COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss
Suffolk

Superior Court County of
No. 01-1647-A

HILLARY GOODRIDGE and JULIE GOODRIDGE,	
DAVID WILSON and ROBERT COMPTON,	
MICHAEL HORGAN and EDWARD BALMELLI,	
MAUREEN BRODOFF and ELLEN WADE,	MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY
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	

INTRODUCTION

Plaintiffs in this case, seven same-sex couples seeking marriage licenses, ask this Court to extend the protections of liberty, equality, and due process guaranteed to them by the Massachusetts Declaration of Rights. These couples meet all of the requirements set forth by statutes to qualify for marriage licenses. They share the same love, honor, and commitment, as any different-sex couple wishing to marry. Denying them the fundamental protections secured by our constitution because they fell in love with someone of the same sex violates the most basic principles and protections guaranteed to them. These couples, who have been together between six and thirty years and share homes, families, children, love, respect, and commitment, seek simply the same security and protection under Massachusetts' laws that their non-gay neighbors enjoy.

The Commonwealth's understanding of the liberty and equality provisions of the Declaration of Rights is out of step with the expansive protections these provisions have historically afforded. Rather than the restrictive, cramped view that the Commonwealth sets forth, these provisions have long been interpreted to provide comprehensive, far-reaching protections, often providing greater protections against infringement of individual rights than those available under their federal counterparts. In light of these extensive protections, the Commonwealth bears a heavy burden to justify the infringements of Plaintiffs' rights resulting from the current marriage system. The "reasons" that the Commonwealth asserts to justify this invidious discrimination collapse under any level of scrutiny and reveal themselves as nothing more than rationalizations for a deeply rooted legacy of anti-gay bias, stereotypes, and prejudice that has no place in our civic life.

I. THE COMMONWEALTH'S BAN AGAINST MARRIAGE FOR SAME-SEX COUPLES INFRINGES PLAINTIFFS' FUNDAMENTAL RIGHTS.

A. Marriage Is A Fundamental Right

The Commonwealth does not provide a shred of precedent in support of its argument to limit the scope of fundamental rights protection for marriage under the Massachusetts Constitution. As all parties agree, marriage is, in the Commonwealth's words, "a vitally important institution." Defs.' Memo. at 2. Caselaw has long established that marriage is a fundamental right, the restriction of which by the Commonwealth is subject to heightened scrutiny by courts. Turner v. Safley, 482 U.S. 78, 95 (1987); Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967). Contrary to the Defendants' assertion, Massachusetts courts have never been "wary of recognizing or creating new fundamental rights under the Massachusetts Constitution." See Defs.' Memo. at 20; see also id. at 24.[1] On the contrary, in the context of examining the rights of the mentally ill, the Supreme Judicial Court ("SJC") said, "we have been skeptical of the narrow interpretation of due process." Williams v. Sec'y of Exec. Office of Human Servs., 414 Mass. 551, 566 (1993). Nor is there any support for the Commonwealth's assertion that to "rein in the otherwise potentially unlimited scope of substantive due process rights," Massachusetts courts have recognized as fundamental only those rights and liberties which are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Defs.' Memo. at 24-25.[2] And regardless, because the federal Constitution creates the floor for

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[1] In two of the cases on which the Commonwealth relies, the SJC reached only federal constitutional issues and did not decide any of the state Constitutional claims. See, e.g., Aime v. Commonwealth, 414 Mass. 667, 669 n. 4 (1993); Curtis v. Sch. Comm. of Falmouth, 420 Mass. 749, 751 n.4 (1995). In another, the plaintiff never even claimed a fundamental right was at issue. See Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 269 n.5 (1992). And another has been overruled. See Commonwealth v. Munoz, 11 Mass. App. Ct. 30 (1980), overruled by 384 Mass. 503 (1981).

[2] While this states the federal standard articulated in Washington v. Glucksberg, 521 U.S. 702 (1997), it does not state the standard for substantive due process review consistently applied by the SJC. In fact, all but

fundamental rights established under the Massachusetts Constitution but decidedly not the ceiling, there is no question that the Plaintiffs' fundamental right to marry is jealously guarded by the Declaration of Rights. See Moe v. Sec'y of Admin. & Fin., 382 Mass. 629, 651 (1981) ("when asked to interpret the Massachusetts Constitution, this court is not bound by Federal decisions, which in some respects are less restrictive than our Declaration of Rights.") (internal quotations omitted); Mills v. Rogers, 457 U.S. 291, 300 (1982) ("[T]he substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution.").

Unable to dispute the fact that marriage is a fundamental right, the Commonwealth seeks to render the marriage right meaningless to Plaintiffs by arbitrarily re-defining and truncating marriage in such a way as to a priori exclude same-sex couples, repeating the mantra that the Constitution protects marriage -- which the Commonwealth shrinks down to nothing more than a right to procreation -- but not "same-sex marriage." This is argument by labeling and lacks any legal support. As Plaintiffs will show, marriage is the civilly

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one of the cases the Commonwealth cites in support of this proposition are cases involving claims under the United States Constitution. See generally id.; Michael H. v. Gerald D., 491 U.S. 110 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); and Commonwealth v. Stowell, 389 Mass. 171 (1983) (SJC case but decided under federal constitution). And, in the only case decided under both the U.S. and Massachusetts Constitutions, Trigones v. Att'y Gen., 420 Mass. 859 (1995), the language the Commonwealth quotes came from the SJC's federal constitutional analysis, not the state due process analysis. Although the SJC stated in dicta that the standard of review under cognate state provisions is "usually" comparable to the federal Constitution, see Trigones, 420 Mass. at 864, it denied the plaintiffs' state due process claims and concluded that a first degree murder defendant seeking review of denial of post-trial motions had received sufficient process. See id. at 864.

In other substantive due process cases decided under the Massachusetts Constitution, there is no discussion or application of the federal Glucksberg standard. Planned Parenthood League of Mass. v. Att'y Gen., 424 Mass. 586 (1997); Moe v. Sec'y of Admin. & Fin., 382 Mass. 629 (1981). If the SJC were to define historical "fundamental rights" at the level of specificity urged by the Commonwealth regarding marriage, privacy would not include procreative choice, id. at 649 or sexual intimacy, Commonwealth v. Balthazar, 366 Mass. 298, 302 (1974).

recognized commitment between two people that may or may not involve procreation or physical intimacy.[3] There are no reasons apart from bias to limit it to different-sex couples.

1. The appropriate inquiry is whether marriage, not "same-sex marriage," is a fundamental right.

In cases involving exclusions of classes of people from the institution of marriage, all courts agree that the starting point is the indisputable principle that marriage is a fundamental right and therefore, justifications for exclusion are examined under the lens of strict scrutiny. See, e.g., Turner v. Safley, 482 U.S. 78 (1987);[4] Zablocki v. Redhail, 434 U.S. 374 (1978); and Loving v. Virginia, 388 U.S. 1 (1967). In an effort to cloud this basic principle and avoid heightened scrutiny, the Commonwealth characterizes the right at stake as the right of "same-sex marriage." Plaintiffs in this case do not seek the right to "same-sex marriage," as if there were or could be such a separate institution.[5] Rather, Plaintiffs, like those in Loving, Turner, and Zablocki, seek the right to marriage.[6] Contrary to Defendants' argument, courts

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[3] Though not addressed herein, Plaintiffs also claim protections under Art. 16 due to both the expressive and intimate nature of marriage and rest on the argument set forth in Pls.' Memo. at 58-62.

[4] The Supreme Court in Turner v. Safley explained that the only reason it did not apply the highest level of scrutiny to the restriction at issue was a concern for the special interests raised by prison administration. See 482 U.S. at 89.

[5] In response to the Vermont Supreme Court's decision in Baker v. State, 744 A.2d 864 (Vt. 1999), the Vermont legislature adopted the Civil Unions Law which could, arguably, be called "same-sex marriage." The creation of an alternate, parallel status such as civil unions would still deny Plaintiffs their constitutional rights as it would fail to provide several key elements that marriage does including its portability from state to state and the status and societal understanding that marriage imparts.

[6] The SJC and the United States Supreme Court have both repeatedly emphasized the individual nature of fundamental rights. See Matter of Spring, 380 Mass. 629, 634 (1980) ("A person has a strong interest in being free from nonconsensual invasion of his bodily integrity and a constitutional right of privacy that may be asserted to prevent unwanted infringements of bodily integrity."); Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 740 (1977) (discussing "the individual's interest in exercising the choice of refusing medical treatment"). See also Glucksberg, 521 U.S.at 726 (1997) (emphasizing the personal nature of fundamental rights and noting "that many of those rights and liberties 'involv[e] the most intimate and personal choices a person may make in a lifetime.'") (citation omitted).

This is particularly true with regard to the right to marry. See Zablocki, 434 U.S. at 383-84 ("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. … and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.") (emphasis added); Loving, 388 U.S. at 12 ("Under our

evaluating marriage bans in other contexts have viewed the marriage right broadly.[7] See Pls.' Memo. at 23.

There is no real dispute before this Court as to whether there is a fundamental right to marry. Once this Court rejects the Commonwealth's mischaracterization and focuses on the right at stake -- marriage -- the only relevant question is whether the Commonwealth's justifications satisfy the appropriate level of scrutiny. See Section IV infra.

2. Marriage is not and never has been defined by procreative ability.

The Commonwealth's suggestion that the marriage right is no more than the right to procreation defies logic and law. Contrary to the Commonwealth's suggestion, marriage is not important simply because of "its relation to procreation." See Defs.' Memo. at 29.

