

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HAROLD DONALD STANDHART, a single man; TOD ALAN
KELTNER, a single man,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the
County of MARICOPA, et al.,

Respondents,

and

STATE OF ARIZONA

Real Party in Interest.

**RESPONSE TO SPECIAL ACTION PETITION
BY INTERVENOR-RESPONDENT
SENATOR MARK ANDERSON**

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1 **ARGUMENT**

2 **I. Petitioners Have Requested Extraordinary Relief But Have Failed**
3 **to Meet Procedural Requirements for Demonstrating Why They**
4 **Should Receive It.**

5 This Court should deny the petition because the Petitioners have failed
6 to meet the standards required to obtain extraordinary relief under the
7 Special Action. This Court has stated that “[a]cceptance of special action
8 jurisdiction is highly discretionary.” *Pompa v. Superior Court*, 187 Ariz.
9 531, 533, 931 P.2d 431, 433 (App. 1997); *see also King v. Superior Court*,
10 138 Ariz. 147, 149, 673 P.2d 787, 789 (1983); *State ex rel. McDougall v.*
11 *Superior Court*, 172 Ariz. 153, 155, 835 P.2d 485, 487 (App. 1992).
12 “Jurisdiction is generally accepted only in those cases in which ‘justice
13 cannot be satisfactorily obtained by other means.’” *Id.* (internal quotation
14 omitted); *see also Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz.
15 159, 162, 933 P.2d 1227, 1230 (App. 1996). One source notes that both
16 divisions of the Arizona Court of Appeals accepted jurisdiction in less than
17 twenty percent of the special action petitions filed in 1999. 1 Ariz. App.
18 Handbook § 7.3.3 (2000).

19 In this case, Petitioners are challenging Arizona marriage laws in
20 reaction to the Maricopa County Clerk’s refusal to issue them a marriage
21 license. Petition at 3. Laying aside the merits of their claims (addressed in

1 Part II, *infra*), Petitioners have failed to meet even basic legal and procedural
2 requirements for bringing a special action. They have further failed to
3 demonstrate why the special action was brought in this Court instead of
4 superior court. Therefore, this Court should decline to exercise jurisdiction
5 and dismiss the Petition.

6 **A. Petitioners have failed to raise any of the only three**
7 **questions allowed in a special action.**

8 Arizona Rules of Procedure for Special Actions, Rule 3 states that:

9 The only questions that may be raised in a special action are:

- 10 (a) Whether the defendant has failed to exercise discretion which
11 he has a duty to exercise; or to perform a duty required by law as to
12 which he has no discretion;
13 (b) Whether the defendant has proceeded or is threatening to
14 proceed without or in excess of jurisdiction or legal authority; or
15 (c) Whether a determination was arbitrary and capricious or an
16 abuse of discretion.

17 In this case, Petitioners have completely omitted a reference to any of
18 these three questions. Their issues presented make no mention of the
19 Clerk's official actions. Petition at 3. This lack of adherence to Rule 3 is
20 problematic, but understandable because Petitioners cannot even raise any of
21 the three questions.

As to the first question, Petitioners cannot show that the Clerk of
Court has failed to perform a duty or exercise discretion as required by law.
The Clerk of Court is authorized by statute to issue marriage licenses.

1 A.R.S. § 25-121. A marriage must have a license to be valid. A.R.S. § 25-
2 111. Valid marriage licenses may be issued only to a couple comprised of
3 one male and one female. A.R.S. § 25-125. Further, “Marriage between
4 persons of the same sex is void and prohibited.” A.R.S. § 25-101(C).

5 Therefore, the Clerk has no discretion to exercise in this matter. By denying
6 Petitioners’ application for a marriage license, he has actually performed –
7 not violated – his duty as required by law.

8 The second and third questions of Rule 3 are resolved on the same
9 grounds as the first: the statutes previously cited completely govern the
10 Clerk’s jurisdiction, authority, determination, and discretion. *See* A.R.S. §§
11 25-121, 25-111, 25-101. The actions of the Clerk in this case are in
12 complete accord with the law and policy of the State of Arizona. There is no
13 conceivable argument that the Clerk’s actions exceeded his statutory
14 authority or were arbitrary and capricious when he complied with the
15 governing statutes. “A plaintiff, in addition to the showing required in all
16 lawsuits that he has standing and that the matter is subject to judicial review,
17 must always carry the burden of persuasion as to discretionary factors.”
18 *Ariz. R.P. Spec. Act. 3 & State Bar Comm. Note.* Petitioners cannot make
19 out even a *prima facie* case worthy of this Court’s jurisdiction and thus have
20 not met their burden under this Rule.

1 **B. Petitioners have failed to demonstrate that they have no**
2 **plain, speedy, or adequate remedy by appeal.**

3 Petitioners are requesting extraordinary relief from this Court, so they
4 must show that a regular legal action, such as a declaratory judgment action
5 brought in superior court, provides them no “plain, speedy, or adequate
6 remedy” to appeal the decision by the Clerk of Court.

7 Arizona has a strong policy against using extraordinary writs as
8 substitutes for appeals. *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 76,
9 796 P.2d 876, 878 (1990). “Except as authorized by statute, the special
10 action shall not be available where there is an equally plain, speedy, and
11 adequate remedy by appeal.” Ariz. R.P. Spec. Act. 1(a); *see, e.g., Sun*
12 *Health Corp. v. Myers*, __ Ariz. __, 70 P.3d 444, 446 (App. 2003); *and see*
13 *State ex rel. McDougall v. Strohson (Cantrell)*, 190 Ariz. 120, 121, 945 P.2d
14 1251, 1252 (1997). Petitioners give lip-service to the standard but then
15 utterly fail to meet it. Merely alleging the absence of an adequate forum (see
16 Petition at 3) is insufficient. “The pleading of the conclusion in so many
17 words that petitioner had no plain, speedy, and adequate remedy at law
18 would not in itself suffice to indicate that the writ should issue.” *Loftus v.*
19 *Russell*, 69 Ariz. 245, 251, 212 P.2d 91, 95 (1949) (analyzing the
20 requirements for an extraordinary writ). In *Loftus*, the Arizona Supreme
21 Court went on to state:

1 [S]ubstance rather than legal forms or expressions furnish the basis for
2 relief . . . If the facts pleaded failed to show a cause cognizable for the
3 application of the extraordinary remedy . . . the writ should not issue
and a want of sufficient facts would not be cured by an allegation of
no adequate remedy at law.

4 *Id.* Petitioners’ pleading is demonstrably defective because it fails to allege
5 or prove that there is no plain, speedy, or adequate remedy by appeal by
6 filing an action for declaratory judgment or some other appropriate legal
7 cause of action.

8 **C. Petitioners have failed to demonstrate why the petition was
9 not brought first in superior court.**

10 Ariz. R.P. Spec. Act. 7(b) requires that the petition “set forth the
11 circumstances which in the opinion of the petitioner[s] render it proper that
12 the petitioner should be brought in the particular appellate court to which it
13 is presented.” Petitioners do not give even a token nod to this requirement.
14 The consequence for this violation of the Rules is dismissal. Ariz. R.P.Spec.
15 Act. 7(b). The Arizona Supreme Court has dismissed special action petitions
16 for this very reason:

17 Adherence to the rules is mandated not only by the constraints on
18 judicial time and resources, but also by the well-reasoned policy of
19 limiting appellate review to final judgments. An exception to this
20 policy, in the form of appellate court special actions, should be
21 reserved for those extraordinary actions necessitating speedy relief.

