

**SUPREME COURT OF IOWA
CASE NO. 07-1499**

KATHERINE VARNUM, et al.,

Plaintiffs/Appellees

v.

TIMOTHY J. BRIEN,

Defendant/Appellant.

**Appeal from the Iowa District Court for Polk County,
Honorable Robert B. Hanson, Judge**

Brief of Amicus Curiae Liberty Counsel In Support of Defendant/Appellant

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INTEREST OF AMICUS CURIAE

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to traditional family values, including marriage, across the United States. Liberty Counsel has successfully defended the federal Defense of Marriage Act (“DOMA”), as well as various state DOMAs, and is presently involved in defending the definition of marriage against constitutional challenges in several jurisdictions. Liberty Counsel provided amicus curiae briefs in *Conaway v. Deane*, 932 A.3d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E. 2d 1 (N.Y. 2006), *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) and other cases. In addition, Liberty Counsel is representing Campaign for California Families in its defense of California’s law defining marriage as the union of one man and one woman. *In re Marriage Cases*, 143 Cal.App. 4th 873 (2006) *review granted*, 53 Cal. Rptr. 3d 317 (Cal. 2006).

Liberty Counsel is committed to upholding the institution of marriage as defined for millennia – the union of one man and one woman – and to ensuring that the institution is not undermined. Liberty Counsel has developed a substantial body of information related to the importance of marriage as the fundamental social institution. Most of this information was not presented to the trial court and is critical to a reasoned analysis of Plaintiffs’ claims. Liberty Counsel respectfully submits this information to assist this Court in evaluating Plaintiffs’ claims.

SUMMARY OF ARGUMENT

While Plaintiffs would have this Court believe that it is being asked to erase a discriminatory “marriage exclusion,” in fact what is at stake is whether Iowa is going to continue to honor a millennia-old transcendent social institution upon which society has been built and depends for its future. Plaintiffs present this Court with a package cleverly wrapped in the mantle of liberty, due process and equal protection. Beneath the colorful packaging, however, lies a ticking bomb aimed at demolishing the very institution to which Plaintiffs claim to seek admission. Plaintiffs are asking this Court to detonate that bomb and destroy an institution that has existed for at least several thousand years “in all or nearly all known human societies.”¹

This Court has repeatedly expressed that marriage – the union of one man and one woman – is a “most vital social institution.” *Bd. of Directors of Indep. School Dist. of Waterloo v. Green*, 259 Iowa 1260, 1269, 147 N.W.2d 854, 859 (Iowa 1967) (“*Green*”); *Bearbower v. Merry*, 266 N.W.2d 128, 130 (Iowa 1978). This Court has consistently reflected its understanding of the transcendent nature of marriage, which John Locke described as “the First Society.”² Locke defined marriage as:

[A] voluntary Compact between Man and Woman; and tho’ [sic] it consist chiefly in such a Communion and Right in one another’s Bodies, as is necessary to its chief end, Procreation; yet it draws with

¹ David Blankenhorn, *THE FUTURE OF MARRIAGE* 9 (Encounter Books, 2007).

² *Id.* at 26 (citing John Locke, *TWO TREATISES OF GOVERNMENT* (1698; Cambridge, U.K.: Cambridge University Press, 1965) 179).

it mutual Support, and Assistance, and a Community of Interest too, as necessary to unite not only their Care and Affection, but also necessary to their common Off-spring, who have a right to be nourished and maintained by them, till they are able to provide for themselves.³

That definition has carried across time and cultures, as all human groups have “fashioned kinship symbols and marriage rules aimed at guaranteeing that each child is emotionally, morally, practically, and legally affiliated with both parents.”⁴ All human societies recognize marriage as a social institution based upon the biological and social facts of human sexuality and reproduction, which are what enable society to continue.⁵ As this Court said in *McKee v. Reynolds*, 26 Iowa 578 (1869), the union of one man and one woman as husband and wife is “one of the chief foundations upon which rest the civilization, the prosperity, the stability, the good order and happiness of society.”