An unbroken line of Massachusetts marriage cases confirms that neither procreation, consummation nor coition is at the core of, or essential to, the marriage right. Franklin v. Franklin, 154 Mass. 515, 516 (1891) ("consummation of a marriage by coition is not necessary to its validity"). See also Damaskinos v. Damaskinos, 325 Mass. 217 (1950) (non-consummation alone is insufficient grounds for annulment); Hanson v. Hanson, 287 Mass. 154, 158 (1934) (no annulment of marriage where wife knew of husband's venereal disease

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Constitution, the freedom to marry … resides with the individual and cannot be infringed by the State.") (emphasis added).

[7] The Commonwealth takes single references from Turner and Loving out of context when it argues that the Court did characterize the right narrowly. See Defs.' Memo. at 30-31, n. 21. The Court in single instances framed the questions as whether the fundamental right to marry "appl[ies] to prison inmates" or whether a white person has the freedom to marry a person of another race not to define the fundamental right narrowly, but rather to be descriptive; and, in fact, the rest of the language in each decision clearly reveals the Courts' broader approach. See Turner, 482 U.S. at 95 (construing the right in the case as "the right to marry" and eschewing a historical analysis of prison marriages); id. at 97 (looking at "whether this regulation impermissibly burdens the right to marry"); Zablocki, 434 U.S. at 383 (1978) (broadly proclaiming that "the right to marry is of fundamental importance"); id. at 383-84, 386 (framing the right as the "freedom to marry," the "right to marry," or "the decision to marry"); id. at 384 ("Although Loving arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."; Loving, 388 U.S.at 12 (1967) ("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."); id. ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.")

even if there was no consummation of the relationship); Martin v. Otis, 233 Mass. 491, 495 (1919) (inability to "fulfill the part of a wife so far as the physical aspect of marriage was concerned" not grounds for voiding marriage); S v. S, 192 Mass. 194 (1906) (wife's inability to engage in sexual intercourse grounds for dissolution but not voiding of a marriage).[8]

Once parties fulfill the statutory requirements for solemnizing marriage, they are married, regardless of whether they share sexual intimacy at all, and certainly regardless of whether they procreate or even intend to procreate. The inability of a spouse to perform sexually or have children has never prevented a Massachusetts couple from validly marrying and remaining married.

The Commonwealth must concede that marriage is a fundamental right even for those different-sex couples who wish to obtain the social recognition and other benefits and protections of marriage but do not wish to procreate. Cf. Griswold, 381 U.S. at 485-86. Indeed, it would violate the constitution to deny marriage to different-sex couples who choose not to physically consummate their marriages.[9]

The Commonwealth turns language from Turner v. Safley on its head when it argues that inmate marriages include the "expectation" of consummation. Defs.' Memo. at 30. To the contrary, the actual language in the decision makes clear that not all marriages entered into by inmates will be fully consummated. 482 U.S. at 96 (contemplating that "most," but

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[8] While it is true that the SJC has affirmed marriage annulments where no consummation occurred, the rule consistently applied has been that non-consummation is insufficient to annul a marriage; however, where one was fraudulently induced to enter a marriage which was never intended to be a legitimate one, the court may annul it. See generally, Anders v. Anders, 224 Mass. 438 (1916); Smith v. Smith, 171 Mass. 404 (1898). The Commonwealth clearly could not argue here that any gay or lesbian person entering a marriage would in any way be without knowledge as to the couples' independent ability to bear children or manner of sharing intimacy.

[9] The fact that some decisions have tied together the rights of "marriage" and "procreation," see Defs.' Memo. at 29-30, simply demonstrates the existence of multiple, indivisible, protected rights; it does not imply that these constitute together a single right. See Turner, 482 U.S. at 95-96 (listing "emotional support and public commitment," "spiritual commitment" and "government benefits" as important aspects of marriage in addition to consummation); Zablocki, 434 U.S. at 386 (distinguishing the right to marry from the right to have and raise children); Carey v. Populations Servs. Int'l, 431 U.S. 678, 685 (1977) (listing the right to marry and the right to procreate separately).

not all, "inmates eventually will be released"). In addition, the Court discusses physical "consummation," which is a reference to physical intimacy and not procreation.[10] The point the Court was making was that even prison inmates, who have no daily, physical contact with a spouse, have an interest in the essential elements of marriage. To suggest that Turner stands for the proposition that procreation and marriage are equivalent defies the Supreme Court's analysis. Simply put, the Commonwealth's argument that marriage exists to facilitate procreation is inconsistent with Massachusetts constitutional and common law.

B. Substantive Due Process Extends To Restrictions As Well As To Coercions

Whenever a governmental restriction impedes the ability and freedom of citizens to exercise fundamental rights, the due process protections of the Massachusetts constitution apply to a challenge of those restrictions. That is why the Commonwealth's argument that the marriage ban against gay and lesbian couples does not rise to the level of a constitutional deprivation misses the mark.[11] Defs.' Memo. at 38-42. In picking and choosing among cases in which the SJC has acknowledged constitutional violations, the Commonwealth makes the unsupportable assertion that the due process provisions of the Massachusetts constitution serve as a shield "rather than a sword requiring the government to act." Defs.' Memo. at 39.

Constitutional challenges to statutes in the context of reproductive choice and sexual intimacy -- none of which forced individuals to act -- demonstrate that the Massachusetts

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[10] It is clear that the Court's decision in Turner did not turn on a concern about the infringement on the right to procreate because, in fact, the regulation at issue allowed an exception to the ban on marriages for inmates whose physical intimacy with a partner resulted in children. See Turner, 482 U.S. at 82, 96-99.

[11] The Commonwealth makes no real argument that there is any explicit textual support for reading an exclusion into the marriage laws for same-sex couples. None of its arguments relying on history or longstanding practice (as even its plain meaning argument does) are sufficient to defeat Plaintiffs' straightforward statutory interpretation claim which would avoid this Court having to address a problem of constitutional magnitude. Pls.' Memo. at 4-7. Resting on their Memorandum of Law as to statutory interpretation, Plaintiffs focus this reply on the constitutional arguments raised in the case.

Constitution does not serve simply as a shield against government coercion or punishment. See Moe, 382 Mass. at 651-59 (state must fund abortions for indigent women when it funds pregnancy-related services); id. at 653 ("[T]he Constitution's protection is not limited to direct interference with fundamental rights."). See also Planned Parenthood v. Att'y Gen., 424 Mass. 586 (1997) (substantive due process protects individuals' rights to less restricted access to abortion). In addition, the SJC held that a statute criminalizing certain private, intimate conduct was unconstitutional, despite that the statutes did not require any action by the state. Commonwealth v. Balthazar, 366 Mass. 298 (1974). The Commonwealth's contention is equally untrue as to cases brought under federal Due Process. The federal marriage cases provide the clearest examples of challenges to restrictions that were struck down as violative of fundamental rights even when there was no coercive action on the part of the government but simply denial of access to marriage. See generally Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

C. Denying Plaintiffs Marriage Licenses Is A Serious Deprivation

The Commonwealth's argument that the Plaintiffs' claims do not rise to the level of a serious deprivation on the ground that gay and lesbian couples can contract for certain limited, circumscribed protections that are also available to married couples, see Defs.' Memo. at 39-41, fails to recognize the full legal and social significance of marriage. First, as a factual matter, the rights and protections gay and lesbian couples can receive by private contract represent a small fraction of those that come with marriage. A small sampling of some of the rights that cannot be obtained by contract demonstrates the speciousness of the Commonwealth's argument. Unmarried couples are precluded from obtaining marital

protections including testimonial privileges in criminal matters, the right to sue for wrongful death or infliction of emotional distress, joint state tax benefits, presumptions of dependency under worker's compensation laws, homestead exemptions for the marital home, and Medicaid protections for a non-institutionalized spouse, among many others. See Pls.' Memo. at 17-18.

If the Commonwealth's argument had any validity, it would have prevailed in the federal context of interracial marriages, marriages involving incarcerated persons, and marriages of people with outstanding child support payments. Those persons denied marriage could also have obtained "various benefits and protections without the benefit of state-sanctioned marriage." Defs.' Memo. at 40. Yet, the United States Supreme Court found a sufficient level of constitutional deprivation to strike the marriage restrictions as to those plaintiffs. Turner v. Safley, 482 U.S. 78, 95 (1987); Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967). In addition to failing legally and factually, the Commonwealth's position is disingenuous, simultaneously defending marriage as a hallowed, revered, centuries old widely-understood institution (to all of which Plaintiffs concur), yet at the same time arguing that the "right to marry would add nothing," Defs.' Memo. at 41, to the Plaintiffs' ability to form intimate, strong, long-lasting, widely understood and deeply-respected relationships.

II. THE COMMONWEALTH'S BAN AGAINST MARRIAGE FOR SAME-SEX COUPLES INFRINGES PLAINTIFFS' EQUALITY RIGHTS.

A. The Declaration Of Rights Shelters Individuals From Inequality In Diverse And Comprehensive Ways

The Declaration of Rights safeguards personal equality rights through a multifaceted and far-reaching framework. Articles 1, 6, 7, and 10 of the Declaration of Rights have been

invoked repeatedly, in various combinations, to ensure broad equality protections to individuals. See, e.g., Brest v. Comm'r of Ins., 270 Mass. 7, 14 (1930) ("The Declaration of Rights of the Constitution of this Commonwealth in arts. 1, 6, 7, [and] 10 … contain[s] ample guarantees for equal protection of equal laws without discrimination or favor based upon unreasonable distinctions."). As the SJC stated in Opinion of the Justices, 303 Mass. 631, 640 (1939), "All these constitutional provisions must be construed together to make an harmonious frame of government."

