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Iowa Representatives Dwayne Alons, Carmine Boal, Royd Chambers, Betty De Boef, Mike May, and Ralph Watts, and Iowa Senators Jerry Behn, Nancy Boettger, Jim Hahn, David Hartsuch, Steve Kettering, Larry McKibben, Paul McKinley, David Mulder, James Seymour, and Mark Zieman (collectively, the “Iowa Legislators” or “*Amici*”), file this brief jointly as *amici curiae* supporting Defendant Timothy J. Brien’s motion for summary judgment and opposing Plaintiffs’ motion for summary judgment.

INTRODUCTION

Marriage, whether in Iowa, in the United States of America, or in America’s common law heritage stretching back to England and throughout Western civilization, has never included a relationship between persons of the same sex. For any governmental authority - whether this court or a local government or a state legislature - to recognize same-sex relationships as entitled to bear the legal status indicated by the name “marriage,” is to change the fundamental and commonly-accepted legal meaning of that word. Marriage developed as a social institution before it became a legal one, arising from the natural complementarity and procreative capacity of the two sexes. The redefinition of marriage Plaintiffs seek can legitimately be granted under Iowa law only by the Iowa Legislature, not the judiciary.

Iowa has long recognized that marriage, though an ancient social institution, is also a legal status/relationship defined and regulated according to public policy *by the Legislature*. *Amici*, members of the Iowa House of Representatives and of the Iowa Senate, have a unique and substantial interest in the outcome of this suit. Were this court to give Plaintiffs the relief they seek, the injury to separation of powers in Iowa would be grave. Any change to the fundamental definition of marriage as the legal union of one man and one woman must be made through a process of

legislative investigation and deliberation of the manifold legal, societal, budgetary, and economic consequences which would attend such a radical change. The complexity of the public policy implications of redefining marriage is the chief reason why Iowa's deferential rational basis review here dictates a finding that Iowa's marriage laws are constitutional.

SUMMARY OF ARGUMENT

For this Court to grant Plaintiffs' claims, it would have to sever marriage from its accepted meaning in American law and human history - the union of a man and a woman. Simply put, there is no legitimate basis for a court to find in the law a constitutional right to same-sex "marriage." Any such "finding," whether as a due process fundamental right, a requirement of equal protection, or otherwise, necessarily involves a revolutionary redefinition of the institution.

A venerable and growing body of case law and state constitutional provisions recognizes that marriage laws serve the public good by promoting responsible procreation (i.e., "steering" procreation into stable family units) and encouraging the optimal environment for child rearing. This is for the good of children, who are best raised and nurtured by their married mother and father, and, ultimately, for the good of society. Against the great weight of authority, Plaintiffs presume that marriage has a meaning that encompasses same-sex couples, and that the state's interest in marriage is no more than the honoring of the "commitment" of any two adults. This "commitment" rationale for marriage has been rejected by every appellate court in the country, save one.¹

¹ Even the New Jersey Supreme Court did not conclude that the institution of marriage itself must be redefined, when the court ordered the State of New Jersey to extend the legal benefits and duties of marriage to same-sex couples under its state constitution's equal protection guarantee: "[W]e cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right . . . [N]o jurisdiction, not even Massachusetts, has declared that there is a fundamental right to same-sex marriage under the federal or its own constitution." *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006).

The analytical convenience of Plaintiffs’ presumption of a different definition of marriage and a novel conception of the state’s interest in marriage is significant. It allows them to falsely portray decades of case law recognizing the fundamental right to marriage as support for their position. But Plaintiffs’ reliance on unsupported presuppositions does not fairly meet the substance of the many judicial analyses finding that the definition of marriage is constitutional. This disconnect reveals that the arguments for same-sex “marriage” are not really legal arguments, but policy arguments calculated to persuade courts to substitute their own social policy preferences for those of the legislative branch, or those of the people. As Iowa Legislators, *Amici* urge this Court to resist Plaintiffs’ invitation to take that course. The Iowa Legislators urge this Court instead to exercise the wise judicial restraint that is the hallmark of separation of powers in our republican form of government. This Court should resist Plaintiffs’ call to redefine marriage.

ARGUMENT

I. Constitutional Analysis of the Marriage Laws is Incoherent Absent Recognition of the Meaning of “Marriage.”

A. Same-sex “Marriage” Claims Make No Sense Without Redefining “Marriage.”

Plaintiffs’ use of the term “marriage” evokes a famous passage by Lewis Carroll:

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “whether you *can* make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

LEWIS CARROLL, *THROUGH THE LOOKING GLASS* (1934 ed.) p. 205. Plaintiffs have taken the Humpty Dumpty approach to the term “marriage.” Nowhere is it carefully defined. It is obviously assumed to mean something broader than a union of a man and a woman. It is treated with a malleability never contemplated by the marriage case law.

Last year, the Supreme Court of Washington observed that the U. S. Supreme Court cases recognizing the fundamental right to marriage are not so vague or malleable, but clearly refer to the union of a man and a woman:

Nearly all United States Supreme Court decisions declaring marriage to be a fundamental right expressly link marriage to fundamental rights of procreation, childbirth, abortion, and child-rearing. In *Skinner v. Oklahoma*, involving invalidation of a nonconsensual sterilization statute, the Court said “[m]arriage and procreation are fundamental to the very existence and survival of the race.” In *Loving v. Virginia*, the Court said that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival” (quoting *Skinner*). In *Zablocki v. Redhail*, the Court invalidated on equal protection and due process grounds a statute that prohibited marriage for any resident behind in child support obligations. The Court noted that

[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.... [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

The Court also quoted the statements made in *Skinner* and *Loving*. See also, *Maynard v. Hill* (marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress”).

Andersen v. King County, 138 P.3d 963, 978 (Wash. 2006) (citing and quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Maynard v. Hill*, 125 U.S. 190 (1888)).

Moreover, the Washington court rejected any suggestion that more recent U. S. Supreme Court cases indicate “that marriage as a fundamental right is no longer anchored in the tradition of marriage as between a man and a woman.” *Andersen*, 138 P.2d at 979. Indeed, for a court to find “that there is a fundamental right to marry a person of the same sex ... is an astonishing conclusion,

given the lack of any authority supporting it; *no* appellate court applying a federal constitutional analysis has reached this result.” *Id.* (emphasis in original).

The United States Court of Appeals for the Eighth Circuit recently echoed this point emphatically in finding the Nebraska Marriage Amendment constitutional:

In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution. Indeed, in *Baker v. Nelson*, when faced with a Fourteenth Amendment challenge to a decision by the Supreme Court of Minnesota denying a marriage license to a same-sex couple, the United States Supreme Court dismissed “for want of a *substantial* federal question.”

