

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-08860

HILARY GOODRIDGE, et al.
Plaintiffs - Appellants
v.

DEPARTMENT OF PUBLIC HEALTH, et al.
Defendants - Appellees

ON APPEAL FROM A JUDGMENT OF THE
SUFFOLK COUNTY SUPERIOR COURT

BRIEF OF AMICUS CURIAE

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INTERESTS OF AMICI CURIAE

The amici curiae joining this brief offer important perspectives on the expressive and symbolic nature of marriage. A description of each of the amici is attached as Addenda A and B to this brief.

One group of amici, constitutional law professors, offers its expertise regarding free expression and intimate association for the Court's consideration in this case. As scholars of constitutional law, these professors are in a unique position to serve as a resource regarding the expressive nature of marriage and its role as an intimate association and to explain why the right to marry is protected under Article XVI of the Declaration of Rights.

The second group of amici consists of organizations dedicated to ending discrimination against same-sex couples and their families. This group of amici is in a unique position to highlight first-hand the ways in which the exclusion from civil marriage deprives same-sex couples of an important symbolic and expressive resource. Amici advocate for the protection of loving, expressive relationships between same-sex couples, recognizing that marriage is an important and irreplaceable form of expression of love and commitment.

Both groups of amici urge this Court to recognize the importance of marriage as a means of expression, and end the Commonwealth's discriminatory exclusion of same-sex couples from sharing their messages of love and commitment through civil marriage.

STATEMENT OF THE ISSUES

Amici adopt the Statement of the Issues of Plaintiffs-Appellants.

STATEMENT OF THE CASE

Plaintiffs, seven same-sex couples involved in long- term loving and committed relationships, wish to be civilly married to "express their love for each other," to "make a statement for themselves and others about their enduring love and commitment to one another" and so that "the world can see them as they see themselves - a deeply loyal and devoted couple that is each other's mate in every way." (R.A. 110.)

Each couple applied for but was denied a marriage license solely because they are of the same sex. The Plaintiffs brought suit, alleging that the Commonwealth's refusal to grant them a marriage license violates their rights under Articles 1, 6, 7, 10, 12, 16 and Pt. 2, c. 1, §1, art. 4, as amended, of the Declaration of Rights of the Massachusetts

Constitution. On May 7, 2002, the Superior Court denied the Plaintiffs' Motion for Summary Judgment and granted the Defendants' Motion for Summary Judgment, holding that the Massachusetts Constitution does not protect the right of same-sex couples to marry. (R.A. 109)

SUMMARY OF ARGUMENT

Society, families, both mixed- and same-sex couples, religious institutions, and courts all recognize that marriage – the civil ceremony of marriage and the choice to live and present oneself to the world as married – is a uniquely expressive form of symbolic speech. It is a means by which couples express themselves to each other and *to society at large*, both intended to be and understood as communicative. Same-sex couples, like mixed-sex couples, seek to marry to declare their love, commitment and fidelity to each other and to the public. (PP. 6 to 11.) Civil marriage is a unique ceremony which creates a relationship that cannot be replaced by other modes of expression. (PP. 11 to 14.)

Marriage for same-sex couples is, accordingly, entitled to protection under Article 16 of the Declaration of Rights of the Massachusetts Constitution

[hereinafter "Article XVI"].¹ Article XVI guarantees that "The right of free speech shall not be abridged." Under both federal and state standards, the protection of free speech extends not only to pure speech, but also to expressive conduct. (PP. 14 to 18.)

The Commonwealth's position, adopted by the Superior Court, that the *issuance* of a marriage license is government speech, "immune from judicial scrutiny in the context of the First Amendment," (R.A. 130), misconstrues the Plaintiff's Article XVI argument. Plaintiffs argue that "the act of undertaking and continuing to live under the responsibilities of civil marriage, and . . . letting it be known that one is living as part of a civil marriage," is the relevant expression that is subject to protection under Article XVI. See David B. Cruz, "Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive

¹This brief addresses only the Plaintiffs' arguments regarding Article XVI of the Massachusetts Constitution. Massachusetts has long held that its Constitution is not limited to the protection of the United States Constitution. See, e.g., *Bowe v. Secretary of Commonwealth*, 320 Mass. 230, 249-50 (1946) ("Upon ... questions[s] of Massachusetts law, federal decisions are persuasive, but not controlling."); accord *Associated Indus. of Mass. v. Attorney General*, 418 Mass. 279, 284 (1994). The protection afforded by the Declaration of Rights of the Massachusetts Constitution is independent of that offered by the First Amendment of the United States Constitution, and protects much speech not protected under the United States Constitution. See *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 267-68 (1993). The Declaration of Rights, however, is *at least as protective of free speech* as the First Amendment, and, therefore, federal First Amendment precedents provide a convenient floor of protection. Accordingly, this brief addresses federal First Amendment case law and the well-developed jurisprudence under Article XVI.

Resource, 74 S. CAL. L. REV. 925, 933 (2001)

[hereinafter Cruz, The First Amendment and Marriage.]

The marriage license is simply the prerequisite for the actual expression in the civil marriage ceremony and relationship. In this way, it is no different than a license to march in a parade or to display a cross in a public forum. (PP. 18 to 23.)

Marriage is also an intimate association, indeed one of the most intimate and identity-shaping associations that we, as a people have created. The right of individuals to participate in the intimate association that is civil marriage is protected by Article XVI because of the expressive, self-defining, and self-realizing nature of marriage. (PP. 23 to 31.)

Because marriage – as speech and an intimate association – is protected by Article XVI, the Commonwealth may not constitutionally restrict or impede couples of any sex from marrying to inhibit their expression. Properly understood, the exclusion of same-sex couples from marriage is aimed at expression and improperly favors the expression inherent in the marriage of mixed-sex couples while limiting the expression inherent in the marriage of same-sex couples. (PP. 31 to 37.) Thus, the restriction is subject to strict scrutiny. (PP. 37 to

42.)

None of the Commonwealth's purported justifications for restricting civil marriage to mixed-sex couples can survive the exacting scrutiny this Court must apply to any attempt to restrict speech. Neither protecting heterosexual couples from discomfort, nor protecting or preserving marriage as a heterosexual symbol is a sufficiently compelling government reason to withhold the expressive resource of marriage from same-sex couples. The Commonwealth's stated public welfare reasons, discussed in other briefs, also are not sufficiently compelling. (PP. 42 to 49.)

The Commonwealth's refusal to permit same-sex couples to marry thus violates the language, the spirit, and the heart of Article XVI. Accordingly, this Court should reverse the decision of the Superior Court and hold that the right of same-sex couples to marry is protected by Article XVI of the Declaration of Rights.