1. Equality rights are individually held.

Contrary to the Commonwealth's contentions, equality rights belong to the individual, rather than to groups or couples.[12] As the SJC has made clear time and again, these provisions protect people as individual members of a class. See, e.g., Planned Parenthood League of Mass. v. Att'y Gen., 424 Mass. 586, 595 n.10 (1997) (individual pregnant unmarried minor is not denied equal protection because the classifications at issue survived rational basis); Williams v. Sec'y of the Exec. Office of Human Servs., 414 Mass. 551, 564-65 (1993) (state and federal equal protection claims fail because plaintiffs could not show that they had been mistreated because of their personal membership in a suspect class). Despite the Commonwealth's framing of the discriminatory classification as between different kinds of couples, the rights being infringed belong to the individual members of those couples. See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 152 (1994) (Kennedy, J. concurring) (equality guarantees are concerned "with rights of individuals, not groups"); Mitchell v. United States,

[12] It is precisely because of the individual nature of these rights that the Commonwealth's argument that the Plaintiffs are not similarly situated to different-sex couples fails as a threshold matter. The Commonwealth's reliance on the ability to procreate as the grounds for demonstrating that Plaintiffs are not similarly situated focuses on the ability of a couple to engage in a particular behavior. This classification disregards the individual nature of equality protections. All individuals have the potential capacity to procreate and are, even assuming arguendo that characteristic is the relevant comparator, similarly situated in that regard.

313 U.S. 80, 97 (1941) ("fundamental right of equality … [does not] depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one"); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938); McCabe v. Atchison, Topeka & Santa Fe R. Co., 235 U.S. 151, 161-62 (1914).

2. Article 1 and the equal rights amendment provide separate and broad equality protections.

As the Commonwealth agrees, Article 1 has long provided robust equality protections, Defs.' Memo. at 43, protections that existed long before the adoption of Art. 106 -- the Equal Rights Amendment ["ERA"]. See, e.g., Commonwealth v. MacKenzie, 368 Mass. 613, 619 (1975) (imposing criminal sentence only on father of non-marital child and not on mother impermissible); Bogni v. Perotti, 224 Mass. 152, 156-57 (1916) (statute that prevents equitable judicial recognition of laborers but allows such recognition of other types of workers violates equality protections); Commonwealth v. Aves, 35 Mass. 193, 1836 WL 2441 at *11 (1836) (Art. 1 plainly and explicitly prohibits slavery). Contrary to the Commonwealth's assertion, the adoption of the ERA did not diminish Art. 1's expansive safeguards. The purpose of the ERA was not to limit the scope of Art. 1; rather, it was to ensure Massachusetts citizens even broader protections than were available under federal equality provisions. Opinion of the Justices to the House of Representatives, 374 Mass. 836, 839-40 (1977).

The Commonwealth argues that the ERA limited the scope of the first sentence of Art. 1, and asserts that such an interpretation is necessary to avoid rendering the ERA meaningless. Defs.' Memo. at 44. However, the Commonwealth's interpretation has the same problem it professes to criticize; it renders the first sentence of Art. 1 superfluous. No provision of the Massachusetts Constitution can be ignored as irrelevant. Opinion of the

Justices, 332 Mass. 769, 777 (1955). Thus, rather than either of these provisions diminishing the protections of the other, the first sentence of Art. 1 and the ERA should be seen as complementary. These two equality provisions have distinct, but mutually reinforcing purposes, and serve to sustain the broad equality protections long recognized in the Commonwealth.

The SJC has repeatedly applied separate analyses under these two related provisions. For example, in Moe v. Sec'y of Admin. & Fin., 382 Mass. 629, 663 (1981) (Hennessey, C.J., dissenting), Chief Justice Hennessey engaged in an equality analysis not undertaken by the majority which rested its holding on due process. He differentiated between the equal protection provision in Art. 1 "and the related provision in the Equal Rights Amendment," conducting separate analyses under each of these provisions. In another case, the SJC rejected the plaintiffs' equal protection argument under Art. 1, but noted, "The plaintiffs make no argument to us concerning the equal rights amendment," thereby illustrating the separate protections of the two provisions. Planned Parenthood League of Mass. v. Att'y Gen., 424 Mass. 586, 595 n.10 (1997). See also Att'y Gen. v. Mass. Interscholastic Athletic Assoc., Inc., 378 Mass. 342, 351 (1979) ("The equal protection guaranty and a fortiori an equal rights amendment condemn discrimination on grounds of sex whether male or female.") (emphasis added); Opinion of the Justices to the Senate, 373 Mass. 883, 887 (1977) (separate analysis under ERA unnecessary as proposed statute held to violate Art. 1).

In addition, contrary to the Commonwealth's claim, the SJC has never held that equality protections are limited to the classifications identified in the ERA or that the ERA generally precludes other classes from protection.[13] In light of the comprehensive protections

[13] The cases cited by the Commonwealth fail to support their assertion. The SJC explained in Att'y Gen. v. Desilets, 418 Mass. 316, 327 (1994), that the reason the ERA does not apply to classifications based on

that the ERA was intended to extend, Opinion of the Justices, 374 Mass. at 839-40, and the robust safeguards that Art. 1 retains, these provisions may certainly be understood to protect the Plaintiffs' rights.[14]

3. Articles 6 and 7 shape the overall equality analysis by guarding against absolute preferences for particular classes of people.

Arts. 6 and 7 significantly contribute to the equality protections of the Declaration of Rights.[15] The SJC has made clear that these provisions prevent the granting of exclusive privileges on any class of people and ensures that governmental protections and benefits are

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marital status is because "marital status discrimination is not as intense a State concern as is discrimination based on certain other classifications." The Court uses the classes listed in the ERA as examples of those meriting "intense" State concern, but does not state that it is a complete list. See also Harding v. DeAngelis, 39 Mass. App. Ct. 455, 458 n.3 (1995) (same), review denied, 422 Mass. 1102 (1996). In Powers v. Wilkinson, 399 Mass. 650, 656 n.10 (1987), the SJC specifically declined to consider the question whether the equality protections might apply to other classifications due to a lack of state action at issue. The SJC's statement in Commonwealth v. Soares, 377 Mass. 461, 488-89 (1979), that the ERA is definitive, is limited to the context of "delineating those generic group affiliations which may not permissibly form the basis for juror exclusion." It does not propose limits on the scope of equality protections.

[14] That the Special Commission reports indicated that the ERA was not intended to authorize marriage for same-sex couples is not dispositive. The Commission was established to theorize about how far the ERA would reach and to anticipate its impact on the existing laws of the Commonwealth. See Special Study Commission on the Equal Rights Amendment, First Interim Report, at i (Oct. 19, 1976). These determinations are in no way binding on the courts, however, which retain the duty to apply constitutional provisions and to determine their scope. Moe, 382 Mass. at 642 (courts have obligation to consider and resolve whether laws, and actions taken under those laws, violate constitutional protections). Constitutional provisions have often been held to grant protections in contexts initially neither anticipated nor desired. For example, as the Commonwealth illustrates, Defs.' Memo. at 43, the framers of the Massachusetts Constitution did not intend to explicitly prohibit slavery, but Art. 1 was used to do just that in Commonwealth v. Aves, supra. Specifically in the context of the ERA, the Special Commission also suggested that the ERA would not have any effect on abortion law, see First Interim Report at 21, but the SJC has twice considered the ERA's applicability to abortion issues without reference to the Special Commission reports. See discussion of Moe and Planned Parenthood, supra at 12.

[15] Although their texts may be slightly different, Arts. 6 and 7 encompass the same principles as the Vermont Common Benefits Clause. The Vermont Supreme Court recognized this in Baker v. State, 744 A.2d 864, 877 n.9 (Vt. 1999), in its examination of parallel provisions from other states in order to illuminate the meaning of Vermont's own provision, stating "Massachusetts included a variation on Vermont's Common Benefits Clause in its Constitution of 1780." These clauses were founded on anti-elitist principles and were concerned with "equal access to public benefits and protections for the community as a whole." Baker, 744 A.2d at 876 ("The concept of equality at the core of the Common Benefits Clause was … the elimination of artificial governmental preferences and advantages." Id.). See Pls.' Memo at 36-37.

intended to extend to all people and not just any one class of people.[16] See Pls.' Memo. at 37-39.

The Commonwealth correctly states that a statutory scheme challenged under these provisions must have as one of its leading purposes the intent to confer a special privilege on any class of people. Hewitt v. Charier, 33 Mass. 353, 355 (1835). This is just what the marriage exclusion does by privileging different-sex couples with the benefits, responsibilities and status of marriage, while denying them to same-sex couples.

Article 6 is about more than hereditary titles and privileges. As the SJC stated in Brown v. Russell, 166 Mass. 14, 22 (1896), "We think it obvious that, whatever may be the advantages of particular and exclusive privileges mentioned, they may include advantages and privileges for life, or a definite period of time as well as hereditary advantages and privileges." (Emphasis added). More recently, in White v. City of Boston, 428 Mass. 250, 255 (1998), the Court indicated that the legislature cannot confer an automatic preference on a group, stating there are "protections against 'special privileges' contained in arts. 6 and 7.'"