Gockley v. Arizona Dept. of Corrections, 151 Ariz. 74, 76, 725 P.2d 1108,
1110 (1986) (dismissing special action where petitioner failed to

1 demonstrate why relief was not sought in superior court). Petitioners' mere
2 impatience does not call for an extraordinary action necessitating speedy
3 relief. Even if the Petitioners clearly met the standards for a special action,
4 they offer no sufficient reason why this matter should not be heard at the
5 trial court.

6 Petitioners are asking this Court to short circuit the normal judicial
7 process and issue extraordinary relief that no state court has ever issued in
8 the history of our country: an order compelling issuance of a same-sex
9 marriage license. However, as noted above, the Petition contains multiple
10 defects and should not serve as the basis to overturn the duly-enacted laws of
11 this state. Jurisdiction should be declined and the Petition dismissed.

12 **II. If This Court Chooses to Accept Jurisdiction, Petitioners' Special**
13 **Action Should Be Denied Because It Is Unsupported By Federal**
14 **or State Law.**

15 Petitioners bear the heavy burden of overcoming the strong
16 presumption in favor of the constitutional validity of A.R.S. §§ 25-101 &
17 25-125. *State v. Sanner Contracting Co.*, 109 Ariz. 522, 524, 514 P.2d 443,
18 445 (1973). As demonstrated below, Petitioners cannot meet that burden.
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1 **A. The Supreme Court decisions cited by Petitioners do not**
2 **guarantee a right to same-sex marriage.**

3 **1. *Lawrence v. Texas* does not invalidate Arizona’s**
4 **marriage laws.**

5 Petitioners grossly overstate the significance of the U.S. Supreme
6 Court’s recent decision in *Lawrence v. Texas*, 539 U.S. ____ , 123 S.Ct. 2472
7 (2003). *Lawrence* did not announce a constitutional right for same-sex
8 couples to join in legal marriage, but only found a liberty interest protected
9 by the Due Process Clause for consensual sodomy by adults done in private,
10 thereby invalidating existing state criminal sodomy laws.

11 The majority opinion in *Lawrence* clearly stated that the case “does
12 not involve whether the government must give formal recognition to any
13 relationship that homosexual persons seek to enter.” 123 S.Ct. at 2484.
14 Justice Sandra Day O’Connor reached the same conclusion in her
15 conurrence and the dissenting justices all agreed with this conclusion.
16 Justice O’Connor stated that the decision striking down Texas’ sodomy law
17 did not invalidate marriage laws defining marriage as one man and one
18 woman:

19 That this law as applied to private, consensual conduct is
20 unconstitutional under the Equal Protection Clause does not mean that
21 other laws distinguishing between heterosexuals and homosexuals
 would similarly fail under rational basis review. Texas cannot assert
 any legitimate state interest here, such as national security or
 preserving the traditional institution of marriage. Unlike the moral

1 disapproval of same-sex relations – the asserted state interest in this
2 case – other reasons exist beyond mere moral disapproval of an
excluded group.

3 *Lawrence*, 123 S.Ct. at 2487-88, (O’Connor, J., concurring).

4 Therefore, the Petitioners overstate the holding in *Lawrence* when
5 they claim “the United States Supreme Court succinctly recognized that gay
6 persons have a fundamental privacy right to marry.” Petition at 4.

7 Petitioners even admit that the Supreme Court was not addressing marriage
8 laws when they later admit that “the Court [in *Lawrence*] was not expressly
9 addressing the marriage issue.” Petition at 5.

10 The reasoning of *Lawrence* shows that the Court did not invalidate
11 marriage laws along with criminal sodomy statutes. The Court examined a
12 series of decisions striking down laws criminalizing abortion and use of
13 contraception. 123 S.Ct. at 2477-83. Marriage laws are not criminal laws,
14 but laws defining a social unit of great importance for society as a whole.
15 The Court recognized that one might have a liberty interest to engage in
16 homosexual sodomy, but that such a liberty interest did not compel the
17 government to grant formal legal recognition to couples who engage in that
18 behavior:

19 This, as a general rule, should counsel against attempts by the State,
20 or a court, to define the meaning of the relationship or to set its
21 boundaries absent injury to a person or abuse of an institution the law
protects. It suffices for us to acknowledge that adults may choose to

1 enter upon this relationship in the confines of their homes and their
2 own private lives and still retain their dignity as free persons.

3 *Lawrence*, 123 S.Ct. at 2478.

4 The Petitioners wrongly attempt to inflate the ruling in *Lawrence* to
5 extend to same-sex marriage by quoting this portion of *Lawrence*:

6 The *Casey* decision again confirmed that our laws and tradition afford
7 constitutional protection to personal decisions relating to marriage,
8 procreation, contraception, family relationships, child rearing, and
9 education. . . . Persons in a homosexual relationship may seek
10 autonomy for these purposes, just as heterosexual persons do.

11 *Lawrence*, 123 S.Ct. at 2481-82.

12 Petitioners again overstate what the Supreme Court said in this
13 passage from *Lawrence* which explains the *Casey* decision. Neither of those
14 cases stands for unlimited rights to personal autonomy free of all state
15 regulation and oversight. *Lawrence* distinguishes itself from other cases,
16 some of them involving private sex between consenting adults and legal
17 recognition of relationships, such as the states give in their marriage laws:

18 The present case does not involve minors. It does not involve persons
19 who might be injured or coerced or who are situated in relationships
20 where consent might not be easily refused. It does not involve public
21 conduct or prostitution. **It does not involve whether the
government must give formal recognition to any relationship that
homosexual persons seek to enter.**

Lawrence, 123 S.Ct. at 2484 (emphasis added).

1 The Supreme Court has repeatedly stated that traditional marriage,
2 that is, marriage defined as one man and one woman, is fundamental and
3 foundational for sustaining our Republic. The Court summarized its
4 holdings in *Zablocki v. Redhail*, 434 U.S. 374 (1978):

5 [D]ecisions of this Court confirm that the right to marry is of
6 fundamental importance for all individuals. Long ago, in *Maynard v.*
7 *Hill*, 125 U.S. 190 (1888), the Court characterized marriage as “the
8 most important relation in life,” *id.*, at 205, and as “the foundation of
9 the family and of society, without which there would be neither
10 civilization nor progress,” *id.*, at 211. In *Meyer v. Nebraska*, 262 U.S.
11 390 (1923), the Court recognized that the right “to marry, establish a
12 home and bring up children” is a central part of the liberty protected
13 by the Due Process Clause, *id.*, at 399, and in *Skinner v. Oklahoma ex*
14 *rel. Williamson, supra*, 316 U.S. 535 (1942), marriage was described
15 as “fundamental to the very existence and survival of the race,” 316
16 U.S. at 541.

17 More recent decisions have established that the right to marry is part
18 of the fundamental “right of privacy” implicit in the Fourteenth
19 Amendment’s Due Process Clause. In *Griswold v. Connecticut*, 381
20 U.S. 479 (1965), the Court observed:

21 “We deal with a right of privacy older than the Bill of Rights--
older than our political parties, older than our school system.
Marriage is a coming together for better or for worse, hopefully
enduring, and intimate to the degree of being sacred. It is an
association that promotes a way of life, not causes; a harmony
in living, not political faiths; a bilateral loyalty, not commercial
or social projects. Yet it is an association for as noble a purpose
as any involved in our prior decisions.” *Id.*, at 486.