Plaintiffs are asking this Court to abandon that universal understanding in favor of a concept of marriage as a bundle of rights and benefits to be bestowed upon any two people who profess to love each other. Plaintiffs cast the union of one man and one woman as an “exclusionary rule” instead of what it is – the universal definition of marriage developed over millennia. Plaintiffs claim that society is obligated to recognize and bestow benefits upon any group of individuals who profess

³ *Id.*

⁴ *Id.* at 100.

⁵ *Id.* at 101-102.

to love each other and that any attempt to limit the award of benefits is an unconstitutional deprivation of rights. Based upon that premise, Plaintiffs claim that defining marriage as the union of one man and one woman violates equal protection, due process and privacy rights. Plaintiffs ask this Court to remedy the purported injustice by de-constructing the institution of marriage at the same time that they are asking to become a part of it. However, defining marriage as the union of one man and one woman neither discriminates on the basis of sex or sexual orientation nor deprives Plaintiffs of the fundamental right to marry.

Therefore, this Court should refuse Plaintiffs' request to ignite the spark that would cause the foundation of society to disintegrate. As this Court said in *Inskip v. Inskip*, 5 Clarke 204 (Iowa 1857), the judgment of the court "must not be governed by caprice or prejudice, or wild and visionary notions, with regard to the marriage institution, but should be so directed as to conduce to domestic harmony, and the peace and morality of society." Redefining marriage to be an amorphous union of any individuals who love each other would be just the sort of capricious action that this Court warned against more than 150 years ago and would serve to conduce disharmony rather than harmony.

This Court has rightly concluded that "the 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.” *Doe v. Ray*, 251 N.W.2d 496, 503 (Iowa 1977). The definition of marriage as one man and one woman, which predates the Constitution, has not suddenly become repugnant merely because Plaintiffs believe the law is unwise. This Court should reverse the trial court’s ruling and find in favor of Defendant.

LEGAL ARGUMENT

I. THIS COURT SHOULD REJECT PLAINTIFFS’ PLEAS TO DE-CONSTRUCT MARRIAGE IN ORDER TO VINDICATE A PURPORTED DEPRIVATION OF INDIVIDUAL RIGHTS.

Before this Court embarks upon this critical constitutional analysis, it is imperative to clarify the institution that this Court is being asked to analyze. Plaintiffs have skewed the analysis by labeling Iowa Code §595.2(1) as the “marriage exclusion law.”⁶ Plaintiffs attempt to mislead this Court into believing that in 1999, when the current version of Section 595.2(1) was enacted, the Legislature made a drastic change in the definition of marriage in Iowa in order to purposefully exclude same-sex couples from a right to which they would otherwise be entitled. In fact, as the legislative history demonstrates, prior to the 1999 enactment, Iowa Code §595.2(1) read “a marriage between a male and a female each eighteen years or age or older is valid.” The 1999 amendment merely changed the provision to read “only a marriage between a male and female is valid,.” and to place the age requirements in subsection (2). Iowa Legis. Serv. Ch. 1099 (West). Contrary to Plaintiffs’ representations,

⁶ Plaintiffs’ Resistance to Defendant’s Motion for Summary Judgment, p. 1.

marriage has been defined as the union of a “male and female” since before Iowa became a state. *See* Iowa Code §595.2 Historical and Statutory Notes (West 2008). The 1999 enactment merely clarified what had already been true for more than 150 years – marriage is, by definition, the union of a man and a woman.

Rather than acknowledging that marriage is a vital social institution universally defined as the union of a man and a woman, Plaintiffs portray marriage as a goody basket of rights and benefits which should be available to any group of people who love each other. Based upon that viewpoint, Plaintiffs claim that any attempt to define the parties who may partake in marriage should be considered a deprivation of individual rights. According to Plaintiffs, since marriage is a basket of government-sanctioned goodies, it should be available to all couples who profess to love each other, regardless of sex.