Similarly, Article 7 is about more than instituting and changing government. In Brown, the SJC made clear that this provision proclaims the worthy ends of government -- that the instrumentalities of government should be created not "for the profit, honor, or private interest of any one man, family, or class of men, but only for the protection, safety, prosperity, and happiness of the people, and for the common good." 166 Mass. at 21. The equality guarantees of this provision prevent the Commonwealth from limiting the institution of marriage, as a device of government, to only a certain class of people.

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[16] The Commonwealth's desire to ignore the opening clauses of Articles 6 and 7 lacks any legal support. As the SJC has stated, 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 Commonwealth's assertion that the courts defer to the legislature in determining whether the purpose for conferring such a benefit is legitimate flies in the face of both existing jurisprudence under Arts. 6 and 7 and general principles of judicial review and enforcement of constitutional mandates. The cases cited by the Commonwealth in no way require the courts to be bound by legislative determinations as to the constitutional propriety of enactments under these provisions.[17] Determining whether a legislative enactment is legitimate in the face of a constitutional challenge lies purely within the province of the courts and is the epitome of judicial review. See Moe, 382 Mass. at 642 ("the duty … to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with the requirements of the Constitution … 'is of the very essence of judicial duty.'") (internal citation omitted).

4. Article 10 Prohibits Invidious Distinctions Between People.

The Commonwealth's attempt to strip Article 10 of its equality protections is unfounded. The Commonwealth argues that Art. 10 allows all distinctions between classes of people so long as the distinction has any legitimate public purpose, citing Kienzler v. Dalkon Shield Claimants Trust, 426 Mass. 87, 91 (1997). The Commonwealth conveniently ignores the rest of SJC's analysis -- that while a statute that favors one person or group at the expense of another is not necessarily condemned under Article 10, the critical inquiry is not just whether the classification has a legitimate public purpose, but whether that purpose

[17] The Commonwealth's reliance on Commonwealth v. Ellis, 429 Mass. 362, 371 (1999), is misplaced because the matter of whether the purpose for the public benefit granted by the statute at issue was legitimate did not arise in the context of the case. The Commonwealth also misconstrues the Court's discussion in Opinion of the Justices, 354 Mass. 799, 801 (1968), which explored previous case law that accepted the Legislature's mandate regarding the substance and effect of the challenged provision, but made no statement regarding deference to the Legislature's determination of what constitutes the public good. The Court made an independent determination that the proposed legislation met the public good. Similarly, the Commonwealth misreads Loring v. Young, 239 Mass. 349, 373 (1921), which discussed the will of the people as manifested in a popular vote, not in the determinations of the legislature as the Commonwealth suggests.

"predominates over the benefit it otherwise confers on private parties and over any injury to another party." (Emphasis added.) To illustrate, the Court contrasted statutes that were upheld because they "did no specific injury to any other person or entity," id. at 90 (citing Boston Gas Co. v. Dep't of Pub. Utils., 387 Mass. 531 (1982), and Comm'r of Pub. Health v. Bessie M. Burke Memorial Hosp., 366 Mass. 734 (1975)), with the proposed legislation at issue in Opinion of the Justices, 373 Mass. 883 (1977), which the Court said would violate Article 10 because while the statute would have benefited a group of females, it "adversely affected the equal protection rights of similarly situated men." Kienzler, 426 Mass. at 90. Based on this same reasoning, the SJC held that proposed legislation allowing Boston to extend insurance coverage to the domestic partners of city employees would not violate Article 10 because the legitimate purposes of this legislation were clear and prevailing and because the provision caused no injury to any individual or group. Opinion of the Justices to the House of Representatives, 427 Mass. 1211, 1218-19 (1998). Thus the equality protections provided by Article 10 plainly prohibit the privileging of one group -- here, different sex-couples -- at the expense of another -- same-sex couples.

B. Applying These Equality Provisions To The Plaintiffs Demonstrates That The Existing Marriage Laws Violate Plaintiffs' Equality Rights

1. Denying the plaintiffs the right to marry constitutes sex discrimination in violation of Massachusetts constitutional equality provisions.

The Commonwealth's contention that the marriage statutes do not treat the Plaintiffs differently because of sex, Defs.' Memo. at 48, disregards the true character of the discrimination. There can be no doubt that the basis for excluding Plaintiffs from the right to marry is the sex of the person whom they want to marry. The SJC has already recognized that denying protections to an individual based on the sex of the person with whom the individual

has the relationship from which the protections would flow constitutes sex discrimination. In Lowell v. Kowalski, 380 Mass. 663, 667 (1980), the SJC held that a law establishing different standards for a child born out-of-wedlock to inherit from a mother as opposed to a father sets up a classification based on sex from the perspective of the individual child. The same is true for the Plaintiffs. The existing marriage laws set up a classification based on sex from the perspective of each individual Plaintiff. They are prevented from establishing a legal marital relationship because of the sex of the person with whom they want to establish the relationship.[18]

The Commonwealth's assertion that the Massachusetts marriage statutes "recognize[] the equally indispensable contribution of both sexes to the marriage relationship," Defs.' Memo. at 50, only highlights the sex discrimination behind them. The Commonwealth never identifies what those distinct contributions are, and Plaintiffs seriously question whether any of those supposed differences could survive constitutional scrutiny. Statutes that seek to codify stereotypes and bias have been repeatedly rejected as inconsistent with guarantees of equality. See, e.g., Att'y Gen. v. Mass. Interscholastic Athletic Assoc., 378 Mass. 342, 352 (1979) (equal rights provisions prohibit discrimination against both men and women because paternalistic stereotypes stigmatize both); Cf. Surabian v. Surabian, 362 Mass. 342, 349 n.7 (1972) ("important changes in both popular and legal thinking … suggest that 'ancient canards about the proper role of women' have no place in the law.") (internal citations omitted).

[18] The Commonwealth's attempt to correlate the discrimination faced by the Plaintiffs to the situation at issue in Buchanan v. Dir. of the Div. of Employment Sec., 393 Mass. 329 (1984) rings false. In that case, the SJC rejected a facial challenge to a statute when no explicitly sex-based distinctions could be found in the statute. The Court indicated, however, that a showing of disparate treatment of or disparate impact on women as a result of the application of the challenged statute would require constitutional scrutiny of the statute. The current marriage regime effects exactly this type of disparate treatment on individuals desiring to marry a person of the same sex.

The Commonwealth attempts to distinguish the race discrimination at issue in Loving v. Virginia, 388 U.S. 1 (1967), from the sex discrimination at issue in the present case by suggesting that without other evidence of race discrimination beyond that revealed by the marriage prohibition itself, the United States Supreme Court could not have struck the law. Yet no similar evidence existed in the case of Perez v. Lippold, 198 P.2d 17, 32 Cal.2d 711, 716 (1948), and still the California Supreme Court stated,

> The decisive question, however, is not whether different races, each considered as a group are equally treated. The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals. … In construing the equal protection of the laws clause of the Constitution, the United States Supreme Court has declared that the constitutionality of state action must be tested according to whether the rights of an individual are restricted because of his race.

The marriage statutes at issue in this case must be evaluated in the same way, to determine whether the rights of the individual Plaintiffs are being restricted because of sex.[19] As discussed supra, this is clearly the case.

2. Denying the plaintiffs the right to marry constitutes sexual orientation discrimination in violation of Massachusetts constitutional equality provisions.

As explained in Section II(A)(2), supra, the scope of Massachusetts equality provisions are not limited to those categories identified by the ERA. These provisions prohibit a broad range of inequalities, including the discrimination the Plaintiffs are facing on

[19] The SJC's previous refusal to construe the prohibition of sex discrimination in G.L. ch. 151B to also prohibit sexual orientation discrimination in Macauley v. Mass. Comm'n Against Discrimination, 379 Mass. 279, 282 (1979) is inapposite to the present situation. In Macauley, the Court focused solely on the meaning of the statutory prohibition against employment discrimination based on sex, holding that it did not encompass sexual orientation discrimination. The Court noted that sexual orientation is sex-linked, but was constrained by the statutory text and by the fact that the legislature was considering protections for sexual orientation separately. No similar concerns constrain this court's interpreting of the constitution.

account of their sexual orientation. In light of the nature of the classification at issue, this discrimination should be subject to heightened constitutional scrutiny.[20]

In the context of whether classifications based on sexual orientation are deserving of heightened scrutiny under the Massachusetts Constitution, as the Commonwealth has correctly recognized, the history of discrimination faced by gays and lesbians is a key factor. Defs.' Memo. at 54. The Commonwealth's assertion that gays and lesbians are not in a position of relative political powerlessness, however, is far from accurate. The existence of a handful of laws to protect gays and lesbians from discrimination in housing, the workplace and public accommodations and from physical harm on account of their sexual orientation does not demonstrate political power. Rather, it acknowledges powerlessness and a history of

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[20] The Commonwealth's contention that no court has held classifications based on sexual orientation to be suspect is plainly incorrect. As the Commonwealth itself notes, both an Oregon appellate court and the 9th Circuit Court of Appeals held that classifications based on sexual orientation are suspect. Defs.' Memo. at 52 n.40. See Tanner v. Oregon Health Sci. Univ., 971 P.2d 435, 447 (Or. App. 1998) (state university violated the privileges and immunities clause of the Oregon Constitution by failing to extend insurance benefits to same-sex domestic partners); Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988) (regulations barring gays and lesbians from military discriminate against a suspect class without promoting a compelling government interest, thus violating equal protection), vacated by Watkins v. United States Army, 875 F.2d 699 (1989) (en banc) (specifically declining to address the constitutional issues), cert. denied, 498 U.S. 957 (1990). The California Supreme Court has also held that invidious discrimination against gays and lesbians violates the Equal Protection guarantee of the California Constitution. Gay Law Students Assoc. v. Pac. Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592 (1979).

