COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Suffolk County
No. SJC-08860

HILARY GOODRIDGE, JULIE GOODRIDGE,
DAVID WILSON, ROBERT COMPTON,
MICHAEL HORGAN, EDWARD BALMELLI,
MAUREEN BRODOFF, ELLEN WADE,
GARY CHALMERS, RICHARD LINNELL,
HEIDI NORTON, GINA SMITH,
GLORIA BAILEY and LINDA DAVIES,

Plaintiffs-Appellants,

v.

DEPARTMENT OF PUBLIC HEALTH and
HOWARD KOH, COMMISSIONER
OF THE DEP'T. OF PUBLIC HEALTH,

Defendants-Appellees.

On Appeal from a Judgment
from the Superior Court, Suffolk County

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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At the heart of this case are seven couples who ask this Court to apply familiar principles of law to address what they daily experience as a profound harm, affecting them and their children: the Defendants' refusal to allow them to marry. Ending this exclusion from marriage harms no one, but maintaining it is devastating to these Plaintiffs and their families. It undermines, even negates, their families, and disadvantages them and their children in numerous transactions of ordinary civic life. Whereas marriage is the central, family-defining legal institution in Massachusetts, Feliciano v. Rosemar Silver Co., 401 Mass. 141, 142 (1987), the exclusion denies their "common humanity," Baker v. Vermont, 744 A.2d 864, 889 (Vt. 1999), renders them nothing more than legal strangers to one another, Feliciano, 401 Mass. at 141-42, and enshrines the status of "illegitimacy" upon their children. Zablocki v. Redhail, 434 U.S. 374, 390 (1978) (striking law forbidding indigent parents from marrying where, inter alia, withholding marriage

licenses “may only result in the children being born out of wedlock”).

Plaintiffs work hard at their jobs as teachers, therapists, business people, advisors and nurses. They give of themselves to their communities, whether as Little League coaches, community choir singers, or field trip chaperones. But above all else, they value their families and have many years of shared lives to fortify them. Like others, they seek a secure foundation and future for their families through marriage.

The Plaintiffs’ lives speak to their cultural inclusion in “family” and the larger Massachusetts community.[1] Defendants’ construction of the marriage eligibility laws is out of step with both this larger cultural inclusion, and critically, with the law, as set forth in Plaintiffs’ Brief and below. Denying the Plaintiffs access to marriage on the same terms on which it is available to others creates legal chaos for them. This is no trifle that can be remedied with

[1] They are also surrounded by a larger Massachusetts culture in which commitment ceremonies are de rigeur –- whether religious, private, or civil unions - and local papers print announcements. As Defendants note, these ceremonies are taken seriously by the media and the public. Defendants’ Brief (“Defs.’ Br.”) 76 n.59.

access to a few (or even many) legal documents or by case-by-case consideration of access to marital protections.[2] Without marriage, the Plaintiffs are simply individuals who rely on legal papers for piecemeal protections that do not even pretend to provide the legal security of marriage, not families with the force of law acknowledging and supporting them. For the reasons stated previously and below, the liberty, equality, due process and speech provisions of the Massachusetts Constitution condemn this continued exclusion.

II. PROCREATION IS NO BASIS FOR EXCLUDING THE PLAINTIFFS FROM MARRIAGE.

Defendants ask this Court to rule that procreation is the defining attribute of marriage. Defs.' Br. 19, 55-56, 111-17. But what is procreation other than having children, something that many gay people do, albeit in a different way from some (but not all) heterosexuals? In order to avoid the obvious, Defendants limit procreation to a particular

[2] But see Connors v. Boston, 430 Mass. 31, 42-43 (1999) (same-sex domestic partners not included within legislative meaning of spouse in municipal health insurance laws); Collins v. Guggenheim, 417 Mass. 615, 617 (1994)(marital protections only for married people); Att'y Gen. v. Desilets, 418 Mass. 316, 328, nn.10, 11 (1994)(same); Feliciano, 401 Mass. at 142 (same).

mode of having children. In terms stated more bluntly by their Amici, Defendants contrast all male-female couples who are "at least theoretically capable of procreation on their own," with the Plaintiffs who "cannot procreate on their own." Defs.' Br. 111-12, 114. By defining marriage to exclude gay people, the Defendants must argue that the purpose of marriage is the production and caretaking of children born solely of a particular heterosexual sexual act. This claim -- central to the entire defense of this case -- cannot even begin to bear the enormous weight Defendants place upon it. It fails under any standard of review.

A. Procreation Is Not the Purpose of Civil Marriage.

Procreation is not the purpose of marriage at all, if it ever has been, and certainly not procreation through a particular sexual act. Chapter 207 does not say that the citizens of Massachusetts must be able to procreate or they may not marry.[3] Quite to the contrary, Massachusetts tells them they

[3] By contrast, for example, adultery and bigamy laws enforce the exclusivity of the marriage relationship. See Foss v. Commmonwealth, 437 Mass. 584, 586 (2002) (statutory language is main source for discerning statutory purpose); Hoffman v. Howmedica, 373 Mass. 32, 37 (1977) (same).

may marry as long as they fulfill the express requirements of the statute, which Plaintiffs do.[4],[5]

1. The capacity for heterosexual intercourse is not essential to marriage.

After a marriage is solemnized, a couple is married regardless of whether they share any form of sexual intimacy at all. This Court has already

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[4] The Plaintiffs' relationships meet the established numerosity, relatedness, age, and exclusivity requirements of the statute. Only the sex-based limiting principle is at issue in this case.

[5] For this reason alone, Defendants' claim that Plaintiffs are not similarly situated to others fails. The Defendants' line drawing simply turns on whether a relationship is same-sex or different-sex, that is, whether the individuals are gay, lesbian or bisexual, or heterosexual. This has no "relevan[ce] to interests the State has authority to implement," Bd. of Trustees v. Garrett, 531 U.S. 356, 366 (2000), or to "factors which are properly cognizable." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985). See also Baker, 744 A.2d at 884 (same-sex and different-sex couples are similarly situated with respect to goal of promoting commitment between married couples for the security of their children).