ARGUMENT

I. CIVIL MARRIAGE IS EXPRESSIVE AND INTIMATE, AND IS PROTECTED BY ARTICLE XVI OF THE DECLARATION OF RIGHTS

A. Marriage Is Expressive

Marriage is a symbol, universally understood to

express, to each member of a couple and to the world at large, the role that each spouse plays in the other's life, and the role that the married couple plays in the community. Indeed, "as the legal consequences of a couple's living together come to approximate those of marriage, and as divorce becomes more readily available, marriage itself takes on a special significance for its expressive content as a statement that the couple wish to identify with each other."

Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624, 636 (1980) [hereinafter Karst, Intimate Association].

"When two people marry, . . . they express themselves more eloquently, tell us more about who they are and who they hope to be, than they ever could do by wearing armbands or carrying red flags." Id. at 654.

Scholars and society recognize that:

First and foremost, civil marriage is nearly always an act and expression of commitment. Marital commitment is expressed not simply by ceremonies, rings, and gifts. It is also expressed by the act of undertaking and continuing to live under the responsibilities of civil marriage, and by letting it be known that one is living as a part of a civil marriage. One's statements of marital commitment gain additional credibility from the civil status. . . .

Cruz, The First Amendment and Marriage, at 933; see also Milton C. Regan, Jr., FAMILY LAW AND THE PURSUIT OF

INTIMACY 120 (1993) ("[M]arriage is the central institution through which we express our aspirations about intimate behavior.")²

B. Courts Have Long Recognized The Expressive Nature Of Marriage

The law likewise recognizes the inherently expressive nature and symbolism of marriage.³ In a number of cases, this Court has recognized that the act of getting and the state of being married conveys to

² Moreover, the act of applying for a marriage license is an expressive act. When a couple seeks a marriage license, the first step is to file with the state a Notice of Intention to Marry. G.L. c. 207, §19. Even the name of this form reflects its expressive nature. By filing this form, a couple communicates to the state that they want to be married, and to take on the responsibilities and receive the benefits attendant to that legal and social status. The clerks' role is to receive and process these forms and to issue the actual marriage license. G.L. c. 207 §§19, 20, 28. It is the clerks' job to understand the intention expressed in the filing of the notice.

³ No court has explicitly addressed the expressive nature of marriage and its implications for same-sex couples who wish to marry under the First Amendment and Article XVI. Rather, courts, while acknowledging that the right to marry is a fundamentally important right, have analyzed restrictions on marriage through other constitutional provisions. See, e.g., Turner v. Safeley, 482 U.S. 78, 99-100 (1987) (law prohibiting inmates from marrying was "unconstitutionally infirm"); Zablocki v. Redhail, 434 U.S. 374, 384, 388 (1978) (finding an Equal Protection violation because "the right to marry is of fundamental importance for all individuals" and the state's interest was not sufficiently important nor closely tailored); Loving v. Commonwealth of Virginia, 388 U.S. 1 (1967) (miscegenation law violated Due Process and Equal Protection clauses); see also Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alas. Sup. Ct. Feb. 27, 1998) (exclusion of same-sex couples violates equal protection and due process), dismissing for lack of ripeness, 21 P.3d 357 (Alas. 2001); Baker v. Vermont, 170 Vt. 194, 744 A.2d 864 (1999) (state statute limiting the legal benefits and protections flowing from marriage to mixed-sex couples was unconstitutional pursuant to the Common Benefits Clause of the Vermont Constitution)]; Baehr v. Miike, No. Civ. 91-1394, 1996 WL 694235, at *22 (Haw. Ct. App. 1996) (state's exclusion of same-sex couples from the right to marriage was unconstitutional pursuant to the Equal Protection Clause of the Hawaii Constitution), rev'd as moot, Baehr v. Miike, 92 Haw. 634, 994 P.2d 566 (1999).

the world at large a change in the couple's position in each other's lives and in the community. See Richardson v. Richardson, 246 Mass. 353, 354 (1923) (viewing marriage, unlike mere cohabitation, as "a status, which affects the parties thereto, their posterity and the whole community"); Chipman v. Johnston, 237 Mass. 502, 504 (1921) (holding that the marriage ceremony gives rise to "a change of status . . . affecting both the parties and the community" and "might affect the legitimacy of the posterity of the parties"); Coe v. Hill, 201 Mass. 15, 21 (1909) (viewing marriage as a social institution or status); Smith v. Smith, 171 Mass. 404, 406-07 (1898) (expressing the difference between being "affianced" and being married because "[a]t marriage there is a change of status which affects [the spouses] and their posterity and the whole community. It is a change which, for important reasons, the law recognizes, and it inaugurates conditions and relations which the law takes under its protection.").

Further, this Court has recognized that through marriage a couple communicates a desire to take on the responsibilities and benefits attendant to this new status. See French v. McAnarney, 290 Mass. 544, 546

(1935) ("Marriage is not merely a contract between the parties. . . . [I]t is a social institution of the highest importance. . . . The moment the marriage relation comes into existence, certain rights and duties necessarily incident to that relation spring into being."); Coe, 201 Mass. at 21 (recognizing that upon entering into the marriage relationship, "each spouse assumes toward the other, and toward society in general, certain duties and responsibilities").

Thus, this Court has consistently ruled that marriage is one of society's most honored expressions – it is more than a contract, it is a uniformly understood statement of commitment and responsibility.

Likewise, in holding that the constitutional protection of the right to marry extends to prison inmates, the United States Supreme Court observed that "inmate marriages, like others, are *expressions* of emotional support and *public* commitment. These elements are an important and significant aspect of the marital relationship." Turner, 482 U.S. at 95-96 (emphases supplied). The Supreme Court has also recognized that marriage is a union that creates a family and indicates that those involved share values that dictate the way in which they want to live their lives. See Roberts v. United States Jaycees, 468 U.S.

609, 619-20 (1984); see also Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

C. Marriage Is Uniquely Expressive

The statement made by civil marriage cannot be replicated by any other expressive act or ceremony, such as the speech of unmarried, committed and monogamous couples, or the speech of couples celebrating a religious rite of marriage. See Richardson, 246 Mass. at 354; Smith, 171 Mass. at 406-07.