Although later reversed by appellate courts, several other courts have also concluded that sexual orientation discrimination is subject to heightened scrutiny. See Equal. Found. of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417, 434-40 (S.D. Ohio 1994); Ben-Shalom v. Marsh, 703 F. Supp. 1372, 1378-80 (E.D. Wis. 1989); High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368-70 (N.D. Cal. 1987). The courts that reversed these decisions, as well as other appellate courts that have ruled similarly, have done so on the basis that classifications based on sexual orientation are actually tied to "homosexual conduct," which may be constitutionally criminalized under federal law, citing Bowers v. Hardwick, 478 U.S. 186 (1986). See Equal. Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 267 (1995) ("Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their conduct which identifies them as homosexual, bisexual, or heterosexual.") (emphasis in original), cert. denied & judgment vacated in light of Romer v. Evans, 518 U.S. 1001 (1996); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573-74 (9th Cir.), reh'g denied, 909 F.2d 375 (9th Cir. 1990). See also Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). This reasoning is inapplicable in Massachusetts, however, given that the SJC made clear in GLAD v. Reilly, 436 Mass. 132 (2002), that private, consensual conduct between consenting adults cannot be constitutionally criminalized.

discrimination. Freedom from being beaten up on the street hardly establishes political powerfulness.

Moreover, in Frontiero v. Richardson, 411 U.S. 677, 687 (1973), the United States Supreme Court viewed the existence of similar anti-discrimination provisions as legislative recognition "that classifications based upon sex are inherently invidious," rather than as an impediment to heightened constitutional protection. The Court noted that this conclusion of a coequal branch of government was highly significant to the Court's own inquiry as to the invidious nature of sex discrimination. Following this reasoning, legislative efforts to protect gays and lesbians from discrimination, harassment and violence provide a basis for this Court to engage in more exacting scrutiny of classifications based on sexual orientation, rather than serving as an impediment.

3. Plaintiffs need not demonstrate purposeful discrimination on the part of the legislature at the time of the adoption of the marriage laws, but history demonstrates ongoing animus in the perpetuation of the exclusion.

The Commonwealth's assertion of an intent requirement is based on a misstatement of case law interpreting the ERA and an improper reliance on federal law.[21] The SJC has imposed no such requirement under the Massachusetts equality provisions.

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[21] The Commonwealth's reliance on MIAA, 378 Mass. at 359, is misplaced. Rather than the SJC stating that the ERA only prohibits intentional discrimination, the Court simply said that the provision at issue did intentionally use sex as a basis for discrimination -- an action forbidden by the ERA.

Further, while the Court has stated that the standards of review for equal protection claims under the state and federal constitutions may be similar, no case has imported the federal intent requirement. See, e.g., Murphy v. Dep't of Correction, 429 Mass. 736, 739 n.3 (1999) (no discussion of intent requirement); Tobin's Case, 424 Mass. 250 (1997) (same); Neff v. Comm'r of Dep't of Indus. Accidents, 421 Mass. 70, 86 (1995) (same). In addition, the Court has also indicated that the standards of review may not always be identical. See Zayre Corp. v. Att'y Gen., 372 Mass. 423, 433 n.22 (1977) (Massachusetts equal protection standard of review more restrictive of state power than federal standard).

Finally, even if the standards are similar, Massachusetts courts are not restrained by federal interpretations in determining the scope of Massachusetts constitutional provisions and are free to find violations in contexts in which the federal courts have not done so. See, e.g., Planned Parenthood League of Mass., Inc. v. Att'y Gen., 424 Mass. 586, 590 (1997) ("While we owe respect to conclusions reached by the Supreme Court interpreting language similar to that in our Declaration of Rights, ultimately we must accept responsibility for

Even assuming, arguendo, that Plaintiffs must demonstrate intent to discriminate in order to prove a violation of the equality provisions, that burden is easily met here. The SJC has long recognized that discrimination can flow from the administration of facially neutral statutes, and that intent may be inferred from a course of conduct. See Pls.' Memo. at 39-40 n.43. The Commonwealth's history of excluding same-sex couples from the institution of marriage plainly demonstrates just such an intent to discriminate and is distinguishable from the "de facto" discrimination described by the Commonwealth. Defs.' Memo. at 57. The Commonwealth's ongoing exclusion is based on impermissible classifications. This is not a situation in which different treatment is unrelated to discrimination. Rather, this is precisely an instance in which "the decisionmaker … selected or reaffirmed a course of action at least in part because of, not merely in spite of its adverse effects on an identifiable group." Ford v. Town of Grafton, 44 Mass. App. Ct. 715, 730 (internal quotations omitted), review denied, 427 Mass. 1108, cert. denied, 525 U.S. 1040 (1998). The many institutions of the Commonwealth that have interpreted the marriage statutes to be limited to different-sex couples, see Defs.' Memo. at 3, 6-7, 9-10, have consistently reaffirmed the discriminatory nature of these laws, despite the lack of textual support within them. The Legislature encouraged this discriminatory understanding in its explicit proviso in St. 1989, c. 516, that the addition of sexual orientation to the bases of prohibited discrimination in the state antidiscrimination laws should in no way be construed to allow marriage between same-sex couples. Finally, the denial of the Plaintiffs' applications for marriage licenses in conformity with the policy of the Commonwealth not to issue such licenses to same-sex couples, Statement of Undisputed Facts, para. 138-40, is a manifestation of this ongoing animus.

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interpreting our own Constitution as text, precedent, and principle seem to us to require."). See also Pls.' Memo. at 31 n.28 for more detailed discussion.

III. EVEN RATIONAL BASIS SCRUTINY IS RIGOROUS AND SUBSTANTIVE IN MASSACHUSETTS AND REQUIRES AT A MINIMUM BOTH THAT THERE IS A LEGITIMATE STATE INTEREST IN THE MARRIAGE BAN AND THAT THE RESTRICTION IS REASONABLY RELATED TO THE ASSERTED INTEREST.

The Commonwealth does not assert any real argument that the three rationales it offers constitute compelling state interests or that the prohibition against gay and lesbian people is in any way narrowly tailored to promote the identified interests. Rather, it argues that the burden in this case is entirely on the Plaintiffs to demonstrate that there are no conceivable grounds supporting the marriage laws' validity. In characterizing the burden and test in this fashion, the Commonwealth identifies the wrong test. See Sections I, II, supra. However, assuming arguendo that rational basis is even the correct standard, the Defendants misstate the SJC's methodology under this level of review.

The two-part test under rational basis scrutiny is whether a statute "is rationally related to the furtherance of a legitimate State interest." Dickerson v. Att'y Gen., 396 Mass. 740, 743 (1986). Ignoring this well-established test, the Commonwealth relies for its characterization of the burden on dicta from a case which held that the Plaintiffs had no standing to facially challenge the constitutionality of a statute. Animal Legal Def. Fund, Inc. v. Fisheries & Wildlife Bd., 416 Mass. 635, 642 (1993). Even in that context the Court affirmed that for a statute to be upheld under the lowest level of scrutiny, the statute must be "rationally related to the furtherance of a legitimate State interest." Id. at 641 quoting Dickerson v. Att'y Gen., 396 Mass. 740, 743 (1986). In fact, all of the cases upon which the Commonwealth relies either affirm the two-part Dickerson test or, in one case, do not directly involve the question of the constitutionality of a statute but rather the constitutionality of the retroactive application of it. Murphy v. Dep't of Corr., 429 Mass. 736, 739 (1999) (affirming Dickerson test); St.

Germaine v. Pendergast, 416 Mass. 698, 702 (1993) (articulating standard for determining constitutionality of retroactive application of a statute); English v. New England Med. Ctr., 405 Mass. 423, 428 (1989) (same).

Moreover, the Commonwealth ignores the important gloss the SJC has put on cases of constitutional magnitude. While the high court has often applied the same standard or analysis as applicable under the Federal constitution, e.g. using three-tiered scrutiny depending on the classification or strict scrutiny for fundamental rights, it has repeatedly explained that while the cases "at times speak of legislation which need only undergo a test of 'reasonable relation' . . . [or] strict scrutiny, 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." Marcoux v. Att'y Gen., 375 Mass. 63, 65 n.4 (1978). See also English, 405 Mass. at 428-29. The SJC has said that particularly in cases challenging statutes which relate not just to economic regulation but to regulation of interests that implicate important rights, a statutory classification will be subject to more searching scrutiny. Murphy v. Comm'r of Dep't of Indus. Accidents, 415 Mass. 218, 232-33 (1993) (noting that the rational basis standard "is not a 'toothless' one"); Shell Oil Co. v. City of Revere, 383 Mass. 682, 686 (1981) (suggesting that non-economic regulations are subject to more searching review than economic ones); Town of Holbrook v. Town of Randolph, 374 Mass. 437, 442 (1978) (judicial review is "particularly" limited for economic legislation). As a result, even rational basis review in Massachusetts requires a rigorous scrutiny of the proffered justifications for a statutory classification, especially one in which the competing values involved include the marital protections and security they provide for family, intimate relations, and home, among others.

The Commonwealth simply ignores the fact that even in cases where arguably far less important rights were at stake, including cases involving strictly economic regulation, the SJC has found constitutional violations even under rational basis scrutiny. See Pls.' Memo. at 56-57. Even under rational basis review, which Plaintiffs contend is not the appropriate standard in light of the interest at stake, this Court's inquiry is a searching one.