The Defendants' cited cases address the consequences of pregnancy or the difficulties of proving paternity in a non-marital context that has no relevance here. Defs.' Br. 112-113. In addition, under the state ERA, to justify a sex-based classification based on biological differences, all persons in the favored class must possess an attribute not enjoyed by any in the disadvantaged class. Att'y Gen. v. Mass. Intersch. Athletic Ass'n, 378 Mass. 342, 358 (1979)("MIAA"). Defendants are therefore foreclosed from using a biologically-based defense where some heterosexuals cannot procreate. Compare Defs.' Br. 114 n.96 with Plaintiffs' Brief ("Pls.' Br.") 58-60.

rejected the notion that a particular sexual act is necessary for a valid marriage.[6] The inability of one of the marital partners to perform sexually (in any particular way) has never been a bar to marriage. "Impotence," or other terms for sexual incapacity, has never prevented a Massachusetts couple from validly marrying and remaining married if they so choose. Physical incapacity for a particular act has rendered marriages "voidable" at the instance of an aggrieved party, not void ab initio even when both parties wish to be married. See Pls.' Br. 83-85. Void marriages include those with an under age person, G.L. c. 207, §26, as well as multiple marriages and marriages within the prohibited degree of consanguinity, § 8, but not those of sterile or "impotent" persons. The Plaintiffs here are well aware of their options for procreation and childrearing.

In short, "procreation" wholly fails to explain the exclusion of the Plaintiffs from marriage because "procreation" is not the purpose of marriage. See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 448-52 (1972)

[6] See Pls.' Br. 85, and generally 36-37, 82-88; Procreation Br. 14, 26-28; Historians' Br. 38-41.

(state's alleged purposes implausible; statute's purpose was to ban contraception).[7],[8]

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[7] One of the statutes at issue in Eisenstadt had been construed by this Court decades earlier as one "to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile and virtuous race of men and women." Commmonwealth v. Allison, 227 Mass. 57, 62 (1917). Just as this morals-based holding could not justify what was in fact a ban on contraception, nor can the nearly 200-year old procreation dicta in Milford v. Worcester, 7 Mass. (1 Tyng.) 48, 52 (1810), justify the Plaintiffs' exclusion from marriage. The dicta defining marriage in Milford lacks any connection to marriage today. For example, the notion that marriage is intended to "multiply, preserve and improve the species" refers in part to the then-extant anti-miscegenation law, which the opinion cites as an example of valid marriage regulation. Id. at 57. The statement in the same sentence that marriage is also intended to "regulate, chasten and refine, the intercourse between the sexes" relies upon legally imposed sex roles during the coverture regime that have long been abandoned. The procreation language in Milford is part and parcel of a definition which may have described the state of affairs in 1810, but has no validity today. See also Procreation Br. 21-23.

[8] See also Jimenez v. Weinberger, 417 U.S. 628, 634 (1974) (text of statute did not support purpose ascribed to it); U.S.D.A. v. Moreno, 413 U.S. 528, 534 (1973)(challenged definition of household was irrelevant to purposes stated in law); Romer v. Evans, 517 U.S. 620, 635 (1996)(the breadth of the exclusion of gay people from legal protections was so far removed from the state's justifications of conserving resources or respecting other citizens' free association rights that it was impossible to credit them).

2. There is no "per se" link between marriage and procreation.

While Defendants claim that the present statutes serve the "primary purpose of linking marriage and procreation per se," they neglect to mention that the state is per se barred from linking the two. Griswold v. Connecticut, 381 U.S. 479 (1965), conclusively severed a state's attempt to link marriage and procreation by striking down a state law forbidding the use of contraceptives by married couples, i.e., establishing a right not to procreate within marriage.[9] By defining marriage as "an association that promotes a way of life," and "a bilateral loyalty ... for as noble a purpose as any involved in our prior decisions," id. at 486, the Supreme Court's vision is one of companionate marriage that embraces those couples who choose to procreate as well as those who do not. It is fundamental to our understanding of liberty that all adults have the same liberty interest in making their own intimate choices in this area. Eisenstadt, 405 U.S. at 453 (married and single individuals alike must be free of government intrusion into procreation decisions); Planned Parenthood v.

[9] See Pls.' Br. 29-32, 36-37; Procreation Br. 24-26.

Casey, 505 U.S. 833, 852 (1992) (reaffirming correctness of Griswold and Eisenstadt).

Like cases before and after it, Griswold underscores that the decision to marry, in and of itself, enjoys the same level of constitutional importance as "decisions relating to procreation, childbirth, child rearing, and family relationships," Zablocki, 434 U.S. at 386, and is not merely instrumental to any of the other protected rights. It is not only ironic to claim that the marriage laws serve the purpose of procreation, but pretextual, because individuals are constitutionally guaranteed an ability to marry without reference to procreation, and to procreate without reference to marriage. The Supreme Court has recognized repeatedly that marriage is too important to be compromised by the State's desire to influence procreation.

3. The procreation justification is tautological.

Procreation is a sham justification that simply recharacterizes the sex- and sexual orientation-based classifications by which Defendants administer the marriage statutes. This fatal flaw condemns their actions under every standard of review. Defendants

create two classifications: same-sex couples and different-sex couples. Their justification is that marriage serves the purpose of procreation through heterosexual intercourse. Thus, Defendants effectively state, "we limit marriage to different-sex (i.e., heterosexual) couples so that marriage can facilitate heterosexual intercourse." Because there is no legal or logical reason to be more concerned with one group of children over another based on the circumstances of their conception, the state's justification exposes its motivation: to define marriage by its exclusion of gay people.[10] Defendants simply conflate their justification with the classifications rather than provide an independent

[10] The Singer and Adams cases noted by Defendants, Defs.' Br. 111 n.91, and relied upon by many of the Defendants' Amici, similarly invoke procreation as a post-hoc rationalization for the exclusion of gay people from marriage and are flawed for the same reasons as Defendants' claim.

Because the court in Baker v. Vermont characterized Plaintiffs' claim as one seeking rights and benefits, it did not rule on many of the claims raised. Baker, 744 A.2d at 867, 886 (fundamental right; access to licenses); id. at 878 n.10 (sexual orientation heightened scrutiny), id. at 870 n.2 ("other claims").

