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 DEPT. OF PUBLIC HEALTH,

Defendants-Appellees.

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

BRIEF OF PLAINTIFFS-APPELLANTS

Mary L. Bonauto, BBO #549967
Jennifer L. Levi, BBO #562298
Gary D. Buseck, BBO #067540
Bennett H. Klein, BBO #550702
Karen L. Loewy, BBO #647447
GAY & LESBIAN ADVOCATES &
DEFENDERS
294 Washington Street, Suite 301

Boston, MA 02108-4608
617.426.1350

TABLE OF CONTENTS

Statement of Issues 1

Statement of the Case 1

1. Prior Proceedings 1

2. Statement of Facts 2

Summary of the Argument 7

Argument 9

I. INTRODUCTION 9

II. THE MARRIAGE STATUTES SHOULD BE INTERPRETED TO ALLOW QUALIFIED SAME-SEX COUPLES TO MARRY ... 12

III. THE RIGHT TO MARRY IS PROTECTED UNDER THE MASSACHUSETTS CONSTITUTION 16

A. Introduction: Protection of Individual Liberty And Equality is Enshrined in the Constitution..... 16

B. The Right to Marry Certainly Is Protected Under the Massachusetts Constitution..... 18

1. Standards for Ascertaining Whether A Right is Protected Under the Massachusetts Constitution 19

2. The Right to Marry Embodies the Kind of Core Personal Choice Respected Under the Federal and State Constitutions 20

a. The Federal Framework Is Extraordinarily Deferential to the Right to Marry..... 20

i. The Constitutional Underpinnings of the Marital Choice 21

ii. The Cases on Marital Choice 25

b. The State Framework for Protecting Personal Decisions Certainly Includes Marriage..... 29

3. The Application of the Marriage Laws by the Defendants Directly and Substantially Burdens the Plaintiffs' Rights to Marry ... 33

4. The Defendants Fail the Balancing Test Required To Justify Governmental Intrusions on Private Personal Choices 34

a. Any State Interest in Biological Procreation Has No Weight Here..... 36

b. Any State Interest in Childrearing Has No Weight Here..... 37

c. Any State Interest in Conserving Resources Has No Weight Here..... 38

d. The Plaintiffs Have the Same Needs for Self-Determination and Family Privacy as Their Non-Gay Neighbors..... 39

e. Doomsday Speculation About Polygamy Cannot Eviscerate the Plaintiffs' Right to Marry..... 40

IV. THE EQUALITY GUARANTEES OF THE MASSACHUSETTS CONSTITUTION FORBID THE EXCLUSION OF THE PLAINTIFFS FROM CIVIL MARRIAGE 42

A. The Plaintiffs Have An Equal Right to Exercise the Fundamental Right to Marry..... 46

1. Infringements on Fundamental Rights Require Strict Scrutiny 46

2. The Defendants' Asserted Interests Fail Strict Scrutiny 46

B. Defendants' Apply the Marriage Laws Based on Sex in Contravention of Article I..... 48

1. The Defendants Apply A Sex-Based Classification To the Marriage Statutes ... 48

2. The Defendants' Cannot Rely on Supposed Biological Differences To Avoid The Plaintiffs' Sex Discrimination Claim 55

C. The Sexual Orientation-Based Distinctions Cannot Survive the Heightened Scrutiny Required by The Constitution..... 61

1. The Protections in Article I Were Expanded by the ERA 63

2. Sexual Orientation Classifications Warrant Heightened Scrutiny Under the Massachusetts Constitution 63

3. Application of the Federal Framework Requires a Finding that Gay Men and Lesbians Are a Suspect Class 66

a. Gay Men and Lesbian Women Have Endured a History of Purposeful Discrimination.... 66

b. Lesbians and Gay Men Have the Ability to Perform In Society Unrelated to Their Sexual Orientation..... 70

c. Gay People Have Historically Lacked Political Power..... 72

d. The Conduct-Based Rulings in the Federal Cases Are Inapplicable in Massachusetts..... 74

4. This Court Should Look to Other States Analyses Under Their State Constitutions .. 76

5. The Sexual Orientation Classification Fails Strict Scrutiny 79

D. The Distinctions Defendants Assert in the Marriage Laws Lack a Rational Basis..... 79

1. "Procreation" Is Not A Legitimate State Interest As Applied Here and Has No Rational Relationship to the Exclusion of Plaintiffs From Marriage 82

a. Procreation Is Not A Concern of the Marriage Laws..... 83

b. The Defendants' Emphasis on Biological Parenting Is Misplaced..... 86

c. Excluding the Plaintiffs From Marriage Fails to Further a State Interest in Procreation..... 87

2. The Defendants' Discrimination Undermines Their Interest in Promoting Childrearing .. 88

a. The Plaintiffs Exclusion from Marriage Does Not Promote Better Childrearing In Any Other Households..... 88

b. The Legislature Has Encouraged Parenting By Gay and Lesbian Couples..... 89

c. Child Welfare Turns on the Child's Best Interests and Not On Biology..... 91

3. Excluding the Plaintiffs From Marriage to Conserve Resources Is Arbitrary 93

4. The Profound Harm of Being Denied Marriage Is Another Reason Why the Defendants' Interests Fail Rational Basis Review 94

