IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KATHERINE VARNUM, et al., **Plaintiffs,** **vs** **TIMOTHY J. BRIEN,** **Defendant.**	**Case No. CV5965** **RULING ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT**

This matter came before the Court for hearing on the parties' competing motions for summary judgment on May 4, 2007. Representing Plaintiffs were attorneys Dennis Johnson, Camilla Taylor, and Kenneth Upton, Jr. Representing Defendant was Assistant Polk County Attorney Roger Kuhle. Having entertained the arguments of counsel, having reviewed the parties' motions, resistances, and all supporting submissions, and being otherwise fully advised in the premises, the Court now makes its ruling on said motions.

I. STANDARD OF REVIEW

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Robinson v. Poured Walls of Iowa, Inc., 553 N.W.2d 873, 875 (Iowa 1996); IOWA R. CIV. P. 1.981(3). The Court shall determine whether summary judgment is appropriate by first examining the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine whether there is any genuine issue of material fact. IOWA R. CIV. P. 1.981(3); Wilson v. Darr, 553 N.W.2d 579, 582 (Iowa 1996). When the facts are undisputed and the only issue is what consequences flow from the facts,

summary judgment is appropriate. Smith v. CRST Int'l, Inc., 553 N.W.2d 890, 893 (Iowa 1996).

"A fact issue is generated if reasonable minds can differ on how the issue should be resolved." Schlueter v. Grinnell Mut. Reins. Co., 553 N.W.2d 614, 616 (Iowa Ct. App. 1996). "An issue of fact is 'material' only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law." Junkins v. Branstad, 421 N.W.2d 130, 132 (Iowa 1988) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "The requirement of a 'genuine' issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

The moving party has the burden to show the nonexistence of any genuine issue of material fact and the record must be viewed in the light most favorable to the nonmoving party. Schlueter, 553 N.W.2d at 615; Thorp Credit, Inc., v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). The statement of undisputed facts submitted by the moving party does not "constitute a part of the record from which genuine issues of material fact may be determined" except insofar as the statement of undisputed facts may contain "express stipulations concerning the anticipated summary judgment ruling." Griglione v. Martin, 525 N.W.2d 810, 813 (Iowa 1994) (citing Glen Haven Homes, Inc. v. Mills County Bd. Of Review, 507 N.W.2d 179, 182 (Iowa 1993)). The statement of undisputed facts "is intended to be a mere summary of claims that must rise or fall on the actual contents of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.'" Id.

To resist the motion, the nonmoving party must set forth specific facts

constituting competent evidence to support a prima facie claim. Hoefer v. Wisconsin Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 339 (Iowa 1991). If the moving party has supported its motion for summary judgment, the nonmoving party "may not rest upon the allegations or denials in his pleadings, but must show there is a genuine issue of fact." Colonial Baking Co. of Des Moines v. Dowie, 330 N.W.2d 279, 282 (Iowa 1983) (citing IOWA RULE CIV. PRO. 1.981(5)). The nonmoving party must plead "ultimate facts and cannot rely upon conclusions by themselves." Schulte v. Mauer, 219 N.W.2d 496, 500 (Iowa 1974). An expert's affidavit submitted in resistance to a motion for summary judgment must "set forth specific facts in order to create an issue of fact for trial." Bell v. Swift Adhesives, Inc., 804 F.Supp. 1577 (S.D. Ga. 1992) (citations omitted); *See* Brody v. Ruby, 267 N.W.2d 902, 904 (federal interpretations of Federal Rule of Civil Procedure 56 are persuasive in considering Iowa Rule of Civil Procedure 1.981). When the expert's opinion is based on speculation, hypothesis and is otherwise unsubstantiated by evidence in the record, it is inadequate to prevent the entry of summary judgment. Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (D.C. App. 1977).

II. UNDISPUTED FACTS

A. Preface to Statement of Undisputed Facts

Both the Defendant and the Plaintiffs have submitted, by affidavit, the statements of several purported expert witnesses in support of and in resistance to the opposing motions for summary judgment. In ruling on a motion for summary judgment, the Court should only consider evidence which would be admissible at trial. Pink Supply Corp. v. Hiebert, Inc., 612 F. Supp. 1334, 1338 (D.C. Minn. 1985) (citing FED.R.CIV.P. 56(e)); *See* McSpadden v. Mullins, 456 F.2d 428 (8th Cir. 1972); Chambers v. United States, 357

F.2d 224, 228 (8th Cir. 1966). For the reasons articulated below, this Court rejects certain expert testimony submitted by the parties.

