IN THE SUPREME COURT OF IOWA

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
Judge Robert B. Hanson
Fifth Judicial District of Iowa

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Defendant-Appellant
Urging Reversal

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INTEREST OF THE *AMICUS*

Amicus Curiae, The National Legal Foundation (NLF), is a 501(c)(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has filed numerous briefs pertaining to the sanctity of marriage. The NLF has an interest, on behalf of its constituents and supporters, in arguing to protect the sanctity of marriage.

SUMMARY OF THE ARGUMENT

This Brief makes three distinct arguments that, to the best of our knowledge, are not made by the party nor any other *amici* who are supporting the Appellant. First, *Amicus* argues that the district court erred in including a number of ultimate facts and sociological judgments in its statement of material facts. Second, *Amicus* explains how same-sex marriage cannot be considered a fundamental right, because the very nature and meaning of marriage is exclusive to the union of a man and a woman. Third, *Amicus* argues that the district court erred in using Justice O'Connor's concurrence from *Lawrence v. Texas*, 539 U.S. 558 (2003), to bolster its decision.

As to the first point, the district court erred in including a number of ultimate facts and sociological judgments in its statement of material facts. While the general rule is that findings of fact from a trial court cannot be reversed unless they are not supported by substantial evidence, that standard of review is not applicable here. This Court has recognized its duty to determine whether the issue

before it is truly one of fact or law, or whether it is a mixed question of law and fact. Additionally, this Court reviews constitutional claims *de novo*. In this case, in addition to the facts that constitute constitutional predicates, the issue is more appropriately considered a mixed question of law and fact. A number of the "facts" that the district court included in its statement of material fact are not true findings of fact that deserve deferential review, rather they are ultimate facts (which is the application of law to fact) and sociological judgments.

As to the second point, same-sex marriage cannot be considered a fundamental right, because, by definition, marriage is the union of a man and a woman. The primary substantial objection to this argument based on definition is that it is simply tautological. However, chemistry provides a clear analogy that demonstrate that this argument is not tautological. The study of chemistry has revealed that the only process in which table salt can be formed is through the union of sodium (Na) and chlorine (Cl). Even if the union of two sodium atoms or two chlorine atoms is called "salt," as a matter of definition, it cannot be. The same is true for marriage; even if you call a union of two same-sex persons a marriage, it simply cannot be. This analogy has proven helpful to at least one court in the past, namely the United State Court of Appeals for the Ninth Circuit in *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2005), and hopefully it will prove helpful to this Court as well.

Finally, the district erred in citing to Justice O'Connor's "more searching form of rational-basis review" from her concurrence in *Lawrence*. The Supreme

Court of the United States has never adopted this expanded review. Furthermore, of the limited number of opinions that have even discussed this form of review, the vast majority have either rejected it or merely mentioned it. Two dissenting judges and one concurring judge have advocated its adoption, and only two state supreme courts have adopted a heightened form of rational basis scrutiny. Additionally, this heighted form of review conflicts with the principle of judicial restraint and would require courts to legislate from the bench, which is contrary to the very principle of rational basis review.

ARGUMENT

I. THE DISTRICT COURT ERRED IN TREATING NUMEROUS "ULTIMATE" FACTS AND SOCIOLOGICAL JUDGMENTS AS FINDINGS OF FACT.

The district court, in granting summary judgment, enumerated a number of undisputed "material facts." *Varnum v. Brien*, No. CV5965 at 23-43 (Iowa D. Ct. for Polk County Aug. 30, 2007). Assuming *arguendo* that these material facts are undisputed, they are not true facts to which this Court is bound to give deference. A number of these putative "material facts" are nothing more than "ultimate facts"[1] or sociological judgments.

As this court has stated, "[s]ummary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ames Rental Property Association v. City of Ames*, 736 N.W.2d

[1] An ultimate fact is the application of law to fact. *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 174 (Iowa 2006) (citing Restatement (Second) of Judgments § 27 (1982)).

