COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss
County of Suffolk

Superior Court
No. 01-1647-A

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Hillary Goodridge and Julie Goodridge,

David Wilson and Robert Compton,

Michael Horgan and Edward Balmelli,

Maureen Brodoff and Ellen Wade,

Gary Chalmers and Richard Linnell,

Heidi Norton and Gina Smith,

and

Gloria Bailey and Linda Davies,

Plaintiffs

v.

DEPARTMENT OF PUBLIC HEALTH,

and

DR. HOWARD KOH, in his official capacity as Commissioner of the Department of Public Health,

Defendants

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case concerns one of the most fundamental of all our human and civil rights: the right to marry the person you love, the person with whom you want to share your life. When two adults make the very intimate and personal decision to commit themselves to one another by assuming the obligations of civil marriage, that is a decision protected by the laws of the Commonwealth.[1]

More than twenty years ago, the Supreme Judicial Court swept away any doubt that, in this Commonwealth, each person has an identifiable, legally protected interest in "not being treated by her government as a second-class citizen." *Lowell v. Kowalski*, 380 Mass. 663, 670 (1980). In the present case, the plaintiffs call upon this Court to enforce that interest. They seek a declaration that their exclusion from marriage violates the present statutory scheme and further that principles of statutory construction harmonized with the principles of equality embedded in the Declaration of Rights compel that result. *See* section II. Beyond statutory issues, they seek a declaration that, in common with other citizens of the Commonwealth, they may not be arbitrarily hindered by the state in the exercise of the fundamental right to marry the partner of their choice. *See* section III. Moreover, excluding plaintiffs from access to civil marriage violates the comprehensive equality protections of the Massachusetts Constitution, s*ee* section IV, and violates their

[1] This case concerns access to the state-created regime of civil marriage and its secular legal status. A religious marriage, on the other hand, may be celebrated or recognized by a community of faith, but has no legal significance in and of itself. A wide range of clergy and religious leaders are authorized to solemnize civil marriages in the course of their religious ritual, G.L. c. 207, §§ 38, 39, but marriage has always been a civil rather than religious or sacramental matter in Massachusetts. *Inhab. of Milford v. Inhab. of Worcester*, 7 Mass. 48, 1810 WL 982, *3 (Mass.) (early settlers invested no civil authority in clergy, although later authorized ministers to solemnize marriages). *See also Gould v. Gould*, 78 Conn. 242 (1905) (contrasting civil nature of marriage in American colonies in contrast to ecclesiastical authority over marriage in England).

expressive rights. *See* section V. Denying plaintiffs access to marriage cannot be justified under any constitutional standard. S*ee* section VI.

A. Statement of Undisputed Facts

The plaintiffs hereby refer to and incorporate the Statement of Undisputed Facts and Legal Elements Submitted Pursuant to Superior Court Rule 9A(b)(5) in Support of the Motion of the Plaintiffs Hillary and Julie Goodridge, et al., for Summary Judgment.

The plaintiffs in this case seek to marry for the same mix of reasons as heterosexual couples who choose to marry.[2] Bostonians Hillary Goodridge, an administrator for a charity, and Julie Goodridge, an investment advisor, seek to marry because their love and lives over the last fourteen years together have led them to seek the same protections and obligations that are available to married couples. Moreover, they seek to provide their daughter with the social recognition and security which comes from having married parents. Statement of Undisputed Facts, ¶ 10, 12, 27.

David Wilson and Robert Compton, both executives in local businesses, live in Boston just a few miles from David's birthplace in West Roxbury. They have come to believe that marriage is a special expression of commitment which is uniquely understood by others, and they seek to marry to express their love for each other. They also seek to marry to provide maximum legal security to and for each other as they age, plan for retirement and face health-related problems. *Id*. at 29-30, 37-38.

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[2] The plaintiffs in this case are not unusual. Even without considering all of the acknowledged reasons for underreporting, recent census data demonstrates that there are at least 17,099 same-sex couple households in Massachusetts. Data from the U.S. Census Bureau can be found at www.ngltf.org/issues/census2000.htm

Michael Horgan, a website developer, and Edward Balmelli, a computer engineer, both hail from central Massachusetts and now live in Boston. They have shared in the marriage celebrations of their many siblings and extended families and seek to be part of that larger community of married persons – both for their own legal security and so that their relationship is understood by the community as it is by them. *Id*. at 43-44, 52.

Maureen Brodoff and Ellen Wade are both lawyers who have lived in the Boston area for nearly twenty-five years, and have enjoyed an enduring and loving partnership for over twenty of those years. Their bond has carried them and their twelve-year old daughter through life's joys and difficulties. They seek to marry to secure the legal protections and obligations civil marriage would provide. *Id*. at 53, 55-56, 61, 71.

Gary Chalmers and Rich Linnell are both teachers who were raised and still live in the Worcester area. They seek to marry to provide legal protection for themselves and their family. They want their eight-year old daughter to have the security provided by her fathers' love and also the security which would come from her parents' legal bond to one another. *Id*. at 72-74, 77, 79, 87.

Heidi Norton and Gina Smith, together with their two sons, have made their home in Western Massachusetts, where they seek to marry to make a statement for themselves and others about their enduring love and commitment to one another and also because they want their sons to grow up in a world where their parents' relationship is legally and communally respected. *Id*. at 88, 90-91, 103.

Gloria Bailey and Linda Davies, both psychotherapists who reside on Cape Cod, have been in a loving and thriving personal relationship for thirty years and have worked as business partners for the last twenty-five years. They seek to protect the assets they

have accumulated together over those many years in the same ways a spouse would be protected. But even more, they seek to marry so the world can see them as they see themselves – a deeply loyal and devoted couple who are each other's mate in every way. They also seek the legal security and emotional peace of mind that flows from being a married couple. *Id*. at 104-105, 112, 117.

B. Summary Judgment is Proper Here Where The Issues Are Matters of Law Only.

Summary judgment must be granted where there are no material facts in dispute and where the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles her to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989).

This issue is ripe for summary judgment, and plaintiffs are entitled to judgment as a matter of law in their favor.

II. THE MARRIAGE STATUTES SHOULD BE INTERPRETED TO ALLOW QUALIFIED SAME-SEX COUPLES TO MARRY

As plaintiffs will show in later sections of this Memorandum, there are compelling state constitutional reasons why civil marriage cannot be the sole privilege of heterosexual couples. However, this Court can resolve this case without deciding the constitutional issues. *Commonwealth v. Joyce*, 382 Mass. 222, 223 (1981) (statute must be construed, if fairly possible, so as to avoid not only the conclusion that is unconstitutional, but also "grave doubts upon that score"). *Accord Ebitz v. Pioneer Nat. Bank*, 372 Mass. 207, 211

(1977) (any ambiguity in trust instrument about meaning of term "young men" should be resolved in accord with Massachusetts public policy of sex equality and also include young women).

Resolution of this case on statutory construction principles is appropriate because nothing in the marriage statutes dictates that marriage be restricted to a man and a woman. At first blush, the proposition that marriage of same-sex couples is permitted under Massachusetts statutory law might seem unlikely. In fact, however, each of the plaintiffs meets the state requirements for marriage. The restrictions on qualifications to marry under General Laws chapter 207 are few. Persons closely related by blood or marriage are forbidden to marry, G.L. c. 207, §§ 1-3, 8, as are persons still married to another. G.L. c. 207, § 4. Section 7 forbids under-age marriages unless permission has been obtained pursuant to sections 24 and 25. Section 28A requires all persons to take a syphilis test, and requires some women to be tested for rubella.[3] All are required to pay a small fee. *Id.*, § 19.

Because the statute's terms are "clear and unambiguous and lead[] to a workable result," this Court should render its decision without regard to statutory or common law rules of construction. *Local 589, Amalgamated Transit Union v. M.B.T.A.*, 392 Mass. 407, 415 (1984). The plaintiffs meet each of the stated requirements for issuance of a marriage license. None of the plaintiffs is presently married or closely related; each is of

[3] Beyond the individual qualifications identified in the text, §10 refuses to recognize certain marriages solemnized in other states if the marriage would have been prohibited in this state, and § 11 prohibits a non-resident from marrying in Massachusetts if his or her home state prohibits the marriage. Finally, G.L. c. 207, § 14 allows the Probate and Family Court to adjudge the validity of marriages that are denied or in doubt.

proper age, passed his or her blood tests, and tendered the required fee. Statement of Undisputed Facts, ¶ 120, 123, 125, 128, 131, 134, 136.

The same result is reached by reference to simple rules of statutory construction. When a statutory scheme such as G.L. c. 207 provides specific exceptions or disqualifications, those which are enumerated must be held to be the only limitations upon the statute. *See Brady v. Brady*, 380 Mass. 480, 484 (1980). Reading the statute to impose no gender-based restrictions would be consistent with the text of the statute, would avoid constitutional problems, and would be congruent with the intent of the legislature as manifested in the evolution of the marriage statutes over time. Explicit restrictions on marriage based on the race of the parties, their competency, and a past divorce have all been discarded over time.[4] The purpose of the marriage statutes is to facilitate the free choice to enter into marriage as long as the parties are two adults who are not closely related or married at present and who pass certain blood tests. Anything more finds absolutely no support in the current statutory scheme.

The few gendered references in the marriage statutes are not controlling, and should be construed in a gender-neutral fashion. General Laws c. 207, §§ 4, 6, and 17 each use the terms "husband" and "wife" and relate to the ban on marrying while one is already married. Section 8 refers to a "former wife or husband" and concerns marrying during the nisi period. Rules of statutory construction provide "words of one gender may be construed to include the other gender and the neuter." G.L. c. 4, § 6 (Fourth). The statutory provisions that contain a gendered reference relate to actions -- marrying

[4] *See* discussion *infra* at section III.

someone else while you are still married or marrying too soon after a divorce -- that may easily be applied equally to a marriage of a same-sex couple.[5]

Some cases addressing issues other than eligibility to marry have stated that same-sex couples may not marry, but such cases are not authority for propositions that the court has not considered. *Commonwealth v. Stasiun*, 349 Mass. 38, 49 (1965). *See, e.g., Adoption of Tammy*, 416 Mass. at 207-08 (dictum noting that two women had to pursue a joint adoption rather than a step-parent adoption since the laws of the Commonwealth do not permit them to marry). Other cases have described the existing state of affairs and referred to marriage as the union of a man and a woman, but those cases can in no way be read as being either proscriptions or dispositive interpretations of the marriage statutes. *See, e.g., Inhab. of Worcester v. Inhab. of Milford*, 7 Mass. 48, 1810 WL 982 (1810) (referring to marriage as the union of a man and a woman).

Because the plain meaning of the statute requires it, this Court should hold that the Plaintiffs be afforded the relief they seek in this Court.

III. MASSACHUSETTS HAS DEVELOPED AN INDEPENDENT CONSTITUTIONAL JURISPRUDENCE WHICH PROTECTS THE FUNDAMENTAL PERSONAL RIGHT TO MARRY THE PARTNER OF ONE'S CHOOSING.

The Declaration of Rights of the Massachusetts Constitution was intended "to announce great and fundamental principles, to govern the action of those who make and those who administer the law, rather than to establish precise and positive rules of action."

[5] Applying this rule of construction and thus ensuring even enforcement of the marriage laws is neither "inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same statute." G.L. c. 4, § 6 (defining parameter of rule).

Foster v. Morse, 132 Mass. 354, 355 (1882). *See also Commonwealth v. Kneeland*, 20 Pick. 206, 219 (1838).[6]

Our constitutional principles have never been viewed as static, but on the contrary are meant to be guideposts that can weather "radical changes in social, economic and industrial conditions." [7] *See, e.g., Cohen v. Attorney Gen.*, 357 Mass. 564, 570 (1970) quoting *Trefey v. Putnam*, 227 Mass. 522, 523-24 (1917); Margaret H. Marshall, Foreword, 44 Bos.B.J. 4, 4 (2000) (hereafter, "Marshall, *Foreword*") ("The genius of both [the Massachusetts and United States] Constitutions resides in the applicability of their principles to the challenges of an evolving society").

There are guiding principles in determining which specific rights of citizens must be recognized as fundamental under the Declaration of Rights. Our Constitution, including our Declaration of Rights, must be

> interpret[ed] in light of the conditions under which it and its several parts were framed, the ends which it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy. . . . It is to be interpreted as the Constitution of a state and not as a statute or ordinary piece of legislation. Its words must be given a construction adapted to carry into effect its purpose.

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[6] This principle finds articulation in many Revolutionary-era writings, including the influential "Essex Result" to the draft Massachusetts Constitution of 1778, drafted by later Supreme Judicial Court Chief Justice Theophilus Parsons. It sets out much of the leading political analysis of that time. *See* Oscar and Mary F. Handlin, eds., POPULAR SOURCES OF POLITICAL AUTHORITY 334 (1966) (hereafter, "POPULAR SOURCES") ("We wish for [a constitution] founded upon such principles as will secure to us freedom and happiness, however our circumstances may vary").

[7] Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 Suffolk U. L. Rev. 887, 930 (1980) (hereafter, Wilkins, *Cognate Provisions*) ("The Supreme Judicial Court has never treated it [the Declaration of Rights] as a static document").

Cohen, 357 Mass. at 571. In addition to historical context, the precise wording of a provision and the Courts' precedents set the contours of constitutional protections. *Commonwealth v. Mavredakis*, 430 Mass. 848, 859 (2000). Further informing the analysis of what is and is not protected by the Constitution is the ever-present admonition that while constitutional guarantees do not change, "the scope of their application" must be flexible enough to meet changing circumstances. *John Donnelly & Sons, Inc. v. Outdoor Advertising Board*, 369 Mass. 206, 218 (1975) (internal quotation omitted).

Because the freedom to marry is a fundamental right of every citizen under the Massachusetts Constitution – derivative of the great principles of liberty, equality, privacy, due process, expression, association, and happiness set forth there -- the Commonwealth must demonstrate that its broad restriction preventing all same-sex couples from legally marrying is narrowly tailored to serve a compelling state interest. *Cepulonis v. Secretary of the Commonwealth*, 389 Mass. 930, 935 (1983) (infringement on prisoners' fundamental right to vote compels strict scrutiny). The Commonwealth cannot even articulate a legitimate public purpose that is reasonably related to the State's prohibiting these seven couples from marrying one another. *A fortiori*, the Commonwealth cannot withstand the heightened scrutiny applicable to a classification that implicates a fundamental right under the Declaration of Rights.