Citizens for Equal Protection v. Bruning, 455 F.3d 859, 870-71 (8th Cir. 2006) (citing *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)(emphasis in original), *reh’g by panel and reh’g en banc denied* (2006). Many courts have recognized that the Supreme Court’s dismissal of the *Baker* appeal for want of a substantial federal question was an on-the-merits adjudication that neither due process nor equal protection guarantees under the U. S. Constitution are violated by defining marriage as the union of one man and one woman.²

² See, e.g., *Hernandez v. Robles*, 805 N.Y.S.2d 354, 369 (N.Y. App. Div. 2005) (Catterson, J., concurring) (“The [Supreme Court’s] dismissal of the appeal [in *Baker*] is an adjudication on the merits of the federal constitutional claims raised, including due process and equal protection, which lower courts are bound to follow”); *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1127 (2004) (Kennard, J., concurring in part and dissenting in part) (“[T]he high court’s summary decision in *Baker v. Nelson* [cit.] prevents lower courts and public officials from coming to the conclusion that a state law barring marriage between persons of the same sex violates the equal protection or due process guarantees of the United States Constitution”); *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976) (“[T]he Supreme Court’s dismissal of the [*Baker*] appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on lower federal courts”); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2005) (finding *Baker* controlling as to whether federal Defense Of Marriage Act is constitutional); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (Supreme Court’s dismissal of *Baker* appeal was “an

Even when the U. S. Supreme Court pronounced unconstitutional a state’s criminal prosecution of private, consensual sexual conduct between adults of the same sex, the Court was careful to note that state protection of marriage was not impacted by the ruling. The majority opinion in *Lawrence v. Texas* cautions that its narrow holding does not involve “an institution the law protects,” or “involve . . . public conduct . . . [or] whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Lawrence v. Texas*, 539 U.S. 558, 567, 578 (2003).³ Justice O’Connor’s concurrence further emphasizes that “[u]nlike the moral disapproval of same-sex relations - the asserted state interest in this case - other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.” *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring).

Any assertion that the legal definition of marriage in general and in Iowa specifically has changed significantly over time is simply false. Some legal incidents of marriage may have changed, but not the meaning of the term itself. “Marriage” has never been defined as something other than the union of a man and a woman at any time in the history of Iowa law. No effort to conflate the

important adjudication on the merits”), *aff’d on other grounds*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982) (noting that the Supreme Court’s dismissal of the *Baker* appeal “operates as a decision on the merits”); *In re Cooper*, 592 N.Y.S.2d 797, 800 (N.Y. App. Div. 1993) (dismissal in *Baker* “is a holding that the constitutional challenge was considered and rejected”) (quoting trial court opinion with approval).

³ Rejecting a Mormon fundamentalist’s claim that *Lawrence* created a broad right of sexual liberty which requires the state to legalize polygamous marriage, the Utah Supreme Court recently noted that marriage very much involves public conduct outside the narrow scope of *Lawrence*:

In marked contrast to the situation presented to the Court in *Lawrence*, this case implicates the public institution of marriage, an institution the law protects, . . . [i]n other words, this case presents . . . conduct identified by the Supreme Court in *Lawrence* as outside the scope of its holding.

Utah v. Holm, 137 P.3d 726, 743 (Utah 2006), *cert. denied*, 127 S.Ct. 1371 (U.S. 2007).

legal incidents of marriage with its actual legal definition can obscure the fact that the legal incidents of marriage in Iowa have always been afforded to a specific kind of relationship—the union of a man and woman.

That specific kind of relationship has defined marriage throughout the history of the English term “marriage,” which pre-dates the State of Iowa and the United States of America. As recognized by the Minnesota Supreme Court, “marriage as the union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.” *Baker*, 191 N.W.2d at 186.⁴ From the oldest English dictionaries in the Library of Congress to modern times, the primary meaning of the term “marriage” has been a legal union of a man and a woman, a husband and wife. *See, e.g.*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (1740) (Marriage: “that honourable contract that persons of different sexes make with one another”); JAMES BUCHANAN, LINGVAE BRITANNICAE VERA PRONUNCIATIO (1757) (Marriage: “A civil contract, by which a man and a woman are joined together”); NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 185 (1806) (Marriage: “the act of joining man and woman”); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 518 (1830) (Marriage: “The act of uniting a man and woman”); JAMES KNOWLES, A CRITICAL PRONOUNCING DICTIONARY OF THE ENGLISH LANGUAGE 425 (1851) (Marriage: “The act of uniting a man and woman”); MERRIAM WEBSTER’S COLLEGIATE DICTIONARY—TENTH EDITION 713 (1993) (“1 a: the state of being married b: the mutual relation of husband and wife: WEDLOCK”).⁵ *See also*

⁴ The Minnesota Supreme Court’s reference to “the book of Genesis” is not a religious argument, but an argument based in antiquity.

⁵ Marriage is also defined as the union of a man and woman in federal law and in Black’s Law Dictionary. 1 U.S.C. § 7; BLACK’S LAW DICTIONARY (5th ed. 1979) p. 876.

Merriam-Webster Online Dictionary, www.m-w.com/dictionary/spouse (“Spouse” means “married person: HUSBAND, WIFE”) (last visited 4/5/07) .

The Iowa Supreme Court has repeatedly noted the importance of marriage as a matter of public policy. In *Hopping v. Hopping*, 233 Iowa 993, 10 N.W.2d 87 (1943), the Court declared:

The integrity and permanence of the marital relation is of such vital importance to the welfare of society and to the public generally that the sovereignty or State has always deeply interested itself in all matters pertaining to the dissolution of that relation. While the suit for divorce is nominally between the two parties, the State is always a quasi party. As said in *Walker v. Walker*, 205 Iowa 395, 398, 217 N.W. 883, 885: “The nominal plaintiff and defendant are not the only parties to the suit. The state and public are parties by implication.” This concern on the part of the State is evinced by various statutory provisions. While marriage is spoken of as a civil contract [cit.], it is also a social institution, which is the foundation of the family and society.

Hopping, 233 Iowa at 996-997, 10 N.W.2d at 89-90 (emphasis added). More recently, the Court noted that “[p]reservation of a marital relationship is a fundamental public policy. This is evident in our decisions, in Iowa statutes, and the ethical code for attorneys.” *Rogers v. Webb*, 558 N.W.2d 155, 157 (Iowa 1997). Indeed, the public policy in promoting and protecting marriage is so strong that it “makes any provision [in a contract] which provides for, facilitates or tends to induce a separation or divorce of the parties after marriage contrary to public policy and void.” *Rogers, id.*, quoting *Norris v. Norris*, 174 N.W.2d 368, 370 (Iowa 1970).

Without redefining “marriage” to mean something other than the union of a man and woman, the position that not permitting same-sex couples to “marry” denies them the fundamental right to marriage and “excludes” people attracted to the same sex from marriage is meaningless. Every homosexual person has the same legal right and ability to enter a union of a man and a woman that heterosexual persons have. Yet Plaintiffs are not interested in a right to enter marriage as it has been defined for centuries. When same-sex “marriage” advocates speak of a marriage prohibition, the

exclusion of gay and lesbian couples from marriage, the fundamental right to marry, or the right to marry the person of one's choice, they obviously mean by the term "marriage" something other than the union of a man and a woman.

