IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 07-1499

KATHERINE VARNUM, et al. Plaintiffs-Appellees, v. TIMOTHY J. BRIEN, in his official capacities as the Polk County Recorder and Polk County Registrar, Defendant-Appellant.	On appeal from the Iowa District Court for Polk County Case No. CV5965 The Honorable Robert B. Hanson, presiding

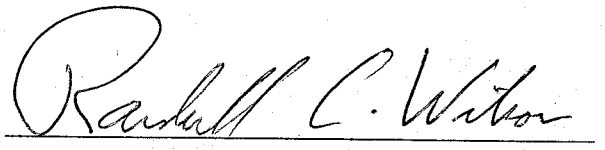
BRIEF OF AMICUS CURIAE THE BAZELON CENTER FOR MENTAL HEALTH LAW, IOWA PROTECTION AND ADVOCACY SERVICES, INC., NATIONAL COUNCIL ON INDEPENDENT LIVING, AND THE NATIONAL SENIOR CITIZENS LAW CENTER

Randall C. Wilson
PK 0007847
Iowa Civil Liberties Union
505 Fifth Avenue
Des Moines, Iowa 50309
Telephone: 515-243-3576
Facsimile: 515-243-8506
rwilson@iowaclu.org

John A. Knight*
American Civil Liberties Union Foundation
180 N. Michigan Avenue
Chicago, Illinois 60601
Telephone: 312-201-9740
Facsimile: 312-288-5225
**pro hac vice* application pending

PROOF OF SERVICE

I certify that on March 27, 2008, I served each of the parties to this action in compliance with Ia. Rule App. Pro.6.13, by depositing two true copies of this Reply Brief in the United States Mail, first class postage prepaid, addressed to each of the parties or their attorneys of record as shown below or by hand delivery of true copies:



Counsel for Defendant-Appellant:

Michael B. O'Meara
Roger J. Kuhle
Assistant Polk County Attorney
111 Court Ave., Rm. 340
Des Moines, Iowa 50309

Counsel for Plaintiffs-Appellees:

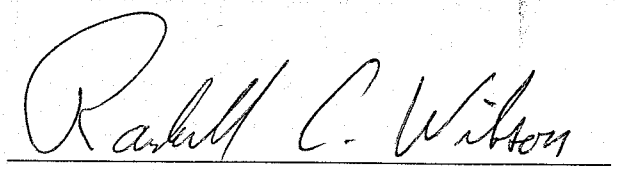
Dennis W. Johnson
Amy J. Bjork
Dorsey and Whitney, LLP
801 Grand Ave.
Suite 3900
Des Moines, Iowa 50309-2790

Camilla B. Taylor
Lambda Legal Defense and Education Fund, Inc.
11 East Adams, Suite 1008
Chicago, Illinois 60603

Kenneth Upton
Lambda Legal Defense and Education Fund, Inc.
3500 Oak Lawn Avenue
Suite 500
Dallas, Texas 75219-6722

CERTIFICATE OF FILING

I certify that on March 27, 2008, I will accomplish filing of this Reply Brief in accordance with Ia. Rule of App. Pro. 6.13 by depositing **eighteen** copies of the same in the United States Mail, first class postage prepaid, addressed to the Clerk of the Iowa Supreme Court with a request that said document be placed on file or by physically filing said document at the Clerk's office on or before said date.



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INTERESTS OF AMICI CURIAE

Amici are organizations that advocate on behalf of persons who are elderly or who have disabilities, or both. Amici include the Bazelon Center for Mental Health Law,[1] Iowa Protection and Advocacy Services, Inc.,[2] the National Council on Independent Living,[3] and the National Senior Citizens Law Center.[4]

As organizations representing persons who face discrimination because they are elderly or have disabilities, Amici share plaintiffs' concern with equal treatment under the law, including equal enjoyment of fundamental constitutional rights. Even though, like Plaintiffs, persons who are aged or have disabilities have been subjected to a long history of state discrimination,[5] discriminatory

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[1] The Bazelon Center is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. Much of the Center's advocacy involves constitutional challenges to disability discrimination.

[2] Iowa Protection and Advocacy Services, Inc., is a federally funded program that defends and promotes the human and legal rights of Iowans who have disabilities.

[3] The National Council on Independent Living is the oldest cross-disability, national grassroots organization run by and for people with disabilities.

[4] The National Senior Citizens Law Center has for some 35 years advocated nationwide through litigation, legislative and agency representation, and assistance to legal aid attorneys to promote the independence and well-being of low-income elderly individuals and persons with disabilities.

[5] The Americans with Disabilities Act ("ADA") was, in 1990,

> enacted … against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, [a]s of 1979, most States ... categorically disqualified 'idiots' from voting, without regard to individual capacity. The majority of these laws remain on the books, and have been the subject of legal challenge as recently as 2001. Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors. *** The decisions of [the] courts, too, document a pattern of unequal treatment in the administration of

classifications of these populations have not been subjected to strict scrutiny but have instead been evaluated for a rational basis.[6] Consequently, meaningful rational basis review of state classifications that exclude a group of people is of crucial importance to Amici. If this Court establishes a precedent for rational basis review that is so deferential that it amounts to no review at all, then persons with disabilities or older persons are placed at risk of having no recourse when they are subject to the serious prejudice and stigma that has influenced government decision-making for so many years.