A. Access to Civil Marriage is a Fundamental Right Under the Declaration of Rights.

1. The Historical Context Demonstrates A Passionate Commitment to Respect for Individual Choice and the Shared Benefits of the Social Contract As Both a Benefit and an End of Government.

Several provisions of the Massachusetts Constitution embrace the values of liberty, freedom and equality. For example, Article I of the Declaration of Rights provides:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their Lives and Liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under law shall not be denied or abridged because of sex, race, color, creed or national origin.

Mass. Const., Decl. of Rights, Art I (as amended by Am. Art. CVI). "Liberty" is expressly protected not only in Article I, but also in Articles X and XII of the Declaration of Rights, and is implicit in the due process protections of Pt. 2, c. 1, sec. 1, Art. 4.[8] Substantive due process principles have a firmer textual footing under the Declaration of Rights than under the federal constitution because Articles I and X explicitly recognize a substantive right to liberty. *Mendonza v. Commonwealth*, 423 Mass. 771, 778-79 (1996).

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[8] Article X provides in part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, *liberty* and property, according to standing laws. . . ". Mass. Const., Pt. 1, Art. X (emphasis added).

Article XII provides in part: "And no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, *liberty*, or estate, but by the judgment of his peers or the law of the land." Mass. Const., Pt. 1, Art. XII (emphasis added). The Supreme Judicial Court has also noted that the term "law of the land" was taken from the Magna Carta and embraces all that is comprehended in the words "due process of law" in the Fourteenth Amendment of the United States Constitution. *Commonwealth v. O'Neal*, 367 Mass. 440, 448 n.5 (1975).

Mass. Const., Pt. 2, ch. 1, § 1, Art. 4 provides in part that the General Court has power "to make, ordain, and establish, all manner of wholesome and reasonable Orders, laws, statutes and ordinances. . . so as the same be not repugnant to or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same. . .". *Id.*

Each of the above-referenced provisions was included in the original Massachusetts Constitution of 1780[9] and has remained there since that time. Social contract theory, the prevailing political philosophy of the late eighteenth century, had an obvious influence on the document as drafted and ratified.[10] It held that some rights were unalienable and could never be given up. Alienable rights, on the other hand, could be parted with for an equivalent protection such as the benefit of joining together in society

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9 *Mass. Const. of 1780*, *in* THE POLITICAL WRITINGS OF JOHN ADAMS, 498-551 (George W. Carey ed., 2000).

10 The delegates at the 1779 Constitutional Convention in Cambridge assigned drafting to a committee of three. John Adams, widely acknowledged as a leading intellectual, emerged as the author of the document. *See, e.g.,* Willi Paul Adams, THE FIRST AMERICAN CONSTITUTIONS 92 (1980) (hereafter, W.P. Adams, THE FIRST AMERICAN CONSTITUTIONS) (describing process); Marshall, *Foreword*, at 4 (describing Adams' intellectual prowess); S.B. Benjamin, *The Significance of the Massachusetts Constitution of 1780*, 70 Temp. L. Rev. 883, 885 (1997) (Adams as drafter); Arthur Lord, *The Massachusetts Constitution and the Constitutional Conventions*, 2 Mass. Law Q. 1, 8 (1916) (describing convention and roles of various participants).

Adams was working both with his own vast knowledge and with his experience as a patriot chafing under British rule that denied the rights of Englishmen to American colonists solely because of their status as colonists - a violation of the social contract. Robert F. Williams, *The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1195, 1198 (1985); Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 94-143 (1967) (hereafter, Bailyn, THE IDEOLOGICAL ORIGINS); Gordon Wood, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 3-45 (1969, 1998 ed.) (hereafter, Wood, THE CREATION).

These concerns animated a then unique conception of constitutional rights as those natural rights secured by a constitution rather than the common law alone. Bailyn, THE IDEOLOGICAL ORIGINS, at 175-98. Among those natural rights was "liberty" and Adams and others understood that only a system of checks and balances could ensure liberty against an otherwise powerful government. Bailyn, THE IDEOLOGICAL ORIGINS, at 55-59, 68, 79; Gordon Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 Rutgers L.J. 911, 914 (1993).

While drafting the 1780 Constitution, Adams also knew of the failed ratification of the draft constitution of 1778 -- a vote that at least in part was based on the absence of a Bill of Rights in the draft constitution. Edward W. Hennessey, *The Extraordinary Massachusetts Constitution of 1780*, 14 Suffolk U. Law Rev. 873, 880 (1980) (describing history); *Essex Result*, *supra* n. 6, at 332 (describing supremacy of bill of rights).

rather than existing as an individual in a state of nature.[11] At the core of this view was the belief that "[i]f the highest purpose of the social contract was to provide the individual with a better chance to find happiness than the presocial state of nature permitted, it seemed only logical that everybody should have a share in the beneficent consequences of the contract."[12]

The Preamble to the Massachusetts Constitution also makes clear that our social contract as a Commonwealth aims at the twin purposes of securing the common good and insuring the conditions for individual liberty and happiness. Accordingly, the affirmative obligation of government is "to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life. . . ". Mass. Const., Preamble.[13] In this context, it is not surprising that the Constitution contains guarantees of liberty, equal rights, and prohibitions on granting special privileges. *See also* section IV.

John Adams and the Constitutional Convention of 1779 never lost sight of the importance of protecting the rights of the individual in society along with achieving the common good. The title of our Constitution -- "A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts" -- is itself a focus on individuals. Similarly, Articles I, X and XII obligate the government to conduct its affairs according to

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[11] A common view was that an equivalent be returned in exchange for parting with alienable rights and that each individual surrender those rights "ONLY WHEN THE GOOD OF THE WHOLE REQUIRES IT." Essex Result, *supra* n. 6, at 330 –31 (emphasis in original).

[12] W.P. Adams, THE FIRST AMERICAN CONSTITUTIONS 187-88.

[13] The Preamble *obliges* the government to enable the individual to enjoy his or her natural rights. As a corollary, the Constitution furnishes the individual with the power to enjoy those rights "according to standing laws." Mass. Const., Pt. 1, Art. X.

certain principles, but in mentioning "natural, essential and unalienable rights" also set out spheres of individual choice and behavior over which the sovereign majority has relinquished control.[14] Among these natural rights is that of "enjoying and defending their lives and liberties," which Adams and his contemporaries saw in part as the power of self-determination. Mass. Const., Pt. 1, Art. I.[15] Another dimension of the liberty clauses is the essential and unalienable right of the people in "obtaining their safety and happiness." Mass. Const., Pt. 1, Art. I. Under our Constitution, we claim the right to a government that "protect[s] individuals, absent adequate justification, from interference with those decisions and activities that may be deemed basic, or essential, to their identity and well being."[16] "[A]cquiring, possessing and protecting property" is another component of our individual rights.[17] These, then, are the benefits and ends of government conferred by the liberty and due process clauses of the Massachusetts Constitution. In short, the Declaration of Rights embodies the promise of the drafters and the electorate of 1780 to government protection for individual liberty and happiness -- a pledge which continues to illuminate the proper application of these clauses today.

2. Precedents Demonstrate Respect for the Choice of Marital Partner and Privileging of Marriage.

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[14] W.P. Adams, THE FIRST AMERICAN CONSTITUTIONS 145.

[15] Although the emphasis in Whig political philosophy was on *civil* liberty – in the sense of the political liberty one enjoyed as a member of the state – the Massachusetts Declaration of Rights places a distinct emphasis on, and refers to, *individual* liberties as well. *See supra.*

[16] Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Constit. Law Q. 1, 27 (1997). *See also* Marshall, *Foreword* at 4 ("The Massachusetts Declaration of Rights and the Federal Bill of Rights serve a common purpose to ensure the dignity and freedom of the individual").

[17] At the time the Constitution was approved, property rights were part of individual rights. Wood, THE CREATION, at 61-65.

Examination of legislative materials and judicial precedent over the last 200 years makes clear two pertinent points: (1) marriage is a highly privileged status; and (2) respect for individual choice in matters concerning marriage and the family are jealously guarded.

a. Judicial Precedent Demonstrates the Profound Importance of Civil Marriage as an Institution and to the Participants.

Nearly 200 years ago, the Supreme Judicial Court stated:

> Marriage, being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been . . . among the first attentions of the civil magistrate to regulate marriages; by defining the characters and relations of parties who may marry, … by describing the solemnities, by which the contract shall be executed, . . . by annexing civil rights to the parties and their issue, and by declaring the causes, and the judicature for rescinding the contract . . . .

Inhab. of Milford, 7 Mass. 48, 1810 WL 982, *3. In other words, from the earliest days of this Commonwealth, marriage has been viewed as an important and special status.

While the bona fides of marriage have long been a subject of state regulation, the choice of a marital partner has been left to the individual with little state interference. Both case law and statutes demonstrate that the choice of marital partner is one of the essential and unalienable rights protected by the Declaration of Rights.

Consistent with modern conceptions of liberty and privacy,[18] the courts have long recognized that the law demonstrates a healthy respect for what is referred to as “freedom

[18] Other rights protected under the state guarantee of privacy include: "an individual's interest in making certain kinds of important decisions which fundamentally affect his or her person”, *see Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 648-49 (1981) (striking Medicaid funding restrictions which unduly restricted a woman's right to choose to terminate a pregnancy); or which relate to especially intimate aspects of a person's life, *see Opinion of the Justices*, 423 Mass. 1201, 1234-35 (1996) (proposed notification provisions of sex offender registration statute withstood constitutional

of choice in matters of marriage and family life." *A.Z. v. B.Z.*, 431 Mass. 150, 162 (2000) (internal citation omitted).[19] *See also Tarin v. Commissioner of Div. of Med. Assist.*, 424 Mass. 743, 756 (1997) ("The rights associated with the family – the right of an individual to marry, establish a home, and bring up children – have long been protected as part of the liberty guaranteed by the due process clause") (internal quotations omitted); *Marcoux v. Attorney Gen.*, 375 Mass. 63, 66 (1978) (marriage is an area "in which individual autonomy is thought to be especially important and desirable"); *Opinion of the Justices*, 375 Mass. 795, 806 (1978) (recognizing "fundamental matters relating to marriage" as within a zone of individual privacy in which government may not intrude absent compelling interest); *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 185 (1977) (acknowledging "freedom of choice in matters of the family"). After all, the right to marry without the freedom to marry the person of one's choice is really no right at all. *Perez v. Lippold*, 198 P.2d. 17, 19, 21 (Cal. 1948).

This principle of respect for marital choice has also historically found support in the legislature. It repealed the ban on interracial marriage in 1842, a major form of state interference, at a time when virtually every other state forbade or criminalized interracial

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scrutiny despite intrusiveness into offenders' lives); or which implicate "the sanctity of free choice and self-determination," *see Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 742 (1977) (constitutional right to privacy includes right to refuse medical treatment); or which implicate the freedom from "unwanted infringe-ments" of one's bodily integrity, *see Matter of Spring*, 380 Mass. 629, 634 (1980) (same).

[19] In *A.Z.*, the Supreme Judicial Court addressed the right to intimate association and held that a woman could not use frozen embryos created with her former husband because family relationships are predicated on free choice: "respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship." *Id.*

marriage.[20] In the same vein, historical restrictions on the right to remarry after divorce were gradually eased and then entirely repealed in 1965,[21] and restrictions on competency have also fallen away.[22]

b. Legislatively Accorded Rights and Obligations to Married Couples Also Demonstrate the Importance of Marriage to the Individuals Involved, the Wider Community, and the Commonwealth as a Whole.

Further confirmation of the high regard of our government for choice of marital partner lies in the dramatic alteration of the legal status of the parties within the marriage vis-à-vis each other, the state, and third parties. *See, e.g., French v. McAnarney*, 290 Mass. 544, 546 (1935) ("Marriage is not merely a contract between the parties. … It 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 v. Hill*, 201 Mass. 15, 21 (1909) (upon entering into the marriage relationship, "each spouse assumes toward the other, and toward society in general, certain duties and responsibilities"); *Smith v. Smith*, 171 Mass. 404, 406-07 (1898) ("At 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").

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[20] *See generally* Michael Grossberg, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA 127 (1985) (pervasiveness of interracial marriage bans). In Massachusetts, interracial marriage between a white person and "negro or molatto" (sic) was expressly prohibited in 1705. P.L. c. 10, § 4 (1705). In 1786, "Indians" were also among those barred from marrying a white person. St. 1786, c. 3 (1786). These and like measures were repealed in 1843. Mass. Acts 1843, c. 5.

[21] *Compare e.g.,* St. 1841, c. 83 (guilty party in divorce barred from remarrying) *with* St. 1965, c. 640 (repealing all disabilities upon remarriage after divorce).

[22] *Compare e.g.,* St. 1824, c. 73, § 1 (1824) *with* St. 1986, c. 599, § 52 (repealing section of law relating to validity of marriages contracted by "insane persons, idiots, or feeble-minded persons").

Marriage provides the married couple with access to a broad array of legislatively-granted protections. The law recognizes that most couples are an economically integrated unit. Married couples may own property as tenants by the entirety, a form of ownership providing maximum protection to the couple against creditors and allowing the automatic descent of the property to the surviving spouse without probate. *See generally* G.L. c. 184. They may file joint income tax returns, thereby pooling both incomes and deductions, and enjoying simplicity as well as tax advantages. Married couples have access to insurance policies for their families, and the term "dependent" always includes a spouse in health, dental and optometric insurance policies. G.L. c. 175, § 108; G.L. c. 176B, § 1. The same is true for public employees' insurances. *Connors v. Boston*, 430 Mass. 31, 43 (1999).