Contrary to Plaintiffs’ portrayals, the question before this Court is not the exclusion of homosexuals from a basket of benefits, but the continuing validity of a social institution that predates the state and transcends the law. Marriage is not a lump of clay that is to be re-molded to fit every new cultural trend, but is the cornerstone upon which society has been built and upon which society’s future depends. This Court should base its constitutional analysis upon that premise.

A. State Marriage Laws Do Not Create A Bundle Of Rights Called “Marriage,” But Regulate A Social Institution Upon Which Society Has Been Built And The Future Of Society Rests.

1. *This Court has consistently recognized that marriage – the union of one man and one woman – is the foundation of society.*

This Court has repeatedly recognized the unique role of marriage in the building and sustaining of society and how that role necessarily arises from the fact that marriage is the union of one man and one woman. As this Court said at the dawn of Iowa’s statehood:

The marriage relation creates the homes of the land, and it alone can effectively secure the care, nurture and education of the children. It is, therefore, one of the chief foundations upon which rest the civilization, the prosperity, the stability, the good order and happiness of society. The State, therefore, encourages marriages, and, after the marriage relation is entered into, is interested in maintaining it unbroken.

McKee v. Reynolds, 26 Iowa 578 (1869).”The marriage relation is sacred, and one which the law will encourage and maintain when formed.” *Barngrover v. Pettigrew*, 128 Iowa 533, 104 N.W. 904 (Iowa 1905). “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.” *Hopping v. Hopping*, 233 Iowa 993, 994, 10 N.W.2d 87, 89 (Iowa 1943). “While marriage is spoken of as a civil contract . . . , it is also a social institution, which is the foundation of the family and society.”

Id. at 996, 90 (citations omitted). The marriage relation referenced by this Court was, then, as now, the union of one man and one woman, not an undefined union of any two people who love each other, as further reflected in the following:

The policy of this state is that the de jure family is the basic unit of social order. This policy is reflected in statutes governing the right to marry. See Iowa Code chapter 595 (1983). It is reflected in the rule recognizing common law marriages. It is demonstrated by statutes defining the rights and responsibilities of husbands and wives toward each other and toward their children. See, e.g., chapters 597 and 598. The policy favoring marriage is not rooted only in community mores. It is also rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.

Laws v. Griep, 332 N.W.2d 339, 341 (Iowa 1983). “The law looks with favor upon marriage and seeks in all lawful ways to uphold this most vital social institution.” *Green*, 259 Iowa at 1269, 147 N.W.2d at 859. That is why this Court has been a strong advocate for marriage – the union of one man and one woman – and has invalidated private agreements and policies which “jeopardize the sanctity of the basic institution of all civilized society, the home.” *In re Dallman's Estate*, 228 N.W.2d 187, 190 (Iowa 1975).

This Court should follow suit in this case by rejecting Plaintiffs’ challenges which would not only jeopardize but actually dismantle the institution of marriage. Contrary to Plaintiffs’ representations, they are not seeking to simply “open up” marriage to same-sex couples,. Instead, they are seeking to create a whole new institution that would be stripped of the very universality and meaning that makes

marriage the fundamental institution that it is, not only in Iowa, but throughout human society.

2. ***The United States Supreme Court has similarly consistently acknowledged that marriage – the union of one man and one woman – is the essential social institution.***

The United States Supreme Court has similarly recognized since the early days of the Republic that marriage is the foundational social institution. Statutes “regulate the mode of entering into the contract, but they do not confer the right.” *Meister v. Moore* (1877) 96 U.S. 76, 78-79.

For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the **union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization;** the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy v. Ramsey 114 U.S. 15, 45 (1885)(emphasis added). Marriage “is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.” *Maynard v. Hill* 125 U. S. 190 (1888) . Marriage fosters responsible procreation and child-rearing, and therefore is “fundamental to the very existence and survival of the race.” *Skinner v. Oklahoma* 316 U.S. 535, 541 (1942).

