No. 07-1499

IN THE SUPREME COURT OF IOWA

Katherine Varnum, *et al.*, Plaintiffs-Appellees,	)	On Appeal from the District Court of Polk County Fifth Judicial District
vs.	)	Case No. CV 5965
Timothy J. Brien, Defendant-Appellant.	)	Hon. Robert B. Hanson Judge Presiding

PROOF BRIEF OF IOWA LEGISLATORS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Iowa Representatives Dwayne Alons, Carmine Boal, and Betty DeBoef, and Iowa Senators Nancy Boettger and James Hahn (collectively referred to as "Iowa Legislators" or "*Amici*") jointly file this brief as *amici curiae* in support of Defendant-Appellant. The Iowa Legislators are members of both the Iowa House of Representatives and the Iowa Senate. As members of the legislative branch, they have an interest in maintaining a proper separation of government powers. In this case, they seek to uphold the separation of powers (1) by stifling Plaintiffs' use of the judicial branch to effectuate fundamental changes in public policies regarding marriage and (2) by defending duly-enacted laws pertaining to policy matters within the sole province of the legislature.

SUMMARY OF THE ARGUMENT

The lower court completely and utterly abdicated its duty as a fair and neutral tribunal to carefully and impartially consider all the evidence and arrive at a balanced, well-supported statement of the "undisputed" facts. The lower court's violation of this duty produced a final product that, far from a beacon of judicial balance and neutrality, is better characterized as an advocacy brief than a judicial opinion. In fact, substantial portions of the lower court's "undisputed" facts are copied verbatim from Plaintiffs' Statement of Material Facts. In arriving at its erroneous factual summary, the lower court made critical evidentiary errors at each step of its analysis, all of which will be outlined in this brief.

First, the lower court erred in its treatment of Defendant's expert testimony. In considering the testimony of Defendant's experts, the lower court incorrectly assumed

that it was limited by the rules of admissibility (i.e., Rule 5.702 of the Iowa Code). But, as established by this Court, a trial court is not bound by the rules of admissibility when a proffered expert testifies regarding "legislative" facts (e.g., social issues). The lower court thus erred in assuming it was constrained by those rules.

Second, having incorrectly believed itself to be bound by the rules of admissibility, the lower court applied those rules in a manner that is contrary to the law, that is against the weight of substantial evidence in the record, and that favors Plaintiffs' over Defendant's experts. For example, the lower court admitted one of Plaintiffs' experts on the basis of her scant experience as an attorney handling adoption cases. *See* Ruling on Plaintiffs' and Defendant's Motions for Summary Judgment (hereinafter referred to as "Ruling") p. 11. In contrast, however, the lower court rejected one of Defendant's experts notwithstanding that he had authored more than five full-length books and one hundred articles (and had testified multiple times before Congress) on issues relevant to his testimony in this case. *See* Ruling p. 7-8. This suspect treatment of Defendant's expert testimony was not limited to this isolated incident; rather, an assortment of legal errors pervades the court's entire analysis of the expert evidence in this case.

Third, in addition to its erroneous rejection of Defendant's experts, the lower court improperly handled Defendant's admitted evidence. In short, the lower court eradicated all Defendant's admissible evidence by improperly weighing it, erroneously construing it in favor of Plaintiffs, and, worst of all, ignoring large portions of it.

Combining each of these errors leads to the lower court's one-sided rendition of the facts. This Court cannot affirm such a mockery of the judicial system.

ARGUMENT

I. THE LOWER COURT'S REJECTION OF DEFENDANT'S EXPERT TESTIMONY AMOUNTS TO A CLEAR ABUSE OF DISCRETION AND INFLICTS SEVERE PREJUDICE ON DEFENDANT.

An appellate court reviews for abuse of discretion a trial court's exclusion of expert testimony. *Hansen v. Central Iowa Hosp. Corp.*, 686 N.W.2d 476, 479-80 (Iowa 2004). "[A] trial court is entitled to exercise a broad discretion in the admissibility of expert testimony," *United Cent. Bank of Des Moines v. Kruse*, 439 N.W.2d 849, 852 (Iowa 1989), but "[t]he court's discretion is not unlimited." *Van Wyk v. Norden Labs., Inc.*, 345 N.W.2d 81, 86-87 (Iowa 1984). A reviewing court will reverse the trial court's decision regarding the admissibility of expert testimony whenever there is "[1] an abuse of . . . discretion and [2] prejudice to the complaining party." *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 309 (Iowa 1998); *see also Bell v. Community Ambulance Serv. Agency for N. Des Moines*, 579 N.W.2d 330, 338 (Iowa 1998) (requiring that the abuse must be "clear"). Both of these requirements are met here and, accordingly, this Court must reverse the lower court's decision.

A. The Lower Court Clearly Abused Its Discretion, First, By Assuming It Was Bound By The Admissibility Rules For Expert Evidence And, Second, By Applying Those Rules Contrary To The Law.

"A court abuses its discretion when the grounds or reasons for the court's decision are 'clearly untenable' or when the court has exercised its discretion to an extent that is 'clearly unreasonable.'" *Equity Control Assocs. v. Root*, 638 N.W.2d 664, 674 (Iowa 2001); *see also State v. Rodriquez*, 636 N.W.2d 234, 245 (Iowa 2001) (applying the same abuse-of-discretion rule in the context of expert testimony). "A ground or reason is untenable when it is not supported by substantial evidence or

when it is based on an erroneous application of the law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

1. The Lower Court Clearly Abused Its Discretion By Assuming It Was Bound By The Admissibility Rules For Expert Evidence.

