, marriage itself must be deconstructed.” *Id.* at 779.

Plaintiffs look at the concept of state-sanctioned marriage and ask the wrong question. Rather than begin by asking, “why marriage?”, they see marriage in the abstract as involving only two people, but without historical context, and immediately ask “why not same-sex marriage?” Plaintiffs consider only the same-sex versus opposite sex issue, but not the couple versus group issue. This gap in their thinking necessarily leads Plaintiffs to an incoherent view of marriage generally. Indeed, Plaintiffs’ arguments against the state’s theories for marriage are really arguments against state recognition of marriage *in toto*, rather than arguments for why same-sex couples should be entitled to state marriage recognition. In the end, all Plaintiffs really understand is that opposite-sex couples have something that same-sex couples do not: state sanction and recognition. But they have no coherent theory as to why, if the state is to sanction marriage at all, this arrangement is unfair. The state’s theories, by contrast, provide a coherent justification for marriage generally as well as justify exclusion of same-sex couples from marital recognition.

II. Section 31-11-1-1 Does Not Violate Article 1, Section 1 Of The Indiana Constitution.

Plaintiffs contend that Section 31-11-1-1 impinges upon some “core value” enshrined in Article 1, Section 1 of the Indiana Constitution, and that the statute must therefore be evaluated under some heightened level of scrutiny. The Indiana Supreme Court, however, has never recognized any “core values” protected exclusively by Section 1 (as distinct from core values protected by other, more specific sections of the Indiana Bill of Rights) that are subject to any scrutiny higher than the test for bare rationality. And even if Section 1 does protect some rights

that may be regulated only where the government can pass some level of heightened scrutiny, no such right is at stake here.

A. The Heightened Scrutiny Applicable in Section 9 Cases Does Not Apply in Section 1 Cases.

Section 1 expressly states that, notwithstanding any protection it also provides, the General Assembly may act to advance “peace, safety, and well-being” of Indiana citizens. Ind. Const. Art. 1, § 1. Article 1 doctrine permits government regulations—even those that curb some individuals’ Section 1 rights—that reasonably achieve those ends. More precisely, the Indiana Court of Appeals has announced a two-part test that 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*, 440 N.E.2d 737, 742 (Ind. Ct. App. 1982) (quoting *Crane Towing, Inc. v. Gorton*, 570 P.2d 428, 433 (Wash. 1977)); *see also Department 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”).

Against this backdrop, the Indiana Supreme Court has *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 Holt*, 231 Ind. at 302, 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, order, safety, or welfare” (*Kirtley v. State*, 227 Ind. 175, 182, 84 N.E.2d 712, 715 (1949)). *See also Hanley v. State*, 234 Ind. 326, 334, 123 N.E.2d 452, 455 (1954) (observing that “[o]ur court has consistently held that the means used by the General Assembly to protect the public health,

morals, order, safety or welfare, must have some reasonable relation to the accomplishment of the end in view,” and collecting cases). In addition, cases *upholding* various laws against Section 1 challenges also have consistently employed a rational-basis test. *See, e.g., Albert v. Milk Control Bd.*, 210 Ind. 283, 290, 200 N.E. 688, 691 (1936) (“[W]hatever rights the individual has under article 1, § 1, the public has the right, through the Legislature, to regulate it for the benefit of the common interest of all . . .”); *Weisenberger v. State*, 202 Ind. 424, 175 N.E. 238, 241 (1931) (refusing to enjoin regulation affecting the manufacture of mattresses that “falls short of being arbitrary” and is “a reasonable exercise by the state of her police power”); *Levy v. State*, 161 Ind. 251, 68 N.E. 172, 175 (1903) (acknowledging that legislature may not act “arbitrarily” but ruling that “[t]hose who assail a statute . . . upon the ground that it is not a legitimate exercise of the police power must be able to show that the act, occupation, or thing prohibited or regulated is not injurious to the public, or likely to impair the public welfare”).