The other "marriage" cases cited by Defendants, e.g., Defs.' Br. 11 n.3, are compromised insofar as they are: based on incomplete understandings of federal law; not state constitutional cases; limited to marital benefits; or not rulings on the merits.

rational basis served by the marriage statutes. This they may not do. Romer, 517 U.S. at 633 (only by requiring a rational connection to an independent and permissible government objective can the courts "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law"); Cleburne, 473 U.S. at 452 n.4 (1985) (Stevens, J., concurring) (legitimate state interest must have a purpose or goal independent of the direct effect of the legislation and one that can reasonably be presumed to have motivated an impartial legislature). Simply excluding gay people to favor heterosexual procreation fails the elemental requirements of equal protection review.[11]

[11] Defendants baldly assert the legislature could be concerned about legal uncertainty and increased costs from the use of reproductive technologies if same-sex couples may marry. Defs.' Br. 115-116. However, the Commonwealth has already mandated broad insurance coverage for infertility for individuals and couples, married or not. Defendants seek to justify their imposition of a unique disability on a small portion of the potential consumers of such technology (some same-sex couples) along with the larger category of people who do not and would not use such methods (those without children or those who adopt) even though the overwhelming majority of consumers of reproductive technology are non-gay people. See Sherri A. Jayson, Comment, "Loving Infertile Couple Seeks Woman Age 18-31 To Help Have Baby. $6,500 Plus Expenses And A Gift": Should We Regulate The Use Of Assisted Reproductive Technologies By Older Women?, 11

The non-neutrality of the procreation justification is also illustrated by analogy to Pers. Adm'r v. Feeney, 442 U.S. 256 (1979). In that case, a woman disadvantaged by veterans' preferences in the civil service job market was held to be disadvantaged because she was not a veteran, but not because she was a woman. The independent and neutral justification for the statute that it assisted veterans –- a class that included both men and women. Id. at 274-75.

By contrast here, the procreation justification does not rest on a "neutral" ground like veteran status. Instead, the justification is baldly premised on heterosexuality and heterosexual intercourse. While both men and women can serve in the military and become veterans, sexual orientation is not so amenable to change. Postulating a particular (heterosexual) sexual act as the raison d'etre of marriage not only incorporates an exclusion of those who are gay or lesbian, but in a circular fashion, uses the non-neutral justification of heterosexuality to privilege heterosexual marriage.

Alb. L.J. Sci. & Tech. 287, 289 (2001) (the majority of women using ART are married). See also Baker, 744 A.2d at 882 (reproductive technology issues no basis for discrimination against same-sex couples).

If "procreation" were not simply a post-hoc rationalization contrived to justify denying the Plaintiffs equal access to marriage, Defendants would assume that all individuals could procreate, but establish an age cut off for men and women based on accepted medical data about when fertility declines. They would also make sterility a ground for fault-based divorce. They have done neither. The fact that these non-intrusive, less arbitrary means are available for furthering its alleged purpose suggests that the "nexus between the actual statutory means and the purported legislative end fails to exist, perhaps because the end itself becomes implausible." Blue Hills Cemetery, Inc. v. Bd. of Reg., 379 Mass. 368, 375 n.11 (1979).

This is not an issue of legislative leeway in line drawing as Defendants suggest. Defs.' Br. 114. It is the arbitrary imposition of different standards on same-sex and different-sex couples. See Ry. Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)("there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a

minority must be imposed generally"); Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 300 (1990)(Scalia, J., concurring)("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me").

B. The Purpose of the Marriage Laws Is to Build and Support a Community of Families.

Even though the legal purpose of marriage is not what Defendants state, see Part II supra, marriage is a term rich in meaning for different people, different religious traditions and different cultures. But as the U.S. Supreme Court recognized, legal marriage is regarded as a "bilateral loyalty" Griswold, 381 U.S. at 486, of love and commitment. The law imposes rights and responsibilities on the married pair, including the duty to remain married until the state allows them to exit. See generally Boston Bar Ass'n Br.; G.L. c. 208, §§ 1-47. Massachusetts has established a vast network of laws to support the married couple as well as to enforce their obligations to each other. Id. By bundling the benefits of marriage along with its responsibilities, the state encourages people to choose committed relationships

over transient ones. Historians' Br. 38-41. This inducement to stability creates an orderly system for the state and an institutional basis for the receipt of "state-conferred benefits." Baker, 744 A.2d at 889 (concurring and dissenting opinion). See also Turner v. Safley, 482 U.S. 78, 95-96 (1987).

By recognizing and supporting the pair bond at the heart of marriage, the marriage statutes give life to the familiar concept that family is the foundation of our community. French v. McAnarney, 290 Mass. 544, 547 (1935). By supporting the couple, the state provides a greater measure of security and stability to the members of the couple both as individuals and families, for their benefit as well as the good and stability of the entire community. Id.; see also Baker, 744 A.2d at 889 (legal support of a couple's commitment provides stability for the individuals, their family, and the broader community).

The rights and responsibilities provided through law are premised on equality and reciprocity, not the sex of the parties. From the dismantling of coverture to the present acknowledgement of the limits of contract and the importance of the married couple's status, the Legislature has arrived at a legal

framework for marriage based on (an otherwise qualifying) couple's consent and commitment. See Historians' Br. 5-37, 44-48. This commitment is at the center of marriage, and not gender or procreation.

To the extent that marriage laws also serve to promote a permanent commitment between a couple for the security of their children, Baker, 774 A.2d at 881, the law does not distinguish based on how those children came to be, but the fact that they have come to be. Insofar as married persons may have rights that flow through to their children, the law distinguishes not at all whether a child came to be through a particular sexual act, through technology, or through adoption.[12]

This case joins the ongoing legal evolution of marriage and family with the cultural inclusion of the Plaintiffs' families in Massachusetts. For all of the same reasons marriage is a good for other families, it would be good for the Plaintiffs. Our Commonwealth would benefit from acknowledging the Plaintiffs' private commitments –- including Linda and Gloria's

[12] Plaintiffs have already argued that the Defendants' emphasis on biological parenting is misplaced. Pls.' Br. 86-87.

shared lives over 30 years –- as public commitments as well.

C. Even Assuming "Procreation" Is the Purpose of Marriage, There Is No Relationship Between That Purpose and the Exclusion of the Plaintiffs from Marriage.

When all is said and done, "procreation" fails to justify the exclusion of the Plaintiffs from marriage because gay people will continue to have children in their (nonmarital) relationships.[13] By excluding the Plaintiffs and others like them from marriage, the only certain outcome is an increase in the number of "illegitimate" children with "second class" gay and lesbian parents. Compare Zablocki, 434 U.S. at 390.

Ending the Plaintiffs' exclusion from marriage bears no real or conceivable connection to procreation[14] –- however defined -- that may occur by married heterosexual couples.[15] Rationality "must find some footing in the realities of the subject

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[13] The day has already arrived when two people of the same sex can both have a biological connection to their child, with more technological innovation all but certain. See Knoll v. Beth Israel Deaconess Med. Ctr., Inc., Suffolk Probate & Fam. Ct., No. 00W1343 (June 28, 2000) (allowing a lesbian couple to secure a birth certificate denominating both egg donor mother and gestational carrier mother as parents).