Marriage is not merely a creation of statute, but is an institution that is older

than the Constitution, state statutes and court decisions. *See Griswold v. Connecticut* 381 U.S. 479, 486 (1965) .

We deal with a right of privacy older than the Bill of Rights-older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. The *Griswold* court struck down a Connecticut law prohibiting the sale of contraceptives to married couples. Since contraceptives are only an issue for couples consisting of a man and a woman, the “coming together” addressed by the *Griswold* court is a “coming together” of a man and woman, not the amorphous joining together of any two people who love each other, as Plaintiffs claim.

The United States Supreme Court, like this Court, has consistently confirmed that marriage is a fundamental social institution which, by definition, is the union of one man and one woman. Statutes such as the one under consideration by this Court memorialize, but do not create, the definition.

3. *Marriage is the cornerstone of society.*

Therefore, far from being merely a statutorily created bundle of rights, marriage – the union of one man and one woman – is a social institution that forms the cornerstone of society. As marriage scholar Maggie Gallagher said, there are many problems with the concept that marriage as a bundle of rights that should be

bestowed upon any couple who is in love and wants social recognition.

It reduces marriage to a creature of the state. By emphasizing the rights of adults, it intrinsically devalues the interest of children and the community in marriage. By reducing marriage to an individual right, it undermines the very norms of commitment it rhetorically upholds. It logically calls into question the notion of family law itself. If the purpose of marriage and family law is to affirm neutrally the multiplicity of adult emotional choices, because individual declarations of intimacy are sacred matters in which the state has no right to interfere, then the question becomes: why do we have laws about marriage at all? ⁷

Similarly, marriage scholar David Blankenhorn writes that “Speaking of marriage exclusively or primarily in terms of ‘rights’ is misleading and I think also demeaning, because it obscures the human dimension.”⁸ “Defining marriage as a set of ‘rights’ also obscures the fact that the married spouses are not simply rights-bearing individuals in an interpersonal relationship, but also agents of society in a vital *social institution*.”⁹ “A social institution is not a ‘bundle of rights,’ but a pattern of rules and structures intend to meet social needs.”¹⁰ Social institutions create and maintain rules, including rules for who is part of the institution, maintain guidelines for behavior that are binding for the participants, build and express shared agreements about what is

⁷ Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?* 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 231 (2004).

⁸ Blankenhorn at 96.

⁹ *Id.* (emphasis in original).

¹⁰ *Id.*

important and what is to be valued, and create authoritative public meaning.¹¹
“Finally, and perhaps most importantly, social institutions exist in order to solve basic
problems and meet core needs.”¹²

In the case of marriage, it exists to address the fundamental problem that
humans are divided into males and females and reproduce sexually, and to meet the
need for a shared life between the sexes and for the successful raising of children.³¹
None of the cultural changes that sparked revisions to rules regarding property and
contract rights in marriage have changed the innate sexual differences upon which
marriage is based.

Marriage is not about bestowing society’s blessings, and the concomitant
benefits, upon any two people who love each other, as Plaintiffs allege. Instead, it is
“the principle human institution through which women and men share a common
life.”¹⁴ Marriage exists to strengthen the bridge between male and female that is
necessary to create and perpetuate society. The Iowa Code section under review is
a memorialization of that universal understanding of marriage, not an “exclusionary
law” aimed at homosexuals.

¹¹ *Id.* at 61.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 105.