Inheritance laws assure that a surviving spouse will receive at least a third of the decedent's personal estate, G.L. c. 191, § 15; shall receive support from the decedent's estate between the time of the decedent's death and the settlement of the estate, G.L. c. 193, § 13; may assume the ownership of a pleasure vehicle owned by the decedent, G.L. c. 90D, § 15A; is entitled to at least one-third of the value of all real estate owned by the decedent at the time of death, G.L. c. 189, § 1 et seq.; is entitled to occupy the decedent's real estate and to receive allowances for a period of time, G.L. c. 196, §§ 1, 2; and is automatically entitled to inherit a portion of the decedent's estate in the event the decedent dies without a will, G.L. c. 190, § 1.

The law even provides a special court to resolve the conflicts that arise when a couple divorces and applies specific rules to marital breakups. *See generally* G.L. c. 208. These courts are required to divide marital property in an equitable manner. *Id.*, § 34.

Married spouses are generally responsible for each other's support. G.L. c. 273, §§ 1, 15A (actions for criminal non-support). They are jointly and severally liable for debts incurred by the other for necessaries. G.L. c. 209, § 1; *Silva v. Silva*, 9 Mass. App. Ct. 339, 341 (1980) (marital obligations imposed on both husband and wife).

Protections for families of crime victims automatically include spouses. G.L. c. 258B, §§ 2, 9. State law allows a person to take time off to care for the other spouse's parent or elderly relative. G.L. c. 149, §52D. The workers' compensation program conclusively presumes that a spouse was dependent for support on an injured or deceased worker and makes payments accordingly. G.L. c. 152, §§ 31, 32, 35A.

The law also acknowledges the confidential and intimate nature of the spousal relationship. At times of crisis, a spouse has an automatic preference for hospital visitation, and may make medical decisions for a disabled or incompetent spouse (absent contrary written directions). *Shine v. Vega*, 429 Mass. 456, 466 (1999). Upon death, the surviving spouse has the automatic right to take possession of the deceased spouse's body (absent contrary written instructions), *Vaughn v. Vaughn*, 294 Mass. 164 (1936), and also has the first priority to administer the estate of a deceased spouse who died intestate. G.L. c. 193, §§ 1, 2. Spouses may make a variety of legal claims dependent on marital status. G.L. c. 229, §§ 1, 2 (wrongful death, lost companionship); G.L. c. 258C, §§ 2, 3 (compensation for families of crime victims); *Feliciano v. Rosemar Silver Co.*, 401 Mass. 141 (1987) (loss of consortium). The same assumed intimacy imposes a mutual obligation of faithfulness upon the spouses. G.L. c. 272, § 14 (adultery). It also prevents a married couple from being compelled to disclose their confidential marital communications in court. G.L. c. 233, § 20(1) and Mass. R. Evid. 504 (b).

c. Marriage Has a Unique Cultural Status Which Is Important For the Individuals Involved.

Marriage is far more than the sum of its legal parts. It is also a special status, perhaps universally understood by others. This common understanding is itself an advantage to the couple because it communicates instantly their relationship to each other and third parties in situations ranging from social encounters to medical emergencies. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 670 (1980).

In contrast, not having access to marriage casts a badge of inferiority on those who are denied access to its wide welcome. Historian Nancy Cott, in a recent book analyzing the political history of marriage in the United States, describes how slaves were once not permitted to marry because they were not free. Professor Cott identifies shades of the same argument in the present exclusion of lesbians and gay men from marriage.

> The exclusion of same-sex partners from free choice in marriage stigmatizes their relationships, and reinforces a caste supremacy of heterosexuality over homosexuality just as laws banning marriages across the color line exhibited and reinforced white supremacy.

Nancy Cott, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 216 (2000). *See also* Kenneth Karst, *Why Equality Matters*, 17 Ga. L. Rev. 245, 48-49 (1983) (discussing right of equal citizenship). The SJC demonstrated its awareness of the damage caused by this type of exclusion in *Lowell v. Kowalski*, 380 Mass. 663 (1980). In striking a requirement that the parents intermarry before a child born out of wedlock could inherit from her father, *id*. at 669-670, the Court wrote:

> The Plaintiff in this case is asserting more than an adverse financial impact; she is litigating the issue of her status in the community. Such a Plaintiff's interest is not simply economic. *The Plaintiff has a separate, identifiable interest in not being treated by her government as a second-class person.*

Id. at 667 (internal citations omitted) (emphasis added). Similarly, the Commonwealth's refusal to legally recognize the commitments of same-sex couples like the plaintiffs with access to civil marriage causes psychic harm as well as economic and legal harm to gay and lesbian families.

d. Sibling States and the United States Supreme Court Demonstrate Respect for An Individual's Choice of Marital Partner.

It is not only Massachusetts that holds the choice of marital partner in high regard. Both state supreme courts and the United States Supreme Court have recognized the primary importance of marriage and condemned invasive restrictions on the right to marry. One of the most striking is the California Supreme Court's decision striking down a ban on interracial marriage. *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948). That court recognized at the outset that marriage is "a fundamental right of free [people]" and that "[l]egislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." *Id*. at 19. Moreover, the court recognized that the "essence of the right to marry is the freedom to join in marriage with *the person of one's choice*," *id.* at 21 (emphasis added), leading to the conclusion that the statutory restriction on marital choice infringed on the individual's right to marry. *Id*. at 19.

The United States Supreme Court has also addressed the importance of marriage. Striking down a Connecticut law prohibiting the use of contraceptives by married couples, it concluded:

> Marriage is a coming together for better or 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 is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965).[23]

In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court reviewed and invalidated a state law imposing racial requirements for marriage. A trial court judge in Virginia had convicted Mildred Jeter, a black woman, and Richard Loving, a white man, for violating the state's ban. The trial judge explained,

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id. at 12. In reversing the Lovings' conviction, the Court focused on the racial requirement for marriage in Virginia's law, and in the process made clear that protection of the individual right of choice is inextricably interwoven with the special role of marriage. In declaring that the statute's infringement on the right to marry was unconstitutional under the Fourteenth Amendment's due process clause, it stated:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Under our

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[23] The *Griswold* opinion discussed the fundamental right of privacy under the Fourteenth Amendment. This confirms that, for the purposes of the Massachusetts Constitution, marriage is a fundamental right since the Massachusetts Declaration of Rights is more protective of individual rights than the federal constitution. *See, e.g., Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629 (1981).

For other decisions discussing the fundamental nature of the marriage right in the context of a federal due process analysis, *see Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (marriage and divorce affect "personal rights of the deepest significance") (considering issue of full faith and credit to another state's divorce decree); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (marriage and procreation involve basic civil rights) (striking law requiring sterilization of certain habitual offenders); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (listing marriage among basic privileges "long recognized at common law as essential to the orderly pursuit of happiness" by free citizens) (invalidating law forbidding teaching foreign languages in grade schools).

> Constitution, the freedom to marry, or not marry, a person of another race *resides with the individual* and cannot be infringed by the State.

Id. (emphasis added).

Subsequent decisions of the United States Supreme Court have confirmed that *Loving*'s fundamental rights analysis of the right to marry applies to "all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). In *Zablocki*, the Supreme Court invalidated a state law which prevented parents who were delinquent on their child support obligations from marrying. It reiterated, "[O]ur past decisions make clear the right to marry is of fundamental importance." *Id.* at 383. Although the state interests were important, the Supreme Court found the statutory classification at issue interfered directly and substantially with the right of a class of people to marry. *Id.* at 388-91.

More recently, the Supreme Court has upheld the constitutional right of a prison inmate to marry, unanimously striking down a Missouri prison regulation barring virtually all inmate marriages. *Turner v. Safley*, 482 U.S. 78 (1987). While acknowledging the reality and validity of restrictions on prisoners, the Court concluded that even convicted criminals were entitled to marry and to enjoy the many protections and benefits accompanying the right to marry. These attributes include:

- "expressions of emotional support and public commitment";
- "for some inmates and their spouses, . . . an exercise of religious faith as well as an expression of personal dedication";
- for "most inmate marriages" "the expectation that they will be fully consummated"; and
- "marital status often is a precondition to the receipt of government benefits (e.g. Social Security benefits), property rights (e.g. tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g. legitimation of children born out of wedlock)."

Turner, 482 U.S. at 95-96. It almost goes without saying that these words have special resonance for lesbians and gay men since these attributes are just as applicable to same-sex couples as to other couples.

Like persons delinquent in child support payments, prison inmates are not a class protected by heightened judicial scrutiny. The key point of *Loving*, *Griswold*, *Zablocki* and *Turner* is that each confirms that there is a fundamental right to marry and that restrictions on that fundamental are subject to strict judicial scrutiny.

The Commonwealth might assert that although marriage is a fundamental right, "same-sex marriage" is not. *See, e.g., Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (holding that restriction on marriages between same gender couples is sex discrimination, but rejecting fundamental rights argument because "same-sex marriage" is not "rooted in the collective conscience of our people.").[24] This argument is nothing more than a clever way to frame the issue so as to compel a desired conclusion. Moreover, it begs the question. Had the California Supreme Court in the *Perez* case, or the United States Supreme Court in the *Loving* opinion, begun their analyses by pointing to the widespread and historically-based bans on interracial marriage, and then considered whether there was a fundamental right to "miscegenic" marriages, their conclusions may well have been different. If the United States Supreme Court had begun in *Zablocki* by asking whether there is a fundamental right for "deadbeat dads" to marry when they cannot even support their existing children, or if it had begun its inquiry in the *Turner* case by determining whether there is a fundamental right to marriage involving convicted and incarcerated

[24] *Baker v. State*, 744 A.2d 864 (Vt. 1999), did not reach the issue of whether or not marriage is a fundamental right under the state constitution.

criminals, that Court may not have so clearly enunciated a fundamental right to marry under the federal Constitution.

Instead, in all of the above cases, the courts first noted that there was a fundamental right to marry, and then considered whether the state had a sufficient reason to curtail the freedom in that case. Thus, to define the "fundamental right" question by asking whether same-sex couples, or any other specifically defined couple, enjoy a fundamental right to marry is to define the fundamental right too narrowly.[25] Only after acknowledging the general fundamental right to marry the person of one's choice did the courts consider the particular types of marriage at issue to determine whether the classifications were permissible. In short, while a history of discrimination against same-sex couples may *explain* the exclusionary nature of the marriage laws, it does not *justify* such exclusion. The Commonwealth must do more than invoke a tradition of discrimination; it must explain how adhering to that tradition is a legitimate government purpose which benefits the public. It cannot do so. *See infra* section VI.

B. The Plaintiffs Must Share in the Fundamental Right To Marry the Partner of Their Choice Under the Massachusetts Constitution.

The Constitution's energizing principles, the government's respect for marital choice and marriage as an institution, and judicial decisions lead inevitably to the conclusion that the right to marry the partner of one's choice is a fundamental right protected by the Massachusetts Constitution. This right extends to each of the seven plaintiff couples and thousands like them throughout the Commonwealth who also have a

[25] *See Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, plurality opinion), 132 (O'Connor, concurring), 139 (Brennan, dissenting) (all but two justices rejecting Justice Scalia's suggestion that court should define right in question, for purposes of due process analysis, at "the most specific level [that] can be identified").

right to share in the common good on an equal basis with others. With the exception of sex, restrictions on the choice of marital partner based on personal identifying characteristics have been eliminated such that the remaining limitations are those concerning relational matters like consanguinity, present marital status, and the number of persons one may marry.[26] The only citizens of the Commonwealth who meet all of the express statutory requirements for marriage but may not marry are couples of the same sex. This is a classic regulation based on personal characteristics and legitimate personal choice. The plaintiffs' choice of marital partner is as much a part of their liberty and happiness as it is for anyone else. *Cf. Casey v. Planned Parenthood*, 505 U.S. 833, 851 (1992) (plurality) (core "liberty" interests warrant constitutional protections for "personal decisions relating to marriage, procreating, contraception, family relationships, child rearing and education" because they "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy").

1. The Plaintiffs are Immeasurably Harmed by Their Exclusion from Marriage.

Real harms befall the Plaintiffs from their inability to marry. Marriage is of undoubted importance, both in terms of how it changes the legal obligations of the parties to each other, but also how it often protects them in interactions with the state, third parties and their fellow citizens. *See generally* section III (A) (2) (b), (c) above; Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence and Couples of*

[26] Also unlike the restrictions in the present matter, age restrictions are temporary because most people will become old enough to marry. Limits on the marriage of minors can be upheld based on the compelling state interest of protecting children who lack legal capacity for consent.

the Same Gender, 41 B.C. L. Rev. 265, 291-311 (2000) (using conservative scholars to demonstrate how various functions of law fail with regard to same-sex couples).

The plaintiffs have formed families of love, commitment and affection, but without access to the laws that protect the emotional bond of married couples. Despite their thirty years together, Gloria and Linda still had to meet and work with Linda's health care providers prior to her bi-lateral hip replacement to ensure that Gloria could be by her side in the hospital. Statement of Undisputed Facts, ¶ 112, 114. David has already had the experience of being seen as a total stranger by the emergency medical technicians after his former partner collapsed from a heart attack in their driveway. *Id.*, ¶ 39. No legal document he and Rob can draw up can prevent that from happening again if Rob's own heart problems worsen. As it stands, when Rob has been ill and David has tried to facilitate contact with insurers, the insurers will not speak with David because the two are not related. *Id.*, ¶ 37-38.

Each of the plaintiff couples has organized themselves into economically integrated households, but without the financial protections accorded to married couples. None of the couples is able to procure a joint policy of health insurance, and those who have domestic partner benefits at work must pay taxes on the value of the benefits. *Id.*, ¶ 99, 113; G.L. c. 175, sec. 108. Gary and Rich presently have one policy for Gary and their daughter through Gary's work, but purchase a separate policy for Rich who does not count as a spouse under existing law. Statement of Undisputed Facts, ¶ 82.

In the same vein, Ed has a pension at Lucent, and Gary has one through the Shrewsbury public schools, but neither Ed's partner Mike nor Gary's partner Rich enjoy the same scope of pension coverage which would be available to a spouse. *Id.*, ¶ 48, 85.

For Gary and Rich, there is no survivorship benefit for Rich at all, let alone the benefits which would be available to Rich as a spouse if Gary were to die before retirement or if Gary were accidentally killed on his job.[27] Heidi and Gina have their own 401(k) accounts, *id.*, ¶ 98, but unlike spouses, if the owner dies, the beneficiary would have to take taxable distributions immediately and could not roll over the account into his or her own tax-deferred account. 26 U.S.C. 401(a)(9)(B)(iii), (iv).