Amici represent groups for whom federal and state anti-discrimination statutory protections currently exist. As a result, constitutional claims are not as common now as they were prior to these statutes' passage. Still, these constitutional protections continue to be important to persons who are elderly or disabled for three reasons: a) there are gaps in the statutory protections against

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> a wide range of public services, programs, and activities, including the penal system, public education, and voting. …

Tennessee v. Lane, 541 U.S. 509, 524-25, 124 S.Ct. 1978, 1989-90, 158 L.Ed.2d 820 (2004) (citations omitted); U.S. Dep't Of Labor, The Older American Worker, Age Discrimination In Employment, Report Of The Secretary Of Labor To The Congress Under Section 715 Of The Civil Rights Act Of 1964 (1965) (documenting the existence of widespread age discrimination in the work place and its damaging effects on both unemployed older workers and on the national economy).

[6] *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S.Ct. 2395, 2406, 115 L.Ed.2d 410 (1991) (age classifications trigger rational basis review); *Hawkins v. Preisser*, 264 N.W.2d 726, 729 (Iowa 1978) (same); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-46, 105 S.Ct. 3249, 3255-57, 87 L.Ed.2d 313 (1985) (same for disability classifications); *In re Detention of Williams*, 628 N.W.2d 447, 453 (Iowa 2001) (citing *Cleburne* court's conclusion that "'mentally ill' is not a suspect classification").

state discrimination,[7] b) the statutes draw their legitimacy in part from their constitutional underpinnings,[8] c) the constitution represents a base line protection

[7] For example, some courts have held that certain conditions, "do not have a substantial enough effect on [individuals'] major life activities," to meet the ADA's threshold, leaving them without any statutory protection from discrimination based on disability. *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002) (holding that an insulin-dependent pharmacist with diabetes who was fired for taking uninterrupted lunch breaks to control his condition was not disabled and had no recourse for his firing) (citation omitted). *See also Schuler v. SuperValu, Inc.*, 336 F.3d 702, 705-06 (8th Cir. 2003) (worker with epilepsy was not disabled or regarded as disabled under ADA); *Holt v. Grand Lake Mental Health Center, Inc.*, 443 F.3d 762, 766-67 (10th Cir. 2006) (person with cerebral palsy who could not cut her own fingernails or toenails, needed help dressing herself, and had difficulty chewing and swallowing not disabled under ADA); *Frazier v. Simmons*, 90 F. Supp.2d 1221, 1225 (D. Kan. 2000) (multiple sclerosis, which caused problems with balance, loss of hand strength, and fifty percent loss of vision, was not a disability under ADA), *aff'd*, 254 F.3d 1247 (10th Cir. 2001). The Iowa Civil Rights Act is interpreted the same as the ADA, *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915, 918 (Iowa 1997), and both apply to private and state discrimination. 42 U.S.C. §§ 12111-12117 (employment), 12131-12134 (public services, programs or activities) (2006); Iowa Code § 216.2 (2007) (Iowa Civil Rights Act defines "employer," "person" and "public accommodation" to include the state) .

[8] *See, e.g., Lane*, 541 U.S. at 519 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 [of the Fourteenth Amendment] authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."); *Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758, 765 (Iowa 1971) ("[I]n construing provisions of [Iowa's Civil Rights Act], we note our Iowa constitution declares all men are, by nature, free and equal. This freedom and equality must and does extend into the areas of facilities, services, goods furnished to the general public, housing and employment practices.") (citing Iowa Constitution, art. I, § 1); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 90-91, 120 S.Ct. 631, 649, 145 L.Ed.2d 522 (2000) (because "Congress failed to identify a widespread pattern of [unconstitutional] age discrimination by the States," the Age Discrimination in Employment Act did not validly abrogate state sovereign immunity).

against the chance that anti-discrimination protections will someday become politically unpopular or in the future will be judicially narrowed.[9]

Amici are also concerned about elderly and disabled lesbians and gay men whose lives are made more difficult, and whose dignity is diminished, by Iowa's ban on marriage for same-sex couples. Amici focus their brief on rational basis review, but Amici agree with Plaintiffs that strict scrutiny is the applicable constitutional standard to apply to review of Iowa's restriction on the fundamental right of marriage. However, if this Court chooses to apply rational basis review, Amici share with Plaintiffs an interest in its being properly and carefully applied.