"The concept of marriage has traditionally been accepted by courts throughout the United States as the union of a man and a woman. Any change in that frequently articulated heterosexual construct would be a revolution in the law rather than evolution." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 364 (N.Y. App. Div. 2005) (Catterson, J., concurring). *Amici* Iowa Legislators respectfully suggest that this Court should rule that "marriage" has a meaning that is beyond the purview of this Court to change, a meaning recognized rather than given by Iowa law. *See Meister v. Moore*, 96 U.S. 76, 78 (1877) (states may "regulate the mode of entering [marriage], but they do not confer the right"). This Court should resist redefining the term "marriage" to a meaning not previously recognized in Iowa history, statutory law or case law, out of sympathy for Plaintiffs' position.⁶

B. Cases Striking Down Anti-Miscegenation Laws Do Not Justify the Redefinition of Marriage.

The landmark cases of *Loving v. Virginia*, 388 U.S. 1 (1967), and *Perez v. Sharp*, 32 Cal.2d 711, 728 (1948), striking down anti-miscegenation statutes as unconstitutional, do not support some general proposition that courts should invalidate statutes which restrict evolving, expanding conceptions of the right to marriage. Interracial marriage was, in fact, "marriage" within the historical meaning of the term. The criminal prosecution at issue in *Loving* was the result of the interracial couple having married in another state – the marriage was illegal in Virginia, but no one

⁶ The Massachusetts Supreme Judicial Court frankly admitted that it redefined the accepted, common law meaning of marriage to extend marital rights to same-sex couples. *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003).

contended that it was not a marriage, a union of a man and a woman.⁷

The Arizona Court of Appeals rejected a similar effort to rely on the invalidation of anti-miscegenation laws as support for a judicial redefinition of marriage:

Implicit in *Loving* and predecessor opinions is the notion that marriage, often linked to procreation, is a union forged between one man and one woman. Thus, while *Loving* expanded the traditional scope of the fundamental right to marry by granting interracial couples unrestricted access to the state-sanctioned marriage institution, that decision was anchored to the concept of marriage as a union involving persons of the opposite sex. In contrast, recognizing a right to marry someone of the same sex *would not expand the established right to marry, but would redefine the legal meaning of “marriage.”*

Standhardt v. Superior Ct., 77 P.3d 451, 458 (Ariz. Ct. App. 2003) (emphasis added).

The Court’s decision in *Loving* was squarely grounded on the imposition of an invidious racial classification, prohibited by the Fourteenth Amendment, upon the fundamental right of men and women to marry each other:

Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

Loving, 388 U.S. at 12, 87 S.Ct. at 1824 (cits. omitted). *See also Loving*, 388 U.S. at 9, 87 S.Ct. at 1822 (“the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn

⁷ All of the prohibitions on interracial marriage were statutory rather than an element of the common law. *See, e.g., In re Stark’s Estate*, 48 Cal.App.2d 209, 214-15 (1942) (common law interracial marriage ruled invalid because of miscegenation statute); *see also Pearson v. Pearson*, 51 Cal. 120, 122 (1875) (interracial marriage valid at common law in Utah; Court recognized marriage even though invalid under California statutes).

according to race”); *Perez*, 32 Cal.2d at 718 (“By restricting the individual’s right to marry on the basis of race alone, [anti-miscegenation statutes] violate the equal protection of the laws clause of the United States Constitution”); *Planned Parenthood v. Casey*, 505 U.S. 833, 980, n. 1, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (Scalia, J., dissenting in part).

It is evident that the decisions in *Loving* and *Perez* simply invalidated a discriminatory application of the historical marriage laws; they did not redefine marriage. Common sense and case law show that *Perez* and *Loving* would have been decided very differently if the arguments had been presented by two men or two women of different races. See, e.g., *Baker*, 191 N.W.2d at 187 (“*Loving* does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex”).

Only by assuming that marriage has some long-existing meaning other than the union of a man and a woman can same-sex “marriage” advocates create the impression that cases like *Loving* and *Perez* support judicial redefinition of marriage. In reality, such cases highlight that Appellees’ claim for a right to same-sex “marriage” is revolutionary rather than evolutionary. The New York Court of Appeals recently upheld the constitutionality of the accepted definition of marriage as the union of one man and one woman. In doing so, that court likewise rejected attempts to draw parallels with *Loving*:

[T]he traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind [from anti-miscegenation laws].

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between

participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006). *See also, Andersen*, 138 P.2d at 989 (“Plaintiffs maintain . . . that *Loving* supports their argument that DOMA violates the ERA *Loving* is not analogous . . . [and] [o]ther courts have also rejected the argument that *Loving* is analogous”).

C. The Judiciary’s Authority to Adjudicate Constitutional Issues Does Not Include the Authority to Redefine Terms and Rewrite Laws.

Courts are increasingly recognizing the serious separation of powers problems posed by a court’s decision, like that of the Massachusetts Supreme Judicial Court in *Goodridge*, to redefine marriage. For instance, these are the opening sentences of the New York Court of Appeals’ decision rejecting claims for same-sex “marriage”:

We hold that the New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature.

Hernandez, 855 N.E.2d at 5. Throughout the *Hernandez* opinion, the New York Court of Appeals repeatedly acknowledged the strong public policy reasons which undergird the state’s regulation of marriage, and noted that such rationales reinforce the principle that a state’s public policy on marriage is the prerogative of the Legislative Branch.

For instance, after reviewing marriage’s logical benefits of steering procreation into stable relationships and having children raised by both their mother and father, the court concluded that “there are rational grounds on which the Legislature could choose to restrict marriage to couples of opposite sex.” *Hernandez*, 855 N.E.2d at 8. The court further observed that “[o]ur conclusion that there is a rational basis for limiting marriage to opposite-sex couples leads us to hold that that limitation is valid under the New York Due Process and Equal Protection Clauses, and that any expansion of the traditional definition of marriage should come from the Legislature.” *Id.* at 9. The

court noted that “[w]e have presented some (though not all) of the arguments against same-sex marriage because our duty to defer to the Legislature requires us to do so.” *Id.* at 12. Finally, the court expressed its hope “that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can; and that those unhappy with the result-as many undoubtedly will be-will respect it as people in a democratic state should respect choices democratically made.” *Id.*

Judge Graffeo’s concurrence in *Hernandez* cogently summarizes the court’s principled deference:

This Court has long recognized that “[f]rom time immemorial the State has exercised the fullest control over the marriage relation,” going so far as to observe that “[t]here are, in effect, three parties to every marriage, the man, the woman and the State.” The historical conception of marriage as a union between a man and a woman is reflected in the civil institution of marriage adopted by the New York Legislature. The cases before us present no occasion for this Court to debate whether the State Legislature should, as a matter of social welfare or sound public policy, extend marriage to same-sex couples. Our role is limited to assessing whether the current statutory scheme offends the Due Process or Equal Protection Clauses of the New York Constitution. Because it does not, we must affirm. Absent a constitutional violation, we may not disturb duly enacted statutes to, in effect, substitute another policy preference for that of the Legislature.

Hernandez, 855 N.E.2d at 13 (Graffeo, J., concurring) (quoting *Fearon v. Treanor*, 272 N.Y. 268, 272 (1936), *app. dismissed*, 301 U.S. 667 (1937)).

The Washington Supreme Court likewise stressed the necessity of studied respect for separation of powers in announcing its decision rejecting a bid for judicial redefinition of marriage:

The two cases before us require us to decide whether the legislature has the power to limit marriage in Washington State to opposite-sex couples. The state constitution and controlling case law compel us to answer “yes,” and we therefore reverse the trial courts.

In reaching this conclusion, we have engaged in an exhaustive constitutional inquiry and have deferred to the legislative branch as required by our tri-partite form of

government. Our decision accords with the substantial weight of authority from courts considering similar constitutional claims.

Andersen, 138 P.3d at 968.

Addressing the dissenters in the case, the court added:

Perhaps because of the nature of the issue in this case and the strong feelings it brings to the front, some members of the court have uncharacteristically been led to depart significantly from the court's limited role when deciding constitutional challenges [W]hile same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it.

