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 Polk County Recorder and Polk County Registrar, *Defendant-Appellant*	On appeal from the Iowa District Court for Polk County District Court Case No. CV5965 Hon. Robert B. Hanson, District Judge

BRIEF *AMICI CURIAE* OF IOWA PROFESSORS OF LAW AND HISTORY

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INTRODUCTION

This case calls upon the State of Iowa to reaffirm its historic commitment to protecting the equality and individual liberties of *all* of its citizens, including its lesbian and gay male citizens. It requires this Court to interpret Iowa's unique constitution with due respect for both text and tradition. The case must be analyzed against the backdrop of Iowa's leadership and courage in the areas of civil rights and family law, and the willingness of its judiciary to uphold constitutional mandates in the face of efforts to legislate prejudice and discrimination.

Plaintiff-Appellees seek nothing more than to share in the protections and responsibilities of civil marriage. As this brief demonstrates, affirmance of the district court's decision by this Court would be in the very best traditions of Iowa values and jurisprudence.

INTEREST OF THE AMICI

Amici are professors at Iowa colleges and universities. They represent a broad spectrum of expertise in the fields of law and history, including Iowa law and history. Accordingly, they care deeply about their state's heritage, about advancing equality, and about protecting the welfare of this state's citizens.

Amici hope to assist the Court by illuminating Iowa's unique legal and social history, and the lessons from that history that should be drawn and applied to this case. The brief chronicles the state's devotion to the principles of

equality and individual liberty, as well as its courage to live up to those principles in the face of popular prejudice. *Amici* believe that a decision affirming the district court and striking down the discriminatory exclusion of lesbian and gay couples from civil marriage is the only decision that would be consistent with Iowa's longstanding commitment to protecting civil liberties and with the precedents of this Court in safeguarding equality.

The *amici* are:

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ARGUMENT

I. Iowa's Legal and Social History Demonstrates a Unique Commitment to Advancing Equal Rights and Protecting Individual Liberties.

Iowa is "the middle land."[1] Situated at a center point between the coasts, Iowa is identified in the American mind with strong values, civic responsibility, and common sense. Its history and culture encompass the traditionalism of a rural heritage, the restlessness and individualism of the American frontier, the dynamism of industry, and the vitality of urban life.

A bellwether by virtue of its presidential caucuses, Iowa is neither "red" nor "blue"; its modern politics are "a mixture of the traditional and the path-breaking."[2] Iowa's people – "somewhat conservative in their politics, usually liberal in their social thinking"[3] – are known for their commitment to family and community. "While [Iowans] may be organized internally into different

[1] *See* DOROTHY SCHWIEDER, IOWA: THE MIDDLE LAND (1996).

[2] LELAND L. SAGE, A HISTORY OF IOWA 318 (1974).

[3] SCHWIEDER, *supra* note 1, at 324.

religious congregations, political parties, or business interests, it is our families and hometowns that have traditionally commanded Iowans' primary loyalties."[4]

Iowa is also known for another, perhaps less widely known characteristic, but one entirely in harmony with its values of family and community: a powerful commitment to the equality and inalienable rights of all people within its borders. This commitment, enshrined in Article I, § 1, of the state constitution,[5] has been given meaning by the opinions of Iowa's jurists, the foresight of its lawmakers, and the powerful personalities and national leaders Iowa has nurtured. Indeed, one scholar has argued that Iowa's record of protecting civil rights and civil liberties is unique in the Union.[6] The state seal, unchanged since 1847, proclaims a motto that looks both backward towards achievement and forward towards vigilance: "Our liberties we prize, and our rights we will maintain."

In challenging private prejudice and arbitrary public restraints on individual dignity and accomplishment, Iowa has not been content to await the word of the federal courts, the deliberations of sister states, or the safety of

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[4] Tom Morain, *Introduction*, in OUTSIDE IN: AFRICAN-AMERICAN HISTORY IN IOWA, 1838-2000 xv, xvii (Bill Silag ed., 2001). Morain is former administrator of the State Historical Society of Iowa.