Cases from this Court have repeatedly distinguished between adjudicative facts and legislative facts. *See, e.g.*, *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 836 (Iowa 2002); *Welsh v. Branstad*, 470 N.W.2d 644, 647-48 (Iowa 1991) (discussing the "distinction between legislative facts and adjudicative facts").

> Adjudicative facts relate to the specific parties and their particular circumstances. They involve particular facts peculiar to the parties, and ordinarily answer the questions of who did what, where, when, how, why, with what motive or intent. Legislative facts, on the other hand, do not pertain to the specific parties. Instead, legislative facts are generalized factual propositions . . . which aid the decision-maker in determining questions of policy and discretion.

Greenwood Manor, 641 N.W.2d at 836 (citations, quotations, and alterations omitted). Legislative facts "are ordinarily considered to be those disputable assertions of an evaluative nature which aid courts in shaping the law to achieve the proper social policy." *Welsh*, 470 N.W.2d at 648; *see also Richards v. City of Muscatine*, 237 N.W.2d 48, 56 (Iowa 1975) (noting that legislative facts "help the tribunal decide questions of law and policy and discretion"); *State v. Henze*, 356 N.W.2d 538, 540 n.1 (Iowa 1984). They "serve as a ground for laying down a rule of law," *Allegre v. Iowa State Bd. of Regents*, 349 N.W.2d 112, 115 (Iowa 1984), and particularly "play a prominent role in constitutional and common law cases," *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 816 (Iowa 1983) (McCormick, J., dissenting).

All Defendant's expert testimony involves legislative facts. The adjudicative facts in this case (i.e., those that are peculiar to the parties) are quite simple: Plaintiffs are same-sex couples who sought marriage licenses, and Defendant denied their requests because Iowa Code § 595.2(1) states that "[o]nly a marriage between a male and a female is valid." In contrast, however, the legislative facts (i.e., those generalized factual propositions that aid in determining questions of law and policy) are fairly intricate. These legislative facts consist of the plethora of expert evidence pertaining to the history of marriage, the procreative purpose of marriage, the effects of permitting same-sex couples to "marry," the rights of children to be raised by their biological parents, the alleged effectiveness of same-sex parenting, and the role of the family in society.

Evidentiary issues involving adjudicative facts are treated differently than those involving legislative facts. "[L]egislative facts may be presented either formally or informally" and the trial court, when considering such evidence, is not "limited by the rules of admissibility." *Welsh*, 470 N.W.2d at 648. Thus, the rules governing admissibility of expert testimony do not apply where the party introduces such testimony for the purpose of establishing legislative facts. The lower court in this case incorrectly assumed that it could "only consider evidence which would be admissible at trial," *see* Ruling p. 3, and, though not in a trial, stringently applied the rules for admissibility of expert testimony at trial. By erroneously assuming that it was constrained by the rules of admissibility, the lower court operated under an improper belief concerning the governing legal principles. This "erroneous application of the

law" is consistent throughout the lower court's opinion and amounts to a clear abuse of discretion. *See Graber*, 616 N.W.2d at 638.

The lower court thus misapprehended the governing law and erred by applying the expert admissibility rules. It is indeed telling that in the countless cases construing Iowa's rules of expert evidence, *Amici* were unable to find one decision involving the types of experts at issue here (e.g., ethicists, political experts, social scientists, psychologists, historians, etc.) testifying to legislative facts. The dearth of such case law stems from the undisputable fact that those rules simply do not apply when an expert testifies regarding legislative facts. Thus, the lower court, by applying those rules to reject five of Defendant's proffered experts, has clearly abused its discretion and committed a reversible error.

2. The Lower Court Clearly Abused Its Discretion By Applying The Admissibility Rules For Expert Evidence In A Manner Biased Against Defendant, Contrary To The Law, And Contrary To Substantial Evidence.

Even if this Court finds that the lower court did not err by applying the admissibility rules to Defendant's expert testimony, the lower court nevertheless clearly abused its discretion by applying those rules in a manner that was partial to Plaintiffs, contrary to the law, and contrary to substantial evidence.

This Court has repeatedly recognized that it is "committed to a *liberal view* on the admissibility of expert testimony." *Mensink v. American Grain*, 564 N.W.2d 376, 380 (Iowa 1997) (emphasis added); *see also Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 827 (Iowa 1993) ("We are committed to a liberal rule on the admission of opinion testimony"). Simply put, "expert testimony is admissible if it is reliable and will assist the trier of fact in resolving an issue." *Heinz v. Heinz*, 653

N.W.2d 334, 342 (Iowa 2002) (alterations and quotations omitted). Rule 5.702 of the Iowa Code governs the admissibility of expert witnesses. "[It] provides an expansive scope of expert testimony," *Leaf v. Goodyear Tire and Rubber Co.*, 590 N.W.2d 525, 530 (Iowa 1999), and states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." IOWA CODE R. 5.702.

This Court has prescribed a three-step analysis for evaluating the admissibility of expert testimony. *See Leaf*, 590 N.W.2d at 533.[1] First, the evidence must be relevant. *Id.* The lower court did not find any of Defendant's expert testimony to be irrelevant; thus this Court need not consider step one of the analysis. Second, the 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." *Id.* (quotations and alterations omitted). Third, "the witness must be qualified as an expert by knowledge, skill, experience, training, or education." *Id.* (quotations omitted). "It is not enough . . . that a 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 Med. Ctr.*, 477 N.W.2d 396, 402 (Iowa 1991). The trial court excluded Defendant's experts primarily because, according to the court,

[1] The standards expressed in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), are not binding in Iowa. *See Leaf*, 590 N.W.2d at 531-33 (recognizing that *Daubert* is not binding on Iowa courts applying their own evidence rules). Furthermore, according to the principles expressed by this Court, the *Daubert* factors should not even be considered here. This Court has noted that *Daubert* will be helpful to a court only "in assessing reliability of evidence in complex cases." *Id.* at 532. "Complex cases" (as that phrase has been used by this Court) are cases involving intricate scientific issues/topics that must be meticulously explained by an expert to the fact finder. *See Mensink*, 564 N.W.2d at 381. In contrast, the topics discussed by Defendant's expert — the history and purpose of marriage, the role of each biological parent, etc. — are not complex, as that term has been interpreted, because they are not "foreign to a layperson's understanding." *See id.*

they were not qualified to testify regarding the applicable issues (i.e., they were not qualified to answer the particular questions propounded). Ruling p. 6-9.