ARGUMENT

I. Introduction.

This Court has taken seriously its responsibility to review legislation that favors one group and disfavors another, and its analysis of state constitutional rights has been independent of the federal analysis and often has been more solicitous of the rights of disfavored classes than the federal courts. Careful rational basis analysis free from the influence of majority prejudice is consistent

[9] *See, e.g., Robinson v. Kansas*, 117 F. Supp.2d 1124, 1147 (D. Kan. 2000) (students with disabilities stated equal protection claims for inadequate school funding), *aff'd*, 295 F.3d 1183 (10th Cir. 2002); *Larkin v. Michigan*, 883 F. Supp. 172, 179-80 (E.D. Mich. 1994) (Michigan law forbidding licensing of a group home for people with disabilities if the home will be less than 1500 feet from another lacked rational basis in violation of equal protection clause), *aff'd*, 89 F.3d 285 (6th Cir. 1996) (on statutory grounds); *Mummelthie v. City of Mason City, Iowa*, 873 F. Supp. 1293, 1336 (N.D. Iowa 1995) (employee's statutory claim based on denial of a promotion because of her age was dismissed for failure to file a timely charge but her equal protection claim could proceed).

with this Court's willingness over the course of its history to courageously strike down discriminatory laws and practices well before other courts were willing to do so. *See, e.g., Clark v. Board of Directors*, 24 Iowa 266 (1868) (rejecting racially segregated schools almost a century before *Brown v. Board of Education*); *Coger v. Northwest Union Packet Co*., 37 Iowa 145 (1873) (guaranteeing equal access to places of public accommodation without regard to race).

This brief first reviews the rational basis analysis this Court has applied in the past and shows that it is not the wholly deferential review Defendant proposes. It next reviews rational basis review as it has been applied by the U.S. Supreme Court and shows how even that Court's application of rational basis to cases like the current one is a significantly more searching review than is argued by Defendant. Finally, it reviews other state courts' applications of rational basis review to marriage cases and shows that they failed to engage in any meaningful review at all. Those courts have not expressed as plainly as this Court their obligation and willingness to independently interpret the equality provisions of their respective constitutions. Moreover, their application of rational basis failed to comport with even the basic standards established by the U.S. Supreme Court.

II. Rational basis review under the Iowa constitution requires a legitimate and credible policy reason for the classification that has some basis in real world facts and that is sufficiently related to the purpose of the classification.

In *Racing Association of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (2004) ("RACI II"), this Court broke down the rational basis test into three parts: 1)

"whether the Iowa legislature had a valid reason," *id.* at 7, for treating differently the disfavored group, 2) "whether this reason has a basis in fact," *id.* at 8, and 3) "whether the relationship between the classification, i.e., the differences between [the favored and disfavored group], and the purpose of the classification is so weak that the classification must be viewed as arbitrary." *Id.* The reason for the disparate treatment must be "a legitimate government interest." *Id.* at 7. There is a "strong presumption" that a statute is constitutional, so "a person challenging a statute shoulders a heavy burden of rebutting this presumption," which "includes the task of negating every reasonable basis that might support the disparate treatment." *Id.* at 8. However, where 1) there is no legitimate and credible policy reason for the classification, 2) that has some basis in real world facts and 3) that is sufficiently related to the purpose of the classification, the statute violates article I, section 6, the equality provision of the Iowa Constitution.

The test is similar to the federal one, *Fitzgerald v. Racing Ass'n*, 539 U.S. 103, 107, 123 S.Ct. 2156, 2159, 156 L.Ed.2d 97 (2003), but this Court applies the test independently and more carefully to fulfill its obligation to rule upon state constitutional claims. *RACI II* at 6. When carefully applied, rational basis review may result in the invalidation of even "economic and social legislation," *RACI II* at 8-9 (collecting cases), notwithstanding "the legislature's constitutional role to make decisions of a policy and political nature ...." *Id.* at 16. Here, where the challenged law is not simply economic legislation, as in *RACI II*, but burdens individuals' personal relationships, the Court should examine even more closely

the state's reasons and their connection to the marriage classification. *See, e.g., Federal Land Bank v. Arnold*, 426 N.W.2d 153, 156 (Iowa 1988) ("deferential scrutiny" given the state "in the realm of economic policy and regulation"). In exercising its independent responsibility to decide state constitutional claims, this Court has stricken legislation that lacked a rational basis, even when the U.S. Supreme Court has upheld the same statutory classification. *See RACI II* at 3*, Bierkamp v. Roger,* 293 N.W.2d 577, 579, 585 (Iowa 1980). If the "unconstitutionality of a given act is plainly made to appear … the court is called upon to declare it void." *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 9, 24, 65 N.W.2d 410, 419 (1954). This Court's "obligation not to interfere with the legislature's right to pass laws is no higher than [its] obligation to protect the citizens from discriminatory class legislation violative of the constitutional guaranty of equality of all before the law." *Id.*

A. If the statute was passed for illegitimate purposes, it fails rational basis review at the outset.

In *RACI II*, this Court looked first to see if the statute "serve[d] a legitimate governmental interest," *id.* at 7 (*quoting Glowacki v. State Bd. of Med. Exam'rs*, 501 N.W.2d 539, 541 (Iowa 1993)), and concluded that "where, as here, the only basis for the classification is to deny a benefit to one group for no purpose other than to discriminate against that group, the statutory classification ...is without a reasonable basis, and arbitrary." *id.* at 15 (citation omitted). Similarly, in *Glowacki*, 501 N.W.2d 541-42, the court concluded that a statute that prevented

the entry of a judicial stay of the revocation or suspension of a medical license pending appeal violated the equal protection rights of a doctor whose license was suspended for improper billing. Stays were available pending review of other agency actions and the medical licensing board admitted this doctor was no threat to the public. Consequently, "[t]he only purpose to be served by withholding Glowacki's right to a stay would be to single him out as a physician for more severe punishment ...." *Id.* at 542. A bare desire to harm is, by itself, a sufficient reason to find a statute has no rational basis.