Thus, when Plaintiffs assert that Section 1 somehow protects various “rights,” including the “right to scalp tickets” and “drink liquor,” they rely on outdated law or mischaracterize the decisions that supposedly found such rights. *Beebe v. State*, 6 Ind. 501, 1855 WL 3616 (Ind. 1855), which Plaintiffs rely on for the idea that Section 1 protects certain core rights, including the right to drink liquor, was rejected and effectively overruled in *Schmitt v. F.W. Cook Brewing Co.*, 187 Ind. 623, 120 N.E. 19 (1918). *Schmitt* upheld prohibitions on liquor sales and said of *Beebe*, “it cannot be determined . . . on what principle the court was acting.” *Id.*, 120 N.E. at 21. Aside from *Herman v. State*, 8 Ind. 545, 1855 WL 3695 (Ind. 1855), which like *Beebe* found a right to consume liquor, and the result of which was also therefore undone by *Schmitt*, Plaintiffs’ remaining cases did not look into the constitutional mist and find various core rights; rather, they simply evaluated the challenged laws against a rational basis standard and conclude that the

statutes were arbitrary or unrelated to protecting the health, safety, and welfare of the community. See *Kirtley v. State*, 227 Ind. 175, 182, 84 N.E.2d 712, 715 (1949) (declaring that law against ticket scalping bears no relationship to the police power); *Department of Insurance v. Schoonover*, 225 Ind. 187, 193, 72 N.E.2d 747, 750 (1947) (holding that no relationship existed between insurance regulation and the police power). Indeed, *Matter of Lawrance* did not find or apply any constitutional rights at all. It simply interpreted the Health Care Consent Act in light of some guiding values of freedom that Section 1 reflects. *Matter of Lawrance*, 579 N.E.2d 32, 39 (Ind. 1991). It certainly did not say, for example, that the General Assembly was forbidden from excluding decisions to refuse life-saving medical treatment from the scope of the Health Care Consent Act.

Plaintiffs rely on *Whittington v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996), and *Price v. State*, 622 N.E.2d 954, 958-9 (Ind. 1993), for the proposition that the state must show that the impairment of a burdened “core value” protected by the constitution is slight or that the exercise of the right, if not so burdened, “threatens to inflict ‘particularized harm’ analogous to tortious injury on readily identifiable private interests.” (Pl. Mem. 14 (quoting *Whittington*)) But those cases employed more stringent scrutiny only where free speech rights that Article 1, Section 9 expressly protects were at stake (indeed, *Whittington* did not employ any scrutiny because no protected speech was threatened). Plaintiffs cite no cases where this Court has employed this test outside the Section 9 context.

Moreover, *Whittington* spoke generally about the structure of the Indiana Constitution and the role of Section 1 in determining the limits of state authority, stating 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.” *Whittington*, 669 N.E.2d at 1368. When

reviewing the state's use of the police power in light of Section 1, the Court "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)). Indeed, according to *Whittington*, except where a claimant shows that "the right to speak is implicated," this Court has "limited [itself] to the narrow role of determining whether challenged state action has some reasonable relation to or tendency to promote the state's legitimate interests." *Whittington*, 669 N.E.2d at 1369 (footnotes omitted).

The General Assembly's ability to act notwithstanding any general liberty protections of Section 1, therefore, is quite broad. This makes sense in light of Section 1's simultaneous provision for the legislature to protect the collective "peace, safety, and well-being." Robert Twomley observed long ago how weak the substantive protections of Section 1 really are:

It would appear, from the action of the constitutional convention of 1850, with reference to the first section of the Bill of Rights of 1816, and from the various court decisions since the changed section 1 was incorporated in the Bill of Rights of 1851, that the first part of section 1 is not a potent part of the constitution in the sense that its sections must be interpreted carefully and followed strictly, but is rather a general statement of a persuasive principle which should act as a guide post for the various functions of the government.

Robert Twomley, *The Indiana Bill of Rights*, 20 Ind. L.J. 211, 221 (1945).

