

STATE OF INDIANA]
]
COUNTY OF MARION]

IN THE MARION SUPERIOR COURT
CIVIL DIVISION
CAUSE NO. 49D13-0211-PL-1946

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

Plaintiffs,]
]

vs]
]

DORIS ANN 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,]
]

Defendants.]
]

and]
]

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

Intervenor.]
]

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TO DEFENDANTS' MOTION TO DISMISS

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APPLICABLE STANDARD

This matter is before the Court on a motion to dismiss the Plaintiff's First Amended Complaint filed jointly by the Defendants and Intervenor (hereinafter collectively referred to as "the State").¹ A motion to dismiss pursuant to Indiana Trial Rule 12(b)(6) tests the legal sufficiency of the claim, not the facts supporting it. *Wilson v. Continental Casualty Company*, 778 N.E.2d 849, 850 (Ind.Ct.App. 2002) (citation omitted). The Court must view the pleadings in the light most favorable to the Plaintiffs, and must draw every reasonable inference in their favor. *Id.* The Court cannot grant a dismissal under Trial Rule 12(b)(6) "unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts." *Id.* In addition, as discussed more fully below, because the statute challenged in the Complaint infringes a core constitutional value, the burden is on the State to prove that the magnitude of the infringement is slight or that it is necessary to prevent particularized harm to readily identifiable private interests. *Whittington v. State*, 669 N.E.2d 1363 (Ind. 1996). Because the State cannot meet its burden, the motion to dismiss should be denied.

FACTS

The Plaintiffs in this action, three (3) same-sex couples in long-term, committed relationships, bring this action pursuant to the Uniform Declaratory Judgment Act (Indiana Code §34-14-1-1 *et seq.*) to challenge Indiana's discrimination in civil marriage. (First Amended

¹ Plaintiffs have filed contemporaneously herewith their Motion for Leave to File Second Amended Complaint. The Second Amended Complaint does not name Kenneth Miller, Commissioner of the Department of Revenue and does contain a claim for recognition of the Plaintiffs' Vermont civil unions. The remaining claims in Plaintiffs' Second Amended Complaint are that Indiana Code Section 31-11-1-1, prohibiting same-sex couples from entering into civil marriage, violates various provisions of the Indiana Constitution. Therefore, in this brief Plaintiffs address only the State's motion to dismiss these claims.

Complaint (“Compl.”) ¶1. They wish to enter into civil marriage to secure the protections and support which marriage provides and to formally accept the responsibilities marriage imposes. *Id.* Indiana Code Section 31-11-1-1 specifically prohibits marriage between persons of the same gender. The Plaintiffs seek a declaration that Indiana Code Section 31-11-1-1 violates the Indiana Constitution and they seek an injunction directing the Defendants to issue them marriage licenses. (Compl. ¶1).

Ms. Morrison and Ms. Stephens live in Indianapolis as spouses in a long-term, intimate, committed relationship. (Compl. ¶11). They share joint finances, including financial accounts. They share the expenses of their home and they have jointly purchased and jointly own various personal property. (Compl. ¶12). They consider themselves to be spouses and hold themselves out to their families, friends and community as spouses in a committed, loving relationship. (Compl. ¶13). Ms. Morrison and Ms. Stephens would marry one another in the State of Indiana if same-sex marriage was not prohibited. (Compl. ¶14). Except for the fact that they are of the same sex, Ms. Morrison and Ms. Stephens are legally qualified to marry one another under the laws of Indiana. Each is over the age of eighteen (18), each is mentally competent, they are not related to each other by blood and neither is married to anyone else. (Compl. ¶15). In order to formalize their commitment to one another and to acknowledge their desire to accept the full responsibilities of a spousal relationship, Ms. Morrison and Ms. Stephens established a civil union in the State of Vermont on October 30, 2000. (Compl. ¶16).

Mr. Wene and Mr. Squire have been a couple for more than four (4) years. They live in Indianapolis as spouses in a long-term, intimate, committed relationship. (Compl. ¶17). They share joint finances, including financial obligations and the expenses of their home. For a period

of approximately one year, Mr. Wene financially supported Mr. Squire so that Mr. Squire could serve as a full time volunteer at a church. (Compl. ¶18). They consider themselves to be spouses and hold themselves out to their families, friends and community as spouses in a committed, loving relationship. (Compl. ¶19). They would marry one another in the State of Indiana if same-sex marriage was not prohibited. (Compl. ¶20). Except for the fact that they are of the same sex, Mr. Wene and Mr. Squire are legally qualified to marry one another under the laws of Indiana. Each is over the age of eighteen (18), each is mentally competent, they are not related to each other by blood and neither is married to anyone else. (Compl. ¶21). In order to formalize their commitment to one another and to acknowledge their desire to accept the full responsibilities of a spousal relationship, Mr. Wene and Mr. Squire established a civil union in the State of Vermont on December 13, 2000. (Compl. ¶22).

Charlotte Egler and Dawn Egler have been a couple for more than five (5) years. They live in Camby, Indiana as spouses in a long-term, intimate, committed relationship. (Compl. ¶23). They own their home together and share joint expenses and joint finances, including financial accounts. They have jointly purchased and they jointly own various personal property (Compl. ¶24). Charlotte and Dawn consider themselves to be spouses and hold themselves out to their families, friends and community as spouses in a committed, loving relationship. (Compl. ¶25). They have decided to bear a child together and to raise that child as co-parents. Charlotte Egler gave birth to their child in May 2002. The child was conceived by the fertilization of Dawn Egler's egg through an anonymous sperm donor, which was then implanted in Charlotte Egler who carried the child to term. (Compl. ¶26). Charlotte and Dawn would marry one another in the State of Indiana if same-sex marriage was not prohibited. Except for the fact that they are of the

same sex, Charlotte Egler and Dawn Egler are legally qualified to marry one another under the laws of Indiana. Each is over the age of eighteen (18), each is mentally competent, they are not related to each other by blood and neither is married to anyone else. (Compl. ¶27). Like their co-Plaintiffs, Charlotte and Dawn established a civil union in the State of Vermont on July 5, 2000 in order to formalize their commitment to one another and to acknowledge their desire to accept the full responsibilities of a spousal relationship. (Compl. ¶28).

Pursuant to Indiana Code Section 31-11-1-1, only a female may marry a male and only a male may marry a female. The effect of I.C. §31-11-1-1 is to prevent the Plaintiffs from marrying solely because they are same-sex couples. (Compl. ¶30). Defendants Ms. Sadler and Ms. Dugan will not, and cannot, issue marriage licenses to the Plaintiff couples because they are same-sex couples. (Compl. ¶31). Because the State prohibits the Plaintiff couples from marrying one another and thereby prevents them from making the legal commitment to one another which marriage entails, the Plaintiffs suffer harm because they are denied the comprehensive legal structure for couples which is provided by marriage. (Compl. ¶32).

SUMMARY OF THE ARGUMENT

This case is about one of the most basic and fundamental human rights enjoyed by free people: the right to marry the person you love. Like thousands of couples across Indiana, the Plaintiffs have pledged themselves to the person with whom they wish to share their lives in committed, intimate relationships. They want to marry but the State forbids it solely because each of them happened to fall in love with someone of the same sex. The statute prohibiting these couples from marrying solely because of their sex is contrary to the mandates of the Indiana Constitution.

The principles enunciated in our Constitution provide broad protections for individual liberties. The freedom to choose the person whom you marry, one of the most personal and intimate decisions one can make, is a core value protected by the Constitution from unnecessary infringement by the State. As such, the State must demonstrate that its infringement is necessary to protect identifiable private interests from harm. The State can make no such showing.