In order for the opinion of an expert witness to be admissible at trial, the proffered evidence must meet several standards set forth by the Iowa Supreme Court in Leaf v. Goodyear Tire & Rubber Co. First, the evidence must be relevant. Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 533 (Iowa 1999) (citing IOWA R. EVID. 5.402). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" IOWA R. EVID. 5.401. Secondly, the evidence "...must be evidence in the form of 'scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.'" Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702). Lastly, "...the witness must be 'qualified as an expert by knowledge, skill, experience, training or education.'" Id. Additionally, it is not sufficient that an expert witness "be generally qualified in a field of expertise; the witness must also be qualified to answer the particular question propounded." Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396, 402 (Iowa 1991).

If a case is particularly complex, the Iowa Supreme Court has indicated that a trial court is free to utilize one or more relevant considerations articulated by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc.. Leaf, 590 N.W.2d at 533. The Court, pursuant to Daubert, is free to consider the following factors in evaluating the reliability of expert testimony: "(1) whether the theory or technique is scientific knowledge that can and has been tested, (2) whether the theory or technique has

been subjected to peer review or publication, (3) the known or potential rate of error, or (4) whether it is generally accepted within the relevant scientific community." Leaf, 590 N.W.2d at 533 (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94, 113 S.Ct at 2797, 125 L.Ed.2d at 483 (1993)). The United States Supreme Court has since extended the application of Daubert to all expert testimony involving "technical and other specialized knowledge" *See* Kumho Tire Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

1. The Defendant's Expert Witnesses:

The Plaintiffs object to several of the Defendant's expert witnesses. First, the Defendant has submitted the statement of Margaret Somerville. Ms. Somerville possesses a post-graduate degree in comparative law and is the Founding Director of the McGill Centre for Medicine, Ethics and Law. Ms. Somerville describes herself as:

> an ethicist with expertise in ethical aspects of new technoscience, including new reproductive technologies, which requires taking into account their impact on social values, including in the context of marriage, and the cultural meaning, symbolism and moral values that traditional marriage places around the inherently procreative male/female relationship, thereby protecting that relationship and the children who result from it.

Ex. F, Appendix to Defendant's Reply Brief and Brief in Resistance to Plaintiffs' Motion for Summary Judgment, Vol. 1 (hereafter "Defendant's Appendix"). Ms. Somerville intends to testify "about the ways in which redefining marriage to include same-sex couples would undermine these roles of the institution of marriage, in turn undermining marriage's ability and society's capacity to protect the inherently procreative relationship and the children who result from it, and related matters." Id at 1-2. She also intends to testify regarding "the impact that redefining marriage to include same-sex couples would

have on the affiliative rights of children to relationships with their biological parents, and related matters." Id at 2. The Defendants have also submitted the statements and deposition of Paul Nathanson, Ph.D. Dr. Nathanson is a senior researcher in the Department of Religious Studies at McGill University and possesses a Ph.D. in Religious Studies. Nathanson indicates that he possesses expertise in the areas of: "the relation between religion and secularity; ethics (new reproductive technologies; children's rights); popular culture (family and marriage); and gender (especially, maleness/masculinity)." Ex. C, Defendant's Appendix. He indicates that he will testify "regarding the significance of marriage as a social institution and the state's role in maintaining it, and related matters." Id. The Defendant also submits the testimony of Dr. Katherine Young, a professor of Religious Studies at McGill University. Dr. Young also possesses a Ph.D. in Religious Studies. Dr. Young seeks to testify on "what universally constitutes marriage and why." Ex. H, Defendant's Appendix.

