IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 07-1499

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

PROOF BRIEF OF PROFESSORS OF FAMILY LAW AND JURISPRUDENCE AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae include Carlos A. Ball, Naomi Cahn, June Carbone, Ann Laquer Estin, Joan Heifetz Hollinger, Angela Onwuachi-Willig, Sarah H. Ramsey, and Michael S. Wald, family law professors who have extensive expertise regarding the use of social science research in constitutional and family law cases, including the substantial body of research regarding children of same-sex parents.[1] Each of these *amici* shares a professional dedication to the appropriate use of reliable social science in family law and jurisprudence. Based on this common goal, *amici* have an interest in ensuring that where reliable and relevant social science research exists, courts consider such research in making findings of fact and in resolving constitutional issues, as the trial court properly did here.

INTRODUCTION

The plaintiffs in this case met their burden of demonstrating the irrationality of Iowa's statutory exclusion of same-sex couples from marriage. They did this, in part, by presenting social science research regarding the irrelevance of sexual orientation to parental ability and the psychological and social well-being of children raised by same-sex parents. In addition to arguing that the marriage exclusion is irrational, the plaintiffs also alleged that the

[1] *Amici*'s Motion for Leave to File Amicus Brief provides additional detail on the biographical backgrounds of the individual academics submitting this brief.

exclusion should be subject to heightened scrutiny because it violates the fundamental right to marry and discriminates on the bases of gender and sexual orientation. *Amici* agree that the exclusion of same-sex couples from marriage should be subject to heightened scrutiny for those reasons. In this brief, however, *amici* focus exclusively on why the trial court appropriately relied on social science research in concluding that the exclusion is not rationally supported by state interests relating to children.

In particular, *amici* explain that it is well settled that courts may rely on social science research to help resolve constitutional issues and that the presentation of such evidence may play an important rule in determining so-called "constitutional" or "legislative" facts. In this case, the mainstream scientific and child welfare community as well as many other courts have accepted the research presented by the plaintiffs as valid. In considering that research, the trial court properly found that it negated the state's asserted justifications for the marriage ban. The trial court also properly declined to admit expert evidence that did not meet the standard in Iowa Rule of Evidence 5.702.

Although this case involves constitutional issues that are subject to *de novo* review, this Court should take the trial court's findings into account and should reject the arguments of the State and certain *amici* that these findings are not entitled to any weight. *See* Def.'s Br. at 44; Proof Br. of the National Legal Foundation as *Amicus Curiae* at 3-10; Br. of United Families International as *Amicus Curiae*, at 23-25; Br. of Iowa Legislators (the "Iowa Legislators Br.") at

18-25. Under any standard of review, this Court should adopt the trial court's findings because they are supported by reliable research and by the unanimous consensus of mainstream medical, psychological, and child welfare organizations, as well as by the prior family law decisions of this Court.

I. THE TRIAL COURT'S RELIANCE ON SOCIAL SCIENCE RESEARCH WAS PROPER.

The trial court's reliance on social science research in this case is consistent with longstanding judicial practice. For decades, courts have relied on social science to inform and shape their judgments on constitutional issues. As early as 1908, the United States Supreme Court relied on social science research, presented in an amicus brief by Louis Brandeis, to uphold an Oregon law limiting female factory workers to ten hours per day. *Muller v. Oregon*, 208 U.S. 412, 419-20; 28 S. Ct. 324, 325-26 (1908).[2] Since that decision, appellate and trial courts frequently have used social science evidence to develop or clarify a rule of law, to present a context relevant to the parties' circumstances, and to make specific findings of facts. In *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954), for example, the Supreme Court held that racial segregation of public schools violated equal protection based in part on research about the negative

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[2] The Supreme Court's reliance on Brandeis' amicus in *Muller* has been termed "the first significant use of social science data in constitutional decision-making." Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91, 105 (1993).

psychological impact of segregation on African-American children. *See id*. at 494 n.11, 692 n.11 (citing studies).