Moreover, the excuses offered by the State to justify gender discrimination in marriage cannot withstand even minimal review. They rest on false premises or sheer bias. For example, Indiana cases and statutes clearly demonstrate that promoting procreation through sexual intercourse -- the State's identified interest -- is not a purpose of marriage law. Furthermore, enforcing a perceived majoritarian desire to treat lesbian and gay Hoosiers as second class citizens is not a legitimate state interest. The State's actual reasons for providing civil marriage are impeded, not furthered, by the gender restriction. Excluding same-sex couples from marriage is irrational and bears no reasonable relationship to any legitimate state interest. Consequently, the statute prohibiting same-sex couples from marrying violates the Indiana Constitution.

ARGUMENT

I. THE INDIANA CONSTITUTION PROTECTS THE RIGHT TO MARRY

A. The Structure of the Constitution Reflects a Strong Commitment to Individual Freedoms

The very first provision of the Indiana Bill of Rights declares that the liberty of Indiana's citizens is inalienable:

We declare, that all people are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and

instituted for their peace, safety and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.

Ind. Const., Art. I, §1.

The philosophy underlying the Constitution is that “individuals possess the ‘inalienable’ freedom to do as they will,” and they have delegated to government a degree of freedom in order to advance the peace, safety and well-being of the community. *Whittington v. State*, 669 N.E.2d 1363, 1368 (Ind. 1996). Under the structure of the Constitution the exercise of state power must be calculated to facilitate the enjoyment of individual rights. *Price v. State*, 622 N.E.2d 954, 959 (Ind. 1993). “The particular guarantees of liberty in the Indiana Bill of Rights are but concrete manifestations of the abstract limiting principle that state power may only be exercised to advance the peace, safety and well-being of Hoosiers.” *Whittington*, 669 N.E.2d at 1369, n. 6. Having been born individualism, the Constitution’s key values are “liberty, opportunity, vigor and privacy.” Prof. Patrick Baude, *Has The Indiana Constitution Found Its Epic?*, 69 Ind. L.J. 849, 853-854 (1994) (discussing the Indiana Supreme Court’s analysis of constitutional history in *Price v. State*, *supra*).

The whole of the Bill of Rights is a guarantee that government will not interfere unnecessarily with individual liberties and, indeed, will exercise its power to protect the inalienable rights of citizens. “Under our constitution, then, we all have some rights that have not been surrendered, which are consequently reserved, and which government cannot deprive us of unless we shall first forfeit them by our crimes; and to secure to us the enjoyment of those rights is the great aim and end of the constitution itself.” *Beebe v. State*, 6 Ind. 501, 1855 WL 3616, *6 (Ind. 1855).

The analysis of constitutional questions “is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it.” *Price*, 622 N.E.2d at 957. In deciding constitutional issues courts should bear in mind the command of our Supreme Court issued only three years after the drafting of our Constitution:

And over the people of this state hangs the shield of written constitutions, which are the supreme law, which our legislators are sworn to support, which grant a restricted legislative power, within which the legislators must limit their action for the public welfare, and whose barriers they cannot overleap under any pretext of supposed safety of the people; for along with our written constitutions we have a judiciary, created by them a co-ordinate department of the government, whose duty it is, as the appropriate means of securing to the people safety from legislative aggression, to annul all legislative action without the pale of those instruments.

Beebe, 1855 WL 3616, *4.

The Indiana statute which prohibits the plaintiffs from marrying solely because of their gender is “without the pale” of our Constitution and it therefore must be declared unconstitutional.

B. The Freedom to Choose One’s Marital Partner Is a Core Value Protected By the Indiana Constitution

The starting point for analyzing constitutional questions is the text of the relevant provision, illuminated by history and by the purpose and structure of the Constitution. *Price*, 622 N.E.2d at 957. Each provision of the Bill of Rights contains core values “which the legislature may qualify but not alienate.” 622 N.E.2d at 960. To determine the core values embodied in a particular guarantee we look to the history of Indiana’s constitutional scheme and the guarantee’s purpose. 622 N.E.2d at 961.

The Constitution protects personal decisions in matters of basic human dignity. The core

value embodied in Art. I, §1 is the right of every individual “to manage one’s own life” – “the right to walk abroad and look upon the brightness of the sun at noon-day[.]” *In the Matter of Lawrence*, 579 N.E. 2d 32, 39 and n.3 (Ind. 1991) (quoting 1 *Debates in Indiana Convention* 968 (1850)). The inalienable right of liberty and happiness protected by Article I, §1 includes such diverse rights as the right to scalp tickets (*Kirtley v. State*, 84 N.E.2d 712 (Ind. 1949)), the right to sell insurance while receiving a salary rather than a commission (*Dept. of Insurance v. Schoonover*, 72 N.E.2d 747 (Ind. 1947)), the right to manufacture and sell liquor (*Beebe v. State*, 6 Ind. 501, 1855 WL 3616 (Ind. 1855)), the right to drink liquor (*Herman v. State*, 8 Ind. 545, 1855 WL 3695 (Ind. 1855)), and the right to refuse life sustaining medical treatment, including artificial feeding and hydration (*In the Matter of Lawrence*, 579 N.E.2d 32 (Ind. 1991)).

In *Herman v. State* our Supreme Court declared that Art. I, §1 protects the right of people to drink liquor in words particularly applicable to this case:

If the constitution does not secure this right to the people, it secures nothing of value. If the people are subject to be controlled by the legislature in the matter of their beverages, so they are as to their articles of dress, and in their hours of sleeping and waking. And if the people are incompetent to select their own beverages, they are also incompetent to determine anything in relation to their living, and should be placed at once in a state of pupilage to a set of government sumptuary officers; eulogies upon the dignity of human nature should cease; and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish. If the government can prohibit any practice it pleases, it can prohibit the drinking of cold water.

1855 WL 3695, *8. Distilled to their essence, these cases reflect that Art. I, §1 zealously guards the right of individual autonomy and self-determination in matters of basic human dignity.

The freedom to marry the person you love and with whom you want to share your life is

central to any reasonable concept of basic human dignity.² The Plaintiffs in this case want to marry for the same reasons other couples want to marry. Their desire to marry is rooted in love and devotion. They seek to formalize and legalize their enduring commitments to share life's journey. In this respect they are indistinguishable from the thousands of couples who marry in Indiana each year. These intangibles are recognized in Indiana as being the heart of marriage:

An ethical marriage is pre-eminently psychical. It is the union of two lives in mutual esteem, confidence, and love. "While it is in some degree of the head, it is primarily and chiefly of the heart," and the ceremonial solemnization, in accordance with the requirements of the state, is "the legal band around affections assumed to be already united."

* * *

[Marriage] is the foundation of the home and the origin of those family ties without which we would cease to be human. It is the source of those motives which prompt us to provide care and comfort for childhood and old age, and to plan and toil and sacrifice for the welfare of future generations. Throughout the ages it has fostered the development of those qualities of head and heart which give us all there is of worth in life.

Wiley v. Wiley, 123 N.E. 252, 256 (Ind. Ct. App. 1919), *overruled in part on other grounds, State v. Larue's, Inc.*, 154 N.E.2d 708 (Ind. 1958) (internal citations omitted).