B. There must be a credible policy reason for the classification's *exclusion* of class members from the protection offered others.

The state's policy reason for the classification must be a credible one. Moreover, it is not enough that there is a policy reason for benefiting the favored class; *excluding* the disfavored class must rationally further the state's proffered policy. *RACI II* considered whether a statute that taxed gambling receipts at racetracks at almost twice the rate as riverboat gambling receipts violated Iowa's equal protection clause. The court considered whether the differences between racetracks and excursion boats justified favoring excursion boats over racetracks by asking whether three policies were furthered by boats *and not racetracks*. *RACI II* at 9-16 (emphasis added). *See also Chicago & N.W. Ry. v. Fachman*, 255 Iowa 989, 1002, 125 N.W.2d 210, 217 (1963) ("There must be some substantial distinction having reference to the subject matter of the proposed legislation *and the objects and places excluded"*) (emphasis added); *Dunahoo v. Huber*, 185

Iowa 753, 171 N.W.123 (Iowa 1919) (law that bars employees, but not employers, from receiving tips violates equal protection); *Sperry*, 65 N.W.2d at 416 (a classification "must be based upon something substantial—something which distinguishes one class from another in such a way as to suggest the reasonable necessity for legislation based upon such classification"). To find otherwise would eviscerate rational basis review of laws that select some for benefits. There must be a reason for selecting some for special favor *and*, more importantly, for excluding others.

C. There must be a factual basis for both the proposed reason for the discriminatory classification and its relationship with the classification.

This Court looks to see: 1) whether the state interest is "'*realistically* conceivable,'" *RACI II* at 7 (emphasis in the original) (quoting *Miller v. Boone County Hosp.*, 394 N.W.2d 776, 779 (Iowa 1986)), and "has a basis in fact," *RACI II* at 8, and 2) "whether the relationship between the classification … and the purpose of the classification is so weak that the classification must be viewed as arbitrary." *Id.* The Court "probe[s]" the state interest "to determine if the constitutional requirement of some rationality in the nature of the class singled out has been met," *id.* (citation omitted), by reviewing the statute, its legislative history, and the factual context in which the statute operates. *See id.* at 9-10. "[M]atters of common knowledge and common report and the history of the times," *id.* at 10, as well as the legislative record, *id.* at 11, are reviewed. If these facts show that the "classification involves extreme degrees of overinclusion and

underinclusion in relation to any particular goal, it cannot be said to reasonably further that goal." *Id.* at 10 (quoting *Bierkamp*, 293 N.W.2d at 584).

In *RACI II*, for example, this Court refused to "accept the economic development of river communities and the promotion of riverboat history as a reasonable basis for the legislature's distinction between excursion boats and racetracks," *id.* at 9, since the interest was not realistically conceivable and there were no facts connecting the tax burden on riverboats to river community promotion. First, the interest was not believable, since the statutory language revealed that "excursion boat gambling was never anticipated as solely a 'river' activity so as to promote 'river communities,'" and "there is nothing peculiar about racetracks that prevents their location in river cities." *Id.* at 10. The fact that two of the three communities with racetracks are river cities made it impossible to credit this proposed "riverboat development" interest. Second, the facts failed to show a connection between the extra taxes on racetracks and an interest in assisting the financial position of riverboats, since the legislative history revealed only a small difference in their economic positions – the expectation that "land-based casinos could function with a lower operating cost" – which justified the legislature's "recommendation of a *four percent* tax differential between land and river casinos, but not the "*sixteen percent* differential that was adopted." *Id.* at 14 (emphasis in original). Finally, the assertion that the burden on racetracks rationally furthered the goal of riverboat development could not be credited, since it involved extreme degrees of overinclusion (by including not only riverboats, but

also boats on lakes and reservoirs) and underinclusion (by failing to include those racetracks located in river communities). *Id.* at 10.

In *Miller*, the Court struck down Iowa's notice of government tort claims requirement, which the court had upheld thirteen years earlier, because it recognized that its earlier decision had "ignored what common knowledge tells us." 394 N.W.2d at 779. An examination of the facts showed that the interests allegedly advanced by the requirement were not realistically conceivable or lacked a connection to the classification. Because the court was aware of the widespread local government use of liability insurance, the legislature could not rationally conclude that a notice requirement was needed for local governments to be able to do their "budget planning." About the claim that the sixty-day notice requirement led to the "repair of defective conditions," the court wrote, "[e]xperience teaches otherwise," *id.* at 780, since government responds to defective conditions whether or not "a lawsuit against it is contemplated." *Id.* An interest in avoiding "stale claims" failed to explain the classification's burden on plaintiffs in comparison to government defendants, since it was common knowledge that "any difficulty in proof in cases arising after sixty days would beset [plaintiffs] as well as defendants." *Id.* Each of these justifications would have worked as a hypothetical explanation for the state's notice requirement, but the Court rejected them because the real-world facts revealed that each was unworthy of belief.