Other provisions of the Bill of Rights may alter the balance between liberty and order such that the General Assembly's power narrows significantly when a more particular right, such as freedom of speech protected by Section 9, is at stake. But Plaintiffs do not rely on any more particular right than the amorphous individual freedoms mentioned in Section 1, so there is no basis for employing anything other than the most deferential review for rationality that the Indiana Supreme Court has always employed in such cases.

B. Article 1, Section 1 Does Not Enshrine the Right to Marry Whomever One May Choose, Let Alone Express a Core Constitutional Value that One May Marry a Member of the Same Sex.

Plaintiffs attempt to circumvent this rational basis analysis—and thereby place the burden of establishing the statute’s constitutionality on the state—by urging that the right to marry whomever one wishes is a “core constitutional value.” However, there is no provision in the Indiana Constitution—nor any right to be implied therefrom—that guarantees Hoosiers the ability to marry anyone they may choose. In fact, as our Supreme Court has long stated, “[t]he relations, duties, obligations, and consequences flowing from the marriage status are so vital alike to the individuals concerned, the issue therefrom, society and the state, that they are essentially subject to legislative control.” *Pry v. Pry*, 225 Ind. 458, 468, 75 N.E.2d 909, 913 (1947). Thus, “[t]here can be no doubt that the Legislature may prescribe who may marry; the age at which they may marry; the procedure and form essential to constitute marriage [and] the duties and obligations created by marriage” *Sweigart v. State*, 213 Ind. 157, 165, 12 N.E.2d 134, 138 (1938). Plaintiffs have failed to cite a single decision or constitutional provision to the contrary.⁷

Nor is there any basis for suddenly finding a right to marry whomever one wishes. Courts do not simply rummage around Article 1 searching for “core” rights that they might prefer. The only core rights that the Indiana Constitution protects are those expressly provided or that are necessarily implied by those express provisions. *See Price*, 622 N.E.2d at 959 n. 4

⁷ Plaintiffs cite *Troue v. Marker*, 252 N.E.2d 800, 803 (1969), for the proposition that the founders’ rejection of specific protection for “the unity and sacredness of the marriage relation” merely rejected protection for the “unity” concept of marriage wherein women lose their independent identities upon marriage. *Troue* does not expressly make that connection, but even if Plaintiffs are correct, the very desire of some convention delegates to seek specific protection for their view of marriage supports the state’s position that the Constitution otherwise does not render marriage impervious to regulation by the General Assembly.

(Ind. 1993) (fundamental rights are those which have their origins in the express terms of the constitution, implied from those terms or of such a quality that the founding generation would have considered it fundamental or natural). Therefore, unlike the political expression at issue in *Price*, the purported core value in this case—the right to marry whomever one wishes, including a member of the same sex—finds no home in the Indiana Constitution.

Plaintiffs claim that “[t]he fact that marriage between same-sex couples is a subject not contemplated by the framers of the Constitution or the legislators who enacted early marriage laws” is irrelevant. (Pl. Mem. 10 n.4) But they offer no guidance as to how to find new rights not so contemplated, or how finding a right to same-sex marriage can be justified while, for example, rights to engage in prostitution, to consume narcotics, or to gamble cannot be. The Indiana Supreme Court has recognized the mischief that such an unguided approach to constitutional interpretation can cause and has held that the search for rights ends at the text and history of the Constitution itself. *See, e.g., Price*, 622 N.E.2d at 959 n. 4 (“Confronted with § 1 claims, . . . we have examined 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.’”). And while *In re Leach*, 134 Ind. 665, 134 N.E. 641, 642 (1893), found no Constitutional or statutory rule prohibiting women from practicing law, that case simply represents the equal application of Section 1 freedoms to women and does not represent an effort to find a new substantive right in Section 1 regardless of text and history. *See id.*