255, 258 (Iowa 2007). When summary judgment is appropriate this Court's review is limited to "whether the district court correctly applied the law." *Id.* Additionally, this Court reviews constitutional claims *de novo*. *Id.* To the extent that some of these "facts" are not constitutional predicates, they are mixed question of law and fact that affect the appropriate standard of review in this case and must be identified. Therefore, *Amicus* will explain why the district court should not be permitted to insulate these "ultimate facts" and sociological judgments by incorrectly labeling them as undisputed material facts, no more so than if the court had labeled them findings of fact. Additionally, a number of the "facts" that the district court relied upon were used to reach constitutional conclusions, which means this Court should review those facts *de novo* as a part of its analysis of constitutional claims.

In a similar situation, the Sixth Circuit Court of Appeals reviewed a case where it had to determine the appropriate standard of review regarding what the trial court labeled "findings of fact." *Equality Found. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995). While the Sixth Circuit's standard of review in that case was clearly erroneous for findings of fact and *de novo* for conclusion of law, its analysis is still useful to this Court because the question was whether the putative "facts" were truly findings of fact. The trial court had included in its opinion a number of "findings of fact," *id.* at 264:

> 3. Sexual orientation is a deeply rooted, complex combination of factors including a predisposition towards affiliation, affection, or bonding with members of the opposite and/or the same gender. . . .

. . . .

> 9. Sexual orientation bears no relation to an individual's ability to perform, contribute to, or participate in, society. . . .
>
> . . . .
>
> 10. There is no meaningful difference between children raised by gays and lesbians and those raised by heterosexuals. Similarly, children raised by gay and lesbian parents are no more likely to be gay or lesbian than those children raised by heterosexuals. . . .
>
> . . . .
>
> 12. Homosexuality is not a mental illness.
>
> 13. Homosexuals have suffered a history of pervasive irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.
>
> 14. Pervasive private and institutional discrimination against gays, lesbians and bisexuals often has a profound negative psychological impact on gays, lesbians and bisexuals.

Id. at 265 (quoting *Equality Found. v. City of Cincinnati*, 860 F. Supp. 417, 426 (S.D. Ohio 1994). The court noted the general rule that findings of fact are only reversed based on "clear error." *Id.* The court reasoned that "where ostensible 'findings of fact' are, in reality, findings of 'ultimate' facts which entail the application of law, or constitute sociological judgments which transcend ordinary factual determinations, such 'findings' must be reviewed *de novo*." *Id.* The court found this principle consistent with other legal rules regarding "findings of fact" that involve more than just "evidentiary facts," including the standard of review for "mixed question of law and fact," which is *de novo* review; and regarding

whether "the evidence to support a finding that a constitutional predicate . . . has been satisfied." *Id.* The court did not allow the trial court to insulate these "ultimate facts" and sociological judgments from review by mislabeling them as findings of fact. The court held that since "most, if not all, of the lower court's findings in the instant case constituted ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support 'constitutional facts' . . . they are subject to plenary review." *Id.*

Neither has this Court allowed lower courts (or administrative agencies) to insulate "ultimate facts" and sociological judgments from review by mislabeling them as findings of fact. *Tuttle v. Mickow Corp.*, 418 N.W.2d 364 (Iowa 1987). In that case, the question that originally went before the industrial commissioner involved the death benefits of an employee on the job. *Id.* at 364. The commissioner determined, as a finding of fact, that the decedent was not in the course of his employment at the time of his death. *Id.* at 366. However, this Court had previously held that such determinations are not solely questions of fact, but rather mixed questions of law and fact. *Id.* (citing *Hawk v. Jim Hawk Chevrolet-Buick, Inc.*, 282 N.W.2d 84, 87 (Iowa 1979)). While holding that the commissioner's actual findings of fact were binding, this Court refused to blindly accept the labels that the commissioner attached to the various sections of his report. *Id*. Instead, this Court recognized that the commissioner's "findings of

fact" were in reality conclusions of law, and that the commissioner's "review of the evidence" was the actual findings of fact. *Id.*