First, civil marriage, the civil institution and attendant governmentally controlled status, is critical to the self-expression in which countless married people engage every day in the United States. "In U.S. culture, all or certainly most of the signs of one's status as married, such as wedding rings, mentions of anniversaries, and the like, are likely to convey a message that one is *civilly* married. These expressions of weddedness are importantly self-expressive and self-constitutive." Cruz, The First Amendment and Marriage, supra, at 934. Most couples who marry civilly but without a religious ceremony or rite and then hold themselves out as "married" are, it is fair to conclude, socially accepted as married largely on

account of the underlying civil marriage. Same-sex couples, however, who conduct a religious ceremony and then hold themselves out as "married" are considered "frauds." ⁴

Second, in a country where church and state are constitutionally separated, civil marriage and marriages celebrated with religious rites are not interchangeable. (See Brief of Amicus Curiae Religious Coalition for the Freedom to Marry, et al.) Civil marriage confers numerous legal rights, privileges, and responsibilities that a religious ceremony in and of itself cannot confer. Reliance on the legal effect of civil marriage can form the backdrop of a couple's ongoing relationship and mutual process of identity formation. For example, Plaintiffs Gloria Bailey and Linda Davies "seek the . . . emotional peace of mind that comes from being a married couple," while Plaintiffs David Wilson and Robert Compton "seek to

⁴ "Without the state sanction afforded mixed-sex couples, all the efforts of [same-sex] couples and supportive religious institutions to declare that these couples are married – wedding ceremonies, 'marriage speech,' wedding rings – are likely to be met with resounding disbelief." Cruz, The First Amendment and Marriage, *supra*, at 1018. Until same-sex couples can civilly marry, courts, the press, and others will likely continue to place "married" in quotes when discussing same-sex marriages, as has the United States Court of Appeals for the Eleventh Circuit, Shahar v. Bowers, 114 F.3d 1097, 1099-1100 nn.1-2 (11th Cir. 1997) (*en banc*), and the Washington Times in discussing this very litigation, Frank Murray, Judge Asked to Skip Trial, License Gay 'Marriages' in Massachusetts, WASH. TIMES (D.C.), Aug. 30, 2001, at A4. Public commentators and ordinary citizens will continue to dismiss these relationships as "pretend" marriages.

marry as a public expression of their commitment to one another" (R.A. 27,42)

Third, civil marriage occupies a special position in our society – a position that amplifies its role as an expressive resource far more than any alternative. "[T]he word 'marriage' . . . carries a *uniquely* intense, resonant, and emotional force in our language and culture." Bryan H. Wildenthal, To Say "I Do": Shahar v. Bowers, Same-Sex Marriage, and Public Employee Free Speech Rights, 15 GA. ST. U. L. REV. 381, 433-34 (1998) (emphasis supplied). "Civil marriage is a uniquely powerful medium through which, or vocabulary with which, people may express themselves to intimate partners and to the world at large" Cruz, The First Amendment and Marriage, *supra*, at 966.⁵

Access to civil marriage provides all couples with an important and unique expressive resource, which confers a legitimization of their union unavailable in other forms. Civil marriage is not constitutionally

⁵ This uniqueness is corroborated by the experiences of some same-sex couples who have tried to have newspapers publish announcements of their marriages, only to be either turned away on the ground that theirs is not a "real" marriage or to discover that the paper changes the heading under which it publishes such announcements from "Marriages" to "Unions" or "Celebrations." See e.g., Times Will Begin Reporting Gay Couples Ceremonies, N.Y. Times, Aug. 18, 2002 at A30 (stating that same-sex "commitment ceremonies" will be reported under the heading "Weddings/Celebrations"); Mark Jurkowitz, Globe to Publish Same-Sex Unions Newspaper Cites Community Interest, Boston Globe, Sept. 29, 2002 at B3 ("same-sex unions will appear under a 'commitments' heading").

fungible with other forms of expression available to committed couples.⁶ Cf. A Quaker Action Group v. Morton, 516 F.2d 717, 733 n.49a (D.C. Cir. 1975) (rejecting argument that government action left constitutionally adequate alternative means of expression due to "unique quality" or "unique symbolism" of forum desired by Plaintiffs).

D. As Expressive Conduct, Marriage Is Entitled To Protection Under Article XVI

As demonstrated above, couples who marry both intend to and actually do convey a message of love, commitment and fidelity and the intent to be bound by the duties and responsibilities imposed upon married couples. Because their conduct in marrying and living as married is meant to, and does, express these messages, it is protected by Article XVI.

Expressive conduct can be protected by Article XVI

⁶ Even a non-marriage marital status for same-sex couples, such as Vermont's civil union – intended to be parallel to civil marriage for purposes of Vermont state law but under a different name – fails to provide Plaintiffs equality of expressive opportunity (as well as other legal, economic, and social benefits). Such a separate and unequal "parallel" withholds "*the crucial symbolic benefit* of sharing the cultural and semiotic status of the marital estate and its surrounding history and ethos. . . ." Cruz, The First Amendment and Marriage, *supra*, at 956 n.168, quoting Harvard Law Professor Laurence Tribe (emphasis added). Moreover, even if same-sex couples were extended all the legally operational consequences of civil marriage under the guise of some new status such as "civil union," Massachusetts would by reserving civil marriage as a heterosexual institution convey an unconstitutional message of heterosexual superiority and homosexual inferiority. See David B. Cruz, The New "Marital Property": Civil Marriage and the Right to Exclude?, 30 CAPITAL U.L. REV. 279, 286 (2002).

"whenever the person engaging in the conduct intends thereby to express an idea," United States v. O'Brien, 391 U.S. 367, 376, (1968), if, in the surrounding circumstances, those perceiving the expression would likely understand that message. See Texas v. Johnson, 491 U.S. 397, 404 (1989); Spence v. Washington, 418 U.S. 405, 410-11 (1974). Under this standard, marriage clearly is expressive conduct.

In determining what types of conduct may be deemed sufficiently expressive to gain protection under Article XVI, Massachusetts courts are guided by the federal courts' analysis of First Amendment protections. See Hosford v. School Committee of Sandwich, 421 Mass. 708, 712 n.5 (1996). However, as noted in footnote one, supra, Massachusetts courts are not limited by this analysis, and may provide greater protection than that secured by the First Amendment. See Associated Industries of Massachusetts v. Attorney General, 418 Mass 279, 289 n.8 (1994); Batchelder v. Allied Stores International, Inc., 388 Mass. 83, 87 (1983).

Indeed, Article XVI has been liberally construed to protect a wide range of expressive conduct. See Benefit v. City of Cambridge, 424 Mass. 918 (1997) (begging); T & D Video, Inc. v. City of Revere, 423

Mass. 577 (1996) (selling non-obscene adult videos); Commonwealth v. Sees, 374 Mass. 532 (1978) (nude dancing); Manor v. Rakiey, 1994 WL 879790 (Mass. Super. Aug. 25, 1994) (a prisoner wearing an African National Congress medal); Commonwealth v. Meuse, 10 Mass. L. Rptr. 661, 1999 WL 1203793 (Mass. Super. Nov. 29, 1999) (tattooing); Doe v. Yunits, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000), aff'd, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (wearing clothing in accordance with gender identity). See also Champagne v. Dubois, 1995 WL 733884, at *2 (Mass. Super. Dec. 11, 1995) (assuming that Article XVI might protect an inmate's right to express himself by wearing an earring).