The Court believes that the proposed expert testimony of Ms. Somerville, Dr. Nathanson and Dr. Young would be inadmissible at trial. Though the testimony of these individuals is potentially relevant to assist the trier of fact in determining what the State may have considered to be rational bases for the enactment of Iowa Code §595.1, the Court does not believe that the expected testimony of these individuals is scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue as required by the Iowa Rules of Evidence and Leaf. Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702). Additionally, the Court concludes that these individuals are not qualified to testify as experts regarding the issues in this matter. Id. Though they may have expertise in certain areas, such expertise is

insufficient to qualify Ms. Somerville, Dr. Young and Dr. Nathanson to answer the particular questions that they are asked. Tappe, 477 N.W.2d at 402. Though these experts desire to make statements regarding gender, results of same-sex marriage on children and the universal definition of marriage, they do not appear to possess expertise in relevant fields such as sociology, child development, psychology or psychiatry. Ms. Somerville specifically eschews empirical research and methods of logical reasoning in favor of "moral intuition." She has no training in empirical research and admits having no knowledge of existing social science research relevant to this case. She concedes that her views do not reflect the mainstream views of other ethicists. Dr. Young claims that she pulls together factors from many academic disciplines, including sociological, economic, political and religious factors, though she does not profess expertise in these areas. Nathanson indicates that his methodology involves observing "what people say about religion." The views espoused by these individuals appear to be largely personal and not based on observation supported by scientific methodology or based on empirical research in any sense. They do not meet the criteria for the admission of expert testimony under the Iowa Supreme Court's test in Leaf and certainly fail the more stringent test articulated by the United States Supreme Court in Daubert.

The Defendant also submits the statements of Allan Carlson, Ph.D. Dr. Carlson possesses a Ph.D. in Modern European History and is the President of the Howard Center for Family, Religion & Society. Carlson intends to testify as to "the history and public purposes of marriage in the United States and the relationship of marriage to broader family policy." Ex. A, Defendant's Appendix. The consequences of marriage for children are relevant factual determinations to be made in this case. Though Carlson

proposes to testify regarding the importance of marriage to children and family policy, he also conducts no empirical data collection and possesses no formal training in empirical research. He has no formal training in a relevant social science discipline enabling him to make reasoned and informed conclusions regarding the impact of marriage on children. This Court does not believe that Dr. Carlson possesses scientific, technical or specialized knowledge which will assist the trier of fact in its determination of whether a rational basis exists for preventing same-sex marriage. Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702). Despite Carlson's impressive academic credentials, the Court does not believe he possesses the knowledge or experience to answer the specific questions propounded to him. *See* Tappe, 477 N.W.2d at 402.

The Defendant also submits the statements of purported economist Dr. Steven Rhoads. Dr. Rhoads possesses a Ph.D. in government and an M.P.A. in Economic Analysis and Public Policy. Dr. Rhoads describes his research as "...big synthetic stuff and wander[ing] into other people's territories." Dr. Rhoads indicates that he intends to testify "regarding the significance of marriage in an overall scheme of laws and public policy founded on an accurate understanding of biological differences between men and women, the ways in which typical male and female parenting styles each contribute uniquely to the healthy development of children and related matters." Dr. Rhoads has no expertise relating to child development nor has he conducted any empirical research concerning same. The Court believes that Rhoad's testimony will not provide the trier of fact with scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue as required by the Iowa Rules of Evidence and Leaf. Leaf, 590 N.W.2d at 525 (citing Iowa R. Evid. 5.702). Dr.

Rhoad's admitted "wandering" into other disciplines is further indication that he lacks the qualifications to answer the specific questions posed in this case. *See* Tappe, 477 N.W.2d at 402.

As a consequence, none of the factual propositions contained in "Defendant's Statement of Material Facts in Dispute Which Bar Plaintiff's Motion for Summary Judgment" which come from these experts are admissible and they will not be considered for that reason. The Plaintiffs concede that the Defendant's three remaining experts - Alan Hawkins, Warren Throckmorten, and Sharon Quick - are "professionals in potentially relevant fields (medicine, mental health, or child development)". As such, the Court will consider the statements of these experts to the extent they are relied upon by the Defendant.

2. The Plaintiffs' Expert Witnesses:

The Plaintiffs have also submitted the statements of several purported experts in resistance to the Defendant's motion for summary judgment and in support of their own motion for summary judgment. The Defendants specifically object to a few of the Plaintiffs' expert witnesses. With regard to the remainder of the Plaintiffs' experts, the Defendant attacks the weight to be given to their testimony, but does not specifically challenge its admissibility. The Defendant also alleges that many of the Plaintiffs' expert witnesses exhibit bias or are "advocates." However, the potential bias exhibited by a witness also goes to the weight of the evidence and not to the admissibility of the evidence. Hubby v. State, 331 N.W.2d 690, 698 (Iowa 1983).