In each successive complaint they have filed in this case, Plaintiffs have cast the right they seek to vindicate as having some relationship to notions of “privacy.” (*See, e.g.,* Second Amended Complaint, ¶ 42) In their memorandum, Plaintiffs do not embrace the term “privacy”

so directly, but they nonetheless cast their claim in terms of preventing state interference with private decision making. (*See, e.g.*, Pl. Mem. 6, 9)

However, Plaintiffs fail to come to grips with, and do not even try to refute, the point that what they seek is not privacy or protection from government interference, but the opposite: public recognition. This is not a challenge to a law that prohibits plaintiffs from cohabiting, that prohibits plaintiffs from making any particular decision or from engaging in any particular behavior, and it is not a challenge to government action that intrudes upon the sanctity of the home. Rather, it is a challenge to a government decision not to bestow official public sanction on Plaintiffs' preferred mode of living. Plaintiffs thus attempt to use Article 1's supposed protection of privacy not as a shield protecting them from government intrusion, but as a sword designed to secure government endorsement. But rights protected by Section 1 (and Section 12), or the "right to privacy," no matter what else they may entail, have always been understood as rights to keep government or others out, not as rights to government recognition. *See, e.g., Herman v. State*, 8 Ind. 545, 1855 WL 3695, at *8 (Oct. 30, 1855) (characterizing Section 1's protections as protections from government interference); *cf. Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.") (footnotes omitted).

Furthermore, Plaintiffs' attempt to bolster their argument by reference to marriage rights protected by the Fourteenth Amendment actually weakens their case. As the state mentioned in its opening brief (St. Mem. 32, n.5), whatever scope the Fourteenth Amendment's right to marry may have, it does *not* include the right to marry a member of the same sex. *Baker v. Nelson*, 191

N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). Again, when the Supreme Court dismisses an appeal for want of a substantial federal 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, 176 (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 . . .”). Thus, it is clear that there is no federal right to enter into a “same-sex marriage.” This is presumably why Plaintiffs have asserted no Fourteenth Amendment rights in this case. So, even if the Court were to follow Plaintiffs’ suggestion and draw upon Fourteenth Amendment doctrine for guidance here, the result remains the same: there is no right to marry a member of the same sex.

In addition, there is no basis for comparing the restrictions against same-sex marriage at issue here with the anti-miscegenation law invalidated in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). In fact, other courts have already rejected this analogy, even the Vermont Supreme Court, which ruled that the Vermont Constitution required some alternative to marriage for same-sex couples. *See Baker v. State*, 744 A.2d 864, 880 n.13, 887 (1999); *see also Nelson*, 191 N.W.2d at 187; *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974); *Goodridge v. Department of Pub. Health*, 2002 WL 1299135, at *10 n.22 (Mass. Super. May 7, 2002), *appeal pending*, No. SJC-08860 (Mass.).

Unlike anti-miscegenation laws, restrictions against same-sex marriage reinforce, rather than disrupt, the traditional understanding of marriage as a unique relationship between one

woman and one man. The appropriate context for contrasting these laws is this: “All one has to do is to look at any standard history of Western law, from Roman times to the present, to see that marriage has been understood to involve the union of a man and a woman.” David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. Pub. I. 201, 219-20 (1998); *see also Goodridge*, 2002 WL 1299135 at *9-11 (explaining that opposite-sex marriage, but not same-sex marriage, is deeply rooted in Massachusetts’ history and traditions). In other words, while marriage has always been defined by reference to male-female couples, it was defined by race only when some states introduced racial marriage restrictions as badges and incidents of slavery. “In this respect, Southern anti-miscegenation laws ran counter to the Western tradition of marriage law.” Coolidge, *Playing the Loving Card*, *supra* at 219. So when Virginia (and other states) prohibited interracial marriages in order to achieve opprobrious goals related to racial social engineering, they were interfering with a fundamental right that traditionally and definitionally had no relationship to the race of the participants.