Although the plaintiffs have each worked hard to acquire security for their family and nearly all own their homes as joint tenants with rights of survivorship, Statement of Undisputed Facts, ¶ 11, 29, 43, 54, 83, 90, 106, they do not enjoy the unlimited marital deduction which would delays any possible tax payments on the house until after the second of the two dies. 26 U.S.C. §§ 1041, 2523.

The safety net provided by civil marriage in times of tragedy, death or hardship is unavailable to each of the plaintiffs despite the enormous efforts made by each couple to obtain the few legal documents which offer them any legal protection. Should one of the members of these couples need nursing home care, they would not enjoy the unlimited ability to transfer assets to a spouse prior to institutionalization and could not protect the family home from a lien by MassHealth. 130 C.M.R. § 520.019 (D) (1) (unlimited transfer for spouses); G.L. c. 118E, § 25 and 130 C.M.R. § 520.008 (A) (home not a countable asset for a married person).

[27] *See generally* G.L. c. 32, § 12(2) Option (a) (joint and last survivor allowance for spouses); G.L. c. 32, § 12(2)(c), (d) (two-thirds of employee's pension available to surviving spouse if employee dies before retirement); G.L. c. 32, § 9(1), (2)(a) (accidental death benefit for surviving spouse).

A number of the plaintiff couples have taken relatives into their homes for a period of time. Statement of Undisputed Facts, ¶ 34, 97. But none of the partners has the right to take time off from work to take his or her "in-law" to a medical appointment because they are not related by blood or marriage. G.L. c. 149, § 52D.

Four of the plaintiff couples are raising children born or adopted into the relationship, but none of those children enjoy the emotional or financial security which comes from having married parents. While each of the couples has completed a second parent adoption of their children, they worry about whether the legal adoption will be respected as they travel throughout the state and beyond. Statement of Undisputed Facts, ¶ 18, 25, 77, 84. If Julie and Hillary were married, it is doubtful that Hillary would have had such a hard time getting access to their new baby and to Julie after Julie's difficult cesarean section operation. *Id.*, ¶ 24.

As discussed above in section III (A) (2) (b), there are many other ways in which the law provides a safety net to married couples and their children. This safety net is not available to the plaintiffs and cannot be reproduced by contract.

2. Constitutional Principles Must Be Interpreted in Light of Evolving Trends of Respect for Gay and Lesbian Citizens and Families in Massachusetts.

Including plaintiffs within the common good via the liberty and privacy provisions of the Massachusetts Constitution is consistent with evolving trends and the cardinal rule that constitutional provisions are not static or frozen in time, as discussed above. Over the years that followed the SJC's condemnation of second-class citizenship in *Kowalski*, all three branches of Massachusetts government have come to recognize gay and lesbian citizens as individuals deserving equal treatment and protection under the law. For

example, non-discrimination statutes were amended in 1989 to ensure equal treatment in employment, housing, public accommodations and credit without regard to sexual orientation. Acts & Resolves 1989, c. 516. The legislature has enacted protections for gays and lesbians against hate crimes and different treatment because of their sexual orientation. Acts & Resolves 1996, c. 163 (amending hate crimes law, G.L. c. 272, sec. 39); Acts & Resolves 1993, c. 282 (amending education law, G.L. c. 76, sec. 5). Court rules on ethical behavior forbid the gratuitous reference to sexual orientation. Massachusetts Rules of Professional Conduct, Rule 3.4 (i).

In addition to individual protections, the Commonwealth also provides gay and lesbian families with some protections. In 1993, then Governor Weld issued an Executive Order providing for domestic partner bereavement and sick leave for certain executive branch employees. Commonwealth of Mass., Exec. Order 340 (Nov. 19, 1993). Unmarried couples, including same-sex couples, may enter into contracts to sort out their financial affairs. *Wilcox v. Trautz,* 427 Mass. 326 (1998). For gay and lesbian people with children, it has long been the law that the mere fact of one's sexual orientation is not a valid reason to deny a parent custody of his or her child. *Bezio v. Patenaude*, 381 Mass. 563 (1980). In 1993, our state's highest court recognized that governing statutes allow unmarried couples, including same-sex couples, to adopt jointly their own children and to adopt jointly from the Commonwealth. *Adoption of Tammy*, 416 Mass. 205 (1993); *Adoption of Susan*, 416 Mass. 1003 (1993) (rescript). More recently, the courts have also recognized that a lesbian couple who have jointly parented a child are a "nontraditional family" and that the relationship merits legal protection upon separation. *E.N.O. v. L.M.M.*, 429 Mass. 824, *cert. denied*, 528 U.S. 1005 (1999). Although these protections

fall far short of the comprehensive protections offered by civil marriage, they demonstrate that each branch of government has begun to recognize that the greater Massachusetts community includes gay and lesbian members whose participation in the life of the community deserves respect and protection.

Neither the plaintiffs nor the larger community nor the Commonwealth as a whole benefits from the plaintiffs' exclusion from marriage. The infringement of their fundamental right triggers strict scrutiny. *Cepulonis*, 389 Mass. at 935. In order for the current regime to pass constitutional muster, the Commonwealth must demonstrate that the categorical exclusion of qualified same-sex couples from marriage is necessary to promote a compelling state interest and that the classification of those excluded is narrowly tailored to that interest. *Id.*, *citing Mass. PIRG v. Secretary of the Commonwealth*, 375 Mass. 85, 93 (1978). The Commonwealth cannot meet this burden. *See* section VI below.

IV. THE EQUALITY PROVISIONS OF THE MASSACHUSETTS CONSTITUTION GUARANTEE PLAINTIFFS ACCESS TO CIVIL MARRIAGE ON THE SAME TERMS AS OTHERS.

Like the liberty provisions of the Declaration of Rights, the equality provisions reflect both the concerns of the Revolutionary era and a promise to future generations. As a matter of practical application, the equality jurisprudence under Articles I, VI, VII and X employs a distinct analytical framework. Many of the cases fall under the familiar federal equal protection mode of analysis in which similarly situated persons are to be treated similarly and with scrutiny of classifications ranging from strict, to intermediate, to rational basis. *Dickerson v. Attorney Gen.*, 396 Mass. 740, 743 (1986). Even when the SJC uses a similar *mode* of analysis as the federal courts, it is by no means constrained to

reach the same *result* because the SJC has made clear that the Declaration of Rights may provide more extensive civil rights protections than the federal analog.[28]

Among the obvious differences between the federal and Massachusetts frameworks is the substantive guarantee of equality in Article I. The strong commitment of our Constitution to equality has led Massachusetts to develop tools in equality cases that demand the government make a more complete justification for inequality and unequal treatment than may be the case under federal jurisprudence. Under the conventional mode of analysis, if a statute imposes on a suspect or quasi-suspect class or

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[28] The SJC reaches different results from the United States Supreme Court for several reasons. One is that the SJC has an independent duty to interpret the State Constitution and it generally guards citizens more jealously against the exercise of the State's police power and thus provides citizens with a greater degree of protection. *See, e.g., Commonwealth v. Mavredakis*, 430 Mass. 848, 858 (2000) (Art. XII); *Commonwealth v. Gonsalves*, 429 Mass. 658, 667-68 (1999) (Art. XIV); *Planned Parenthood League of Mass., Inc. v. Attorney Gen.*, 424 Mass. 586, 590 (1997) (Arts. I, X, XII); *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 87 (1983) (Art. IX); *Attorney Gen. v. Colleton*, 387 Mass. 790, 800 (1982) (Art. XII, "[P]ositive safeguards secured to individuals by the Massachusetts Constitution, yet not available under the cognate provisions of the United States Constitution, should not be . . . circumscribed" by interpretations of the federal document); *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 651 (1981) (Art. X); *Blue Hills Cemetery, Inc. v. Bd. of Reg.*, 379 Mass. 368, 373 n.8 (1979) (Art. I, X, Pt. II, c. 1, sec 1., Art. IV); *Coffee-Rich, Inc. v. Com'r of Pub. Health*, 348 Mass. 414, 421 (1965) (Arts. I, X and XII); *Hutcheson v. Dir. of Civil Service*, 361 Mass. 480, 490 (1972). *See generally* Henry Clay, *Human Freedom and State Constitutional Law: Part One, the Renaissance*, 70 Mass. L. Rev. 161, 161 (1985) (identifying "human freedom" which encompasses individual rights as an area of the law which is particularly suitable for independent state grounds analysis).

Another basis for divergence is textual differences between the two constitutions. *See, e.g., Commonwealth v. Burgess*, 426 Mass. 206, 218 (1997) (Art. XII), *Mendonza.*, 423 Mass. at 778-79 (Arts. I and X); D*ane v. Bd. of Registrars*, 374 Mass. 152, 160-61 (1978) (Art. I); *Commonwealth v. Upton*, 394 Mass. 363, 372 (1985) (Art. XIV).

A third reason for different results may arise from principled disagreement with the United States Supreme Court. *Moe*, 382 Mass. at 654-55; *Commonwealth v. Blood*, 400 Mass. 61, 72 (1987) (Art. XIV); *Dist. Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648, 667-68 (1980) (Art. XXVI); *Commonwealth v. Soares*, 377 Mass. 461, 486 (1979) (Art. XII); *Commonwealth v. Sees*, 374 Mass. 532, 538-39 (1978) (Art. XVI).

burdens fundamental interests, it receives strict scrutiny. Absent those factors, rational basis review applies, meaning that a statute will be upheld as long as it is rationally related to the furtherance of a legitimate state interest. *Murphy v. Com'r of Dept. of Industrial Accidents*, 415 Mass. 218, 226-27 (1993). However, rational basis review is far from toothless in Massachusetts, *id.*, at 233; and state regulation of personal rights and characteristics receive more searching review than tax and economic regulation. *Blue Hills Cemetery, Inc. v. Bd. of Reg.*, 379 Mass. 368, 373 n. 8 (1979) (Massachusetts courts less willing than federal to ascribe to legislature speculative and implausible ends, or to find rational the nexus between a plausible end and the chosen statutory means, but in area of economic regulation, federal and state constitutional standards are essentially the same).[29] See discussion at section IV (D) below.

In *Marcoux v. Attorney Gen.*, 375 Mass. 63, 65 n.4 (1978), the SJC expressly captured the courts' dynamic review of equality cases, eschewing an exclusive reliance on the federal tiers in favor of a flexible balancing test based on the interests involved. In that case, the SJC stated:

> The cases speak at times of legislation which need only undergo a test of 'reasonable relation' and legislation that must survive 'strict scrutiny,' but we conceive that these sobriquets are a shorthand for referring to the opposite ends of a continuum of constitutional vulnerability determined at every point by the competing values involved.

[29] *See also Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n*, 429 Mass. 721, 725 (1999) (same); *Rushworth v. Registrar of Motor Vehicles*, 413 Mass. 265, 269 (1995); *Corning Glass Works v. Ann & Hope, Inc.*, 363 Mass. 409, 416 (1973) (same).

Id. The SJC has repeatedly articulated and preserved the *Marcoux* mode of analysis,[30] with the precise contours of the balancing process depending on the case.[31]

Under any conception of equality or equal protection jurisprudence in Massachusetts, the Commonwealth cannot articulate a sufficient justification for excluding the plaintiffs from, or failing to include them in, civil marriage.

A. The Massachusetts Commitment to Equality

As with the liberty clauses discussed in the previous section, equality was a central theme in the Revolutionary era and in the Massachusetts Constitution. The idea of equality is inherent in social contract theory. As explained by historian Willi Paul Adams, "If all citizens voluntarily joined society with the same need for protection, then it was unjust that some citizens claimed more rights than others once the contract was closed."[32]

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[30] *See, e.g.*, *Murphy*, 415 Mass. at 232 n. 19; *Moe*, 382 Mass. at 656-57; *Bachrach*, 382 Mass. at 276 n. 18; *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n*, 378 Mass. 342, 354 (1979). While *Marcoux* articulated the balancing test in a due process context, the subsequent cases have clarified that the test may apply in an equality context as well.

[31] *Marcoux* cited with approval *State v. Erickson*, 574 P.2d 1 (1978), in which the Alaska Supreme Court stated its version of the balancing test under its Constitution:

> "[T] here is no reason why we cannot use a single test. The test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective. . . . [B]y avoiding outright categorization of fundamental and non-fundamental rights, a more flexible, less result-oriented analysis may be made."

Id. at 11-12.

The SJC applied the *Marcoux* balancing test in both *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 658-59 (1981) and *Planned Parenthood v. Attorney Gen.*, 424 Mass. 586, 591-97 (1997).

[32] W.P. Adams, THE FIRST AMERICAN CONSTITUTIONS 165.

Stated differently, equal application of the laws is a principle that enhances the common good. *Baker v. State*, 744 A.2d 864, 876 (Vt. 1999).[33]

These equality principles constrain the majority to treat individuals with equity and impartiality.[34] The very first Article of the Declaration of Rights now provides:

> All people are born free and equal and have certain natural, essential and unalienable rights among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possession and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under law shall not be denied or abridged because of sex, race, color, creed or national origin.

Mass. Const., Decl. of Rights, Art I (as amended by Art. CVI).

In addition to stating natural, essential, and unalienable rights, Article I has been a forceful guarantee of, and admonition toward, equality.[35] For example, it was invoked by

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[33] Construing the Common Benefits clause of the Vermont Constitution, that state's equality provision which dates from 1777, the Vermont Supreme Court stated the provision expressed "the principle of inclusion" and "a vision of government that afforded every Vermonter its benefit and protection and afforded no Vermonter particular advantage." *Baker*, 744 A.2d at 875. This conclusion certainly resonates with the Massachusetts text and history as well.