Furthermore, in another similar case, the Supreme Court of the United States did not allow trial courts to insulate these "ultimate facts" and sociological judgments from review by mislabeling them as findings of fact. *Powell v. Texas*, 392 U.S. 514, 521 (1968) (plurality). In that case, the defendant was charged with being drunk in a public place, and his defense was that he was a chronic alcoholic, that chronic alcoholism is a disease, and, therefore, his public drunkenness was not of his own free will. *Id.* at 517. While the trial judge did not allow the defense to be asserted, *id.*, he did enter three findings of fact, solely based on the testimony of the defendant's expert witness, *id.* at 518, which read

> "(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

Id. at 521 (quoting the district court's opinion). The Supreme Court, in a plurality opinion, however, rejected these statements as "findings of fact" and did not afford them the clearly erroneous standard of review. *Id.* The plurality went so far as to say that these were "not 'findings of fact' in any recognizable, traditional sense in which that term has been used in a court of law; they are the premises of a

syllogism transparently designed to bring this case within the scope of this Court's [precedent]." *Id.* The plurality rebuked the dissenters for wanting to accept the "facts" at face value and immediately decide the constitutionality of the case. *Id.* The plurality also rejected these "findings of fact" because of the disagreement in the medical field as to what alcoholism truly is. *Id.* at 522. The plurality especially noted that "'alcoholism' is [considered] a 'disease,' for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems." *Id.* The plurality held that the lack of information illustrated the problem of using scientific and medical theories in the law, especially when the law utilizes a different set of assumptions than those other disciplines. *Id.* at 526. In his concurring opinion, Justice Black recognized that the defendant's argument primarily consisted of sociological data. *Id*. at 537 (Black, J., concurring). In fact, he said that the defendant's argument "read more like a highly technical medical critique than an argument for deciding a question of constitutional law one way or another." *Id.* at 538. He began his discussion of the statute's constitutionality by noting that "the desirability of this Texas statute should be irrelevant in a court charged with the duty of interpretation rather than legislation, and that should be the end of the matter." *Id.*

In this case, the Appellees have argued that Iowa's law restricting marriage to opposite sex couples is unconstitutional. In support of their position, Appellees submitted a list of "material facts" that the district court adopted as "Material Facts as to Which There is No Genuine Issue," a number of which had been taken

directly from expert witnesses affidavits. *Varnum*, No. CV5965 at 16. However, as mentioned above, a number of these facts read just like the "findings of fact" that the Sixth Circuit rejected in *Equality Foundation*, namely that homosexuality is an innate characteristic to be sexually attracted to members of the same sex, *id.* at 27, *Equality Found.* at 265, and that this characteristic is either highly unlikely, *Varnum*, No. CV5965 at 28, or impossible to change, *Equality Foundation* at 265. The district court's two "findings of fact" that are most blatantly ultimate facts are number eighty-four, which said that "Plaintiffs are similarly situated to different-sex couples who have the option to marry," and number eighty-nine, "Minor Plaintiffs are similarly situated to the children of heterosexual couples who have the option to marry." *Varnum* No. CV5965, 35-36. These statements are not facts, but rather conclusions of law which determine whether the Iowa Equal Protection Clause will apply.[2] *Id.* at 47. In *Powell*, the defendant attempted to establish a constitutional claim when the trial court incorrectly attributed a list of sociological claims as findings of fact. 392 U.S. at 521. These sociological claims include classifying alcoholism as a disease, claiming that he had no control over his actions as a symptom of the disease, and asserting that he suffered from that disease. *Id.* As in *Powell*, most of the "facts" in the instant case consist of sociological claims. These include claims regarding the effect of an attempt to change a person's sexual orientation (Nos. 59-61) and the effect that homosexual

[2] However, as will be discussed in section II, the plaintiffs are not similarly situated to heterosexual couples, so the district court's conclusion is erroneous on this point regardless.

parenting has on their children's sexual orientation (No. 79). *Varnum*, CV5965 at 28, 30-33. Other potential questionable "facts" include the nature of homosexuality (Nos. 55-63), parental affects of homosexuality (Nos. 66-83), history of homosexual discrimination (Nos. 111-14), and homosexuals' political powerlessness (Nos. 117-120).