This Court also has frequently acknowledged that social science research may play a useful role in constitutional and other cases. For example, in *State v. Hartog*, 440 N.W.2d 852 (Iowa 1989), this Court relied, in part, on social science research to reject a constitutional challenge to Iowa's mandatory seat belt law. The plaintiff in *Hartog* argued that the statute was an invalid exercise of the state's police power because the decision whether to wear a seat belt affected only the individual involved. This Court rejected that argument based in part on studies showing that "an unrestrained passenger poses danger of injuries to other occupants through direct or indirect body contact brought about by occupant kinetics." *Id*. at 858 (concluding that "the legislature could rationally conclude unbelted drivers and passengers endanger the safety of others"). Similarly, in *Roth v. Reagen*, 422 N.W.2d 464 (Iowa 1988), the plaintiff alleged that an Iowa statute permitting the state to keep a confidential record of unfounded accusations of child abuse for a limited period of time violated his rights to privacy and due process under the federal and state Constitutions. This Court held that the statute was justified by the state's compelling interest in protecting children against abuse, an interest based in part on research documenting "30,000 to 40,000 instances of battered children each year; 100,000 additional instances of sexual abuse; and 200,000 to 300,000 additional cases of psychological abuse." *Id*. at 469 (citing Contemporary Studies Project, *Iowa Professionals and the Child*

Abuse Reporting Statute--A Case of Success, 65 Iowa L. Rev. 1273, 1286, 1282-83 (1980)).

Social science also played an important role in this Court's recent decision in *In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007), which reexamined the traditional rule that courts should award joint physical custody of children only in exceptional circumstances. *Id*. at 692-93 (noting that social science research on child custody issues "is now richer and more varied than it was in the past"). Based on a review of the research, this Court found that the current data on joint physical care is indeterminate and does not support a presumption either in favor or against joint custody awards. *Id*. at 694-95 (noting that an exhaustive review of the research commissioned by the Washington State Supreme Court Gender and Justice Commission and the Domestic Relations Commission concluded that the available studies "did not reveal any particular post-divorce residential schedule to be most beneficial to children"). Accordingly, this Court held that trial courts should determine physical custody based on "the unique facts" in each case. *Id*. at 695. *See also, e.g.*, *State v. Sullivan*, 679 N.W.2d 19, 23-25 (Iowa 2004) (applying Iowa R. Evid. 5.404(b) to reverse district court's admission of evidence of defendant's prior possession of cocaine based in part on studies showing that the introduction of evidence of such prior bad acts is likely to elicit unfair prejudice).

In *City of Council Bluffs v. Cain*, 342 N.W.2d 810 (Iowa 1983), this Court held that, in appropriate cases, plaintiffs who challenge the constitutionality of a

statute under rational basis review should develop a factual record in order to meet their burden of "negat[ing] every reasonable basis upon which [the challenged statute] may be sustained." *Id.* at 813 ("An evidentiary showing should be foregone only when a challenger is confident that the unreasonableness appears as a matter of law."). This Court further held that "the [defendant] should, but is not required to, produce rebuttal evidence," and cautioned that "[w]hen the [defendant] produces no evidence it assumes the risk the court will find the challenger's burden of persuasion is sustained." *Id*. at 814. In this case, the plaintiffs properly presented evidence to negate the government's asserted justifications for the marriage ban. Under the holding in *City of Council Bluffs*, it was proper for the trial court to consider that evidence, as well as the state's lack of evidence to rebut it. Accordingly, this Court should give due weight to the trial court's findings.

II. THE TRIAL COURT PROPERLY FOUND THAT THE SOCIAL SCIENCE RESEARCH ON CHILDREN OF GAY AND LESBIAN PARENTS IS VALID AND THAT THE MARRIAGE BAN DOES NOT PROMOTE ANY LEGITIMATE STATE INTERESTS RELATING TO CHILDREN.

Consistent with this Court's holding in *City of Council Bluffs*, the plaintiffs presented evidence to negate the state's assertion that the marriage ban serves purported state interests relating to the stability and well-being of children. To demonstrate the irrationality of that asserted justification, the plaintiffs presented an affidavit from Dr. Michael Lamb, one of the country's foremost experts on

parenting and child welfare issues.[3] Dr. Lamb stated in his affidavit that, based on current research and knowledge, there is a consensus within the mainstream scientific community that sexual orientation is not relevant to parental ability and that the children of gay and lesbian parents are as well adjusted and as psychologically, emotionally, educationally and socially successful as children of heterosexual parents. Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment ("SMF"), Ex. 13 ("Lamb Aff.") at 7-10; *see also* Ruling on Pls.' and Def's Mot. For Summ. J. ("Ruling") at Section II.B, ¶¶ 72-81. Dr. Lamb also stated that research about children in single-parent families and step-families does not support any negative conclusions about same-sex parent families, and that children with same-sex parents would benefit as much as other children if their parents were permitted to marry. Lamb Aff. at 5-6, 10-11; *see also* Ruling at Section II.B, ¶¶ 70-71, 82-83.