In *Bierkamp*, 293 N.W.2d 577, the state suggested that an Iowa statute relieving drivers of liability for injuries to their non-paying passengers encouraged

persons to offer rides and share transportation and prevented collusive lawsuits, *id.* at 582, 584, but neither interest withstood inquiry about the practical impact of the statute. The "hospitality interest" was not realistically conceivable, since knowledge of the statute's waiver of liability to non-paying passengers (guests) "is more likely to be disruptive of hospitality and the sharing of transportation," *id.* at 583. "While there may be more offerors, there would concomitantly be fewer acceptors." *Id.* The collusion concern fell short both because it was not credible, *id.* at 584 ("[i]f the mischievous parties would be tempted to commit perjury or aid and abet a false claim on the issue of liability to allow recovery, wouldn't they be just as tempted to lie about the payment of compensation for the ride and avoid that statute in that way?"), and because of the extremely poor fit between the purpose and the burden placed on non-paying passengers, *id.* (the statute was grossly overinclusive "by barring all ... guest actions .... regardless of the lack of evidence of collusion" and underinclusive "for it does nothing to prevent collusive [guest] actions" based on one of the "exceptions to the statute").[10]

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[10] This Court's recent decision upholding a zoning ordinance that limited the number of unrelated persons, but not related persons, who could live in a single-family residence, *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255 (Iowa 2007), is consistent with the analysis applied in other cases. In *Ames,* there was no showing of an illegitimate purpose to disfavor a particular class, *id.* at 262 ("[s]ignificantly, the ordinance is not limited to college students nor does it bar them from living in single-family zones), credible policy reasons were offered for excluding larger groups of unrelated persons from single-family housing, *id.* at 260-61 ("Ames is a university campus city and ... experiences typical secondary effects of mass student congestion" including impermanence, noise, and traffic), and there was a factual basis for the purposes and their connection to the unrelated person classification. *Id.* at 260-62 (Although "imprecise and based on

In sum, the Court has consistently examined the policy reasons offered for a statute and their link to the statutory classification to determine whether they are "credible." To do so, it has considered whether they are consistent with "common knowledge" and "experience," and have a basis in fact. Applying that standard here, the Court should not accept entirely hypothetical connections between the exclusion of lesbian and gay male couples and heterosexual procreation. Such a policy purpose and its connection to the marriage classification are not credible, since they are neither consistent with common knowledge and experience nor based in fact, as set forth in Plaintiffs' Brief.

III. The federal standard involves some level of scrutiny of legislative purposes and their relationship to the classification and is applied more carefully in cases involving laws that burden personal relationships or aim primarily to disadvantage a group.

As described above, Iowa conducts rational basis review independently from the federal courts. However, even if this Court were to pattern its analysis after that of the U.S. Supreme Court, the approach should be substantially similar because the state's exclusion of same-sex couples from marriage regulates not in the economic arena, but in the area of personal relationships. The U.S. Supreme Court applies one rational basis test in all cases calling for that level of scrutiny, *Vance v. Bradley*, 440 U.S. 93, 96-97, 99 S.Ct. 939, 942-43, 59 L.Ed.2d 171

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stereotypes," the Ames city council had had "experience with students living off campus," its conclusions that the ordinance would achieve the council's goals were credible ones, and the overinclusion and underinclusion inherent in the ordinance were not extreme.) The ordinance's challengers had failed to offer more than "extreme examples of groups of people who do or do not offend the goals of the zoning ordinance" that are not "typical of reality." *Id.* at 260-61.

(1979), but the care exercised is plainly greater in cases involving laws burdening personal relationships or that are intended to disadvantage a group. *See Lawrence v. Texas*, 539 U.S. 558, 580, 123 S.Ct. 2472, 2485, 156 L.Ed.2d 508 (2003) ("We have been most likely to apply rational basis review to hold a law unconstitutional … where … the challenged legislation inhibits personal relationships" or reflects "a desire to harm a politically unpopular group.") (O'Connor, J., concurring) (collecting cases); *Vance*, 440 U.S. at 97 (deferential rational basis review is appropriate "absent some reason to infer antipathy …").[11] The test requires: 1) that there be a "plausible policy reason for the classification," 2) that "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker," and 3) that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Fitzgerald*, 539 U.S. at 107. The policy reason must be "an independent and legitimate legislative end." *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1997).

A. The reason for the classification must be legitimate for it to be upheld.

Government disapproval or dislike of a group is never a legitimate government purpose for a law that disadvantages a group. *U.S. Dep't of Agric. v.*

[11] In contrast, the Supreme Court's review has been "especially deferential" towards classifications, such as industry regulatory schemes, *FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307, 313-14, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993), and social welfare programs distributing limited funds, *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970).