Plaintiffs are asking this Court to graft onto marriage a concept that is wholly foreign to the institution's core purposes. "[T]oday's proponents of same-sex marriage in the United States are seeking to restructure marriage and use it for a special purpose. That purpose is to gain social recognition of the dignity of homosexual love."⁵¹

Marriage exists for public purposes that can be specified. *Diminishing homophobia is not one of marriage's public purposes.* Marriage is institutionally alive to the fact of sexual embodiment and, flowing from it, sexual reproduction. Regarding the subjective and often complex issue of sexual orientation, marriage is institutionally blind, deaf and dumb. It doesn't ask, tell, require, record, stipulate, accept, judge, or reject on the basis of individual sexual desire. Asking marriage to do so now – asking marriage to reconstitute itself according to the criterion of sexual orientation, and in doing so to help change public attitudes about orientation – is asking marriage to do something entirely unprecedented, and something for which the institution is radically ill equipped.¹⁶

Plaintiffs' view of marriage is that it is an expression of love, a private relationship of commitment which should be honored by society regardless of the sex of the partners. However, centuries of human history have demonstrated that marriage is a social institution aimed at bridging the sexual divide so as to provide for the perpetuation of society.¹⁷ It is the latter view that is memorialized in Iowa Code §595.2(1).

¹⁵ *Id.* at 177-178.

¹⁶ *Id.* at 179 (emphasis in original)..

¹⁷ *See id.*

B. This Court Should Reject The Plaintiffs’ Perspective Of Marriage As The Granting Of Public Approval To Private Relationships And Honor Its Long-Standing Recognition Of The Public Purposes Served By Defining Marriage As The Union Of One Man And One Woman.

Plaintiffs’ portrayal of Iowa Code §595.2(1) as an exclusionary rule reflects their perception that marriage exists solely to bestow social approval upon private relationships. Plaintiffs operate from the perspective that society is obligated to recognize and bestow benefits upon any group of individuals who profess to love each other, regardless of whether they are male or female. This perspective wholly ignores the public purposes upon which the social institution of marriage was built hundreds of years before the statutes were enacted.¹⁸ Since these public purposes are the essence of the institution of marriage, they should be at the forefront of this Court’s analysis of Section 595.2(1).

Marriage scholar Lynn Wardle summarized the problem posed by adopting Plaintiffs’ perspective on the meaning of marriage:

Most arguments for same-sex marriage emphasize the individual interest in marriage and argue from that perspective that there is no difference between heterosexual marriage and same-sex “marriage” – a major flaw because the primary purpose of marriage laws has been and should be to regulate marriage in the public interest, not to promote any individual’s or any particular class’ private interests. Asserting that legalizing same-sex marriage will enhance the lives or lifestyles of homosexuals misses the target. The proper question is whether, and if so, how, legalizing same-sex marriage will contribute to promoting the public interests in marriage, and to achieving the social policy purposes

¹⁸ These public purposes are discussed in detail in Section II.

for which laws establishing marriage have been enacted.⁹¹

“Marriage law is not enacted to promote private, personal interests, but to protect and promote those individual interests that are shared in common with society as a whole, i.e., social interests.”²⁰ Professor Wardle cogently describes the consequences of adopting Plaintiffs’ individual-centered perspective of marriage. “Prolonged excessive accentuation of individualism in marriage can be cancerous, and can destroy not only a marriage but also the sense of community and respect for the institution of marriage that is essential to the survival of our society.”²¹ Ms. Gallagher agrees that “[t]he private relationship view of marriage requires a deconstruction of the institution as the private needs of the individuals are all that matter.”²²

By contrast, the public purpose view of marriage is designed to reinforce key norms that are necessary to protect children and the reproduction of the family system and society.²³

Marriage law is at its heart not simply a cluster of benefits given to

¹⁹ 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, 779 (2001).

²⁰ *Id.* at 778.

²¹ *Id.* at 779.

²² Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 778-779 (2002).