Here, quite the opposite is true. Marriage traditionally and definitionally has had everything to do with the sex of each participant. Section 31-11-1-1 and similar laws simply enshrine that traditional definition and traditional understanding of marriage into statutory law. *See Singer*, 522 P.2d at 1191 (“The operative distinction [with *Loving*] lies in the relationship which is described by the term ‘marriage’ itself, and that relationship is the legal union of one man and one woman.”); *see also Goodridge*, 2002 WL 1299135 at *10 n. 22 (“By contrast, statutory restrictions on interracial marriage . . . did not have such deep historical roots.”). And while cases such as *Wiley v. Wiley*, 75 Ind. App. 456, 123 N.E. 252, 256 (1919), *overruled in part on other grounds*, *State v. Larue’s, Inc.*, 239 Ind. 56, 154 N.E.2d 708 (1958), may discuss other attributes of marriage, there can be no debating that such discussions were predicated on

the notion that each participant in the marriage was a member of the opposite sex. There was no reason for the court in *Wiley* to say something like “of course marriage is only between a man and a woman.” That was implicit and understood in 1919. Section 31-11-1-1, therefore, is merely a confirmation of the traditional right to marry, as understood in federal fundamental rights doctrine, not (unlike anti-miscegenation statutes) an interference with it.

Plaintiffs advert to *Loving* only by distorting its holding. *Loving* in no way held that the right to marry means the right to marry whomever one wishes. It merely held the obvious: that whatever else marriage is about, it is not about racial segregation. *See Loving*, 388 U.S. at 12; *see also Baker* 744 A.2d at 880 n. 13 (observing that in *Loving* “the high court had little difficulty in looking behind the superficial neutrality of Virginia’s anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy”); *Nelson*, 291 Minn. at 314, 191 N.W.2d at 187 (“Virginia’s anti-miscegenation statute . . . was invalidated solely on the grounds of its patent racial discrimination.”).

The only way to analogize same-sex marriage to the interracial marriages protected in *Loving* is to reduce marriage to nothing more than “state-sponsored intimacy.” *See Coolidge, Playing the Loving Card, supra* at 238. And, indeed, if marriage were nothing more than this, Plaintiffs might have a valid complaint for unequal treatment. But then so would polygamists, endogamists, and others who might desire state recognition for their “intimate relationships.”⁸ In

⁸ The fact that Virginia argued in *Loving* that invalidating antimiscegenation laws would lead to invalidating laws against polygamy, endogamy, and other laws prohibiting marriage does not undermine the validity of arguing that such laws would be vulnerable if same-sex marriage were found to be a constitutional right. *Loving* properly rejected (or ignored) such arguments for the same reason it properly invalidated anti-miscegenation laws: Marriage has nothing to do with race, so predicating the right to marry on the race of the participants is invidious discrimination. But that has nothing to do with other regulations of marriage that are legitimately related to the purpose of marriage: to promote procreation and child rearing in the context where both biological parents are around. And once courts invalidate one such legitimate restriction on the

fact, Plaintiffs do not deny that if same-sex couples have a fundamental right to marry under the Indiana Constitution, so do polygamists, endogamists, minors, the mentally incompetent, and others. They merely try to distinguish regulation of marriage among these groups on the basis that such regulation would prevent individual harm to the marriage participants that would inevitably occur, whereas prohibiting same-sex marriages does not similarly prevent harm to individuals. (Pl. Mem. 14-15) This implicit concession is necessary, but no less stunning. State prohibitions of polygamy and endogamy surely are not subject to heightened scrutiny whereby the State must prove at a trial the theory of some academician that such laws protect women (or men) from being devalued. But that is exactly the standard that Plaintiffs argue would apply if the Court agrees with their position. (*See* Pl. Mem. 15)