[14] Semantics aside, Defs.' Br. 106,"conceivably," "rationally" and "reasonably" are used synonymously. English v. New England Med. Ctr., Inc., 405 Mass. 423, 428 (1989); Lee v. Comm'r of Rev., 395 Mass. 527, 529-30 (1985); Nordlinger v. Hahn, 505 U.S. 1, 15 (1992).

[15] Defendants' disclaim any argument to increase the number of children born in heterosexual marriages. Defs.' Br. 110 n.88.

addressed," Heller v. Doe, 509 U.S. 312, 321 (1993), but there is simply no rational relationship between the present exclusion and the Defendants' goal.[16] Withholding marriage from the Plaintiffs will do nothing to affect whether heterosexual procreation through any particular means will occur in heterosexual marriages, but it will absolutely disadvantage the families of gay people and their children.

III. THE COURT HAS THE POWER AND DUTY TO PROTECT PLAINTIFFS' RIGHTS UNDER THE MASSACHUSETTS CONSTITUTION.

Like Mildred and Richard Loving, Andrea Perez and Sylvester Davis, and Roger Redhail, Plaintiffs stand before this Court seeking protection for their most intimate of relationships –- fundamental to their very happiness and dignity. Defendants clothe their

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[16] See Pls.' Br. 80-82 (state constitutional cases); Murphy v. Dep't. of Corr., 429 Mass. 736, 742 (1999)(Art. I case; no basis for distinction); St. Germaine v. Pendergast, 416 Mass. 698, 703-04 (1993)(Art. X case; same). For analogous cases under the 14th Amendment, see Hooper v. Bernalillo County Assessor, 472 U.S. 612, 619 (1985)(no rational relationship between exclusion or limitation and purported state interest); Cleburne, 473 U.S. at 448-50 (same); Zobel v. Williams, 457 U.S. 55, 61-63 (1982)(same); Carey v. Population Servs. Int'l., 431 U.S. 678, 690 (1977) (same); Jimenez, 417 U.S. at 636-38 (same); Moreno, 413 U.S. at 535-37 (same); Eisenstadt, 405 U.S. at 450-53 (same).

arbitrary treatment of the Plaintiffs with post hoc requirements for marriage (i.e., procreation) that apply only to same-sex couples. When this and the equally arbitrary justifications offered by the Defendants' Amici are peeled away, all that is left is a naked and constitutionally unsupportable state preference for heterosexual families to the exclusion of gay and lesbian families.

In an effort to shield this bald preference from constitutional scrutiny, Defendants repeatedly advance the argument of last resort, imploring this Court to abstain from vindicating Plaintiffs' claims in deference to the Legislature. However, because "[t]he very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), this Court must resist those pleas to abdicate its core responsibility of judging the constitutionality of laws.

A. The Defendants Confuse Policy Choices and Constitutional Imperatives.

Defendants treat Plaintiffs' claims to equal treatment under the Massachusetts marriage statutes

and Constitution as a legislative issue. But there is no public policy exception to adjudicating the constitutionality of the marriage statutes. If there were, then the Supreme Court would have turned back the Lovings and Roger Redhail to make their cases to their respective state legislatures. The constitutional issue in this case is familiar: whether the Legislature and the Defendants have complied with the limitations of the Massachusetts Constitution in enacting and enforcing particular laws. The Plaintiffs are suffering a massive constitutional and personal injury by Defendants' application of the marriage laws; it is the role of this body to enforce the state constitution and vindicate their rights.

At the same time, a ruling by this Court in favor of the Plaintiffs does not foreclose the Legislature from its ongoing role in regulating marriage; it would simply state that this exclusion contravenes our guarantees of liberty and equality. While no rewriting of statutes would be required, the Legislature remains free to revisit and amend the statutes concerning the incidents of marriage and the duties of married couples, consistent with

constitutional requirements of justifiable distinctions and even-handed action.

B. The Constitution Speaks to This Case.

Defendants seek to remove this case from the scope of this Court's ordinary purview by characterizing the Plaintiffs' claims as novel and unprecedented, but even more, by claiming the Massachusetts Constitution does not even speak to the harms imposed on the Plaintiffs -- harms that would be immediately obvious, intolerable and unconstitutional if it were any other group of citizens who were forbidden to marry although otherwise qualified. As they must, Defendants acknowledge the Constitution provides broad principles to guide each branch of government, Merriam v. Sec'y of the Commonwealth, 375 Mass. 246, 257 (1978), but then eviscerates those principles into desiccated platitudes. According to Defendants, the fact of legislative action in an area is the answer to any constitutional objection as to how the Legislature has acted.[17] But the presumption

[17] See Defs.' Br. 37 (in Art. VI matter, court must accept legislature's action as establishing a legitimate public good); id. at 37 n.24 (liberty and due process protections in Pt. 2, c. 1, § 1, Art. 4 subordinate to legislature's determination of public good); id. at 38-39 (Art. VII limited to right to

of constitutionality of statutes does not ipso facto allow the mere incantation of a public good -- no matter how divorced from the realities of the subject addressed -- to defeat a constitutional challenge. The Massachusetts Constitution is not so pathetic an instrument.[18] Not only does it speak to the issues here and provide adequate and independent grounds for the Plaintiffs' claims,[19] but our frame of government demands that this Court maintain its position as a co-equal branch of government and ensure that legislative action regarding marriage is consistent with constitutional guarantees.

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change government when executive refuses to consent to laws); id. at 44 (Art. X protects life, liberty and property only to extent that laws have so provided); id. at 78 (Art. I sought equality with inhabitants of England).

[18] Compare Edward F. Hennessey, The Extraordinary Massachusetts Constitution of 1780, 14 Suffolk U. L. Rev. 873 (1980); see also State Constitutional Law Br. 13-35.

[19] Just as baldly, Defendants assert that none of Arts. I, VI, VII or X was intended to confer individual rights. Defs.' Br. 77. This claim betrays the very text of the Constitution. The title of "Part the First" of the Constitution is "A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts." (emphasis added). If not individuals, then who is it that possesses "natural, essential and unalienable rights?" Is not the underlying purpose of the entire Constitution "to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it, with the power of enjoying ... their natural rights, and the blessings of life?" Mass. Const., Preamble (emphasis added).