Defendant proffered eight expert witnesses. Plaintiffs did not object to three of these witnesses, and thus their testimony was admitted without discussion. But Plaintiffs did challenge, and the lower court did in fact reject, the other five experts. The court's fundamental error in rejecting each of these experts lies in its failure to properly apply two deep-seated tenets of Iowa law. First, "experience is sufficient to qualify a witness as an expert." *Leaf*, 590 N.W.2d at 535; *see also Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 886 (Iowa 1994) ("[E]xperience may provide the essential elements of [an expert's] qualification."); *State v. Buller*, 517 N.W.2d 711, 714 (Iowa 1994) ("Practical experience . . . will suffice to qualify an expert witness."). Second, scientific knowledge is not required to qualify a witness as an expert. *See* IOWA CODE R. 5.702 (noting that expert evidence may take the form of "scientific, technical, or other specialized knowledge"); *Olson*, 579 N.W.2d at 309 ("[T]he source of expert knowledge is not significant.").

In dismissing these five experts, the court ignored their vast experience in areas relevant to their testimony, and arbitrarily imposed so-called "scientific" requirements as prerequisites for admissibility. *See* Ruling p. 6-9. In sharp contrast, however, the court found that two of Plaintiffs' challenged experts — Sharon Malheiro and Deborah Tharnish — were qualified "by virtue of [their] experience as [] attorney[s]" to present nonscientific evidence "in the form of specialized knowledge." *Id.* at 11. This brazen double-standard (and inherent bias against Defendant's experts) plainly demonstrates the lower court's clear abuse of discretion. *See*

Hutchison, 514 N.W.2d at 886 ("[A] trial court may commit an abuse of discretion if it refuses to allow an expert qualified by experience.").

A succinct review of the lower court's bases for rejecting Defendant's expert witnesses will further unveil the court's clear abuse of discretion. The court considered the first three rejected experts — Margaret A. Somerville, Paul Nathanson, Ph.D., and Katherine Young, Ph.D. — as a collective group because of their affiliation with the University of McGill in Montreal. The lower court's generic grouping of experts who specialize in different disciplines (Ms. Somerville is an ethicist, and Dr. Nathanson and Dr. Young have differing expertise in religion) as if they were one in the same, raises suspicions about the court's understanding of their respective backgrounds and proffered testimony. Because the lower court grouped these three experts together, it erroneously rejected all their testimony for the same reasons. For expediency's sake, the Iowa Legislators specifically discuss only the first rejected expert, Margaret A. Somerville, although the same legal analysis applies to them all.

Ms. Somerville is an ethicist and the Founding Director of the University of McGill Centre for Medicine, Ethics, and Law. She has served as director of the Centre for nearly twenty years, *see* Appendix to Defendant's Reply Brief and Brief in Resistance to Plaintiffs' Motion for Summary Judgment (hereinafter referred to as "Def. App'x") Ex. F p. 13, and, during that time, has authored publications, legal briefs, and op-ed articles (as well as given speeches and presentations) regarding reproductive technologies, the procreative purpose of marriage, the rights of children to be raised by their biological parents, and the effects of permitting same-sex couples to "marry," *see, e.g.*, *id.* at 44-45, 101-04, 143, 161, 171, 204-49. In addition, Ms.

Somerville has completed an extensive research project, which spanned a four-year period and was funded by more than $500,000, in which she explored "New Reproductive Technologies and the Family." *Id.* at 108. She has also served as an expert witness in two Canadian same-sex "marriage" cases, *see id.* at 132, and has testified before Canadian legislative committees regarding reproductive technologies, same-sex "marriage," and children's rights to a relationship with their biological parents, *see id.*

Ms. Somerville offered testimony regarding these issues, but the lower court found that she was not qualified as an expert in this capacity. Ruling p. 6. The lower court first stated that it was rejecting her testimony because she lacked expertise in "sociology, child development, psychology[,] or psychiatry." *Id.* The imposition of these unnecessary requirements stems from the lower court's gross misunderstanding of Ms. Somerville's testimony. The court apparently thought that her testimony involved the sociological and psychological impact of same-sex "marriage" on children. But, as is clear from her affidavit and attached publications, Ms. Somerville's testimony pertained to the procreative purpose of marriage, the role of reproductive technologies, the effects of permitting same-sex couples to "marry," and the rights of children "to know and to be brought up by [their] biological parents." *See* Def. App'x Ex F. p. 161-62. When her testimony is properly characterized as such, it is apparent that she is eminently qualified to testify concerning these issues. The court thus abused its discretion by arbitrarily imposing requirements of additional expertise.

The lower court additionally rejected Ms. Somerville's testimony because, in the court's estimation, her observations were not "supported by scientific methodology or

based on empirical research"; she did not use "empirical research"; she had "no training in empirical research"; and she had "no knowledge of existing social science research relevant to this case." Ruling p. 7. Again, the court misapprehends the nature of an ethicist's work, which is not primarily founded in or based on empirical or scientific research. More importantly, however, the lower court's line of reasoning — which unduly focuses on the source of Ms. Somerville's knowledge and arbitrarily requires a scientific basis for her opinions — violates several tenets of Iowa law.