The right to choose the person you marry free from unnecessary interference by the State, a matter of basic human dignity, certainly falls within the constitutional protections afforded

² The State's argument that the framers intended no constitutional protection for marital choice because they refused to include the ancient concept of "unity" of marriage in the Constitution is unavailing. The unity concept of marriage meant that a women, upon marriage, lost their legal identity. *See, Trone v. Marker*, 252 N.E.2d 800, 803 (Ind. 1969). Far from allowing the majority to discriminate against minorities at will, refusing to enshrine second-class status for women as a constitutional value set the stage for future changes to the rights of women and the institution of marriage.

individual autonomy and self-determination in such matters.³ Article I, §1 protects the freedom of citizens to choose an occupation, to choose to drink beer and to choose to reject life sustaining medical care. Surely no reasonable person can deny that it protects the freedom to choose to enter into the one relationship which “[t]hroughout the ages ... has fostered the development of those qualities of head and heart which give us all there is of worth in life.” *Id.*⁴

C. The Considerable Deference Shown the Freedom to Marry Under the Federal Constitution Further Demonstrates That This Freedom Is a Core Value Entitled to Protection Under the Indiana Constitution⁵

“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (prohibition of interracial marriage violates the due process clause of the 14th Amendment). The Constitution protects individuals from unwarranted state interference with “personal decisions relating to marriage, procreation, contraception, family relationships, child

³ The Plaintiffs do not dispute that the State can impose reasonable regulations which do not significantly interfere with the decision to marry.

⁴ The 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 “cannot prevail as against their right to do so independently of either.” *In Re Leach*, 34 N.E.2d 641, 642 (Ind. 1893) (fact that framers and legislators did not contemplate a condition of society when women would want to practice law does not justify excluding them from the practice). This is consistent with the position of the framers who, when debating Art. I, §1, recognized that inherent rights belong to everyone even if they were not presently recognized at the time the Constitution was formed and that not being allowed to exercise natural rights is not the same as not having those rights. 1 Debates In Indiana Convention 964, 967 (1850).

⁵ The U.S. Supreme Court’s decisions concerning the constitutional freedom to marry, which is protected by the Due Process Clause of the 14th Amendment, are especially useful in determining the liberties protected by Art. I, §12 of the Indiana Constitution because the substantive component of Indiana’s provision “is analogous to federal substantive due process.” *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 976 (Ind. 2000).

rearing and education.” *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). To allow unwarranted governmental interference in such matters would violate very basic principles of human dignity:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. The freedom to marry, with its deep attachments and commitments essential for human dignity, is inherent in the core concept of liberty protected by the Constitution.

Decisions following *Loving* “confirm that the right to marry is of fundamental importance for all individuals.” *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added) (striking down statute which prohibited individuals who owed child support from marrying); *see also*, *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating regulation which prohibited inmates from marrying). In other words, the Supreme Court “has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974). As the Supreme Court of California recognized in striking down its miscegenation statute 20 years before *Loving*, “the right to marry is the right to join in marriage with the person of one's choice” and it is “as fundamental as the right to send one's child to a particular school or the right to have offspring.” *Perez v. Sharp*, 198 N.E.2d 17, 19 (Cal. 1948).

In the face of such clear expressions that the federal Constitution protects the freedom to

choose a marital partner free from unwarranted state intrusion, the State attempts to re-cast the question to compel its desired answer. The State begs the question when it argues that even if marriage is a fundamental constitutional right, same-sex marriage is not because such marriages are not part of the country's history. This clever attempt to redefine the fundamental rights question is contrary to the Supreme Court's approach. The freedoms protected from state interference by substantive due process are not defined so narrowly:

It is also tempting ... to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*.

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.

Casey, 505 at 847-848 (citations omitted).

More importantly, in its marriage cases the Supreme Court never defined the freedom to marry at the most specific level identifiable within the context of the case. At the time the Court decided *Loving*, interracial marriage certainly could not have been said to be rooted in the history and traditions of the country. In 1967, sixteen states prohibited interracial marriage and another fourteen states had just repealed their miscegenation statutes in the preceding fifteen years.

Loving, 388 U.S. at 4, n.5. As the Court later noted in *Casey*, interracial marriage bans had a

widespread and long-standing history. *Casey*, 505 at 847-848 (“interracial marriage was illegal in most states in the 19th century”). Similarly, in *Zablocki* and *Turner* the Court did not first inquire whether the right of deadbeat dads to marry or of prisoners to marry was rooted in the nation’s history and traditions.

Rather, in each of these cases the Court began with the proposition that the freedom to marry the person of one’s choice is a fundamental right. The Court then considered whether the state’s interference with this fundamental right was justified by sufficient reason. The specific types of marriage at issue (interracial, deadbeat dads and prisoners) were relevant only at this second level when the Court determined whether the lines drawn by the state were sufficiently justified. Thus, a history of discrimination against same-sex couples may explain why they are excluded from marriage but it does not justify the exclusion.

The freedom to marry is a core value protected by both the U.S. and Indiana Constitutions. The question for this Court is whether the State can sustain its burden of proving that excluding the Plaintiffs from marriage solely because of their gender is sufficiently justified. As explained below, because the State’s discrimination materially burdens core constitutional values and no legitimate state purpose is served by excluding the Plaintiff couples from marriage, the exclusion violates the Indiana Constitution.

II. THE STATUTE PROHIBITING SAME-SEX COUPLES FROM MARRYING VIOLATES ARTICLE I, SECTIONS 1 and 12 OF THE INDIANA CONSTITUTION

A. The Marriage Prohibition Materially Burdens a Core Value

The core values embodied in the provisions of the Indiana Bill of Rights may be qualified by the legislature but cannot be alienated. *Price*, 622 N.E.2d at 960. Once a plaintiff establishes

that a core constitutional value is implicated, the State must prove that its action does not materially burden the core value. *Whittington v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996). The State must demonstrate “either the ‘magnitude of the impairment’ is slight or [exercise of the constitutional right] threatens to inflict ‘particularized harm’ analogous to tortious injury on readily identifiable private interests.” *Id.*, citing *Price*, 622 N.E.2d at 960 n.7 and 964.

The statute prohibiting same-sex couples from marrying materially burdens core values inherent in the constitutional right to liberty and happiness. As discussed above, the freedom to marry the person of one’s choice is an essential human right which finds shelter in Art. I, §§ 1 and 12. The magnitude of the impairment caused by the State’s marriage prohibition certainly is not slight and the State does not claim otherwise. The Plaintiffs are absolutely prohibited from choosing to marry the person to whom they have committed their lives, one of the most intimate, personal choices an individual can make. The damage to their personal dignity and autonomy is of a magnitude far greater than most can imagine.

Moreover, preventing the Plaintiff couples from marrying solely because of their gender is not necessary to prevent harm to any identifiable individual. Indeed, the State suggests no such individualized harm in its motion to dismiss and, instead, relies on the same “public nuisance” kind of argument rejected by our Supreme Court in *Price*. See, 622 N.E.2d at 963-964. Clearly the Plaintiffs will benefit by marrying one another and accepting the benefits and responsibilities of marriage. Certainly Dawn and Charlotte’s son will benefit if his parents are allowed to marry.

In contrast to the gender restriction, the State’s other restrictions on the freedom of marital choice are designed to prevent harm to particularized individuals. Preventing close relatives from marrying is necessary to protect the individuals involved. Such marriages are

prohibited because they “would inevitably confuse parental and filial duties and affections...” *State v. Tucker*, 93 N.E. 3 (Ind. 1910). Prohibiting the underage or mentally incompetent from marrying protects the individuals involved as they are legally incapable of understanding the nature of their consent. *See, e.g. Wiley v. Wiley, supra.* (where one of the parties is insane there can be no mutual consent and therefore no marriage). Similarly, prohibiting polygamous marriage protects the individuals involved from the negative consequences of a diluted ability to meet the emotional and financial responsibilities of marriage and, perhaps more importantly, from the inequality inherent in such marriages. *See, e.g., Teresa S. Collett, Marriage, Family and the Positive Law*, 10 Notre Dame J.L. Ethics & Pub. Pol’y 467, 475 (1996) (polygamous marriages have an inherent inequality which results in the devaluing of women).