Therefore, the district court erred in considering these "ultimate facts" and sociological judgments to be material facts. This Court should not allow the trial court to insulate these "facts" from review by mislabeling them as undisputed material facts.

II. THIS COURT SHOULD REVERSE THE DISTRICT COURT BECAUSE THE FUNDAMENTAL RIGHT TO MARRY ONLY INCLUDES OPPOSITE-SEX MARRIAGE.

The District Court erroneously held that that the plaintiffs are similarly situated to heterosexual couples that marry. The only appellate decision that has required a state to recognize "the fundamental right of marriage" between persons of the same-sex was that of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (plurality). This controversial decision, however, has been given no support by other appellate courts; no other appellate court has recognized same-sex "marriages." *Conaway v. Deane*, 932 A.2d 571, 627-628 (Md. 2007).

While marriage itself is an established fundamental right, *see Sioux City Police Officers' Association v. City of Sioux City*, 495 N.W.2d 687 (Iowa 1993), the right to marry a person of the same sex is not. The Supreme Court of the

United States has not "conferred the fundamental right to marry on anything other than a traditional, opposite-sex relationship." *In re Kandu*, 315 B.R. 123, 140 (Bankr. D. Wash. 2004); *see also Conaway*, 932 A.2d at 294 ("The Right to Same-Sex Marriage is Not so Deeply Rooted in the History and Tradition of this State or the Nation as a Whole Such That it Should be Deemed Fundamental.") ; *Standhardt v. Super. Ct. of Ariz.*, 77 P.3d 451, 460 (Ariz. 2003) ("[S]ame-sex marriage is not a fundamental [right] protected by due process."); *Baehr v. Lewin*, 852 P.2d 44, 44 (Haw. 1993) (finding no fundamental right to same-sex marriage).

While this Court has recognized that "[d]ue process protections . . . should not ultimately hinge upon whether the right sought to be recognized has been historically afforded," *Varnum*, No. CV5965 at 44 (citing *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999)), it has more importantly recognized that tradition "is an important consideration in determining the existence of a fundamental interest." *Id.* at 190. This Court went on to say that "courts should [not] engage in 'uncontrolled social engineering.'" *Id.* at 191. Engaging in "uncontrolled social engineering" would be the result of the district court's decision because the notion of marriage that the Plaintiffs advocate conflicts with the very nature of marriage and what it has meant for centuries.

Absent social engineering by courts, a person's simple right to enter into any relationship they please does not make that decision a fundamental right. *See Washington v. Glucksberg*, 521 U.S. 702, 727 (1997) ("[T]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy

[does not warrant the sweeping conclusion] that any and all important, intimate, and personal decisions are so protected . . . ."); *see also Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306-07 (M.D. Fla. 2005) ("[N]ot all important decisions are protected fundamental rights."); *Standhardt*, 77 P.3d at 459-60 ("[N]ot all important decisions sounding in personal autonomy are protected fundamental rights."). Nor does the right to enter a relationship inherently require any particular status be given to that relationship. "[T]here is a distinct difference between protecting the right to engage in private conduct . . . and the 'affirmative right to receive official and public recognition'" of that conduct. *Wilson*, 354 F. Supp. 2d at 1307 n.10 (quoting *Lofton v. Sec'y of the Dep't of Children & Family Services*, 58 F.3d 804, 817 (11th Cir. 2004)).

By definition, "'marriage' is the legal union of one man and one woman as husband and wife." *Baker v. State*, 744 A.2d 864, 868 (Vt. 1999); *see also* The American Heritage Dictionary of the English Language 1102 (3rd ed. 1996) (marriage is the "union of a man and woman as husband and wife."); Webster's New International Dictionary 1506 (2nd ed. 1955) (marriage is "being united to a person . . . of the opposite sex as husband or wife"); Black's Law Dictionary 758 & 992 & 1628 (8th ed. 2004) (marriage is the "union of a couple as husband and wife[;]" a husband is "[a] married man;" a wife is "[a] married woman;"); Black's Law Dictionary 986 (7th ed. 1999) (marriage is the "union of a man and woman as husband and wife."); Black's Law Dictionary 756 (1st ed. 1891) (marriage is "one man and one woman united in law for life"). "[A]s it has been recognized and