[5] "All men and women are, by nature, free and equal, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." IOWA CONST. art. 1, § 1.

[6] *See* Harlan Hahn, *Civil Liberties in Iowa*, 38 ANNALS OF IOWA 76 (1965).

national consensus. Twenty-six years before ratification of the Thirteenth Amendment, this Court declared that "no man in this territory can be reduced to slavery."[7] Eleven years before ratification of the Fourteenth Amendment, the state's constitution guaranteed African-Americans, on the same terms as all other citizens, the rights to life, liberty, and property.[8] Nearly a century before *Brown v. Board of Education*, this Court rejected a "separate but equal" system of public education for African-American children.[9]

Iowa was the first state to admit a woman to the practice of law, and the home state of the nation's most heralded advocate for women's suffrage, Carrie Chapman Catt. In the darkest days of McCarthyism, it was the only state to defeat a legislative measure that would have imposed a teachers' loyalty oath.[10] Iowa has led other states in equal access to education and the reform of family law. As of 2007, state law prohibits discrimination on the basis of sexual orientation in employment, housing, education, and public accommodations,[11] and the state is one of only 13 to offer domestic partner benefits to state

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[7] *In re: Ralph* , Morris 1, 1839 WL 2764, at *6 (Iowa Terr. July 1839).

[8] SAGE, *supra* note 2, at 136.

[9] *See Clark v. Board of Directors*, 24 Iowa 266 (1868).

[10] *See* Arnold A. Rogow, *The Loyalty Oath Issue in Iowa, 1951*, 55 AM. POL. SCI. REV. 861 (1961).

[11] Iowa Code Ch. 216.

employees.[12] The University of Iowa's gay and lesbian student group was founded in 1970, making it one of the first such organizations on any American college campus,[13] and UI was one of the first institutions to add sexual orientation to its non-discrimination policy.

Iowa's longstanding commitment to equality, and to the use of law and public policy to advance rather than inhibit individual autonomy and dignity, provides powerful support to Plaintiff-Appellees' argument that they have an equal right under the Iowa constitution to the protections and responsibilities of civil marriage. The matter before this Court transcends differing views about religion, politics, or other matters on which Iowans hold diverse views. It rests instead on first principles on which Iowans long ago found common ground: the value of family, and the right to live on equal terms as a member of one's community.

A. Early Influences

Its earliest settlers "brought to Iowa the idea that individuals possessed the right to govern their own lives,"[14] a value that would shape the state's commitments to tolerance, equality, and freedom of conscience. Abner Kneeland, a pioneer evangelist who "anticipated by a century opinions now held

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[12] See searchable database of employers providing domestic partner benefits, *available at* http://www.hrc.org/workplace.

[13] *See* http://www.uiowa.edu/%7Eglbtau/history.html.

[14] Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 DRAKE L. REV. 593, 611 (1993).

without opposition," settled in Iowa in 1839 after serving jail time in Massachusetts for blasphemy.[15] Following the 1844 murder of Joseph Smith, Jr., in Illinois, nearly 20,000 members of the Church of Jesus Christ of Latter-day Saints crossed into southern Iowa under the leadership of Brigham Young and established their first encampment west of the Mississippi in Lee County.[16] During its territorial years, a vigorous abolitionist movement planted the seeds for Iowa to become, by the end of the civil war, one of the Union's most racially egalitarian states.[17] Iowa passed one of the nation's first civil rights laws in 1884.[18]

When Iowa held its three constitutional conventions between 1844 and 1857, "natural rights and limited government … were already familiar phrases in America's political jargon."[19] The prevailing political philosophy of the times was captured by John Stuart Mill, whose essay *On Liberty* announced a simple but powerful limiting principle for government intrusion into private life: "the only purpose for which power can be rightfully exercised over any member of a

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[15] "Abner Kneeland," DICTIONARY OF UNITARIAN UNIVERSALIST BIOGRAPHY, *available at* http://www.uua.org/uuhs/duub/articles/abnerkneeland.html.