For the Plaintiffs, the constitutional freedom to marry is rendered meaningless by the State’s gender prohibition. The magnitude of the impairment is substantial and the State has not demonstrated that its interference is necessary to protect any readily identifiable individual. The State’s motion to dismiss must be denied.

B. The Marriage Prohibition Does Not Bear a Substantial Relationship to Any Governmental Interest in Promoting Procreation

Even if the statutory prohibition of same-sex marriage did not materially burden a core value protected by the Constitution, it must nonetheless bear “a reasonable and substantial relation to accomplishing” a legitimate government interest. *City of Indianapolis v. Clmt’s Wrecker Service, Inc.*, 440 N.E.2d 737, 742 (Ind.Ct.App. 1982). When the rationale maintained by the State is “fanciful and cannot be established” it will not justify an infringement of the right to life, liberty and the pursuit of happiness. *Dept. of Insurance v. Schoonover*, 72 N.E.2d 187, 193 (Ind.

1947) (striking down statute which prohibited the licensing of insurance agents who were paid salaries rather than commissions as violating Art. 1, Sec. 1). “The rights guaranteed by Art. I, §1, are cherished rights and not to be surrendered lightly.” 72 N.E.2d at 194. None of the justifications claimed by the defendants in this case survive even minimal scrutiny.

1. Promoting procreation is not the purpose of Indiana marriage law.

Promoting procreation clearly is not a purpose of Indiana’s marriage law. The State’s discrimination against the Plaintiffs cannot further such a “purpose” because it is pretextual. The defendants point to no statutory or logical support for the proposition that in 1986, when it passed the statute prohibiting same-sex marriages, the General Assembly considered under-population to be such a problem in Indiana that it needed to prohibit committed same-sex couples from marrying in order to promote procreation. Indeed, despite the many Indiana cases discussing the importance of marriage and describing the State’s interests in marriage, the defendants do not, and cannot, cite to a single Indiana decision which holds that the State regulates civil marriage in order to promote procreation. Even if encouraging a population increase were a sufficiently legitimate governmental interest to justify discrimination against citizens because of their sex, excluding same-sex couples from marriage bears no reasonable relationship to raising the State’s census numbers. Prohibiting gay and lesbian couples from marrying does nothing to increase the number of children they bear, nor does it increase the likelihood that heterosexual couples will have more children.

Moreover, if a couple’s inability to procreate through sexual intercourse is all that is necessary to justify the State in prohibiting that couple from marrying, the State can prohibit the elderly and couples with sterile men or infertile women from marrying. “The very extent to which

a concession of the power in this case would carry its exercise, shows it cannot exist.” *Herman*, 1855 WL 3695, *8.

Beyond the fact that the State’s procreation defense is patently illogical on its face, Indiana statutes and case law relating to marriage, divorce and annulment demonstrate that promoting procreation is not, and has never been, central to the State’s interest in marriage. The General Assembly has expressly declared the policy and purpose of Indiana’s laws governing marriage, divorce and family matters and its express declaration does not include the promotion of procreation. I.C. §31-10-2-1.⁶ Indiana courts have long applied the maxim *expressio unius est*

⁶ I.C. §31-10-2-1 provides.

It is the policy of this state and the purpose of this title [Title 31: Family Law and Juvenile Law] to:

- (1) recognize the importance of family and children in our society;
- (2) recognize the responsibility of the state to enhance the viability of children and family in our society;
- (3) acknowledge the responsibility each person owes to the other;
- (4) strengthen family life by assisting parents to fulfill their parental obligations;
- (5) ensure that children within the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation;
- (6) remove children from families only when it is in the child’s best interest or in the best interest of public safety;
- (7) provide for adoption as a viable permanency plan for children who are adjudicated children in need of services;
- (8) provide a juvenile justice system that protects the public by enforcing the legal obligations that children have to society and society has to children;
- (9) use diversionary programs when appropriate;
- (10) provide a judicial procedure that:
 - (A) ensures fair hearings;
 - (B) recognizes and enforces the legal rights of children and their parents; and
 - (C) recognizes and enforces the accountability of children and parents;
- (11) promote public safety and individual accountability by the imposition of appropriate sanctions; and
- (12) provide a continuum of services developed in a cooperative effort by local governments and the state.

exclusio alterius. “[W]hen the legislature specifies only certain factors or matters in a statute, by implication, other facts, or things not so specified, are excluded.” *Sue Yee Lee v. Lafayette Memorial Hospital*, 410 N.E.2d 1319, 1324 (Ind Ct App 1980), *citing*, *Duda v. New Prairie United School Corp.*, 224 N.E.2d 327 (Ind.Ct.App.1967). This maxim is particularly applicable in determining legislative intent. *Id.* Thus, the legislature’s decision to not include the promotion of procreation in its specific list of purposes for Indiana’s marriage laws necessarily excludes this alleged purpose as the intended goal of marriage law.

The fact that procreation is *not* a purpose of civil marriage law in Indiana is also made obvious by the whole of the statutory scheme governing marriage. Article 11 of Title 31, the general statutes governing marriage, does not contain a single reference to procreation as either the purpose of marriage or a prerequisite to marriage. No couples seeking to marry are required to show that they are able to have children or intend to have children in order to obtain a marriage license. Post-menopausal women, sterile men, the impotent and the elderly are not denied access to civil marriage even though they are unable to procreate.

In addition to the fact that procreation is not a requirement to enter into civil marriage, one’s inability or unwillingness to procreate has never been a basis for ending a marriage through annulment or fault-based divorce. In Indiana marriages historically have been void if they were bigamous, if the parties were closely related, if one of the parties was mentally incompetent at the time of the marriage and, after 1957, if it was a common law marriage. *See*, I.C. §31-11-8-1 *et seq.* Marriages were voidable through annulment at the request of the aggrieved party if the party was underage at the time of the marriage or if the marriage was procured by fraud. *See*, I.C. 31-11-9-1 *et seq.* Indiana statutes simply did not provide for the voiding of marriages between

persons unable or unwilling to procreate. Marriages which could not or did not produce children were neither void *ab initio* nor voidable at the insistence of an aggrieved party.

The history of fault-based divorce law in Indiana similarly provided no basis for terminating a marriage because the parties were unable or unwilling to procreate. Historically divorce could be granted only for limited causes including adultery, impotency existing at the time of marriage⁷, abandonment for two (2) years, cruel and inhuman treatment, habitual drunkenness or either party, the failure of a husband to provide for his family, post-marriage conviction of an infamous crime or incurable insanity after five (5) years of being institutionalized. *See e.g.* former I.C. §31-1-12-3 (Burns Indiana Statutes, 1972).

Thus, under the clear terms of Indiana's historical fault-based divorce regime, the inability or unwillingness to procreate was not sufficient cause to terminate a marriage. Moreover, Indiana courts, following the "great weight of authority" in other jurisdictions, refused to construe the limited statutory causes for divorce to include a party's unwillingness to engage in sexual intercourse or unwillingness to procreate. *Foster v. Foster*, 138 N.E.2d 360 (Ind.Ct.App. 1923). In *Foster* the Court of Appeals affirmed the trial court's refusal to grant a divorce where the husband claimed "cruel and inhuman treatment" under the statute because the wife refused to have sexual relations with him and refused to have children by him. *Id.*

As with the rules governing entering into and exiting from marriage, one's ability or willingness to procreate similarly plays no role in the duties, rights and responsibilities which attach to the marital relationship. The statutory benefits and responsibilities of marriage, both

⁷ "Impotence," which is the "organic, mental or functional inability to perform an act of sexual intercourse" is different than "sterility" which is the inability to procreate. *Whitman v. Whitman*, 215 N.E.2d 689, 690 (Ind.Ct.App. 1966).

tangible and intangible, are granted to married couples without regard to whether they are able or willing to have children. All married persons, fertile or infertile, parents or not, have the right of spousal privilege and confidential communications (I.C. § 34-46-3-1); the extension of attorney-client privilege, clergy privilege and physician-patient privilege to the spouse of the person whose communications are privileged (I.C. § 34-46-3-2); the right to make health care decisions for a spouse who is unable to do so for himself or herself (I.C. §16-36-1-5); the right of the surviving spouse to direct the disposition of the deceased spouse's remains (I.C. §23-14-55-2); the duty of spousal support (I.C. §35-46-1-6); intestate inheritance rights (I.C. §29-1-2-1); inheritance tax benefits (I.C. §6-4.1-3-7); wrongful death benefits (I.C. §34-23-1-1); various retirement and survivor benefits, including firefighter's pension (I.C. §36-8-7-12.2) and worker's compensation benefits (I.C. §22-3-3-19).