defined for centuries—indeed, millennia—[marriage] necessarily excludes two persons of the same sex from entering into that relationship." *Dean v. D.C.*, 653 A.2d 307, 308 n.2 (D.C. 1995) (Terry, J., concurring).[3] *See also Smelt*, 447 F.3d at 680-81 & n.18 (finding that California's definition of marriage, "between 'a man and a woman'" is traditional); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1976) (noting that the "union of man and woman" is "as old as the book of Genesis"); *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006) (recognizing that until recent, even the idea "same-sex marriage" was unthinkable).

Some would dismiss this and similar observations as tautological, a "definitional or semantic substitute for meaningful analysis." Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. Rev. 16, 38; *but see* Jay Alan Sekulow and John Tuskey, *Sex and Sodomy and Apples and Oranges - Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 BYU J. Pub. L. 309 (1988). If the sole argument were that marriage must remain the union of one man and one woman for no other reason than it has always been that way, then such a dismissal might be in order. The "definition" of marriage, however, is much more than a relatively meaningless semantic distinction. A cogent analogy is found at the molecular level.

For millennia, the layman has known sodium chloride (NaCl) as common table salt, or simply salt. The study of chemistry has established that a molecule

[3] The opinion of the court was rendered *pur curiam*, and included Judge Terry's concurring opinion. This will be true for all cites to Judge Terry.

of salt is made up of the union of one atom of sodium (Na) and one atom of chlorine (Cl).[4] Two atoms of chlorine may, nonetheless, join together and form Cl_2. Two atoms of sodium may also join together, forming Na_2. However, neither Cl_2 nor Na_2 are NaCl, nor can they ever be. At the very least, each lacks a key component to complete the union required for NaCl. It is a definitional impossibility.

Just as the union of one atom of sodium and one atom of chlorine has a very specific outcome, so the union of one man and one woman has a very specific outcome. One is a chemical formula, with very specific features and dynamics and effects on the world around it. The other is a social or relational formula, with very specific features and dynamics and effects on the world around it. One can certainly *call* Na_2 or Cl_2 "salt," but neither will ever be, nor have the same features, dynamics, and effects as, NaCl. Likewise, one can call the union of two men or two women "marriage," but neither will ever be, nor have the same features, dynamics, and effects as, the union of one man and one woman.

Just as the term "salt" is given to the specific molecular union NaCl, the term "marriage" is given to the specific social union of one man and one woman. Recognizing that the union of two men or two women is not marriage because it is a definitional impossibility is no different than recognizing that Na_2 or Cl_2 is not salt. That is not circular reasoning—simply a recognition that the union of two

[4] Technically, salt is an ionic compound, but it is often referred to as a molecule, and for ease of discussion here, we shall refer to it as an atom.

men or two women is not the same as the union of one man and one woman. The reservation of the term "marriage" for the specific union of one man and one woman, therefore, is not tautological, but only employment of that timeless, basic system of verbal communication used to convey specific and exclusive meaning.

While it may be argued that there is more similarity between same-sex unions and opposite-sex unions than either Na_2 or Cl_2 and NaCl, it has been recognized through the ages, and more recently by the United States Congress, that a man and a woman each contribute and produce something unique in that particular union that cannot be duplicated by another union. *See, generally,* H.R. Rep. No. 104-664 (1996). Congress has determined that the protection and promotion of this union is in the best interest of the state. *See id.; see also* Defense of Marriage Act, 1 U.S.C. § 7 (2006) (hereafter referred to as DOMA). The Iowa General Assembly made a similar determination when it enacted Iowa Code § 595.2 (2006), the statute under review in this case. Such a determination is well within the authority of the legislature to make, and well outside the authority of the judiciary to refute, absent specific criteria.