Moreno, 413 U.S. 528, 534, 93 S.Ct. 2821, 2826, 37 L.Ed.2d 782 (1973) (in rejecting food stamp eligibility rule aimed at excluding hippie communes, the Court declared that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional purpose to harm a politically unpopular group cannot constitute a legitimate governmental interest."). Even where the evidence in the legislative history of the intent to disfavor a group is scant, absent another legitimate and *credible* purpose, the statute must be stricken.

Similarly, in *Cleburne*, the Court overturned a city's refusal to grant a permit to a home for the mentally retarded that was driven by the "negative attitude of the majority of property owners." 473 U.S. at 448. Even though the government was merely giving in to the prejudice of private citizens, its deference to their views was illegitimate, since "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" by the government, "are not permissible bases for treating a home for the mentally retarded differently" from other multiple dwellings. *Id.* at 448. *See also Romer*, 517 U.S. at 633 (constitutional amendment prohibiting any government measure that would protect lesbian and gay men from discrimination failed rational basis review, since it was drafted simply "for the purpose of disadvantaging the group burdened by the law"). Even where it is not obvious that the classification is the product of bias, the goal of "the search for the link between classification and objective" is to ferret out the prejudice that may underlie supposed public purposes. *Id.* at 632-33.

B. There must be a plausible and independent reason for excluding the group disfavored by the classification.

The purposes must provide a legitimate basis for excluding the disadvantaged group from the benefits offered others. The city of Cleburne did not require special use permits for multiple-dwelling housing, such as apartment buildings and nursing homes, but demanded one for a home for the mentally retarded. *Cleburne*, 473 U.S. at 447-48. The Court agreed that persons with mental retardation "may be different from those who would occupy other facilities" permitted in the community, but concluded that 'this difference is largely irrelevant unless the … home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses would not." *Id.* at 448. Absent an interest that is served by excluding a group from participation in a benefit, such as the special use permit at issue in *Cleburne*, the discriminatory classification fails rational basis review.

Even when the law at issue does not burden personal relationships or reflect a desire to harm a group, there must be a legitimate reason for burdening the affected class. In *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881, 105 S.Ct. 1676, 1683, 84 L.Ed.2d 751 (1985), the Court required that the government have a legitimate government purpose and that the "burden [the classification] imposes be rationally related to that purpose." To find otherwise, the Court explained, would mean that "[a] discriminatory [classification] would stand or fall depending primarily on how a State framed its purpose – as benefiting one group or as

harming another. This is a distinction without a difference …." *Id.* *See also* *FCC*, 508 U.S. at 317-19 (the Court required not only that the government articulate a reason for regulating some cable operators, but that it provide a basis for distinguishing those it regulated from those it did not).

The purpose for excluding the disfavored group must be independent of the classification. *Romer*, 517 U.S at 633. The purpose, for example, of a classification that excludes disabled persons cannot be the exclusion of disabled persons, since that purpose does not explain the differential treatment, but merely repeats it. Without an independent purpose, a law is nothing more than "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 635.

C. The connection between the exclusionary classification and the government purposes must have some basis in fact.

The relationship between the exclusion and the objective must be rational when viewed in its "factual context." *Romer*, 517 U.S. at 632-33; *see also Heller v. Doe*, 509 U.S. 312, 321, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993) (rational basis review must have "footing in the realities of the subject matter addressed by the legislation"); *Allegheny Pittsburgh Coal Co. v. Webster County,* 488 U.S. 336, 343, 109 S.Ct. 633, 637-38, 102 L.Ed.2d 688 (1989) (a property valuation system that "theoretically" might be able to find the true value of property violates equal protection where *in fact* it results in widespread disparity). In *Cleburne*, the Court scrutinized the purposes that the city offered for denying the permit – safety of the

home's location on a flood plan, legal liability, potential over-crowding within the home, neighborhood noise and congestion, and fire hazards, 473 U.S. at 449-50 – in light of its understanding of the real world and found it "difficult to believe" that these problems would be any worse for a home for persons who are mentally retarded than for other congregate housing units.

"The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446. *See also Romer*, 517 U.S. at 623. In *Romer*, the United States Supreme Court considered an equal protection challenge to "Amendment 2," a state constitutional amendment that prohibited the passage of civil rights laws that would protect lesbians, gay men and bisexuals from discrimination on the job, in housing, and in public accommodations. *Romer,* 517 U.S. at 623. The primary interests the State offered in support of the amendment —respect for the freedom of association of landlords and employers and conserving resources to fight race and sex discrimination—were unquestionably legitimate. *Id*. at 635. The Supreme Court nonetheless struck "Amendment 2" down under rational basis review, holding that it defied the "conventional and venerable" principles of the rational basis test because "the breadth of the Amendment is so far removed from these particular justifications" that it was "impossible to credit them." *Id*. *See also Moreno*, 413 U.S. at 536-37 (rejecting government's assertion of fraud prevention as a rationale for excluding households with unrelated persons from food stamp eligibility because the existence of other provisions in the Food Stamp

Act that addressed the problem of fraud made it hard to believe that the policy was rationally intended to prevent the very same problem).

