

IN THE
INDIANA COURT OF APPEALS

NO. 49A02-0305-CV-447

RUTH MORRISON et al.,)	Appeal from the
)	Marion Superior Court 13
Appellants (Plaintiffs Below),)	
)	
v.)	49D13-0211-PL-001946
)	
DORIS ANN SADLER, et al.,)	
)	The Honorable S.K. Reid,
Appellee (Defendants Below).)	Judge.
)	

BRIEF OF APPELLEES

STATEMENT OF THE ISSUES

I. Whether Article 1, Section 23 of the Indiana Constitution permits the State to recognize marriages between opposite-sex couples but not same-sex couples.

II. Whether Article 1, Section 1 of the Indiana Constitution protects a judicially enforceable right to state-recognized same-sex marriage.

III. Whether Article 1, Section 12 of the Indiana Constitution protects a judicially enforceable right to state-recognized same-sex marriage.

STATEMENT OF THE CASE

Pursuant to Indiana Rule of Appellate Procedure 46(B)(1), Defendants and Intervenor accept the Plaintiffs' Statement of the Case.

STATEMENT OF FACTS

Indiana Code Section 31-11-1-1 expressly prohibits marriage between persons of the same sex, specifically stating that “[o]nly a female may marry a male [and] [o]nly a male may marry a female.” *Id.* The law also provides that “[a] marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.” *Id.*

Plaintiffs are three same-sex couples, each of which lives together, shares joint finances, and holds itself out to family, friends and community as spouses in long-term, intimate, committed relationships. (Second Am. Compl. ¶¶ 2-27) Ruth Morrison and Teresa Stephens reside in Marion County and established a civil union in the State of Vermont on October 30, 2000. (*Id.* ¶¶ 2-3, 15) David Wene and David Squire also reside in Marion County and established a civil union in Vermont on December 13, 2000. (*Id.* ¶ 4-5, 21) Finally, Charlotte Egler and Dawn Egler reside in Hendricks County and established a civil union in Vermont on July 5, 2000. (*Id.* ¶ 6-7, 27) But for Section 31-11-1-1, each couple would seek an Indiana marriage license from one of the two defendant county clerks. (*Id.* ¶¶ 13, 19, 26)

SUMMARY OF ARGUMENT

Plaintiffs' theory is that traditional state recognition of marriage between members of the opposite sex is irrational and therefore invalid if it does not also

extend to same-sex couples. But while proposing to upset and redefine a centuries-old institution, Plaintiffs offer no coherent theory of state-recognized marriage that would justify recognition of same-sex and opposite-sex couples' marriages but not other intimate relationships. Why does the state recognize marriage at all? Why is two the magic number? Plaintiffs mistakenly suppose marriage to be an entirely private matter and therefore have no coherent answer to these questions. The State, however, provides multiple alternative theories for state recognition of marriage that justify excluding same-sex couples (and larger groups) from marital recognition and thereby render Section 31-11-1-1 invulnerable to Plaintiffs' attacks under Article 1, Sections 1, 12, and 23 of the Indiana Constitution.

Plaintiffs fail to state a claim under Section 23, first, because they do not identify any cognizable classification of persons drawn by Section 31-11-1-1 that can trigger Section 23 scrutiny: contrary to Plaintiffs' undeveloped assertion, the statute does not discriminate based on sex. But even if there were a cognizable classification, the state has three compelling interests for recognizing traditional opposite-sex marriage that do not apply to same-sex marriage. First, state-recognition of marriage for opposite-sex couples is justified by reference to the compelling government interest in promoting procreation in the optimal environment—where both natural parents are present—for child rearing. Such a limitation advances the state's objective of encouraging potentially procreative couples to marry, thereby providing stable homes and both male and female role models for the good of society's children, and binding together the biological

relationship that produces children. This justification cannot extend to same-sex couples. Second, state recognition of opposite-sex marriages recognizes the traditional family model's time-tested role as the foundational unit for society, an interest which again is tied to the theoretical ability of opposite-sex couples to produce children and which therefore also excludes same-sex couples. Finally, prohibition of same-sex marriage protects the integrity of traditional marriage. Especially in light of the strong presumption of constitutionality that applies to Section 31-11-1-1, these justifications are more than sufficient to support the law.

Furthermore, Plaintiffs fail to state a claim under Sections 1 and 12. As the Indiana Supreme Court has strongly suggested recently, Section 1 is not judicially enforceable. Even if it were, the only rights enforced through Section 1 have been economic rights cases, which are themselves highly suspect and do not lead to recognition of a new right to state-recognized same-sex marriage. Plaintiffs claim that Section 1 protects privacy and individual autonomy. But what they seek here is the opposite—public acceptance and recognition. Similarly, Section 12 does not protect any rights that are at stake in this lawsuit. Section 12 applies only to tort remedies and therefore supplies only limited substantive protection. Ultimately, Sections 1 and 12 at most require only a rational relationship to a legitimate legislative objective. For the reasons given above, Section 31-11-1-1 easily passes this test as a matter of law.

More broadly, Plaintiffs' brief asks the irrelevant question of how the state's interests are served by excluding same-sex couples from marriage. What escapes

Plaintiffs, however, is that state recognition of traditional marriage vindicates social interests that have nothing to do with same-sex couples. Marriage law does not exist to discriminate against homosexuals or same-sex couples. It exists for legitimate reasons that do not happen to justify recognition of same-sex marriages.

ARGUMENT

Standard of Review

A case is properly dismissed under Rule 12(B)(6) if the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. *Parks v. State*, 789 N.E.2d 40, 46 (Ind. Ct. App. 2003), *trans. denied*. In considering a constitutional challenge to a statute, this Court presumes that the statute is valid and places a “heavy burden” on the party challenging it to clearly overcome that presumption. *State v. Moss-Dwyer*, 686 N.E.2d 109, 112 (Ind. 1997); *State v. Price*, 724 N.E.2d 670, 675 (Ind. Ct. App. 2000), *trans. denied*. All reasonable doubts must be resolved in favor of the statute’s constitutionality. *State v. Lombardo*, 738 N.E.2d 653, 655 (Ind. 2000). Here, Plaintiffs’ challenges to the statute fail under any set of facts.

I. Section 31-11-1-1 Is Valid Under Section 23 Because It Does Not Treat “Persons” Unequally And Because Any Classification Of Couples, If Relevant, Relates To Inherent Distinctions Between Same-Sex Couples And Opposite-Sex Couples

Under Article 1, Section 23, any governmental preference for a class of “persons” is constitutional if it (1) is “reasonably related to inherent characteristics which distinguish the unequally treated classes” and (2) is “uniformly applicable and equally available to all persons similarly situated.” *Collins v. Day*, 644 N.E.2d

72, 80 (Ind. 1994). Under Part 1—the only *Collins* claim that Plaintiffs assert—the relevant “inherent characteristics” are those of the underlying bases for different statutory treatment. *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 981-82 (Ind. 2000). The legislature is entitled to great deference when this Court analyzes what relevant inherent characteristics underlie legislative distinctions. *Id.* at 983; *see also Dvorak v. City of Bloomington*, 2003 WL 22204179 at *2 (Ind. Sept. 23, 2003) (holding that government need not prove the validity of a challenged law). With marriage law in particular, social policy is for the legislature, not the courts. *Sweigart v. State*, 213 Ind. 157, 165, 12 N.E.2d 134, 138 (1938). Plaintiffs must “negative every conceivable basis which might have supported the classification.” *Collins*, 644 N.E.2d at 80 (quoting *Johnson v. St. Vincent Hospital, Inc.*, 273 Ind. 374, 392, 404 N.E.2d 585, 597 (1980)).

A. Section 31-11-1-1 Does Not Discriminate Based On Sex, And Plaintiffs Have Identified No Other Classification Of “Persons” Drawn By That Statute

Collins makes it clear that Section 23 is designed to protect against unfair government discrimination against “persons.” Plaintiffs have not identified any classification of *persons* (as opposed to *couples*) that triggers Section 23 scrutiny. At most, Plaintiffs suggest discrimination based on “gender.” (Pl. Br. 4, 8) But Section 31-11-1-1 is sex neutral: It does not separate men and women as discrete classes subject to purportedly unequal treatment. It merely provides that marriage is between one man and one woman. Not even the Vermont Supreme Court, which required some alternative to marriage for same-sex couples, thought that limiting

marriage to opposite-sex couples amounted to sex discrimination. *Baker v. State*, 744 A.2d 864, 880 n. 13 (Vt. 1999); *see also Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974), *rehearing denied* (“There is no . . . sexual classification . . . because appellants are not being denied entry into the marriage relationship because of their sex . . .”). A claim of sex discrimination is no more plausible here, and Plaintiffs have identified no other way that the statute classifies persons as opposed to couples.

B. Several Important Interests Justify Recognition Of Opposite-Sex Marriages But Not Same-Sex Marriages

Even if there is a classification of persons triggering Section 23 scrutiny, there are at least three justifications that, under any set of facts, validate Section 31-11-1-1 under Section 23. Once the Court accepts these justifications for Section 31-11-1-1, the reasonable relationship between the legal classifications (same-sex and opposite-sex couples) and the inherent characteristics that rationally distinguish these classes follows and the first part of *Collins* is satisfied. *See Collins*, 644 N.E.2d at 80.