Indiana's statutes and case law lead to the inescapable conclusion that promoting procreation is not the purpose of civil marriage. If promoting procreation were the purpose of marriage, the General Assembly would have included it in the detailed recitation of its specific purposes for marriage law. It did not. If promoting procreation were the purpose of marriage, concern with the procreative ability and intent of couples wishing to enter marriage or to exit marriage would be reflected in the statutes or case law governing marriage and the conditions under which marriages may be annulled or dissolved. No such concern exists. If promoting procreation were the purpose of marriage, the legislature, in providing the statutory duties and benefits attendant to marriage, would have distinguished between married persons willing and able to procreate and those unable or unwilling to procreate. Instead the legislature provided identical responsibilities and benefits to all married couples whether they procreate or not.

As a gloss on its procreation defense, the State posits that excluding same-sex couples from marriage is justified by its preference for biological parents. This proposition would no doubt shock and offend the innumerable Indiana citizens who have become parents through adoption or through the use of reproductive technology, if it were not such a transparent, and wholly unsupportable, attempt to rationalize invidious discrimination. Indiana law in no way favors conception through sexual intercourse as the method for becoming a parent. All children are afforded the same rights and protections and all parents are subject to the same duties and responsibilities regardless of whether the children were conceived through intercourse or reproductive technology or whether they were adopted.

Our courts have acknowledged the use of reproductive technology to conceive children and have declared in no uncertain terms that the parents of such children are subject to the same responsibilities as biological parents. *Levin v. Levin*, 626 N.E.2d 527 (Ind.Ct.App. 1993), *summarily aff'd. with opinion*, 645 N.E.2d 601 (Ind. 1994). The General Assembly encourages the birth of children through reproductive technology by leaving the field virtually unregulated, thereby allowing unfettered access to the technology.⁸ The law simply shows no favor to those parents (or their children) who procreate through sexual intercourse over those who use reproductive technology.

Moreover, Indiana's adoption law explicitly provides that adoptive parents "occupy the same position toward the child" as if they were the child's biological parents. I.C. §31-19-15-2(b)(1); *see also, In Re C.W.*, 723 N.E.2d 956, 963 (Ind.Ct.App. 2000) ("An adoption 'severs the

⁸ Limited record keeping and testing requirements are imposed on those practitioners who receive or implant semen for donor insemination. I.C. §16-41-14-1 *et seq.* Otherwise, the use of reproductive technology in Indiana is unregulated.

child entirely from its own family tree and engrafts it upon that of another.”). In fact, in some circumstances the State favors adoptive parents over those who procreate through intercourse by paying financial subsidies to adoptive parents to help pay the costs of the child’s general support and health care expenses. I.C. §31-19-26-1 *et seq.* In contrast, biological parents are not paid by the State to procreate. The State’s own policies as expressed in statutory and case law belie its assertion that parents who procreate through sexual intercourse are preferred to those who become parents through adoption or through the use of reproductive technology.

To the extent the State’s argument concerning procreation through sexual intercourse is meant to imply the State prefers heterosexual parents, its assertion is contrary to Indiana law and policy. Adoption is available to all prospective parents without regard to their sexual orientation or marital status.⁹ In fact, since 1999 the General Assembly has rejected at least four (4) proposals to limit adoption to heterosexual parents.¹⁰ As noted above, lesbians and gay men are permitted free access to reproductive technology as Indiana policies leave the field completely unrestricted. Furthermore, when courts determine child custody and visitation matters, the law does not prefer heterosexual parents over homosexual parents. “Visitation and custody determinations must be determined with respect to the best interests of the children, not the sexual preferences of the parents.” *Downey v. Muffley*, 767 N.E.2d 1014, 1021 (Ind.Ct.App. 2002).

If the public policy of Indiana were that only heterosexual parents who produce their children through sexual intercourse can provide a positive environment for childrearing,

⁹ The statutes do not require adoptive parents to be married. They require only that, if married, both spouses join in the petition to adopt. I.C. §31-19-2-4.

¹⁰*See*, S.B. 560 (1999), H.B. 1055 (1999), S.B. 144 (2001), S.B. 182 (2002).

restrictions would have been imposed on adoption and access to reproductive technology, as well as the custody and visitation rights of gay and lesbian parents. Instead the public policy of the state, as expressed in statutes and case law, mandates broad availability of alternative parenting methods and rejects the use of sexual orientation itself to limit custody or visitation. These policies are well-founded.

The consensus of the scientific and child welfare communities is that it is beyond reasonable scientific dispute that children of lesbian and gay parents fare as well as the children of heterosexual parents in all measures of well-being, adjustment and development. The American Academy of Pediatrics, with its 57,000 pediatrician members, adopted a formal policy declaring that children of gay and lesbian parents “fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual.”¹¹ The 155,000 member American Psychological Association concluded in a complete research review that “[n]ot a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents.”¹² The National Association of Social Workers, The American Psychoanalytic Association and the American Academy of Child & Adolescent Psychiatry have all reached the same conclusion.¹³ No scientific basis exists to prefer opposite-sex parents over

¹¹ Ellen C. Perrin, M.D. & the Committee on Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341 (February 2002), available at www.aap.org/policy/020008t.html.

¹² American Psychological Association, *Lesbian and Gay Parenting: A Resource for Psychologists*, 8 (1995), available at www.apa.org/pi/parent.html.

¹³ National Association of Social Workers, *Policy Statement: Lesbian, Gay, and Bisexual Issues*, in *Social Work Speaks*, 193, 194 (1997); American Psychoanalytic Association, Position Statement on Gay and Lesbian Parenting, (May 2002), available at www.apsa-

same-sex parents and Indiana's laws and policies reflect this reality.

Simply put, the State's attempt to justify its discrimination by asserting the purpose of civil marriage is to promote procreation or to express a preference for biological or heterosexual parents is a pretext. Nothing in Indiana's statutory or case law supports this position. In the words of our Supreme Court, the State's rationale is "fanciful and cannot be established." *Dept. of Insurance v. Schoonover*, 72 N.E.2d at 193.

2. Excluding same-sex couples from marriage is not reasonably and substantially related to promoting procreation......

Setting aside the defendants' obvious pretext, even if promoting procreation were a purpose of Indiana's marriage law, excluding same-sex couples from civil marriage does not bear "a reasonable and substantial relation to accomplishing" that interest. *Chit's Wrecker Service, Inc.*, 440 N.E.2d at 742. It 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. No connection exists between preventing the Plaintiff couples from marrying and increasing the number of children born in the state. Indeed, our Supreme Court squarely rejected the proposition that excluding people from marriage is related to the State's interests concerning the conception of children:

Marriage is not a necessary predicate to the birth of children, and preventing a contemplated marriage may only result in children being born out of wedlock. Instead of protecting the welfare of future children, the [marriage prohibition] may have the opposite effect, in that it will promote cohabitation without marriage.

www.aacap.org/ctf/cgli/parenting.htm; American Academy of Child & Adolescent Psychiatry, *Policy Statement on Gay, Lesbian and Bisexual Parents*, (June 1999), available at www.aacap.org/publications/policy/ps46.htm.