In Benefit, 424 Mass. at 923, this Court applied the protections of Article XVI to expressive conduct, and held that "the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance." Similarly, the presence of a same-sex couple in the marriage ranks conveys a message about the love and commitment of the lesbian, gay, or bisexual persons involved. Just as communication about need is an "an inherent aspect" of begging, id. at 923 n.4, communication of a couple's love and commitment is "an inherent aspect" of

marriage. The indisputably expressive nature of marrying and living as a married person must be accorded at least as much constitutional protection as begging, nude dancing or tattooing.

The Defendants have cautioned against giving constitutional free speech protection to any and all acts attempting to convey a message, asserting that doing so could subject all government action to heightened judicial scrutiny. It may be true that “[i]t is possible to find some kernel of expression in almost every activity a person undertakes” City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989). Yet Plaintiffs are not seeking to have all acts or even all acts with communicative intent treated as expression protected under Article XVI. Rather, a couple’s act of joining together and living in civil marriage must be protected as expression under Article XVI because civil marriage is highly expressive, both in intention and reception, and has traditionally been among the most important institutions of human expression. See Cruz, The First Amendment and Marriage, supra, at 976. Moreover, “a narrow, succinctly articulable message is not a condition of constitutional protection.” Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S.

557, 569 (1995).

E. The Expression in Which Plaintiffs Seek to Engage by Entering into and Living Under Civil Marriage Is Private Speech

The persons speaking in and through a marriage are the married couple. When it dismissed the Plaintiffs' argument that marriage should be treated as "speech" for purposes of Article XVI, the Superior Court incorrectly concluded that "[w]ithout deciding whether or not the issuance of a marriage license is speech, it would be speech by the government, not by applicants or licensees." (R.A. 130.) Plaintiffs do not assert that the *issuance* of a marriage license is expression protected by Article XVI. Rather, Plaintiffs argue that the license is a permit for civil marriage through which couples speak, and it is that speech that is protected by Article XVI. A license to marry without an attendant civil marriage would be a pointless exercise.⁷

Civil marriage is a means by which individual couples express themselves and constitute their identities; it is not predominantly a mode of

⁷ The Plaintiffs do not argue that the Commonwealth may not itself express a preference for mixed-sex marriage, just as it is free to express its views that it opposes smoking, teenage drinking, or alcoholism. What the Commonwealth may not do is deny same-sex couples access to an expressive resource or public forum – civil marriage – based on the content of the same-sex couple's speech. The Commonwealth may not discriminatorily disadvantage private speech based on content. See Section III.B., infra.

government speech. See Cruz, *The First Amendment and Marriage*, supra, at 986 (footnote omitted). This Court should not begin its analysis by treating civil marriage primarily as state speech. Rather, this Court should start by acknowledging that Article XVI, like the First Amendment, "is designed to protect individuals' expression against governmental restriction, not to shield government expression at the expense of individuals' speech." Id. at 987.

In concluding that the speech at issue was government speech, the Superior Court placed inappropriate reliance on Board of Regents v. Southworth, 529 U.S. 217, 229, 235 (2000). In Southworth, a group of students sued the University of Wisconsin at Madison, claiming that the University's requirement that students pay an activity fee to fund student groups violated the First Amendment rights of students who disagreed with the messages of some of those groups. Because the funding scheme was viewpoint neutral, the Court held that it did not violate the students' rights. 529 U.S. at 233. While the Court cautioned that its holding did not apply to situations where the University itself was speaking, it concluded that the activity fee was not such a situation. 529 U.S. at 234-35.

Indeed, the analysis in Southworth supports the Plaintiffs' position in this case. When the government actively subsidizes or licenses certain speech, the Supreme Court has concluded that the appropriate analysis is not whether the government is speaking, but whether the government's funding or licensing criteria are constitutionally appropriate, i.e., viewpoint and content neutral. See id., 529 U.S. at 235.

Here, Massachusetts controls private speech by requiring a license to marry. The Commonwealth should not be permitted to use this licensing mechanism to control the content of marital expression by prohibiting same-sex couples from using civil marriage to express their message of love and commitment. See Legal Services Corporation v. Velazquez, 531 U.S. 533, 542 (2001) (holding impermissible viewpoint-based restrictions arising from a government-sponsored Legal Services Corporation program designed to facilitate private speech).⁸

This case is governed by those cases that hold

⁸ The trial court also improperly relied on the plurality opinion in Bowen v. Roy, 476 U.S. 693, 699 (1996), apparently for the proposition that "[n]ever . . . has the [Supreme] Court interpreted the First Amendment to require the government itself to behave in ways the individual believes will further his or her spiritual development or that of his or her family." While true, that proposition is wholly inapposite to the present context. This case does not concern any conduct remotely analogous to the wholly internal governmental use of Social Security numbers.

that the government may not use a license, funding, or permit requirement to forbid speech because it disapproves of the content of that speech, such as Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995). In Pinette, the Ku Klux Klan obtained an injunction requiring a state licensing agency to issue it a permit to erect a cross in an established public forum. 515 U.S. at 758-59. The Supreme Court made clear that the *license* was not government speech – it was the government’s provision of an expressive resource to private speakers:

The State did not sponsor [the Klan’s] expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

515 U.S. at 763.

Here, as in Pinette, by issuing a marriage license to same-sex applicants on the same terms required of mixed-sex applicants,⁹ the Commonwealth would be neither speaking nor sponsoring expression.

Likewise, in Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 833 (1995)

⁹ Plaintiffs met the statutory age and consanguinity requirements and presented themselves at their respective town clerk’s offices with fees and medical certifications in hand. (R.A. 42-47.)

the Supreme Court held that the University of Virginia could not fund certain speech but refuse to fund other speech based on content or viewpoint. The University funded student news generally, but refused to fund a student-run religious newspaper. Id. at 822-24. The Court rejected the argument that the funding mechanism was government speech. Id. at 833 (the speech was not "specific information pertaining to [the government's] own program.") Instead, the Court held that because the University funded a range of private expression, the viewpoint-discriminatory exclusion of students who published a religious newspaper was unconstitutional. Id. at 837, 844-46.¹⁰

A marriage license under a free speech analysis is no different. As Virginia supported a range of private expression by student publishers, Massachusetts, through its marriage laws, supports mixed-sex couples in conveying a range of messages about their love and commitment for one another. Yet as Virginia unconstitutionally excluded religious publications from eligibility for support, Massachusetts

¹⁰ The dissent, although disagreeing that there was viewpoint discrimination involved in the eligibility conditions, agreed with the majority that "if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well." Rosenberger, 515 U.S. at 895 (Souter, J., dissenting).

unconstitutionally excludes same-sex couples from sharing the expressive benefits that civil marriage provides.¹¹

For these reasons, this Court should reject the Superior Court's conclusion that the Plaintiffs seek to compel government speech, and acknowledge that the right to marry impacts the Plaintiffs' rights under Article XVI's protection of Freedom of Speech.