[34] This is exactly the kind of check and balance favored by John Adams, whose theory of mixed government led him to advocate for a frame of government with a bicameral legislature, an executive and an independent judiciary in order to restrain the possible excesses of the people in a unicameral legislature. John Adams, *Thoughts on Government*, in George W. Carey, ed., THE POLITICAL WRITINGS OF JOHN ADAMS 482-497 (2000). Although Adams did not believe that all persons were equal in the sense of capabilities or talents, he favored the idea that we are all born to equal rights. David McCullough, JOHN ADAMS 224 (2001). Adams' draft of Article I stated that all men were "born free and independent," a formulation drawn from the Declaration of Independence, but this version was altered by the Constitutional Convention. *Id.*

[35] The Vermont Supreme Court, construing its state constitutional equality provision and the historical context of the late 1770's, could just as easily have been talking about the Massachusetts Constitution when it commented:

> While not opposed to the concept of a social elite, the framers of the first state constitutions believed that is should consist of a 'natural aristocracy' of talent, rather than an entrenched clique favored by birth or social connections. As the preeminent historian of the ideological origins of the Revolution explained,

the Supreme Judicial Court (which then had the assistance of a jury in appellate matters) as a basis for instructing a jury that human slavery was inconsistent with the equality principles of Article I.[36] In a later judicial decision, this case was considered to be the case which abolished slavery in Massachusetts. *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 1836 WL 2441, *9 (1836) (Court refused to send back to Louisiana a girl who had been brought to Massachusetts as a slave). In addition, particularly since its amendment in 1976 adding the second sentence, Article I has also been understood to forbid discriminations and distinctions based on personal characteristics. *See, e.g., Attorney Gen. v. Mass. Interscholastic Athletic Ass'n*, 378 Mass. 342 (1979) (hereafter, "*MIAA*") (invalidating a rule which forbade boys from playing on girls' sports teams). *Accord Commonwealth v. Soares*, 377 Mass. 461, 486-87 (1979) (systematic exclusion of jurors based on characteristics identified in Article I violates Article XII).

Other provisions of the Declaration of Rights also raise equality themes. Article X, often paired with Article I, uses the phrase "has a right to be protected" in its formulation, thereby suggesting an affirmative government obligation to ensure equality

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> 'while equality before the law was a commonplace at the time, equality without respect to the dignity of the persons concerned was not; [the Revolution's] emphasis on social equivalence was significant.' Thus, while the framers' 'egalitarian ideology' conspicuously excluded many oppressed people of the eighteenth century – including African-Americans, Native Americans, and women – it did nevertheless represent a genuine social revolt pitting republican ideals of 'virtue,' or talent and merit, against a perceived aristocracy of privilege both abroad and at home.

Baker, 744 A.2d at 876 (internal citations omitted).

[36] *See, e.g.*, John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case,"* 5 Am. J. Legal Hist. 118, 124-25 (1961).

rather than simply declaring equality as does the first sentence of Article I.[37] In *Holden v. James*, 11 Mass. 396, 1814 WL 1043 (1814), Article X was invoked for the principle that all cases must be decided according to existing law or else some citizens would "enjoy privileges and advantages which are denied to all others under like circumstances." *Id.*, at *5. *See also Kienzler v. Dalkon Shield Claimants Trust*, 426 Mass. 87, 89 (1997) (same).

Articles VI and VII also raise basic issue of fairness and equality, primarily ensuring that laws are enacted for the common good and do not privilege people except to ensure the common good. Article VI provides in part:

> No man, or corporation, nor association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; . . . [38]

Mass. Const., Pt. 1, Art. VI. In a related vein, Article VII states in part:

> Government is instituted for the common good, for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men . . . . [39]

Mass. Const., Pt. 1, Art. VII.

The first clause of Article VII is an "affirmative and unequivocal mandate" of what the government shall be – a government for the common good.[40] The second clause of Article VII and the first clause of Article VI both prevent the conferral of rights and

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[37] Art. X provides in part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws . . .". Mass. Const., Pt. 1, Art. X.

[38] The provision continues: "and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge is absurd and unnatural." Mass. Const., Pt. 1, Art. VI.

[39] The provision continues: "Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter or totally change the same, when their protection, safety, prosperity and happiness require it." Mass. Const., Pt. 1, Art. VII.

benefits to a privileged class, unlike the federal Fourteenth Amendment which forbids denying rights to disfavored individuals or groups.[41] Former SJC Chief Justice Herbert Wilkins explained that Articles VI and VII "address egalitarian principles and the obligation of government to act for the protection, safety, prosperity and happiness of all men. . . . These provisions are substantially an expression of the right to equal protection of the laws."[42] Or as the Vermont Supreme Court stated in construing a similar provision under its state constitution, Articles VI and VII express "a principle of inclusion . . . [and] a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage." *Baker*, 744 A.2d at 875.

The case law under Articles VI and VII demonstrates more particularized concerns about operating the government for the common good and distributing government benefits equally. To be consistent with this constitutional mandate, even legislative classifications that do not trigger heightened scrutiny must serve a public purpose (*i.e.* for

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[40] The Vermont Supreme Court recently construed its common benefits clause as such a mandate. *Baker*, 744 A.2d at 874. The clause originally provided in part: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people nation, or community, and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community . . ." Vt. Const. of 1777, ch. I, Art. VI.

[41] This insight is also drawn from the *Baker* decision. *Baker*, 744 A.2d at 874.

[42] Wilkins, *Cognate Provisions*, 14 Suffolk U. L. Rev. at 914-15 n. 162. While some question has arisen as to whether Art. VII is independently enforceable, *see Brookline v. Secretary of the Commonwealth*, 417 Mass. 406, 423 n.19 (1994), that case is better understood as limiting the reach of Art. VII when the claimed violation was that a voting district was privileged as opposed to "the private interest of a class of men." *Id.* at 423-24. There is no doubt that Art. VII is one of the provisions under which "equal protection . . . considerations may arise." *Opinion of the Justices*, 408 Mass. 1215, 1223 (1990) (citing Arts. I, VI, VII, X). Every part of the Constitution has meaning and nothing short of a constitutional amendment can render any part of the Constitution superfluous. *Opinion of the Justices*, 332 Mass. 769, 777 (1953) (words of constitution cannot be ignored as meaningless).

the common good) and cannot be arbitrary or irrational generally or in light of the balance of interests involved. A statutory requirement can violate this requirement in two ways: first, it can purposely give a special benefit to a group unrelated to compensation for public service; and second, it can distribute benefits arbitrarily and without regard to the common good. For example, in a series of cases, the SJC has clarified that veterans' preference employment statutes may be justified as consideration for the service rendered by such an individual and the need to promote such service, but that absolute preferences for veterans transgress Article VI by denying the government any opportunity to ascertain whether an individual is actually qualified to perform the job. *See, e.g., Brown v. Russell,* 166 Mass. 14, 25 (1896); *Hutcheson v. Director of Civil Service*, 361 Mass. 480, 488-90 (1972).

Articles VI and VII were the focus of the Justices in an advisory opinion in which they opined that a variety of proposed bills which would have limited or eliminated married women's opportunities for public employment, but would have allowed unmarried women to continue in such jobs, were unconstitutional. *Opinion of the Justices,* 303 Mass. 631, 640 (1939). Acknowledging that *all women* are citizens with "a like interest in the application of the public wealth to the common good," the Court focused on the principle of inclusion, and condemned the bills' rendering of unmarried women as "an absolutely preferred class," *id.* at 649, "irrespective of age, character and capabilities" of the married women. *Id*. at 646. Excluding all married women from these jobs was something the Constitution could not tolerate. *Id.* at 643.

The principle of inclusion is also illustrated by Article VI cases. While Article VI is in part concerned with the transmission of hereditary titles, *Sheridan v. Gardner*, 347

Mass. 8 (1964), it is more generally concerned with whether a particular enactment was intended, or has as one of its leading purposes, the intent to confer an exclusive privilege on any man or class of men. *Hewitt v. Charier*, 33 Mass. 353, 355 (1835) (medical licensing laws not intended to advantage licensed physicians, but to guard the public).

Taken together, the various equality provisions of the Declaration of Rights stand as a bulwark both against invidious and arbitrary distinctions among citizens, and for inclusion of all citizens within the framework of the common good. For this reason, and under the standards discussed above, the Commonwealth cannot justify the unequal treatment imposed on the plaintiffs by denying them access to and failing to include them within civil marriage. Articles I and X prohibit the present regime with respect to gay and lesbian individuals and same-sex couples because it discriminates on the suspect bases of sex and sexual orientation without serving a compelling basis which interest is narrowly tailored to the exclusion it purports to serve. Articles VI and VII inform the overall equality analysis by rejecting the absolute preferences of the present system: for different-sex couples over same-sex couples; and for heterosexual men over gay men and heterosexual women over lesbian women. The present system is precisely the kind of arbitrary and absolute preference for a particular class of persons which the Constitution reviles.[43]

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[43] It is far from clear that an intent to discriminate against gay and lesbian people or same-sex couples is necessary to make out a violation of the Massachusetts Constitution in this case. This is particularly true given that Articles VI and VII provide an anti-privileging aspect to equality jurisprudence in Massachusetts and that such an absolute preference presently exists for heterosexuals and non-gay couples in the marriage laws. *Compare Commonwealth v. Soares*, 377 Mass. 461, 482 n. 22 (1979); *Commonwealth v. Bastarache*, 382 Mass. 86, 102 (1980); *Commonwealth v. Aponte*, 391 Mass. 494, 508 (1984) (each discussing how systematic exclusion of a distinct qualified segment of society

B. The Sex-Based Distinctions Defendants Assert Under the Marriage Laws Violate Plaintiffs' Rights to Equality.[44]

It is immediately apparent that the defendants' interpretation of the marriage laws contains gender-based classifications. The Constitution plainly states, "Equality under law shall not be denied or abridged because of sex. . . ." Mass. Const., Article I (as amended by Art. CVI). As discussed above, the defendants consider same-sex couples ineligible to marry under Massachusetts law. Heidi Norton was denied a license to marry

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from various forms of jury service violates Article XII, even where such discrimination is unintentional).

Assuming, *arguendo*, that an intent to discriminate is necessary to make out a violation of the equality provisions, that requirement is satisfied here. As discussed in section II, the marriage statutes themselves impose no sex or sexual orientation requirement in the qualifications for marriage in Massachusetts, but the plaintiffs were nonetheless systematically denied marriage licenses for those reasons. The Registrar of Vital Statistics confirmed this is the policy of the Defendants. Statement of Undisputed Facts, para. 138-40.

The SJC has repeatedly condemned discrimination which flows from the administration of facially neutral statutes, sometimes inferring intent from a course of conduct. *See, e.g., New York Times Co. v. Com'r of Revenue*, 427 Mass. 399, 406 (1998) (Art. X claim that company was singled out for different treatment respecting excise tax; "Discrimination necessary to make out a violation of the equal protection clause need not. . . be premised solely on explicit policy. As *Yick Wo v. Hopkins*, and its progeny show, discriminatory intent may be gathered from evidence regarding the actual administration of a facially neutral law") (internal citations omitted); *Buchanan v. Dir. of Div. of Emp. Sec.*, 393 Mass. 329, 335 (1984) (Art. I challenge to method for calculating unemployment benefits for women with extended maternity leaves; "Statutes may be found to deny equality under the law if they are applied in a discriminatory fashion") (internal citations omitted); *School Comm. of Springfield v. Bd. of Educ.*, 366 Mass. 315, 329 (1974) (school committee motion to vacate orders regarding desegregation in light of new state law; "The certain consequences of an appeal . . . would be resegregation. . . . The school committee must be held to 'intend' the certain consequences of its acts") (internal citations omitted). *See generally Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (local ordinance regarding wooden laundries enforced only against Chinese; "Though the law be fair on its face, and impartial in its appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as" to distinguish "between persons in similar circumstances" then it violates Fourteenth Amendment).

[44] For purposes of this and the following discussions, the plaintiffs will assume that the marriage statutes contain gender-based classifications. *But see* section II.

Gina Smith because both are women. If David Wilson were a woman, Robert Compton could undoubtedly marry him. In each case, an individual's choice of marital partner was constrained because of the sex of that other individual, and it is the individual's right to be free from sex discrimination that is protected by the Constitution. *Compare Adarand Contractors v. Pena*, 515 U.S. 200, 230 (1995) (acknowledging "long line of cases understanding equal protection as a personal right;" Constitution protects *persons*, not *groups*) (emphasis in original).

Attorney Gen. v. Desilets, 418 Mass. 316 (1994) illustrates the point and points the way to the proper analysis of the discrimination that has occurred in this case. In *Desilets*, a landlord claimed to have refused to rent to an unmarried couple not because they were unmarried but because of their presumed sexual conduct. The SJC analyzed the matter as follows:

> If married couple A wanted to cohabit in an apartment owned by Defendants, they would have no objection. If unmarried couple B wanted to cohabit in an apartment owned by the Defendants, they would have great objection. The controlling and discriminating difference between the two situations is the difference in the marital status of the two couples.

Id. at 320. The same mode of analysis illustrates that it is the sex of the parties which the Commonwealth used as a basis for refusing the plaintiffs marriage licenses.

> If a [male-female] couple A wanted to obtain a marriage license, they would have no objection. If [male-male or female-female] couple B wanted to obtain a marriage license, they would have great objection. The controlling and discriminating difference between the two situations is the difference in the [sex] of the two couples.

The controlling factor in the decision not to issue each of the plaintiffs a marriage license was the fact that each plaintiff sought to marry a partner of the same sex. [45] *See also Lowell v. Kowalski*, 380 Mass. at 667 (law establishing different standards for a child born out-of-wedlock to inherit from mother and father sets up a classification based on sex *from the perspective of the individual child*). (Of course, the same analogy can be made with respect to the exclusion of gay and lesbian individuals from marriage).