A law that is extremely overinclusive and underinclusive may, as a result, be too "attenuated" from the "asserted goal" to be rational. *Cleburne*, 473 U.S. at 446. *See also Romer*, 517 U.S. at 635.

IV. Under Iowa's and the applicable federal rational basis standard, procreation is not a rational basis for excluding lesbian and gay male couples from marriage.

Defendant proposes procreation as a rational basis for the marriage classification. Def. Br. at 15. However, under Iowa's rational basis precedents and the applicable federal ones, procreation fails as a rational basis for excluding lesbian and gay male couples from marriage. It fails because the purpose of the exclusion of same-sex couples from marriage is to treat lesbian and gay male couples differently, which is a classification for its own sake and therefore prohibited by the Equal Protection Clause. In addition, Defendant's focus on different-sex biological procreation is illegitimate, since it favors biological offspring born without medical assistance over adopted children, or children born with the assistance of reproductive medical treatments, in violation of Iowa's commitment to treat all such parental relationships the same. Iowa Code § 633.223 (1994) (inheritance from adopted parent); *Schott v. Schott*, 744 N.W.2d 85, 89 (Iowa 2008) (after second-parent adoption, "Heather and Jamie are the children's legal parents"). The purpose offered is also not credible, since the real

world facts about marriage and procreation show the relationship between excluding same-sex couples from marriage and promoting procreation to be so remote as to be arbitrary. Finally, lesbian and gay couples procreate, so the purpose fails to explain why they should be excluded from marriage.

Defendant proposes that this Court reject its long tradition of careful rational basis review and follow the lead of other states that have upheld discriminatory marriage classifications by engaging in rational basis review that hardly amounts to any review at all. Those cases include *Conaway v. Deane*, 932 A.2d 571 (Md. 2007), *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), *Anderson v. King County*, 138 P.3d 963 (Wash. 2006), *Standhardt v. Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003), and *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005). The reasoning applied in these cases is inconsistent with the careful rational basis review that Iowa has historically conducted in examining whether a classification violates Iowa's unique Constitution. Similarly, they represent a diluted review that is inconsistent with the analysis the U.S. Supreme Court has used in considering cases comparable to this one.

All of these cases discuss their state's rational basis standards in terms that are starkly different from Iowa's analysis. In Maryland, "[t]he constitutional safeguard is offended only if the classification rests on grounds *wholly irrelevant to the achievement* of the State's objective." *Conaway*, 932 A.2d at 604 (quoting *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)) (emphasis added). *See also Hernandez*, 855 N.E.2d at 12 ("highly

indulgent"); *Anderson* 138 P.3d at 969 ("highly deferential"). *Morrison* applied Indiana's unique standard that is even "less restrictive of legislative classification than the federal" equal protection standard, and which has "never resulted in a statute or ordinance being declared facially invalid" under the Indiana Constitution. 821 N.E.2d at 22 n.7, 8.[12] *Compare RACI II* at 9 ("Our prior cases illustrate that, although the rational basis standard of review is admittedly deferential to legislative judgment, 'it is not a toothless one' in Iowa.") (citation omitted).

In addition, the factual record present in this case sets it apart from these out-of-state cases, where the records did not contain the kind of extensive and undisputed evidence about child welfare, parenting, and the history of marriage that was developed in the trial court here. [13]

These courts upheld discriminatory marriage classifications only because they failed to correctly apply even the federal rational basis standards. Plaintiffs' Brief shows that, properly applied, Iowa's marriage law fails even federal rational

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[12] It considers only whether "the disparate treatment according by the legislation" relates to "inherent characteristics which distinguish the unequally treated classes." *Morrison*, 821 N.E.2d at 21. It does not require a court to consider the nature of the right affected, the nature of the classification, the purposes for a legislative classification, or the burdens it imposes. *Id.* at 21-22.

[13] *Compare, e.g.,* the minimal fact-finding in *Deane v. Conaway*, No. 24-C-04-005390 (Maryland Circuit Ct. for Baltimore City, Part 30, Jan. 20, 2006), *rev'd*, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007), a copy which is attached, to the more than one hundred undisputed facts in the Ruling before this Court. *See also Standhardt*, 77 P.3d at 454 ("[n]o party asserts that factual findings are necessary to decide these issues"); *Morrison*, 821 N.E.2d at 19 (appeal of grant of motion to dismiss).

basis review. The courts all honed in on procreation as the rational basis for excluding same-sex couples from marriage but discussed two variations on the procreation theme. All of them have narrowed their view of procreation to "producing biological offspring of both members," *Conaway*, 932 A.2d at 631, *see also, Hernandez*, 855 N.E.2d at 3-4, 17-18, *Anderson*, 138 P.3d at 982-83, *Standhardt*, 77 P.3d at 461-63, *Morrison*, 821 N.E.2d at 23, since only by doing so can they exclude lesbian and gay male couples who procreate. However, as explained above, this preference for biological off-spring is inconsistent with Iowa's equal treatment of biological and adoptive children. Without that illegitimate preference for children related by biology to both parents, these courts' analysis fails to show how the exclusion of lesbian and gay couples from marriage and the protections it will offer to their children furthers in any reasonably conceivable way an interest in supporting procreation by heterosexuals.