This Court should give weight to Dr. Lamb's affidavit not only because the trial court properly admitted him as an expert and found his statements to be reliable, but also because his statements reflect the unanimous consensus of mainstream child welfare, medical, and psychological organizations regarding the irrelevance of sexual orientation to parental ability. As Dr. Lamb indicated in his affidavit, over the past twenty-five years, there have been a number of studies of children being raised by gay and lesbian parents. These studies have analyzed

[3] This Court recently cited Dr. Lamb as a respected child welfare scholar in *In re Marriage of Hansen*, 733 N.W.2d 683, 693 (Iowa 2007).

many aspects of the children's development, including: the presence or absence of significant academic, emotional or social problems; their level of self-esteem; their relationships with peers; their relationships with their parents; and their gender identification and sexual orientation. Lamb Aff. at 7-8; *see also* Cheryl A. Parks, *Lesbian Parenthood: A Review of the Literature*, 68 Am. J. Orthopsychiatry 376 (1998); Charlotte Patterson, *Children of Lesbian and Gay Parents*, 19 Advances in Clinical Child Psychol. 235 (1997); Ellen C. Perrin et al, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Am. Acad. of Pediatrics 341 (2002), available at http://aappolicy.aappublications.org/cgi/reprint/pediatrics;109/2/341.pdf.

The findings of these studies are all consistent. Upon reviewing these studies, the American Psychological Association, in 2005, concluded that the research indicates that children raised by gay and lesbian parents are not "disadvantaged in any significant respect relative to the children of heterosexual parents." American Psychological Association, *Lesbian and Gay Parenting* (2005), available at http://www.apa.org/pi/lgbc/publications/lgparenting.pdf. In another review of the research in 2002, the American Academy of Pediatrics concluded that children raised by same-sex parents "fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual." Ellen C. Perrin et al, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Am. Acad. of Pediatrics 341 (2002), available at

http://aappolicy.aappublications.org/cgi/reprint/pediatrics;109/2/341.pdf. The American Psychiatric Association also has acknowledged the validity of this research, concluding that:

> Numerous studies over the last three decades consistently demonstrate that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents. This research indicates that the optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults.

SMF Ex. 13, exhibit C, American Psychiatric Association, Adoption and Co-parenting of Children by Same-Sex Couples Position Statement. The American Academy of Child & Adolescent Psychiatry likewise has concluded that "studies of children raised by parents with a homosexual or bisexual orientation, when compared to heterosexual parents, show no greater degree of instability in the parental relationship or developmental dysfunction in children." SMF Ex. 13, exhibit C, American Academy of Child & Adolescent Psychiatry, Gay, Lesbian and Bisexual Parents Policy Statement,; *see also* SMF Ex. 13, exhibit C, Child Welfare League of America, Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults ("Studies using diverse samples and methodologies in the last decades have persuasively demonstrated that there are no

systematic differences between gay or lesbian and non-gay or lesbian parents in emotional health, parenting skills, and attitudes toward parenting.").

In light of this research, mainstream child welfare organizations uniformly have adopted formal policies recognizing that sexual orientation is not relevant to parental ability and urging that children of same-sex parents be provided with the same legal security and protections as other children. Those organizations include the American Psychological Association, the American Academy of Pediatrics, the American Psychiatric Association, the American Academy of Child & Adolescent Psychiatry, the American Psychoanalytic Association, the Child Welfare League of America, and the National Association of Social Workers. *See* SMF Ex. 13, exhibit C.