In addition, the SJC long ago acknowledged that "homosexuality is . . . sex-linked"; "[a]s a matter of literal meaning, discrimination against homosexuals could be treated as a species of discrimination based on sex." *Macauley v. Mass. Comm'n Against Discrimination*, 379 Mass. 279, 281 (1979). The Court in *Macauley* declined to interpret the term "sex" in G.L. c. 151B (the employment non-discrimination law) to include sexual orientation because it felt constrained by the legislature's intent as manifested by its refusal to amend G.L. c. 151B to include sexual orientation. *Id.* at 282. The analysis changes where, as here, a statute is applied to create a sex-based classification in contravention of a constitutional prohibition on creating sex-based classifications. The defendants here discriminate on the basis of sex by excluding individuals from marrying the partner of their choice based on the sex of the partner, and by excluding gay and lesbian individuals from

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[45] Some courts have attempted to evade the obvious sex-based discrimination built into the marriage laws by arguing that the prohibition of marriage for same-sex couples flows from the definition of marriage. *See, e.g.*, *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) ("[A]ppellants are prevented from marrying, not by the statutes of Kentucky … , but rather by their own incapability of entering into a marriage as that term is defined"). Other courts have rejected this reasoning as "circular and unpersuasive" because the issue is whether prohibition itself is discriminatory and constitutionally permissible. *Baehr v. Lewin*, 852 P.2d 44, 61 (Haw. 1993). *See also Loving v. Virginia*, 388 U.S. 1, 3 (1967) (rejecting idea that Virginia's miscegenation law was constitutional because a marriage between a white person and person of color was not a true marriage).

marrying the person of their choice, *i.e.*, a same-sex partner. This reasoning was adopted by the Supreme Court of Hawaii in identifying the constitutional flaw in that state's restriction on marriage for same-sex couples. *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993) (reversing motion to dismiss and remanding for trial).

The Commonwealth might argue that men and women, whether gay or non-gay, are equally disadvantaged by the present scheme since no woman can marry any woman and vice versa, and thus no discrimination occurs. In *Perez*, the California Supreme Court dismissed the suggestion that the miscegenation laws were not discriminatory because they imposed the same restrictions on Caucasians and people of color. The court noted:

> A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.

Perez v. Lippold, 198 P.2d at 25. The United States Supreme Court also rejected such an argument in *Loving* when the Commonwealth of Virginia argued all blacks and whites were treated equally because none were allowed to marry the other. But since race was the determining factor for eligibility to marry, that Court held that the miscegenation law violated the equal protection clause. *Loving*, 388 U.S. at 11-12. Just as *Perez* and *Loving* contained a race-based classification, so, too, does the present marriage system contain a sex-based classification.[46]

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[46] Cases rejecting the "equal discrimination defense" in a non-marriage context include *United Bldg. and Const. Trades Council v. Camden*, 465 U.S. 208, 217-18 (1984) (municipal job preference ordinance not immune from constitutional review simply because it burdens both in-state residents and out-of-state residents); *Hunter v. Underwood*, 471 U.S. 222, 231 (1985) (invalidating provision of Alabama Constitution which disenfranchised people who committed "crimes of moral turpitude" even though the provision had been aimed at disenfranchising both blacks and poor whites).

Because the marriage laws as interpreted by the defendants foreclose these plaintiffs and thousands of Massachusetts citizens from legally marrying their chosen life partners based on gender-based classifications, those laws should be subjected to heightened scrutiny in accord with the Massachusetts Equal Rights Amendment (hereafter "ERA"). Mass. Const., Pt. 1, Art. I (as amended by Art. CVI). Classifications based on sex are subjected to the most searching scrutiny and may only be upheld if "they further a demonstrably compelling purpose and limit their impact as narrowly as possible consistent with their legitimate purpose." *Commonwealth v. King*, 374 Mass. 5, 21 (1977) (sex-based classifications receive scrutiny at least as strict as racial classifications under the Fourteenth Amendment); *MIAA*, 378 Mass. at 353-54 (rule that no boy may play on a girls' team is the kind of total exclusion which is prima facie invalid); *Opinion of the Justices*, 374 Mass. 836, 842 (1977) (total exclusion of girls from participating with boys in football and wrestling serves no compelling interest).[47] Given the intense concern from the SJC in matters of exclusion from sports programs, that much more concern must be directed when the exclusion is from a major institution in civic life.

In short, the sex-based classifications in the marriage system that prevent individuals from marrying based on the sex of their chosen partner are subject to strict scrutiny under the Massachusetts Constitution and must be found to be unconstitutional. See section VI below.

[47] This standard is stricter than the federal standard for sex discrimination and is necessitated by the adoption of the Equal Rights Amendment in 1976. *Opinion of the Justices*, 374 Mass. 836, 840 (1977).

C. The Sexual Orientation-Based Distinctions Defendants Assert in the Marriage Laws Violate the Plaintiffs' Rights to Equality Under the Massachusetts Constitution.

Closely related to the sex discrimination built into the marriage statutes, as interpreted by the defendants, is their discrimination on the basis of sexual orientation. By prohibiting a man from marrying a man, and a woman from marrying a woman, the Commonwealth is essentially barring all gay and lesbian couples – couples formed by two gay men or two lesbian women – from marrying. In doing so, the Commonwealth is unquestionably discriminating against gay and lesbian persons and families.[48]

Under the Massachusetts Constitution, discrimination based on sexual orientation is properly viewed as "sex-linked" and therefore as a subset of sex discrimination. *See supra* section IV (B). Even if discrimination based on sexual orientation is not incorporated within sex discrimination, it is still invidious and should be subject to strict review by Massachusetts courts. The characteristics set out in Article I of the Declaration of Rights are among those the courts consider suspect, but this list is not exclusive. Both illegitimacy and alienage have been found to be "suspect" under the state constitution, and neither is mentioned in Article I. *See Doe v. Roe*, 23 Mass. App. Ct. 590 (1987) (illegitimacy); *Doe v. McIntire*, No. 00-3014-F, WL 95457 at *6 (Sup. Ct. Jan. 25, 2001) (alienage, relying on *Graham v. Richardson*, 403 U.S. 365, 376 (1971)).

One way that the Massachusetts courts can determine whether a classification is suspect under the state constitution is to employ the mode of analysis frequently used by

[48] As noted above, the Declaration of Rights expressly forbids favoritism to any particular "family." Mass. Const., Pt. 1, Art. VII.

courts interpreting the Fourteenth Amendment.[49] In general, it is appropriate for a court to look more searchingly at governmental action affecting a group that has historically been subject to "prejudice and antipathy" for in such cases the disparate treatment is "seldom related to the achievement of any legitimate state interest," but rather signals a breakdown in the normal, majoritarian political process that warrants special judicial vigilance. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Special scrutiny of such classifications is the only way to ensure that equality guarantees serve their intended function – "nothing less than the abolition of all caste-based and invidious-based legislation." *Plyler v. Doe*, 457 U.S. 202, 213 (1982). Some of the factors deemed to have relevance in determining whether a classification warrants heightened scrutiny include:

- whether the group at issue has been subjected to a history of purposeful unequal treatment;
- whether the disadvantaged class is defined by a trait that "frequently bears no relation to ability to perform or contribute to society"; and
- whether the group has "historically been relegated to such a position of political powerlessness".

See Cleburne, 473 U.S. at 440-41; *Plyler*, 457 U.S. at 216 n. 14; *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 684-87

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[49] There are other approaches open to Massachusetts for determining what classes are suspect. *See Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 447-48 (Or. App. 1998) (class of unmarried same-sex couples is suspect under Oregon equal privileges and immunities clause); *Baker*, 744 A.2d at 892-93 (Dooley, J., concurring) (agreeing with *Tanner* framework). *See generally* David A.J. Richards, WOMEN, GAYS AND THE CONSTITUTION 354-73 (1998) (arguing for heightened scrutiny of sexual orientation classifications on a non-federal model).

Moreover, the cases often refer to the possibility of a classification being suspect or "quasi-suspect," thereby offering another alternative for the courts.

(1973) (plurality); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).[50] Each of these three factors, none of which is required in all cases, weigh in favor of finding discrimination against gay men and lesbians to be "suspect."

1. Gay Men and Lesbian Women Have Endured a History of Purposeful Discrimination.

Perhaps the key factor that has inspired other courts to apply heightened scrutiny to a particular classification is a history of intentional discrimination or destructive stereotyping against the targeted group. *See, e.g., Murgia*, 427 U.S. at 313; *Rodriguez*, 411 U.S. at 28; *Cleburne*, 473 U.S. at 441. For example, in applying heightened scrutiny to classifications disadvantaging children born out of wedlock, the United States Supreme Court noted that illegitimate children should not be burdened by society's condemnation of irresponsible liaisons. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). In contrast, in cases involving classifications burdening groups that have not historically been subjected to purposeful discrimination, the Supreme Court has declined to apply strict

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[50] Among the Massachusetts cases citing or relying upon these federal cases are *Williams v. Secretary of Exec. Office of Hum. Serv's*, 414 Mass. 551, 564 (1993) (relying on *Cleburne*); *Soares v. Gotham Ink of New England, Inc.*, 32 Mass. App. Ct. 921, 923 (1992) (relying on *Rodriguez*).

Note that a trait need not be "immutable" in order for classifications which disadvantage that group to receive heightened scrutiny. *Cleburne*, 473 U.S. at 442 n.10. Where reference to immutablity does appear in the federal caselaw, the Court explains that the determinative factor is whether the characteristic bears a relation to ability to perform or contribute to society. *E.g., Frontiero*, 411 U.S. at 686. Many characteristics change as a legal matter (alienage, legitimacy, race) or factual matter (religion, sex); yet classifications based on each nonetheless require heightened scrutiny. The difficulties with an immutability requirement in equal protection analysis have been acknowledged by courts and scholars. *See, e.g.,* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of 'Don't Ask, Don't Tell,'* 108 Yale L.J. 485, 490-91 (1998). What is clear is that this court need not resolve the complex (and perhaps unanswerable) question of whether sexual orientation derives from nature or nurture in order to resolve this case.

scrutiny. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (close relatives); *Murgia*, 427 U.S. at 313 (the elderly).

It is fair to infer the existence of discrimination from a variety of sources. First, there are legislative enactments intended to combat that discrimination. *See supra* section III (B) (2) (describing general non-discrimination, student non-discrimination and hate crimes laws).[51] At the same time, overtly antagonistic laws are still routinely considered in the Massachusetts legislature: the last two legislative sessions featured bills to expressly forbid couples of the same sex from marrying. H.472 (1999); H.3375 (2001) (also providing that no benefits exclusive to marriage can be extended to unmarried couples).

Second, the SJC has recognized the possibility of bias against gay people in a variety of contexts. In *Muzzy v. Cahillane Motors, Inc.*, 434 Mass. 409 (2001), the SJC noted that a plaintiff in a sexual harassment case could object to jury instructions referencing her sexual orientation because of the possibility such a reference might provoke bias against the plaintiff. *Id*. at 413-14. In *Commonwealth v. Plunkett*, 422 Mass. 634, 641 (1996), the SJC acknowledged that "juror attitudes toward homosexuality may be important" in a murder case involving two gay men. *Id.* at 641. Sometimes discriminatory intent is baldly stated. *Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston*, 418 Mass. 238, 251 (1994), *reversed on other grounds*, *Hurley v. Irish American Gay, Lesbian, Bisexual Group of Boston*, 515 U.S. 557 (1995) (parade organizers refused participation to an openly gay contingent); *Madsen v. Erwin*, 395 Mass. 715 (1985) (reporter fired after disclosing her sexual orientation).

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[51] The fact that the Congress had enacted a number of laws condemning sex discrimination was regarded by the Supreme Court as evidence that Congress already concluded that classifications based on sex were invidious. *Frontiero*, 411 U.S. at 687.

Third, published reports in Massachusetts and elsewhere document discrimination. A recent report from the United States Surgeon General acknowledged that "our culture often stigmatizes homosexual behavior, identity and relationships."[52] According to the 1999 Youth Risk Behavior Survey of Massachusetts, lesbian, gay and bisexual youth are nearly three times as likely as their non-gay peers to have been involved in a physical fight at school, three times as likely to have been threatened with or injured by a weapon at school, and nearly four times as likely to skip school because they felt unsafe.[53] In addition, The Violence Recovery Program at the Fenway Community Health Center issues reports on anti-lesbian, gay, transgender and bisexual violence each year. Since 1990, they have documented a total of 2,047 bias incidents in Massachusetts.[54] As recently as the early 1980's, in a survey conducted by the Office of Boston Mayor Kevin H. White, of the 1500 gay and lesbian respondents reporting, over half had been subject to verbal abuse in Boston, nearly a quarter had been physically attacked or robbed, and twenty percent had faced job discrimination.[55]

Fourth, discrimination with roots elsewhere also affects Massachusetts citizens. The United States military excludes openly gay people from serving in the armed forces. 10 U.S.C. sec. 654. The federal government has also enacted a law intended to ensure that same-sex couples do not enjoy any of the federal benefits and protections of marriage.

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[52] The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior (June 2001). Available at http://www.surgeongneral.gove/library/sexualhealth/call.htm at p. 7.

[53] *See* Massachusetts Dept. of Ed., 1999 Massachusetts Youth Risk Behavior Survey, at 24 (May 2000). Available at www.doe.mass.edu/lss/yrbs99/toc.html.

[54] The reports are available from the program by calling (617) 927-6250.

[55] The Boston Project, A Profile of Boston's Gay and Lesbian Community, Preliminary Report of Findings at 6-7 (1983).

1 U.S.C. sec. 7 (definition of marriage). Despite repeated attempts to amend Title VII, there is no protection against sexual orientation discrimination in federal job discrimination laws. 42 U.S.C. sec. 2000e; *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999). The vast majority of states still permit sexual orientation discrimination in wide swaths of public life. Lori Montgomery, *Foes of Md. Gay Rights Law Could Force Referendum*, Washington Post, June 30, 2001 at B1 (noting that only twelve states have sexual orientation non-discrimination laws).

In sum, both historically and in present times, there is a substantial record of purposeful discrimination against gay and lesbian people, both by the broader community and by government itself. *See generally* Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551 (1993); Evan Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different*, 14 Harv. J.L. & Pub. Pol'y, 21, 30-33 (1991); *Developments in the Law- Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1556 (1989); Rhonda Rivera, *Our Straight Laced Judges*, 30 Hastings L. Rev. 799 (1979).

2. Lesbians and Gay Men Have the Ability to Perform In Society Unrelated to Their Sexual Orientation.

A second factor that courts frequently consider in determining whether a legally disadvantaged group should be treated as a suspect class is whether the characteristic which defines the group bears upon any ability to perform in or contribute to society. *Frontiero*, 411 U.S. at 686; *Cleburne*, 473 U.S. at 440-41. The lack of a relationship between the trait and ability is likely to reflect "prejudice and antipathy." *Cleburne*, 432 U.S. at 440. On the other hand, if a law burdens a class of people with genuinely reduced

abilities, heightened scrutiny may not be appropriate. *See, e.g., id.,*. at 442-43 (declining to apply heightened scrutiny to classification based upon mental retardation based on reduced ability of the developmentally disabled to function in the everyday world).