This Court has recognized that "the source of expert knowledge is not significant." *See Olson*, 579 N.W.2d at 309. The lower court violated this precept by elevating a particular source of Ms. Somerville's knowledge (i.e., scientific) to a requirement for expert qualification. Moreover, the plain language of the Iowa rule acknowledges that expert testimony need not be based on science, but may in fact be founded on "other specialized knowledge." IOWA CODE R. 5.702. And in construing this rule, this Court has never required that a witness perform "scientific testing" to be qualified as an expert. *See Leaf*, 590 N.W.2d at 535. The lower court misapplied these bedrock principles by requiring Ms. Somerville to perform or, at the very least, be aware of empirical scientific research. Indeed, it is an egregious misconstruction of Iowa law to reject an expert's testimony (especially an expert from a philosophically based field) because it is not based on scientific evidence. While Ms. Somerville's alleged lack of knowledge of existing social science research and her alleged lack of training in empirical research may undermine the weight of her statements, those factors do not render her testimony inadmissible. *See Olson*, 579 N.W.2d at 309 (noting that "deficiencies in [an expert's] background . . . go to the weight of [her]

testimony rather than to its admissibility"); *Leaf*, 590 N.W.2d at 535 (recognizing that the lack of scientific testing affects the weight of testimony, not its admissibility). [2]

The lower court also refused Ms. Somerville's testimony because "her views do not reflect the mainstream views of other ethicists." Ruling p. 7. Such a basis for rejecting testimony is unprecedented in Iowa law. More than twenty-five years ago, this Court made it clear that general acceptance of an expert's views or theories is not a "prerequisite to admission of [expert] evidence, scientific or otherwise." *State v. Hall*, 297 N.W.2d 80, 85 (Iowa 1980); *see also Van Wyk*, 345 N.W.2d at 86-87. Accordingly, the trial court clearly abused its discretion in excluding Ms. Somerville's testimony.

The fourth rejected expert is Allan Carlson, Ph.D. The court found that he lacked expertise to testify regarding "the history and public purposes of marriage in the United States[,] the relationship of marriage to broader family policy," and "the importance of marriage to children and family policy." Ruling p. 7-8. Given Dr. Carlson's extensive education and experience (as will be discussed herein), it is truly astonishing to even imply, much less conclude, that Dr. Carlson is not an expert in the areas of history, family, and marriage.

Dr. Carlson is President of the Howard Center for Family, Religion & Society, and he is the International Secretary for the World Congress of Families. Def. App'x Ex. A. p. 1. In 1988, the President of the United States appointed him to serve on the

[2] The court relied upon these same reasons for rejecting the testimony of Dr. Nathanson and Dr. Young. As in the case of Ms. Somerville, the court failed to appreciate that these experts may present expert testimony even if their testimony is not based on scientific knowledge. Thus, the same reasons that the lower court clearly abused its discretion in dismissing the testimony of Ms. Somerville (i.e., misapprehended the nature of her testimony/work, imposed unnecessary requirements of expert qualification, unduly focusing on the source of her knowledge, etc.) apply to its haphazard rejection of Dr. Nathanson's and Dr. Young's testimony.

National Commission on Children, a position he held for the next five years. *Id.* He holds a doctorate in history; he has authored at least five books on marriage and the family; he has written more than one hundred articles on these issues; and he has testified as an expert witness on these issues before the United States Senate and the House of Representatives. *Id.* at 2. This Court has particularly acknowledged that "a trial court may commit an abuse of discretion if it refuses to allow an expert qualified by experience," *see Hutchison*, 514 N.W.2d at 886, and, given the substantial evidence of Dr. Carlson's relevant experience, this case is a quintessential example of such clear abuse, *see Van Wyk*, 345 N.W.2d at 86 (finding that the trial court abused its discretion by denying expert testimony from a witness who had given presentations, authored articles, and extensively studied the topics relevant to his testimony). Indeed, in light of Dr. Carlson's impeccable credentials and vast experience, this Court must wonder: If he is not qualified as an expert, is there anyone who can present evidence on these issues in an Iowa courtroom?

The lower court rejected Dr. Carlson's testimony primarily for the same reasons it rejected Ms. Somerville's, namely, because Dr. Carlson "conducts no empirical data collection." Ruling p. 8. As previously established, however, it is a misapplication of Iowa law to require an expert witness to conduct scientific testing. *Leaf*, 590 N.W.2d at 535. While a witness's failure to perform scientific testing "could . . . affect the weight of [his] testimony," it does "not render his testimony inadmissible." *Id.* Moreover, expert testimony need not be based on scientific evidence; it can be founded on any type of "specialized knowledge" gained through experience. IOWA CODE R. 5.702. Here, Dr. Carlson's testimony is based on specialized knowledge of

issues involving marriage, families, and children that he gained through multiple decades of experience, and the lower court committed a clear legal error by requiring more for his testimony to be accepted.

The lower court also rejected Dr. Carlson's testimony for the additional reason that he "possesses no formal training in empirical research" and has "no formal training in a relevant social science discipline." Ruling p. 8. But, in order to be qualified as an expert, a witness need not have any type of "formal training." This Court has explicitly recognized that "[n]o particular education is required; experience is sufficient to qualify a witness as an expert." *Leaf*, 590 N.W.2d at 535; *see also Buller*, 517 N.W.2d at 714 ("Practical experience . . . will suffice to qualify an expert witness."). Thus, the denial of Dr. Carlson's expert testimony is a clear abuse of discretion because it is "based on an erroneous application of the law" and "it is not supported by [and in fact is contradicted by] substantial evidence." *See Graber*, 616 N.W.2d at 638.