Id. at 968-969 (emphasis added).

In this case, were this Court to redefine marriage as sought by Plaintiffs, it would likewise raise grave issues of separation of powers. Over 50 years ago, the Iowa Supreme Court declined to hold a common law marriage invalid in an estate contest challenging the common law wife's right to be recognized as the decedent's widow and administratrix. The Court's refusal was grounded on deference to the Legislature's authority over marriage, even as to legal aspects of marriage that first developed by common law rather than statutorily:

We have too long recognized the common-law marriage status in Iowa to change it by judicial decision. . . . There is a sound reason for adhering generally to settled principles of law. They should not be overturned lightly, nor unless they appear patently unsound and liable to cause mischief if uncorrected. The people should be able to know what the law is, and to order their affairs accordingly. We cannot abandon the rule of stare decisis except for far more impelling reasons than we find here. If the law as it has been settled by the courts and understood, not only by the legal profession but by the public generally, is to be changed, it is a task for the legislature.

In re Stopps' Estate, 244 Iowa 931, 935, 57 N.W.2d 221, 223 (1953) (emphasis added).

The courts of Iowa have long observed wise self-restraint from exercising judicial power to make policy decisions in violation of separation of powers, preserving our Nation's foundational commitment to a republican form of government. "Policy decisions . . . involve the weighing of the

merits of social, political and economic factors traditionally held to be within the purview of the legislature. Judicial review of such decisions would be an apparent violation of the separation of powers principle.” *Goodman v. City of Le Claire*, 587 N.W.2d 232, 236 (Iowa 1998).

Most fundamentally, the Legislature is entrusted with establishing public policy for the State. The Iowa Courts have long recognized that it is the province of the Legislature, not the courts, to determine public policy. The Legislature may choose to retain existing public policy or change it at will, providing the change does not violate the Constitution:

[T]he judicial branch of our government has no power to determine whether legislative Acts are wise or unwise, nor has it the power to declare an Act void unless it is plainly and without doubt repugnant to the Constitution. In fact so long as there is no constitutional defect, the legislature may enact any law, reflecting whatever social policy it desires.

Doe v. Ray, 251 N.W.2d 496, 503 (Iowa 1977) (citations omitted) (emphasis added). *See also State v. Bruntlett*, 36 N.W.2d 450, 460 (Iowa 1949) (“The legislature, and not this court, declares the public policy of this state. . . . We are limited both by law and conscience to the judicial function of faithfully interpreting and applying the law as we find it.”), *overruled in part on other grounds*, *State v. Martin*, 55 N.W.2d 258 (Iowa 1952); *Board of Park Com’rs of City of Des Moines v. Diamond Ice Co.*, 105 N.W. 203, 205 (Iowa 1905) (“A legislative act, if constitutional, declares in terms the policy of the state and is final so far as the court is concerned”).

As shown in Section I(A), the Iowa Supreme Court has repeatedly noted the importance of marriage as a matter of public policy. *See Hopping*, 10 N.W.2d at 89-90; *Rogers*, 558 N.W.2d at 157; *Norris*, 174 N.W.2d at 370. The promotion of marriage is undoubtedly a deeply-rooted and fundamental public policy of the State of Iowa. As Iowa Legislators, *Amici* are committed to protecting the Legislative Branch’s recognized central role in shaping and maintaining marriage

policy in the State of Iowa. The constitutional dignity of their offices as legislators and the Legislature's prerogative to define marriage policy for the State of Iowa are directly implicated in this Court's decision whether to grant the judgment sought by Plaintiffs and redefine marriage to include same-sex couples.

Marriage policy has "traditionally been held to be within the purview of the legislature" in Iowa, such that settled law on marriage is generally to be changed only by the Legislature and not through the courts. *Goodman*, 587 N.W.2d at 236. The social, political, legal, economic and budgetary factors implicated by a revolutionary redefinition of marriage to include same-sex couples are profound and pervasive. Weighing the merits and far-reaching consequences of such a sea-change in the law of marriage to the many areas of state law affected by marital status is a task for which the judiciary is not designed or equipped. Such policy analysis and deliberation are squarely within the assigned duties and core competencies of the Legislature in Iowa's constitutional separation of powers.

If Plaintiffs' bid to redefine marriage for the State of Iowa through the courts ultimately succeeds, the Legislature will be forced to make appropriations sufficient to pay the costs generated by the statewide change in scope of numerous laws for which marital status is a triggering factor. The Legislature would have to make a thoroughgoing review and revision of all of Iowa's laws relating to marriage which have been adopted with society's common understanding, and Iowa's declared policy, that marriage is the legal union of a man and a woman uniquely involving procreation and child rearing. And all of this after the fact, rather than in the course of legislative deliberation of the wisdom and effects of making such a monumental change in the law.

It cannot be gainsaid that the Legislature has specifically rejected the public policy the

Plaintiffs are demanding that the Court adopt. Although Iowa’s marriage laws have always clearly extended only to opposite-sex unions, Iowa Code Ann. § 595.2 was amended in 1998 to reaffirm that “[o]nly a marriage between a male and a female is valid.” *Id.*, subsec. (1). Plaintiffs’ lawsuit is a direct frontal assault on the Legislature’s prerogative (which it has already exercised) to establish the most fundamental marriage policy of the state: its continuing embrace of human society’s millennia-old definition of marriage as the union of a man and a woman.

Evaluating constitutional claims is an appropriate exercise of the judicial power. Redefining well-established social institutions and rewriting statutes and constitutional provisions is not. As Iowa Legislators, *Amici* urge this Court to honor separation of powers principles by resisting Plaintiffs’ plea for judicial redefinition of marriage.

D. The Fundamental Right to Marry Cases Cannot Be Interpreted with a Definition of “Marriage” that Did Not Exist When They Were Written.

The fundamental right to marriage cases indisputably involved the right to enter the union of a man and a woman. *See, e.g., Andersen*, 138 P.3d at 978 (reviewing U. S. Supreme Court cases premising marriage’s status as a fundamental right on its unique ties to procreation between men and women). It is thus not circular reasoning to insist that the term “marriage” in those cases be interpreted as the courts used it when talking about the fundamental right at issue. By contrast, Plaintiffs ask this Court to adopt an ill-defined, novel meaning for the term “marriage,” and then use that meaning to interpret (actually, to reinterpret) old case law. Such an approach would be unthinkable in statutory construction. *See, e.g., Cubit v. Mahaska County*, 677 N.W.2d 777, 784 (Iowa 2004) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning”), quoting *Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543, 548 (Iowa 2002). It would be just as inappropriate to

redefine “marriage,” and then attribute that new meaning to the way the term was used in cases where the courts either implicitly or explicitly meant the union of a man and woman.

Plaintiffs can only claim that what they seek is access to the fundamental right to marriage by assuming marriage means something other than the union of a man and a woman. Yet Plaintiffs cannot substantiate that the cases recognizing that fundamental right, and exploring its contours and implications, meant or even contemplated something else. Attributing a meaning to the terms used that is foreign to the way the cases used them is not legal analysis; it is result-driven semantics.

The only American appellate court that has created a right to same-sex “marriage,” the Massachusetts Supreme Judicial Court, honestly admitted that it could not do so without redefining the term: “[O]ur decision today marks *a significant change to the definition of marriage* as it has been inherited from the common law, and understood by many societies for centuries.” *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003) (emphasis added.)⁸ Though it redefined marriage, even that court did not apply its redefinition to pre-existing precedent on the fundamental right to marry. Indeed, it did not rule that same-sex “marriage” is a fundamental right. *Id.* at 961 (stating that it was not necessary to reach fundamental right issue in light of finding that no rational basis existed for denying same-sex couples right to marry under state constitution).