The Defendant objects to the proffered testimony of Plaintiffs' expert witness, Dan Johnston. Mr. Johnston is licensed to practice law in the State of Iowa and served as

the Polk County Attorney from 1977 – 85. He also served as an Assistant Iowa Attorney General. Mr. Johnston purports to be an expert on anti-gay bias and discrimination in Iowa, the efforts of gays and lesbians to exercise political power and the obstacles faced by the gay and lesbian community. Such facts would be potentially relevant in this case. However, while Mr. Johnston's statement recounting his life experience as a gay man in Iowa is an emotional one, it is essentially anecdotal and, for that reason, the Court does not believe that Mr. Johnston's statements are admissible as expert testimony, as Mr. Johnston's personal experiences do not provide scientific, technical, or other specialized knowledge as required by Leaf and Iowa Rule of Evidence 5.702. Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702).

The Defendant also objects to the statements of purported expert witness Mr. John Schmaker. Mr. Schmaker is currently the Chief Financial Officer for the Central Iowa Chapter of the American Red Cross and has previously been employed by several other organizations including the Iowa Democratic Party, the Greater Iowa Chapter of the Alzheimer's Association, the Varsity Café, and the Iowa Communications Group. Mr. Schmaker purports to be an expert on anti-gay bias and discrimination in Iowa, the efforts by gays and lesbians to exercise political power and the obstacles they face in the exercise of political power. Testimony regarding the political power of gays and lesbians and the discrimination they face in Iowa could be relevant to determining facts of consequence in this case. However, much like Mr. Johnston, the Court believes that Mr. Schmaker's statements are also essentially anecdotal as they are all based on his personal experiences while living in Iowa. For that reason, his testimony likewise does not

constitute scientific, technical, or other specialized knowledge and would not be admissible at trial. Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702).

The Defendant also objects to the statements of Plaintiffs' expert witnesses Sharon Malheiro and Deborah Tharnish, attorneys licensed to practice law in the State of Iowa. Ms. Malheiro has represented gay and lesbian clients in over 200 family-related matters. Ms. Tharnish has participated in over 100 adoption proceedings, approximately 10 of which have involved same-sex couples. Both Ms. Tharnish and Ms. Malheiro intend to testify as to their experiences as attorneys with regard to certain legal difficulties or financial costs faced by gay and lesbian individuals because of their inability to marry. Their statements regarding these challenges and costs involve facts of consequence in this case such that their testimony would be relevant. *See* IOWA R. EVID. 5.401. Ms. Malheiro's testimony as to the legal challenges and costs incurred by gay couples is also evidence in the form of specialized knowledge that would assist the trier of fact. *See* Leaf, 590 N.W.2d at 525 (citing IOWA R. EVID. 5.702). She is qualified to testify with regard to these specific issues by reason of her experience as an attorney representing gay and lesbian clients in approximately 200 family-related matters. Id. Ms. Tharnish's testimony regarding the requirements for adoption and, more specifically, same-sex adoption is also evidence in the form of specialized knowledge. Id. Ms. Tharnish is qualified to testify with regard to these matters by virtue of her experience as an attorney having participated in 100 adoptions, including several same-sex adoptions. Both Ms. Tharnish's and Ms. Malheiro's testimony would be admissible as expert testimony at trial and as such, their statements are properly considered by this Court.

3. Sources of Undisputed Facts

This Court considers certain facts to be undisputed because they are expressly admitted by the parties. *See* Plaintiffs' "Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment", "Defendant's Response to Plaintiffs' Statement of Material Facts", "Defendant's Statement of Undisputed Facts in Support of Motion for Summary Judgment", "Amended Statement of Undisputed Facts by Defendant Timothy Brien", "All Plaintiffs' Resistance to Defendant's Motion for Summary Judgment" (p.1), and "Reply in Support of All Plaintiffs' Motion for Summary Judgment" (p.1).