Zablocki, 434 U.S. at 384 (parallel citations omitted).

This Court has also discussed the fundamental importance of marriage
to American society:

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Nevertheless, the state is also vitally concerned with the establishment of marriages because marriage is a relationship in which “the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.” *Nelson*, 604 F.Supp. at 593 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

Moran v. Moran, 188 Ariz. 139, 144; 933 P.2d 1207, 1212 (App. 1996).

The definition of marriage in American culture, which is “older than the Bill of Rights,” has always been one man and one woman and has never included same-sex couples. In the late 1800s, the Supreme Court rejected challenges to the traditional legal definition of marriage by Mormon polygamists claiming an alleged constitutional right to engage in plural marriage. For example, in *Murphy v. Ramsey*, 114 U.S. 15 (1885), the U.S. Supreme Court stated:

[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy, 114 U.S. at 45.

The cases in which the Supreme Court addressed the “right to marry” are in cases where the government restricted peoples’ access to marriage traditionally defined. The Court has never understood the “right to marry”

1 to empower the participants to redefine marriage any way they want and
2 then receive governmental recognition of that relationship.

3 For example, in *Zablocki*, the Supreme Court declared
4 unconstitutional a Wisconsin statute that required people in arrears for
5 paying child support to seek court permission to marry. In *Turner v. Safley*,
6 482 U.S. 78 (1987), the Supreme Court struck down Missouri’s prison
7 regulations that prohibited prisoners from getting married unless the warden
8 found a compelling reason to let a prisoner marry. The Court has rejected
9 attempts, like the polygamy cases, to redefine marriage.

10 Therefore, the definition of marriage recognized by the Supreme
11 Court for at least over a century has been one man and one woman. The
12 fundamental right to marry recognized by the Court has been a right against
13 governmental attempts to limit people’s access to marriage traditionally
14 defined. The Supreme Court has never recognized a “right to marry” that
15 allows the participants to change the definition of marriage, as the
16 Petitioners seek to do here. This Court should dismiss the Petitioners’
17 Special Action and uphold the constitutionality of Arizona’s marriage
18 statutes.

1 **2. *Romer v. Evans* does not invalidate Arizona’s marriage**
2 **laws.**

3 Petitioners wrongly argue that Arizona’s marriage laws violate the
4 Supreme Court’s ruling in *Romer v. Evans*, 517 U.S. 620 (1996). They claim
5 that the Arizona Legislature’s decision to retain the near universal definition
6 of marriage is based solely upon class-based “animus” toward homosexuals,
7 rather than any legitimate state interest. Petition at 7. This argument
8 misunderstands the holding in *Romer*, and disregards the reasonableness of
9 the rational consensus on the legal definition of marriage.

10 The Supreme Court’s opinion in *Romer* was a very narrow one that
11 struck down a Colorado state constitutional amendment that prohibited all
12 levels of government from protecting a particular class of citizens against
13 any kind of discrimination. The constitutional flaw in Colorado’s
14 Amendment 2 was its extreme overbreadth, not the identity of the group it
15 adversely affected. *Romer* stated that the extremely broad legal disabilities
16 imposed on homosexuals by Amendment 2 “outrun and belie any legitimate
17 justifications that may be claimed for it.” *Romer*, 517 U.S. at 635.

18 The law struck down in *Romer* was a constitutional amendment that
19 prohibited all levels of state and local government from enacting any law or
20 policy providing homosexuals any “protected status or claim of
21 discrimination.” *Romer*, 517 U.S. at 624. The extreme breadth of this

1 provision made it possible to imagine instances in which Amendment 2
2 would bar policies designed to protect homosexuals from harms that
3 everyone would acknowledge to be wrongful. During oral argument, various
4 Justices expressed concern that under Amendment 2 homosexuals would be
5 helpless to protect themselves against exclusion from public libraries, police
6 protection, and life-saving treatment at public hospitals. Justice Kennedy's
7 majority opinion in *Romer* concluded that the "unprecedented" evil of
8 Amendment 2 was that it identified persons by "a single trait" and then
9 "denie[d] them protection across the board." *Romer*, 517 U.S. at 633. The
10 Amendment imposed "a broad and undifferentiated disability on a single
11 named group" by denying "specific protection" against "exclusion from an
12 almost limitless number of transactions and endeavors that constitute
13 ordinary civic life in a free society." *Romer*, 517 U.S. at 631-32.
14 Homosexuals were placed completely outside the protection of the law and
15 could "obtain specific protection against discrimination only by enlisting the
16 citizenry of Colorado." *Romer*, 517 U.S. at 631.

17 *Romer* is not a case in which the Court inferred an invidious intent
18 based upon the identity of the disadvantaged group. Rather, the Court drew
19 an inference of animus from the unlimited breadth of the disability created
20 by Amendment 2 and from the fact that no legitimate state interest was even
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1 remotely related to the infinitely broad sweep of the law’s restrictions. The
2 leading federal cases construing *Romer* agree that the decision “hinged upon
3 the wide breadth of Colorado Amendment 2.” *Equality Foundation v. City of*
4 *Cincinnati*, 128 F. 3d 289, 299 (6th Cir. 1997), *cert. denied* 525 U.S. 943
5 (1998); *see also Shahar v. Bowers*, 114 F. 3d 1097, 1110 (11th Cir. 1997),
6 *cert. denied* 522 U.S. 1089 (1998) (referring to *Romer* as involving “an
7 across-the-board denial of legal protection to a group because of their
8 condition”).

9 Arizona’s marriage laws are clearly valid under *Romer*, because they
10 are not status-based laws that fence out a particular group from protection
11 against any and all discriminatory wrongs. As the Court explicitly stated in
12 *Romer*, ordinary laws will be “sustained” so long as they are “narrow
13 enough in scope and grounded in a sufficient factual context for us to
14 ascertain some relation between the classification and the purpose it
15 serve[s].” 517 U.S. at 632-33. Arizona’s marriage laws, define marriage in
16 the same way that the original colonies and all fifty states have consistently
17 done as one man and one woman. These laws are reasonable and narrowly-
18 drawn laws that do not violate the constitutional norms spelled out by the
19 Supreme Court in *Romer*. This Court should uphold the constitutionality of
20 Arizona’s marriage laws and dismiss the Petitioners’ Special Action.

1 **3. *Loving v. Virginia* does not invalidate Arizona’s marriage**
2 **laws.**

3 The Petitioners also misapply the Supreme Court’s decision striking
4 down Virginia’s anti-miscegenation statute in *Loving v. Virginia*, 388 U.S. 1
5 (1967), to claim that laws defining marriage as one man and one woman are
6 as unconstitutional as laws banning interracial marriages. Petition at 8.

7 *Loving* does not apply to this case because the racial classifications in that
8 case clearly violated the Fourteenth Amendment and had nothing to do with
9 the essential and traditional definition of marriage as consisting of one man
10 and one woman. Race, not the definition of marriage, was the issue in
11 *Loving*.

12 Justice Scalia has pointed out that the overt racial classifications in the
13 Virginia law at issue in *Loving* violated the Fourteenth Amendment:

14 In *Loving*, however, we correctly applied heightened scrutiny, rather
15 than the usual rational-basis review, because the Virginia statute was
16 “designed to maintain White Supremacy.” *Id.*, at 6, 11. A racially
17 discriminatory purpose is always sufficient to subject a law to strict
 scrutiny, even a facially neutral law that makes no mention of race.
 See Washington v. Davis, 426 U.S. 229, 241-242 (1976). No purpose
 to discriminate against men or women as a class can be gleaned from
 the Texas law, so rational-basis review applies.