Every state or federal appellate court that has addressed the issue of whether the fundamental right to marriage extends to same-sex couples has ruled that it does not. *Lewis*, 908 A.2d at 211 (“[W]e cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right”); *Andersen*, 138 P.2d at

⁸ The plurality did not appear to recognize the circularity of using the redefined meaning of “marriage” to reach the conclusion that it should redefine marriage. *See id.* at 948 (“Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society”).

979 (For a court to find “that there is a fundamental right to marry a person of the same sex ... is an astonishing conclusion, given the lack of any authority supporting it; no appellate court applying a federal constitutional analysis has reached this result”); *Hernandez*, 855 N.E.2d at 10 (“We conclude that, by defining marriage as it has [the union of one man and one woman], the New York Legislature has not restricted the exercise of a fundamental right”); *Citizens for Equal Protection*, 455 F.3d at 870 -871 (no federal constitutional right to same-sex “marriage”); *Morrison v. Sadler*, 821 N.E.2d 15, 32-33 (Ind. Ct. App. 2005) (rejecting argument that same-sex “marriage” is a fundamental right); *Standhardt*, 77 P.3d at 460 (“The history of the law’s treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental right”); *Baker v. State*, 744 A.2d at 887 (rejecting claim that same-sex couples were entitled to marriage, which the court defined as the union of a man and a woman); *Dean v. District of Columbia*, 653 A.2d 307, 331 (D.C. App. 1995) (“I speak now for the division majority; we conclude that same-sex marriage is not a ‘fundamental right’”); *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (Same-sex “couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise”), *other holding overruled by constitutional amendment*; *Singer v. Hara*, 522 P.2d 1187, 1195-96 (Wash. 1974) (rejecting claim that marriage laws violate fundamental right to marriage); *Baker v. Nelson*, 191 N.W.2d at 186 (rejecting claim that the fundamental right to marriage applies “without regard to the sex of the parties”). All of these cases recognized that the fundamental right to marriage cases used the term “marriage” to mean the union of a man and a woman.

Plaintiffs' invocation of the fundamental right to marriage follows the same path as the *Goodridge* court, but circular semantics are not legal analysis.

E. The Court Cannot “Carefully Describe” a Fundamental Right Without Giving a Concrete Meaning to the Term Used.

A claim to a fundamental right under substantive due process requires the claimant to carefully describe the right at issue. However, same-sex “marriage” advocates claim that the liberty interest they are pursuing is carefully described as “marriage,” within the meaning of *Washington v. Glucksberg* 521 U.S. 702 (1997). That claim is not well grounded. Again, although Plaintiffs refer to the right at issue as “marriage,” they have not defined in any lucid way what they mean by the term, if not the union of a man and a woman. Absent a specific meaning for the term they are using for the right they seek, it cannot be said that they have “carefully described” the right. *Glucksberg*, 521 U.S. at 721. *See also Storrs v. Holcomb*, 168 Misc.2d 898 (N.Y. Super. 1996) (heavy burden of showing same-sex “marriage” ranks as a fundamental right not supported by arguable mere lack of governmental interest in prohibiting exchange of personal commitments between same-sex couple). “Marriage” has always meant the union of a man and a woman in Iowa law and the other federal and state cases discussing the fundamental right of marriage. Plaintiffs cannot justify attributing a different definition.

F. The Marriage Laws Do Not Interfere with the Privacy Rights of Same-sex Couples.

Arguments relating to privacy interests implicated in same-sex “marriage” are likewise premised solely on an assumed redefinition of marriage. Analyzing a claim to a right of same-sex “marriage” under the right to privacy adds nothing to the analysis, because the fundamental right to marriage is grounded in the right to privacy. *See Zablocki*, 434 U.S. at 384 (“recent decisions have established that the right to marry is part of the fundamental ‘right of privacy’ implicit in the

Fourteenth Amendment's Due Process Clause"). The term as used in the U.S. Supreme Court's marriage rights cases has been recognized repeatedly as referring to the union of a man and a woman.

All people have a right of intimate association that is not impacted by the marriage laws. Iowa's marriage laws do not prohibit homosexual persons from pursuing consensual family relationships. The laws simply do not provide for calling same-sex relationships "marriage," and do not equate those relationships to marriage. Without interfering with same-sex couples' ability to pursue intimate relationships, the marriage laws do not interfere with their right of intimate association. *See Morrison*, 821 N.E.2d at 34 (rejecting claim of interference with right of intimate association).

G. Iowa Has Not Adopted the "Commitment" Rationale for Marriage.

Arguments for same-sex "marriage" are based in part on the unsubstantiated assumption that the state's reason for licensing and regulating marriage is to honor the "commitment" of persons in a long term relationship. The few cases where courts have redefined marriage necessarily adopted this "commitment" rationale for marriage. *See, e.g., Goodridge*, 798 N.E.2d at 948 ("The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society"); *Hernandez v. Robles*, 7 Misc.3d 459, 497, 794 N.Y.S.2d 579, 609 (N.Y. Sup. 2005) ("Marriage, as it is understood today, is both a partnership of two loving equals who choose to commit themselves to each other and a State institution designed to promote stability for the couple and their children"), *rev'd*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006); *Brause v. Bureau of Vital Statistics* 1998 WL 88743, *6 (Alaska Super. 1998) (construing fundamental right to marriage as "the decision to choose one's life partner"), *overturned by constitutional amendment. See also Fourie v. Minister of Home Affairs*, South Africa Supreme

Court of Appeals 2004, Case No. 232-2003 at 11 (“[T]he capacity for commitment, and the ability to love and nurture and honour and sustain, transcends the incidental fact of sexual orientation”).

No state or federal *appellate* court other than *Goodridge*, however, has adopted this “commitment” view of marriage. Indeed, nearly all appellate decisions since *Goodridge* have either criticized the decision for reliance on the “commitment” rationale, or extensively quoted from the dissenting justices. New York’s First Department in *Hernandez* repeatedly quoted the reasoning of the dissenting justices in *Goodridge*. *Hernandez*, 805 N.Y.S.2d at 358, 359-62. The court’s repeated citation of the *Goodridge* dissents indicates sharp disapproval of the assumptions underlying the *Goodridge* decision. *See also Samuels*, 811 N.Y.S.2d 136, 145-46 (3rd Dept. 2006) (recognizing majority view, as opposed to *Goodridge*, that promoting responsible procreation is a legitimate basis for marriage laws).

In *Morrison*, the Indiana Court of Appeals criticized the *Goodridge* court’s unsubstantiated presupposition of the “commitment” rationale:

We . . . find that the *Goodridge* majority opinion is largely devoid of discussion of why the Commonwealth of Massachusetts might have chosen in the first place to extend marriage benefits to opposite-sex couples but not same-sex couples. It may well be, as the [plurality] stated, that for many people “it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.” However, *that does not answer the question of why the government may choose to bestow benefits on one type of permanent commitment and not another.*

Morrison, 821 N.E.2d at 29 (emphasis added).