Miller v. Morris, 386 N.E.2d 1203, 1205 (Ind. 1979) (striking as unconstitutional an Indiana statute which prohibited a woman from marrying because her fiancé owed child support).

Similarly, any “preference” for parents who procreate through sexual intercourse and/or who are heterosexual is in no way furthered by excluding the Plaintiffs from civil marriage. Prohibiting same-sex couples from marrying does nothing to decrease the availability of reproductive technology or to encourage prospective parents to procreate through intercourse rather than adopt unwanted children. It does nothing to make the responsibilities and duties of parents or the entitlements of children dependent upon the circumstances of birth. Parents and their children will continue to have the same rights duties and responsibilities regardless of whether their families were created through sexual intercourse, reproductive technology or adoption. Moreover, the marriage prohibition does not alter the long-standing law of Indiana which refuses to provide a preferential status to heterosexual parents over their lesbian and gay counterparts with respect to child custody and visitation.

In recent cases, after carefully analyzing the proposition, courts have rejected the assertion that excluding same-sex couples from marriage is reasonably related to a state interest in procreation and child rearing. In *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), the Supreme Court of Vermont concluded that the state had no rational reason to exclude same-sex couples from the benefits and protections of marriage. The court there considered the state’s statutes and policies regarding such matters as adoption and the use of the reproductive technology and concluded that, given the fact that lesbians and gay men become parents through both means, the marriage exclusion is not reasonably related to a state interest in procreation and child rearing:

If anything, the exclusion of same-sex couples from the legal

protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against. In short, the marital exclusion treats persons who are *similarly* situated for purposes of the law, *differently*.

744 A.2d at 883 (emphasis in original). The court further noted that many opposite-sex couples who are permitted to marry cannot procreate or do not intend to procreate. “Therefore, if the purpose of the statutory exclusion of same-sex couples is to ‘further [] the link between procreation and child rearing,’ it is significantly underinclusive. The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal.” 744 N.E.2d at 881.

Similarly, the Superior Court of Justice in Ontario, Canada, rejected the assertion that excluding same-sex couples from marriage is rationally related to procreation as the purpose of marriage. *Halpern v. Attorney General of Canada*, 215 D.L.R. (4th) 233 (Sup. C.J. Div. Ct 2002). The court noted:

[I]t was only recently -- when same-sex couples began to advance claims for equal recognition of their conjugal relationships -- that some courts began to infer that procreation was an essential component of marriage [I]t appears to be a mere pretext used to rationalize discrimination against lesbians and gays.

215 D.L.R. (4th) at 293-296 ¹⁴

¹⁴ *Baker* and *Halpern*, which actually analyze the procreation claim, are in sharp contrast to the dated cases cited by the State which provide virtually no analysis of the question. See, e.g. *Adams v. Howerton*, 486 F.Supp. 1119 (C.D. Cal. 1980) and *Singer v. O'Hara*, 522 P.2d 1187 (Wash.Ct.App. 1974). The court in *Howerton* merely cites to *Singer* and otherwise finds support for the procreation claim in the canonical laws of Judaism and Christianity. 486 F.Supp. at 1182. This is of little help in analyzing the marriage law of Indiana which declared marriage to be a civil contract to place the subject under civil authority rather than the ecclesiastical. *Wiley*, 123 N.E.2d at 255-256. *Singer* contains no legal analysis but merely makes a conclusory assertion and dismisses married people who do not procreate as “exceptional situations.” 522 P.2d at 1194.

Contrary to the State's assertion, the expressed policies and purposes of our laws governing marriage and family matters apply with equal force to same-sex couples and their children. Excluding same-sex couples from marriage frustrates the State's real purposes for marriage rather than furthering them. The State's interest in recognizing the importance of family and children in our society, helping parents fulfill their responsibilities to their children and making clear the responsibilities family members owe to one another are the same whether the family is headed by a same-sex couple or an opposite-sex couple. As the State acknowledges, the responsibilities imposed and the benefits provided by marriage reinforce the commitments of parents to each other, supports their relationship and thereby benefits their children immeasurably. Denying these supports only to same-sex couples harms them and their children. The Vermont Supreme Court recognized this in rejecting the assertion that excluding same-sex couples from the benefits and protections of marriage is rational:

The laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the benefits and protections of marriage to same-sex couples, who are no differently situated with respect to *this goal* than their opposite-sex counterparts.

Baker, 744 A 2d at 884 (emphasis in original)

C. The Marriage Prohibition Does Not Bear a Substantial Relationship to Any Governmental Interest in Fostering "Sound Political Ordering"

Implicitly recognizing that their procreation defense is a fiction wholly unsupported by the explicit laws and policies of Indiana, the defendants would have this Court believe that *all* regulations on civil marriage will rise or fall with the State's ability to engage in gender discrimination. If the Plaintiffs are allowed to marry, the argument goes, polygamous and

incestuous marriages will result and democracy will fall. The very notion of such desperate scare tactics should cause this Court to view the State's argument with wary suspicion. The State's genuine interest is in fostering the contributions civil marriage makes to the political state. Excluding same-sex couples from civil marriage does not further this interest and, indeed, undermines it.

As an initial matter, the State's slippery slope argument faces an insurmountable hurdle: history has proven it to be untrue. The advocates of laws prohibiting interracial marriage made the identical argument. When the California Supreme Court struck down that state's ban on interracial marriages in *Perez*, the dissent asserted that the justifications for anti-miscegenation laws parallel those for prohibiting incestuous and bigamous marriages. *Perez*, 198 P.2d at 46 (Shenk, J., dissenting). Similarly, at oral argument in *Loving*, the State of Virginia claimed:

the state's prohibition of interracial marriage ... stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage, or the prescription of minimum ages at which people may marry, and the prevention of the marriage of people who are mentally incompetent.

Peter Irons & Stephanie Guitton, eds., *May It Please The Court* at 282-283 (transcript of oral argument).

Contrary to the predictions of doom, more than fifty years after *Perez* and thirty-five years after *Loving* the elimination of race discrimination in marriage has not led to the legalization of multiple partner marriages or marriages between father and daughter. The fact that the State completely fails to explain *how* ending gender discrimination in marriage would lead to polygamous marriage is proof positive that no rational explanation exists. Instead the State simply raises the specter of fear and hopes that this Court will react with a visceral response

instead of reasoned judgment.

The Plaintiffs readily agree that the commitments of marriage foster the development of important civic virtues. The duties and obligations inherent in marriage ideally result in significant contributions to the State:

[Marriage] is the foundation of the home and the origin of those family ties without which we would cease to be human. It is the source of those motives which prompt us to provide care and comfort for childhood and old age, and to plan and toil and sacrifice for the welfare of future generations. Throughout the ages it has fostered the development of those qualities of head and heart which give us all there is of worth in life.

Wiley, 123 N.E. at 256.