1. Promoting child rearing by both natural parents

The government’s interest in recognizing and regulating marriage is largely based on the idea that the public purposes of marriage are related to procreation and child rearing. Though many varied interests may inform private relational choices, governmental regulation of marriage is tied to the fact that the sexual union of men and women often produces children. The biological fact that male-female relationships produce children necessarily implicates important

governmental interests, both with respect to the well-being of these children and the future of society. Governments recognize marriage to encourage potentially procreative couples to bind themselves together for the good of their natural offspring, a circumstance that does not arise with same-sex couples.

a. Courts and scholars alike recognize this justification

Scholars recognize that “[t]raditional male-female marriage is the institution that has functioned most consistently to facilitate, support and protect responsible human procreation.” Lynn D. Wardle, *“Multiply and Replenish”*: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J. L. & Pub. Pol’y 771, 784 (2001); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581, 593 (1999) (“The primary social function of marriage is rearing children.”). It follows that government may therefore confer recognition on opposite-sex marriages, which may produce children, but not confer recognition on same-sex marriages, which cannot, on their own, produce children. Wardle, *supra*, at 784 (“Society has compelling interests in protecting the social institution that has best furthered social interests in procreation, in maintaining the clear social identity of that institution, and in preserving the linkage that institution forges among sex, procreation, and child rearing.”) Traditional marriage and procreation of natural offspring supplies an environment for raising children that same-sex marriage cannot match: “The natural commitments, restraints, complementarity, and shared responsibilities of traditional marriage create the best environment into which offspring may be born.” *Id.* at 789.

Courts have recognized this principle. In *Singer*, the court stated that Washington’s policy limiting marriage to males and females “is based upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.” *Singer*, 522 P.2d at 1195. Recognizing the reality that procreation is not the basis for every marriage, the court explained that it remains the paramount governmental interest:

This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.

Id.

Singer is far from alone in recognizing this justification. Numerous other courts have also recognized that the state purpose of furthering procreation where both parents are present to raise the child is at least rational, if not compelling. *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff’d* 673 F.2d 1036 (9th Cir. 1982) (“state has a compelling interest in encouraging and fostering procreation of the race”); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (finding that this “central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples”); *Goodridge v. Dep’t of Pub. Health*, 2002 WL 1299135 at *13 (Mass. Super. May 7, 2002), *appeal pending*, No. SJC-08860 (Mass.) (upholding restriction against same-sex marriage “because same-sex couples are unable to procreate on their own”); *Baker v. Nelson*, 191

N.W.2d 185, 186 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis”); *In the Matter of Cooper*, 564 N.Y.S.2d 684, 688 (Surrogate’s Court 1990) (citing “self-preservation” and “procreation” as two bases for a compelling interest in opposite-sex marriage), *aff’d*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993).

b. Supreme Court doctrine in related areas supports this justification

Recent Supreme Court doctrine also bolsters this compelling governmental interest in opposite-sex marriage. *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), upheld rules for citizenship which impose different burdens of proof upon unwed mothers and unwed fathers to prove their relationship to the child. *Nguyen* articulated two “important governmental objectives” which strongly support the rationality of Indiana’s marriage law. *Id.* at 62. First is “the importance of assuring that a biological parent-child relationship exists.” *Id.* Both Indiana law and federal law presume a biological relationship where a child is born to married parents. 42 U.S.C. § 666(a)(5)(G); Ind. Code §§ 31-14-7 *et seq.* This presumption is justified insofar as marriage carries with it a tradition and expectation of monogamy and fidelity. While children may occasionally result from extramarital liaisons or donor-enabled assisted reproductive technology, the vast majority of children born within marriage are biologically related to their mother’s husband. Though admittedly

less than perfect, marriage is a reliable indicator of the biological relationship between parent and child.¹

Not only is marriage an important indicator of the biological connection between parent and child, but to fulfill this purpose marriage is properly limited to the union of one man and one woman. Every child has exactly one biological mother and one biological father. Thus, marriage recognizes and protects the one male-one female union—the only union that can produce children. Extending marriage to same-sex couples would do nothing to further this important governmental objective, in that children of same-sex couples are necessarily unrelated biologically to at least one of their parents. At the same time, a state’s desire to protect the biological relationship between parents and children does not require a state to outlaw adoptions or otherwise to prevent parents from raising children to whom they are not biologically related. It does, however, allow the state to express a preference for biological parents “whom our society . . . [has] always presumed to be the preferred and primary custodians of their minor children.” *Reno v. Flores*, 507 U.S. 292, 310 (1993). This policy supports a marriage law which is not only limited to male-female couples, but which also extends the plenary benefits of marriage to

¹ Moreover, the presumption of a biological relationship where a child is born to married parents furthers the government’s important interest in protecting the integrity of the family unit by “excluding inquiries into the child’s paternity that would be destructive of family integrity and privacy.” *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (upholding a California statute creating a presumption that the child born to a married woman living with her husband is a child of the marriage).

couples willing to undertake a legal and financial commitment to each other and to their children.

The second important interest that *Nguyen* held was furthered by the citizenship rule is an interest in:

the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and in turn, the United States.

Nguyen, 533 U.S. at 64-65. More than any other relationship, marriage provides children with the greatest likelihood of being raised in a stable home by their biological parents. At a minimum, marriage provides a means by which a child's father can be legally identified and held accountable for the care and protection of his child.

Considering marriage's central public purpose of furthering procreation and childrearing where both parents are present, it is perfectly rational for Indiana to permit marriage between opposite-sex couples, who are at least theoretically capable of procreation on their own, but not between same-sex couples, who are not. Every child raised by a same-sex couple has been deprived of the opportunity to develop "real, everyday ties" with at least one of his or her biological parents. *Nguyen*, 533 U.S. at 64. Thus, same-sex marriages "generally do not advance the social interest in responsible procreation; rather, they impair the integrity of the institution that has best been able to further the social interests in responsible procreation." Wardle, *supra*, at 797.

- c. Plaintiffs’ arguments ignore the legislature’s prerogatives and misunderstand this justification for Section 31-11-1-1

Plaintiffs suggest that the only justifications possible for any law pertaining to marriage are enshrined in Indiana Code Section 31-10-2-1. (Pl. Br. 10) That statute in no way precludes other explanations for Section 31-11-1-1 and in any event supports, rather than undermines, the government’s justifications for Section 31-11-1-1. Section 31-10-2-1 states that the purpose of the family law title is to “recognize the importance of family and children in our society,” and to “recognize the responsibility of the state to enhance the viability of children and family in our society.” Ind. Code § 31-10-2-1 (1) & (2). That is exactly the government’s justification for Section 31-11-1-1. By promoting procreation and child rearing in the traditional family unit, Section 31-11-1-1 recognizes the importance and enhances the viability of family and children in society. It is hard to imagine a more direct relationship between Section 31-10-2-1’s statement of purposes and Section 31-11-1-1.²

Plaintiffs also argue that the state’s recognition of opposite-sex marriages even where couples cannot procreate or do not wish to procreate undermines the notion that marriage recognition exists to promote procreation and child rearing in the traditional family context. First, however, Plaintiffs implicitly concede the

² Significantly, in *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. 2002), *cert. granted* 806 A.2d 1066 (Conn. 2002), the court concluded that a Vermont civil union—the same-sex alternative to marriage—was not even a “family relations matter” and that Connecticut courts therefore had no jurisdiction to dissolve such civil unions.

soundness of the state's rationale in this regard when they argue—as their only justification for state-recognized marriage—that the goal of marriage is to provide stable homes for children. (Pl. Br. 13) Yet, Plaintiffs urge marriage for *all* same-sex couples, not just for parents or those who intend to become parents. Taken together, these two positions negate Plaintiffs' ability to argue that the State's procreation/child rearing justification is fatally underinclusive or overinclusive.

Moreover, it would obviously be a tremendous intrusion on individual privacy to inquire of every couple that wished to marry whether they could procreate or whether they intended to procreate. The state is not required to go to such extremes simply to prove that the purpose behind government recognition of marriage is to promote procreation and child rearing in the traditional family context. Undertaking such an inquiry would itself raise serious constitutional questions involving Fourteenth Amendment rights to marriage and privacy. *Adams*, 486 F.Supp. at 1124. Thus, “[t]here is no real alternative to some overbreadth in achieving this goal.” *Adams*, 486 F.Supp. at 1124. *See also Dean*, 653 A.2d at 363-65, n.5 (Steadmen, Associate Judge, concurring); *Baker*, 191 N.W.2d at 187; *Matter of Cooper*, 592 N.Y.S.2d at 800 (rejecting argument that procreation/child rearing argument is underinclusive). It suffices to observe that only members of the opposite sex have even a chance at procreating, so it is fair to limit marriage to opposite-sex unions as an initial matter, regardless whether there are further regulations of marriage.

Plaintiffs cite *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), for the notion the right to marry exists separate from any right or obligation to procreate. But *Griswold* merely stands for the proposition that sexual liberty within traditional marriage is sufficiently protected on its own that, notwithstanding the procreative rationale for marriage, states are not justified in restricting marital sex to procreation. That *Griswold* is ultimately about sexual liberty and has nothing to do with rationales for marriage is confirmed by *Eisenstadt v. Baird*'s extension of *Griswold* to unmarried couples. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Furthermore, a constitutional right not to procreate does not invalidate a state's interest in encouraging a man and woman who do procreate to be married to each other. In precluding states from insisting that married couples be open to procreation, *Griswold* suggests that any state inquiry into an individual couple's intent and ability to procreate would raise serious constitutional questions, a concern that is not implicated by a refusal to recognize same-sex marriage, *i.e.*, a circumstance where no couple, regardless of individual circumstances, can procreate on its own.