II. MARRIAGE IS AN INTIMATE ASSOCIATION PROTECTED BY ARTICLE XVI

Marriage is not solely an expressive resource for couples to make statements about their love, fidelity, and commitment to themselves and others; it is also a private, intimate, and self-identifying union – an intimate association. See, e.g., Bd. Of Dirs. Rotary Club v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987); Roberts v. United States Jaycees, , 468 U.S. 609, 619-20 (1984); Maynard v. Hill, 125 U.S. 190, 205

¹¹ The U.S. Supreme Court holding in Hurley, 515 U.S. 557, supports the position that the issuance of a government permit or license does not convert speech from private expression into government speech. There, the Court unanimously held that applying Massachusetts's public accommodations law to the private organizers of a St. Patrick's Day-Evacuation Day parade to require them to allow a unit of lesbian, gay, and bisexual persons to march under its banner, a group with whom the parade organizers disagreed, violated the First Amendment. Id. at 559, 570, 572-73. "If private persons can define their parades as they wish – even with an official permit, and via a public thoroughfare, policed and maintained by public money – and despite an official policy against discrimination, then private persons can define their marriages (surely more central to personhood than parades) as they wish – even with an official license and despite an official policy against same-sex unions." Toni M. Massaro, Gay Rights, Thick and Thin, 49 STAN. L. REV. 45, 67-68 (1996).

(1888) (characterizing marriage as creating "the most important relation in life"). The U.S. Supreme Court stated it best:

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.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965)

(emphasis added).

A. Article XVI Protects Intimate Associations

In Concord Rod and Gun Club, Inc. v. Massachusetts Commission Against Discrimination, this Court discussed the basis of the constitutional right of intimate association:

Constitutionally protected freedom of association may be understood in two distinct senses; the right "to enter into and maintain certain intimate human relationships," and a right "to associate for the purposes of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion.

402 Mass. 716, 721 (1988), quoting Roberts, 468 U.S. at 617-18.

This Court and the Supreme Court have based the right of intimate association alternatively on the right of free expression in Article XVI and the First

Amendment as well as on the right of privacy. See, e.g., City of Dallas v. Stanglin, 490 U.S. 19, 23-24 (1989) (First Amendment embraces a right of association in certain circumstances, including intimate association and expressive association); Lyng v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW, 485 U.S. 360, 364-66 (1988) (discussing First Amendment intimate association rights); Bd. of Dirs. of Rotary Int'l, 481 U.S. at 545 ("[T]he First Amendment protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life.'") (citation omitted); Griswold, 381 U.S. 479 (locating right of intimate association within right to privacy, while suggesting that right to privacy stems from many constitutional protections, including the First Amendment); A.Z. v. B.Z., 431 Mass. 150, 162 (2000) (recognizing the elements of "freedom and personal choice in matters of marriage and family life" and noting that "respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship"); Padilla

v. Padula, 2 Mass. L. Rptr. 129, 1994 WL 879788 at *4 (Mass. Super. Apr. 29, 1994) ("The right 'to enter into and maintain certain intimate human relationships' is a fundamental element of the freedom of association guaranteed by the First Amendment."). See also Walker v. Georgetown Housing Authority, 424 Mass. 671, 675 (1997)(suggesting that one's right to associate with visitors in one's home is a right based in Article XVI and the First Amendment because it depends "upon the will of the individual master of each household, and not upon the determination of the community.").

Both this Court and the Supreme Court, however, in discussing the right of intimate association, have emphasized its expressive roots. Intimate associations are protected because they afford the opportunity

to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

Griswold, 381 U.S. at 483

Thus, although both Courts have located intimate associations in free speech provisions and the right to privacy, the right of intimate association falls directly within the protection of Article XVI because such associations are an expressive resource. Concord

Rod & Gun Club, 402 Mass. at 721; Roberts, 468 U.S. at 622 (“we have long understood as implicit in the right to engage in activities protected by *the First Amendment* a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends”) (emphasis added).¹²

In addition to locating the right of intimate association in speech protections, the Supreme Court and this Court have also located the source of the right to privacy itself in the protection of free speech. See, e.g., Griswold, 381 U.S. at 483 (“[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.”); Opinion of the Justices to the Senate, 375 Mass. 795, 808-09 (1978) (suggesting that a right to privacy may stem from Article XVI).

Intimate associations are also constitutionally protected because they perform a self-realization function – they greatly influence the formation and

¹² Further, recent interpretations of the right of intimate association also have tended to focus on the First Amendment as the source of this right. See, e.g., Chesser v. Sparks, 248 F.3d 1117 (11th Cir. 2001); Torres v. Pueblo Bd. of Cty. Comm’rs, 229 F.3d 1165, 2000 WL 1346347 (10th Cir. Sept. 19, 2000); Sowards v. Loudon Cty., Tennessee, 203 F.3d 426 (6th Cir. 2000), cert. denied 531 U.S. 875 (2000); Adler v. Pataki, 185 F.3d 35 (2d Cir. 1999); Wallace v. Texas Tech Univ., 80 F.3d 1042 (5th Cir. 1996); United States v. Frame, 885 F.2d 1119 (3d Cir. 1989).

shaping of an individual's sense of identity, character development and self-image. As the Supreme Court pointed out in Roberts, "the constitutional shelter afforded [intimate associations] reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty". 468 U.S. at 619. See also Proconier v. Martinez, 416 U.S. 396, 427 (1974), overruled on other grounds by, Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1974) (Marshall, J. concurring) ("The First Amendment serves . . . the needs of . . . the human spirit - a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a *sense of identity*.") (emphasis added); Karst, Intimate Association, supra, at 635-37 ("Transient or enduring, chosen or not, our intimate associations profoundly affect our personalities and our senses of self. When they are chosen, they take on expressive dimensions as statements defining ourselves.")¹³

¹³ See also Martin H. Redish, The Value of Free Speech, 130 U. PA. L. REV. 591, 604 (1982) ("Free speech aids all life-affecting decisionmaking, no matter how personally limited. [I]ndividuals need . . . a free flow of information and opinion to guide them in

Because the right of intimate association is based upon and interwoven with the right of free expression, and the self-realization functions of such associations, intimate associations are protected by Article XVI.

B. Marriage Is One of Society's Most Intimate Associations

Marriage clearly constitutes an intimate association. See Roberts, 468 U.S. at 618-20; see also Turner v. Safeley, 482 U.S. 78, 95-96 (1987) (expressions of emotional support and public commitment are an important and significant aspect of the marital relationship). In Roberts, the Supreme Court noted that "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." 468 U.S. at 619-20. Thus, "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's

making . . . life-affecting decisions."); David Cole & William N. Eskridge, Jr., From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct, 29 Harv. C.R.-C.L. L. Rev. 319, 327 (1994) ("The First Amendment protects the individual's freedom to explore, develop, and expand upon her identity.")

fellow employees." Id. at 620.