The legal issue for this Court is whether the State's interest in encouraging couples "to plan and toil and sacrifice for the welfare of future generations" is somehow reasonably furthered by excluding the Plaintiffs from marriage. The Court will search without success for any rational explanation of how denying Charlotte and Dawn the ability to raise their son as a married couple furthers this interest. Indeed, the defendants offer no explanation.¹⁵ Denying the Plaintiffs the duties, responsibilities and benefits of marriage not only fails to advance the State's interest in marriage, it undermines that interest. Excluding them from marriage does nothing to improve the

¹⁵ Instead the defendants attempt to obfuscate the question by positing a lack of evidence to establish that allowing same-sex marriage would further the State's goals. As shown above, it is the State's burden to show that the prohibition is necessary to prevent harm to identifiable individuals. Moreover, such marriages would further the State's true purposes for providing for civil marriage. Even in the context of rationality review, the defendants ask the wrong question. The only relevant question is whether excluding same-sex couples from marriage bears "a reasonable and substantial relation to accomplishing" a legitimate government interest. *Clint's Wrecker Service, Inc.*, 440 N.E.2d at 742. In other words, the Court must ask whether the discrimination itself furthers the State's interest, not whether ending the discrimination would further the State's interest.

quality of commitment made by any opposite-sex couples, nor does it improve the odds that those couples will sacrifice more for future generations.

Instead of furthering a legitimate interest, excluding the Plaintiffs from marriage undermines the State's interest. The State is interested in encouraging firm commitments made by two adults. The State is interested in requiring those firmly committed couples to undertake certain responsibilities and duties. The State is interested in protecting those couples who undertake the commitments by providing certain benefits attendant to marriage. Denying the Plaintiffs the ability to undertake the legal commitments and accept the legal responsibilities inhibits the very goals for which the State provides civil marriage.

The essence of the State's argument is that only opposite-sex couples are capable of developing the civic virtues which are the goal of marriage. Of course, rather than rely openly on its obvious gender stereotyping, the defendants disguise their efforts by invoking tradition and traditional marriage. The thinly veiled implication inherent in this position is that a woman cannot develop commitment or responsibility without a man to guide her, and vice versa. However, irrational stereotypes are not reasonable justification for discrimination. *Cf., United States v. Virginia*, 518 U.S. 515, 533 (1996) (gender based "justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.").

The State tries in vain to swim against the current of science when it asserts that same-sex couples are incapable (or less capable than heterosexual couples) of developing within their relationships the virtues which contribute to democratic principles. Its position has no credible scientific support and it offers none in its brief. Social science research demonstrates that same-

sex couples are indistinguishable from opposite-sex couples with regard to the relationship qualities which civil marriage seeks to foster.

The Plaintiff couples have all formed long-lasting, committed relationships and science indicates this is typical. Research shows that sexual orientation is irrelevant to a couple's capacity to form long-term, stable, committed relationships. A 2000 study by a University of Virginia psychology professor reports that gays and lesbians "desire for an enduring love relationship with a partner of the same gender" and thus "many if not most" form long-term, committed relationships. Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. Marriage & Fam. 1052, 1053 (2000). Another study conducted over a four year period found that 88% of gay male couples and 78% of lesbian couples remained together. Lawrence A. Kurdek, *Relationship Stability and Relationship Satisfaction in Cohabiting Gay and Lesbian Couples: A Prospective Longitudinal Test of the Contextual and Interdependence Models*, 9 J. Soc. & Pers. Relationships 125, 132 (1992). Similarly, the scientific research shows "no differences as a function of sexual orientation on any of the measures of relationship quality." Patterson, *supra*. A research study conducted by the Gottman Institute of the University of Washington concluded that relationship satisfaction and quality are the same across lesbian, gay and heterosexual couples. The Gottman Institute, 12-Year Study of Gay and Lesbian Couples (2002), available at www.gottman.com/research/projects/gaylesbian/index.php.

Finally, the State argues that its gender discrimination is rational for two additional reasons. First, the State hypothesizes that gays and lesbians are unpopular and if they can marry then opposite-sex couples will not want to marry. Second, allowing same-sex couples to marry will encourage marriages of convenience by heterosexual, same-sex couples. These arguments,

absurd and completely unsupported by law or logic, cast in sharp relief the negative animus which runs throughout the State's brief. Even if gays and lesbians are disliked by many people, the State's desire to enforce private prejudice is never a legitimate interest. *Palmore v. Sidoti*, 466 U.S. 429 (1984). Moreover, it is simply preposterous to suggest that heterosexual couples choose to marry simply because their lesbian and gay neighbors cannot make the same choice.

With regard to marriages of convenience, some same-sex couples may marry for reasons many might consider inappropriate, just as many opposite-sex couples do now. The State's marriage laws make no effort to determine the seriousness with which opposite-sex couples enter into marriage. The fact that the State is concerned only with marriages of convenience if entered into by persons of the same sex illustrates the bias which motivates the marriage ban.

Furthermore, it strains credulity to imagine that two heterosexual men would marry merely for "companionship" or "short-term convenience" when they would be faced with the comprehensive legal burdens marriage entails, such as duties of financial support, the right to an elective share of the other's estate and the inability to exit the relationship without seeking permission from a court.

Simply put, the State's justifications for prohibiting same-sex couples from marrying are "fanciful and cannot be established." *Dept. of Insurance v. Schoonover*, 72 N.E.2d at 193. Thus, even if the marriage prohibition did not materially burden a core constitutional value, the justifications offered by the State cannot survive minimal review. Accordingly, the motion to dismiss should be denied.

III. THE STATUTE PROHIBITING SAME-SEX COUPLES FROM MARRYING VIOLATES ARTICLE I, SECTION 23 OF THE INDIANA CONSTITUTION

The freedom to marry is itself a special privilege. It is the formation of legal relationship universally understood by others to signify that a couple shares love, honor, commitment and responsibility. Moreover, marriage is the exclusive gateway to a host of additional special privileges granted by the State. Only married couples may obtain the privileges and only opposite-sex couples are permitted to marry. The same-sex marriage prohibition violates Article I, Section 23 of the Indiana Constitution. The discriminatory treatment afforded same-sex couples is not reasonably related to any characteristics inherent in their gender. Quite to the contrary, the State's gender classification inhibits the State's purposes for civil marriage rather than furthering those interests.

Article I, Section 23 provides that no citizen or class of citizens may be granted "privileges or immunities which, upon the same terms, shall not equally belong to all citizens." When state action grants unequal privileges or immunities to different classes of people, the constitutionality of the grant of special privileges is determined by application of a two-part test. First, the disparate treatment "must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable to all persons similarly situated." *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). When challenging a statute under Section 23, the plaintiff must disprove those bases for the challenged classification which are readily apparent, including those contained in the statute itself and those relied upon by the proponent of the statute during litigation. *Dvorak v. City of Bloomington*, 702 N.E.2d 1121, 1125 (Ind.Ct.App. 1998).

In this case the State's motion to dismiss must be denied. The State's classification is not germane to the purpose civil marriage.

A. The State's Gender Discrimination in Marriage Is Not Based on Inherent Characteristics Germane to the Objectives of Civil Marriage

The State's marriage statute divides couple who seek to marry into two classes: opposite-sex couples and same-sex couples. It then treats those classes differently. Opposite-sex couples are permitted to marry and same sex couples are not.¹⁶ The characteristic which defines the unequally treated classes -- gender -- is not germane to the State's purpose in providing for civil marriage. As a result, the statute fails under the first prong of the *Collins* test.

The first part of the *Collins* test has two components: (1) the classification "must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class." and (2) "the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics." *Collins*, 644 N.E.2d at 79. The State's classification must be germane to the subject matter and the objective of the policy. *Dvorak*, 702 N.E.2d at 1124-1125 ("In *Collins*, our supreme court stated that the class must be germane to the subject matter and the object to be attained.").