V. THIS COURT SHOULD DECLARE THAT THE PLAINTIFFS ARE ENTITLED TO MARRIAGE LICENSES 96

Conclusion 98

ADDENDUM A1

STATUTORY APPENDIX 1

TABLE OF AUTHORITIES

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A.Z. v. B.Z.,
431 Mass. 150 (2000) 32

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515 U.S. 200 (1995) 52

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386 Mass. 741 (1982) 31

Adoption of Susan,
416 Mass. 1003 (1993) 78, 87, 90

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Wildlife Bd.,
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842 P.2d 44 (Haw. 1993) 49, 57

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744 A.2d 864 (Vt. 1999) 43, 77, 89, 91

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cert. denied, 494 U.S. 1004 (1990) 75

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437 Mass. 649 (2002) 46

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224 Mass. 152 (1916) 81, 82

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478 U.S. 186 (1986) 75

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83 U.S. 130 (1872) 59

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1998 WL 88753 (Alaska Super.
No. 3AN-95-6562 CI, Feb. 27, 1998) 49

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398 Mass. 417 (1986) 30, 40

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166 Mass. 14 (1896) 45

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393 Mass. 329 (1984) 34

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406 Mass. 679 (1990) 92

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443 U.S. 76 (1979) 50

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389 Mass. 930 (1983) 35

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97 Cal. App. 4th 740 (Ct. App., 1st Dist 2002) .. 79

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348 Mass. 414 (1965) 58, 82, 83

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357 Mass. 564 (1970) 17, 18

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378 Mass. 550 (1990) 33

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35 Mass. (18 Pick.) 193 (1836) 44

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366 Mass. 298 (1974) 34, 76-77

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433 Mass. 229 (2001) 96

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382 Mass. 222 (1981) 12

Comm. V. King,
374 Mass. 5 (1977) 62

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37 Mass. (20 Pick.) 206 (1838) 17

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435 Mass. 455 (2001) 26

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216 Mass. 356 (1914) 17

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368 Mass. 613 (1975) 55

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422 Mass. 634 (1996) 67

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374 Mass. 532 (1978) 24

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431 Mass. 417 (2000) 90

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349 Mass. 38 (1965) 15

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402 Mass. 716 (1988) 25

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Slip Op., Nos. 99-E-0183, -0184
(Midd. Prob. & Fam. Ct., Apr. 2002) 92

Connors v. Boston,
420 Mass. 31 (1999) 5, 72, 73, 78

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523 U.S. 833 (1998) 27

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435 Mass. 285 (2001) 86

Custody of a Minor,
377 Mass. 876 (1979) 31, 38

Dept. of Pub. Welfare v. J.K.B.,
379 Mass. 1 (1979) 31

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396 Mass. 740 (1986) 81

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437 Mass. 521 (2002) 63

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16 Mass. App. Ct. 499 (1983) 91

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429 Mass. 824, cert. denied,
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372 Mass. 207 (1977) 12

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231 P. 483 (Okla. 1924) 26

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405 U.S. 438 (1972) 31

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405 Mass. 423 (1989) 80, 95, 96

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860 F. Supp. 417, 434-40 (S.D. Ohio 1994),
rev'd, 54 F.3d 261 (1995) 75

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508 U.S. 307 (1993) 81, 82

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44 Mass. App. Ct. 715 rev. den., 427 Mass. 1108,
cert. den., 525 U.S. 1040 (1998) 70

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132 Mass. 354 (1882) 17

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154 Mass. 515 (1891) 85

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411 U.S. 677 (1973) ..... passim

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363 Mass. 235 (1973) 63

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436 Mass. 132 (2002) 75

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24 Cal. 3d 458, 595 P.2d 592 (1979) 79

Graham v. Richardson,
403 U.S. 365 (1971) 63

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381 U.S. 479 (1965) 25, 83

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344 Mass. 695 (1962) 81, 82

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225 F.3d 1084 (9th Cir. 2000) 65

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33 Mass. 353 (1835) 45

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653 P. 2d 970 (1982) 77

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rev'd, 895 F.2d 563 (9th Cir.),
reh'g denied, 909 F.2d 375 (9th Cir. 1990) 75

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11 Mass. 396 (1814) 17, 44, 76

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471 U.S. 222 (1985) 50

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Bisexual Grp. of Boston,
515 U.S. 557 (1995) 68

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361 Mass. 480 (1972) 45

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7 Mass. 88 (1810) 18

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16 Mass. (Tyng) 157 (1819) 18

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7 Mass. 48 (1810) 9, 14

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Boston v. Boston, 418 Mass. 238, 251 (1994),

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379 U.S. 184 (1964) 51, 53, 54

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262 U.S. 390 (1923) 21

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457 U.S. 291 (1982) 29

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382 Mass. 629 (1981) ..... passim