IV. BECAUSE THEY EITHER REST ON FALSE PREMISES OR ARE ROOTED SOLELY IN BIAS, NONE OF THE THREE JUSTIFICATIONS OFFERED BY THE COMMONWEALTH FOR THE MARRIAGE BAN CAN PASS MUSTER UNDER ANY LEVEL OF SCRUTINY.

A. Allowing Gay And Lesbian Couples To Marry Does Not Threaten Marriage

The Commonwealth's argument that prohibiting gay and lesbian couples from marrying fosters the state's interest in preserving "traditional" marriage fails both prongs of rational review. First, the vague reference to "traditional" marriage is so devoid of substance that it does not, without more, state a legitimate interest. Second, the Commonwealth demonstrates no relationship, least of all a rational or reasonable one, between the marriage ban for gay and lesbian couples and how the state's interest is advanced. That is, although the Commonwealth asserts an interest in preserving "traditional" marriages, it never explains how prohibiting gay and lesbian couples from marrying advances this interest.

1. Gay and lesbian couples have children.

The gist of the Commonwealth's argument is, at its core, based on the incorrect assertion that marriage is solely about procreation.[22] As explained above, see Section I(A)(2), Massachusetts courts have rejected the suggestion that marriage is solely about procreation.

[22] It would come as a great surprise to the elderly, the sterile, the impotent or those married couples who simply choose not to raise children, that their right to marry exists at the whim of the government. It is beyond credulity that the Massachusetts Constitution would countenance a restriction on the marriage rights of elderly or infertile couples.

Moreover, the Commonwealth would be forced to admit, and it is well-established, that same-sex couples do form families with children. In fact, of the seven couples involved in this case, four are raising children. In addition, according to 1998 Census data, there were reported to be 167,000 same-sex households with children under the age of fifteen across the United States. See U.S. Census Bureau, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), Table 8: Households with Two Unrelated Adults, by Marital Status, Age, and Sex (March 1998) 71, at http://www.census.gov/prod/99pubs/p20-514u.pdf. It is widely believed that this number is greatly under-reported particularly given that the data collection was not specifically focused on counting the number of children of gay and lesbian couples. Allowing gay and lesbian couples to marry would hardly undermine the state's interest in propagation of the species.

Apart from recognizing the sheer volume of same-sex families with children, it has long been acknowledged by the SJC that same-sex couples with children are deserving of equal protections for establishing legal relationships with their children. Adoption of Tammy, 416 Mass. 205 (1993); Adoption of Susan, 416 Mass. 1003 (1993); E.N.O. v. L.M.M., 429 Mass. 824, cert. denied, 528 U.S. 1005 (1999).[23]

If the Commonwealth is asserting the state's interest to be that children may benefit from being raised in the context of a legally, committed relationship, Plaintiffs could not agree more. In fact, creating a legally, committed relationship for their children's benefit is a significant motivating factor for several of the couples' involvement in this case. However, if

[23] It bears mention that gay couples parent as a result of varied circumstances including procreation and adoption. In addition, owing to advancing reproductive technologies, lesbian couples may conceive children with a biological or genetic relationship to both parents. Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285 (2001) (egg-donor insemination results in two women having either biological or genetic relationship to child).

the Commonwealth's interest is in protecting children, this should be no less true for the children being raised by gay and lesbian parents than those currently being raised by married different-sex couples.[24] Therefore, there is no rational connection between even the stated interest and the exclusion from marriage for same-sex couples.

2. Promoting stable relationships does not justify prohibiting gay and lesbian couples from marrying.

Although the Commonwealth asserts an interest in promoting stable relationships, it can hardly point to the marriage laws as a means of effecting this goal. No-fault divorce, G.L. c. 208 § 1 et. seq., allows couples to sever marriages with no justification and has been relied on by many, many couples for easy exit. The Commonwealth's divorce scheme and the resulting divorces obtained by over 50% of couples marrying belie the suggestion that the marriage laws promote relationship stability. See National Center for Health Statistics, Massachusetts Health Facts at http://www.cdc.gov/nchs/fastats/mass.htm. Moreover, the Commonwealth has no real support for its assertion that same-sex unions are less stable than different-sex marriages. It makes this assertion with no support other than a glancing reference to a point made by Judge Posner in a law review article that children help to stabilize marriages.[25] Insupportable assertions, even those which, in a vacuum state a legitimate interest, are insufficient even under rational basis scrutiny. Sperry & Hutchinson

[24] Even if the state has no interest in ensuring that children of gay and lesbian couples are raised in the context of legally, committed relationships, the question remains how excluding gay and lesbian couples from marrying undermines preserving the integrity of the institution even as traditionally defined by preservation of the species. In other words, the state's argument seems to boil down to there being a legitimate justification for excluding gay and lesbian couples in order to preserve heterosexual marriage. Indeed, the state's justification of preserving traditional marriage could hardly make the bare animus behind it any clearer. Such a justification fails under any level of review. Romer v. Evans, 517 U.S. 620, 635 (1996) (if equal protection means anything, the bare desire to harm an unpopular group cannot constitute a legitimate governmental interest).

[25] It bears mention that Judge Posner has an ideological perspective based in "pragmatism" that maintains, as the Commonwealth tries to, that unpopularity alone is the basis for defeating gay people's challenges to discriminatory marriage laws. This ideological perspective, without a legal basis, is hardly grounds upon which to base a state interest. Andrew Koppelman, Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein, 49 UCLA L. Rev. 519, 536-38 (2001).

Co. v. McBride, 307 Mass. 408, 418-19 (1940) (invalidating state statutes on constitutional grounds because the asserted state interest in preventing fraud was factually insupportable). And, even assuming arguendo that the Commonwealth's assertion had any factual foundation, there is no relationship between banning gay and lesbian couples from marrying and the state's interest in supporting and enhancing the stabilization of relationships since gay and lesbian couples would reap the same benefits of enhanced stability the marriage laws offer different-sex couples. Blue Hills Cemetery, Inc. v. Bd. of Registration, 379 Mass. 368, 373 n.8 (1979) (court is unwilling to "ascribe to the Legislature speculative and implausible ends, or to find rational the nexus said to exist between a plausible end and the chosen statutory means."); Sperry & Hutchinson Co., 307 Mass. at 424 ("[R]egulations must be reasonable in their nature, directed to the prevention of real evils and adapted to the accomplishment of their avowed purpose.").

3. The Commonwealth's fraud concerns are unsupported.

The Commonwealth asserts that if gay and lesbian people could marry "nothing would prevent heterosexual same-sex couples from marrying." Arguing that allowing same-sex couples to marry would entice same-sex heterosexuals is preposterous and ignores the significance and scope of the marital protections and responsibilities. It is hard to imagine that two non-intimate same-sex people would marry given the tremendous burdens marriage imports including such responsibilities as shared debt, the elective share of one's estate, obligations of financial support, and no severance of the relationship without state involvement, among others. G.L. c. 189, § 1 (elective share); G.L. c. 209, § 1 (shared debt); G.L. c. 209, § 32 (support obligation); G.L. c. 208, §§ 6-22 (divorce).

Moreover, while it may be true that same-sex couples could marry if Plaintiffs' claims are successful, there already is nothing to prevent non-intimate, different-sex couples from marrying and yet the Commonwealth allows different sex couples to marry. See, e.g., Damaskinos v. Damaskinos, 325 Mass. 217, 218 (1950) (man entered into marriage "to get out of trouble with the immigration authorities"). The Commonwealth's role has never been to determine the seriousness with which couples take on marital responsibilities nor, in any way, looked beyond the question of whether a couple meets the basic marriage requirements to determine their sincerity in entering the relationship.

If anything, because both same- and different-sex couples may have improper reasons for marrying, the Commonwealth's proffer of this justification as exclusively in support of a ban on same-sex couples marrying belies the negative animus and stereotypes behind it. The Commonwealth, even in a case clearly subjected to rational basis review, could not simply state an insupportable assertion (like prevention of fraud) and expect a statutory scheme to survive review. See, e.g., Hall-Omar Baking Co. v. Comm'r of Labor and Indus., 344 Mass. 695 (1962) (articulation of state interest relating to fraud and risk of harm insufficient to defeat constitutional challenge to statute requiring licensing of peddlers of baked goods but exempting certain others); Coffee-Rich, Inc. v. Comm'r of Pub. Health, 348 Mass. 414, 425 (1965) (state interests in fraud concerns determined upon scrutiny to be "more fanciful than real.").

4. A fear of polygamous or incestuous marriage cannot justify a ban on gay and lesbian couples marrying.

Nor does the Commonwealth's scare tactic of raising the specter of a slippery slope leading to polygamous or incestuous marriages constitute a legitimate state interest. Ending discrimination in marriage against same-sex couples will no more make polygamy legal than

ending race discrimination did. As previously explained, see Pls.' Memo. at 66, this case challenges restrictions based on personal characteristics, not numerosity. While not before this Court, other bans such as on polygamous or incestuous marriages may indeed survive scrutiny where supported by adequate justification.