Most significantly for purposes of rebutting the state's asserted justification for the marriage exclusion, none of the studies support the claims that children raised by same-sex parents will have serious emotional, intellectual, or social development problems because of their parents' sexual orientation or because they do not have both a male and female parent. The vast majority of children functioned well academically and did not engage in self-destructive behaviors or in behavior harmful to the community. *See* A. Brewaeys et al., *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 Hum. Reprod. 1349, 1355 (1997); Raymond Chan et al., *Psychosocial Adjustment Among Children Conceived Via Donor Insemination By Lesbian and Heterosexual Mothers*, 69 Child Dev. 443, 449 (1998); David Flaks

et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 Developmental Psychol. 105, 109-12 (1995); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. Child Psychol. & Psychiatry 551, 565-71 (1983); Charlotte Patterson, *Children of Lesbian and Gay Parents*, 19 Advances in Clinical Child Psychol. 235, 245-46 (1997). The studies also find that children raised by lesbian parents get along as well with their parents and peers as do children raised in heterosexual families. *See supra* sources cited in this paragraph. The research finds no differences between these groups of children in terms of self-esteem or in characteristics such as leadership ability, self-reliance, interpersonal flexibility, and self-confidence. *See supra* sources cited in this paragraph. In these regards, as well as in general psychological and emotional well-being, they did not differ from their counterparts with heterosexual parents. *See supra* sources cited in this paragraph. In a study that followed children raised from birth into adulthood by one or two gay parents, the young adults did not differ from the young adults raised in heterosexual families with respect to employment, ability to find and relate to partners, or in their general sense of well-being. Fiona L. Tasker & Susan Golombok, *Growing up in a Lesbian Family: Effects on Child Development* 128-30, 138, 143-44 (Guilford Press 1997).

The research relied upon by the trial court in this case has been accepted as valid and reliable by courts in other cases involving gay and lesbian parents. In

1993, the Hawaii Supreme Court held that Hawaii's statutory exclusion of same-sex couples from marriage presumptively violated the Hawaii Equal Rights Amendment and remanded the case to the trial court in order to give the state an opportunity to demonstrate whether it had a sufficient interest to justify the denial of equal protection to same-sex couples. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993). On remand, both the state of Hawaii and the couples challenging the marriage exclusion presented expert testimony regarding sexual orientation, parenting, and the best interests of children, including much of the same research described by Dr. Lamb in this case. *Baehr v. Miike*, 1996 WL 694235 (Hawai'i Cir. Ct., unreported in P.2d). Based on that expert testimony, the trial court found that, as a general matter, sexual orientation does not affect an individual's parenting ability and that gay and lesbian parents have the same potential and ability to raise healthy, well-adjusted children as heterosexual couples. Specifically, the trial court found that:

> 125. The evidence presented by Plaintiffs and Defendant establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child.
> …..
> 126. The sexual orientation of parents is not in and of itself an indicator of parental fitness.
>
> 127. The sexual orientation of parents does not automatically disqualify them from being good, fit, loving or successful parents.
>
> 128. The sexual orientation of parents is not in and of itself an indicator of the overall adjustment and development of children.
>
> 129. Gay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well-adjusted.

> 130. Gay and lesbian parents and same-sex couples are allowed to adopt children, provide foster care and to raise and care for children.
>
> 131. Gay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children.
>
> 132. Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples.
>
> 133. While children of gay and lesbian parents and same-sex couples may experience symptoms of stress and other issues related to their non-traditional family structure, the available scientific data, studies and clinical experience presented at trial suggests that children of gay and lesbian parents and same-sex couples tend to adjust and do develop in a normal fashion.

In contrast, the trial court found no evidence that "the public interest in the well-being of children and families, or the optimal development of children [would] be adversely affected" by permitting same-sex couples to marry. *Id*. at 18.

In 2006, the Arkansas Supreme Court affirmed a trial court decision invalidating a regulation barring lesbians and gay men from serving as foster parents. *Department of Human Services v. Howard*, 238 S.W.3d 1, 9 (Ark. 2006). In its decision, the court relied on the trial court's findings, based on expert testimony about the social science research on children of gay and lesbian parents, that:

> 29. Being raised by gay parents does not increase the risk of problems in adjustment for children.
>
> 30. Being raised by gay parents does not increase the risk of psychological problems for children.
>
> 31. Being raised by gay parents does not increase the risk of behavioral

problems.

32. Being raised by gay parents does not prevent children from forming healthy relationships with their peers or others.

33. Being raised by gay parents does not cause academic problems.

34. Being raised by gay parents does not cause gender identity problems.
. . . .

37. Children of lesbian or gay parents are equivalently adjusted to children of heterosexual parents.

38. There is no factual basis for making the statement that heterosexual parents might be better able to guide their children through adolescence than gay parents.

39. There is no factual basis for making the statement that the sexual orientation of a parent or foster parent can predict children's adjustment.

40. There is no factual basis for making the statement that being raised by lesbian or gay parents has a negative effect on children's adjustment.