Against this great weight of persuasive authority rejecting the “commitment rationale” for state regulation of marriage, Plaintiffs have suggested no viable reason for this Court to adopt such a rationale. This Court should not accept Plaintiffs’ implicit invitation to reach a decision on the

basis of an unsubstantiated assumption that the state regulates marriage simply out of respect for the commitment of couples.

II. There Are Multiple Rational Bases for Iowa's Marriage Laws.

The starting point for equal protection analysis under the Iowa Constitution is the same as that under the U.S. Constitution: “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as if they were the same.” *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942). See *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002) (“The Equal Protection Clause requires that similarly-situated persons be treated alike. ‘If people are not similarly situated, their dissimilar treatment does not violate equal protection.’”) (quoting *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000)). Moreover, Defendant Brien has established that Plaintiffs’ constitutional claims in this case must be evaluated under rational basis review, given that no fundamental right or suspect class is involved such as is sufficient to trigger heightened scrutiny. Plaintiffs cannot demonstrate that same-sex couples are essentially the same as opposite-sex couples when it comes to several legitimate state interests rationally served by the marriage laws, and thus Iowa’s marriage laws must be found constitutional.

A. Responsible Procreation and Optimal Child Rearing Are Well-Recognized as the State Interests Served By Marriage.

The New York Court of Appeals and the Washington Supreme Court have recently identified as strong state interests the promotion of responsible procreation (*i.e.*, steering the reproductive capacity of male-female relationships into stable, long-term relationships), and encouraging the optimal environment for child rearing. In keeping with the vast majority of appellate courts to address the issue, each high court found these interests to be constitutionally sufficient justifications for limiting marriage to opposite-sex couples. *Hernandez*, 855 N.E.2d at 7; *Andersen*, 138 P.2d at

979. The United States Court of Appeals for the Eighth Circuit recently reached the same conclusion. *Citizens for Equal Protection*, 455 F.3d at 868.

The U.S. Supreme Court has long recognized that marriage and procreation are inextricably intertwined. The Supreme Court has called marriage “the foundation of the family and of society, without which there would be neither civilization nor progress.” *Maynard*, 125 U.S. at 211. *See also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“the right ‘to marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause”); *Skinner*, 316 U.S. at 541 (“[m]arriage and procreation are fundamental to the very existence and survival of the race”); *Zablocki*, 434 U.S. at 383-84 (same); *Loving*, 388 U.S. at 12 (same). So pronounced is the procreation link in the Supreme Court’s marriage cases that the D.C. Court of Appeals found the Supreme Court “has called this right [to marriage] ‘fundamental’ *because of its link to procreation.*” *Dean*, 653 A.2d at 332 (emphasis added).

Most other courts that have considered the issue – federal and state courts alike – have also recognized that the state’s interest in marriage is rooted in addressing the consequences of the biological reality that opposite-sex couples will procreate, intentionally or accidentally. In one of the nation’s first challenges to the opposite-sex nature of marriage more than thirty years ago, a Washington court found that marriage “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.” *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974). *See also Morrison*, 821 N.E.2d at 30; *Lofton v. Dept. of Children & Family Services*, 358 F.3d 804, 818-19 (11th Cir. 2004), *cert denied*, 125 S.Ct. 869 (2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff’d*, 673 F.2d 1036 (9th Cir. 1982); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005);

In re Kandu, 315 B.R. 123, 147-48 (Bankr W.D. Wash. 2004); *Standhardt*, 77 P.3d at 464-65; *Baker*, 191 N.W.2d at 186; *In re Estate of Cooper*, 564 N.Y.S.2d 684, 688 (Sur. Ct. 1990).

This state interest in regulating marriage has been termed “responsible procreation,” a concept acknowledging two objectives: 1) steering inevitable opposite-sex procreation into a stable environment for the good of children and society; and 2) promoting an environment for optimal child rearing that encourages the biological mother and father to stay together to raise their child. *Morrison*, 821 N.E.2d at 25 n.13. Put another way, “[t]he State . . . has a legitimate interest in encouraging opposite-sex couples to enter and remain in, as far as possible, the relatively stable institution of marriage for the sake of children who are frequently the natural result of sexual relations between a man and a woman.” *Morrison*, 821 N.E.2d at 30. *See also* George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J. L. & POL. 581, 593-601 (1999) (describing state interest in responsible procreation and providing optimal environment for raising children); William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 164-72 (2004) (same); Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CANADIAN J. FAM. L., 11, 41-85 (2004) (same); 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, 788-90 (2001) (detailing the higher incidents of physical and sexual child abuse, educational failure, and poverty among children born out of wedlock).

Justice Cordy observed in his dissenting opinion in *Goodridge* that

[p]aramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. . . . [A]n orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.

Goodridge, 798 N.E.2d at 995 (Cordy, J., dissenting). *Accord Goodridge*, 798 N.E.2d at 979 n. 1 (Sosman, J., dissenting) (“[T]he reasons justifying the civil marriage laws are inextricably linked to the fact that human sexual intercourse between a man and a woman frequently results in pregnancy and childbirth”).

The intermediate *Hernandez* decision from New York’s First Department offers one of the most compelling statements in American law on the state’s interest in marriage:

The legislative policy rationale is that society and government have a strong interest in fostering heterosexual marriage as the social institution that best forges a linkage between sex, procreation and child rearing. It systematically regulates heterosexual behavior, brings order to the resulting procreation and ensures a stable family structure for the rearing, education and socialization of children. Marriage promotes sharing of resources between men, women and the children that they procreate; provides a basis for the legal and factual assumption that a man is the father of his wife’s child via the legal presumption of paternity plus the marital expectations of monogamy and fidelity; and creates and develops a relationship between parents and child based on real, everyday ties. It is based on the presumption that the optimal situation for child rearing is having both biological parents present in a committed, socially esteemed relationship. The law assumes that a marriage will produce children and affords benefits based on that assumption. It sets up heterosexual marriage as the cultural, social and legal ideal in an effort to discourage unmarried childbearing and to encourage sufficient marital childbearing to sustain the population and society; the entire society, even those who do not marry, depend on a healthy marriage culture for this latter, critical, but presently undervalued, benefit.

Hernandez, 805 N.Y.S.2d at 360.

The courts may not ignore or lay aside this substantial state interest in marriage in preference of more “enlightened” rationales for the institution. As one federal court noted:

[I]t is a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents. Because procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest. Encouraging the optimal union for rearing children by both biological parents is also a legitimate purpose of government. The argument is not legally helpful that children raised by same-sex couples may also enjoy benefits, possibly different, but equal to

those experienced by children raised by opposite-sex couples. It is for Congress, not the Court, to weigh the evidence.

Smelt v. County of Orange 374 F.Supp.2d 861, 880 (C.D. Cal. 2005). *See also Singer*, 522 P.2d at 1195 (“[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race”).

Given the great weight of authority for responsible procreation as the state’s interest in marriage, the courts have had no problem answering the common objection that not all married couples produce children:

Their argument that the statute does not have a rational basis because it allows heterosexual couples unable or unwilling to have children to marry ignores precedent holding that the classification created by a statute need not be perfect. Nor does it lack rational basis because it addresses one legitimate policy interest or problem (regulating heterosexual marriage) over others even if they are related to the same subject. The legislative process involves setting priorities, making difficult decisions, making imperfect decisions and approaching problems incrementally, and rational basis analysis does not require that a legislature take the ideal or best approach. Finally, there is no requirement in rational basis equal protection analysis that the government interest be furthered by both those included in the statutory classification and by those excluded from it.