Defendant has denied "for lack of knowledge" a number of other facts contained in the "Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment." *See* "Defendant's Response to Plaintiffs' Statement of Material Facts." These denials for lack of knowledge are not accompanied by any specific references to the record as required by Iowa Rule of Civil Procedure 1.981(5) and (8). The facts which have been denied for lack of knowledge by Defendants (indeed all the facts contained in the "Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment") are accompanied by specific references to the record. Further, it appears to the Court that none of them are contradicted by any of the admissible facts (*See* "Preface to Statement of Undisputed Facts" above) contained in "Defendant's Statement of Material Facts in Dispute Which Bar Plaintiffs' Motion for Summary Judgment" nor are they contradicted by any of the facts contained in either "Defendant's Statement of Undisputed Facts in Support of Motion for Summary Judgment"or the "Amended Statement of Undisputed Facts by Defendant Timothy Brien", none of which are disputed

by Plaintiffs. For all these reasons, the Court considers all of the facts contained in the "Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment", which were denied for lack of knowledge by Defendant, as undisputed.

Finally, Defendant has denied – without any qualification – certain other facts contained in the "Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment." *See* "Defendant's Response to Plaintiffs' Statement of Material Facts." Those facts are all accompanied by references to the record but, once again, Defendant's denials are not. None of these facts are contradicted by any of the facts contained in either "Defendant's Statement of Undisputed Facts in Support of Motion for Summary Judgment" or the "Amended Statement of Undisputed Facts by Defendant Timothy Brien." Careful examination of the record reveals that none of these facts are contradicted by any of the admissible facts in "Defendant's Statement of Material Facts in Dispute Which Bar Plaintiffs' Motion for Summary Judgment," either.

Paragraph 2 of Defendant's Statement of Material Facts in Dispute Which Bar Plaintiffs' Motion for Summary Judgment reads as follows:

> 2. Gay couples choose to bring children into the relationship by way of adoption or other means.

The Court believes the operative word in this paragraph is "choose." Defendant and his authorities strive to make the point that same-sex couples do not procreate by accident. In other words, because they have to utilize methods such as adoption or artificial insemination to have children, their decisions are viewed as necessarily involving planning and investment of resources. On the other hand, heterosexual couples may procreate and frequently do procreate without forethought or planning, which gives rise to the purported governmental interest in encouraging heterosexual couples to

procreate responsibly, i.e., within the context of a stable, committed relationship – marriage. The Court does not perceive any substantial disagreement between the parties on this proposition. *See*, e.g., par. 73 of "Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment."

Paragraphs 10 and 11 of the same statement read as follows:

> 10. Social science literature demonstrates that children who are reared by a married mother and father have more positive outcomes on a wide variety of important factors compared to children in other adequately studied family structures, and these outcome differences exist even when controlling statistically for important socio-demographic differences between children reared in different family structures. Ex. B.
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> 11. Children reared in a stable married family are likely to do better on various measures of educational attainment; exhibit fewer behavioral problems, including conduct disorders, alcohol and drug abuse, and juvenile delinquency; will not be as likely to engage in criminal behavior as adults; engage in sexual relations as teenagers, and to experience an unwed pregnancy; have a decreased risk for mental/emotional illness; have a decreased risk of physical illness and infant mortality; experience decreased risk of suicide; have a greater average life expectancy; likely to benefit from high levels of parental investment, commitment, and closeness (particularly with their fathers); be victims of physical and sexual abuse; experience higher levels of family stability as adults, including a decreased divorce risk. Ex. B.

However, Dr. Hawkins makes it clear in his deposition that he has not read the vast majority of the studies concerning gay and lesbian parenting, that he has performed no related research himself and that he is unaware of the existence of many recently-published studies cited by Plaintiffs' expert, Michael Lamb. Hawkins Deposition Transcript, page 33, lines 3-13; page 98, line 16; page 110, line 25. Because he admittedly is unable to evaluate current social science regarding gay and lesbian parenting generally or critique the methodology upon which that science is based, Dr. Hawkins apparently is not commenting upon the relative frequency of positive outcomes

in child-rearing by heterosexual couples as opposed to same-sex couples nor apparently is he commenting upon how children do by various measures when reared by stably married heterosexual couples as opposed to same-sex couples. Given this understanding of his opinions, it is apparent to the Court that what is said in paragraphs 10 and 11 is not disputed by Plaintiffs' evidence. *See* p. 6, "Reply in Support of All Plaintiffs' Motion for Summary Judgment."