The constitutional protections upon which Plaintiffs rely are nothing new. Plaintiffs merely seek the same constitutional protections assumed by their non-gay neighbors. The right to marry and form a family with the partner of one's choice enjoys a distinguished constitutional pedigree. The right to be free from government classifications and limiting generalizations on the basis of sex and otherwise is part of our constitutional tradition and the equality guarantees of Arts. I, VI, VII and X. Can anyone seriously doubt that many laws were conceived in an era clouded by basic ignorance of who gay people are, if not by outright stereotypes?[20] No matter how parsed, the Constitution condemns the present administration of the marriage laws: a privilege reserved for different-sex couples untethered to any public interest that justifies excluding same-sex couples. Two centuries ago, as today, "It is manifestly contrary to ... our constitution ... that any one citizen should enjoy privileges and advantages which are denied to all others under like

[20] Defendants do not contest that gay people have been subject to a history of discrimination.

circumstances....” Holden v. James, 11 Mass. 396, 405 (1814)(Art. X).[21],[22]

IV. THIS IS A HEIGHTENED SCRUTINY CASE.

A. Plaintiffs Enjoy the Same Fundamental Right to Marry Enjoyed By Others in Massachusetts.

1. Defendants err on the level of specificity.

Without conceding that a fundamental right to marry exists, Defendants argue that any fundamental right to marry is limited to different-sex couples. A

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[21] Art. I condemns the Plaintiffs’ exclusion under these familiar principles. Pls.’ Br. 80-82, 86 n.63. Arts. VI and VII, particularly in their rejection of absolute governmental preferences, similarly condemn this absolute preference and intended advantage for heterosexual families. Opinion of the Justices, 303 Mass. 631, 649-53 (1939); Brown v. Russell, 166 Mass. 14, 25 (1896). Art. X condemns Plaintiffs’ exclusion from marriage because any public purpose served does not predominate over the injury imposed on the Plaintiffs, Kienzler v. Dalkon Shield Claimants Trust, 426 Mass. 87, 91 (1997), and no harm would befall others from ending the exclusion. Opinion of the Justices to the House of Representatives, 427 Mass. 1211, 1218-19 (1998) (extending domestic partnership coverage to city employees would not violate Art. X where it served a public purpose and harmed no one else).

[22] This Court has the jurisdiction to review the legislature’s properly enacted marriage laws. Compare Brief of Amici Curiae, Massachusetts Citizens Alliance and Massachusetts Citizens For Marriage in Support of the Appellees with 1 Charles P. Kindregan, Jr. & Monroe L. Inker, Mass. Prac. Family Law & Practice, § 1.6 (2d ed. 1996).

level of specificity examining the right to "same-sex marriage" is not required under law.[23]

Contrary to Defendants' framing of the issue, the issue is not "whether the right to marry extends to same-sex couples." Defs.' Br. 33. If the Supreme Court had begun its analysis by considering whether there was a fundamental, historic right to "miscegenic" or mixed-race marriages in Loving v. Virginia, 388 U.S. 1 (1967), its conclusions would have been very different. If it had commenced its discussion in Zablocki by asking whether there is a fundamental right for the poor to marry, or if it had begun its inquiry in Turner, 482 U.S. 78, by determining whether incarcerated criminals have a fundamental right to marry, that Court may not have so clearly enunciated a fundamental right to marry under the U.S. Constitution. In all of the above cases, only after acknowledging the well-established and general fundamental right to marry did the Supreme Court consider the particular types of marriage to determine whether the states could justify denying a

[23] See Pls.' Br. 27 n.15; 33 n.19. See also Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (concurring opinion)(the Court's cases have discussed "asserted rights at levels of generality that might not be 'the most specific level' available").

particular class of people the right to marry the person of their choice.[24],[25]

2. Defendants err as to the role of history.

The Court has found rights to be fundamental under the State Constitution even when they did not exist at common law or in 1780. When this Court has examined history, it has done so without the originalist constraints advanced by Defendants. See Pls.' Br. 19-20, 27 n.15. See, e.g., Moe v. Sec'y of Admin. & Fin., 382 Mass. 629, 649 (1981) (right to abortion consistent with recently delineated right to privacy); Dist. Att'y for Suffolk County v. Watson, 381 Mass. 648, 661 (1980)(death penalty

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[24] 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 (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"); Loving, 388 U.S. at 12 ("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").

[25] Without legal authority, Defendants argue "it is necessary to focus ... on the underlying interests ... to see whether they are applicable here." Defs.' Br. 54-55. Individuals need not meet qualifying tests for access to a fundamental right. Plaintiffs are aware of no Massachusetts case in which fundamental rights distinguish among classes of citizens.

unconstitutional under Art. XXVI even though capital punishment was common both before and after its adoption).[26]

Finally, this Court, like the Supreme Court, must take notice of "traditions from which it [has] broke[n]." Casey, 505 U.S. at 850 (quotation marks omitted). Any history of exclusion is being broken down by a developing tradition of respect for gay and lesbian parents, same-sex couples, and same-sex couples and their children. Pls.' Br. 78 & n.55, 92 n.65. See also Defs.' Br. 72-76, 97-98 (legal rights afforded to gay people and same-sex couples in Massachusetts).[27]

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[26] Defendants rely heavily on Washington v. Glucksberg, 521 U.S. 702 (1997), a case never before cited by this Court for guidance in construing the state constitution. In any event, unlike marriage, the right to suicide, assisted or otherwise, has not existed for anyone in any manner at any time.

[27] Assuming, arguendo, that Plaintiffs need show a coercive and/or grievous deprivation of their constitutional rights, Defs.' Br. 67-77, they have done so here.

Excluding the Plaintiffs from marriage seeks to coerce the choice of a different-sex partner. The statutes at issue in Perez v. Sharp, 198 P.2d 17 (Cal. 1948) and Loving, coerced the choice of a partner based on race. The state's use of its power in this case is as offensive as in the others.

Excluding the Plaintiffs from marriage is also a "grievous" harm, notwithstanding the availability of wills, health care proxies and relationship agreements (which are equally available to marriage-eligible non-

B. This Court Should Accord Strict Scrutiny to the Sex- and Sexual Orientation-Based Classifications in the Statute.

1. If necessary for claims under the state constitution, discriminatory intent is obvious here.

Even assuming, arguendo, that discriminatory intent is required for demonstrating an equality violation under the state constitution,[28] that requirement is satisfied here.