Likewise, in discussing intimate associations in the context of forced parenthood, this Court noted the "freedom of personal choice in matters of marriage," and that "individuals shall not be compelled to enter into intimate family relationships" because of a respect for "liberty and privacy." A.Z. v. B.Z., 431 Mass. at 162 ("there are personal rights of such delicate and intimate character that direct enforcement of them by any process of the Court should never be attempted.") (citations omitted).¹⁴

Marriage is also a union that creates a family and indicates that those involved share values that dictate the way in which they want to live their lives. See Roberts, 468 U.S. at 619-20; Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). It is a relationship that conveys a certain status both between those within the relationship and between the couple and the community. See Richardson v. Richardson, 246 Mass. 353, 354 (1923); Chipman v. Johnston, 237 Mass. 502, 504 (1921); Coe v. Hill, 201 Mass. 15, 21 (1909); Smith v. Smith, 171 Mass. 404, 406-07 (1898).

Finally, marriage, probably more than any other

¹⁴ Although in A.Z. this Court refused to *compel* an intimate association, its analysis of the importance of family relationships demonstrates that marriage is a fundamental intimate association.

chosen relationship, shapes one's sense of self and provides the emotional enrichment necessary to self-identity. Its self-realization functions are thus protected by Article XVI.

III. THE COMMONWEALTH'S EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE IS SUBJECT TO STRICT SCRUTINY

A. The Exclusion of Same-Sex Couples From Marriage is Directed at the Messages Expressed by Their Unions

In Turner v. Safeley, the United States Supreme Court identified four "important attributes of marriage": The "expression[] of emotional support and public commitment," the "exercise of religious faith as well as an expression of personal dedication," the expectation that the relationship will be "consummated," and "the receipt of government benefits[,] property rights[,] and other, less tangible benefits." 482 U.S. at 95-96. The Turner analysis acknowledges that the constitutionally fundamental interests of an individual in marriage center not on procreation or child-raising, but rather on the statement made by the couple to one another and the world, as well as the emotional companionship, interpersonal commitment, physical and spiritual fulfillment, social and governmental recognition and support, and access to important benefits and protections that come with marriage.

These interests do not differ for same-sex couples – each is of vital importance to lesbian, gay and bisexual persons in Massachusetts, just as it is to non-gay people. When same-sex couples seek marriage licenses they want to make their “expression [] of emotional support” to one another under the law, just like mixed-sex couples. See Turner, 482 U.S. at 95-96. They want to make a “public commitment,” i.d., and take on legal responsibilities toward each other and third parties as a married couple, just like mixed-sex couples. And equally, they want to make the statement that the love of two life-partners of the same sex who undertake to pursue happiness and build a life together is worthy of this central legal and social institution under law, just like the love of mixed-sex couples.¹⁵

Because the important attributes of marriage are no different for same-sex couples than for mixed-sex couples, the restriction against their marriage clearly is based on the content of the speech inherent in the marriage and nothing more. The State’s continued exclusion of same-sex couples from civil marriage stems not from any lack of qualification on the couples’

¹⁵ Despite this identity of expressive intent, each of the important interests found by the Turner Court to inhere in marriage is denied to lesbians and gay men in Massachusetts, even though, as the Supreme Court held, the interests are so important that *even prisoners*, who can constitutionally be denied many other

part, but rather an intent to favor the view that their love is not worthy of the statements made in marriage.

B. The Recurrent Arguments to Exclude Same-Sex Couples from Marriage Demonstrate That the Exclusion Is Directed at the Messages Expressed by Their Unions

The arguments used to support the prohibition against marriage for same-sex couples are themselves expressive – and highlight that the mixed-sex marriage requirement is unconstitutionally content-based.

Arguments that marriage simply “means” a man and a woman, so that allowing same-sex couples to marry civilly would change the meaning of marriage, or that the mixed-sex requirement is necessary to preserve the “specialness” of marriage and defend the “institution” of marriage, demonstrate that the restriction aimed at same-sex couples is content-based and violates the constitutional guarantees of free speech.

The first objection typically raised against same-sex marriage is “definitional” – that a mixed-sex requirement does not discriminate or deny any rights to anyone because “marriage” simply means one man and one woman. See, e.g., Singer v. Hara, 11 Wn. App. 247, 253-54, 522 P.2d 1187, 1191 (1974), review denied, 84 Wn. 2d 1008 (1974); Jones v. Hallahan, 501 S.W.2d 588,

rights and freedoms, may not be arbitrarily denied the freedom to marry.

589 (Ky. 1973); Baker v. Nelson, 291 Minn. 310, 311-12, 191 N.W.2d 185, 185-86 (1971).

Prohibiting same-sex couples from marrying because their marriage would change the "meaning" of marriage is undeniably content-based: The Commonwealth seeks to restrict the "meaning" of marriage to one view by prohibiting private expression.¹⁶

The second objection typically raised against same-sex marriage is that mixed-sex marriage is "special" and "unique." See Karen E. Crummy, Group Eyes State Ballot to Ban Same-Sex Marriage, BOSTON HERALD, July 24, 2001 ("'There needs to be a legal definition of marriage which holds it special and unique and protects the children,' said Bryan Rudnick, executive director of the conservative [Massachusetts Citizens Alliance]."); 142 CONG. REC. H7495, H7493 (1996)(statement of Rep. Weldon, a co-sponsor of the federal Defense of Marriage Act, urging "it is vital that we protect marriage against attempts to redefine

¹⁶ The Defendants made a similar argument below. That argument, however, is blatantly unresponsive to the challenge that constitutional principles render such a legal definition of marriage impermissible. It is circular, effectively saying that the reason government may adopt a definition of marriage excluding same-sex couples is that the definition of marriage excludes same-sex couples. The definitional argument was thus properly repudiated by the Hawaii Supreme Court in 1993, see Baehr v. Lewin, 74 Haw. 530, 565 & 571, 852 P.2d 44, 61 & 63 (1993) (scorning the definitional argument as "circular and unpersuasive" and an "exercise in tortured and conclusory sophistry"), and this Court should reject it as well. What is important to note about

it in a way that causes the family to lose its special meaning.")

That argument is prima facie based on the expressive component of marriage. The Commonwealth may not prohibit private speech to maintain a particular image of marriage as solely an expression of love and commitment between a man and a woman.

A third objection opponents of marriage for same-sex couples commonly raise is that permitting same-sex marriage will weaken the "institution" of marriage.