Hernandez, 805 N.Y.S.2d at 361 (citations omitted).

The conclusion of these many appellate courts is that promoting responsible procreation and encouraging the optimal child rearing environment, for the good of children and of society, are the state’s interests in marriage. The enduring definition of marriage as a union between a man and a woman is not some arbitrary arrangement or invidious discrimination against homosexuals.⁹ Human

⁹ Despite various iterations of the marriage laws throughout the years, “marriage” has meant the union of a man and a woman from time immemorial. The definition and the historical laws cannot have had a discriminatory intent or purpose because the concept of a person “being” homosexual did not exist until late in the Nineteenth Century. *See* MERRIAM WEBSTER’S COLLEGIATE DICTIONARY—TENTH EDITION 556 (definition of “homosexual” as adjective in 1892, and as a noun in 1902). *See also Hernandez*, 855 N.E.2d at 8 (concept of same-sex “marriage” essentially unheard of, at any time or in any society, until just a few decades ago).

society, particularly the western legal tradition, has recognized that the state has a *compelling* interest in regulating opposite-sex relationships and promoting their stability for the maximum good of the children likely to be produced by such relationships. “In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society’s paramount goals.” *Adams*, 486 F. Supp. at 1124.¹⁰

This conclusion is not only legally sound, but venerated by millennia of human experience. Until recently, every major civilization throughout history, transcending religion and culture, has recognized and fostered only opposite-sex relationships within the bounds of marriage. Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage*, 47 CATH. U. L. REV. 1271, 1324 (1998). Government has an interest in promoting responsible procreation where children will be more likely to be raised by their biological, married mother and father.

Against all of the foregoing great weight of authority, the *Goodridge* decision from Massachusetts stands alone as the only American appellate decision ever to reject procreation as the valid state interest in marriage, and correspondingly the only American appellate decision ever to redefine marriage. However, the official validation of adult commitments so central to the reasoning of *Goodridge* simply does not suffice as the rationale for state licensing and regulation of marriage:

Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society, and such preference constitutes a rational policy decision. Thus, society and government have reasonable,

¹⁰ See also Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) (“[S]ome form of permanent association between the sexes [is] one of the rudimentary characteristics of Civilization”).

important interests in encouraging heterosexual couples to accept the recognition and regulation of marriage.

Hernandez, 805 N.Y.S.2d 360.

By sharp contrast to *Goodridge*, the well-considered conclusion of virtually all other appellate courts that considered the issue has been that the promotion of responsible procreation, for the good of children and of society, is the legitimate and well-established public interest served by marriage laws. This finding is congruent not only with the social and legal history of marriage, but also with the findings of the great majority of appellate courts across the country faced with claims for a right of same-sex “marriage.” Appellate courts over the last three decades have consistently confirmed responsible procreation as the legitimate public interest served by marriage laws.

B. Same Sex Couples Are Not Similarly Situated with Opposite-Sex Couples Regarding Procreation.

Consistent with this overwhelming weight of authority, many appellate courts have found that same-sex couples are not similarly situated with opposite-sex couples as regards the state interest in marriage of promoting responsible procreation. *See, e.g., Andersen*, 138 P.2d at 979 (“[The state Defense of Marriage Act] is constitutional because the legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children’s biological parents[, and that] [a]llowing same-sex couples to marry does not ... further these purposes”); *Citizens for Equal Protection*, 455 F.3d at 867 (state can legitimately conclude that “responsible procreation” theory of marriage “justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce

children by accident, but not on same-sex couples, who cannot”); *Hernandez*, 855 N.E.2d at 7 (same); *Morrison*, 821 N.E.2d at 25 (same).

By adopting the anemic and widely-rejected “commitment model” of marriage espoused in *Goodridge*, same-sex “marriage” advocates *a priori* ignore the essential facets of marriage which arise from opposite-sex unions. Same-sex couples as a class are not similarly situated with opposite-sex couples when it comes to marriage. Same-sex relationships are distinctly different from opposite-sex relationships reproductively, in terms of child-rearing environment, and historically.¹¹ Accordingly, under both the federal and state constitutions, the state of Iowa need not treat them as if they were the same.

Same-sex relationships are not similar to opposite-sex couples in respect to the state’s interest in “steering” procreation into marriage through the promotion and regulation of marriage, *i.e.*, encouraging responsible procreation. The vast majority of opposite-sex couples of child bearing age will procreate absent deliberate efforts to avoid doing so.¹² Since opposite-sex couples, *as a class*, will inevitably procreate, the state has a legitimate interest in encouraging opposite-sex couples to marry and have children within that state-sanctioned relationship.

¹¹ Defendant Brien has additionally demonstrated through expert testimony and in his summary judgment briefing that the Legislature can rationally conclude that same-sex couples are not similarly situated with opposite-sex couples in terms of optimal child-rearing and relational characteristics.

¹² In fact, many couples will procreate accidentally, regardless of intent. Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QLR 447, 454 (2004). About half of pregnancies are unintended. *Id.* at 455.

Courts upholding marriage laws against same-sex challenges have regularly noted that opposite-sex couples and same-sex couples are not similarly situated with regard to procreation. For instance, the Indiana Court of Appeals noted this fundamental difference:

[State recognition for marriage] encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly. . . . The recognition of same-sex marriage would not further this interest in heterosexual “responsible procreation.”

Morrison, 821 N.E.2d at 25.

Morrison followed the reasoning of the Arizona Court of Appeals, which also rejected a demand to redefine marriage, in part because same-sex couples are not similarly situated to opposite-sex couples when it comes to procreation:

Indisputably, the only sexual relationship capable of producing children is one between a man and a woman. The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.

Standhardt, 77 P.3d at 462-63. *See also Hernandez*, 855 N.E.2d at 7 (“[T]he Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.”);

By contrast to opposite-sex couples, 100% of same-sex couples are sterile *as couples*. Two males cannot father a child without a surrogate mother, nor two females father a child without a sperm-donating father. Every same-sex couple must “borrow” from the opposite sex to get pregnant.

Same-sex “marriage” advocates admit same-sex couples are not similarly situated, because for such a couple to parent a child together necessarily requires a third party’s involvement:

One feature of our experience has been an emphasis on “families we choose,” anthropologist Kath Weston’s felicitous phrase. Such families are fluid alliances independent of the ties imposed by blood and by law. Often estranged from blood kin, openly gay people are more prone to rely on current as well as former lovers, close friends, and neighbors as their social and emotional support system. Include children in this fluid network and the complexity becomes more pronounced. Because same-sex couples cannot have children through their own efforts, a third party must be involved: a former different-sex spouse, a sperm donor, a surrogate mother, a parent or agency offering a child for adoption. The family of choice can and often does include a relationship with this third party.

William Eskridge, Jr., *The Case for Same-Sex Marriage* 81 (1996) (footnote omitted).

Several courts have found this undeniable difference between same-sex and opposite-sex couples dispositive. *See, e.g., Adams*, 486 F. Supp. at 1123 (“if propagation of the race is basic to the concept of marriage and its legal attributes, ‘marriage’ is . . . impossible and unthinkable between persons of the same sex”); *see also Singer*, 522 P.2d at 1195 (“marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race . . . it is apparent that no same-sex couple offers the possibility of the birth of children by their union”); *Morrison*, 821 N.E.2d at 25 n. 13 (only opposite-sex couples present risk of unplanned conception, the ills of which marriage laws seek to ameliorate). *Cf. Hernandez*, 805 N.Y.S.2d at 360 (“[m]arriage . . . is based upon important public policy considerations . . . based on innate, complementary, procreative roles, a function of biology, not mere legal rights”).