41. There is no reason in which the health, safety, or welfare of a foster child might be negatively impacted by being placed with a heterosexual foster parent who has an adult gay family member residing in that home.
. . . .
46. There is no evidence that gay people, as a group, are more likely to engage in domestic violence than heterosexuals.

47. There is no evidence that gay people, as a group, are more likely to sexually abuse children than heterosexuals.

Id. at 7 (finding "no correlation between the health, welfare, and safety of foster children *and* the blanket exclusion of any individual who is a homosexual or who resides in a household with a homosexual") (emphasis in original).

In other cases, the proposition that children are not harmed by having same-sex parents and that sexual orientation is irrelevant to parental ability is so well-

established and so universally accepted by credible mainstream child welfare experts that, even without the benefit of expert testimony, courts simply have taken judicial notice of that fact. *See, e.g., In re Adoption of Caitlin*, 622 N.Y.S.2d 835, 840 (N.Y. Fam. Ct. 1994) (citing studies disproving negative effects of being raised by same-sex parents, including studies concluding that there are no significant differences between children of lesbian and heterosexual mothers and that the sexual orientation of a parent is irrelevant to the mental health of the children at issue); *In re Evan*, 153 Misc.2d 844, 851 n.1, 583 N.Y.S.2d 997 (N.Y. Misc. 1992) (noting that "research that has been done in recent years on the possible differences between children of gay and lesbian parents and children of heterosexual parents . . . reveals no disadvantage among the former in any significant respect"); *In the Interest of Hart*, 806 A.2d 1179, 1190 n.15 (Del. Fam. Ct. 2001) (citing social science research on children of same-sex parents to support finding that a person's sexual orientation is irrelevant to parental ability); *Conkel v. Conkel*, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (taking "judicial notice that … there is substantial consensus among experts that being raised by a homosexual parent does not increase the likelihood that a child will become homosexual"); *Bezio v. Patenuade*, 410 N.E.2d 1207, 1215-16 (Mass. 1980) ("There is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, maladjusted than children raised with a loving couple of mixed sex. Sexual orientation of the parent is irrelevant to the child's mental health."); *Blew v. Verta*, 617 A.2d 31, 36 n.2 (Pa. Super. Ct. 1992)

(noting that "a variety of psychological studies indicate that lesbianism does not correlate negatively with the ability to raise a healthy, normal child").

Similarly, in this case, even without the benefit of expert evidence, the trial court could have concluded that the marriage exclusion is irrational because sexual orientation is not relevant to parental ability, and children are not harmed by having same-sex parents. As the trial court noted, Iowa courts have held in prior cases that a parent's sexual orientation should not be treated as a relevant factor. *See* Ruling at 57 (citing *In re Marriage of Cupples*, 531 N.W.2d 656 (Iowa Ct. App. 1995); *In re Marriage of Walsh*, 451 N.W.2d 492 (Iowa 1990); *Hodson v. Moore*, 464 N.W.2d 699 (Iowa Ct. App. 1990); *In re Marriage of Wiarda*, 505 N.W.2d 506 (Iowa Ct. App. 1993)). The trial court correctly concluded that these cases support "the proposition that eligibility for marriage should not be tied to sexual orientation." *See* Ruling at 58.

Unquestionably, the manner in which the next generation will be raised should be a central concern of the state. As discussed above, however, the evidence indicates that children raised in households headed by a gay parent do as well as those raised in heterosexual households. Even more important from the perspective of children's psychological and emotional development, the relevant question is not whether one form of family is better for children, however "better" is defined. There currently are over a quarter of a million children living with parents in same-sex partnerships or with a single gay mother or father who may later find a partner. Adam P. Romero et al., *Census Snapshot: United States* (The

Williams Institute, Los Angeles, Cal.), December 2007, at 2, available at http://www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf. They will continue living with their parent(s) regardless of whether the state allows their parents to marry. Nobody is suggesting that they be should be taken from their parent(s) and placed elsewhere; such a policy would not only be undesirable and contrary to current state laws, it would be unconstitutional.[4]

For these children, the only pertinent issues are whether their parents will be married or cohabiting and whether it will be easier or harder for the partner who is not the biological parent to adopt the child. As the trial court found, children of gay parents would benefit if their parents were able to marry. This would maximize stability and protect their economic interests. They would be able to see their family as more similar to families with heterosexual parents, thereby reducing their experience of difference and stigma. Their parents' well-being would likely be improved, enhancing their child-rearing capacity. By not allowing gay parents to marry, children are made to suffer.