It is also irrelevant whether Indiana's historic fault-based divorce law permitted divorce based on a spouse's unwillingness or inability to procreate. While a justification for state recognition of marriage is to promote procreation and child rearing in the traditional family context, it is permissible for other social reasons for the state to enact high barriers to divorce that do not include inability or unwillingness to have children. And even at that, impotence, adultery, and

abandonment were grounds for divorce. *See* Ind. Code §31-1-12-3 (repealed)(Burns Indiana Statutes, 1972). While these are obviously not perfect proxies for sterility or unwillingness to procreate, they do suggest a legislative preference for ending marriage only where the attributes that make traditional families preferred environments for procreating and raising children cease to exist.

The state's policies with respect to the use of reproductive technology, adoptions and custody by divorced parents with same-sex domestic partners are also irrelevant here. Just because marriage law bestows recognition on opposite-sex couples, the only couples able to procreate on their own, does not mean that the law must also burden adoptive or surrogate parenthood. The legislature may reasonably understand that, while the traditional family context is the best environment for procreating and for raising children, such arrangements do not always work and therefore it is wise to provide and permit other arrangements.

Plaintiffs consistently view marriage, adoption and surrogate parenting from an adult-centered perspective, as a means by which to further the parental fulfillment of adults. But the state's justification focuses on the well-being of children, encouraging a child's natural parents to make the commitment necessary to raise the child. Nothing about adoption law or surrogate parenthood undermines the legitimacy of the state's preference for rearing children by natural parents. Leaving the area of reproductive technology unregulated is not the same as "encouraging" the use of that technology as if it were the preferred mode of human reproduction. And, of course, the relative level of encouragement for particular

reproductive contexts can be a matter of degree. The legislature can express its preference for the traditional marriage context through its decision to bestow marriage without simultaneously regulating the use of reproductive technology. Again, the point is to encourage potentially procreative couples to marry and thereby prefer that context for procreation and child rearing, not to create a rigid construct that permits only one type of household.

In re the Adoption of M.M.G.C., 785 N.E.2d 267 (Ind. Ct. App. 2003), which permits a second-parent adoption by a member of a same-sex couple without terminating the first-parent's rights, also has no bearing on this issue. Even if Indiana's adoption statutes permit two adoptive parents of the same sex, neither of which is a biological parent of the adopted child, that does not hamstring the General Assembly from recognizing opposite-sex marriage but not same-sex marriage as a means of promoting procreation and child rearing in a context where both natural parents will raise the child. Adoption law provides for when the state's preferred model for procreation and child-rearing fails. "Alternate arrangements, such as adoption, arise not primarily in deference to the emotional needs or sexual choices of adults, but to meet the needs of children whose biological parents fail in their parenting role." Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 788 (2002).

Accordingly, there is no point in judging the validity of marriage laws against the backdrop of adoption laws. Otherwise, legal environments that permit three individuals to share legal parental rights (*see, e.g., LaChapelle v. Mitten*, 607

N.W.2d 151, 161 (Minn. Ct. App. 2000) (approving agreement whereby former same-sex partners had joint custody and sperm-donor father had “various rights to the child”)) would perforce require state-sanctioned polygamy. *See* Martha Ertman, *Marriage As A Trade: Bridging the Private/Private Distinction*, 36 Harv. C.R.-C.L. L. Rev. 79, 130 (2001) (relying on the judicial sanction of *LaChapelle* as support for state sanction of “polyamorous” relationships as LLCs).³

Plaintiffs also rely on *Baker v. State*, 744 A.2d 864 (Vt. 1999), for the proposition that the availability of adoption and reproductive technology invalidates the nexus between marriage and child rearing. However, *Baker* applied more exacting scrutiny than Section 23 permits and began with a “core presumption of inclusion” (*Baker*, 744 A.2d at 879) rather than a presumption of deference to legislative line-drawing. *See Collins*, 644 N.E.2d at 79-80. *Baker* then considered three factors, none of which has an analogue in Indiana doctrine: “(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government’s stated goals; and (3) whether the classification is significantly underinclusive or overinclusive.” *Baker*, 744 A.2d at 879. Only because of this highly skeptical standard did the availability of adoption and reproductive technology to same-sex couples matter.

³ Furthermore, a holding that the rationality of marriage law depends in some way on the state of adoption and reproductive technology laws would also be inherently unstable and subject to legislative changes in those areas.

However, *Baker*'s concern for closeness of fit is irrelevant under *Collins*. Indeed, *Collins* says that a reasonable classification “is not to be condemned merely because it is not framed with such mathematical nicety as to include all within the reason of the classification and to exclude all others.” *Collins*, 644 N.E.2d at 80 (quoting *Cincinnati, H. & D. Ry. Co. v. McCullom*, 183 Ind. 556, 561, 109 N.E. 206, 208 (1915)). Therefore, the fact that same-sex couples might raise children does not undermine the state’s legitimate objective of using marriage as a means for promoting procreation where both natural parents are present.

The case on which Plaintiffs rely for the proposition that marriage is not necessary for reproduction, *Miller v. Morris*, 386 N.E.2d 1203, 1205 (Ind. 1979), actually underscores the validity of the state’s point. *Miller* merely implemented *Zablocki v. Redhail*, 434 U.S. 374 (1978), and invalidated under the Fourteenth Amendment (and not the state constitution) a marital prohibition for those who had not paid child support. In doing so, *Miller* rejected the notion that such a regulation vindicates government interests in responsible child rearing because, even if they could not marry, a couple that wished to marry likely would still procreate. Thus, “preventing a contemplated marriage may only result in children being born out of wedlock.” *Id.* at 1205. The reference to wedlock, of course, was a reference to opposite-sex wedlock. The statute in *Miller* was invalid precisely because it eroded the state’s interest in promoting procreation in the context of a traditional family. *See id.* (“Instead of protecting the welfare of future children, the statute may have the opposite effect, in that it will promote cohabitation without marriage.”) The

trouble with the statute in *Miller* was that opposite-sex couples can procreate on their own even if not married. The trouble for Plaintiffs here is that same-sex couples cannot procreate on their own, even if married. If anything, *Miller* held that promoting procreation in the traditional marital setting is the bedrock of Indiana marriage law.⁴

Plaintiffs flat-out miss the point when they question whether excluding same-sex couples from marriage promotes the state's interest in promoting procreation among married opposite-sex couples. (Pl. Br. 15) No one has argued that prohibiting same-sex marriages promotes procreation and child rearing generally. Rather, the state argues that recognizing opposite-sex marriages promotes procreation and child rearing in the best possible context (where both natural parents are present), and that this justification does not exist for recognizing same-sex marriages.

Finally, it makes no difference whether same-sex couples may provide healthy and prosperous environments for children. Plaintiffs' suggested evidence concerning the suitability of same-sex homes for child rearing, while perhaps relevant to a political debate or even to a legal argument concerning a child-rearing prohibition, cannot negate the General Assembly's ability to recognize opposite-sex

⁴ Similarly, *O'Connor v. O'Connor*, 253 Ind. 295, 253 N.E.2d 250 (Ind. 1969), which Plaintiffs cite, also supports the state's point. When *O'Connor* spoke of "the institution of marriage," it necessarily meant *opposite-sex* marriage, and it was referring to the "stable environment" that *opposite-sex* marriage provides for children that result from the "biological drives" that marriage "channels" into "socially accepted activity." *Id.* at 310, 253 N.E.2d at 258.

marriages as the best context for procreating and raising children. This Court simply does not sit to revisit controversial political debates or to second-guess the General Assembly. It may only decide whether there is a conceivable rational basis for the General Assembly to do what it did. Given the fact that opposite-sex couples are the only couples that can procreate on their own, no amount of proof concerning the suitability of same-sex homes for raising children can undermine the reasonableness of Section 31-11-1-1.

2. Promoting the traditional family as the foundation for society

The trial court also properly found another related, yet analytically distinct, fundamental and compelling governmental interest that underlies Section 31-11-1-1: the protection and promotion of the traditional family, headed by a husband and wife, as a foundational political unit in society. Contrary to Plaintiffs' conception of marriage law (which, they suggest, must provide the freedom "to marry the person you love" (Pl. Br. 29)), state government regulation of marriage does not simply arise from an interest in regulating individual behavior. Rather, "regulation of marital status has always been a fundamental element in helping human society induce the behavior needed for social as well as individual survival." Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 470 (1983).

As one scholar puts it, "[h]eterosexual marriage appears to provide the strongest and most stable companionate unit of society, and the most secure setting for intergenerational transmission of social knowledge and skills" Wardle,

supra, at 780. As a result, “[h]eterosexual marriage arguably provides the best seedground for democracy, the most important schoolroom for self government, the most important wellspring of (and testing ground for) civic virtue, and the most valuable unit of social organization.” *Id.* at 780-81. More particularly, the traditional family fosters a sense of voluntary duty reflected in the husband-wife marital commitment and their unquestioning devotion to their natural children. Through natural relationships between parents and their offspring, “the family in a democratic society not only provides emotional companionship, but is also a principal source of moral and civic duty.” Hafen, *supra*, at 477.

These precepts find a home in judicial doctrine at all levels. The Supreme Court has itself recognized the connection between marriage and free society, referring to traditional marriage over 100 years ago as “the foundation of the family and of society, without which there would be neither civilization nor progress.” *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Justice Holmes observed that “some form of permanent association between the sexes” is one of the rudimentary characteristics of civilization. Oliver Wendell Holmes, Jr. *Natural Law*, 32 Harv. L. Rev. 40, 41 (1918). Other courts have also recognized that “the structure of society itself largely depends upon the institution of marriage The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.” *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976); *see also Matter of Cooper*, 564 N.Y.S.2d at

688 (citing “the concept of marriage and family as a basic fabric of our society” as a compelling interest that justifies non-recognition of same-sex marriage).