See SAME-SEX MARRIAGE: PRO AND CON 225, 226 (Andrew Sullivan ed., 1997) ("It [same-sex marriage] demeans the institution. . . . The institution of marriage is trivialized by same-sex marriage."), quoting U.S. Rep. Henry Hyde; see also Brief of Amicus Curiae the Church of Jesus Christ of Latter-Day Saints at §III in Baehr v. Miike, 92 Haw. 634, n.1, 994 P.2d 566 (1999), available at [http://](http://www.hawaiilawyer.com/same_sex/briefs/Mormons.txt)

www.hawaiilawyer.com/same_sex/briefs/Mormons.txt ("A decision by this Court to strike down the requirement that marriage must be between a man and a woman will substantially and irreversibly weaken this venerable and indispensable institution").

If "it is not anyone's marriage but rather what

the argument, however, is that it is related to expression and is viewpoint based.

marriage will signify and the role marriage will thus be capable of playing in expressions of personal commitment and identity that are 'at risk' from same-sex marriage," then "the concern over the 'institution' of marriage is a concern over [the content of] expression." Cruz, The First Amendment and Marriage, supra, at 950. The Commonwealth may not prohibit same-sex couples from marrying and permit mixed-sex couples to marry in order to favor the mixed-sex couples' speech about the institution of marriage. That is content-based discrimination.

The recurrent themes raised against permitting same-sex couples to marry are aimed at the expression in marriage between same-sex couples. To the extent the Commonwealth's restriction against same-sex couples is intended to modulate the messages about marriage, the restriction favors one viewpoint, is content-based, and subject to strict scrutiny.

C. Because the Commonwealth's Restriction Against Marriage for Same-Sex Couples Is Content Based, It Is Subject to Strict Scrutiny

The Commonwealth may not proscribe expressive conduct based on the particular message espoused. Such discrimination violates foundational free expression principles. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989).

Stated another way, "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). The requirement of viewpoint neutrality is a general free expression principle: "[O]ur 'cultural life,' just like our native politics, 'rests upon [the] ideal' of governmental viewpoint neutrality." Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 603 (1998) (Souter, J., dissenting), quoting Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994). "[A]bove all else, the First Amendment means that

government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

Viewpoint neutrality also requires that the government may not *favor* one message over another. For example, in Benefit v. City of Cambridge, this Court noted that the statute at issue, which prohibited begging but not the solicitation of charitable donations, could be viewed as viewpoint based because "it favor[ed] the view that poor people should be helped by organized groups and should not be making public requests for their necessities." 424 Mass. 918, 924-25 (1997).

The Commonwealth's support of mixed-sex marriage, and opposition to marriage for same-sex couples, clearly favors one message and speaker over another. The mixed-sex requirement makes civil marriage available to certain people to make statements about love and commitment – mixed-sex couples – thus unconstitutionally privileging those speakers and their viewpoints on those topics.

Even if this Court does not find that the restriction prohibiting same-sex couples from marrying constitutes viewpoint discrimination – i.e., is aimed

directly at the expression inherent in same-sex marriages in a way that disfavors views about love and commitment within same-sex couples – the restriction treats the same conduct differently based on expressive content and must be subject to strict scrutiny.

The Commonwealth may not proscribe particular conduct because that conduct has expressive elements. “What might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.” Johnson, 491 U.S. at 406, quoting Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (1983) (Scalia, J., dissenting) (emphasis in original), rev’d sub nom, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

The law in Massachusetts under Article XVI is the same: The Commonwealth may not proscribe conduct based on its expressive nature, and such proscription is subject to the strictest scrutiny. See T&D Video v. City of Revere, 423 Mass. 577, 582 (1996) (lower court did not abuse its discretion in “determining that the

defendants failed to show that the adult entertainment ordinances were 'designed to serve a substantial government interest'")(citation omitted).

This Court has recognized the presumptive unconstitutionality of government-fostered expressive inequality. In Benefit, this Court noted that similar expressive conduct was treated differently. 424 Mass. at 924 ("By prohibiting peaceful requests by poor people for personal financial aid, the statute directly targets the content of their communications, punishing requests by an individual for help with his or her basic human needs while shielding from government chastisement requests for help made by better-dressed people for other, less critical needs. The statute is thus necessarily content based"). The Court went on to reiterate that, under both Articles I and XVI of the Declaration of Rights and under the First and the Fourteenth Amendments to the United States Constitution, such content-based discrimination triggers strict scrutiny. Id. at 925.

The Commonwealth's denial of same-sex couples' right to marry prohibits conduct on the basis of expression and is similarly content-based. The Commonwealth directly targets same-sex couples and prohibits their use of the expressive resource that is

civil marriage, while allowing mixed-sex couples to use that same resource. The restriction is undeniably content-based. Plaintiffs were denied a marriage license because the Commonwealth seeks to suppress the messages of love and commitment that marriage between same-sex couples provides. Defendants' actions, accordingly, must be subject to strict scrutiny. Benefit, 424 Mass. at 925; see also Turner, 512 U.S. at 643 (laws that "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based"); R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) ("content-based regulations are presumptively invalid").

Moreover, because the denial of civil marriage to same-sex couples is based at least in part on the government's intent to disfavor the expression of same-sex couples, the more lenient test contemplated by United States v. O'Brien, 391 U.S. 367, 376-77 (1968), does not govern.¹⁷ Rather, strict scrutiny applies. See Texas v. Johnson, 491 U.S. 397, 407-10 (1989); cf.

¹⁷ The test set forth in O'Brien applies when the government regulates conduct containing both speech and non-speech elements, but does not apply if the government interest is "related to the suppression of free expression." O'Brien, 391 U.S. at 376-77. Even the O'Brien test, however, requires a compelling, substantial, subordinating, paramount, cogent, or strong government interest and mandates that the incidental restriction on speech be "no greater than is essential to the furtherance of that interest." Id. (footnotes omitted.) For the same reasons that the complete exclusion of same-sex couples from the

Zablocki v. Redhail, 434 U.S. 374, 383 (1978)

(conducting "critical examination" of state interests in law burdening entry into marriage).

As the analysis in Part IV below shows, the mixed-sex requirement for civil marriage fails the demands of strict scrutiny. None of the potential justifications for the Commonwealth's prohibition of same-sex couples marrying are sufficiently compelling to withstand strict heightened scrutiny.

IV. THE COMMONWEALTH'S JUSTIFICATIONS FOR PROHIBITING SAME-SEX COUPLES FROM MARRYING FAIL STRICT SCRUTINY

To be constitutionally permissible and survive strict scrutiny, the Defendants must show that the restriction at issue is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Benefit, 424 Mass. at 925, quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The denial of marriage to same-sex couples cannot come near meeting that standard.

A. Preventing Offense to Mixed-Sex Couples Is Not a Compelling Government Interest

As noted above, the majority of the arguments raised against extending marriage rights to same-sex

expressive resource of marriage cannot survive strict scrutiny, it cannot survive the O'Brien test.

couples relate to the protection of the "institution" or "specialness" of marriage. Those arguments must be understood to protect some mixed-sex couples from the discomfiting effect of same-sex marriage. Such a purpose is antithetical to basic free expression principles.