It is well established that sexual orientation, like gender, religion, race and national origin, bears no relation to ability to perform or contribute to society. The American Psychiatric Association removed homosexuality from its list of mental illnesses in 1973 and concluded that "homosexuality *per se* implies no impairment in judgment, stability, or general social or vocational capabilities."[56] Like others in our society, gay men and lesbian women, like the plaintiffs in this case, form committed, long-term and often lifetime relationships. And like most of the plaintiffs, many gay and lesbian couples raise children together successfully. *Cf. Bezio v. Patenaude*, 381 Mass. 563, 579 (1980) (trial judge improperly assumed mother's lesbian orientation would have detrimental affect on child); *Doe v. Doe*, 16 Mass. App. Ct. 499, 502 (1983) (mother's lesbianism, standing alone, insufficient grounds for denying her joint custody).

Any law which purports to distinguish between gay and lesbian people and others on the basis of generalizations about the ability of gay and lesbian couples to form, nurture and maintain cohesive families is based only on rank prejudice. One's sexual orientation is a significant part of one's identity, but that orientation does not determine how good an employee, citizen, parent or partner that person will be.

3. Gay People Lack Political Power.

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[56] Resolution of the Amer. Psychiatric Ass'n Dec. 15, 1973. *See also* Resolution of the Council of Rep's of the Amer. Psychological Ass'n, 30 *Am. Psychologist* 633 (1975).

The third factor sometimes considered by courts in analyzing whether strict scrutiny is appropriate under the federal model is whether the group has historically been relegated to a position of relative political powerlessness within the majoritarian, legislative political sphere. *See, e.g., Rodriguez*, 411 U.S. at 28; *Plyler*, 457 U.S. at 216 n.14. This criterion cannot be taken too literally, however, as women, and in some places, African-Americans, are political majorities who presumably wield political power. As one commentator suggests, the cases look beyond the political arena to society generally. Guido Calabresi, *The Supreme Court – Forward*, 105 Harv. L. Rev. 80, 95 (1991).

It should be obvious that the kinds of unequal treatment described above would have ongoing consequences and relegate gay people to a position of relative political powerlessness. While gay men and lesbians have recently become more visible politically in Massachusetts, many still feel the need to hide their sexual orientation to avoid the widespread discrimination and violence it engenders. This situation of being trapped "in the closet" has a negative impact on the group's ability to gain political advantage. *See* Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1176 & n. 79 (1988) ("the exercise of political power by gays and lesbians is unusually difficult"); Calabresi, *The Supreme Court – Forward*, 105 Harv. L. Rev. at 97-98 n. 51 (same).

Undoubtedly, gay and lesbian people have made some strides toward protection in Massachusetts, but over the last thirty years, there have been only four members of the General Court who are or have been openly gay or lesbian at the time they were serving. No state-wide elected official in Massachusetts ever has been acknowledged to be gay or lesbian while serving. *Compare Frontiero*, 401 U.S. at 686 n.17 (finding women vastly

under-represented in elected offices). Legislative proposals to allow state and municipal domestic partner health care coverage – of primary importance to same-sex couples since they have not been able to marry and qualify for insurance benefits in that way – have stalled in the Legislature for the last nine years.

Beyond these markers are other examples of the lack of political power of gay people. One is the passage of the federal anti-marriage law (mentioned above), which former President Clinton signed despite his comments that the legislation was "gay-baiting";[57] the continued discriminatory regime imposed on gay and lesbian persons in the United States military, despite evidence that lesbian and gay people serve as well as or better than their heterosexual counterparts[58]; continuing political initiatives intended to limit or eviscerate the rights of gay people[59]; and ongoing violence against lesbian and gay persons based on their sexual orientation.[60]

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[57] J. Jennings Moss, *Same as it ever was*, The Advocate, Dec. 10, 1996.

[58] *See, e.g., Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1331 (E.D. Cal. 1993) (discussing internal military studies which conclude that gay service members perform better on a variety of indices); Statement of General Colin Powell, "Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Committee on the Armed Services", 103d Cong., 707 (1993) (gay and lesbian soldiers "served well in the past and are continuing to serve well . . . ").

[59] A few of many examples include: measures seeking repeal of civil rights protections (*e.g.* Maine's repeal of non-discrimination law in 1998 and rejection of anti-discrimination measure in 2000, Carey Goldberg, *Maine Governor and Gay Rights Supporters Pose a Question*, New York Times (December 8, 2000) at A28); constitutional amendments which withdraw discrimination against same-sex couples in marriage from judicial review in Hawaii, Alaska and Nebraska) and a new attempt to do so in Massachusetts (*see* Benjamin Gedan, *Ballot Effort Eyes Gay Marriage Ban*, Boston Globe (August 4, 2002 at B2); and measures seeking to nullify all claims of sexual orientation discrimination (*see e.g.*, Colorado's Amendment 2 which was overturned in *Romer v. Evans*, 517 U.S. 620, 623 (1996)).

[60] In addition, at the national level, a report on the criminal justice system's response to bias crime was suppressed by the Justice Department after the news media reported on its conclusion that "homosexuals are probably the most frequent victims" of hate violence

In conclusion, sexual orientation should be considered a suspect or quasi-suspect classification that requires strict scrutiny from this Court. While the United States Supreme Court has not yet ruled on whether sexual orientation-based classifications should receive heightened scrutiny, some members of that Court have spoken to the issue. For example, former Justice Brennan opined:

> [H]omosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is likely . . . to reflect deep-seated prejudice rather than . . . rationality.

Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009 (1985) (Brennan, J., dissenting, from denial of writ of certiorari).[61] But even if the Supreme Court were not to hold sexual orientation as suspect, this Court should nevertheless do so under the state Constitution and strike down the exclusion of gay people from civil marriage because the Commonwealth cannot justify the discrimination against the plaintiffs in this case. *See* section VI below.

D. The Distinctions Defendants Assert in the Marriage Laws Lack a Rational Basis.

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in America. Kevin T. Berrill, Gregory M. Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes*, 5 J. of Interpersonal Violence 401, 403 (Sept. 1990).

[61] Most federal court decisions dealing with gay people have arisen in the context of the military ban or defense security clearances where courts have held that they must give extraordinary deference to military policy and thus applied rational basis review. *See, e.g., Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996). In the only equality case to reach the United States Supreme Court, the suspect classification question was not reached because Colorado's Amendment 2 demonstrated "animus" toward gay and lesbian people, which cannot constitute a *legitimate* governmental interest." *Romer v. Evans*, 517 U.S. 620, 634 (1996).

As a general matter, absent imposition on a suspect or quasi-suspect class or a burden on a fundamental right, statutes enjoy a presumption of constitutionality and all rational inferences are made in favor of the constitutionality of the legislation. *Commonwealth v Henry's Drywall*, 366 Mass. 539, 541 (1974). But this is hardly tantamount to a rubber stamp of approval for any and all statutes. Under the Massachusetts Constitution, all legal classifications must, at a bare minimum, be "rationally related to a legitimate state interest." *Murphy v. Comm'n of Dept. of Indus. Accidents*, 415 Mass. 218, 226-27 (1993). The exclusion of the plaintiffs from marriage fails this test.

Equality guaranties resist both unequal treatment of those similarly situated as well as distinctions drawn on an invidious basis. *Id.* (all persons similarly situated should be treated alike; striking down statute requiring fee for appeal of denial of worker's compensation benefits when employee is represented by counsel but not when employee proceeds pro se); *Bachrach*, 382 Mass. at 276 (invidious discrimination in singling out "Independents" and denying them expression on the ballot).

Both prongs of legitimate state interest and rational relation must be satisfied; if not, the law is unconstitutional and the Court need not inquire further. This analysis does not occur in a vacuum. Rational basis analysis requires the court to "look carefully at the purpose to be served" and "the degree of harm to the affected class." *English v. New England Med. Ctr.*, 405 Mass. 423, 428 (1989). To survive rational basis review, the Court must find that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to members of the disadvantaged class." *Id.* at 429.

The SJC has struck laws that promoted invalid government goals on a number of occasions. Long before the ERA became law, and at a time when married women were still denied some rights of public life, the SJC opined that several proposed bills which would have barred married women from working in public sector jobs were "arbitrary" and "lacking a reasonable basis." *Opinion of the Justices*, 303 Mass. 631, 646-48 (1939). In later years, absolute exclusions of boys from girls sports teams and other programs and vice versa were challenged under the ERA, but rejected "under any standard" of constitutional review. *MIAA*, 378 Mass. 342, 356-57 (1979); *Opinion of the Justices*, 374 Mass. 836, 842 (1977); *Opinion of the Justices*, 373 Mass. 883, 887-88 (1977).

In other contexts, the SJC has struck down laws that simply singled out one group or class for different treatment. *Murphy*, 415 Mass. at 232 (arbitrary to require appeal fee only of represented claimants but not pro se claimants); *Bachrach*, 382 Mass. at 274-75. This has been true even in the economic context. *Coffee-Rich, Inc. v. Com'r of Pub. Health*, 348 Mass. 414, 423-25 (1965) (law forbidding sale of frozen creamer product due to state fears of mislabeling and consumer confusion is irrational); *Hall-Omar Baking Co. v. Com'r of Labor and Indus.*, 344 Mass. 695, 707 (1962) (arbitrary to treat itinerant sellers of bakery products more stringently than itinerant sellers of milk products); *Vigeant v. Postal Tel. Cable Co.*, 260 Mass. 335, 341(1927) (based on federal law; no foundation for a classification which imposes liability on telegraph operators for their poles and wires but not other businesses and utilities which use poles and wires); *Bogni v. Perotti*, 224 Mass. 152, 159 (1916) (statute providing that labor organizations have more limited rights than others to protect their property is arbitrary).

In the same vein, classifications having no "real and substantial relation" to an asserted government purpose fail the rational basis test. *Murphy*, 415 Mass. at 230 (connection between state interests in reducing costs and deterring frivolous appeals too attenuated from classification burdening with a fee those who are represented by counsel on appeal); *Coffee-Rich, Inc.*, 348 Mass. at 424-25 (concern that frozen dairy creamer will be repackaged and sold as milk is "more fanciful than real"); *Hall-Omar Baking Co.*, 344 Mass. at 705 (hawkers and peddlers statute is "inappropriate and ineffective" to address concerns about different weights in "special cakes" and other bakery products); *Mansfield Beauty Acad. v. Bd. of Reg.*, 326 Mass. 624, 626-27 (1951) (no rational relationship between the public health and statute barring charges for materials used in connection with customers serviced at hairdressing schools); *Sperry & Hutchinson Co. v. Dir. of Div. on Necessaries of Life*, 307 Mass. 408, 418 (1940) (law forbidding gas stations to issue trading stamps has no real and substantial relation to state goal of preventing fraud); *Opinion of the Justices*, 303 Mass. at 651-53 (bills disqualifying married women from employment bear no rational connection to laws regulating marital relations or the health of mothers).

As shown below in section VI, the Commonwealth has no rational basis for excluding the plaintiffs from civil marriage.

V. THE DEFENDANTS' ACTIONS VIOLATE THE PLAINTIFFS' RIGHTS TO FREE EXPRESSION AND INTIMATE ASSOCIATION.

The Plaintiffs also raise free expression and intimate association claims under Article XVI which guarantees that "The right of free speech shall not be abridged." Mass. Const., Pt. 1, Article XVI.

A. In Denying Them Access to Marriage, Defendants Have Infringed on Plaintiffs' Expressive Conduct In Violation of Article XVI.

Article XVI's speech protections extend both to pure speech and also to "conduct designed to express ideas." *Commonwealth v. Sees*, 374 Mass. 532, 535 (1978) (nude dancing). Certainly the acts of seeking a marriage license and joining in marriage are no less communicative than nude dancing and other types of conduct deemed expressive in Massachusetts. Similarly, joining in marriage should be treated as "speech" for purposes of the Declaration of Rights. *See* Statement of Undisputed Facts, ¶ 26-27, 40-41, 51-52, 70, 86, 102-103 (identifying plaintiffs' communicative goals in seeking both a license and marriage). Treating the act of joining in marriage as expressive conduct protected under Article XVI makes sense in light of the goals of Article XVI: personal autonomy, the marketplace of ideas, and nondiscrimination. *See generally* David B. Cruz, *Just Don't Call It Marriage: The First Amendment and Marriage as an Expressive Resource*, 74 S. Cal. L. Rev. 925 (2001).

Even if the defendants have not intentionally suppressed the communications of the plaintiffs, their actions cannot be upheld if they are "related to the suppression of free expression" or if "the incidental restriction of First Amendment freedoms involved in the cases is greater than is essential to the furtherance of that governmental interest." *Sees*, 374 Mass. at 535, citing *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

The defendants' acts are related to the suppression of free expression because the plaintiffs were denied both the opportunity to complete the marriage license form and the opportunity to join in a civil marriage with the person of their choice. There is no governmental interest which justifies the defendants' restriction on the plaintiffs' expressions of love, commitment and personhood by denying them an opportunity to join in marriage simply because of the abstract idea that two women or two men joined together conveys to a disapproving portion of the population. *Spence v. Washington*, 418 U.S. 405, 412 (1974); *Terminello v. Chicago*, 337 U.S. 1, 4 (1949). *See also* section VI.

This case should take inspiration from *Bachrach* v. *Secretary of the Commonwealth*, 382 Mass. 268, 275 (1981). In that case, candidates for elective office were forbidden from using the word "Independent" to describe themselves on nominating petitions or ballots, but other self-designations were permitted. In other words, those who chose to campaign as Independents were "singled out and denied that expression on the ballot." *Id*. at 275. The SJC found that the synergy between the meritorious Article XVI (and First Amendment) and equality claims warranted strict scrutiny and struck the law. Here, it is individuals otherwise qualified to marry who seek to express their love for another person of the same sex who are singled out and denied the opportunity to marry – the same combination of speech and equality concerns which prompted the result in *Bachrach*.