The fifth excluded expert is Steven Rhoads, Ph.D. The lower court held that he was not qualified to testify "regarding the significance of marriage in an overall scheme of laws and public policy" and "the ways in which typical male and female parenting styles each contribute uniquely to the healthy development of children." Ruling p. 8. Dr. Rhoads received a doctorate in government from Cornell University. Def. App'x Ex. E. p. 10. He has been a professor of government and foreign affairs at the University of Virginia for well over thirty years. *Id.* at 1, 10. During this time, he has taught graduate-level classes on sex differences and public policy, and he has

authored books and articles pertaining to the biological difference between the sexes, the role of sex in parenting, and various family issues. *Id.* at 1-3, 11.

The court rejected Dr. Rhoads's expert testimony because he "has no expertise relating to child development nor has he conducted any empirical research [on that issue]." Ruling p. 8. When considering issues of admissibility, it is irrelevant whether Dr. Rhoads conducts any empirical research; Iowa law does not require that a proffered expert personally perform "scientific testing." *Leaf*, 590 N.W.2d at 535. Moreover, "[a]ny deficiencies in [an expert's] background[,] such as lack of experience with [child development,] go to the weight of his testimony rather than to its admissibility." *Olson*, 579 N.W.2d at 309. The court again confused issues that go to the weight of an expert's testimony with those affecting admissibility.

The court additionally rejected Dr. Rhoads's testimony because he is a self-professed multi-disciplinarian who "wander[s] into other people's territories." Ruling p. 8-9. It is irrelevant, however, whether Dr. Rhoads is a multi-disciplinarian with expertise in other subject matters, the relevant question is whether he has expertise in the areas over which he plans to testify (i.e., biological difference between the sexes, the impact of these biological differences in parenting, etc.). It is clear that Dr. Rhoads, who has taught graduate-level classes and authored publications on these issues, *see* Def. App'x Ex. E. p. 1-3, 11, is an expert for purposes of this litigation. This Court should hold that — given the lower court's application of incorrect legal principles, *see Graber*, 616 N.W.2d at 638, and this Court's "liberal view on the admissibility of expert testimony," *see Mensink*, 564 N.W.2d at 380 — the lower court clearly abused its discretion in rejecting Dr. Rhoads's testimony.

B. The Lower Court's Clear Abuse Of Its Discretion Severely Prejudiced Defendant.

Defendant was severely prejudiced by the trial court's improper exclusion of his expert evidence. On the one hand, the trial court permitted Plaintiff to introduce an abundance of expert testimony summarizing the social science on one side of the same-sex "marriage" debate. On the other hand, however, the trial court, hiding behind its faulty assessment of expert evidence, turned a blind judicial eye to the wealth of evidence on the other side of this cultural debate. This one-sided assessment of the relevant legislative facts unfairly crippled Defendant's case and profoundly prejudiced his defense of Iowa Code § 595.2(1).

The great prejudice to Defendant is illustrated by a simple example. As part of the lower court's rational basis analysis, it boldly stated that it "does not accept as valid any assertion that same-sex couples, as a class, are in any way inferior to opposite-sex couples insofar as their child-rearing capabilities are concerned." Ruling p. 56. But if the court had properly admitted Dr. Carlson's testimony — the exclusion of which is probably the most baffling and unsupported of all — the lower court would have had before it credible expert evidence indicating that "[t]he historical record, common sense, and social research all affirm that children do best when they are born into and reared by a family composed of their two natural [i.e., opposite-sex] parents bound in marriage." Def. App'x Ex. A p. 3. Furthermore, the admission of Dr. Carlson's testimony would have undermined much of the lower court's allegedly undisputed facts, and it would have (theoretically) forced the court to portray a more balanced picture of the relevant social science. But the lower court used its rejection of Dr. Carlson's testimony (and that of the other excluded experts) to "support" its one-

sided statement of the legislative facts and ultimately to "justify" its unprecedented legal analysis.

The prejudice to Defendant is amplified by the trial court's erroneous application of heightened scrutiny under both its substantive due process[3] and equal protection[4] analysis. By improperly applying heightened scrutiny, the trial court shifted the burden in this case from Plaintiffs to Defendant. The trial court then compounded this error, and thus intensified the harm to Defendant, by rejecting all the expert testimony challenged by Plaintiffs. In essence, then, by improperly applying heightened scrutiny and shifting the burden to Defendant, the trial court forced Defendant to fight an unnecessary battle. And, worse yet, by excluding most of Defendant's expert testimony, the trial court forced Defendant to fight this battle with his hands tied behind his back. By doing so, the trial court's clear abuse of discretion in denying Defendant's expert testimony severely prejudiced his case.

In sum, then, it is clear that the lower court's rejection of Defendant's expert witnesses severely prejudiced his case. This Court cannot condone such a legally flawed analysis of the admissibility requirements for expert evidence.

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[3] The lower court applied heightened scrutiny in its due process analysis because of its unsupported conclusion that the fundamental right to marry includes a fundamental right to enter into a same-sex "marriage." *See* Ruling p. 43. But, as made abundantly clear in a recent case from Maryland's highest court, "virtually every court to have considered [this] issue has held that same-sex marriage is not constitutionally protected as fundamental in either their state or the Nation as a whole." *See Conaway v. Deane*, 932 A.2d 571, 615 n.57 (Md. 2007). This Court should follow "virtually every court to have considered [this] issue" and hold that the right to same-sex "marriage" is not fundamental.