18 *Lawrence*, 123 S.Ct at 2495 (parallel citations omitted); *see also Singer v.*
19 *Hara*, 522 P.2d 1187, 1190-92 (Wash. Ct. App. 1974) (upholding statutes
20 restricting marriage to opposite-sex couples and finding *Loving*

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1 inapplicable); *and see* David Orgon Coolidge, *Playing the Loving Card:*
2 *Same-sex Marriage and the Politics of Analogy*, 12 *BYU J. PUB. L.* 201
3 (1998).

4 In *Loving*, the Court found that “[t]here is patently no legitimate
5 overriding purpose independent of invidious racial discrimination which
6 justifies this classification.” 388 U.S. at 11. Noting that “Virginia prohibits
7 only interracial marriages involving white persons,” the Court determined
8 that “the racial classifications must stand on their own justification, as
9 measures designed to maintain White Supremacy.” *Id.* That “justification,”
10 the Court concluded, was patently inadequate: “We have consistently denied
11 the constitutionality of measures which restrict the rights of citizens on
12 account of race. There can be no doubt that restricting the freedom to marry
13 solely because of racial classifications violates the central meaning of the
14 Equal Protection Clause.” *Id.* at 11-12.

15 Unlike the history of the anti-miscegenation statutes at issue in
16 *Loving*, which clearly stigmatized blacks as inferior to whites, Petitioners do
17 not identify anything in the history of the laws limiting marriage to opposite-
18 sex couples suggesting that they were intended to segregate men and
19 women, or treat one sex as inferior to the other. Simply put, there is no
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1 stigma for anyone by defining marriage as one man and one woman, as there
2 was when Virginia banned interracial marriages.

3 The Virginia statutes challenged in *Loving* were not even consistent
4 because they allowed some interracial marriages, but banned only marriages
5 between “white persons” and “non-white persons.” *Loving*, 388 U.S. at 11 &
6 n.11. Interracial marriages between “non-whites,” *e.g.*, blacks and Asians,
7 were not banned, nor, for that matter, were marriages between “white
8 persons” and “American Indians.” Thus, the “symmetry” of treatment in the
9 Virginia anti-miscegenation statutes struck down in *Loving*, which
10 Petitioners argue is analogous to the uniform treatment of same-sex
11 marriages in Arizona (no such marriages are allowed), is more illusory than
12 real. The statutory treatment of interracial marriages in *Loving* was actually
13 asymmetrical and therefore, *Loving* does not parallel the situation here.

14 Laws against same-sex marriage, on the other hand, are supported by
15 a multitude of reasons. “Conventional marriage laws reasonably advance
16 many legitimate governmental interests,” among which may be included
17 safeguarding public morality, encouraging childbirth within marriage,
18 promoting the undeniable advantages of dual-gender parenting, not placing
19 society’s “stamp of approval” on homosexual relationships, and avoiding a
20 slippery slope of intended and unintended consequences of recognizing
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1 same-sex marriages. Richard F. Duncan, *The Narrow and Shallow Bite of*
2 *Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial)*
3 *Response to Professor Koppelman*, 6 Wm. & Mary Bill Rts. J. 147, 158-165
4 (1997).

5 Therefore, *Loving v. Virginia* does not extend to invalidate the laws of
6 the fifty states limiting legal recognition of marriage to opposite-sex couples
7 who meet the other qualifications. This Court should dismiss the Petitioners'
8 Special Action and reject all of the state and federal constitutional challenges
9 to Arizona's marriage statutes.

10 **B. The Due Process Clause of the Arizona Constitution does**
11 **not guarantee a right to same-sex marriage.**

12 The State of Arizona has not violated the due process rights of the
13 Petitioners because there is no "due process right" to same-sex marriage
14 under Arizona Constitution, Art. II, § 4. The Arizona Supreme Court has
15 interpreted Art. II, § 4 as follows:

16 Due process, when applied to substantive rights, is interpreted to mean
17 that the state is without right to deprive a person of life, liberty or
18 property by an act that has no reasonable relation to any proper
19 governmental purpose, or which is so far beyond the necessity of the
20 case as to be an arbitrary exercise of governmental powers.

21 *Valley Nat'l Bank of Phoenix v. Glover*, 62 Ariz. 538, 553, 159 P.2d 292,
298-99 (1945). Petitioners bear the burden of proving a substantive due
process right to same-sex marriage under the Arizona Constitution. Aside

1 from a conclusory allegation (Petition at 6), they have not even attempted to
2 do so.

3 Same-sex marriage is not a fundamental right under either the federal
4 or state constitutions because same-sex marriage has no historic roots in
5 Arizona or in the United States. A fundamental right derived from the
6 Arizona Constitution must be a right that is “deeply rooted in this Nation’s
7 history and tradition or is so weighty as to be implicit in the concept of
8 ordered liberty such that neither liberty nor justice would exist if it were
9 sacrificed.” *State v. Watson*, 198 Ariz. 48, 51-52, 6 P.3d 752, 755-56 (App.
10 2000), (and cases cited).

11 The U.S. Constitution employs a similar test. A “fundamental liberty
12 interest” under the Due Process Clause must be “deeply rooted in this
13 Nation’s history and tradition,” *Washington v. Glucksburg*, 521 U.S. 702,
14 721 (1997), and must also be “implicit in the concept of ordered liberty,” so
15 that “neither liberty nor justice would exist if [it] were sacrificed.” *Id.*

16 Same-sex marriage is not a fundamental right, because no court in this
17 country has found the existence of a right for same-sex couples to marry –
18 certainly not Arizona’s courts. Arizona courts have long held that a valid
19 marriage is limited to one man and one woman. *Forsythe v. Paschal*, 34
20 Ariz. 380, 271 P. 865 (1928). In *Horton v. Horton*, the Supreme Court of
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1 Arizona stated, “The Legislature undoubtedly had the power to enact what
2 marriages shall be void in this state . . .” 22 Ariz. 490, 495; 198 P. 1105,
3 1107 (Ariz. 1921).

4 Arizona courts in other instances have repeatedly recognized that the
5 “freedom to marry” may be limited under certain circumstances without
6 violating a person’s due process rights. *Graville v. Dodge*, 195 Ariz. 119,
7 124-25, 985 P.2d 604, 609-10 (App. 1999); *Moran*, 188 Ariz. at 144, 933
8 P.2d at 1212. The *Graville* Court said the following in reference to
9 *Zablocki*: “[t]here, the Court stressed that every state regulation that related
10 to the right to marry need not be subjected to strict scrutiny.” *Id.* The *Moran*
11 Court quoted *Zablocki* as affirming that ““reasonable regulations that do not
12 significantly interfere with decisions to enter into the marital relationship
13 may legitimately be imposed.”” 188 Ariz. at 144, 933 P.2d at 1212.

14 Therefore, Petitioners have no basis for claiming same-sex marriage
15 as a fundamental right under the Arizona Constitution.

16 **C. There is no “fundamental privacy right” in the Arizona**
17 **Constitution to marry whomever one chooses.**

18 The State of Arizona has not violated Petitioners’ privacy rights by
19 limiting the scope of marriage to opposite-sex couples. Arizona Constitution,
20 Art. II, § 8 does contain an express “right to privacy,” but this right is not
21 unlimited. *See State v. Emond*, 163 Ariz. 138, 142, 786 P.2d 989, 993 (App.