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[4] The right to parent is constitutionally protected. The state can only interfere with the right to parent if there is a risk of harm to the child and if the interference is in the child's best interests. *See Prince v. Massachusetts*, 321 U.S. 158, 166-70, 64 S. Ct. 438, 442-44 (1944) (holding that the state has the authority to limit "parental freedom and authority in things affecting the child's welfare," but also noting that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

III. THE TRIAL COURT PROPERLY ADMITTED ONLY QUALIFIED EXPERTS.

Some *amici* who support the marriage ban argue that the trial court should have relaxed the admissibility rules for expert evidence because this case involves "legislative" rather than "adjudicative" facts.[5] *See* Iowa Legislators Br. at 4-6 (arguing that the rules of admissibility do not apply to expert evidence regarding legislative facts and that the trial court "erroneously assume[ed] that it was constrained by the rules of admissibility"). That argument has no merit. It is true that courts may base findings about legislative facts on both formally and informally presented evidence, and may consider non-record evidence such as books, articles, and treatises. *See Welsh v. Branstad*, 470 N.W.2d 644, 648 (Iowa 1991).[6] But even in cases involving legislative facts, evidence that is *formally* presented to the court must adhere to the same rules of admissibility that govern other cases. Indeed, it is axiomatic that all evidence brought before the court,

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[5] *See, e.g., Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 836 (Iowa 2002) (Adjudicative facts "relate to the specific parties and their particular circumstances," while legislative facts are "generalized factual propositions . . . . which aid the decision-maker in determining questions of policy and discretion."); Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 402-03 (1942) ("[L]egislative facts are those facts that transcend the particular legal dispute and have relevance to legal reasoning and the fashioning of legal rules.").

[6] For a general discussion of the court's ability to consider non-record evidence when determining legislative facts, see Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 Iowa L. Rev. 1011, 1013-18 (1990).

including expert affidavits, must be admissible and thus must meet the standards of reliability established by the Iowa Rules of Evidence and this Court.

The admissibility of expert evidence is governed by Rule 5.702 of the Iowa Rules of Evidence. In order to comply with Rule 5.702, expert evidence must be "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,'" and "the witness must be 'qualified as an expert by knowledge, skill, experience, training, or education.'" *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 533 (Iowa 1999) (quoting Iowa R. Evid. 5.702). 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).

In this case, the trial court properly applied the rules of admissibility for expert evidence to exclude several of the state's proffered experts.[7] Each of the excluded witnesses sought to provide evidence, at least in part, about the purported impact of permitting same-sex couples to marry on children. *See* Ruling at 6-9. Yet none had training or expertise "in relevant fields such as sociology, child development, psychology, or psychiatry." Ruling at 7 (describing Ms. Somerville, Dr. Nathanson, and Dr. Young); *see also id.* at 8 (making similar findings with

[7] The trial court also properly excluded two of the plaintiff's proffered witnesses who lacked sufficient qualifications. *See* Ruling at 9-10 (excluding Dan Johnston and John Schmaker as experts on the ground that they lacked any scientific, technical or other specialized knowledge).

regard to Dr. Carlson and Dr. Rhoads). In addition, with regard to three of the state's proffered experts, the trial court appropriately found that their views "appear to be largely personal and not based on observation supported by scientific methodology or based on empirical research in any sense." *Id*.

Because this case involves legislative as well as adjudicative facts, the trial court's evidentiary rulings merely excluded the presentation of certain views through expert affidavits. Those rulings did not prevent the state from citing in its briefs or otherwise informally presenting any arguments or information (including any pertinent articles, books or studies by any of its proffered experts) it wished the trial court to consider. Nor do those rulings prevent the state from presenting any arguments or information to this Court on appeal.[8] As the trial court correctly held, the state's inability to provide any evidence to support its position is telling, and demonstrates the absence of any rational basis to exclude same-sex couples from marriage.

[8] *See, e.g., Dunagin v. City of Oxford*, 718 F.2d 738, 748 n. 8 (5th Cir. 1983) ("The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court."); see also Fed. R. Evid. 201 advisory committee's note (describing court's freedom to consider non-record evidence when determining legislative facts).