[4] The lower court applied heightened scrutiny in its equal protection analysis because of its nonsensical conclusion that Iowa Code § 595.2(1) discriminates on the basis of sex. *See* Ruling p. 47. But, as acknowledged by New York's highest court, a state does not engage in sex discrimination "[b]y limiting marriage to opposite-sex couples." *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006). Under such a legislative scheme, "[w]omen and men are treated alike — they are permitted to marry people of the opposite sex, but not people of their own sex." *Id.* at 10-11. This Court should acknowledge this self-evident principle and hold that Iowa Code § 595.2(1) does not discriminate on the basis of sex.

II. THE COURT VIOLATED ITS ROLE AT THE SUMMARY JUDGMENT STAGE BY IMPROPERLY WEIGHING AND, IN SOME INSTANCES, COMPLETELY IGNORING THE EVIDENCE SUBMITTED BY DEFENDANT'S ADMITTED EXPERT WITNESSES.

At the summary judgment stage, a court "does not weigh the evidence but inquires as to whether a reasonable fact finder viewing the evidence most favorably to the nonmoving party could return a favorable verdict." *Schmidt v. Blackhawk Fleet*, 601 N.W.2d 91, 92-93 (Iowa 1999). "All materials available to the court [must] be construed in the light most favorable to the party opposing the motion for summary judgment." *First Sec. Bank of Brookfield v. McClain*, 403 N.W.2d 788, 790 (Iowa 1987). The lower court, however, abdicated its duty (as a neutral and impartial tribunal resolving a motion for summary judgment) (1) to construe the evidence in the light most favorable to Defendant (2) and to refrain from weighing the persuasiveness of the evidence. The court's refusal to obey these basic commands of summary judgment review resulted in its thoroughly biased recitation of the facts.

This Court has distinguished between adjudicative facts and legislative facts in the summary judgment context. "[T]he 'genuine issue of material fact' required to preclude summary judgment under Iowa [law] must involve adjudicative facts" (as opposed to legislative facts). *See Welsh*, 470 N.W.2d at 648. The lower court failed to appreciate this distinction, as evidenced by its extensive (and improper) efforts to erase any issues of adjudicative or legislative facts. In reality, however, many genuine issues of fact remain in the record, although only as to the legislative facts. Because the adjudicative facts are not in dispute, this Court cannot deny summary judgment on that basis.[5]

[5] Beyond finding support in Iowa case law, it makes good legal sense to conclude that disputed legislative facts do not preclude summary judgment. Otherwise it would be impossible for a court to

The lower court's evaluation of the allegedly "undisputed" legislative facts is wrought with analytical simplicity, evidence-weighing, and partiality. Nearly all the lower court's "Material Facts as to Which There is No Genuine Issue" are *copied directly* from Plaintiffs' "Statement of Material Facts in Support of All Plaintiffs' Motion for Summary Judgment."[6] And even though Defendant denied most of those assertions in Plaintiffs' Statement of Material Facts, *see* Defendant's Response to Plaintiffs' Statement of Material Facts p. 1-7, the court summarily rejected those denials and incorrectly concluded that Plaintiffs' version of the facts was not "contradicted by any of the admissible facts," *see* Ruling p. 12-13.[7] The lower court arrived at this conclusion by disregarding and/or misinterpreting all the evidence

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grant summary judgment in any case involving conflicting social science (e.g., same-sex "marriage" cases). Denying summary judgment on the basis of disputed legislative facts does not conform to the pattern of same-sex "marriage" cases that have been litigated across the county. These cases almost always involve conflicting social science, but nevertheless are often decided at the summary judgment stage. *See, e.g.*, *Conaway*, 932 A.2d at 615 n.57 (resolving a same-sex "marriage" case on summary judgment even though the parties submitted contradictory studies on social science issues).

[6] The lower court's wholesale copying of Plaintiffs' Statement of Material Facts is improper. The moving party's 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." *Glen Haven Homes v. Mills County Bd. of Review*, 507 N.W.2d 179, 183 (Iowa 1993) (quotations omitted). But rather than using the statement of undisputed facts as a guidepost for interpreting the actual contents of the record (i.e., the depositions, affidavits, etc.), the court adopted Plaintiffs' Statement of Material Facts verbatim into its own recitation of the facts.

[7] In refusing to credit Defendant's denial of Plaintiffs' Statement of Material Facts, the lower court also relied on the mere fact that Defendant's denials were "not accompanied by any specific references to the record as required by Iowa Rule of Civil Procedure 1.981(5) and (8)." Ruling p. 12-13. Those rules, however, do not require that a party include specific references to the record in its reply to a statement of undisputed facts. Iowa R. Civ. P. 1.981(8) states merely that a party moving for summary judgment must submit a statement of undisputed facts. And Iowa R. Civ. P. 1.981(5) states that a party defending a motion for summary judgment "may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." This rule does not require Defendant to include record cites in its reply to Plaintiffs' Statement of Material Facts; it simply requires Defendant to "set forth specific facts" "by affidavits or . . . otherwise." Defendant has met that burden by introducing an abundance of affidavits and other evidence in its "Appendix to Defendant's Reply Brief and Brief in Resistance to Plaintiffs' Motion for Summary Judgment." It is thus improper to state, as the lower court did, that Iowa R. Civ. P. 1.981 requires Defendant to include record cites in its reply to Plaintiffs' Statement of Material Facts.

submitted by Defendant's three admitted experts (who were likely admitted only because Plaintiffs did not object to them) — Alan J. Hawkins, Ph.D., Sharon Quick, M.D., and Warren Throckmorton, Ph.D.