Similarly, the Indiana Supreme Court has observed that “[i]n every enlightened government [marriage] is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern.” *Noel v. Ewing*, 9 Ind. 37, 1857 WL 3556, at *8 (1857). According to *Noel*, marriage “giv[es] character to our whole civil polity.” *Id.* And in *Cleveland, C. C. & St. L. Ry. Co. v. Marshall*, 182 Ind. 280, 105 N.E. 570, 572 (1914), the Court recognized that “the family was the earliest of our social institutions, and has formed the basis of human progress toward a more perfect civilization.” Indeed, it is the concern for the family that “has inspired the organization of state governments and guaranteed their perpetuity. . . .” *Id.* Accordingly, “[t]he promotion of the welfare of the family . . . is concededly a proper subject for the exercise of the police power of the states.” *Id.* It hardly need be said that the Court was referring to traditional families, not households headed by same-sex couples.

Again, the key is the natural link between traditional marriages and procreation. *See Wardle, supra*, at 794. It is the natural bond between parents and their biological offspring that provides the best environment for passing along the traditions of duty and responsibility so critical to democratic society. *See id.* at 789, 797; Hafen, *supra*, at 470 n.28, 474-77.

This does not mean that households—whether headed by a single person, a same-sex couple, or an opposite-sex couple—with adopted children or with only one

biological parent cannot create any sense of voluntary duty or other civic virtues for their children (or should be prohibited because they do not feature all of the social benefits of traditional families). *See Wardle, supra*, at 809, 811. Nor does it mean that opposite-sex couples who cannot or wish not to have children must be deprived of the right to marry lest they not fully contribute to marriage’s social goals. *Id.* at 800–803. What it means instead is that the American tradition has long recognized that the values necessary for the continuation of a successful society are best fostered in the context of families where two parents raise their natural offspring. Providing for traditional marriage is one means of encouraging this optimal social foundation. Providing for same-sex marriage (which necessarily cannot be an environment where both natural parents raise their children) is not.

Choosing to permit or restrict marriage reflects a choice of what political and social organizing principle society will follow. *Noel* recognized that deferring to the legislature with respect to the regulation of marriage is a necessary consequence of recognizing the importance of marriage to the social structure. *Noel*, 9 Ind. 37, 1857 WL 3556 at *8 (“The sovereign power may, by general enactment, regulate and mold [the couple’s] relative rights and duties at pleasure.”).

However, adopting Plaintiffs’ argument—that an individual should be permitted “to marry the person [he or she] love[s]” (Pl. Br. 29)—would create a presumption against any state regulation of marriage and undermine the General Assembly’s long-accepted ability to order society through marriage regulations. The burden would be on the state to justify each regulation by proving the vindication of

some special interest, a circumstance that would create a much greater likelihood of invalidation. The prohibition against polygamy and first-cousin marriages for those under 65, for example, might be vulnerable to attack if the prohibition against same-sex marriage is declared invalid. One commentator observes that “[t]he Equal Protection argument for same-sex marriage also applies to polygamy. The ban on polygamy discriminates . . . against . . . bisexuals, who cannot act on their sexual preference within marriage unless they can have multiple spouses.” Dent, *supra*, at 628. So too with first-cousin marriages: “[T]he main arguments for endorsing gay marriage—individual autonomy in intimate affairs and validation of loving relationships—also apply to endogamy.” *Id.* at 631. *See also* William N. Eskridge, Jr., *The Case for Same-Sex Marriage*, 151 (1996) (questioning the constitutionality of broadly prohibiting marriage by relatives).

To be sure, the legislature may adopt other social foundations to perpetuate liberty. *See* Preamble to the Constitution of the State of Indiana (announcing that the Constitution is ordained “To the end that . . . liberty be perpetuated”). But the Indiana Constitution does not require it. Until very recently, virtually every society in recorded history has recognized marriage as a male-female union. Peter Lubin and Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage*, 47 *Cath. U. L. Rev.* 1271, 1324 (1998). This longstanding correlation between traditional marriage and successful, stable societies provides a reasonable justification—as a matter of law—for recognizing traditional marriage but not same-sex unions.

3. Protecting the integrity of traditional marriage

Same-sex marriage is not deeply rooted in any state's history and tradition, but traditional marriage quite obviously is. *See Goodridge* 2002 WL 1299135 at *12. Because traditional marriage performs important social functions related to child rearing and social organization, "there is great danger if its meaning and definition become ambiguous." Wardle, *supra*, at 780.

Permitting same-sex marriage would lead to ambiguity in the meaning of marriage by undermining the public purposes of marriage as related to children, biological parenting, and male-female equality. *Cf. Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1383-84 (S.D. Fla. 2001), *on appeal*, No. 01-16723-DD (11th Cir.) (approving the argument that married opposite-sex couples provide children with "proper gender role modeling and minimize social stigmatization.") Same-sex marriage would define marriage as simple contractual cohabitation, and marriage as the socially endorsed institution for procreating and raising children would be eviscerated. *See generally* Roger Scruton, *The Moral Birds and Bees: Sex and Marriage, Properly Understood*, National Review, Sept. 15, 2003, at 40. Opposite-sex marriages that do not produce children tend to be the exception (*Singer*, 522 P.2d at 1195) and do not inherently threaten the premise that marriage is a preferred social institution because of the link to child rearing. Recognizing same-sex marriages would flout (to the point of nullifying) the aspirational link between procreation and childrearing which marriage provides, diminishing the meaning of marriage in society. In a time when marriage may already be undermined by the

easier availability of divorce and the increased prevalence of out-of-wedlock births, states, and especially courts, should be wary of radically redefining marriage to include same-sex unions.

Scholarship provides solid justifications for the need to protect traditional marriage. “Traditional marriage is a public good. That is, it benefits not only married couples and their children but also generates positive externalities, or benefits to others. Men and women who marry and stay married encourage others to do likewise, to the profit of society.” Dent, *supra*, at 599. In light of this social good, government is well justified in recognizing and encouraging traditional marriage but not same-sex marriage. “As social esteem for marriage and parenting declines, so does citizens’ willingness to assume these roles. Validation of same-sex marriages would accelerate this decline.” *Id.* at 601. The Court should not second-guess the judgment of the General Assembly to protect traditional marriage by means of refusing to recognize same-sex marriages. *See Collins*, 644 N.E.2d at 80.

Plaintiffs reject tradition as being as unavailing as it was for the defense of antimiscegenation laws in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Drawing an analogy to *Loving* on any level is profoundly erroneous. *Loving* involved racial classifications subject to heightened scrutiny under the Fourteenth Amendment—a test that bears no relationship to the *Collins* test. Furthermore, other courts have already rejected this analogy, including the Vermont Supreme Court, which required some alternative to marriage for same-sex couples. *See Baker*, 744 A.2d at

880 n.13; *see also Goodridge*, 2002 WL 1299135, at *10 n.22; *Nelson*, 191 N.W.2d at 187; *Singer*, 522 P.2d at 1191-92.

Unlike antimiscegenation laws, restrictions against same-sex marriage reinforce, rather than disrupt, the traditional understanding of marriage as a unique relationship between one woman and one man. “All one has to do is to look at any standard history of Western law, from Roman times to the present, to see that marriage has been understood to involve the union of a man and a woman.” David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 *BYU J. Pub. L.* 201, 219-20 (1998); *see also Goodridge*, 2002 WL 1299135 at *9-11. In other words, while marriage has always been defined by reference to male-female couples, it was defined by race only when some states introduced racial marriage restrictions as badges and incidents of slavery. “In this respect, Southern anti-miscegenation laws ran counter to the Western tradition of marriage law.” Coolidge, *supra*, at 219.

Here, quite the opposite is true. Far from imposing some new, invidious restriction on marriage, Section 31-11-1-1 simply preserves the traditional definition and understanding of marriage. *See Singer*, 522 P.2d at 1191 (“The operative distinction [with *Loving*] lies in the relationship which is described by the term ‘marriage’ itself, and that relationship is the legal union of one man and one woman.”); *see also Goodridge*, 2002 WL 1299135, at *10 n.22 (“By contrast, statutory restrictions on interracial marriage . . . did not have such deep historical roots.”).

Plaintiffs also rely on dicta from *Cornell v. Hamilton*, 791 N.E.2d 214, 219 (Ind. Ct. App. 2003), to the effect that some households are now headed by same-sex couples. Section 31-11-1-1 does not interfere with such arrangements; it merely refuses to bestow government recognition on them as “marriage.” The existence of other living arrangements does not undermine the legitimacy of the state’s interest in recognizing only traditional marriages.

C. Plaintiffs Do Not Posit A Coherent Theory Of Marriage

The only theories of marriage that Plaintiffs offer are incoherent and do not justify recognition for some intimate relationships but not others, such as polygamous relationships. Plaintiffs simply say that “[t]he societal interest [in marriage] is . . . in assuring a stable family unit in which children can be raised if the married couple wishes to raise children.” (Pl. Br. 13) But this theory of marriage—which the Court may not adopt unless the State’s theories are utterly irrational—contains at least two fundamental flaws. First, as discussed above, it implicitly validates the State’s procreation/child-rearing-by-natural-parents justification for marriage, which must win out of deference to the legislature. And, if we are still to take seriously Plaintiffs’ argument that marriage cannot be predicated on the needs of children because the elderly, sterile, and those preferring to remain childless are permitted to marry (and apparently still would under Plaintiffs’ theory), then Plaintiffs have no theory of marriage left.