CONCLUSION

For the reasons stated above, *amici* professors ask that the Court affirm the trial court's holding that Iowa's statutory exclusion of same-sex couples from marriage lacks a rational basis and therefore violates the equal protection and due process guarantees of the Iowa Constitution.

Dated: March ____, 2008
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Respectfully submitted,

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CERTIFICATE OF FILING

I, Joseph M. Barron, hereby certify that I, or a person acting in my direction, did file the attached Proof Brief of Professors of Family Law and Jurisprudence as *Amici Curiae* in Support of Plaintiff-Appellee by delivering four (4) copies thereof to the Clerk of the Iowa Supreme Court on the ___ day of March 2008.

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CERTIFICATE OF SERVICE

I, Joseph M. Barron, a member of the Bar of Iowa, hereby certify that on March __, 2008, I served this Proof Brief of Professors of Family Law and Jurisprudence as *Amici Curiae* in Support of Plaintiff-Appellee by mailing one copy thereof to each of the following:

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IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 07-1499
ON APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
FIFTH JUDICIAL DISTRICT, CASE NO. CV5965

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.	MOTION FOR LEAVE TO FILE AMICUS BRIEF

COME NOW the undersigned professors of family law and jurisprudence, pursuant to Iowa Rule of Appellate Procedure Rule 6.18, and request permission to file the attached *amicus* brief, and in support thereof state:

1. *Amici* are a number of individual professors of family law and jurisprudence, each of whom has extensive expertise regarding the use of social science research in family law cases, including the substantial body of research regarding children of same-sex parents. The attached appendix includes biographical backgrounds of the individuals submitting this motion.

2. Each of these *amici* share a professional dedication to the appropriate use of reliable social science in family law and jurisprudence. Based on this common goal, *amici* have an interest in ensuring that where reliable and relevant social science research

exists, courts consider such research in making findings of fact and resolving constitutional issues, as the trial court properly did here. *Amici*'s submission explains why the trial court's reliance on social science research in this case was proper and based upon valid research, and why this Court should adopt the trial court's findings.

3. The *amici* seek the Court's leave to submit the attached *amicus* brief concerning the trial court's proper reliance on social science research and the findings of fact relating thereto.

4. Pursuant to Iowa Rule of Appellate Procedure Rule 6.18(1), the *amici* request permission to file and serve the enclosed brief, which is conditionally filed herewith, within the deadlines set for the plaintiff-appellees.

Respectfully submitted,

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APPENDIX: ADDITIONAL INFORMATION ON *AMICI*

Carlos A. Ball is the Weiss Family Distinguished Faculty Scholar and a Professor of Law at Penn State University. He is a nationally-recognized expert on family law issues as they relate to questions of sexual orientation. He is the author of *The Morality of Gay Rights: An Exploration in Political Philosophy* (2003) and a co-editor of *Cases and Materials on Sexual Orientation and the Law* (2008). His writings have appeared in the Cornell Law Review, the Georgetown Law Journal, the Minnesota Law Review, and the UCLA Law Review, among other journals. A former law clerk to Chief Justice Paul Liacos of the Massachusetts Supreme Judicial Court, Professor Ball received his LL.M. from Cambridge University, his J.D. from Columbia University, and his B.A. from Tufts University.

Naomi Cahn is the John Theodore Fey Research Professor of Law at George Washington University Law School. Her areas of expertise include family law and adoption law. She has written numerous law review articles on family law and other subjects, and has co-authored several books, including *Contemporary Family Law* (Thomson/West 2006). Her future research includes a study with the Yale Cultural Cognition Project concerning gay and lesbian parenting.

June Carbone is the Edward A. Smith/Missouri Chair of Law, the Constitution and Society at the University of Missouri at Kansas City. She previously served as Associate Dean for Professional Development and Presidential Professor of Ethics and the Common Good at Santa Clara University School of Law. She received her J.D. from the Yale Law School, and her A.B. from the Woodrow Wilson School of Public and International Affairs at Princeton University. She teaches Property, Family Law, Assisted Reproduction and Bioethics. Her book *From Partners to Parents: The Second Revolution in Family Law* was published by Columbia University Press in 2000. She has co-authored the third edition of *Family Law* (Aspen 2005) with Leslie Harris and the late Lee Teitelbaum.