[16] State Historical Society of Iowa, Prairie Voices Iowa Heritage Curriculum Annotated Iowa History Timeline, *available at* http://www.state.ia.us/government/dca/shsi/education/heritage_curriculum/timeline/ iowa__timeline_page2.html.

[17] *See* ROBERT R. DYKSTRA, BRIGHT RADICAL STAR: BLACK FREEDOM AND WHITE SUPREMACY ON THE HAWKEYE FRONTIER (1993).

[18] Acts of the Twentieth General Assembly, ch. 105, §§ 1-2 (1884).

[19] Kempkes, *supra* note 14, at 617.

civilised community, against his will, is to prevent harm to others."[20] "Mill explained that a civilized society actually benefited from diversity and that it therefore should not legally interfere with someone merely seeking to be different."[21] Government could reason, remonstrate, or seek to persuade, but could not compel a citizen to conform to the opinions of the majority.[22] As Mill put the point succinctly in Chapter 3,

> As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself.[23]

What Mill "was telling the world in 1859" about natural rights "could be heard in Iowa City" during the state's three constitutional conventions.[24] Much debate at the final convention in 1857 focused on Art. I, § 1, the first words of which were changed from "All men are, by nature, free and independent," to "All men are, by nature, free and *equal*." Echoing concepts not only from Mill but from political philosophers such as Hobbes, Locke, and Rousseau, a Bill of

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[20] JOHN STUART MILL, ON LIBERTY (1969), ch. 1, *available at* http://bartleby.com/130/1.html.

[21] Kempkes, *supra* note 14, at 618 (footnote omitted).

[22] *See* MILL, *supra* note 20.

[23] MILL, *supra* note 20, ch. 3, *available at* http://bartleby.com/130/3.html.

[24] Kempkes, *supra* note 14, at 620.

Rights committee of the 1857 convention stressed that while some autonomy is relinquished when civil societies are formed, the rights to life, liberty, and property "are not taken away when men associate themselves into governmental organizations."[25] Another delegate argued that its citizens desired Iowa to have "the best and most clearly defined Bill of Rights" of any state.[26] He added,

> The annals of the world … furnish many instances in which the freest and most enlightened governments that have ever existed upon earth, have been gradually undermined, and actually destroyed, in consequence of the people's rights not being guarded by written constitutions.[27]

The primacy of an individual's ability to chart his or her life, free from arbitrary or unjustified government restraints, was not, in Iowa, merely a passing enthusiasm of the mid-19th century. This principle would ring out in "[o]ne of the most important cases decided by the [Iowa Supreme] Court in the early years of the new century,"[28] involving the state government's attack on the corporate existence of the Amana Society. The Society was a religious settlement whose members believed in the communal ownership of property – a belief sharply at odds with prevailing common-law views regarding property. Invoking the "spirit of tolerance and liberality which has pervaded our institutions from the

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[25] JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 245 (1857)

[26] *Id*. at 100.

[27] *Id*.

[28] RICHARD, LORD ACTON & PATRICIA NASSIF ACTON, TO GO FREE: A TREASURY OF IOWA'S LEGAL HERITAGE 200 (1995).

earliest times,"[29] Justice Ladd explained that the purposes of the state's corporate laws had to be balanced against the Society members' right to religious freedom:

> Certain it is that the status of the individual members [of the Amana Society] is not in accordance with prevailing American ideals. . . . But in this country all opinions are tolerated and entire freedom of action allowed, unless this interferes in some way with the rights of others. Each individual must determine for himself what limit he shall place upon his aspirations…. Under the blessings of free government, every citizen should be permitted to pursue that mode of life which is dictated by his own conscience.[30]

B. Legal and Social Equality

While pledges of equality in the laws and constitutions of other states and the federal government took decades to bear fruit, in Iowa such guarantees were given meaning early on through challenges to injustice in the courts, in the public square, and in everyday life. A series of decisions by this Court spanning more than a century made Iowa among the most innovative and proactive states in upholding the civil rights of racial minorities. *See* Part II.A, *infra*. The state's history also is distinguished by important advances in equal rights for women.