Second, Plaintiffs’ theory contains no principle that would include members of the same sex but still limit marriage to *couples*. It could be used to justify not

only marriages between same-sex and opposite-sex couples, but also marriages with more than two partners. What would be the government objective vindicated by the recognition of marriages between same-sex couples and opposite-sex couples, but not larger groups, especially those with children? Plaintiffs do not say.

Plaintiffs' citation to *Halpern v. Toronto*, 36 R.F.L. (5th) 127, 2003 Ont. C.A. Lexis 271 (Ontario Court of Appeals 2003), underscores this point. *Halpern* relies on the notion that the availability of reproductive technology and adoption to same-sex couples renders such couples indistinguishable from opposite-sex couples when it comes to marriage. On that theory, however, partnerships consisting of more than two people who also wished to use such technologies would also be indistinguishable from opposite-sex couples. Indeed, the *Halpern* court acknowledged the connection between opposite-sex couples, natural procreation, and marriage, but rejected that nexus as an insufficient government interest: "In our view, however, 'natural' procreation is not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex couples." *Halpern*, 2003 Ont. C.A. Lexis 271, *61.

Whatever the standards of review that Canadian courts use, of course, this Court is not similarly free to substitute its judgment for the government's as to whether promoting natural procreation in marriage is a "sufficiently pressing and substantial objective." Moreover, *Halpern's* analysis begs the question whether there is any infringement of equality rights. If promoting natural procreation in the marital context is legitimate, and if protecting marriage as an important historic

institution and the foundation for society is legitimate, there is no inequality. If these interests are not legitimate, there may be no legitimate distinction for state marital recognition of couples but not larger groups.

Plaintiffs do not deny that if same-sex couples have a fundamental right to marry under the Indiana Constitution, so may polygamists. They merely try to distinguish regulation of marriage among polygamists on the basis that such regulation would prevent individual harm to the marriage participants that would inevitably occur. (Pl. Br. 20-21; 32-33) This implicit concession is necessary, but no less stunning. State prohibitions of polygamy surely are not subject to the notion that the State must prove some academic theory that such laws protect women (or men) from being devalued or treated unequally. And if same-sex couples can assert and prove that they are just as good at parenting and raising families as opposite-sex couples, why can't polygamists? Plaintiffs suggest that polygamous relationships would suffer from a diluted ability to "meet the emotional and financial responsibilities of marriage," (Pl. Br. 20) but Plaintiffs do not specify against what baseline such "dilution" must be measured, and their open-ended theory of marriage would permit polygamists to come into court and try to disprove that assumption simply because they "want to marry for the same reasons other couples want to marry." (*Id.* at 29)

The state's theories for marriage, by contrast, focus on the uniqueness of the male-female couple for purposes of procreating and rearing children and establishing the traditional building blocks of society, and thereby include an

inherent limitation on the types of relationships deserving of state recognition as “marriage.” After all, “[m]arriage is not primarily a way of expressing approval for infinite variety of human affectional or sexual ties; it consists, by definition, of isolating and preferring certain types of unions over others.” Gallagher, *supra*, at 781-82. If the state’s justifications are illegitimate, then there is nothing left to support the state’s interest in sanctioning marriage as a special relationship. All relationships would be on equal footing. “If marriage is just another word for an intimate union, then the state has no legitimate reason to insist that it even be intimate, unless the couple, or the quartet, want it so. For the individual to be truly free to make unconstrained relationship choices, marriage itself must be deconstructed.” *Id.* at 779.

Plaintiffs begin with the unsupportable proposition that marriage is a “fundamentally . . . private enterprise.” (Pl. Br. 5) Plainly it is not, if government is to be involved, and indeed Plaintiffs’ arguments consequently are directed against state recognition of marriage *in toto*, rather than supportive of why same-sex couples should be entitled to state marriage recognition. Their flawed premise leads Plaintiffs to look at the concept of state-sanctioned marriage and ask the wrong question. Rather than begin by asking, “why marriage?”, they see marriage in the abstract as involving only two people, but without historical context, and immediately ask “why not same-sex marriage?” Plaintiffs’ superficial view of marriage considers only the same-sex versus opposite-sex issue and ignores other fundamentally important marriage recognition issues. All Plaintiffs really

understand is that opposite-sex couples can have something that same-sex couples cannot: state sanction and recognition. But they have no coherent theory as to why, if the state is to sanction marriage at all, this arrangement is unfair.

The state's theories, by contrast, provide coherent justifications for state-sanctioned marriage that do not justify recognition of same-sex marriage.

Therefore, the class is "germane to the subject matter and the object to be attained."

Dvorak v. City of Bloomington, 702 N.E.2d 1121, 1124-25 (Ind. Ct. App. 1998).

II. Article 1, Section 1 Provides No Judicially Enforceable Right To State-Recognized Same-Sex Marriage

A. Section 1 Contains No Judicially Enforceable Rights

Article 1, Section 1 provides as follows:

WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.

Ind. Const. art. 1, § 1.

The Indiana Supreme Court recently cast serious doubt that Section 1 is a self-executing provision capable of judicial enforcement rather than an unenforceable expression of the general principles that animate our Constitution. *See Doe v. O'Connor*, 790 N.E.2d 985, 989-92 (Ind. 2003). In *Doe*, the Court called Section 1's enforceability into question and compared Section 1 to similar provisions

in other states' constitutions that have been deemed not to create any judicially enforceable rights. *Id.*

For example, the Ohio Constitution provides that “[a]ll men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.” *See State v. Williams*, 728 N.E.2d 342, 352 (Ohio 2000) (quoting Ohio Const. art. I, § 1). The Ohio Supreme Court held that this expression of natural rights is “not an independent source of self-executing protections.” *Id.* at 354. “Rather, it is a statement of fundamental ideals upon which a limited government is created” but that “requires other provisions of the Ohio Constitution or legislative definition to give it practical effect.” *Id.* Moreover, even these fundamental ideals or natural rights may be regulated or restricted in ways that bear a “real and substantial relation to the public health, safety, morals, or general welfare” and that are not “arbitrary or unreasonable.” *Id.* at 355.

Similarly, the Vermont Supreme Court held that an analogous provision in the Vermont Constitution “expresses fundamental, general principles . . . that infuse the rights of individuals and powers of government specified elsewhere in the constitution.” *See Shields v. Gerhart*, 658 A.2d 924, 928 (Vt. 1995). As such, these principles are not self-executing, enforceable rights, but merely provide the “philosophical truisms” that should guide all legislative decision-making. *See id.* at 928-29. Other states have also declared that similar state constitutional

declarations of natural rights do not provide a basis upon which legislation may be challenged. *Doe*, 790 N.E.2d at 990-91; *see also, e.g., Blea v. City of Espanola*, 870 P.2d 755, 759 (N.M. Ct. App. 1994) (stating that “vague references to safety or happiness” in an analogous constitutional provision “are not sufficient” to support a claim); *Sepe v. Daneker*, 68 A.2d 101, 105 (R.I. 1949) (quoting *In re Dorrance St.*, 1856 WL 2331, at *12 (R.I. 1856)) (stating that an analogous constitutional provision was advisory rather than mandatory and was “addressed rather to the general assembly by way of advice and direction, than to the courts, by way of enforcing restraint upon the law-making power”).

Plaintiffs cite cases from fifteen other states that supposedly recognize judicially enforceable rights under constitutional provisions analogous to Indiana’s Section 1. However, many of those cases found enforceable rights only by cobbling together several different constitutional provisions. *See Doe v. Maher*, 515 A.2d 134, 149 (Conn. Super. Ct. 1986) (unappealed trial court order relying in dicta on state constitution’s preamble, first article, and separate due process provision in finding enforceable right); *Murphy v. Pocatello Sch. Dist. No. 25*, 480 P.2d 878, 884 (Idaho 1971) (relying on Section 1 “inalienable rights” provision and Section 21 “reserved rights not impaired” provision); *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742, 748 (Ill. App. Ct. 1952) (citing both inalienable rights provision and liberty due process provision of Illinois Constitution as collateral support for common law invasion of privacy tort); *Jarvis. v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988) (relying on Article I, Sections 1, 2, and 10 of the Minnesota Constitution, none of

which mentions natural or liberty rights); *Barber v. Time, Inc.*, 159 S.W.2d 291, 294 (Mo. 1942) (citing “Sections 1-4 of Art. 2” [sic Art. 1] covering the “source of political power,” “natural rights of persons,” “powers of the people,” and the “independence of Missouri,” as collateral support for common law tort); *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 6 n.3 (Tenn. 2000) (finding enforceable right in at least two, and perhaps as many as seven, constitutional provisions, one of which provides a liberty due process right); *Texas State Employees Union v. Texas Dep’t of Mental Health & Retardation*, 746 S.W.2d 203, 205 (Tex. 1987) (citing Article 1, Sections 6, 8, 9, 10, 19, 25 of the Texas Constitution).