B. The Commonwealth's Prohibition On Marriage For Same-Sex Couples Harms Children And Does Nothing To Advance The State's Interest In Creating Supportive Environments For Child-Rearing

The Commonwealth's argument that excluding gay and lesbian couples from marriage promotes the rearing of children in optimal environments is deeply flawed. First, is based on the unfounded and insupportable assertion that only different-sex couples can provide an optimal setting for raising children. In an attempt to bolster this false assertion, the Commonwealth baldly states that children generally benefit from having married parents. While Plaintiffs do not dispute this conclusion, it supports rather than undermines Plaintiffs' claim. To the extent that having married parents is good for children, then permitting same-sex parents to marry furthers the goal of benefiting all children, and prohibiting same-sex parents from marrying hinders it. The Commonwealth's argument dances around this contradiction and ignores the negative impact of its position on children with lesbian and gay parents. Excluding same-sex couples from marriage serves only to hurt children with gay and lesbian parents; it does not benefit children with non-gay parents. Therefore, while fostering optimal child-rearing is a legitimate state interest, the ban on marriage for same-sex couples does not further it.

1. The legislature has not determined that two different-sex parents is the optimal setting for child-rearing.

The Commonwealth's claim that the legislature has an interest in fostering child-rearing in the setting of a married different-sex couple to the exclusion of the equally

important interest in the welfare of children of same-sex couples cannot be a legitimate state interest. First, the legislature ratified the adoption of children by same-sex couples in its amendments to the adoption laws after the SJC decisions of Adoption of Tammy, 416 Mass. 205 (1993), and Adoption of Susan, 416 Mass. 1003 (1993), which held that adoptions by same-sex couples were authorized by Massachusetts law. The amendments left the interpretation of Massachusetts law in these decisions intact. See Acts & Resolves 1999, c. 3, sec. 15. In so doing, the legislature can hardly be said to have determined that different-sex couple parents are inherently or categorically preferable to same-sex couple parents. Similarly, the laws relating to use of alternative reproductive technologies ("ART") fail to restrict, in any way, access to these technologies by unmarried individuals or couples. Nothing in these statutes even hints at a preferred class or category of persons to whom ART should be made available. As both of these examples demonstrate, the legislature has not chosen to foster child-rearing only in the context of married different-sex couples.[26] Moreover, if the Legislature truly wanted to limit the rearing of children to heterosexual married couples, it could and would have advanced this goal directly, through laws prohibiting same-sex couples from adopting, being foster parents, or using assisted

[26] The Commonwealth's argument that the marriage ban could be related to a state interest in reducing use of new reproductive technologies is absurd. The General Court has never taken any action to restrict the use of ART and in fact has codified its policy decision to support infertile couples' use of such technology by requiring insurance coverage for it. Mass. Gen. Laws Ann. ch. 175 § 47H (2001); Mass. Gen. Laws Ann. ch. 176A § 8K (2001); Mass. Gen. Laws Ann. ch. 176G § 4 (2001); Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 293 (2001) ("The Legislature has responded to the cost concerns that infertile couples face in attempting to conceive by mandating health insurance companies to provide coverage for infertility treatments."). If the legislature wanted to limit the use of ART by unmarried couples, it could have done so directly and would not need to do so through the marriage laws.

Moreover, the vast majority of consumers of ART are infertile heterosexual couples, largely married ones. See, Elaine Tyler May, Barren in the Promised Land: Childless Americans and the Pursuit of Happiness (1995). While gay and lesbian couples have also availed themselves of this method to have and raise children (and will continue to do so whether or not they may legally marry), the number of gay people who have done so pales in comparison to the number of non-gay ones. See, Elaine Tyler May at 242 (although sperm donor insemination procedures are now available to unmarried women, "its most common use is among married couples").

reproduction to have children. In fact, however, none of these laws bans same-sex couples from raising and caring for children. To the contrary, they all acknowledge and provide support for families formed by same-sex couples.

2. The Commonwealth's assertion that only different-sex parents can provide the optimal setting for raising children is insupportable.

In addition, because the Commonwealth can offer no credible support for its assertion that the legislature could reasonably determine that same-sex couples are not capable of providing an optimal setting for child-rearing, the marriage ban has no rational relationship to the state's interest in child-rearing. Indeed all of the existing research supports the conclusion that gay and non-gay people are equally capable of being good parents. As the American Academy of Pediatrics recently affirmed in its statement in support of co-parent adoption, "the weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and non-gay parents in emotional health, parenting skills, and attitudes toward parenting." Ellen C. Perrin, MD, et al., Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 2, 341-344 (2002).[27] The Commonwealth ignores the clear conclusion drawn even in the article on which it relies – namely, that research from the most rigorously peer-reviewed journals in child development and sociology provide accepted social scientific evidence that lesbian and gay parents are as fit, effective and successful as different-

[27] The same conclusion was reached several years earlier by the American Psychological Association ("APA"). In a 1995 report, after summarizing the existing research on lesbian and gay parenting, the APA concluded: "In summary, there is no evidence to suggest that lesbians and gay men are unfit to be parents or that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth." Lesbian and Gay Parenting: A Resource for Psychologists (American Psychological Association, 1995).

sex parents are. Judith Stacy & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter, 66 Am. Soc. Rev. 159, 160 (April 2001).[28] These studies find that children of same-sex couples are at least as emotionally healthy, socially adjusted, and cognitively successful as children raised by heterosexual parents. Id. at 176. There is neither theory nor evidence that leads in the opposite direction. To the extent that there are differences that have been noted, they are simply differences, not deficits. Id. at 177.[29]

Moreover, despite the Commonwealth's effort to cast doubt on the uniformly positive findings in these studies, the Defendants' allusion to the piecemeal and scatter shot attack on the methodology employed in some studies does not undermine the cumulative weight of the scholarly research in this area. Defs.' Memo. at 64. It is a well-accepted standard in social science research that although one study itself cannot be generalized, when researchers using different samples and different methods consistently achieve the same results, it increases the validity and reliability of the individual studies. Herman J. Loether & Donald G. McTavish,

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[28] The Commonwealth takes several quotes from this article by Judith Stacey and Timothy Biblarz completely out of context in support of its argument preferencing heterosexual parenting. First, their statement that the "only theory of child development we can imagine in which a child's sexual development would bear no relationship to parental genes, practices, environment, or beliefs would be an arbitrary one," is completely misconstrued. Defs.' Memo. at 63. Far from asserting that optimal child-rearing is with a mother and a father, Stacey's and Biblarz's point by that quote was to highlight their concern that social science researchers have shied away from discussing differences in child-rearing between gay and lesbian parents and their non-gay counterparts because of "heterosexism" "that accepts heterosexual parenting as the gold standard." Stacy & Biblarz, 66 Am. Soc. Rev. at 162. Rejecting that orthodoxy, Stacey and Biblarz closely examined 21 psychological studies published between 1981 and 1998 that addressed the question of how sexual orientation of parents affects their children to determine whether there were any differences, not simply whether there were any deficits as previous researchers had focused upon. Id. at 167.

[29] Differences of the same or related nature would be found in any studies that varied the demographic information relating to parents. For example, there might be differences in outcomes of studies between children raised by parents who grew up in cities versus those who were raised on farms. Or, for example, there might be differences in outcomes of studies between children raised by parents from different religions or faith backgrounds. However, the critical inquiry with respect to any legitimate state interest is whether there are deficits reflected in one cohort. Any alternative approach would repeat the mistake for which Biblarz and Stacey take other social science researchers to task of setting up different-sex parenting as the "gold standard," see above, with no empirical basis. Such approach incorporates bias, rather than research, as the baseline for conclusions to be drawn regarding the health and welfare of children as it relates to the sex of their parents. Stacey and Biblarz clearly conclude that looking at 21 studies done over nearly 20 years, there are no deficits to note in children raised by same-sex couples. Id. at 177.

Descriptive and Inferential Statistics 416 (4th ed. 1993) ("scientific generalizations are based upon replications of a study rather than a single, isolated study").[30] To the contrary, from a social science perspective, it is indisputably significant that after twenty plus years of studies, researchers have found a complete absence of any empirical basis for concern about the well-being of children raised by gay or lesbian parents. See n.27 and accompanying text supra. In short, nothing the Commonwealth points to or could point to supports any conclusion that same-sex parenting gives rise to "harmful effects on children." Defs. Memo. at 65. Indeed, all of the existing data is to the contrary. Because even under minimal scrutiny, justifications must have some real basis and not simply be "fanciful," the Commonwealth's support for the marriage ban based on parenting outcomes fails. Coffee-Rich, Inc. v. Comm'r of Pub. Health, 348 Mass. 414, 425 (1965).

Moreover, while it may well be true that having married parents can provide strong supports for children, no studies conclude that different-sex parents are preferable to same-sex ones or that different-sex parents are the only ones capable of providing an optimal environment for children. The Commonwealth has not cited any research or evidence supporting its position that same-sex parents are inherently inferior to different-sex parents for the simple reason that none exists. Many factors are relevant to parental ability (such as commitment, stability, and consistency); sexual orientation is not.

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[30] In addition, taking a single reference to a study of 25 children of lesbian parents to argue that the legislature could reasonably determine that a ban on gay and lesbian couples marrying relates to the state's interest in limiting teenage pregnancies defies credulity. See Defs.' Memo. at 64. Indeed, the Commonwealth has a legitimate state interest in reducing teen pregnancies and state agencies have appropriately devoted significant attention to this issue. The root causes of teen pregnancy have largely been identified to include "social and economic factors such as poverty, racism, sexism, job opportunities, past history of sexual abuse, family stability, school failure, and risk-taking behaviors." See Debra W. Haffner, M.P.H. & Eva S. Goldfarb, Ph.D., But, Does It Work?: Improving Evaluations of Sexuality Education, Report, Sexuality Information & Education Council of the United States, at http://www.siecus.org/pubs/evals/eval0000.html. The Commonwealth's suggestion in the context of this case that gay and lesbian couples being able to marry could be one of the causes considered by the legislature to be of teen pregnancy is preposterous.