The United States Court of Appeals for the Ninth Circuit utilized this salt analogy in its recent consideration of *Smelt v. County of Orange* 447 F.3d 673 (9th Cir. 2005). In that case, same-sex couples challenged the California statutory prohibition on same-sex marriage and DOMA. Although the court ultimately decided the case based on abstention and standing, it considered the definitional issues along the way. *Id*. at 680 n. 18, 681. Furthermore, during the oral

argument, the judges relied upon a brief filed by your *Amicus* to specifically question counsel about the salt analogy. *Id.*, Audio File, May 05, 2006, *available at* http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search? OpenForm&Seq=1 (After reaching this web site, enter the docket number, 05-56040. On the next web page, click on the link for the docket number and the audio file will play.). Relying on the salt analogy, one of the judges made the point repeatedly that prohibiting same-sex marriage does not constitute discrimination; rather, such prohibition simply implies that definitions matter. *By definition*, same-sex unions cannot be marriages.

"[T]he word 'marriage,' when used to denote a legal status, refers only to the mutual relationship between a man and a woman as husband and wife, and therefore . . . same-sex 'marriages' are legally and factually—*i.e.*, definitionally—impossible." *Dean*, 653 A.2d at 308. Thus, recognizing same-sex "marriage" as included in the fundamental right to marry "would not expand the established [fundamental] right to marry, but would redefine the legal meaning of 'marriage.'" *Standhardt*, 77 P.3d at 458. A court does not have the authority to "alter or expand the definition of marriage . . . ." *Dean*, 653 A.2d at 362. Should doing so ever become necessary, that responsibility lies with the legislature. *Maynard v. Hill,* 125 U.S. 190, 205 (1888); *Dean*, 653 A.2d at 362; *Shields v. Madigan*, 783 N.Y.S.2d 270, 277 (N.Y. Sup. Ct. 2004).

There is no legal justification for conferring fundamental right status on a relationship whose very name is a contradiction in terms and whose status is

otherwise confirmed by relevant case law. "The history of the law's treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process." *Standhardt*, 77 P.3d at 460. The lower court improperly concluded that the fundamental right to marry does should include same-sex "marriage."

III. THE DISTRICT COURT ERRED IN CITING JUSTICE O'CONNOR'S CONCURRENCE IN *LAWRENCE*.

The District Court erred in citing Justice O'Connor's concurrence in *Lawrence v. Texas*, 539 U.S. 558 (2003), regarding her expanded form of rational basis review. *Varnum*, CV5965 at 52-53. In *Lawrence*, Justice O'Connor argued that the Supreme Court of the United States had adopted a "more searching form of rational basis review to strike down [some] laws under the Equal Protection Clause." 539 U.S. at 580. Using that passage and subsequent passages from Justice O'Connor's concurrence was improper.

Not only is Justice O'Connor's "more searching form of review" not binding precedent, it has not even been mentioned by a majority of the Supreme Court of the United States. *Powers v. Harris*, 379 F.3d 1208, 1224 (10th Cir. 2004) (citing *Lawrence*, 539 U.S. at 580 (O'Connor, J. concurring)) (rejecting Justice O'Connor's interpretation of recent rational basis precedent and finding

that it would not be applicable to the case before it).[5] Furthermore, only a few other courts have even discussed Justice O'Connor's concurrence. *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 403 (D.C. Mass. 2006) (appeal docketed) (holding that even if Justice O'Connor's approach was correct, it would not be applicable to that case); *Williams v. King*, 420 F. Supp. 2d 1224, 1251 (N.D. Ala. 2006) (citing Justice O'Connor's analysis without further discussion), *aff'd*, 478 F.3d 1316 (11th Cir. 2007); *Henderson v. Perry*, 399 F. Supp. 2d 756, 766 (E.D. Tex. 2005) (noting that Justice O'Connor's approach is different than the accepted version of rational basis review) *aff'd in part, rev'd in part*, 126 S. Ct. 2594 (2006); *In re Marriage Cases*, 143 Cal. App. 4th 873, 920 (2006), *superseded by grant of review* (discussing Justice O'Connor's analysis, but noting Scalia's challenge to this analysis);; *State v. Druktenis*, 86 P.3d 1050, 1080 & 1084 (N.M. 2004) (citing Justice O'Connor's summary of the law to show that rational basis review can result in decisions favorable to plaintiffs, but later rejecting O'Connor's "more searching" review); *Ex parte Morales*, 212 S.W.3d 483, 501 (Tex. App. 2006) (citing (seemingly with approval) Justice O'Connor's approach in a discussion of rational basis review regarding claims of homosexual discrimination, but not employing it). A few dissenting and concurring judges and justices have argued that it should be adopted as good law, but those arguments were either ignored or rejected by the majorities. *Lofton v. Sec'y of the Dep't of Children & Family*