Two important measures of a state's commitment to equality are the openness of its public higher education system and of its legal bar to all qualified applicants. On both counts, Iowa has been an exemplar for the nation.

Iowa has been "a true pioneering State in making available what the [Northwest] Ordinance of 1787 called 'the means of education' to all persons,

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[29] *State v. Amana Society*, 132 Iowa 304, 319, 109 N.W. 894, 899 (1906).

[30] *Id*. at 317, 899.

regardless of sex or race."[31] In 1857, the University of Iowa became the first state university in the country to open its degree programs to women.[32] The state's history also "records a string of firsts in providing educational opportunities for African Americans, at times when other states and universities were unwilling to open their doors to former slaves and their descendants."[33]

Iowa also has been a beacon for equality in providing access to the bar. The University of Iowa law school was one of the first to accept an African-American student.[34] The Iowa State Bar Association admitted African-American members long before the American Bar Association followed suit.[35] What would become the National Bar Association, the nation's oldest and largest organization for African-American attorneys, was founded in Des Moines in 1925.[36]

Iowa admitted Arabella Mansfield, the first woman in the United States to practice law, to its bar in 1869 – a "dramatic first" that stood "in great contrast to the position taken in other states."[37] A year later, the General Assembly removed

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[31] ENCYCLOPEDIA OF IOWA 75 (1995).

[32] *Id*.

[33] Dennis J. Shields, *A View From the Files: Law School Admissions and Affirmative Action*, 51 DRAKE L. REV. 731, 732 (2003).

[34] *Id*.

[35] ACTON, *supra* note 28 at 233.

[36] *Id*.; Shields, *supra* note 33, at 732.

[37] ACTON, *supra* note 28, at 132.

the words "white male" from the statute governing qualifications to practice law.[38] And the first woman admitted to practice before the United States federal courts was reportedly Emma Haddock, of Iowa City, in 1875.[39] Three years later, the state supreme Court appointed Haddock to examine law students for admission to the bar.[40]

This early elimination of critical gender barriers evinces what Jennie McCowen, one of the first women to graduate from the University of Iowa Medical Department, described in 1884 as "the progressive and liberal attitude of the State toward women"[41]:

> In no state has it been more freely conceded that human interests are not one but many, and that the work of the world, broad and varied, must fall not upon one sex, nor upon one class, but that each individual, in return for benefit received, is in honor bound to bear his or her share of the burden.[42]

Dr. McCowen documented Iowa women registering patents, producing art and literature, and practicing medicine and law. Women were employed in virtually

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[38] *Id*.

[39] Jennie McCowen, *Women in Iowa*, in 3 ANNALS OF IOWA (October 1884), *available at* http://iagenweb.org/history/annals/oct1884.htm; Ellen A. Martin, *Admission of Women to the Bar*, 1 CHICAGO LAW TIMES (Catharine V. Waite, ed., 1887), *available at* http://womenslegalhistory.stanford.edu/articles/chicagotimes.pdf.

[40] Martin, *supra* note 39.

[41] McCowen, *supra* note 39.

[42] *Id*.

every line of work – in most cases with "no difference in the salaries paid men and women for the same grade of work."[43]

This spirit must also have inspired Carrie Chapman Catt, who grew up near Charles City and would become the most important force in the American movement for women's suffrage.[44] First elected president of the National Woman Suffrage Association in 1900, Catt criss-crossed the nation and provided indefatigable leadership to the movement for the 19th Amendment, which was finally ratified in 1920 and gave all women the right to vote.[45]

C. Reform of Family Law

In the regulation of marriage and family life, which in our federal system is uniquely the province of the states, Iowa has been a model for the principle that family law must first and foremost serve the goals of individual autonomy, dignity, and security. In 1970, when the issue was still highly controversial, Iowa became one of the first two American states to "[lead] American family law jurisprudence into a new era"[46] by allowing couples to divorce without proving

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[43] *Id.*

[44] State Historical Society of Iowa, Prairie Voices Iowa Heritage Curriculum Annotated Iowa History Timeline, *available at* http://www.state.ia.us/government/dca/shsi/education/heritage_curriculum/timeline/iowa__timeline_page3.html.