²³ *See id.* at 788.

people whose taste in sex or lifestyle we happen to personally approve; it is a set of obligations and rewards that serve important social, not merely personal, goals. Marriage serves a pointing function, elevating a certain type of relationship – permanent, exclusive, normally procreative – above all others. Marriage law demarcates certain public boundaries which social norms can then use to impose informal rewards or sanctions.²⁴

Consequently, contrary to Plaintiffs’ portrayal, “marriage does not merely reflect individual desire, it shapes and channels it.”²⁵

Marriage as a social institution communicates that a certain kind of sexual union is, in fact, our shared ideal: one where a man and a woman join not only their bodies, but also their hearts and their bank accounts, in a context where children are welcome. In important ways marriage regulates the relationships and sexual conduct even of people who are not married and may never marry. Its social and legal prominence informs young lovers of the end towards which they aspire, the outward meaning of their most urgent, personal impulses. Its existence signals to cohabitators the limitations of their own, as well as their partners’ commitment. ⁶₂

As Ms. Gallagher observed, maintaining marriage as the union of one man and one woman “does not require the ruthless suppression of alternatives”²⁷ Society can still recognize that there are alternative forms of sexual expression but just not agree to grant those alternatives the same legal status as the union of a man and a woman. ⁸₂

²⁴ *Id.* at 788-789.

²⁵ *Id.* at 790.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

If society does what Plaintiffs suggest, and loses the idea that “marriage is, at some basic level, about the reproduction of children and society, if our law rejects the presumptions that children need mothers and fathers, and that marriage is the most practical way to get them for children, then we cannot expect private tastes and opinions alone to sustain the marriage idea.”²⁹

Therefore, this Court cannot adopt Plaintiffs’ myopic view of marriage, but must analyze the marriage statutes in light of the predominant public purposes of the institution, purposes which this Court alluded to more than 130 years ago.

The marriage relation creates the homes of the land, and it alone can effectively secure the care, nurture and education of the children. It is, therefore, one of the chief foundations upon which rest the civilization, the prosperity, the stability, the good order and happiness of society. The State, therefore, encourages marriages, and, after the marriage relation is entered into, is interested in maintaining it unbroken

McKee, 26 Iowa 578. It is that perspective of marriage, rather than Plaintiffs’ “deprivation of rights” perspective, that this Court should utilize. In so doing, this Court will see that preserving the definition of marriage is not about preserving a tradition of discrimination or exclusion, but about preserving the relationship upon which the future of society rests.

²⁹ *Id.*

II. CENTURIES OF HISTORICAL AND SOCIAL EXPERIENCE ESTABLISH EMINENTLY RATIONAL, EVEN COMPELLING, STATE INTERESTS IN DEFINING MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN.

A. Fostering And Preserving Responsible Procreation Remains A Key State Interest In Defining Marriage As The Union Of One Man And One Woman.

Marriage scholar William Duncan aptly summarizes why this Court should reject the Plaintiffs' and trial court's contention that the link between marriage and procreation has become irrelevant.

Our law and culture have always understood marriage as the primary vehicle for the creation of a family. In spite of technological changes and shifting sexual mores, it is still the case that the only way for conception to occur, absent third-party intervention, is in a relationship between a man and a woman. This is true even when the parties do not intend their relationship to result in the conception of a child.³⁰

By contrast, a sexual relationship between same-sex partners cannot result in conception, so only the intervention of a third party makes procreation or adoption possible.³¹ With same-sex relationships, procreation can never be "unintended."

Thus, as regards the state's interest in procreation, same- and opposite-sex couples are in very different positions. The state has an interest in all opposite-sex couples because all are theoretically capable of procreation. With same-sex couples, no state interest in procreation is raised by their relationship unless some outside intervening

³⁰ William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 165 (2004).

³¹ *Id.*

circumstance creates a procreative capacity.³²

Quoting Bertrand Russell, David Blankenhorn notes that “it is through children alone that sexual relations become of importance to society, and worthy to be taken cognizance of by a legal institution. Thus the main purpose of marriage is to replenish the human population of the globe.”³³ Mr. Blankenhorn explains that the connection between marriage and procreation is not an outmoded concept that can be discarded with the dawn of assisted reproduction technology. Instead, scores of anthropological studies have demonstrated that the link between marriage and procreation is an integral and necessary part of human development.³⁴“For anthropologists working from an evolutionary perspective, the linkage between marriage and sex could hardly be plainer – in part because for these scholars both sex and marriage are inextricably linked to procreation, which is the starting point for the study of human evolution and of human groups.”⁵³

Other marriage scholars affirm the continuing importance of the link between marriage and procreation. Professor George Dent wrote that “[v]ery few social institutions are found in all cultures throughout history. Heterosexual marriage is one

³² *Id.* at 166.