1 1989) (“The right of privacy is not unqualified and absolute and must be
2 considered in the light of important state interests.”). Specifically, Art. II, § 8
3 provides that “[n]o person shall be disturbed in his private affairs, or his
4 home invaded, without authority of law.” The “chief evil” against which the
5 right to privacy is directed is unwarranted government intrusion into private
6 homes. *State v. Martin*, 139 Ariz. 466, 473, 679 P.2d 489, 496 (1984). The
7 right to privacy in Arizona has been extended in limited circumstances, but
8 only to fundamental rights such as: “activities relating to marriage,
9 procreation, contraception, family relationships, child rearing, and
10 education.” *State v. Murphy*, 117 Ariz. 57, 60, 570 P.2d 1070, 1073 (1977).
11 It is important to note that the *Murphy* court did not extend the right to
12 privacy to the definitions relating to marriage, etc., as the Petitioners would
13 have this Court do for the first time. The Arizona Supreme Court has
14 correctly said that the right to privacy “is not some broad, unrestricted right
15 to be left alone. Rather, it is a more particularized concept of privacy. . . .”
16 *Watson*, 198 Ariz. at 52, 6 P.3d at 756. Indeed, the right to privacy has been
17 almost exclusively applied as a shield against the state’s police powers. *See*,
18 *e.g.*, *State v. Whitaker*, 164 Ariz. 359, 793 P.2d 116 (1990) (upholding an
19 individual’s right to expose himself within his home). Here, there is no
20 police power involved because the state, by defining marriage as between
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1 one man and one woman, is not using its power of the sword to prevent
2 individuals from engaging in particular acts. Indeed, the state is not even
3 interfering with the decisions these individuals have decided to undertake
4 regarding their living arrangements, commitments to each other, etc. Rather,
5 the state is simply refusing to recognize any concept of marriage except as
6 between one man and one woman. Petitioners cannot demonstrate the
7 existence of a fundamental right of privacy that covers same-sex marriage,
8 and therefore the statute should receive rational basis review.

9 Furthermore, marriage is a public and not simply a private institution.
10 *Moran*, 188 Ariz. at 144, 933 P.2d at 1212. Therefore, a right to privacy
11 must be weighed in the context of the public’s interest in defining marriage
12 and perpetuating the desired civil order of the public. The state may define
13 marriage and family without necessarily violating a person’s right to
14 privacy. In *Behavioral Health Agency of Cent. Ariz. v. City of Casa Grande*,
15 this Court specifically affirmed the formulation of “family” developed in
16 *Moore v. City of East Cleveland*, and summarized the *Moore* holding as
17 follows: “[t]he *Moore* opinion held that the constitution’s protection of the
18 sanctity of the family was deeply rooted in the nation’s history and to its
19 tradition.” 147 Ariz. 126, 131, 708 P.2d 1317, 1322 (Ariz. App. 1985).

1 Petitioners have failed to demonstrate there is a fundamental privacy right at
2 stake, therefore the challenged statutes should receive rational basis review.

3 **D. The Arizona Constitution’s “Equal Privileges And**
4 **Immunities Clause” Does Not Create A Right To Same-Sex**
5 **Marriage Because The Federal Constitution Does Not**
6 **Create Such a Right.**

7 Arizona Constitution Art. II § 13 (Equal Privileges and Immunities) is
8 interpreted in the same way as its federal counterpart. *See, e.g., Big D Const.*
9 *Corp. v. Court of Appeals*, 163 Ariz. 560, 565-66, 789 P.2d 1061, 1066-67
10 (1990); *Valley Nat’l Bank of Phoenix*, 62 Ariz. at 554, 159 P.2d at 299; and
11 *see Phoenix Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 77, 927 P.2d 340,
12 343 (App. 1996). Therefore, the federal Equal Protection Clause and the
13 state Equal Privileges and Immunities Clause require statutes making
14 classifications to classify reasonably and afford equal treatment to persons
15 similarly situated. *Salt River Pima-Maricopa Indian Cmty. Sch. v. State*, 200
16 Ariz. 108, 111, 23 P.3d 103, 106 (App. 2001). This Court has also stated
17 that the Clauses “do not prohibit all discrimination or inequality of treatment
18 but only require that all in a given class be treated equally and that
19 classification itself be reasonable and not arbitrary or capricious. *Pastore v.*
20 *Arizona Dept. of Economic Sec.*, 128 Ariz. 337, 340-41, 625 P.2d 926, 929-
21 30 (App. 1981). Neither do the Clauses require that the law treat those things
that are different in fact or opinion as though they were the same or

1 equivalent. *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *see also Salt River*
2 *Pima-Maricopa Indian Cmty. Sch.*, 200 Ariz. at 111, 23 P.3d at 106.

3 Petitioners would have this case decided under the “strict scrutiny”
4 standard. Petition at 6. However, strict scrutiny will not apply when the
5 statute does not categorize based on a suspect classification or threaten a
6 fundamental right – the statute will be upheld “if it has any conceivable
7 rational basis to further a legitimate governmental interest.” *Phoenix*
8 *Newspapers, Inc.*, 187 Ariz. at 78, 927 P.2d at 344. Such a legitimate state
9 interest is derived from any connection between the statutes and a purpose to
10 protect the “public health, safety, morals and public welfare.” *State v. Also*,
11 11 Ariz. App. 227, 229, 463 P.2d 122, 124 (App. 1969). Petitioners are not
12 members of a suspect class, nor do the statutes burden a fundamental right,
13 as explained earlier in this brief.

14 1. **Same-sex couples are not a suspect class.**

15 The statutes at issue allow a male and a female to get married. A.R.S.
16 §§ 25-101 & 25-125. These statutes do not make distinctions based on any
17 suspect class, such as race or religion. These statutes do not even make
18 distinctions based on homosexuality. Even if they did, courts have uniformly
19 rejected the notion that homosexuality is a suspect class for equal protection
20 analysis.

1 In *Dean v. District of Columbia*, the D.C. Court of Appeals held that
2 “homosexuals comprise neither a ‘suspect’ class mandating ‘strict scrutiny’
3 of the statutory bar against same-sex marriage, nor a ‘quasi-suspect’ class
4 requiring ‘intermediate scrutiny’ of the marriage barrier.” 653 A.2d 307, 333
5 (D.C. Cir. 1995). Federal courts of appeals have unanimously found that
6 homosexuality is not a suspect class. *See, e.g., Thomasson v. Perry*, 80 F.3d
7 915, 928 (4th Cir. 1996); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985);
8 *Equality Foundation*, 128 F.3d at 292-293 (holding that the city’s charter
9 amendment concerning sexual orientation was subject to review ‘under the
10 most common and least rigorous equal protection norm . . . the ‘rational
11 relationship’ test”); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir.
12 1989), *cert. denied*, 494 U.S. 1004 (1990) (holding that a “deferential
13 standard of review” was applicable to military regulation regarding
14 homosexuals); *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996), *cert.*
15 *denied sub nom. Richenberg v. Cohen*, 522 U.S. 807 (1997) (rejecting that
16 homosexuals are a “suspect classification” requiring strict scrutiny); *Holmes*
17 *v. California Army National Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997),
18 *cert. denied* 525 U.S. 1067 (1999) (stating that “homosexuals do not
19 constitute a suspect or quasi suspect class” and military don’t ask don’t tell
20 policy is only subject to “rational basis review”); *Rich v. Secretary of the*
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1 *Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (“classification based on one’s
2 choice of sexual partners is not suspect”); *Steffan v. Perry*, 41 F.3d 677, 684
3 n.3 (D.C. Cir. 1994) (holding that a group defined by homosexual conduct
4 “cannot constitute a suspect class”); *Woodward v. United States*, 871 F. 2d
5 1068, 1076 (Fed. Cir. 1989), *cert. denied* 494 U.S. 1003 (1990) (holding that
6 homosexuals are not in a “class to which heightened scrutiny must be
7 afforded”).