[45] *See generally* NATE LEVIN, CARRIE CHAPMAN CATT: A LIFE OF LEADERSHIP (2006).

[46] Bradley A. Case, *Turning Marital Misery Into Financial Fortune: Assertion of Intentional Infliction of Emotional Distress Claims By Divorcing Spouses*, 33 J. OF FAMILY L. 101, 101 (1994-95). *See also* Jack W. Peters, *Iowa Reform of Marriage Termination*, 20 DRAKE L. REV. 211 (1971).

fault by one spouse. "The no-fault revolution was grounded on the premise that the legal dissolution of a marriage should be granted solely on a factual finding that the marriage is irretrievably broken."[47] Iowa also was one of the first ten states to protect a married woman from forcible rape by her husband.[48]

Iowa has a long tradition of upholding equality in the fundamental right of civil marriage – the issue at the heart of this case. It eliminated its short-lived law banning interracial marriage in 1851 (the ban had been part of the Territorial Laws of 1839-40), making it the third state to reject so-called anti-miscegenation laws.[49] Iowa's closest neighbors took many years to follow suit: such bans fell in Illinois in 1874; in South Dakota in 1957; in Nebraska in 1963; and in Missouri not until 1967, after the Supreme Court finally struck down all remaining miscegenation laws in *Loving v. Virginia*.[50]

II. Led By This Court, Iowa's Judiciary Has Played a Paramount and Courageous Role in Protecting Equality and Liberty.

From its earliest days, the Iowa judiciary – and especially this Court – has played a preeminent and indispensable role in protecting the state constitution's guarantees of freedom, equality, and inalienable rights. This tradition of judicial

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[47] Case, *supra* note 46, at 101.

[48] *See* Martin D. Schwartz, *The Spousal Exemption for Criminal Rape Prosecution*, 7 VT. L. REV. 33, 41 (1982).

[49] *See* table at http://www.lovingday.org/map_access.htm.

[50] 388 U.S. 1 (1967); *see* table at http://www.lovingday.org/map_access.htm.

leadership and independence is so essential to the state's history that the Iowa Judicial Branch devotes a section of its web site to the state's early civil rights cases.[51] "Like the courts of today," the Judicial Branch explains, "the early Iowa courts were sometimes called upon to decide cases that involved volatile social or political controversies of the time. . . . These decisions demonstrate legal foresight as well as a deep and abiding respect for the values enshrined in our Constitution and Bill of Rights."[52] This history sheds valuable light on the role of the judiciary in deciding whether state officials may exclude same-sex couples from the protections and responsibilities of marriage.

A. Enforcing Civil Rights

In its very first decision, this Court considered the case of Ralph, a former Missouri slave whose master, Jordan Montgomery, allowed him to go to Dubuque to earn money to buy his freedom.[53] After Ralph had been in Iowa for five years, Montgomery sent agents into the state to reclaim him by force. This Court held that since Montgomery had given Ralph permission to resettle in Iowa, the former slave could not be labeled a fugitive. Although the Court ruled that Ralph was obligated to pay the $550 Montgomery had demanded for his

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[51] Iowa Judicial Branch, *Early Civil Rights Cases*, *available at* http://www.judicial.state.ia.us/Public_Information/Iowa_Courts_History/Civil_Rights/.

[52] *Id*.