The biological reality that same-sex couples are not similarly situated with different sex couples in terms of procreative capacity cannot be altered by assisted reproductive technology or changing sexual mores. Nor is the relevance of this difference defeated because some opposite-sex

couples are allowed to marry even if not capable of having children.¹³ This argument misses the point. Though not every married couple has children, the fact that some couples cannot or choose not to procreate does not undermine responsible procreation as the state's legitimate interest served by the marriage laws. Usually only one of the two members of an infertile couple has a problem conceiving a child. Men often remain fertile well into their late years. And birth control sometimes fails. In all of these cases, the marital relationship serves the state purpose of steering procreative capacity away from conception of children out of wedlock, in part through the stigma attached to marital infidelity. In any event, exceptions to the general rule do not change the rule. *See Singer*, 522 P.2d at 1195 (married couples incapable of becoming parents or which produce no children are exceptional situations and do not undermine procreation as state's interest in marriage). *See also Irizarry v. Board of Ed.*, 251 F.3d 604, 608 (7th Cir. 2001) (noting that "law and policy are based on the general rather than the idiosyncratic").

Procreative inability alone places same-sex couples in a different class than opposite sex couples with regard to the state's interest in promoting responsible procreation. They are not similarly situated with opposite-sex couples.

¹³ State efforts to assess an opposite-sex couple's fertility would surely raise other constitutional concerns. *Hernandez*, 855 N.E.2d at 11-12 ("While same-sex couples and opposite-sex couples are easily distinguished, limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable line-drawing. A legislature that regarded marriage primarily or solely as an institution for the benefit of children could rationally find that an attempt to exclude childless opposite-sex couples from the institution would be a very bad idea."). *See also Adams*, 486 F. Supp. at 1124-1125 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)); *Standhardt*, 77 P.3d at 462 (same). *See generally*, Lynn D. Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL., 771, 800-812 (2001).

C. Same Sex Couples Are Not Similarly Situated with Opposite-Sex Couples As to the Historic Social Institution of Marriage.

Same-sex relationships have not had the status of marriage historically. “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.” *Baker*, 191 N.W.2d at 186.¹⁴ Throughout history, nearly every civilization has affirmed that concept, and has recognized that same-sex relationships are a departure from the norm. See Peter Lubin and Dwight Duncan, *Follow the Footnote or The Advocate as Historian of Same-Sex Marriage*, 47 CATH. U.L. REV. 1271, 1324 (1998) (a critique of THE CASE FOR SAME-SEX MARRIAGE). No great civilization has ever given legal recognition to same-sex relationships as being the equivalent of marriage.¹⁵ The only historical cultures that supposedly accepted same-sex relationships were primitive cultures or civilizations that were in decline. See WILLIAM ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 15-50 (1996).

The state's vital role in protecting the institution of marriage through regulation cannot be gainsaid. Indeed, prompted by the many contemporary attacks on marriage by activists advancing various alternate family structures, growing numbers of notable scholars have called on the political and legal institutions of America to resist efforts to redefine and undermine such an important social institution. For instance, in June 2006, the Witherspoon Institute issued a joint statement by more

¹⁴ Justice Kennard of the California Supreme Court recently recognized the significance of the Supreme Court’s dismissal of *Baker*. “Until the United States Supreme Court says otherwise, which it has not done, *Baker v. Nelson* defines federal constitutional law on the question whether a state may deny same-sex couples the right to marry.” *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1127 (2004) (Kennard, J., concurring in part and dissenting in part).

¹⁵ Notwithstanding the eccentricities of one or two Roman emperors, not even William Eskridge claims that Roman law recognized homosexual marriage. THE CASE FOR SAME-SEX MARRIAGE at 23.

than 50 scholars of history, economics, psychiatry, law, sociology and philosophy,¹⁶ calling for a return to the active promotion of an understanding of the unique importance of marriage to civil society:

Marriage protects children, men and women, and the common good. The health of marriage is particularly important in a free society, which depends upon citizens to govern their private lives and rear their children responsibly, so as to limit the scope, size, and power of the state. The nation's retreat from marriage has been particularly consequential for our society's most vulnerable communities: minorities and the poor pay a disproportionately heavy price when marriage declines in their communities. Marriage also offers men and women as spouses a good they can have in no other way: a mutual and complete giving of the self. Thus, marriage understood as the enduring union of husband and wife is both a good in itself and also advances the public interest.

Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 5 (2006) <http://www.princetonprinciples.org> (available online in its entirety) (hereafter, "*Princeton Principles*").

In the *Princeton Principles*, the signatories review evidences for the importance of a shared understanding of marriage norms from history, the social and biological sciences, and moral and political philosophy. See *Princeton Principles*, 17-33. All of these sources demonstrate the unique and fundamental role played in civil democratic society by a strong, commonly-held understanding of, and public support for, the social institution of marriage. *Id.* It is on these bases that the *Princeton Principles* scholars underscore the state's crucial part and interest in protecting marriage, including protecting it from the threat of plural marriage:

Given the clear benefits of marriage, we believe that the state should not remain politically neutral, either in procedure or outcome, between marriage and various alternative family structures. Some have sought to redefine civil marriage as a private contract between two individuals regardless of sex, others as a binding union of any

¹⁶ The *Princeton Principles'* signatories are listed alphabetically, with position and institutional affiliation, beginning on page 39 of the publication.

number of individuals, and still others as any kind of contractual arrangement for any length of time that is agreeable to any number of consenting adult parties. But in doing so a state would necessarily undermine the social norm which encourages marriage as historically understood – i.e., the sexually faithful union, intended for life, between one man and one woman, open to the begetting and rearing of children. The public goods uniquely provided by marriage are recognizable by reasonable persons, regardless of religious or secular worldview, and thus provide compelling reasons for reinforcing the existing marriage norm in law and public policy.

Princeton Principles at 14. See also, Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CON. LAW & PUB. POL. 1 (2006) (analyzing extensively the ways in which traditional marriage is an important social institution that can only be sustained in a form benefitting society when it is protected by the law); Institute for American Values, *Marriage and the Law: A Statement of Principles* (2006) (same, by a group of 101 legal and family scholars).

Thus, a growing body of legal and social science scholars is calling for governments to exercise extreme caution in considering claims to redefine marriage. The delicate balance between marriage as a social institution, which serves as a fundamental building block of democratic society, and the legal institution of marriage, may be irreparably disturbed by legal redefinition of marriage. Accelerated erosion of the marriage culture will bring negative consequences for all in society, married or not.

Same-sex and opposite-sex couples are not similarly situated with regard to the historic, social institution of marriage as the primary form of legally recognized familial relationship.

CONCLUSION

For these and all the reasons urged by Defendant, Defendant's motion for summary judgment should be GRANTED, and Plaintiffs' motion for summary judgment DENIED.

Respectfully submitted this 6th day of April, 2007.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing *IOWA LEGISLATORS' BRIEF AS AMICI CURIAE* has been served upon all parties to this matter by delivery of a copy to each of the attorneys of record at the addresses and by the methods indicated below:

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