8 Clearly, Petitioners are not members of a suspect class entitled to
9 strict scrutiny.

10 **2. The Arizona marriage laws do not burden a fundamental**
11 **right of Petitioners.**

12 Neither do the statutes at issue burden a fundamental right under the
13 state constitution, as discussed above in sections II-A and II-B. The right to
14 marry under the state Constitution cannot allow individuals to redefine
15 marriage, because the Arizona Constitution contains an explicit ban on
16 polygamy.

17 Article XX, § 2 of the Arizona Constitution says, “Polygamous or
18 plural marriages, or polygamous cohabitation, are forever prohibited within
19 this State.” Petitioners’ arguments based on various state constitutional
20 provisions cannot be correct because they apply equally to consenting adults
21 living in polygamous relationships who seek legal recognition – marriage –

1 of their relationship. Therefore, the Petitioners’ interpretation of the state
2 constitutional provisions must be wrong, because they would permit
3 polygamy, which the state constitution specifically bans.

4 Petitioners’ arguments also conflict with what this Court has said
5 about polygamous marriage, that the constitutional policy explicitly
6 restricting marriage and excluding certain types of marriage “remains the
7 will of the people of this state.” *Barlow v. Blackburn*, 165 Ariz. 351, 355,
8 798 P.2d 1360, 1364 (App. 1990). In *Barlow*, the court recognized that
9 Arizona’s regulation and restriction of marriage supercedes mere statutory
10 enactment because it is constitutional in nature and thus “[t]he sovereign
11 people, in whom is vested all governmental power, have spoken in their
12 organic law, and their mandate, so expressed, must be enforced by the courts
13” *Barlow*, 165 Ariz. at 354, 798 P.2d at 1363 (quoting the Arizona
14 Supreme Court in *State v. Osborne*, 14 Ariz. 185, 191-192, 125 P. 884, 887
15 (1912)) (“[t]he constitution itself, however, is the expression of the will of
16 the people”). *See also Consumers Intern., Inc. v. Sysco Corp.*, 191 Ariz. 32,
17 37, 951 P.2d 897, 902 (App. 1997) (the state constitution “embod[ies] the
18 public conscience of the people of this state”). Moreover, the Arizona
19 Supreme Court has gone beyond the restrictions and regulations willed by
20 the people through their Constitution, and has said that marriage can exist
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1 only between one man and one woman. Distinguishing marriage from mere
2 ordinary civil contracts that “may exist between two or more of either or
3 both sexes for any stipulated time,” the Supreme Court said that marriage
4 “can only exist where one man and one woman are legally united for life.”
5 *Forsythe*, 34 Ariz. at 384, 271 P. at 866 (emphasis added). Therefore, there
6 is no constitutional right to same-sex or polygamous marriage.

7 Additionally, Petitioners incorrectly rely on *Simat Corp. v. Arizona*
8 *Health Care Cost Containment System*, 203 Ariz. 454, 56 P.3d 28 (2002), in
9 support of their assertion that they are being unequally treated. Petition at 7.
10 *Simat* involved a restriction on the “fundamental right to abortion” and
11 therefore the court applied strict scrutiny. 203 Ariz. at 459, 56 P.3d at 33.
12 No court has recognized an equivalent fundamental right to same-sex
13 marriage.

14 **E. The Classification Is Rationally Related To A Legitimate**
15 **State Interest.**

16 A.R.S. §§ 25-101(C) & 25-125 (A) should receive rational basis
17 review because no fundamental right or suspect class is implicated. *Watson*,
18 198 Ariz. at 51, 6 P.3d at 755.¹ Under this test, the Petitioners must prove

19 ¹ Even if same-sex marriage were to be found by this Court to be a
20 fundamental right, a rational basis test should still be employed. Not even
21 every “state regulation that impinge[s] on a fundamental right” is subject to
strict scrutiny. *Graville*, 195 Ariz. at 124, 985 P.2d at 609 (App. 1999)

1 that such legislation employs unreasonable, arbitrary, or capricious means to
2 achieve its purported goals and lacks any substantial relation to the goals
3 sought. *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 67 Ariz. 20, 28, 189
4 P.2d 912, 917 (1948); *and see Watson*, 198 Ariz. at 51, 6 P.3d at 755.

5 Moreover, “the Legislature is primarily the judge of the necessity of such an
6 enactment, [and] every possible presumption is in favor of its validity.” *Am.*
7 *Fed'n of Labor*, 67 Ariz. at 28, 189 P.2d at 917. Thus, “each act of
8 legislation has the support of the presumption that it is an exercise in the
9 interest of the public,” and “[t]he burden is on him who attacks the
10 legislation.” *Id.* at 30, 189 P.2d at 918; *see also Baseline Liquors v. Circle K*
11 *Corp.*, 129 Ariz. 215, 218, 630 P.2d 38, 41 (App. 1981).

12 The state interests listed below would also satisfy the compelling state
13 interest standard, because support and protection of marriage is a compelling
14 governmental interest. However, the Arizona marriage statutes should be
15 reviewed by rational basis review because the laws do not use a suspect class
16 or infringe on a fundamental right.

17 Here, the state has a legitimate interest to regulate marriage in a way
18 that maximizes its beneficial effects for the people. Arizona law makes it

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(quoting *City of Akron v. Akron Ctr. For Reproductive Health, Inc.*, 462 U.S.
416, 462-63 (1983) (O'Connor, J., dissenting)).

1 clear it is within the duty and purview of the state to issue marriage licenses
2 in accordance with the dictates of the Legislature. In addition, the
3 Legislature acted reasonably because there is a clear interest in defining and
4 limiting marriage in accordance with tradition, morality, and perpetuation of
5 the civil order. As this Court has noted, “[m]arriage and procreation are
6 fundamental to the very existence and survival of the race.” *Soos v. Superior*
7 *Court for the County of Maricopa*, 182 Ariz. 470, 474, 897 P.2d 1356, 1360
8 (App. 1994) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct.
9 1110, 1113 (1942)). Therefore, the statutes meet the rational basis test and
10 should be upheld.

11 In Arizona, the Legislature states the interest in regulating and
12 defining marriage. A.R.S. § 25-103 states: “It is declared that the public
13 policy of this state and the general purposes of this title are: 1. To promote
14 strong families; 2. To promote strong family values.” To strike down the
15 challenged statutes, Petitioners would have to convince this Court beyond all
16 reasonable doubt that there is no connection between the promotion of
17 strong families and strong family values and the statute prohibiting the
18 recognition of same-sex marriages. *See US West Communications, Inc. v.*
19 *City of Tucson*, 198 Ariz. 515, 525-26, 11 P.3d 1054, 1064-65 (App. 2000).

1 The State’s classification between same-sex and opposite-sex couples
2 is valid under this standard for at least three additional reasons.