[53] *In re: Ralph*, Morris 1, 1839 WL 2764 (Iowa Terr. 1839). *See also* SCHWIEDER, *supra* note 1, at 68-69.

freedom, such a debt could not form a basis on which any "man in this territory can be reduced to slavery."[54] The case of Ralph stands in sharp contrast to the infamous *Dred Scott* decision 18 years later,[55] in which the U.S. Supreme Court ruled that even in free states, slaves had no legal claim to freedom.

On the question of "separate but equal" systems of education, this Court was nearly a century ahead of its federal counterpart in declaring segregated schools to be intolerable and contrary to law. The 1868 case, *Clark v. Board of Directors*,[56] concerned Susan B. Clark, a 12-year-old girl who had been denied admission to Muscatine Grammar School No. 2 because of her race. This Court said the local school board had no authority to deny African-American children the right to equal education merely because "public sentiment in their district is opposed to the intermingling of white and colored children."[57] To do so "would be to sanction a plain violation of the spirit of our laws [and] tend to perpetuate the national differences of our people and stimulate a constant strife."[58] Not until *Brown v. Board of Education*[59] would the U.S. Supreme Court locate the

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[54] *In re: Ralph*, 1839 WL 2764, at *6.

[55] *See Dred Scott v. Sandford*, 60 U.S. 393 (1856).

[56] 24 Iowa 266, 1868 WL 145 (1868).

[57] 1868 WL 145, at *6.

[58] *Id*.

[59] 347 U.S. 483 (1954).

federal constitutional principles and summon the courage to reach the same conclusion.

Constitutional scholar Suzanna Sherry cites *Clark*[60] as a prominent example of one of the noblest yet most fragile traditions of American self-government: a judiciary willing to assert its independence when fidelity to the law and constitutional principles requires it, even when doing so runs "contrary to both popular sentiment and legislative will."[61] Sherry argues that such courageous and independent judges have been "vindicated by history."[62]

> We do not praise the majority in *Plessy v. Ferguson*, which upheld segregation in 1896, or the majority in *Korematsu v. United States*, which affirmed the internment of Japanese-Americans in 1944. We admire instead the Justices who dissented in each of those cases. . . . So when we try to achieve a balance between independence and accountability, we should be careful not to be blinded by present passions. What we might today think is excessive judicial activism and insufficient accountability might in a hundred years be viewed as a shining example of judicial courage.[63]

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[60] Suzanna Sherry, *Independent Judges and Independent Justice*, 61 LAW & CONTEMP. PROBS. 15, 18 (Summer 1998).

[61] *Id.* at 15.

[62] *Id.* at 19.

[63] *Id.*

In the same vein, the Iowa Judicial Branch explains how judicial independence gives courts the freedom to render fair and impartial decisions "without yielding to political pressure or intimidation."[64]

> Although it may be appropriate for politicians to consider public opinion and the views of special interest groups when drafting laws and regulations, it is never appropriate for judges to do so when deciding cases. Judges must remain impartial. In this respect, the judiciary is very different from the other two branches of government. Judges are accountable to the Constitution and the law—not political pressure.[65]

Five years after *Clark*, this Court considered the case of Emma Coger, a mixed-race woman who had been forcibly removed from a steamboat dining cabin reserved for whites.[66] In holding that Coger was entitled to the same rights and privileges as white passengers, the Court invoked the federal Civil Rights Act of 1866 and the Fourteenth Amendment, but ultimately rested its conclusion on Art. I, § 1 of the Iowa constitution:

> The decision is planted on the broad and just ground of the equality of all men before the law, which is not limited by color, nationality, religion or condition in life. This principle of equality is announced and secured by the very first words of our State constitution which relate to the rights of the people, in language most comprehensive, and incapable of

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[64] Iowa Judicial Branch, *Judicial Independence*, *available at* http://www.judicial.state.ia.us/Public_Information/About_Judges/Judicial_Independence_and_Accountability/.

[65] *Id*.