³³ Blankenhorn at p. 17 (quoting Bertrand Russell, *MARRIAGE AND MORALS* (London: George Allen and Unwin Ltd., 1929) pp 125, 189).

³⁴ *Id.* at 93.

³⁵ *Id.*

of the few. This fact alone argues that heterosexual marriage is important to the survival of a culture.”³⁶ Maggie Gallagher summarizes it best: “Societies need babies. It is a truism frequently forgotten by large complex societies: only societies that reproduce survive.”³⁷

Obviously, the state has an interest in ensuring for the survival of society. Consequently, it is eminently rational, even compelling, for the state to give particular recognition and bestow rights and benefits upon the union that is necessary to create future generations. The fact that technology has developed to assist in reproduction does not lessen the legitimacy of giving particular recognition to the union of a man and a woman.

B. Defining Marriage As The Union Of One Man And One Woman Promotes The Optimal Environment For the Rearing Of Children.

The state’s interest in responsible procreation includes not only an interest in having children born into a marriage relationship, but also an interest in promoting the optimal environment for the rearing of children. Plaintiffs and the trial court dismissed this interest as inconsequential because of the presence of children raised in “alternative” family structures. Nevertheless the United States Supreme Court and

³⁶ George W. Dent, Jr. *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 428 (2004).

³⁷ Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA.L. REV. 773, 789 (2002)

numerous state high courts have recognized that the state purpose of furthering procreation where both the mother and father are present to raise the child is at least rational, if not compelling.

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The law does not create families, it creates a structure in which family life can be legally recognized and protected. Redefining marriage by court decree would change this orientation. It would shift the legal posture of the state from recognizing a naturally recurring relationship (the joining of men and women in a relationship open to creating new life) to creating the institution (any two people whom the law chooses to recognize). The state would become the creator of families and thus turn the family into a mechanism for imposing state values on individuals.

Bellotti v. Baird 443 U.S. 622, 638 (1979) (plurality opinion) (quoting *Prince v. Massachusetts* 321 U.S. 158, 166 (1944)). Similarly, the Washington Supreme Court, New York Court of Appeals and Maryland Court of Appeals held that marriage enjoys its fundamental status due, in large part, to its link to procreation. *Conaway v. Deane*, 932 A.2d 571, 630 (Md. 2007); *Andersen v. King County* 138 P.3d 963, 983 (Wash. 2006); *Hernandez v. Robles*, 855 N.E. 2d 1, 7 (N.Y. 2006).

As Professor Dent observed, “By conferring honor on marriage the law promotes that institution which maximizes the likelihood that parents will give their children good care. By contrast, recognizing same-sex marriage will sever the connection between marriage and child-rearing.”³⁸ Professor Dent also disputed the

³⁸ Dent, *Traditional Marriage*, at 431-432.

private relationship premise which drives Plaintiffs' quest for marriage recognition.

People find fulfillment in many human relationships, such as drinking buddies and bridge groups. However, the law generally leaves these to be handled privately. Marriage is different largely because of its importance to children, who cannot protect their own interests within the family as drinking buddies and members of bridge groups can.³⁹

David Blankenhorn observed that "Marriage's main purpose is to make sure that any child born has two responsible parents, a mother and a father who are committed to the child and committed to each other."⁴⁰ He referenced philosopher Sylvaine Agacinski's observation that;

[E]ach child has a right to its "double origin." Humanity is divided into male and female. Each new child is born of one man (its father) and one woman (its mother). In a good society, the double origin of every child is recognized and respected. Unalterably denying or effacing a child's double origin in the name of adult freedom is morally wrong.⁴¹

It is not necessary that Plaintiffs or the Court agree with these scholars or the other courts to uphold Iowa Code §595.2(1). It is sufficient to show that these issues provide a sufficient basis to maintain the presumption that Section 595.2 is constitutional. *See Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 558 (Iowa 1980).