Paragraph 17 of the same statement reads as follows:

> Some kind of change in sexual behavior, desire and/or identity over time is not theoretically unfounded or empirically unprecedented for at least some people. Ex. G.

Plaintiffs admit that their evidence does not conflict with this statement. *See* p. 6, "Reply in Support of All Plaintiffs' Motion for Summary Judgment."

Paragraph 23 of the same statement is purportedly derived from Plaintiffs' own exhibits, specifically Plaintiffs' Exhibit 15. The Court's review of Exhibit 15 does not reveal any support for this proposition. However, the Court's review of the transcript of the deposition of Dr. Greg Hereck, one of Plaintiffs' experts, supports the proposition that "expressions of hostility" towards people with AIDS and "anti-gay prejudice" are "correlated." *See* Hereck Deposition, pages 80-87. Consequently, paragraph 23 is stricken because it is not supported by the record cited. However, it is not disputed that expressions of hostility towards persons afflicted with AIDS and anti-gay prejudice are correlated.

Finally, as to paragraph 24 of the same statement, no record support is cited and, therefore, the paragraph is stricken.

As stated previously, it is therefore the Court's conclusion that, for all the foregoing reasons, there is no dispute as to all those facts contained in the "Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment" which were "denied" in "Defendant's Response to Plaintiffs' Statement of Material Facts," excepting those based upon the affidavits of Messrs. Johnson and Schmaker.

B. Material Facts as to Which There is No Genuine Issue

1. The Parties

1. Plaintiffs each have chosen and consented to marry the one unique person who is irreplaceable to them and with whom they have formed a deeply intimate bond and share daily family life, but have been denied this right by the government.

2. Plaintiffs are twelve lesbians and gay men, who comprise six same-sex couples, who reside throughout the State of Iowa and who wish to marry their partners in Iowa. Minor Plaintiffs are the children of two of Plaintiff couples.

3. The Plaintiffs are same sex couples who have applied for and were denied marriage licenses by the Defendant Timothy J. Brien, acting in his official capacity as the Recorder for Polk County, Iowa.

4. Plaintiffs Katherine Varnum ("Kate"), 33, and Patricia Varnum ("Trish"), 41, are a lesbian couple who reside in Cedar Rapids. Kate and Trish have been in a loving, committed relationship for almost 6 years. They have had a commitment ceremony and intend to become parents.

5. Plaintiffs Jennifer BarbouRoske ("Jen"), 36, and Dawn BarbouRoske ("Dawn"), 38, are a lesbian couple residing in Iowa City with their two daughters, McKinley and Breeana. Jen and Dawn have been in a loving, committed relationship for

over 16 years. They have had a private commitment ceremony and are registered domestic partners in Iowa City.

6. Plaintiffs David Twombley ("David"), 65, and Lawrence Hoch ("Larry"), 64, are a gay male couple residing in Urbandale. David and Larry have been in a loving, committed relationship for over 5 years, and obtained a civil union in a private ceremony in Vermont in 2002.

7. Plaintiffs Jason Morgan ("Jason"), 36, and Charles Swaggerty ("Chuck"), 34, are a gay male couple residing in Sioux City. Jason and Chuck have been in a loving, committed relationship for 9 years, are licensed foster parents, and intend to adopt in the future.

8. Plaintiffs William M. Musser ("Bill"), 48, and Otter Dreaming ("Otter"), 49, are a gay male couple residing in Decorah. They have been together as a same-sex couple in a loving, committed relationship for over 5 years, obtained a civil union in Vermont in 2002, are licensed foster parents and intend to adopt in the future.

9. Plaintiffs Ingrid Olson ("Ingrid"), 28, and Reva Evans ("Reva"), 32, are a lesbian couple residing in Council Bluffs with their son, Jamison Olson. Ingrid and Reva have held a commitment ceremony and have been in a loving, committed relationship for 9 years.

10. Minor Plaintiff McKinley BarbouRoske ("McKinley") is the older daughter of Jen and Dawn, her legal parents. Jen gave birth to McKinley in 1998 after conceiving via donor insemination. McKinley became Dawn's legal daughter via an adoption in which Jen also joined.