[66] *Coger v. Northwestern Union Packet Co*., 37 Iowa 145, 1873 WL 368 (1873).

misconstruction, namely: "All men are, by nature, free and equal."[67]

This Court's "fundamental concern for equal treatment for all"[68] also led to breakthroughs for women. As early as 1869, it ruled that women could not be denied the right to practice law. As a result, Arabella Mansfield became the first woman admitted to the bar in any state of the Union[69] – three years before the U.S. Supreme Court would rule that women did *not* have a right to practice law under the federal Constitution.[70] This Court also was one of the first to hold that the Nineteenth Amendment, in extending to women the right to vote, made them eligible for jury service as well.[71] Seven years after amendment was ratified in 1920, Iowa was still among only a minority of states where women served on juries.[72]

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[67] 1873 WL 368 at *5. As the Iowa Judicial Branch notes on its web site, "[t]he same conclusion" about equal access to places of public accommodation "was not reached by the U.S. Supreme Court until *Heart of Atlanta Motel, Inc. v. United States*[, 379 U.S. 241] (1964), a case that upheld the 1964 Civil Rights Act." Iowa Judicial Branch, *Early Civil Rights Cases*, *supra* note 51.

[68] Iowa Judicial Branch, *Early Civil Rights Cases*, *supra* note 51.

[69] *Id*.

[70] *Bradwell v. Illinois*, 83 U.S. 130 (1872).

[71] *State v. Walker*, 192 Iowa 823, 836, 185 N.W. 619, 626 (1921).

[72] Burnita Shelton Matthews, *The Woman Juror*, 15 WOMEN LAWYERS' J. (April 1927), *available at* http://womenslegalhistory.stanford.edu/articles/juror.htm.

In 1949, this Court returned to the issue of racial equality in *State v. Katz*.[73] The case involved two African-American Des Moines residents who had been refused ice cream at a downtown soda fountain.[74] The store manager was tried and convicted under a state statute originally passed in the late 1880s making it a crime to refuse service on the basis of race. This Court affirmed the conviction. As one authority on Iowa's African-American history has written, the state's civil rights pioneers not only "had the courage and conviction to challenge injustice," they also "found support in Iowa's institutions" – including her courts.[75]

B. Rejecting Regressive and Outdated Laws

For almost a century and a half, on fundamental issues of law concerning marriage, children, family relations, and privacy, this Court has not hesitated to break – and to do so boldly – from outdated and oppressive legal regimes clung to by other states.

As far back as 1867, this Court abandoned "the harsh common law rule that a father was entitled to absolute custody of his children in the event of a

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[73] 241 Iowa 115, 40 N.W.2d 41 (1949).

[74] *See* Ronald N. Langston, *Iowa's record on rights precedes landmarks*, DES MOINES REGISTER, Nov. 21, 1999, *available at h*ttp://desmoinesregister.com/extras/civilrights/iowalegacy.html; Shirley Salemy, *Activists keep alive memory of Iowa's civil-rights pioneers*, DES MOINES REGISTER, June 21, 1998, *available at* http://desmoinesregister.com/extras/civilrights/katz.html.

[75] Langston, *supra* note 74. In a similar public accommodations case, an Iowa federal court held in 1954 that the state's Civil Rights Act, first enacted in 1884, protected an African-American woman's right to gain admission to a public ballroom. *Amos v. Prom, Inc.*, 117 F. Supp. 615 (N.D. Iowa 1954).

divorce."[76] Instead, in *Cole v. Cole* it articulated the question that today frames every case involving children: "what does the best interest of [the] child require?"[77] The Court awarded custody of the couple's 13-year-old son to his disabled mother because "the evidence showed that the father was often drunk and violent and that best interests of the child would be served in his mother's care."[78] In breaking with a hoary common law command, the Court stressed its duty to decide the case based on what "humanity, common reason and the best interests of society demand[]."[79] Later decisions by this Court continued to recognize a more equal role for women in marriage.[80]

In 1956, this Court held that a wife could bring a cause of action for loss of consortium against a defendant who had negligently injured her husband.[81] At common law, only a husband was allowed to bring a loss of consortium action – a rule based on what this Court excoriated as the "hollow, debasing, and degrading philosophy" that a wife's legal personality was merged with that of

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[76] ACTON, *supra* note 28, at 133.