Ann Laquer Estin has been a professor of law at the University of Iowa College of Law since 1999 and currently does research with a focus on international family law. During 1998 and 1999, Professor Estin was on the law faculty at the University of Colorado. She is a co-author of *Cases and Problems in Domestic Relations* (7th ed. 2005) (with Homer H. Clark, Jr.) and *Global Issues in Family Law* (2007) (with Barbara Stark). Professor Estin received her J.D. from the University of Pennsylvania in 1983 and her A.B. from Dartmouth College in 1979. She is currently admitted to practice in Colorado and Iowa.

Joan Heifetz Hollinger is a leading scholar on adoption law and policy. She teaches courses on family law and child welfare at the University of California, Berkeley Law School where she has been on the faculty since 1994, is the principal author of the three volume treatise *Adoption Law and Practice* (Matthew Bender\Lexis 1988-2007), co-author of *Families By Law: An Adoption Reader* (New York University 2004), the *Reporter for the Uniform Adoption Act* (NCCUSL), and a contributor to the interdisciplinary journal Adoption Quarterly. She helped draft the new proposed Uniform Parentage Act of 2002 and has been involved since 1993 in efforts to implement the Hague Convention on Intercountry Adoption. She often serves as *amicus curiae* on behalf of children in family law, adoption and parentage cases in state and federal courts, including a number of appellate cases that have extended legal protections to same-sex couples and their children. She is one of the twenty-three California family law professors who are *amici* in support of the parties challenging the exclusion of same-sex couples from marriage in *The Marriage Cases* currently before the California Supreme Court.

Angela Onwuachi-Willig joined the University of Iowa College of Law faculty in 2006 after three years as a professor at the University of California, Davis School of Law (King Hall). Her research and teaching interests include family law, employment discrimination, critical race theory, feminist legal theory, and evidence. Her recent publications have appeared in the Michigan Law Review, California Law Review, Vanderbilt Law Review, Wisconsin Law Review, Minnesota Law Review, and Iowa Law Review. In 2006, Professor Onwuachi-Willig was honored for her service by the Minority Groups Section of the Association of American Law Schools with the Derrick A. Bell Award, which is given to a junior faculty member who has made an extraordinary contribution to legal education, the legal system, or social justice. Professor Onwuachi-Willig is the Chair Elect of both the AALS Minority Section and AALS Law and Humanities Section for 2008 and is a member of the Latina/o Critical Theory Board and Society of American Law Teachers ("SALT") Board of Governors. Professor Onwuachi-Willig graduated from Grinnell College, where she was elected Phi Beta Kappa, and received her law degree from the University of Michigan Law School, where she was a Clarence Darrow Scholar, a Note Editor on the Michigan Law Review, and an Associate Editor of the founding issue of the Michigan Journal of Race and Law. After law school, Professor Onwuachi-Willig clerked for the Honorable Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, and the Honorable Karen Nelson Moore, United States Circuit Judge for the Sixth Circuit Court of Appeals. She also practiced law as a litigation and employment attorney at Jones Day in Cleveland, Ohio, and as an employment attorney with Foley Hoag LLP in Boston, Massachusetts.

Sarah H. Ramsey is a Professor of Law at Syracuse University College of Law and a Laura J. and L. Douglas Meredith Professor for Teaching Excellence. She also is the Director of the Family Law and Social Policy Center at the College of Law and Co-Director of the Syracuse Family Advocacy Program. She is the author of books and articles on child and family law, including a number of articles on the use of social science in family law cases. She is a member of the American Law Institute and is an American Bar Foundation Fellow.

Michael S. Wald is the Jackson Ely Reynolds Professor of Law, Emeritus at Stanford Law School. A frequent expert advisor on youth and children's legal issues nationwide, Professor Wald has had a distinguished career as an academic researcher and teacher. He is one of the leading national authorities on legal policy towards children, and drafted the American Bar Association's Standards Related to Child Abuse and Neglect, as well as major federal and state legislation regarding child welfare. Professor Wald has served as deputy general counsel for the U.S. Department of Health and Human Services during the Clinton Administration, executive director of the San Francisco Department of Human Services, and senior advisor to the president of the William and Flora Hewlett Foundation. He has been a Guggenheim Fellow and is a board member of Legal Services for Children in San Francisco. He is one of the twenty-three California family law professors who are *amici* in support of the parties challenging the constitutionality of the state's exclusion of same-sex couples from marriage in *The Marriage Cases* pending before the California Supreme Court.

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