Marriage has never been defined as government recognition for just any intimate relationship, however; it has always been a unique community between a man and a woman. *See* Coolidge, *Playing the Loving Card*, *supra* at 238; *see also* *Baker*, 291 Minn. at 312, 191 N.W.2d at 186. Plaintiffs are simply wrong to assert that “[t]he state is interested in encouraging firm commitments made by two adults.” (Pl. Mem. 30) Marriage is not about taking any two adults and providing them some legal framework for binding themselves together. What would be the point? Marriage has historically been about promoting procreation and family. If marriage is subject to the sort of redefinition that would make an analogy to *Loving* appropriate, such redefinition must come at the hands of the General Assembly, not courts. *See Nelson*, 291 Minn. at 312, 191 N.W.2d at 186 (“This historic institution manifestly is more deeply founded than the

theory that marriage has no such purpose, nothing supports the other restrictions. As the state mentioned in its opening memorandum, even proponents of same sex marriage recognize this consequence. (St. Mem. 27)

asserted contemporary concept of marriage and societal interests for which petitioners contend. The . . . Fourteenth Amendment is not a charter for restructuring it by judicial legislation.”).

C. Section 31-11-1-1 Vindicates Compelling Government Goals in Promoting the Health, Safety and Welfare of Indiana Citizens.

Section 31-11-1-1 easily passes the Section 1 rational basis test. As argued in the state’s opening memorandum and in Part I, *supra*, the statute substantially vindicates several compelling government goals that “promote the health, peace, morals, education, good order and welfare of the people.” *City of Indianapolis v. Clint’s Wrecker Service*, 440 N.E.2d 737, 742 (Ind. Ct. App. 1982) (quoting *Crane Towing, Inc. v. Gorton*, 570 P.2d 428, 433 (Wash. 1977)).

Plaintiffs argue that Section 31-11-1-1 materially impinges upon a core constitutional value and therefore must either impact the core value only slightly or prevent the exercise of the constitutional right in a way that “threatens to inflict ‘particularized harm’ analogous to tortious injury on readily identifiable private interests.” (Pl. Mem. 14 (quoting *Whittington*, 669 N.E.2d at 1370 and *Price*, 622 N.E.2d at 960 n.7 and 964)) Even if Article 1 protects some rights in the sense that regulations affecting those rights must be subject to heightened scrutiny, and even if the right to engage in a same-sex marriage is one of those protected rights, however, the test from *Whittington* and *Price* cannot possibly be the proper test to apply. Those cases were both Article 1, Section 9 (free speech) cases, not Section 1 cases, and the Indiana Supreme Court has never applied that test to rights that are supposedly protected only by Section 1. Moreover, while that test may be useful in the specific context of protecting Section 9 rights because free speech either harms individuals in particular ways (such as through libelous statements) or not at all, it makes no sense to apply it to laws that seek a broader social goal.

It makes more sense to ask whether the government interest at stake is so important that it overrides the individual interest at stake. Though this Court need not and should not decide this

issue, Section 31-11-1-1 meets this test. The government's interests in promoting the traditional family unit as the best environment for procreation and child rearing and the best basic living unit in a free society are sufficiently compelling that they override Plaintiffs' interests in engaging in same-sex marriages.

III. Section 31-11-1-1 Does Not Violate Article 1, Section 12.

It is equally clear that Section 31-11-1-1 does not violate Article 1, Section 12. Our Supreme Court has stated that Section 12's substantive rights protection at most "imposes the requirement that legislation interfering with a right bear a rational relationship to a legitimate legislative goal *** [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." *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 976 (Ind. 2000). This standard is again one of bare rationality. For the reasons stated in Part I, *supra*, even if the substantive rights claimed by Plaintiffs exist, Section 31-11-1-1 is rationally related to legitimate state objectives of promoting procreation and child rearing in the context of the traditional family; 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 State v. Lombardo*, 738 N.E.2d 653, 655 (Ind. 2000). The law is therefore valid and Plaintiffs' complaint fails to state a claim on which relief may be granted.