3. Prohibiting gay and lesbian couples from marrying hurts rather than helps children.

The Commonwealth's justification relating to child-rearing ignores a critical fact. Marriage would be good for children of same-sex couples for the same reasons it is good for children of non-gay parents. As Professor Michael Wald explained,

> [R]ecognition of a right of all same-sex couples to marry would be very beneficial to the thousands of children who are currently living with parents in a same-sex partnership. Enabling their parents to marry would protect the children's economic interests by insuring their access to the resources of both adults. . . Children living with same-sex parents also would benefit by seeing that the community views their family as more "normal." Their parents' well-being will be improved, which will contribute to their capacity for child-rearing. By not allowing their parents to marry, or by undoing existing marriages, the children living with same-sex partners are made to suffer.

Michael Wald, Same-Sex Couples: Marriage, Families, and Children, An Analysis of Proposition 22, The Knight Initiative, Stanford Institute for Research on Women and Gender, Stanford University, Stanford, CA (1999). If the true concern of the Commonwealth is, as it should be, creating an optimal setting for child-rearing, it would lift the ban against gay and lesbian parents marrying, not defend it.

C. Prohibiting The Gay And Lesbian Plaintiff Couples From Marrying Bears No Relationship To The Commonwealth's Asserted Interest In Conserving Financial Resources

While the Commonwealth may indeed have a legitimate interest in conserving financial resources, the marriage ban on gay and lesbian couples does nothing to foster that interest. And, based on the position the federal government has taken with respect to welfare legislation, prohibiting gay and lesbian couples from marrying may actually undermine this interest. In addition, the related justification the Commonwealth offers for the ban, that same-sex relationships "tend to be more independent and therefore in less need of such financial

assistance," is baseless and therefore cannot serve as the basis for the Commonwealth's justification.

First, the reason there is no relationship between the ban on gay and lesbian couples marrying and conserving financial resources is that married couples generally have lower poverty rates.[31] There is no basis for concluding that married same-sex couples would not also be lifted out of poverty by marriage, just as are married different-sex couples.[32] In fact, it is just this conclusion that has led the federal government to recently introduce serious incentives to encourage poor people to marry. See, e.g., The White House, Working Toward Independence 19-21 at http://www.whitehouse.gov/news/ releases/2002/02/welfare-reform-announcement-book.pdf (overview of proposals to "Promote Child Well-Being and Healthy Marriages" in context of welfare reauthorization plan); H.R.2893, 107th Cong. § 2 (2001) ("Promotion and Support of Responsible Fatherhood and Healthy Marriage Act of 2001," establishing programs to promote marriage as a way to "increase family income and economic security").

Second, the Commonwealth's justification of preserving financial resources relies on its assertion that gay and lesbian couples are more financially independent and therefore less needing of marital protections. This assertion is unfounded. Published studies find that the earnings of lesbians are similar to that of heterosexual women, which is significantly less than that of heterosexual men. M.V. Lee Badgett, The Wage Effects of Sexual Orientation

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[31] Census data from 1990 show that in Massachusetts, less than 3% of married couples' families had income below the poverty level, while over 20% of unmarried families did. Massachusetts State Data Center, MISER, University of Massachusetts, Poverty Status in 1989 of Families by Type and by Presence of Children, Report 92-05, at http://www1.miser.umass.edu/datacenter/population/topical5.pdf, accessed 2/22/02.

[32] More recent federal data makes the same point. Married couple families had a 5% poverty rate nationally in 2000, while families head by single women had a nearly 25% poverty rate. Joseph Dalaker, Current Population Reports, U.S. Census Bureau, Poverty in the United States: 2000 2 (Table A) (Sept. 2001).

Discrimination, 49 Indus.& Lab. Rel. Rev. 726, 736 (1995); M.V. Lee Badgett, Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men 35 (2001); Marieka Klawitter & Victor Flatt, The Effects of State and Local Antidiscrimination Policies for Sexual Orientation Discrimination, 17 J. Pol'y Analysis & Mgmt. 658, 675 (1998). In a related vein, studies demonstrate that individual gay men earn less in their jobs than similarly qualified heterosexual men.[33] As a result of either the sexual orientation disadvantage for gay men or the gender disadvantage for lesbians, same-sex couples actually earn less than heterosexual married couples and are, accordingly, no less deserving of the Commonwealth's marital protections based on alleged lack of financial interdependency.

In any case, the Commonwealth's financial justification could not pass muster in light of the nature of the right at stake. The Commonwealth can hardly characterize this case as one involving economic regulation simply because the justification it offers is a financial one. Moreover, an economic justification could be offered for many statutory restrictions yet must fail even rational basis scrutiny where the right at stake is an important one. See, e.g., Murphy v. Comm'r of Dep't of Indus. Accidents, 415 Mass. 218, 226-27 n.16 (1993) (in case addressing assistance of counsel, though not a fundamental right, where the state offered mostly financial reasons for the filing fee including the reduction of administrative cost of workers compensation and litigation costs for disadvantaged, reasons were determined to be "so attenuated as to render the distinction arbitrary or irrational").

[33] M.V. Lee Badgett, The Wage Effects of Sexual Orientation Discrimination, 49 Indus. & Lab. Rel. Rev. 735 (1995); M.V. Lee Badget, Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men 34 (2001); Klawitter & Flatt, supra, at 670; Sylvia A. Allegretto & Michelle M. Arthur, An Empirical Analysis of Homosexual/Heterosexual Male Earnings Differentials: Unmarried and Unequal?, 54 Indus. & Lab. Rel. Rev. 634 (2001).

V. THE ATTORNEY GENERAL'S POLICY PREFERENCE TO HAVE THE LEGISLATURE ADDRESS THIS ISSUE DOES NOT OBVIATE THIS COURT'S CONSTITUTIONAL DUTY TO ADDRESS PLAINTIFFS' CLAIM

The Commonwealth's repeated urging that this Court simply send Plaintiffs to the Legislature to vindicate their rights turns constitutional jurisprudence on its head. There is no question that the Legislature's authority is both limited and defined by the Massachusetts Constitution. Article XXX. Within this context of allocation of authority and the creation of three branches of government, the Massachusetts Constitution provides for judicial review of statutes to ensure that Massachusetts citizens are not denied the constitutional protections secured for them. As the SJC has explained:

> It is elementary in constitutional law under the Constitution of this commonwealth that a duty is cast upon the judicial department of government, when the question is properly raised between litigants, to determine whether a public officer is overstepping constitutional bounds and whether statutes duly enacted conform to the fundamental law as expressed in the Constitution. It is a delicate duty, always approached with caution and undertaken with reluctance, but an imperative duty which cannot be escaped.

Horton v. Att'y Gen., 269 Mass. 503, 507 (1930).

"Adjudicat[ing] a claim that a law and the actions undertaken pursuant to that law" conflict with the requirements of the Constitution is "the very essence of judicial duty." Moe v. Sec'y of Admin. & Fin., 382 Mass. 629, 642 (1981) (quoting Colo. v. Treasurer & Receiver Gen., 378 Mass. 550, 553 (1979)).

Arguing that this is an issue best left to the Legislature because of the Commonwealth's belief that it is a topic of controversy or one where the outcome lacks popularity, is tantamount to asking this Court to abdicate its constitutional role of reviewing statutes. In an arguably equally tendentious case involving public funding of abortion, the SJC held that it is the court's duty to protect and enforce constitutional rights. In reaching

such conclusion, the SJC expressly acknowledged that "deep-seated resistance" to an outcome compelled by the constitution may not defeat a claim even where it raises important issues of social policy. Moe, 382 Mass. at 660.

The SJC has rightly refused to abdicate its duty even in cases where the legislature had a legitimate interest in regulating an area of important public interest. In Murphy, 415 Mass. at 219, Plaintiffs challenged the constitutionality of a statutory scheme governing workers' compensation claims that required an employee wishing to challenge an administrative law judge's denial of benefits to pay a fee if the employee wished to proceed with the assistance of counsel. Even where the parties had reached a settlement agreement and the department had promulgated new regulations eliminating the fee requirement as to certain parties, the SJC struck the statutory scheme as violative of constitutionally protected rights. As the Court explained, even in the absence of a live controversy, it was critical for the issue to be addressed and resolved "so as to further the public interest." Id. at 221 n. 5. See also, Doe v. Att'y Gen., 430 Mass. 155 (1999); Cabaret Enters., Inc. v. Alcoholic Beverages Control Comm'n, 393 Mass. 13 (1984); Att'y Gen. v. Mass. Interscholastic Athletic Ass'n., 378 Mass. 342 (1979); Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728 (1977);

This case presents a live controversy, a matter of public import and a challenge to a statutory scheme. The Commonwealth's desire for this Court to ignore Plaintiffs' claims is not legal grounds for avoiding a decision in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the Plaintiffs' motion for summary judgment, deny the Defendants' cross-motion for summary judgment, enter an order declaring that civil marriage must be made available to the Plaintiffs on the same terms as other couples in the Commonwealth and order Defendants to issue marriage licenses to the Plaintiff couples.

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CERTIFICATE OF SERVICE

I, Jennifer L. Levi, certify that on this 4th day of March, 2002, I caused this Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment and Reply to be served upon counsel for the Defendants, Judith Yogman, Assistant Attorney General, One Ashburton Place, Boston, MA 02108, by hand delivery

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Date Jennifer L. Levi