As the U.S. Supreme Court stated in Texas v. Johnson, 491 U.S. at 408, any justification for regulation of expressive conduct that relates to concerns that those perceiving the particular expression might take offense is inherently invalid. The Court "recognize[d] that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" Id. at 408-09, quoting Terminello v. Chicago, 337 U.S. 1, 4, (1949); see also Spence v. Washington, 418 U.S. 405, 412 (1974) ("'It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" (citation omitted); Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (in order for the state to "justify prohibition of a

particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid" the effects of an unpopular viewpoint on those perceiving it); Benefit, 424 Mass. at 926 ("A listener's annoyance or offense at a particular type of communication activity does not provide a basis for a law burdening that activity.")

Moreover, a strong current of First Amendment jurisprudence identifies the "heckler's veto" – whereby government limits expression out of concern for how it will be received – as inconsistent with our national commitment to robust discourse even at significant cost to peace of mind. See, e.g., Street v. New York, 394 U.S. 576, 592, (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

Protection of minority expression is a fundamental object of free speech rights as they are understood today. Psychic upset is the unavoidable – and often desirable – consequence of our constitutional protection of free expression. In trying to protect how some heterosexually identified persons think and feel by denying to same-sex couples the expressive resource and intimate association of civil marriage, government runs afoul of one neutrality norm embodied

in the First Amendment: "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails" United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000). Thus, any rationale for the mixed-sex requirement that hinges on a desire to aid those who favor maintaining a traditional image or definition of marriage is not a legitimate governmental concern.

Finally, as this Court has suggested, the fact that the government's long-term exclusive endorsement of this particular image of marriage has gone unchallenged does not mean that it may continue to stand. See Colo v. Treasurer and Receiver General, 378 Mass. 550, 557 (1979) ("[T]he mere fact that a certain practice has gone unchallenged for a long period of time cannot alone immunize it from constitutional invalidity, 'even when that span of time covers our entire national existence and indeed predates it.'") (citation omitted).

B. Preserving Marriage as a Heterosexual Symbol Is Not a Compelling Government Interest

The "meaning of marriage" is an important public or common symbolic resource. See David B. Cruz, The New "Marital Property", 30 Capital U. L. Rev. 279, 312-13 (2002). The mixed-sex requirement has enshrined the

symbol of civil marriage as a heterosexual symbol. Thus, one can assume that another government interest protected by the mixed-sex requirement is the preservation of the current symbolic meaning of civil marriage. Such a purpose is blatantly unconstitutional.¹⁸

The constitutional problem with the Commonwealth's goal of preserving civil marriage as a heterosexual symbol is illuminated by the United States Supreme Court's "flag burning" decisions, Johnson, 491 U.S. 397 and United States v. Eichman, 496 U.S. 310 (1990). Those cases reject the proposition that government may seek to preserve the current meaning of a symbol by precluding its use by persons who may take a different view of its meaning and wish to use it to convey a message different from the majority's.

Johnson and Eichman presented challenges to state and federal laws prohibiting certain actions with respect to the United States flag such as "desecrating" or "physically defil[ing]" it, which the state and federal prosecutors argued were justified as efforts to

¹⁸ Indeed, the purpose of protecting the symbol of civil marriage as a heterosexual symbol effectively skews public debate about lesbian, gay, and bisexual people and their rights. It distorts public discourse about the capacity of same-sex couples for fidelity and commitment by providing mixed-sex couples with a uniquely powerful tool for expressing to the world their interpersonal bonds while denying that tool to lesbian, gay, and bisexual persons.

protect the flag's symbolic meaning. See Eichman, 496 U.S. at 315; Johnson, 491 U.S. at 413.

While the Supreme Court accepted that government may have a legitimate interest in the meaning of at least some symbols, it held that the anti-flag burning laws violated constitutional guarantees of free expression because of the way the laws had gone about serving that symbolic interest: by restricting contradictory expression with that symbol. Eichman, 496 U.S. at 318-19; Johnson, 491 U.S. at 412-19. The statutes at issue permitted the flag to be used as a symbol with respect to certain types of expression,¹⁹ while precluding others from using the flag as a symbol to express dissenting views. As the Court observed in Johnson, "[w]e never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents." Id. at 417. In both cases, the Court held that the First Amendment barred government from doing so.

Similarly, free expression principles should invalidate the mixed-sex requirement for civil marriage

¹⁹ In Johnson, the state of Texas argued "that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings." 491 U.S. at 413. In Eichman, the United States argued that it had "an interest in 'protect[ing] the physical integrity of the flag under all circumstances' in order to safeguard the flag's identity 'as the unique and unalloyed symbol of the Nation.'" 496 U.S. at 315.

that denies that expressive or symbolic resource to same-sex couples. Even if admitting same-sex couples to the institution of civil marriage modulated the symbolic messages that marrying might convey, that is the consequence of our commitment to expressive freedom. It is not constitutional for government to discriminatorily reserve civil marriage for mixed-sex couples to try to keep the term "marriage," the symbol that "marriage" is, or the social notion of "marriage" from coming to be understood as embracing same-sex couples. Many same-sex couples consider themselves married, although not yet legitimately so in the eyes of the law. That some persons take a contrary position does not authorize the Commonwealth to deny the expressive resource and intimate association that is civil marriage to same-sex couples.

C. The Public Welfare Arguments Raised by the Commonwealth Are Not Compelling

The various public welfare arguments offered in support of the different-sex requirement do not satisfy strict scrutiny. See, Brief of the Plaintiffs-Appellants. Accordingly, they cannot justify denying the expressive resource and intimate association that is civil marriage to same-sex couples. Indeed, their poor fit merely confirms that something else – a concern with the expression in which same-sex couples

would engage should they marry civilly – underlies the Commonwealth’s insistent adherence to the mixed-requirement for civil marriage.

CONCLUSION

Civil marriage is a unique and irreplaceable civil institution. Through the institution of marriage couples express themselves in ways that cannot be replicated. As a unique expressive resource and as an honored intimate association, marriage is protected by Article XVI and the First Amendment’s guarantees of freedom of speech. The Commonwealth’s prohibition against same-sex couples entering into civil marriage is intended to advance the expression inherent in the marriages of mixed-sex couples while disfavoring the expression inherent in the marriage of same-sex couples. As such, the prohibition is subject to strict scrutiny, and none of the oft-used justifications to prohibit same-sex couples from marrying can survive strict scrutiny. The Commonwealth may not limit speech to protect listeners or protect the present symbolic meaning of civil marriage.

This Court should rule that same-sex couples are constitutionally guaranteed the right to civilly marry to express their love, commitment and fidelity to each other and to each of us.

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