The Georgia case relied on a single constitutional provision, but that was a liberty due process provision, which neither our Section 1 nor Section 12 contains. See *Powell v. State*, 510 S.E.2d 18, 21 (Ga. 1998) (relying on provision that “declares that no person shall be deprived of liberty except by due process of law”). And, far from simply being an overarching collection of constitutional ideals, Section 1 of the Kentucky Constitution carefully enumerates a specific, defined, and generally enforceable set of rights, including rights of worship, communication, assembly, and arms, so it is no wonder its less defined liberty and happiness provisions were also enforced in *Commonwealth v. Campbell*, 117 S.W. 383, 385 (1909). See Ky. Const. Part 1, Sec 1. Similarly, Section 1 of the California Constitution specifically enumerates a right to privacy, which, unlike “happiness,” has a judicially recognized meaning rendering it more readily capable of judicial enforcement. See Cal. Const. art. 1, § 1; *Comm. to Defend Reproductive Rights v. Myers*, 625 P.2d 779

(Cal. 1981). That leaves Plaintiffs with cases from only five states—Alaska, Florida, Pennsylvania, New Hampshire and New Jersey—that actually have found judicially enforceable rights solely in a Section 1-type natural rights provision. And of those, the Florida and Pennsylvania cases would likely have come out the same even without reliance on the Section 1 analogue. This is hardly overwhelming precedent for honing judicially enforceable rights from the expansive, undefined philosophical commitments contained in Indiana’s Section 1.

The sounder approach is to recognize that the vitality of Section 1 lies in the guidance it provides to the General Assembly in passing laws and to Indiana courts in interpreting those statutes and other constitutional provisions. *See In re Lawrence*, 579 N.E.2d 32, 39-41 (Ind. 1991) (interpreting the Health Care Consent Act in the context of the liberty values proclaimed in Section 1); *see also Whittington v. State*, 669 N.E.2d 1363, 1368-69 (Ind. 1996) (discussing how Article 1, Section 9’s “responsibility clause” is interpreted in light of the natural rights philosophy expressed in Section 1). Therefore, this Court should find that Section 1, standing alone, does not provide a basis upon which a constitutional challenge to a statute may be brought.

B. There Is No Text Or History Supporting A Section 1 Right To State-Recognized Same-Sex Marriage

Even if Section 1 were to provide some level of judicially enforceable protection for some asserted “natural rights,” there is no textual or historical basis for concluding that it protects any right or “core value” of state-recognized same-sex marriage. This lack of textual and historical grounding is critical because, as the

Indiana Supreme Court has held, “[i]nterpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it.” *Price v. State*, 622 N.E.2d 954, 957 (Ind. 1993); *see also Richardson v. State*, 717 N.E.2d 32, 38 (Ind. 1999) (stating that questions of state constitutional interpretation are to be resolved by examining the language of the text “in the context of the history surrounding its drafting and ratification” and that the “intent of the framers . . . is paramount”) (citations omitted); *O’Brien v. State*, 422 N.E.2d 1266, 1270 (Ind. Ct. App. 1981) (observing that Section 1 at most protects only those rights “which have their origin in the express terms of the constitution or which are necessarily to be implied from those terms.”).

It is simply unfathomable that a constitutional text written in 1851 could have protected a right to state-recognized same-sex marriage, notwithstanding any general protections of liberty and the pursuit of happiness. Indeed, the 1850 Constitutional Convention *voted down* a provision that would have precluded the General Assembly from passing a law “impairing the unity and sacredness of the marriage relation.” *Convention Journal*, 896. No matter what was meant by “the unity and sacredness of the marriage relation,” if the framers would not enshrine any particular protection related to marriage, then they left all regulation of marriage to the legislature, including the ability to refuse recognition of same-sex marriage.

Further, the Indiana Supreme Court itself has held that “there is no constitutional provision protecting the marriage itself.” *Noel*, 9 Ind. 37, 1857 WL 3556, at *8. And while cases such as *Wiley v. Wiley*, 75 Ind. App. 456, 123 N.E. 252, 256 (1919), *overruled in part on other grounds by State v. Larue’s, Inc.*, 239 Ind. 56, 154 N.E.2d 708 (1958), may discuss various fundamental attributes of marriage, there can be no debating that such discussion in 1919 referred only to traditional opposite-sex marriage. Plaintiffs cannot mandate a redefinition of marriage simply by referring to the attributes of traditional marriage.

C. Old Economic Rights Cases Do Not Support A Right To State-Recognized Same-Sex Marriage

Because there is no history or text to support a right to same-sex marriage under the Indiana Constitution, Plaintiffs’ attempt to create a new right under Section 1 proceeds from a doctrinal foundation that is shaky at best. The only cases that Plaintiffs cite that invalidated statutes based on Section 1 rights are economic or property-rights cases, not individual liberties or privacy cases.⁵ *See Dep’t of Fin.*

⁵ Without specifically mentioning Section 1, the Indiana Supreme Court once suggested that some general “right of privacy” might encompass the right of an acquitted arrestee not to have his photo included in a police photo collection. *See State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946). It was unclear whether such a right was “personal” or a species of property rights. In any event, however, the Court ruled that the police had a valid purpose for including the photograph in its collection and there was no violation of any right of privacy because “Art. 1 § 1 of the Indiana Constitution contains nothing that the statute complained of could conflict with.” *State ex rel. Mavity v. Tyndall*, 225 Ind. 360, 364, 74 N.E.2d 914, 916 (1947); *see also Voelker v. Tyndall*, 226 Ind. 43, 44-45, 75 N.E.2d 548, 549 (1947) (upholding the ability of police to retain fingerprints and signature cards of acquitted arrestees as against Section 1 “Right of Privacy” challenge).

Insts. v. Holt, 231 Ind. 293, 301, 310, 108 N.E.2d 629, 633, 637 (1952) (invalidating statute limiting prices on retail installment contracts based on asserted Section 1 “freedom of contract”); *Kirtley v. State*, 227 Ind. 175, 182, 84 N.E.2d 712, 715 (1949) (invalidating law requiring tickets to any “place of public amusement” to be resold only at face amount based on asserted Section 1 “property rights of the ticket owner”); *Dep’t of Ins. v. Schoonover*, 225 Ind. 187, 193-94, 72 N.E.2d 747, 750 (1947) (invalidating insurance agent compensation law based on “freedom to contract”); *State Bd. of Barber Exam’rs v. Cloud*, 220 Ind. 552, 572, 44 N.E.2d 972, 980 (1942) (striking down regulation that established minimum prices and maximum hours based on asserted “right to engage in a lawful business”); *Street v. Varney Elec. Supply Co.*, 160 Ind. 338, 66 N.E. 895, 897 (1903) (invalidating public work minimum wage legislation based on asserted “liberty to contract”).

The Indiana Supreme Court at one time found a right to possess alcohol as a species of property right. See *Beebe v. State*, 6 Ind. 501, 1855 WL, 3616 at * 11, (1855); *Herman v. State*, 8 Ind. 545, 1855 WL 3695, at *8 (1855). But the Court ultimately rejected this right and effectively overruled *Beebe* (and by implication *Herman*). See *Schmitt v. F.W. Cook Brewing Co.*, 187 Ind. 623, 120 N.E. 19, 21 (1918) (upholding prohibitions on liquor sales and saying of *Beebe*, “[i]t cannot be determined . . . on what principle the court was acting”).

That Section 1 has provided meaningful protection only for economic interests (and then only sporadically) is important for at least two reasons: first, because there is no connection between economic rights and the right to state-

recognized same-sex marriage; and second, because economic rights doctrine has been discredited.

1. There Is No Connection Between Economic Rights And Any Right To State-Recognized Same-Sex Marriage

First, one must make a substantial inferential leap from any protection for economic interests to some equal or greater protection of individual privacy interests. Plaintiffs rely principally on *In re Lawrence* to bridge that gap. But *Lawrence* did not find or apply any constitutional rights. It simply interpreted the Health Care Consent Act in light of some guiding values of freedom that Section 1 reflects. *In re Lawrence*, 579 N.E.2d 32, 39 (Ind. 1991).

Moreover, the vague notion of a right to “privacy” has no relationship to what Plaintiffs demand in this case. As observed above, state recognition of marriage is not a private matter: it unalterably affects the public interest, especially as it relates to raising children and forming society’s building blocks. After all, Plaintiffs do not simply wish for the government to leave them alone or not to collect or publicize information about them, which is the typical “privacy” complaint. *Cf. Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (“The cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”) (footnotes omitted). Instead they want to “formalize and legalize their enduring commitments to share life’s journey.” (Pl. Br. 29) But, there is nothing

illegal about their commitments now. Plaintiffs instead want to use Section 1’s supposed privacy shield as a sword to secure government endorsement of their relationships, announced through a public act and a public document. This is the antithesis of privacy and does not even meet the terms of the general constitutional right that the Plaintiffs invoke.

Furthermore, Plaintiffs’ attempt to bolster their argument by reference to marriage rights protected by the United States Supreme Court (Pl. Br. 29) actually weakens their case. Whatever scope the Fourteenth Amendment’s right to marry may have, it does *not* include the right to marry a member of the same sex. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972).⁶ Thus, it is clear that there is no federal right to enter into a “same-sex marriage.”⁷ So, even if the Court were to follow Plaintiffs’ suggestion and draw upon Fourteenth Amendment doctrine for guidance here, the result remains the same: there is no right to marry a member of the same sex.

⁶ When the U.S. Supreme Court dismisses for want of a substantial question, it affirms the lower court judgment (though not necessarily its reasoning) on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (citing *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) (Brennan, J., memorandum) (“Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . .”)); *see also Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (providing that dismissals for want of a substantial federal question affirm the judgment of the court below and “prevent lower courts from coming to opposite conclusions on the precise issues presented . . .”).