Four of these decisions offer a different procreation interest, the interest in channeling *accidental* procreation by different-sex couples into marriage. *Hernandez*, 855 N.E.2d at 359, *Anderson,* 138 P.3d at 982, *Standhardt*, 77 P.3d at 462, *Morrison*, 821 N.E.2d at 23. This interest in providing a stable household for children is much too narrow to survive Iowa's rational basis standard or even to withstand federal review. Excluding same-sex couples from marriage does nothing at all to induce different-sex couples to marry, or to have children within marriage, or even to plan their pregnancies. There is simply no connection

between the *exclusion* and the proffered interest, which is required under the applicable precedent in Iowa and federal courts.

These courts were all content to ignore the grossly overinclusive and underinclusive nature of the classification. *Conaway*, 932 A.2d at 632-34, *Hernandez*, 855 N.E.2d at 17, *Anderson*, 138 P.3d at 980, *Standhardt*, 77 P.3d at 463, *Morrison*, 821 N.E.2d at 27. They also failed to look carefully at whether the proposed interest and its relationship to the marriage classification had any basis in fact. The facts about the world that the *Conaway* court failed to properly consider – that many lesbian and gay couples have children and that, in 2000, "there were just as many married households in the United States without marital children as those households with marital children," *Conaway,* 932 A.2d at 631-32 – actually show the irrationality of the supposed connection. The stability that comes with marriage is important for same-sex couples raising children just as it is for different-sex couples raising children, and the classification here is therefore grossly over- and under-inclusive. In *Hernandez* and *Anderson*, the courts did not consider actual facts in the real world but instead accepted the hypothetical legislative speculation about how different-sex couples might be better for children. *Hernandez*, 821 N.E.2d at 3-4, *Anderson*, 138 P.3d at 980. This Court has traditionally looked much more closely at asserted interests than did these courts, *see, e.g., RACI II*, 675 N.W.2d at 11 ("irrational classification" since "[t]here is nothing in the record, nor is it a matter of common knowledge ....."),

and the factual record developed here shows that this speculation is not in fact true.

The *Conaway* and *Standhardt* courts suggest that the privacy interests of heterosexual couples in refusing to disclose their intentions about procreation justify the extremely poor fit between excluding same-sex couples from marriage and promoting procreation by heterosexuals. *Conaway*, 932 A.2d at 633, *Standhardt,* 77 P.3d at 462. However, the state need not ask applicants for a marriage license whether they intend to have children in order to know that a significant number of different-sex married couples do not have children, while a large percentage of same-sex couples do. Only by improperly capitulating to a proffered interest, without any consideration of the real world facts, were these courts able to find a rational basis.

All four of these courts found rational bases for offering the protections of marriage to different-sex couples but failed to explain how excluding same-sex couples from marriage would promote procreation by heterosexuals or stable heterosexual relationships. These courts' failure to find a rational basis for *excluding* lesbians and gay men from marriage is a fatal flaw in their analysis. *Conaway*, 932 A.2d at 633 (sufficient that classification promotes heterosexual procreation), *Hernandez*, 855 N.E.2d at 3-4 (same), *Anderson*, 158 P.3d at 40-41 ("[T]he correct inquiry ... is whether allowing opposite-sex couples to marry further[s] legitimate government interests"), *Standhardt*, 77 P.3d at 463 ("We agree ... allowing same-sex couples to marry would not inhibit opposite-sex

couples from procreating, ...[b]ut the reasonableness of the [limitation] is not dependent on the contrary"), *Morrison*, 821 N.E.2d at 23. This Court, in contrast, has consistently and correctly required a credible reason for excluding someone from a protection, even on rational basis review.

CONCLUSION

Forming and protecting family relationships through marriage is a central aspiration for many Iowans, including the plaintiffs. The statutory exclusion of lesbians and gay men from marriage places a significant burden on them. Although they believe that this Court's scrutiny of this fundamental right should be strict, if the Court considers this classification under the rational basis standard, then Amici respectfully request that it do so with the care and scrutiny it has traditionally used. A burden on such a central right deserves no less.

Respectfully submitted,

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Randall C. Wilson PK0007857
ACLU of Iowa Foundation
901 Insurance Exchange Bldg.
505 Fifth Avenue
Des Moines, Iowa 50309-2321
Tel. (515) 243-4032
Fax (515)
rwilson@iowaclu.org

John A. Knight*
American Civil Liberties Union Foundation
180 N. Michigan Avenue, Suite 2300
Chicago, Illinois 60601
Tel. (312) 201-9740
Fax (312) 288-5225
*Application for *Pro Hac Vice* Admission Pending