Proof of intent, at least at the federal level, is required to obtain heightened scrutiny only when the statute itself is facially neutral. See, e.g., Pers. Adm'r, 442 U.S. at 272-73.[29] If Defendants are

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gay people). Certainly Virginia's refusal to acknowledge the Lovings' marriage constituted a grievous injury although they had "another outlet," i.e. they could have moved to a state more hospitable to their marriage. Defendants unnecessarily trivialize the life-altering consequences of withholding marriage from the Plaintiffs.

[28] Plaintiffs do not concede this point. Several cases point to facially neutral laws whose impact was so obvious that a separate demonstration of intent was not required under the state constitution. Sch. Cte. of Springfield v. Bd. of Educ., 366 Mass. 315, 327, cert. denied, 421 U.S. 947 (1975) (facially neutral action may result in unlawful discrimination under Arts. I and X); Opinion of the Justices, 363 Mass. 899, 902 (1973)(opining that the context, objective and effect of proposed bill showed it would perpetuate existing segregation in violation of Art. I). Compare Defs.' Br. 100-01 (cases turning on 14th Amendment).

[29] At the same time, there is a strong strain of federal law that focuses on effect, just as does Massachusetts law. See, e.g., Washington v. Davis, 426

correct that the term "marriage" is inherently defined by gender such that one must read "one man and one woman" in all references to marriage in chapter 207, then there is a facial sex classification in the statute.

But Defendants also misconceive Plaintiffs' claim. This is not a disparate impact claim. Cf. Washington v. Davis, 426 U.S. 229, 246 (1976) (employment test that disproportionately affected blacks, but not all blacks [and also some whites] could not be traced to a discriminatory purpose). Plaintiffs do not argue that some people who seek to marry another person of the same sex will be allowed to do so but most will not. Chapter 207, as interpreted by Defendants, constitutes a wholesale exclusion of those who wish to marry someone of the same sex, which is also a nearly perfect proxy for gay people. Defs.' Br. 100-102. As the U.S. Supreme Court explained in M.L.B. v. S.L.J., 519 U.S. 102, 126 (1996), a case involving a wholesale exclusion is different in kind from one of disproportionate impact.

U.S. 229, 254 (1976)(Stevens, J., concurring) (where the "disproportion is ... dramatic," "it really does not matter whether the standard is phrased in terms of purpose or effect").

Like the statutes at issue in M.L.B. that harmed only indigents, the exclusion in this case is "wholly contingent" on one's sex and sexual orientation. Thus, all individuals wishing to marry someone of the same sex, and a fortiori, all gay people, are excluded under the present scheme. No further showing is necessary. Id. at 126-127 & n.15 (distinguishing Davis and Feeney on this ground; striking state law affecting all indigent persons).

If any further showing of intent is necessary, altered circumstances have rendered c. 207 purposely discriminatory over time. This principle is familiar to this Court as well. "[I]t is nothing new in constitutional law that a statute valid at one time may become void at another time because of altered circumstances." Vigeant v. Postal Tel. Cable Co., 260 Mass. 335, 342 (1927).[30] For example, in Baker v. Carr, 369 U.S. 186, 197-210 (1962), the Supreme Court struck on equal protection grounds a Tennessee apportionment statute which had become unfair in light

[30] See also Hall-Omar Baking Co. v. Comm'r of Labor & Indus., 344 Mass. 695, 704 (1962)(while an exemption may have been rational in 1937, "our task is to decide whether there is unjustified discrimination in 1962"); Opinion of the Justices, 303 Mass. 631, 647-48 (1939)(application of constitutional "equality rules" "may vary with changing circumstances").

of the state's population growth and redistribution, but which the Legislature had not amended in 60 years. See id. at 261 (Clark, J., concurring)(intent found sub silentio).

2. Defendants discriminate based on sex in violation of the ERA.

The parties obviously disagree about whether a sex-based classification exists in c. 207, either on its face or as applied.[31] By arguing that the choices of men and women are restricted evenhandedly, Defendants' shift the inquiry from whether the marriage laws improperly limit an individual's marital choice on the basis of sex to whether those laws limit the choices of men and women as groups.

A slight change in the facts reveals the flaw in the Defendants' analysis. If the statute provided that all persons may only marry members of their same race, or that they must marry someone of a different race, then under the Defendants' rationale, there

[31] Contrary to Defendants' claim, this Court has not endorsed "separate but equal" in the sex discrimination context. Defs.' Br. 84. MIAA, 378 Mass. at 349 (no question raised about the validity of separate but equal teams); Opinion of the Justices, 374 Mass. 836, 842 (1977) (not addressing separate but equal facilities). The "separate but equal" rationale of Roberts v. Boston, 59 Mass. (5 Cush.) 198 (1849), was justly repudiated in Brown v. Bd. of Educ., 347 U.S. 483 (1954), and should not be resurrected here.

could be no objection under the ERA because all races would be affected and treated equally under this scheme. But in fact, a statute that makes "race" or "sex" the criterion by which marital partners may be selected, whether explicitly or implicitly, and even if applied to all, is a race-based or sex-based classification demanding exacting justification from the state.[32]

Defendants and their Amici also mischaracterize a post-hoc Special Study Commission Report as legislative history. Pls.' Br. 53-54. The polestar of constitutional interpretation is the language and the general principle established. The Constitution does not specify "a detailed system of practical rules" for its application. Merriam, 375 Mass. at 257.[33]

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[32] For the same reasons, Defendants' strenuous attempts to limit Loving, Perez, and McLaughlin v. Florida, 379 U.S. 184 (1964), to cases about white supremacy must fail. Defs.' Br. 86-89 & n.69. Plaintiffs assume this Court would strike a recent-vintage race-based classification for marriage as well. This case also raises the issue of heterosexual supremacy. Nancy Cott, Public Vows 216 (2000) (marriage laws "reinforce[] a caste regime of heterosexuality over homosexuality").

[33] See also Robert F. Williams, The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents, 27 Okla. City U. L.Rev. 189, 201-02 (2002)(study commissions not equivalent to

constitutional conventions in terms of constitutional history). Compare Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (even though "sex" proscription in Title VII was added as a way to defeat the Civil Rights Act of 1964, discrimination because of sex "includes sexual harassment of any kind that meets the statutory requirements).