[5] In fact, a LexisNexis search of the U.S. Supreme Court Cases, Lawyers' Edition database using "'more searching' /p 'rational basis'" does not return any post-*Lawrence* decision that discusses this approach.

Servs., 377 F.3d 1275, 1292 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing en banc) (arguing that Justice O'Connor's more searching form of the rational basis review standard should be adopted); *Andersen v. King County*, 138 P.3d 963, 1029 (Wash. 2006) (Bridge, J., concurring in dissent) (adopting Justice O'Connor's more searching form of review); *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (Mass. 2006) (Marshall, C.J. concurring) (adopting Justice O'Connor's more searching form of review, but finding that it was not applicable to that case). Finally, two state supreme courts have adopted versions of rational basis review that are similar to, if not the same as, Justice O'Connor's approach. *State v. Limon*, 122 P.3d 22, 24-25 (Kan. 2005) (noting Justice O'Connor's approach and being "direct[ed]" by the same cases she had used in her *Lawrence* concurrence); *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 460-61 (Wis. 2005) (citing *Lawrence*, 539 U.S. at 580 (O'Connor, J. concurring)) (adopting a rational basis scrutiny "with teeth" approach).

Furthermore, in addition to the lack of any judicial support for Justice O'Connor's approach this "more searching form" of review is not consistent with the principles behind rational basis review. In Judge Birch's special concurrence to the denial of *en banc* review in *Lofton*, she noted that rational basis review is supposed to be "'a paradigm of judicial restraint,' . . . not . . . 'a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Lofton*, 377 F.3d at 1277 (Birch, J., specially concurring in the denial of rehearing *en banc*) (quoting *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th

Cir. 2004). Judge Birch noted that the Florida legislature had a *rational basis* for the public policy decision that it had made, and that "any argument that the Florida legislature was misguided in its decision is one of legislative policy, not constitutional law." *Id.* at 1281. She reasoned that the Justice O'Connor's approach, which the dissent advocated, would have the court making decisions of public policy, essentially legislating from the bench, which is a "breach of separation of powers . . . ." *Id.* at 1282.

The district court erred in using Justice O'Connor's concurring opinion in *Lawrence* as an additional rationale for its decision. Justice O'Connor's concurrence has not been adopted by any federal appellate court and has been rejected by most of the state appellate courts that have reviewed it. Additionally, the district court should not have cited Justice O'Connor's heightened rational basis review because it eschews judicial restraint and would permit courts to correct perceived mistakes in public policies, undermining the very purpose of rational basis review, which is legislative deference.

CONCLUSION

For the foregoing reasons, and the arguments submitted by the Appellant and various *Amici Curiae*, this Court should reverse the judgment of the district court.

Respectfully submitted,
this 28th day of January 2008

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Andrew J. Boettger
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CERTIFICATE OF FILING

The undersigned hereby certifies that they have filed eighteen (18) copies of the attached Brief *Amicus Curiae* with the Clerk of the Iowa Supreme Court, 1111 E. Court Avenue, Des Moines, Iowa 50319, by placing the same in the U.S. Mail, postage prepaid on January 28, 2008, pursuant to I. Rules App. P. 6.13(6) and 6.31(1).

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Nathan A. Driscoll

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the attached Brief *Amicus Curiae* were served on all required parties by placing the same in the U.S. Mail, postage prepaid on January 28, 2008, and addressed as follows:

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