A close inspection of the lower court's decision discloses the startling simplicity and formalism that characterizes the court's dismissal of "Defendant's Statement of Material Facts in Dispute Which Bar Plaintiffs' Motion for Summary Judgment." Like a programmed machine seeking to purge any remnant of factual support for Defendant's position, the court systematically refuted each and every proposition in Defendant's Statement of Disputed Facts. The court began by summarily rejecting every paragraph supported by evidence from a rejected expert. Ruling p. 9. It apparently did not consider that these statements could be supported (and in many cases were supported) by other admissible evidence in the record. This initial step eliminated eighteen of the twenty-four paragraphs in Defendant's Statement of Disputed Facts.

The lower court then proceeded through each of the six remaining paragraphs in Defendant's Statement of Disputed Facts, improperly weighing, interpreting, and contorting the evidence to support Plaintiffs' case. For example, the court erroneously distinguished testimony from Dr. Hawkins which stated: "Social science literature demonstrates that children who are reared by a married mother and father have more positive outcomes . . . compared to children in other adequately studied family structures." Ruling p. 14. By improperly weighing and interpreting this evidence, the court found that "other adequately studied family structures" do not include same-sex couples, and thus concluded that Dr. Hawkins's statement did not undermine any of Plaintiffs' evidence in support of same-sex parenting. *Id.* at 14-15. This simplistic

distinction of one sentence from Dr. Hawkins's ten-page affidavit is unpersuasive, narrow, and, most importantly, entirely improper at the summary judgment stage. *Schmidt*, 601 N.W.2d at 92-93 (stating that a court engaging in summary judgment review "does not weigh the evidence"). Moreover, the court ignored other portions of Dr. Hawkins's affidavit, which clearly and unambiguously state that "children, on average, do *best* when reared by their *biological mother and father* in a stably married, intact family." Def. App'x Ex. B p. 2 (emphasis added). This statement (and others like it in Dr. Hawkins's affidavit) demonstrates that the court's improper weighing of this evidence was ultimately without support.

Through this mechanical process, the lower court succeeded in dismissing (or at the very least reinterpreting) each and every paragraph in Defendant's Statement of Disputed Facts. In the end, the lower court eradicated any semblance of Defendant's (admitted and excluded) evidence. What remains is a factual background that reads much like an advocacy brief (which is not surprising considering that most of it was copied from Plaintiffs' Statement of Material Facts), *see* Ruling p. 22 ("Plaintiffs suffer great dignitary harm . . . [that] amounts to a badge of inferiority . . . and . . . second-class status"), rather than a balanced, well-reasoned judicial opinion.

In addition to improperly weighing the evidence, the lower court, as part of its relentless efforts to abolish all Defendant's evidence, ignored substantial portions of Defendant's unopposed expert testimony. This is readily apparent from a cursory comparison between the lower court's so-called "Material Facts as to Which There is No Genuine Issue" and the evidence submitted by Defendant's unopposed experts — Dr. Hawkins, Dr. Quick, and Dr. Throckmorton. Compare, for example, the court's

recognition of the "numerous studies" allegedly showing that "[c]hildren raised by gay and lesbian parents are as well-adjusted . . . as children raised by heterosexual parents," *see* Ruling p. 32, and its statement that "[r]ecognized experts in developmental psychology have not criticized the methods used in these studies," *id.* at 32, with Dr. Hawkins's critique of the methods used in these studies, *see* Def. App'x Ex. B p. 8-9 ("[These] child-rearing modes . . . have not been 'adequately studied'"), and Dr. Quick's extensive deconstruction of the "methodological flaws" in these studies, *see* Def. App'x Ex. D p. 3-4 ("The literature relating to the effects on children of having parents who identify as [engaging in same-sex sexual behavior] is replete with methodological flaws as has been admitted by some of the cited authors").[8]

Furthermore, compare the court's statement that "[i]nterventions aimed at changing an individual's sexual orientation have not been demonstrated by empirical research to be effective or safe," Ruling p. 28, with Dr. Throckmorton's statement that "[m]any individuals who report efforts to change their sexual orientation feel that the efforts were helpful," Def. App'x Ex. G p. 2. Compare also the court's inept definition of "sexual orientation," *see* Ruling p. 27, with Dr. Throckmortion's explanation that "sexual orientation as a construct lacks conceptual clarity and precision of definition," *see* Def. App'x Ex. G p. 2. Compare next the court's statement that "[s]exual orientation is a characteristic of the individual, like biological sex, . . . race[,] or age" causing Plaintiffs to "experience[] an innate attraction to people of the same sex," *see* Ruling p. 27-28, with Dr. Throckmorton's scientific conclusion that "there are multiple

[8] Not only does Defendant's admitted expert testimony refute the lower court's "undisputed" facts regarding the studies on same-sex parenting, the lower court's facts are also disputed by other courts that have considered these studies. For example, in *Hernandez*, New York's highest court stated that "the studies on their face do not establish beyond doubt that children fare equally well in same-sex and opposite-sex households." *Hernandez*, 855 N.E.2d at 8.

etiological pathways leading to homosexuality," which demonstrates that "sexual orientation" is not an innate characteristic like race or sex, *see* Def. App'x Ex. G p. 2-3; *see also Conaway*, 932 A.2d at 615 n.57 ("[S]tudies . . . have concluded that culture and environment, at least in part, play a factor in the development of an individual's sexual orientation."). The examples could go on and on, until at last a balanced version of the legislative facts would appear. But, for present purposes, suffice it to say that the lower court, in arriving at its statement of allegedly undisputed facts, inexplicably ignored much of Defendant's "admitted" expert testimony in favor of the controverted rhetoric spouted by Plaintiffs. By doing so, the court violated its duty to construe the legislative facts in the light most favorable to Defendant (and in fact viewed that evidence in the light most favorable to Plaintiffs).