11. Minor Plaintiff Breeanna BarbouRoske ("Bre") is the younger daughter of Jen and Dawn, her legal parents. In 2002, Bre was an Iowa foster child who was placed in Jen and Dawn's home at three weeks old. In 2003, Jen and dawn jointly adopted Bre.

12. Minor Plaintiff Jamison Olson is the son of Ingrid and Reva, his legal parents. Reva gave birth to Jamison in 2006. In September, 2006, Ingrid adopted Jamison.

13. Defendant Timothy J. Brien ("Brien") was at all times relevant the Polk County Recorder and the Polk County Registrar.

14. Julie M. Haggarty is the current Polk County Recorder and the Polk County Registrar.

2. Defendant's Denial of Marriage Licenses and Applications to Plaintiffs

15. As Polk County Recorder and the Polk County Registrar, Brien and his agents and employees ("Defendant"), furnished and processed applications for licenses to marry in Iowa, including accepting and denying applications for marriage licenses.

16. At all relevant times, Defendant executed these duties from the Office of the Polk County Recorder in Des Moines, Polk County, Iowa.

17. On various dates between November 23, 2005 and January 24, 2006, each Plaintiff appeared in person with his or her partner at the Des Moines office of Defendant, accompanied by a suitable witness and prepared to tender the required application fee and identification documents to obtain a marriage license.

18. Each Plaintiff couple attempted to submit their application for a marriage license to Defendant in order that they could marry each other in the State of Iowa.

19. In each case, Defendant refused to accept Plaintiffs' applications for marriage licenses or to issue marriage licenses to Plaintiffs, citing Iowa law, "gender restrictions" in the law or the fact that the couple was a same-sex couple.

20. On or about November 23, 2005, Jen BarbouRoske and Dawn BarbouRoske appeared in person, accompanied by a witness and prepared to tender the application fee and identification documents, at the office of the Polk County Recorder. The two women asked to submit their application for a marriage license so that they could marry each other in the State of Iowa. An agent or employee of Defendant Brien told them that, under the Iowa Code, she could not accept their application to marry.

21. On or about November 29, 2005, David Twombley and Larry Hoch appeared in person, accompanied by a witness and prepared to tender the application fee and identification documents, at the office of the Polk County Recorder. The two men asked to submit their application for a marriage license so that they could marry each other in the State of Iowa. At that time, an agent or employee of Defendant Brien refused to accept their application, stating that to do so would violate Iowa law.

22. On or about November 29, 2005, Jason Morgan and Chuck Swaggerty appeared in person, accompanied by a witness and prepared to tender the application fee and identification documents, at the office of the Polk County Recorder. The two men asked to submit their application for a marriage license so that they could marry each other in the State of Iowa. At that time, an agent or employee of Defendant Brien refused to accept their application on the ground that people of the same sex legally cannot marry in the State of Iowa.

23. On or about November 30, 2005, Ingrid Olson and Reva Evans appeared in person, accompanied by a witness and prepared to tender the application fee and identification documents, at the office of the Polk County Recorder. The two women asked to submit their application for a marriage license so that they could marry each other in the State of Iowa. An agent or employee of Defendant Brien refused to accept their application, stating that, under the Iowa Code, marriage is exclusively between a man and a woman.

24. On or about December 2, 2005, Kate Varnum and Trish Hyde appeared in person, accompanied by a witness and prepared to tender the application fee and identification documents, at the office of the Polk County Recorder. The two women asked to submit their application for a marriage license so that they could marry each other in the State of Iowa. Upon learning that the two are both women, an agent or employee of Defendant Brien refused to permit them to apply for a marriage license because of what were described as "gender specifications" in the Iowa Code.

25. On or about December 5, 2005, Bill Musser and Otter Dreaming informed the office of the Polk County Recorder by telephone that they intended to drive to Polk County in order to submit an application to marry in the State of Iowa in person. At that time, an agent or employee of Defendant Brien told them that, even if they did so, the office would refuse to accept their application on the ground that people of the same sex legally cannot marry in Iowa.