⁷ Plaintiffs rely on *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), for the proposition that “intimate decisions” are “at the core of the modern notion of privacy.” (Pl. Br. 29) *Lawrence*, however, reviewed a law affecting entirely private activity and expressly stated that it did not involve “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Id.* at 2484.

2. Economic Rights Doctrine Has Been Discredited And Left Behind

Second, Indiana's Section 1 economic rights cases are the product of an old model of judicial supremacy over public policy that was discredited long ago. The United States Supreme Court's analogous economic rights era is most closely associated with *Lochner v. New York*, 198 U.S. 45 (1905), where the Court invalidated a New York State law that limited the hours employees in bakeries could work based on notions of the "right of contract between the employer and employees." *See id.* at 53. The entire *Lochner* era, of course, has long been discredited, disavowed and overruled by the United States Supreme Court (*see, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949)). "The doctrine is seen as a violation of sound democratic procedures in that it permits judges to substitute their judgment as to political policy for that of the legislature." Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 Minn. L. Rev. 91, 92 (1950) (citation omitted).

The Indiana Supreme Court relied heavily on Fourteenth Amendment economic rights activism in 1903 when it spoke of a "liberty to contract" and invalidated public works minimum wage legislation under Section 1. *See Street*, 66 N.E. at 897. That same year, the Court invalidated (in part based on Section 1) a statute that prescribed when wages must be paid and that proscribed their assignment, declaring that it was "the duty of the court, when called on, to decide whether the particular regulation is *just and reasonable . . .*" *Republic Iron &*

Steel Co. v. State, 160 Ind. 379, 66 N.E. 1005, 1007 (1903) (emphasis added). These are very nearly the same non-deferential words that *Lochner* used two years later. *Lochner*, 198 U.S. at 56 (“Is this a fair, reasonable, and appropriate exercise of the police power . . . ?”).

However, this era of judicial activism and supremacy in the arena of public policy—economic or otherwise—is now over in Indiana. See *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975 (Ind. 2000) (describing *Lochner* and other property rights cases as “now discredited”). As far as the State is aware, the last time this Court or the Indiana Supreme Court invalidated social welfare legislation based on economic (or other) rights under Section 1 was in 1952, in the *Holt* case. The few pronouncements concerning Section 1 since then make it clear that *Lochner*’s focus on whether legislation is “reasonable” or “appropriate” is no longer the touchstone for judicial power. For example, in *City of Indianapolis v. Clint’s Wrecker Service*, 440 N.E.2d 737 (Ind. Ct. App. 1982), this Court backed away considerably from the idea that it should second-guess whether social welfare regulations were appropriate. *Clint’s Wrecker Service* upheld a city towing ordinance and expressly rejected the assertion that Section 1 protects a “right to conduct . . . business unimpeded by any regulatory control.” *Id.* at 741. The plaintiff unsuccessfully urged invalidation because it “unnecessarily and unreasonably restrains its business” *Id.* But this Court more deferentially asked only whether the ordinance tended to promote, and had a reasonable relation to, public safety. *Id.* at 742. See also *Bd. of Comm’rs v. Jones*, 457 N.E.2d 580, 585-87 (Ind. Ct. App. 1983) (disregarding *Street* and

upholding as constitutional under Sections 1 and 23 a prevailing wage statute that was reasonably related to a legitimate legislative objective).

More recent cases from our Supreme Court confirm the transition toward a more deferential approach. In *Price*, the Court observed that “[t]he State may exercise its police power to promote the health, safety, comfort, morals, and welfare of the public” and to do so it may “subject persons and property to restraints and burdens, even those which impair ‘natural rights.’” 622 N.E.2d at 959 (citing *State v. Gerhardt*, 145 Ind. 439, 44 N.E. 469 (1896) and *Weisenberger v. State*, 202 Ind. 424, 429, 175 N.E. 238, 240 (1931)). Further, *Price* recognized that “courts defer to legislative decisions about when to exercise the police power . . . and typically require only that they be rational.” 622 N.E.2d at 959 (citation omitted); *see also Whittington*, 669 N.E.2d at 1369 (stating that “we must accord ‘considerable deference’ to the judgment of the legislature, inasmuch as the decision as to what constitutes a public purpose is first and foremost a legislative one”).⁸

Accordingly, the *Lochner*-esque reasoning of *Herman*, *Beebe*, *Holt*, *Kirtley*, *Schoonover*, *Cloud*, and *Street* provides a rickety doctrinal foundation for finding a new right to same-sex marriage. Plaintiffs assert that “[i]t would be a mistake . . . to view the substantive rights secured by Art. I, § 1 as applying solely to economic rights.” (Pl. Br. 23) However, especially in light of the serious questions that *Doe v.*

⁸ *Clem v. Christole*, 582 N.E.2d 780 (Ind. 1991), further substantiates the trend toward more deferential review, except where specific text-based rights are at stake. *Clem* ruled that, where no textual right is at stake, legislative action can be upheld by highly deferential reference to the general police power rather by reference to the “necessary police power.” *Id.* at 784.

O'Connor poses for the judicial enforceability of Section 1 as a general matter, it would more likely be a mistake to assume that any meaningful and enforceable economic rights protections remain, let alone infer that they lay the foundation for a new, self-executing right to state-recognized same-sex marriage.

D. Our Supreme Court Has Already Rejected The Notion That Indiana Has An Elastic Constitution From Which New Rights Can Continually “Evolve”

Plaintiffs urge that new constitutional rights can simply “emerge” and “evolve” from the Constitution. (Pl. Br. 30-31) The Indiana Supreme Court has already rejected such a model of constitutional interpretation, holding that “[j]udges must enforce the Constitution as written and intended.” *Bd. of Trs. of the Pub. Employees’ Ret. Fund v. Pearson*, 459 N.E.2d 715, 717 (Ind. 1984). This remains true even when times have changed such that the framers’ concerns that gave rise to a particular provision no longer apply with the same force. In *Pearson*, the Court acknowledged that the core concerns animating Article 11, Section 12, which prohibits the State from becoming a stockholder in a corporation or association, could be met in this age by less restrictive measures. *See id.* at 716-17. However, the Court stated that “these possibilities can be of no moment in this tribunal” when interpreting and applying that provision. *Id.* at 717.

Accordingly, our Supreme Court long ago rejected the notion that the meaning of our Constitution should change with the times.

We are not unaware of a doctrine which holds that a Constitution is an elastic instrument of no particular rigidity, which stretches to meet the demands of the moment. . . . The courts must resist under their oaths,

pressures of the moment to change or mutilate constitutional language.

Finney v. Johnson, 242 Ind. 465, 472-73, 179 N.E.2d 718, 721 (1962).

Beyond this rejected notion of elasticity, Plaintiffs' only other ground for finding a right to public, legal recognition of same-sex marriages is to refer to *In re Lawrence's* suggestion that Section 1's reference to "liberty" protects a right "to manage one's own life" and *Lawrence's* quotation of Delegate Smith that Section 1 is meant to protect "the right to walk abroad and look upon the brightness of the sun at noon-day." 579 N.E.2d at 39 n.3 But there would be no limitation on finding new rights if Plaintiffs could merely claim the undifferentiated mantle of the "right to manage one's own life." Individuals might claim protected liberty rights to engage in prostitution, drug use, public nudity, professional gambling, or any number of other traditionally prohibited actions that, for some, may be part of managing one's own life. *Cf. State v. Levitt*, 246 Ind. 275, 281, 203 N.E.2d 821, 824 (1965) ("[N]o right, constitutional, fundamental or otherwise, is absolute and unlimited in this society of ours—not even life and personal liberty—if we are to live with our neighbors.").

The only sound limiting principle for finding new rights is the text, structure, and history of the Constitution; otherwise, the Court is left to its own unguided preferences in deciding whether the mantle of privacy or liberty fits. History shows that the framers did not intend for the Indiana Constitution to provide any protected right to same-sex marriage, and this Court should not read such a right into the Constitution in contravention of that intent.

E. Section 1 Does Not Provide Heightened Protection For Any “Natural Rights,” And The Act Reasonably Relates To The Peace, Safety, And Well-Being Of Indiana Citizens

Section 1 expressly states that the government should act to advance the “peace, safety, and well-being” of Indiana citizens. Accordingly, as mentioned above, this Court has set forth a two-part test for determining whether a statute is consistent with Section 1:

1. whether the law tends to promote the health, peace, morals, education, good order and welfare of the people; and
2. if so, whether the law bears a reasonable and substantial relationship to accomplishing the legislative purpose.

Clint’s Wrecker Serv., 440 N.E.2d at 742. Even under the old activist approach to social welfare and economic legislation, a legislative act—even one encroaching upon individuals’ natural rights—falls within the legitimate police powers recognized in Section 1 as long as that law is “supported by any reason” and is not “purely arbitrary.” *Weisenberger v. State*, 202 Ind. 424, 175 N.E. 238, 240 (1931).⁹

This Court must accord considerable deference to the legislature’s police-power judgment because “the decision as to what constitutes a public purpose is first and foremost a legislative one.” *Whittington v. State*, 669 N.E.2d at 1369. Even the old economic rights cases recognize that a presumption of constitutionality attaches to statutes. *See Holt*, 231 Ind. at 300, 108 N.E.2d at 633; *Kirtley v. State*,

⁹ Laws have been invalidated under Section 1 only where the Court could discern no legitimate public interest or relationship to the protection of public health, safety, or welfare. *See, e.g., Holt*, 231 Ind. at 305, 108 N.E.2d at 634-35; *Kirtley*, 227 Ind. at 181-182, 84 N.E.2d at 715; *Schoonover*, 225 Ind. at 193, 72 N.E.2d at 750.