In sum, defendants have interfered with plaintiffs' rights to speech without justification. That these plaintiffs, because of their sex and their sexual orientation, are forbidden from expressing their love and commitment through the Commonwealth's marriage system, warrants rigorous review from this Court.

B. In Denying Them Access to Marriage, the Defendants Have Infringed Upon Plaintiffs' Right of Intimate Association Under Article XVI.

Encompassed within the protection of free speech lies the right to join in and sustain intimate associations. *Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination*, 402 Mass. 716, 721 (1988) (noting that the constitutionally protected freedom of association encompasses both intimate and expressive associations). *See also Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) ("[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).[62]

While Massachusetts has yet to establish the precise contours of the intimate association right under the state Constitution, the federal courts have done so. In the foundational case of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court established a variety of considerations for whether the relationship merited protection, such as whether it is "highly personal" or the type of bond which has "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals . . . and foster[ing] diversity" or which "reflects the realization that individuals draw much of their emotional enrichment from close ties with others." *Id.*, at

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[62] Despite a lack of doctrinal clarity regarding the source of this protection, the right of intimate association is found in free speech protections. *Concord Rod & Gun Club*, 402 Mass. at 721; *Rotary Club*, 481 U.S. at 545. To the extent that the right of intimate association also flows from privacy or equality protections, *see* sections III and IV *supra*, those arguments are incorporated here by reference. *See, e.g., Opinion of the Justices to the Senate*, 375 Mass. 795, 808-09 (1978) (suggesting that a right to privacy may stem from Article XVI); *Griswold*, 281 U.S. at 483.

618-19. Such relationships must be further examined with respect to their "size, purpose, policies, selectivity, congeniality, and other characteristics." *Id.*, at 620.

Marriage is a paradigmatic example of a constitutionally protected intimate association under the federal Constitution and should be treated with no less respect under the Massachusetts Constitution. The United States Supreme Court has already stated that "the creation and sustenance of a family – marriage" is one those personal affiliations deserving of constitutional protection. *Id.*, at 619; *Rotary Club*, 481 U.S. at 545. Marriage is a small association of two individuals, extraordinarily selective, highly personal and perpetuates our shared values of marital choice and commitment. Its highly expressive nature also points toward protection. S*ee Turner*, 482 U.S. at 95-96 (expressions of emotional support and public commitment an important aspect of marriage). *See also* section III (A) (2) (c) above; Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 636-37 (1980) (marriage expresses that the individuals in the couple wish to identify with each other and thus "take on expressive dimensions as statements defining ourselves").

The plaintiffs enjoy a right to intimate association under Article XVI and the Declaration of Rights generally. The Commonwealth has infringed on the intimate association rights of the plaintiffs by withholding access to marriage, an infringement subject to close review since it is among the most intimate, and least attenuated, of associations. *Padilla v. Padula*, No. 933 973 1994 WL 879788 at *4, (Mass. Super. Apr. 29, 1994) (citing *Attorney Gen. v. Bailey*, 386 Mass. 367, 381, *cert. denied sub nom Bailey v. Bellotti*, 459 U.S. 970 (1982); *Roberts*, 468 U.S. at 620. As with expressive conduct and the other claims asserted by plaintiffs, the defendants have no justification

which is rationally related, let alone compelling, for infringing on the plaintiffs' ability to marry. *See* section VI below.

VI. THE COMMONWEALTH CANNOT JUSTIFY ITS EXCLUSION OF THE PLAINTIFFS FROM CIVIL MARRIAGE UNDER THE DECLARATION OF RIGHTS.

A. The Interplay of Important Constitutional Values At Issue Here Requires Strict Scrutiny of the Plaintiffs' Exclusion from Marriage.

Because marriage is a fundamental right, because the present system discriminates on the suspect bases of sex and sexual orientation, and because denying access to marriage infringes on rights of free speech, strict scrutiny applies. But even assuming, arguendo, that strict scrutiny is not warranted for these reasons, it is warranted for other reasons. Under *Marcoux* and its progeny, the balance of the competing values involved weighs decisively in favor of the plaintiffs. In other words, even if access to civil marriage were not a fundamental right, it is certainly a right of the utmost importance. *Compare Fiorentino v. Fiorentino*, 365 Mass. 13, 19 (1974) (access to divorce court an important right); *Bachrach*, 382 Mass. at 275 (candidate's ability to describe self as "Independent" an important right). Marriage implicates autonomy and personhood, is a special and unique legal status, and is a gateway to hundreds of protections and responsibilities. *See infra* section III (A) (1) (a – c). As noted by a Vermont Justice, "the complexity of the current system of government-created benefits and burdens has made civil marriage a modern day emolument, a government recognized and supported special status, for which [gay and lesbian couples] are not eligible." *Baker*, 744 A.2d at 889 (Dooley, J., concurring).

In the same vein, even if sexual orientation discrimination is not analyzed as is sex discrimination, it is clear that both the legislature and the courts have repeatedly frowned upon laws disadvantaging gay men and lesbian women and have sought to reverse the reflexive discrimination generally imposed on gay people. *See* section III (B) (2) above.

Even if, arguendo, this case does not implicate the right of free speech, or expressive conduct, or intimate association per se, without a doubt there is something both personally and culturally expressive about joining in marriage which must be added to the balance of interests here. *See* section V above.

Any state interests, to the extent they are even legitimate objects for the Commonwealth fail in tipping the scales toward continued discrimination against same-sex couples. In any event, those interests are so attenuated from the exclusion of same-sex couples from marriage that they are little more than a sham. *Commonwealth v. Soares*, 377 Mass. 461, 491 (1979) ("[W]e rely on the good judgment of the trial courts to distinguish bona fide reasons . . . from sham excuses belatedly contrived to avoid admitting facts of group discrimination") (internal citation omitted).

B. There is No Rational Basis for the Plaintiffs' Exclusion from Marriage.

Although the Commonwealth has not yet articulated its justifications for the present discriminatory regime, a number of possible justifications can be swiftly dispatched as neither legitimate state interests, nor compelling ones, nor interests which are related to the exclusion of same-sex couples from civil marriage. Since defendants cannot meet the rational basis test with or without a balancing of relevant interests, *a fortiori*, they cannot

meet the higher standard required for the fundamental right and suspect classifications implicated in this case.

1. Any Interest in Maintaining "Tradition" Fails To Justify the Commonwealth's Discrimination.

The Commonwealth may invoke the longevity of the exclusion of same-sex couples from marriage as a justification for its continued existence. However, the SJC has rejected defenses for discrimination premised on tradition. In *Opinion of the Justices*, 373 Mass. 883 (1977), the SJC was asked to consider the constitutionality of a proposed bill to continue a "Girl Officers Regiment," notwithstanding laws forbidding sex discrimination in education. The Court did not even reach issues of strict scrutiny because maintaining tradition for the sake of tradition did not even rise to the level of a legitimate state interest. "The bill appears to have no purpose other than to exclude male students from participation in a coeducational public high school in the interests of perpetuating the organization's traditionally sex-restrictive membership requirement." *Id.* at 887-88. In other words, tradition for the sake of tradition fails to justify discrimination when constitutional values are at stake. *See also Baker*, 744 A.2d at 885 (long history of official intolerance of same-sex relationships not a basis for refusing protection under the Vermont Constitution); *Perez*, 198 P.2d at 27 ("Certainly, the fact alone that the [racial] discrimination has been sanctioned by the state for many years does not supply such [a compelling] justification").

2. Any Interest Based on Gender Differences Fails To Justify Plaintiffs' Exclusion from Civil Marriage.

Justifications for the present exclusion of same-sex couples from marriage often turn on the alleged special attributes that men, on the one hand, and women, on the other

hand, bring to the marital relationship, thereby marking the marriage relationship as a unique union of differences. Stated differently, the notion is that men and women have separate and proper roles and, in order for a marriage to be a "marriage," the parties should be fulfill those roles. Such an argument has already been rejected by the SJC as merely echoing archaic and overbroad generalizations about the roles and abilities of men and women. *MIAA*, 378 Mass. at 358-59 (striking a rule which barred all boys from playing on girls' teams). In that case, the SJC did not ignore that "biological circumstance does contribute to some overall male advantages" but the Court nonetheless refused to endorse the use of sex as a 'proxy' for functional classification. *Id.* at 357. If sex is not a proxy for function in sports, it should no more serve as a proxy for what attributes a particular individual person will bring to a marriage.

Moreover, any justification premised on gender stereotypes denies equality and protection to the *individual* who has a right to be free from discrimination. *Id.* at 352. *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW sec. 16-29 (2d ed. 1988) (The characteristic injury of gender discrimination lies not in the failure to be treated on a gender-blind basis, but rather in being deprived of an opportunity because one is a woman, or because one is a man).

Laws which insist on strong differentiation between the sexes by prohibiting same-sex intimacy, or limiting marriage to different-sex couples, not only constrain men and women to limited gender roles, but actually perpetuate the subordination of women in the

same way that miscegenation laws reflected and entrenched an ideology of white supremacy.[63]

To the extent that the biological differences rationale is really an argument that the purpose of marriage is to beget children, it proves far too much. Infertile couples, as well as those past childbearing age, are permitted to marry. Many infertile couples use reproductive technology or adoption to form families, just as do same-sex couples. In short, the Commonwealth licenses marriage, not procreation.

3. Any Claimed Interest Based on Fears of a Slippery Slope Fails to Justify Plaintiffs' Exclusion from Civil Marriage.

Access to civil marriage cannot be limited by any possible fears of a slippery slope. This is the same argument made by opponents of interracial marriage. The Commonwealth of Virginia raised issues about polygamy in the *Loving* case[64]; the *Perez* dissent raised issues about incestuous marriages.[65] Both were wrong for the same reason the argument is wrong here. This case is about discrimination based on personal identifying characteristics, not numerosity or blood relations. Should a case arise, for example, in which a man seeks to marry more than one woman, it is at that time that the

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63 *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L Rev. 197 (1994); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187 (1988).

64 At oral argument in *Loving*, the Assistant Attorney General arguing for Virginia stated, "[T]he state's prohibition of interracial marriage . . . stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage, or the prescription of minimum ages at which people may marry, and the prevention of the marriage of people who are mentally incompetent." Peter Irons & Stephanie Guitton, eds., MAY IT PLEASE THE COURT 277, 282-83 (1993).

65 *Perez*, 198 P.2d at 46 (Shenk, J., dissenting).

Commonwealth must articulate its justification for that particular limitation.[66] That presents an entirely different issue, however, from the state's justification for discriminating against the choice of a partner who is of the same sex in the fundamental right of marriage. Ending discrimination in marriage against individuals who seek to marry someone of the same sex will hardly make legalization of multiple-partner marriages inevitable any more than ending race discrimination did.

4. Any Interest in Promoting Parenting By Biological Parents and Childrearing By Male and Female Couples Fails to Justify the Plaintiffs' Exclusion from Civil Marriage.

To the extent the Commonwealth may argue that it wishes to give a preference to marriages in which the children are raised by their biological parents, that preference cannot be tied to the marriage laws. Married parents may also adopt children, or use reproductive technology involving donor eggs, donor sperm, or both. Biology is not the sum total of parenthood.

If the Commonwealth argues that it prefers children to have male and female role models, that preference flies in the face of the sanction of single parent adoptions as well as joint adoptions by unmarried couples, including same-sex couples. *See* G.L. c. 210, sec. 1 (authorizing single person adoptions, *inter alia*); *Adoption of Tammy*, 416 Mass. 205 (1993) (construing section 1 to allow unmarried couples to adopt jointly). In 1999, the legislature amended portions of the adoption statute without changing the provision

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[66] In addition to the numerosity distinction, commentators across the political spectrum have justified the prohibition of polygamous marriages on a variety of bases. *See, e.g.*, Teresa S. Collett, *Marriage, Family and the Positive Law*, 10 Notre Dame J. L. Ethics & Pub. Pol'y 467, 475 (1996) (polygamous marriage creates inequality within companionate marriage); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. Rev. 1501 (1997) (polygamy undermines modern liberal state); Richard Posner, SEX AND REASON 216 (1992) (anomalous in companionate marriage and would benefit few men at the expense of many).

the SJC relied upon in *Tammy*, and thereby ratified the Court's decision. Acts & Resolves 1999, c. 3, sec. 15.

In a similar vein, state lawmakers have not made broad generalizations about the effects on children of living with an adult of the same or different sex, and the courts have long rejected consideration of the sex of the child or custodial parent in determining the best interests of the child upon divorce. G.L. c. 208, sec. 28; *Harding v. Brown*, 227 Mass. 77, 87 (1917).

In the face of this clear expression of legislative policy in favor of providing state protections and supports for children, including children being raised by parents of the same gender, and the legislature's rejection of consideration of gender as a factor in evaluating a child's best interests, it is difficult to fathom how the State could now infer a legislative intent to withhold from those same children the legal protections and supports that flow from legal recognition of the relationship between their parents. This Court cannot accept as underpinning any law a purpose which is so riddled with exceptions as to reduce the reason to a sham or deceit. *Commonwealth v. Soares*, 377 Mass. at 491. *See also Baker*, 744 A.2d at 881, 884-85 (state's interest in protecting children actually argues in favor of extending marital rights and protections to same-sex couples); *Baehr v. Miike*, 1996 WL 694235, *18 (Haw. Cir. Ct.) (after trial on exclusion of same-sex couples from civil marriage, court concluded, *inter alia*, that neither "the public interest in the well-being of children, or the optimal development of children, will be adversely affected by same-sex marriage").

VII. CONCLUSION

For all of the above reasons, this Court should grant the Plaintiffs' motion for summary judgment and enter an order declaring that civil marriage must be made available to the Plaintiffs on the same terms as other couples in the Commonwealth.

THE PLAINTIFFS,
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CERTIFICATE OF SERVICE

I, Mary L. Bonauto, certify that on this 20th day of August, 2001, I caused this Memorandum in Support of Plaintiffs' Motion for Summary Judgment to be served upon counsel for the Defendants, Judith Yogman, Assistant Attorney General, One Ashburton Place, Boston, MA 02108, by hand delivery.

_____ _____

Date Mary L. Bonauto