In sum, the lower court violated its limited role as fact finder at the summary judgment stage of the proceedings. Most notably, the lower court ignored large portions of Defendant's admitted evidence that would have directly undermined the court's "undisputed" statement of facts. This Court cannot endorse such a one-sided assessment of the facts.

III. THIS COURT SHOULD CORRECT THE LOWER COURT'S EVIDENTIARY ERRORS, CONSIDER ALL DEFENDANT'S EVIDENCE, AND PROCEED TO A WELL-REASONED ANALYSIS OF THE SUBSTANTIVE ISSUES.

In light of the intolerable evidentiary errors that occurred below, this Court is faced with two possible courses of action. This Court may remand with instructions for the lower court to correct those clear errors and properly consider the entirety of Defendant's evidence. *See, e.g.*, *Van Wyk*, 345 N.W.2d at 86-88 (remanding a case where this Court found that the rejection of expert testimony amounted to an abuse of

discretion). But *Amici* propose that the better approach is for this Court to correct those evidentiary errors itself, consider all the evidence that was (and should have been) admitted by the lower court, and address the legal issues based on a careful consideration of all the evidence in the record.[9]

It must be stressed that this Court is in no way bound by the abysmally crafted, incomplete factual statement concocted by the lower court. As previously noted, the vast majority of the lower court's allegedly undisputed facts are legislative facts, and this Court has recognized that "legislative facts may be presented either formally or informally" and, when reviewing such facts, "an appellate court on review is [not] limited by the rules of admissibility and the standards of review that apply to disputed issues of adjudicative facts." *Welsh*, 470 N.W.2d at 648. This Court is therefore not limited by the lower court's assessment of the facts but, instead, is free to reconsider all the evidence and write its own statement of facts based on the entirety of the record. Additionally, because this Court is not "limited by the rules of admissibility," it

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[9] In light of the Iowa Legislators' governmental role, they are compelled to note that the weighing and judging of policy matters regarding marriage are uniquely within their province as legislators and it is thus improper for the courts to engage in this sort of inquiry. To demonstrate where the expert evidence regarding "legislative" facts (note the use of the term "legislative") is relevant to this Court's analysis, it is best to outline concisely a comprehensive analysis of the relevant legal issues. First, this Court must determine which standard of review applies. To do this, the Court must make the strictly legal determinations of (1) whether there is a fundamental right to enter into a same-sex "marriage" and (2) whether the challenged law, Iowa Code § 595.2(1), discriminates against a suspect class of people. These legal inquiries, for the most part, do not depend upon the submitted expert evidence. *But see Conaway*, 932 A.2d at 615 n.57 (discussing, in the context of equal protection analysis, scientific studies regarding the "immutability" of "sexual orientation"). Once the court determines that no fundamental right has been infringed and there has been no discrimination against a suspect class, the court will apply rational basis scrutiny. It is at this point that the expert testimony becomes relevant, and the Court will use that evidence *only* to determine whether there is a rational basis for Iowa Code § 595.2(1). The Court is not permitted to reweigh the social evidence and substitute its judgment for that of the legislature; instead, the Court's role is merely to determine whether there is a rational basis for the law. This same-sex "marriage" issue involves important policy considerations that must be deferred to the legislature. As recognized by New York's highest court, "the participants in the controversy over same-sex marriage [should] address their arguments to the [l]egislature" so that the present generation has "a chance to decide the issue through its elected representatives." *Hernandez*, 855 N.E.2d at 8.

may freely consider the evidence submitted by all Defendant's expert witnesses (including those whose testimony was rejected by the lower court).

Even putting aside the distinction between adjudicative and legislative facts, this Court is nevertheless permitted to discard the lower court's statement of the facts. A trial court's factual findings (both adjudicative and legislative) will not be sustained if they were not "supported by substantial evidence" or were "induced by an erroneous view of law." *Aid (Mut.) Ins. v. Steffen*, 423 N.W.2d 189, 191 (Iowa 1988). As demonstrated herein, the lower court's recitation of the facts is not support by the "substantial evidence" in the record, and the lower court's analytical journey to its statement of "undisputed" facts was laden with "erroneous view[s]" of the law. Consequently, this Court need not sustain the lower court's factual findings and may, instead, consider those facts anew.

CONCLUSION

Given the egregious evidentiary errors committed below, this Court cannot affirm such a judicial travesty. That being clear, this Court is faced with two options, both of which are available under the legal authority outlined in this brief. This Court may either (1) remand to the lower court with instructions to correct its evidentiary errors, or (2) correct those evidentiary errors itself, rewrite a balanced statement of the facts mirroring the evidence in the record, and proceed to a well-reasoned analysis of the substantive legal issues. The Iowa Legislators propose that, in the interest of judicial efficiency, the Court should take the latter approach, acknowledge the lack of support for Plaintiffs' substantive arguments, and uphold Iowa Code § 595.2(1) as a constitutional exercise of the Iowa Legislators' authority.

Dated: January 28, 2008

Respectfully submitted,

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* Application for *Pro Hac Vice*
Admission Pending

PROOF OF SERVICE

I, Brian W. Raum, declare under penalty of perjury, that the following is true and correct:

On January 28, 2008, I served one copy of the foregoing *Brief of Iowa Legislators as Amici Curiae in Support of Defendant-Appellant* on the below-listed attorneys by depositing each copy with the United Parcel Service for next-day delivery addressed as follows:

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