3 **1. Promoting procreation and child rearing**

4 The government’s interest in regulating marriage is largely based on
5 the idea that the purpose of marriage is procreation and the rearing of
6 children by a mother and a father. Scholars recognize that “[t]raditional
7 male-female marriage is the institution that has functioned most consistently
8 to facilitate, support, and protect responsible human procreation.” Lynn D.
9 Wardle, *“Multiply and Replenish”: Considering Same-Sex Marriage in*
10 *Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol’y
11 771, 784 (2001); George W. Dent, Jr., *The Defense of Traditional Marriage*,
12 15 J.L. & Pol. 581, 593 (1999) (“The primary social function of marriage is
13 rearing children.”). It follows that government may therefore confer
14 recognition on opposite-sex marriages, which may produce children, but not
15 confer recognition on same-sex marriages, which cannot, on their own,
16 produce children. Wardle, *“Multiply and Replenish,” supra*, at 784
17 (“Society has compelling interests in protecting the social institution that has
18 best furthered social interests in procreation, in maintaining the clear social
19 identity of that institution, and in preserving the linkage that institution
20 forges among sex, procreation, and child rearing.”) Traditional marriage and
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1 procreation of natural offspring supplies an environment for raising children
2 that same-sex marriage cannot match: “The natural commitments, restraints,
3 complementarity, and shared responsibilities of traditional marriage create
4 the best environment into which offspring may be born.” *Id.* at 789.

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

12 This is true even though married couples are not required to become
13 parents and even though some couples are incapable of becoming
14 parents and even though not all couples who produce children are
15 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.

16 *Id.*

17 Numerous courts have recognized that the state purpose of furthering
18 procreation is at least rational, if not compelling. *Adams v. Howerton*, 486
19 F.Supp. 1119, 1124 (C.D. Cal. 1980), *aff’d* 673 F.2d 1036 (9th Cir.) (“state
20 has a compelling interest in encouraging and fostering procreation of the
21 race”), *cert. denied* 458 U.S. 1111 (1982); *Singer*, 522 P.2d at 1197

1 (characterizing this interest as “of basic importance in our society”); *Dean*,
2 653 A.2d at 337 (D.C. 1995) (finding that this “central purpose . . . provides
3 the kind of rational basis . . . permitting limitation of marriage to
4 heterosexual couples”).

5 Both Arizona law and federal law presume a biological relationship
6 where a child is born to married parents. A.R.S. § 25-814(A)(1); 42 U.S.C. §
7 666(a)(5)(G). This presumption is justified insofar as marriage carries with
8 it a tradition and expectation of monogamy and fidelity. While children may
9 occasionally result from extramarital liaisons or donor-enabled assisted
10 reproductive technology, the vast majority of children born within marriage
11 are biologically related to their mother’s husband. Though admittedly less
12 than perfect, marriage is a reliable indicator of the biological relationship
13 between parent and child.

14 Not only is marriage an important indicator of the biological
15 connection between parent and child, but to fulfill this purpose marriage is
16 properly limited to the union of one man and one woman. Every child has
17 exactly one mother and one father. Thus, marriage recognizes and protects
18 the one male-one female union—the only union that can produce children.
19 Extending marriage to same-sex couples would do nothing to further this
20 important governmental objective, in that children of same-sex couples are
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1 necessarily unrelated to at least one of their parents. This policy does,
2 however, support a marriage law which is not only limited to male-female
3 couples, but which also extends the plenary benefits of marriage to couples
4 willing to undertake a legal and financial commitment to each other and to
5 their children.

6 More than any other relationship, marriage provides children with the
7 greatest likelihood of being raised in a stable home by their biological
8 parents. At minimum, marriage provides a means by which a child's father
9 can be legally identified and held accountable for the care and protection of
10 his child.

11 Considering marriage's central purpose of furthering procreation and
12 the rearing of children by a father and a mother, it is perfectly rational for
13 Arizona to permit marriage between opposite-sex couples, who are at least
14 theoretically capable of procreation on their own, but not between same-sex
15 couples, who are not. As noted above, recognition of same-sex marriage
16 would do little to further this governmental objective. To the contrary, every
17 child raised by a same-sex couple has been deprived of the opportunity to
18 develop "real, everyday ties" with at least one of his or her biological
19 parents. Thus, same-sex marriages "generally do not advance the social
20 interest in responsible procreation; rather, they impair the integrity of the
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1 institution that has best been able to further the social interests in responsible
2 procreation.” Wardle, “*Multiply and Replenish*,” *supra*, at 797.

3 **2. Promoting sound political ordering and fostering a free**
4 **society.**

5 Another governmental interest that is yet even more fundamental—
6 and compelling—also underlies the restriction against same-sex marriages:
7 the protection and promotion of the traditional family, headed by a husband
8 and wife, as a foundational political unit in a free and democratic society.
9 State government regulation of marriage does not simply arise from an
10 interest in regulating individual behavior. Rather, “regulation of marital
11 status has always been a fundamental element in helping humane society
12 induce the behavior needed for social as well as individual survival.” Bruce
13 C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual*
14 *Privacy: Balancing the Individual and Social Interests*, 81 Mich. L. Rev.
15 463, 470. Socially, the needs of a free and open democratic society depend
16 on marriage and family as traditionally conceived and practiced: “The
17 unarticulated policy roots of family law are also related to the political ends
18 of democracy, because it is primarily through the family bonds that both
19 children and parents learn the attitudes and skills that sustain an open
20 society.” *Id.* As one scholar puts it, “[h]eterosexual marriage appears to
21 provide the strongest and most stable companionate unit of society, and the

1 most secure setting for intergenerational transmission of social knowledge
2 and skills” Wardle, “*Multiply and Replenish*,” *supra*, at 780. As a
3 result, “[h]eterosexual marriage arguably provides the best seedground for
4 democracy, the most important schoolroom for self government, the most
5 important wellspring of (and testing ground for) civic virtue and the most
6 valuable unit of social organization.” *Id.* at 780-81.

7 To be more particular, the traditional family fosters a sense of
8 voluntary duty reflected in the husband-wife marital commitment and their
9 unquestioning devotion to their natural children. This family tradition “is a
10 prerequisite to a successful individual tradition. Through the commitments
11 of marriage and kinship both children and parents experience the need for
12 and the value of authority, responsibility, and duty in their most pristine
13 forms.” Hafen, *The Constitutional Status of Marriage*, *supra*, at 476. This
14 tradition is critical because “a sense of voluntary duty is the lifeblood of a
15 free society.” *Id.* Thus, “the family in a democratic society not only
16 provides emotional companionship, but is also a principal source of moral
17 and civic duty.” *Id.* at 477. The traditional family is also important to a
18 free, open, and democratic society because it provides for natural mediation
19 between the individual and the state. *Id.* at 479. It is the source of personal
20 meanings and personal values in our lives, without which “the political order
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1 becomes detached from the values and realities of individual life.” *Id.* “An
2 inherent connection thus links the pattern of domestic regulation to the
3 structure of political freedom.” *Id.*

4 These precepts find a home in judicial doctrine at all levels. The U.S.
5 Supreme Court has itself recognized the connection between marriage and
6 free society, referring to traditional marriage over 100 years ago as “the
7 foundation of the family and society, without which there would be neither
8 civilization nor progress.” *Maynard v. Hill*, 125 U.S. 190, 211 (1888).
9 Justice Holmes observed that “some form of permanent association between
10 the sexes” is one of the rudimentary characteristics of civilization. Oliver
11 Wendell Holmes, Jr., *Natural Law*, 32 Harv. L. Rev. 40, 41 (1918). Other
12 courts have also recognized that “the structure of society itself largely
13 depends upon the institution of marriage The joining of a man and
14 woman in marriage is at once the most socially productive and individually
15 fulfilling relationship that one can enjoy in the course of a lifetime.” *Marvin*
16 *v. Marvin*, 557 P.2d 106, 122 (Cal. 1976). The Indiana Supreme Court long
17 ago observed that “[i]n every enlightened government [marriage] is pre-
18 eminently the basis of civil institutions, and thus an object of the deepest
19 public concern.” *Noel v. Ewing*, 9 Ind. 37, 1857 WL 3556 at *8 (1857).