The statute prohibiting same-sex couples from marrying fails the *Collins* test. No link exists between the classification and the purpose of civil marriage. The discrimination is rooted in bias and undermines the State's actual purposes in providing for civil marriage and its consequent

¹⁶ This assumes that couples meet other statutory requirements such as age and mental competency. The Plaintiffs in this case meet all statutory requirements for marriage except the challenged gender requirement. (Complaint ¶¶ 15, 21 and 27).

duties, responsibilities and privileges.¹⁷

The policies of civil marriage law explicitly identified in the Indiana Code include 1) to recognize the importance of family and children in our society; 2) to recognize the responsibility of the State to enhance the viability of children and family in our society; 3) to acknowledge the responsibility each person owes to the other; and 4) to strengthen family life by assisting parents to fulfill their parental obligations. I.C. §31-10-2-1. These statutorily expressed policies and the entire scheme of marriage and family law in Indiana reveal several important purposes of marriage. First, marriage law is calculated to encourage long term, stable units. *See generally*, Prof. Michael S. Wald, *Same-Sex Couples: Marriage, Families and Children*, Stanford Public Law and Legal Theory Working Paper Series, Stanford Law School (1999) at 6. This is especially true for couples with children because children need stable care giving. *Id.* Second, marriage law facilitates the sharing of economic lives. This is equally important both for couples with children and for those who do not raise children. Clearly, the sharing of economic lives benefits the children of those couples who choose to become parents. For couples without children, facilitating the sharing of economic lives expands the options of the individuals involved which can benefit the community as a whole and it reduces the likelihood that the state will have

¹⁷As a threshold matter, gender “is an inherent characteristic in the sense of ‘innate’.” *McIntosh*, 729 N.E.2d at 980 (age is an inherent characteristic in the sense of innate). The Supreme Court recognizes that classifications based on *innate* characteristics raise a “host of issues” which it has yet to address, most notably 14th Amendment Equal Protection problems. *Id.* When the State relies on classifications based on innate characteristics it should bear the burden of proving an *exceedingly persuasive* justification to sustain the classification. Given the history of invidious discrimination based on gender, the State’s decision to discriminate based on this innate characteristic is analogous to the State’s infringement of core constitutional values which requires that the State bear the burden of justification. *See, Whittington, supra.* Nonetheless, because the State’s asserted justifications for gender discrimination in marriage cannot survive even minimal review, this Court need not address whether a stricter standard is required.

to provide economic support to individuals. *Id.* Third, marriage laws enhance the emotional commitment the couples make which, in turn, contributes to the emotional well-being of the individuals involved. *Id.* Lastly, the imposition of legal responsibilities and duties encourages people to be connected to the concerns and well-being of others, rather than focusing all energies on themselves, thereby developing values important to sustaining democratic principles. *Id.* The discriminatory treatment imposed by the State's same-sex marriage prohibition – drawing a gender-based classification – is unrelated to these purposes.

The legal question is whether there are inherent distinctions between couples, based on their gender, which are reasonably connected to the State's purposes for civil marriage and its policy of denying same-sex couples the freedom to marry. *Dvorak*, 702 N.E.2d at 1125 ¹⁸ The simple answer is no. All couples, regardless of their gender, have the same need for the freedom to marry. More to the point, neither the State's purposes for providing for civil marriage, nor the justifications it offers for its discrimination, are reasonably connected to denying same-sex couples the freedom to marry.

The State's interest in encouraging couples with children to enter into long-term, stable, committed units is the same whether the couples are of the same sex or opposite sex. The children of same-sex couples deserve the same protection and stability which marriage provides as

¹⁸ Where an ordinance prohibited households consisting of a certain number of unrelated individuals from living in certain neighborhoods, the issue was "whether there are inherent distinctions between households based on whether the adults in the household are related or unrelated that are reasonably connected to imposing the burden of exclusion from some neighborhoods."

the children of opposite-sex couples.¹⁹ The State's gender discrimination undermines its interest in having couples with children marry by denying marriage to same-sex couples with children. Moreover, harming the children of same-sex couples by denying their parents the equal access to stability which marriage provides does nothing to enhance the caretaking opposite-sex couples' children

The State's interest in facilitating the sharing of economic lives by couples and its interest in enhancing the emotional well-being of its citizens by encouraging marriage likewise are undermined, not furthered, by the marriage prohibition. The State benefits when broader options are available to people and when it is less likely to be saddled with the responsibility of providing economic support to individuals. The benefits result from the sharing and support inherent in the marital unit, not from the gender of the individuals. Denying marriage to same-sex couples does nothing to further the support and sharing available to opposite-sex couples. Similarly, with respect to emotional well-being, the benefits to the State of having emotionally healthy citizens are the same whether those citizens are male or female. Given the scientific research which demonstrates that same-sex couples and opposite-sex couples are qualitatively identical, excluding only same-sex couples from marriage undermines the State's interest. Furthermore, refusing to enhance the emotional well-being of same-sex couples through marriage does nothing to increase the emotional well-being of opposite-sex couples.

Finally, the benefits the State derives by encouraging people to be connected to the concerns and well-being of another, rather than being overly individualistic and ego centric, are

¹⁹ It is also self-evident that adopted children and children born through the use of reproductive technology deserve the same protection and stability as children created through biological procreation.

not gender dependent. When a person devotes his or her energies to the well-being of another in the context of a marital relationship, thereby developing values important to sustaining democratic principles, the quantitative and qualitative benefit to the State is neither more nor less depending on whether the object of devotion is male or female. Rather than furthering the State's interest, excluding same-sex couples from marriage significantly diminishes the benefits to the State by reducing the number of couples who enter into marriage, the legal relationship calculated to produce the benefit.

With regard to the purported justifications advanced by the State in support of its motion to dismiss, those assertions are addressed fully in Part II-B and II-C above. The idea that Indiana's marriage laws are designed to promote procreation is a complete fiction. The State does not cite a single Indiana case or statute in support of its argument. As discussed above, Indiana statutes and case law do nothing to require or encourage people who marry to procreate. Married couples are subjected to the same responsibilities and entitled to the same benefits, vis a vis one another and the State, whether they raise children or not. Even if the procreation defense was not concocted in response to litigation, the same-sex marriage ban does nothing to increase the likelihood that opposite-sex couples will decide to have children, or more children, as long as the lesbian and gay couples next door cannot marry.

Moreover, if, as the State claims in its brief, it is rational to limit marriage to those couples who can "theoretically" procreate through sexual intercourse, then the classifications the State is advancing for purposes of Art. I, §23 are couples who can theoretically procreate by this particular means alone and couples who cannot. This classification fails the second part of the *Collins* test because similarly situated couples are not treated uniformly. Some couples who

cannot procreate through sexual intercourse (the elderly, the infertile) are allowed to marry and some others similarly situated couples (same-sex couples) are not. Thus even if theoretical procreation through sexual intercourse was an object of the statute, it treats similarly situated couples differently and violates Art. I, §23.

Similarly, the State's interest in stable, committed couples developing values vital to the preservation of democratic principles is not furthered by excluding same-sex couples. Vague references to "tradition" which are devoid of substance and resting on a foundation of naked bigotry simply fails to constitute any legitimate interest to be furthered by State policy. Excluding same-sex couples from marriage does not reasonably further any of the State's legitimate purposes for providing civil marriage. The statute violates Art. I, §23.

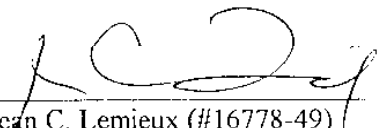
CONCLUSION

The Plaintiff couples have a constitutionally protected right to marry one another free from unwarranted interference by the State. They have the same needs for marriage, and the desire to marry for the same reasons, as any opposite-sex couple. Excluding these couples from civil marriage is no more related to any legitimate state interest than bans on interracial marriages were. The statute prohibiting same-sex marriage violates Art. I, §§1, 12 and 23 of the Indiana Constitution. The Plaintiffs' Complaint states claims upon which relief can be granted and the State's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via United States mail, first class postage prepaid, this 20 day of February, 2003, on the following counsel of record:

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