3. Defendants discriminate based on sexual orientation.

The first sentence of Art. I has meant too much for too long to credibly argue it is not a source of individual rights.[34] By locating all individual rights in the ERA, or second sentence, Defendants impermissibly render the first sentence of Art. I a nullity. If this Court believed that the ERA was the sole source for determining whether a classification was suspect in all contexts, it could have said so when evaluating such claims. It has not, and instead has brought to bear federal suspect class analysis. See, e.g., Tobin's Case, 424 Mass. 250, 252-53 & n.2 (1997) (citing Cleburne); Murphy v. Dep't of Indus. Accidents, 415 Mass. 218, 226-27 (1993)(same); Williams v. Sec'y of Exec. Office of Hum. Servs., 414 Mass. 551, 564 (1993)(same).

To answer a question posed by Defendants, there is a principled distinction to be made between gay people and other classes not yet deemed suspect under federal standards. Defs.' Br. 99. As explained in Pls.' Br. 64-66, the non-suspect classes of the

[34] Compare Pls.' Br. 43-44 and State Constitutional Law Br. 13-33 with Defs.' Br. 78-80, 94-96.

elderly, the physically disabled[35], and the mentally disabled are deemed compromised in their ability to perform in society; gay people are not. In addition, since most people will become elderly, there is no need for the elderly to secure protection from the majoritarian political process. Because it turns on what you have rather than personal characteristics, wealth is unlike any classification deemed suspect. Like sex and race, sexual orientation is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." Cleburne, 473 U.S. at 440.

C. The Speech Clauses of the Massachusetts Constitution Speak to the Plaintiffs Exclusion from Marriage.

Whether denominated a claim under Art. XVI (as amended by Art. LXXVII) or Art. I, withholding marriage from the Plaintiffs also infringes on their rights to speech and association. By joining in civil marriage, David and Rob would be making "a public expression of their commitment." R.A. 42. It is

[35] It has not yet been determined how Mass. Const., Amend. Art. CXIV (forbidding handicap discrimination in programs or activities of the Commonwealth) might change this analysis under the state constitution.

exactly this form of expression –- unique to marriage and uniquely understood by others as a statement of love and commitment -- that is denied to the Plaintiffs. See Kenneth L. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 636 (1980).

While the government licenses marriage, it is ultimately the individuals who make the commitment to marry and assume the legal obligations of that status.[36] This private expression is analogous to the wide range of expressive conduct already protected by Art. XVI. See, e.g., Benefit v. City of Cambridge, 424 Mass. 918, 923 (1997) (panhandling); Commonwealth v. Sees, 374 Mass. 532, 537 (1978)(nude dancing).[37]

As is clear from the Defendants' focus on maintaining marriage as a heterosexual institution (see Part II above), the same-sex inclusive content of

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[36] The Superior Court mischaracterized the speech at issue as "government speech." R.A. 130. It was wrong for this reason and others. See Expression Br. 18-23.

[37] Marriage is also a protected association under either Art. XVI (as amended) and Art. I. From the generalized acknowledgement of intimate association in Concord Rod & Gun Club, Inc. v. MCAD, 402 Mass. 716, 721 (1988), to the location of associational rights within protections for the family, see, e.g., A.Z. v. B.Z., 431 Mass. 150, 162 (2000), this Court has recognized the variety of intimate associations worthy of constitutional protection. The exclusion of the Plaintiffs from marriage necessarily denies them access to a unique form of protected association.

the Plaintiffs' proposed speech and association is what the Defendants find objectionable. Compare Bachrach v. Sec'y of the Commonwealth, 382 Mass. 268, 276 (1981) (unconstitutional to single out "Independents" and deny them expression on the ballot).

Defendants' administration of the marriage laws cannot withstand strict scrutiny under Art. XVI (as amended). Benefit, 424 Mass. at 924-25; see also Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).[38]

V. THE STATE CANNOT DEFEND THE PROFOUND DISABILITY IT HAS IMPOSED ON THE PLAINTIFFS.

Defendants do not contend that any of its rationales constitute compelling state interests, or that its discrimination is narrowly tailored to promote such interests. The proffered rationales fail as a matter of rational basis as well. Pls.' Br. 79-94. See also Pls.' Br. 36-39 (interest balancing).

A. Procreation and Child-Rearing

Plaintiffs have addressed procreation in Part II above, and to a large extent, the justification of promoting heterosexual childrearing (Defs.' Br. 117-

[38] The uniqueness of marriage is demonstrated in, inter alia, Expression Br. 6-13; Boston Bar Ass'n Br.

18) suffers from the same tautological flaws and also fails to find any footing in the reality of the subject addressed. Heller, 509 U.S. at 321.

First, Defendants have yet to explain, because they cannot, how excluding the Plaintiffs from marriage bears any rational connection to their alleged interest in promoting childrearing in married heterosexual households.[39] What is inevitably true, however, is that withholding marriage from families with gay and lesbian parents has a profound impact on their children. Among other things, the legal protections available to a married family are off limits to the Plaintiffs' families in times of tragedy or hardship, and the children, as the parents, will suffer from the lack of these supports.

Second, all of the authoritative medical, psychological, psychiatric and other social science organizations familiar with the relevant research (as well as any of its limitations) have concluded that children raised by gay and lesbian parents are normal and healthy, and fare as well on all measures of

[39] See also supra note 15.

adjustment and development as children of different-sex parents.[40],[41]

Third, even if there are any empirical differences between "gay parenting" and "heterosexual parenting" (to speak in these broad, crass terms), even the Defendants do not go so far as to suggest that the differences can be considered a deficit. Defs.' Br. 119-21. Like geography (being raised in a city versus on a farm) or parental religion (Hasidic Jewish or atheist), any differences are irrelevant to normal, healthy child development and outcomes.

Fourth, Defendants cannot justify the discrimination against Plaintiffs by a mere incantation of "difference;" it must be a difference related to the state's interest in having healthy children. No such difference can be plausibly asserted here. Indeed, in November 2002, the American

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[40] See Pls.' Br. 66; Br. of Mass. Psychiatric Society.

[41] The literature upon which Defendants rely about the unique contributions of fathers, and suggesting a detriment to children from not having fathers, is all premised on the notion that there is only one parent (a single mother) in the household. Childrearing by married same-sex couples, by contrast, will involve two parent households. See Blixt v. Blixt, 437 Mass. 649, 663-64 (2002)(acknowledging differences between one and two parent households), petition for cert. filed, 71 U.S.L.W. 3416 (U.S. Dec. 3, 2002) (No. 02-847).

Psychiatric Association issued a further statement endorsing recognition of gay and lesbian families and summarizing the scientific consensus on the parenting research.