1 According to *Noel*, marriage “giv[es] character to our whole civil polity.”

2 *Id.*

3 Just as important, there is no basis for assuming that same-sex
4 marriages would provide comparatively valuable bedrock for a free and
5 open society. The connection between traditional opposite-sex marriages
6 and sound social ordering goes back to the natural link between such
7 marriages and procreation. Wardle, “*Multiply and Replenish*,” *supra*, at
8 794. It is the natural bond between parents and their biological offspring
9 that provides the best environment for passing along the traditions of duty
10 and responsibility so critical to democratic society. *See id.* at 789, 797;
11 Hafen, *The Constitutional Status of Marriage*, *supra*, at 470 n.28, 474-77.

12 This does not mean that families with adopted children or marriages
13 where only one partner is a biological parent of children in the family should
14 be prohibited because they do not feature all of the social benefits of
15 traditional two-parent families. Wardle, “*Multiply and Replenish*,” *supra*, at
16 809, 811. Nor does it mean that opposite-sex couples who cannot or wish
17 not to have children must be deprived of the right to marry lest they not fully
18 contribute to the democratic ideal. *Id.* at 800–803. What it means instead is
19 that the American tradition—indeed all of Western civilization—has long
20 recognized that the values necessary for the continuation of free society and
21

1 democracy are best fostered in the context of families where two parents
2 raise their natural offspring. The Arizona Constitution does not require a
3 perfect fit between the end to be achieved and the line drawn by the
4 legislature.

5 Rejecting the Arizona Legislature’s choice of a foundational family
6 model for society in this instance, moreover, may undermine the
7 Legislature’s long-accepted authority to order society through other
8 marriage regulations. The prohibitions against polygamy and endogamy, for
9 example, might be vulnerable to attack if the prohibition against same-sex
10 marriage is declared invalid. One commentator observes that “[t]he Equal
11 Protection argument for same-sex marriage also applies to polygamy. The
12 ban on polygamy discriminates not only against religions that approve
13 polygamy, but also bisexuals, who cannot act on their sexual preference
14 within marriage unless they can have multiple spouses.” Dent, *The Defense*
15 *of Traditional Marriage, supra*, at 628. So too with endogamy: “the main
16 arguments for endorsing gay marriage—individual autonomy in intimate
17 affairs and validation of loving relationships—also apply to endogamy.” *Id.*
18 at 631. *See also* William N. Eskridge, Jr., *The Case for Same-Sex Marriage:*
19 *From Sexual Liberty to Civilized Commitment* 151 (Free Press 1996).
20 (arguing that bans on same-sex marriage are unconstitutional and
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1 acknowledging that the author remains “open to the argument” that
2 restrictions against endogamy are also unconstitutional). Same-sex
3 marriage, polygamy, and endogamy all clearly have to do with the social
4 order. Choosing to permit or restrict each reflects a choice of what political
5 and social organizing principle should be followed. The principle that
6 underlies Petitioners’ argument—that they should be permitted to marry
7 whomever they wish—would undercut prohibitions against endogamy and
8 polygamy were it to carry the day here.

9 To be sure, the Arizona Legislature is free, if it wishes, to reject the
10 notion that to promote traditional opposite-sex marriages is to promote the
11 foundations of free society and democracy. But nothing in the Arizona
12 Constitution forces the Legislature or the people of Arizona to reject this
13 understanding. It would be farcical to suggest that a founding document
14 ratified in 1910 somehow laid the seedbed for a right to same-sex marriage
15 and a concomitant rejection of the political model—the traditional family—
16 that had fostered the development of the free and open society that led to
17 that very constitutional moment in the first place.

18 Petitioners have provided no basis for concluding that the model the
19 Legislature has chosen—the protection of opposite-sex marriages and the
20 rejection of same-sex marriages—is invalid.

1 **3. Protecting the integrity of traditional marriage.**

2 Permitting same-sex marriage might undermine the institution of
3 marriage as a life-long commitment. If same-sex marriage were permitted,
4 nothing would prevent heterosexual same-sex couples (such as roommates
5 or close friends) from marrying for such less important reasons as mere
6 companionship, short-term convenience, or financial interest, thereby
7 undermining the importance and integrity of the institution itself. Similarly,
8 if the same-sex restriction were deemed irrational, then state prohibitions on
9 polygamy, affinity, and consanguinity restrictions would be vulnerable to
10 challenge as well. Although it is true that the strength and integrity of
11 traditional marriage has already been undermined by other societal trends
12 and legal developments such as the “sexual revolution,” the easier
13 availability of divorce, and the increased prevalence of out-of-wedlock
14 births, such considerations should make states all the more wary of
15 subjecting the institution of marriage to the additional risks of the radical
16 and untested inclusion of same-sex couples.

17 Scholarship provides solid justifications for these concerns and for the
18 need to protect traditional marriage. One author writes that “[t]raditional
19 marriage is a public good. That is, it benefits not only married couples and
20 their children but also generates positive externalities, or benefits to others.

21

1 Men and women who marry and stay married encourage others to do
2 likewise, to the profit of society.” Dent, *The Defense of Traditional*
3 *Marriage, supra*, at 599. In light of this social good, government is well
4 justified in recognizing and encouraging traditional marriage but not same-
5 sex marriage. “As social esteem for marriage and parenting declines, so
6 does citizens’ willingness to assume these roles. Validation of same-sex
7 marriage would accelerate this decline.” *Id.* at 601 (citation omitted).

8 Petitioners look at the concept of state-sanctioned marriage and ask
9 the wrong question. Rather than begin by asking, “why marriage?”, they see
10 marriage in the abstract as involving only two people, without any historical
11 context, and immediately ask “why not same-sex marriage?” Petitioners
12 consider only the same sex versus opposite sex issue. This gap in their
13 thinking necessarily leads Petitioners to an incoherent view of marriage
14 generally. Indeed, Petitioners’ arguments against the state’s theories for
15 marriage are really arguments against state recognition of marriage *in toto*,
16 rather than arguments for why same-sex couples should be entitled to state
17 marriage recognition. In the end, all Petitioners really understand is that
18 opposite-sex couples have something that same-sex couples do not: state
19 sanction and recognition. But they have no coherent theory as to why, if the
20 state is to sanction marriage at all, this arrangement is unfair. The state’s

1 theories, by contrast, provide a coherent justification for marriage generally
2 as well as justify exclusion of same-sex couples from marital recognition.

3 The Court should not second-guess the judgment of the people or the
4 Legislature to promote and protect traditional marriage by means of refusing
5 to afford state recognition for same-sex marriages. The statutes pass the
6 rational basis test and should be upheld.

7 **CONCLUSION**

8 Respondents ask this Court to reject Petitioners' Special Action
9 petition and uphold A.R.S. §§ 25-101 & 25-125.

10 **Oral argument is requested.**

11 Respectfully submitted this 21st of July, 2003.

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