Furthermore, while Plaintiffs urge that substantive claims under Section 12 should be treated like substantive claims under the Fourteenth Amendment (Pl. Mem. 10 n.5), the Indiana Supreme Court has never held that any substantive rights protected by Section 12 are entitled to heightened protection. In fact, *McIntosh* holds that *all* substantive rights Section 12 claims

merely prompt application of a rational basis test. *McIntosh*, 729 N.E.2d at 976. And Plaintiffs' embrace of the Fourteenth Amendment right to marry as providing the substance of the Section 12 right they seek to vindicate in this case utterly dooms their claim. As already explained, the United States Supreme Court has rejected, on the merits, a claim that the Fourteenth Amendment right to marry includes the right to engage in a same-sex marriage. *Nelson*, 191 N.W.2d at 187. The state's opening brief explained the meaning of this decision, and Plaintiffs have not even attempted to refute its significance in terms of foreclosing a federal right to engage in a same-sex marriage.

IV. Section 31-11-1-1 Is Valid Under Article 1, Section 23 Of The Indiana Constitution

Indiana law allowing certain opposite-sex couples the ability to marry while denying that opportunity to same-sex couples does not violate the equal privileges and immunities clause of the Indiana Constitution. At all times the challenged preference is cloaked in a presumption of constitutionality, and the challenger bears the burden "to negative every conceivable basis which might have supported the classification." *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). A "conceivable basis" is one in which the distinction is "reasonably related to inherent characteristics which distinguish the unequally treated classes." *Id.* The relevant "inherent characteristics" are those "inherent differences in situation related to the subject-matter of the legislation which require, necessitate, or make expedient different or exclusive legislation with respect to members of the class." *Id.* at 78. Furthermore, when they apply Section 23 analysis, "courts must accord considerable deference to the manner in which the legislature has balanced the competing interests involved." *Id.* at 79-80.

Here, Plaintiffs cannot negate the inherent distinctions between same-sex and opposite-sex couples that are related to the exclusion of same-sex couples from marriage. As explained in

more detail in the state's opening memorandum at 18-30 and in Part I, *supra*, these inherent distinctions include the impossibility of same-sex couples to produce offspring born of the union versus the possibility that opposite-sex couples may reproduce as husband and wife; the inability of a same-sex couple to provide both a male and female parent versus an opposite-sex couple's ability to provide that model; and the reality that a same-sex couple represents a departure from historical traditions of marriage in contrast to opposite-sex couples' firmly entrenched place in those traditions.

Plaintiffs' attempts to characterize the preferential treatment in this case as sex discrimination are far off the mark. Section 31-11-1-1 is sex neutral: It does not separate men and women as the discrete classes subject to purportedly unequal treatment. Instead, the statute states that a marriage is between one man and one woman and that marriage between "persons of the same gender is void." Ind. Code § 31-11-1-1. Thus, even the Vermont Supreme Court, which required some alternative to marriage for same-sex couples, determined that sexual discrimination analysis does not provide a "useful analytic framework" for determining whether same-sex couples have been denied the equal protection of the law. *Baker v. State*, 744 A.2d 864, 880 n. 13 (Vt. 1999); *see also Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974) ("There is no . . . sexual classification . . . because appellants are not being denied entry into the marriage relationship because of their sex . . ."). A claim of sex discrimination is no more plausible here.

Furthermore, notwithstanding Plaintiffs' wish for the contrary (Pl. Mem. 35 n. 17), the Indiana Supreme Court has made it crystal clear that there is no such thing as heightened scrutiny in the context of Section 23 challenges. *Collins* ruled that "[t]he protections assured by Section 23 apply fully, equally, and without diminution to prohibit grants of unequal privileges or

immunities” regardless of whether suspect classes or fundamental rights are involved. *Collins*, 644 N.E.2d at 80. In fact, “this Court has applied Section 23 to invalidate grants of privilege which were improperly gender-based without using a heightened level of scrutiny.” *Id.* Thus, the “multiple-level” system of analysis remains for Fourteenth Amendment claims, but not for Section 23 claims. *Id.* *Collins* forecloses Plaintiffs’ suggestion that this Court should apply some higher level of scrutiny analogous to the Fourteenth Amendment’s higher scrutiny of laws that discriminate on the basis of sex.