> Numerous studies over the last three decades consistently demonstrate that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social and sexual functioning as children raised by heterosexual parents. . . . [O]ptimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults. . . . [C]hildren who have two parents, regardless of the parents' sexual orientations, do better than children with only one parent.

Add. A1.[42] Just because some people want to quarrel does not mean the point is debatable: the scientific consensus is established.

At the same time, to say that more study is needed in this area is to acknowledge the nature of scientific inquiry. In medical and social science research, study authors routinely discuss the limitations of their work and recommend further inquiry. Even something as established as the modes

[42] American Psychiatric Association, Position Statement, Adoption and Co-parenting of Children by Same-sex Couples (Nov. 2002), at http://www.psych.org/archives/200214.pdf.

of transmission of the common cold continues to be studied.[43]

B. Conserving Resources

As Plaintiffs have argued, limiting marriage on the basis of "conserving resources" is patently arbitrary. Pls.' Br. 93-94. Under the Defendants' rationale, the Commonwealth could decide to limit access to marriage based on some calculation of what groups are more or less likely to cost the state money. Thus, "conserving resources" could be invoked to withhold access to public education for the children of parents earning over $150,000 per year. We are past the point, however, where such a claim is credible. The Supreme Court has bluntly condemned exactly the argument proffered here, even as a matter of rational basis review.

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[43] The States of Virginia and California both unsuccessfully advanced scientific research about the effects of mixed race marriages on children to maintain their anti-miscegenation laws. See Brief on Behalf of Appellee at 41-50, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), reprinted in 64 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 789, 834-43 (Philip B. Kurland & Gerhard Casper eds., 1975)(Add. A2); Perez, 198 P.2d at 22-26, id. at 44-45 (dissenting opinion cataloging this "research"). This Court should reject this offensive attempt to pathologize gay people and their children to justify their blatantly unfounded discrimination.

> [A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. The State must do more than justify its classification with a concise expression of an intention to discriminate.

Plyler v. Doe, 457 U.S. 202, 227 (1982)(citations omitted); id. at 249 (dissenting opinion)("fiscal concerns alone could not justify ... an arbitrary and irrational denial of benefits to a particular group of persons"). Unlike the cases cited by Defendants, this is not a case triggering the judiciary's deference to legislative line drawing within a particular welfare program.

Moreover, Defendants ask this Court to ignore what is obvious to the Legislature, i.e., that married couples owe one another a duty of support, and that marriage creates an enormous change in a person's economic circumstances. Califano v. Jobst, 434 U.S. 47, 53 (1977). Finally, there is no reason to believe Plaintiffs will be any more or less likely than the population at large to draw upon government-financed programs.[44]

[44] See M.V. Lee Badgett, Income Inflation: the Myth of Affluence Among Gay, Lesbian and Bisexual Americans, 15, available at http://www.iglss.org/media/

C. Stamp of Approval

Some of Defendants' Amici complain that granting relief to the Plaintiffs will place a stamp of approval on the Plaintiffs' relationships. Plaintiffs agree that their exclusion from marriage and the "family of state-sanctioned human relations," Baker, 744 A.2d at 889, presently conveys a stamp of disapproval on the them and concretely harms their families. But whether framed as a stamp of approval or as morality, mere negative views about a disfavored group are not a legitimate basis for legal discrimination. Romer, 517 U.S. at 634-35 (dislike of gay people); Cleburne, 473 U.S. at 448 (negative reactions toward the mentally retarded); Moreno, 413 U.S. at 534 (desire to condemn "hippies"); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (prejudice toward a mixed-race couple; "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

In any event, as the range of marriage-eligible persons clarifies, the state has no role in endorsing

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files/income.pdf ("lesbian, gay and bisexual people are spread throughout the range of household income distribution, just as heterosexual people are").

the relationships of particular individuals. See, e.g., Turner, 482 U.S. at 99.

D. "Respect" for Other States

Whether denominated as an interest in uniformity, or in preserving marriage in a form recognized by other states, the Amici Curiae Brief of three states asks this Court to give its constitutional approval to discrimination in marriage because those states and others discriminate, too. Acquiescing in the prejudice of other states by denying Massachusetts residents the protections of their own Constitution would render the state an accomplice to the prejudice of others and eviscerate the independent significance of the Massachusetts Constitution.

Massachusetts has chosen to depart from the choices of other states in ways that distinguish its leadership.[45] Massachusetts repealed its ban on

[45] "It is one of the happy incidents of the federal system that a single courageous State may ... serve as a laboratory; and try novel social ... experiments without risk to the rest of the country," Santosky v. Kramer, 455 U.S. 745, 773 (1982) (Rehnquist, J., dissenting)(quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting)).

The current Vice President of the United States, speaking of marriage rights for gay men and lesbians, acknowledged this very point. Michael Cooper, The 2000 Campaign: The Republican Running Mate; Cheney's Marriage Remarks Irk Conservatives, N. Y. Times, Oct.

marriages between people of different races before the Civil War, a time when anti-miscegenation statutes were common.[46] In 1993, this Court ruled that unmarried couples may jointly adopt, a ruling increasingly favored by other state courts.[47] Even when Masssachusetts is not a leader, it is sometimes in the minority, as with the licensing of first cousin marriages.[48] G.L. c. 207, §§ 1, 2. Accord Baker, 744 A.2d at 885 (rejecting identical arguments).[49]

VI. CONCLUSION

For all of the above reasons, and the reasons set forth in the Plaintiffs' original brief, the only constitutional, workable and just solution is for this

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10, 2000, at A23 ("'[P]eople should be free to enter into any kind of relationship they want to enter into' and ... the issue of gay marriages should be decided by the states"); Rod Dreher, GOP Gay Bombshell Stuns Conservatives, New York Post, Oct. 6, 2000, at 9.

[46] See Historians' Br. 22-28.

[47] See generally Laura S. Brown, "Relationships More Enduring", 41 Fam. Ct. Rev. 60, 61 (2003).

[48] See 1 H. Clark, The Law of Domestic Relations in the United States, § 2.9, at 153-54 (2d ed. 1987).

[49] Nor does the principle of comity or cooperative federalism support the Amici States' claim. Although states sometimes apply another jurisdiction's law when that law offends no policy of the forum state, the Amici have not cited any case in which the courtesy of comity has superseded a state's application of its own constitutional guarantees, or in which comity was invoked as a sword to prevent a speculative conflict rather than in the context of a specific dispute.

Court to order the issuance of marriage licenses to the Plaintiffs forthwith.

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