³⁹ *Id.* at 432.

⁴⁰ Blankenhorn, at . 153.

⁴¹ *Id.* at 197 (quoting Sylvaine Agacinski, *The Double Origin* in PURITY OF THE SEXES (New York: Columbia University Press, 2001) 99-110).

C. Defining Marriage As The Union Of One Man And One Woman Fosters Equality And Relative Value Of The Sexes And Their Complementary Roles In Society.

Defining marriage as the union of one man and one woman also serves the important social function of fostering equality and optimal health and well-being between the sexes. As Professor Duncan explained, “marriage is necessary to bridge the differences between the sexes on a footing of equality for both.”⁴² Professor Duncan observed that “marriage provides two significant additional benefits to society which justify its preservation:”

First, marriage provides an institution where men and women are valued equally. As currently understood, there can be no marriage without both sexes. Neither sex can be excluded without impairing the institution. This equality is not compelled by lawsuits, as has been the case with the integration of sex-segregated private clubs, but is intrinsic to the nature of the institution. Because the very nature of marriage requires equal participation by men and women, it sends a powerful message about the importance of each sex to society's fundamental unit. Related to this reality of sex equality in marriage is the message that the law of marriage conveys about the relative worth of men and woman, particularly in their roles as fathers and mothers. Redefining marriage to include same-sex couples is a legal endorsement of the fungibility of men and women, mothers and fathers. In other words, when the state says that “any two persons” are equivalent to a mother and father, it is also saying that a mother or a father makes no unique contribution to child well-being. In the United States there are 16,473,000 children living in mother-only homes and 3,297,000 children in father-only homes. In the face of these numbers, it is eminently reasonable for the state to shrink from sending a legal message that men (fathers) are not essential to marriage or that women (mothers) can be dispensed with without consequences. Marriage advances these state interests by acknowledging that a marriage cannot exist without both a man and a

⁴² Duncan at 171.

woman.³⁴

Professor Wardle agrees that “the assumption that same-sex unions are fungible with marriages in terms of social policy is wrong.”⁴⁴ “In reality, not all relationships are the same, and not all relationships are of equal value to children, to families, and to society.”⁴⁵ “Marriage has an ethical or moral dimension lacking in other relationships that transfigures it into a truly unique institution and that can transform the individual men and women into caring and ‘other-committed’ husbands and wives, at the same time.”⁴⁶ Professor Wardle observed that:

The astounding thing about the argument for functional equivalence between marriage and other partnerships is that it has developed at a time in history when there is overwhelming evidence of the unique value and superior benefits of marriage compared to other adult intimate relationships. Married couples live longer, are healthier, report that they are happier, have lower rates of mental illness, have lower rates of substance abuse, earn more, save more, have more enjoyable sexual intercourse, experience less physical and emotional abuse.⁷⁴

As is true with the studies cited immediately above, it is not necessary that the parties or the Court agree with Professor Duncan and Professor Wardle’s conclusions, only that the studies provide a rational basis for defining marriage as the union of one

⁴³ *Id.* at 171-172

⁴⁴ Wardle, *The “End” of Marriage* at 53.

⁴⁵ *Id.* at 52.

⁴⁶ *Id.*

⁴⁷ *Id.*

man and one woman.

CONCLUSION

This Court should decline Plaintiffs' invitation to de-construct the institution of marriage from the universally understood union of one man and one woman to an amorphous union of any group of people who profess to love each other. For the reasons set forth above, Amicus respectfully requests that this Court reverse the trial court decision and retain the definition of marriage as the union of one man and one woman.

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