26. Plaintiffs otherwise met all legal requirements to obtain a marriage license and to marry in Iowa.

27. Polk County Recorder and Polk County Registrar Timothy J. Brien, and his agents and employees, denied Jen BarbouRoske and Dawn BarbouRoske, David Twombley and Larry Hoch, Jason Morgan and Chuck Swaggerty, Ingrid Olson and Reva Evans, Kate Varnum and Trish Hyde, and Bill Musser and Otter Dreaming the opportunity to apply for and obtain marriage licenses solely because each of them wish to marry a partner of the same sex.

28. That the Defendant Brien did deny Plaintiffs' request because the Iowa Legislature has enacted §595.2, Iowa Code which in essence provides that only persons of the opposite sex may marry in the state of Iowa when it states: "Only a marriage between a male and female is valid."

29. The Code also requires that the applicants for a marriage license meet other criteria regarding their ages, consent, competency and not being related by a certain degree of consanguinity, etc. §§595.2, 595.3 and 595.13, Iowa Code. Defendant concedes the adult Plaintiffs met all those other eligibility criteria.

30. Iowa Code §§ 595.2(1) and (20) were passed in response to marriage litigation brought by same-sex couples in Hawaii in order to ensure that lesbian and gay people are treated unequally to everyone else in Iowa with respect to their relationships.

31. Defendant does not contest that the Plaintiffs are in committed relationships for the purpose of this motion but states that none of the personal circumstances of the Plaintiffs were considered in the decision not to accept Plaintiffs' application. The reasons for not accepting the license application were purely legal.

3. Harms from the Denial of Marriage Rights

32. Plaintiffs proceed solely on claims under the Iowa Constitution.

33. Plaintiffs and their families are harmed in numerous tangible and intangible (including dignitary) respects by their exclusion from the right to marry in Iowa.

34. As a result of their exclusion from the civil institution of marriage, Plaintiffs, their relationships and their families are stigmatized and made more vulnerable in comparison to heterosexuals. Through the marriage exclusion the State devalues and de-legitimizes relationships at the very core of the adult Plaintiffs' sexual orientation and expresses, compounds, and perpetuates the stigma historically attached to homosexuality, for them and all gay persons.

35. Plaintiffs suffer great dignitary harm because the State's denial to Plaintiffs of access to an institution, so woven into the fabric of daily life and so determinative of legal rights and status, amounts to a badge of inferiority imposed on them and Minor Plaintiffs. Plaintiffs are continually reminded of their own and their family's second-class status in daily interactions in their neighborhoods, workplaces, schools, and other arenas in which their relationships and families are poorly or unequally treated, or are not recognized at all.

36. Because their parents cannot marry, Minor Plaintiffs are subjected to the historical stigma of "illegitimacy" or "bastardy" which, though of diminished social and legal force, is still a status widely considered undesirable. Minor Plaintiffs also experience the effects of stigma directed at them and at their parents because of how their parents are treated unequally by the government as a result of their parents' sexual orientation. The Minor Plaintiffs would benefit from having even the threat of such stigma removed from their lives.

37. Without access to the institution, familiar language and legal label of marriage, Plaintiffs are unable instantly or adequately to communicate the depth and permanence of their commitment to others, or to obtain respect for that commitment, as others do simply by invoking their married status.

38. Plaintiffs' inability to marry their chosen partners is a painful frustration of their life goals and dreams, their personal happiness and their self-determination.

39. Civil marriage in Iowa is the only gateway to an extensive legal structure that protects a married couple's relationship and family in and outside the State. Iowa reserves an unparalleled array of rights, obligations and benefits to married couples and their families, privileging married couples as a financial and legal unit and stigmatizing same-sex couples.

40. Plaintiffs and their families are in just as much or more need of the rights, obligations, benefits and privileges of marriage as heterosexuals and their families, but cannot access them.

41. Plaintiffs are harmed in an infinite number of daily transactions as a result of being denied the right to marry, including transactions with employers, hospital, courts, preschools, insurance companies, businesses such as health clubs, and public agencies including taxing bodies.

42. As a result of their exclusion from marriage, Plaintiffs and their children or future children may be denied the full benefit of laws that determine custody, visitation, child and spousal support, and parentage.

43. Marriage uniquely secures the legal bonds between parents and children welcomed into their home. Plaintiffs who are or will be parents, as well as their children,