The question in this case is whether there are characteristics inherent to same-sex couples that are reasonably related to the purpose behind the prohibition of same-sex marriage. *Collins*, 644 N.E.2d at 78. These distinctions relate to the purposes of Section 3-11-1-1, *i.e.*, to encourage procreation between a male and female within the confines of a traditional opposite-sex marriage, to promote the traditional family as the foundation of free society, and to protect the sanctity of traditional marriage (explored in more detail in Def. Mem. 18-30 and in Part I, *supra*).

Plaintiffs also cannot dispute that all same-sex couples and all opposite-sex couples are treated the same under the State’s definition of marriage. While *Collins* requires that “any privileged classification must be open to any and all persons who share the inherent characteristics which distinguish and justify the classification,” *i.e.*, that “the preferential treatment must be uniformly applicable and equally available to all persons similarly situated” (*Collins*, 644 N.E.2d at 79, 80), this is not a demand that a legislative classification be perfectly narrowly tailored to vindicate the government’s purpose. *Id.* at 80 (“A classification having some reasonable basis is not to be condemned merely because it is not framed with such mathematical nicety as to include all within the reason of the classification and to exclude others.”) In fact, *Collins* reminds us that “only where the lines drawn appear arbitrary or

manifestly unreasonable” do courts even think about invalidating legislation under Section 23. *Id.* (quoting *Chaffin v. Nicosia*, 261 Ind. 698, 701, 310 N.E.2d 867, 869 (1974)).

In this vein, it does not matter that the state permits elderly opposite-sex couples, or other opposite-sex couples who cannot reproduce, to marry even though the main purpose of marriage is to encourage procreation and child rearing. The state is not required to screen opposite-sex couples for their interests in reproduction or their capacity to reproduce before granting them marriage licenses. The state is permitted generally to permit opposite sex couples to marry because they are the only types of couples that can reproduce. And because Section 31-11-1-1 does not discriminate among opposite-sex couples, all opposite-sex couples, *i.e.*, those who are similarly situated, are treated equally.

Plaintiffs once again miss the point when they contend that same-sex couples are similarly situated with opposite sex couples who cannot reproduce: Same-sex couples cannot reproduce on their own, end of story. Opposite sex couples at least theoretically can. These are inherent differences that justify Section 31-11-1-1, and all who share the inherent characteristics are treated the same. The legislature drew a line “based upon substantial distinctions with reference to the subject matter,” so its line-drawing is valid. *See Collins*, 644 N.E.2d at 78 (quoting *Chaffin*, 261 Ind. at 701, 310 N.E.2d at 869). Unless the state is required to achieve a perfect fit between its means and its ends (and it is not) (*id.* at 80), same-sex couples simply cannot be put into the same category with any opposite-sex couples. The fact that Plaintiffs may question the judgment of the General Assembly does not make Section 31-11-1-1 unconstitutional.

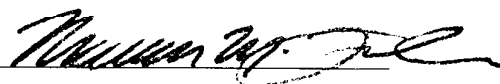
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In sum, Plaintiffs have failed to meet their burden to rebut the presumption of constitutionality afforded to Section 31-11-1-1. *See Lombardo*, 738 N.E.2d at 655. The law is therefore valid and Plaintiffs' complaint fails to state a claim on which relief may be granted.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the state's opening memorandum, this Court should dismiss the Second Amended Complaint.

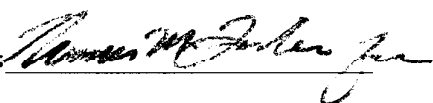
Respectfully submitted,

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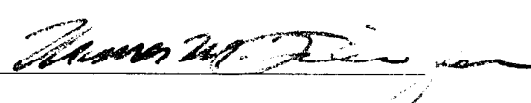
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Certificate of Service

I do hereby certify that on the 26th day of March, 2003, I caused the foregoing Reply Memorandum in Support of Motion to Dismiss to be served by hand delivery on the following:

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