227 Ind. at 179, 84 N.E.2d at 714. This, of course, means that Plaintiffs, not the state, bear the burden of showing that the statute is unconstitutional. *State v. Moss-Dwyer*, 686 N.E.2d 109, 112 (Ind. 1997).

Significantly, Indiana cases do not contemplate any scenario whereby the State must come forward with evidence either to prove the existence of a legitimate police power interest or the relationship between the law and that interest. Courts have upheld statutes against Section 1 challenges as a matter of law without mentioning any burden of proof that the state was required to meet or any evidence supporting validity whatever. *See Albert v. Milk Control Bd.*, 210 Ind. 283, 289-91, 200 N.E. 688, 690-91 (1936) (upholding the validity of regulations on the milk industry because they were reasonably related to the public health and welfare); *Weisenberger*, 175 N.E. at 241 (refusing to enjoin a regulation affecting the manufacture of mattresses because it “[fell] short of being arbitrary” and was “a reasonable exercise by the state of her police power”); *Levy v. State*, 161 Ind. 251, 68 N.E. 172, 175-76 (1903) (finding constitutionally valid a business licensing requirement because it was reasonably related to the public welfare). Absent some factual assertion by the Plaintiffs that would defeat either the legitimacy of the purpose or the connection between the statute and that purpose—and there is none here—the statute is valid as a matter of law.

Indiana courts have never held that any form of heightened scrutiny or “material burden” analysis applies to Section 1 claims. Our Supreme Court applies the “material burden” analysis only with respect to particular “core values”

protected by a constitutional provision. *See Price*, 622 N.E.2d at 960-64. If bare Section 1 claims, which under Plaintiffs’ theory could apply to literally any conduct that plausibly involves life, liberty or the pursuit of happiness, were themselves entitled to material burden analysis, all state constitutional challenges would be elevated to this heightened level of scrutiny.

However, the Supreme Court made clear in *Price* that judicial scrutiny under even the more specific provisions of the Bill of Rights will “typically” require only that the legislative action be rationally related to the state’s police powers. *See id.* at 959; *see also Whittington*, 669 N.E.2d at 1369 (noting that in considering constitutional challenges, the courts generally are limited to the “narrow role of determining whether challenged state action has some reasonable relation to or tendency to promote the state’s legitimate interests”). As far as the state is aware, the only context in which the *Price* test has been applied outside of Section 9 is to the rights of freedom of conscience and religious practice that are expressly protected by Article 1, Sections 2, 3, and 4 of the Indiana Constitution. *See City Chapel Evangelical Free, Inc. v. City of South Bend*, 744 N.E.2d 443, 447-51 (Ind. 2001). Our courts simply do not go casting about for new non-textual “rights” or “core values” to which they can apply the *Price* “material burden” test.

Regardless of any protections found in Section 1 that may apply, the legislature’s ability to act is still quite broad, which makes sense in light of Section 1’s simultaneous provision for the legislature to protect the collective “peace, safety, and well-being.” *See Robert Twomley, The Indiana Bill of Rights*, 20 Ind. L.J. 211,

221 (1945) (“[T]he first part of section 1 is not a potent part of the constitution in the sense that its sections must be interpreted carefully and followed strictly. . . .”).

Accordingly, even if Section 1 protects a right to privacy that in turn encompasses a right to state-recognized same-sex marriage, the Act is valid if it fits within the police power and satisfies the rational basis test governing regulations of Section 1 rights. For the reasons stated in Part I.B., *supra*, the law is reasonable and rational: It promotes procreation and child rearing where both natural parents are present, promotes the traditional family unit, with the natural relationship between parents and child, as the foundational unit of society, and protects the integrity of traditional marriage.

Plaintiffs argue that Section 31-11-1-1 materially impinges upon a core constitutional value and therefore must either impact the core value only slightly or prevent “particularized harm analogous to tortious injury.” (Pl. Br. 32 (citing *Whittington*, 669 N.E.2d at 1370)) Even if Section 1 requires some kind of heightened scrutiny here—and it does not—the Section 9 test from *Whittington* cannot possibly be the proper test. That test may be useful for speech restrictions because free speech either harms individuals in particular ways (such as through libelous statements) or not at all, but it makes no sense when applied to laws that seek a broader social goal. At most, the Court should ask whether the government interests at stake are so important that they override the individual interests at stake. Though this Court need not and should not decide this issue, Section 31-11-1-1 meets this test. The government’s interests in promoting traditional marriage

as the best environment for procreation and child rearing, as the foundational unit of society, and to protect the integrity of marriage are sufficiently compelling that they override Plaintiffs' interests in state-recognized same-sex marriages.

III. Section 12 Applies Only To Tort Remedies, And In Any Event The Act Succeeds Under Section 12 Because It Rationally Relates To Multiple Legitimate Interests

As with Section 1, there is no protection for some undifferentiated right of privacy under Section 12, and certainly no provision of a right to same-sex marriage. In fact, Plaintiffs do not explain how Section 12's protections for person, property and reputation (but not liberty) conceivably cover same-sex marriage, particularly when the text of Section 12 appears to provide, at most, the (highly regulable) right to tort remedies. *See* Ind. Const. art. 1, § 12 (“every person, for injury done to him in his person, property, or reputation, *shall have remedy* by due course of law”) (emphasis added). As our Supreme Court has held, Section 12 requires, “as a threshold matter, that the claimant have a ‘protectable interest’” and that only where legislation “interfer[es] with a right” is it subject to Section 12's mild scrutiny. *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975-76 (Ind. 2000).

Both Section 12's omission of any reference to liberty and its explicit protection of remedies mean something in this regard. They mean, for example, that “[b]y its terms, this provision applies only in the civil context” and not to criminal proceedings. *Id.* at 976. By parity of reasoning they also mean that only limited rights—tort causes of action and remedies to be precise—receive Section 12's limited substantive protection. *See id.* at 979 (“Section 12 requires that

legislation that deprives a person of a complete tort remedy must be a rational means to achieve a legitimate legislative goal”) (emphasis added). Section 12 does not protect the entire universe of human activity, and it certainly does not apply to same-sex marriage. For this reason alone Plaintiffs state no cognizable Section 12 claim.

Even if Section 12’s substantive protections extend beyond tort remedies to general personal conduct, like Section 1 it provides only a test for bare rationality (as Plaintiffs themselves acknowledge): “[T]here is no state constitutional ‘substantive’ due course of law violation [if the] legislation has been held to be . . . rationally related to a legitimate legislative objective.” *McIntosh*, 729 N.E.2d at 976. Again, for the reasons stated above, Section 31-11-1-1 is rationally related to several legitimate and compelling government interests.

CONCLUSION

For the foregoing reasons, the trial court’s dismissal should be affirmed.

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<i>Singer v. Hara</i> , 522 P.2d 1187 (Wash. Ct. App. 1974)	7, 9, 26, 28
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<i>State ex rel. Mavity v. Tyndall</i> , 225 Ind. 360, 74 N.E.2d 914 (1947)	39
<i>State v. Gerhardt</i> , 145 Ind. 439, 44 N.E. 469 (1896)	45
<i>State v. Levitt</i> , 246 Ind. 275, 281 N.E.2d 821 (1965)	47
<i>State v. Lombardo</i> , 738 N.E.2d 653 (Ind. 2000).	5
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<i>State v. Williams</i> , 728 N.E.2d 342 (Ohio 2000)	34
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Other Authorities

Indiana Constitutional Convention (1850) Convention Journal	38
Coolidge, David Orgon, <i>Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy</i> , 12 <i>BYU J. Pub. L.</i> 201 (1998)	28
Dent, George W., Jr., <i>The Defense of Traditional Marriage</i> , 15 <i>J.L. & Pol.</i> 581 (1999).....	8, 25, 27
Ertman, Martha, <i>Marriage As A Trade: Bridging the Private /Private Distinction</i> , 36 <i>Harv. C.R.-C.L. L.Rev.</i> 79 (2001).....	18
Eskridge, William N., Jr., <i>The Case for Same-Sex Marriage</i> , 151 (1996)	25
Gallagher, Maggie, <i>What is Marriage For? The Public Purposes of Marriage Law</i> , 62 <i>La. L. Rev.</i> 773, 781-82 (2002).....	17, 32
Hafen, Bruce C., <i>The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests</i> , 81 <i>Mich. L. Rev.</i> 463 (1983)	21, 22, 23
Holmes, Oliver Wendell, Jr., <i>Natural Law</i> , 32 <i>Harv. L. Rev.</i> 40 (1918)	22
Lubin, Peter and Dwight Duncan, <i>Follow the Footnote or the Advocate as Historian of Same-Sex Marriage</i> , 47 <i>Cath. U. L. Rev.</i> 1271 (1998).....	25
Paulsen, Monrad G., <i>The Persistence of Substantive Due Process in the States</i> , 34 <i>Minn. L. Rev.</i> 91 (1950).....	43
Scruton, Roger, <i>The Moral Birds and Bees: Sex and Marriage, Properly Understood</i> , <i>National Review</i> , September 15, 2003	26
Twomley, Robert, <i>The Indiana Bill of Rights</i> , 20 <i>Ind. L.J.</i> 211 (1945)	50
Wardle, Lynn D., “ <i>Multiply and Replenish</i> ”: <i>Considering Same-Sex Marriage in Light of State Interests in Marital Procreation</i> , 24 <i>Harv. J. L. & Pub. Pol’y</i> 771 (2001);	<i>passim</i>