[77] 23 Iowa 433, 1867 WL 355, at *8 (1867).

[78] ACTON, *supra* note 28, at 133.

[79] *Cole*, 1867 WL 355, at *7.

[80] *See*, *e.g.*, *Johnson v. Barnes*, 69 Iowa 641, 29 N.W. 759 (1886) (both parents responsible for support of a child); *Niemeyer v. Chicago, B&Q Ry. Co.*, 143 Iowa 129, 121 N.W. 521 (1909) (in a personal injury action, married woman may sue for her own lost earnings); *Reid v. Reid*, 216 Iowa 882, 249 N.W. 387 (1933) (wife has capacity to enter into a contract with her husband).

[81] *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480 (1956).

her husband.[82] Even by 1956, the general rule among states was that a wife could bring such an action only where her husband had been intentionally injured. In extending a cause of action for negligent injury as well, the Court acknowledged that it was rejecting "the great weight of authority" from other states, but it deemed such authority worthy of support only when it "can stand the scrutiny of logic and sound reasoning in the light of present day standards and ideals. . . . When the reason for the rule ceases, so should the rule."[83]

In 1980, this Court held that a child custody order could not be modified merely because the custodial parent was in an interracial relationship[84] – four years before the U.S. Supreme Court would reach the same conclusion on federal grounds.[85] "Community prejudice," this Court declared, "cannot be permitted to control the makeup of families."[86]

This Court has applied that principle to the question of sexual privacy as well. It held in 1976 that the state's sodomy law, as applied to the private consensual conduct of an opposite-sex couple, violated the federal Constitution's equal protection guarantee by criminalizing conduct for unmarried persons that

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[82] *Id*. at 280, 485.

[83] *Id*. at 280-81, 485-86 (citations and quotation marks omitted).

[84] *In re: Marriage of Kramer*, 297 N.W.2d 359 (Iowa 1980).

[85] *See Palmore v. Sidoti*, 466 U.S. 429 (1984). *See also* Kim Forde-Mazrui, *Black Identity and Child Placement: the Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 931 n.35 (1994).

[86] *Kramer*, 297 N.W.2d at 361.

was not criminalized for married couples.[87] (The sodomy law was repealed in its entirety in 1978.) In this respect, this Court was ahead of the U.S. Supreme Court by 25 years: it was not until *Lawrence v. Texas*[88] in 2003 that the U.S. Supreme Court finally struck down (on federal due process principles) the 14 remaining state sodomy laws, including 10 that applied both to same- and opposite-sex couples.

This Court once again took a practical and independent course when in 1981 it abolished the common law cause of action for "alienation of affections."[89] Casting aside generations of legal cant, the Court called such a cause of action "useless as a means of preserving a family" as well as "demean[ing to] the parties and the courts."[90] The Court observed that while the action had been abolished by legislative action in 18 states and the District of Columbia, its decision would make Iowa only the second state to do so by judicial decision.[91]

Nonetheless, the Court rejected the notion that such a change must "come from the legislature rather than from the courts,"[92] noting that it is the duty of the

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87 *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976).

88 539 U.S. 558 (2003).

89 *Fundermann v. Mickelson*, 304 N.W.2d 790, 791 (Iowa 1981).

90 *Id*. at 791.

91 *Id*. at 792.

92 *Id*. at 793.

courts "to monitor and interpret the common law, and to abandon antiquated doctrines and concepts."[93] Those words apply to the letter in this case.

CONCLUSION

Iowa boasts proud traditions of leadership in civil rights and civil liberties and of courage and independence among its judiciary. Those traditions demand that the district court's well-reasoned decision be affirmed. In light of the history discussed in the foregoing brief, *amici curiae* respectfully urge this Court to hold that Ia. Code § 595.2(1) violates the Iowa Constitution.

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[93] *Id*. (citation omitted).