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431 U.S. 494 (1977) 24

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208 U.S. 412 (1908) 60

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434 Mass. 409 (2001) 67

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185 Or. 579, 204 P.2d 569 (Or. 1949) 77-78

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427 Mass. 399 (1998) 69

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303 Mass. 631 (1939) ..... passim

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373 Mass. 883 (1977) 62

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374 Mass. 836 (1977) 54, 76

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375 Mass. 795 (1978) 32

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106 U.S. 583 (1883) 26

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434 Mass. 23 (2001) 92

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77 Cal. App. 4th 1269 (2002) 78-79

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383 Mass. 573 (1981) 32

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424 Mass. 586 (1997) 31, 52, 62

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505 U.S. 833 (1992) 12, 22, 27, 40

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163 U.S. 537 (1896) 25-26

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457 U.S. 202 (1982) ..... passim

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399 Mass. 650 (1987) 62

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26 Mass. App. Ct. 124 (1988) 85

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468 U.S. 609 (1984) 23, 25

Romer v. Evans,
517 U.S. 620 (1996) 11, 80, 94

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470 U.S. 1009 (1985) 66

S. v. S.,
192 Mass. 194 (1906) 85

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411 U.S. 1 (1973) 65, 66, 73

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347 Mass. 8 (1964) 45

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307 Mass. 408 (1940) 81, 82

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630 P.2d 810 (1981) 77

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157 Or. App. 502, 971 P.2d 435 (1998) 76, 77

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424 Mass. 250 (1999) 67, 71

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429 Mass. 774 (1999) 32

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Statement of Issues

1. Did the trial court err in failing to rule, as a matter of law, that the statutes of the Commonwealth must be construed to allow the plaintiffs to marry?

2. Did the trial court err in failing to rule, as a matter of law, that the plaintiffs' exclusion from marriage violates the plaintiffs' fundamental right to marry or other protected liberty interests under the Massachusetts Constitution?

3. Did the trial court err in failing to rule, as a matter of law, that the plaintiffs' exclusion from marriage violates the equality rights of the plaintiffs under the Massachusetts Constitution, articles I, VI, VII and X?

Statement of the Case

1. Prior Proceedings

On April 11, 2001, the plaintiffs Hillary Goodridge et al. instituted this action against the Department of Public Health and its Commissioner (defendants) seeking a declaration that the exclusion of the plaintiffs from access to marriage licenses violates Massachusetts law. R.A. 19. DPH is the

executive agency charged with execution of the marriage laws. R.A. 21.

The plaintiffs moved for summary judgment on August 20, 2001, R.A. 68, with an accompanying statement of undisputed facts. R.A. 71. Defendants did not dispute any of the facts asserted by plaintiffs and cross-moved for summary judgment on January 2, 2002. R.A. 106, 70. By memorandum and order of May 7, 2002, the defendants' motion was allowed, and the plaintiffs' motion was denied. R.A. 109. Judgment for the defendants was entered May 9, 2002. R.A. 135.

The plaintiffs filed a timely notice of appeal. R.A. 137. This Court granted direct appellate review.

2. Statement of Facts

The plaintiffs in this case seek to marry for the same mix of reasons as heterosexual couples who choose to marry.

Hillary Goodridge and Julie Goodridge celebrated their fifteenth anniversary in April 2002 and live in Boston with their seven-year old daughter. They seek to marry because they love one another. Hillary is an administrator for a charity, and Julie is an investment advisor. Although they have merged their

finances and taken the legal steps available to protect their relationship to each other, they have had difficulties nonetheless. When their daughter was born, she breathed in fluid and was sent to neonatal intensive care. Julie had a difficult caesarian and was in recovery for several hours. Even with a health care proxy, Hillary had difficulty gaining access to her newborn daughter at the hospital. Marriage would also provide protections to their daughter beyond those they attained by jointly adopting her. They seek to secure legally the obligations they have assumed morally, and to situate their family within the social recognition and legal rights that only marriage affords. R.A. 73-75.

David Wilson and Robert Compton live in Boston just a few miles from David's birthplace in West Roxbury. They are both executives in local businesses and have ongoing contact with their families from previous marriages. David and Rob took care of David's parents when they were ill, nursing David's mother after a heart attack until her death in 1998 and caring for his father who had a stroke at the same time. They, too, have taken the available legal steps to secure their relationship, but believe these

protections are inadequate. David has already had the experience of finding his former partner of thirteen years dead from a sudden heart attack and being treated as a stranger by emergency medical personnel. In addition, Rob has had health problems requiring emergency care and they are concerned about providing each other with maximum access and security as they age and inevitably face an increasing number of health-related issues. R.A. 75-78.

Michael Horgan, a website developer, and Edward Balmelli, a computer engineer, are from the central Massachusetts towns of Ayer and Milford and now live in Boston. After nine years together, they have shared in the marriage celebrations of their many siblings and extended families and seek to be part of that larger community of married persons -- both for their own legal security and so that their relationship is understood by the community as it is by them. Ed would also like to be able to name Mike as the beneficiary of his pension plan at Lucent, but cannot since Mike is not his spouse. R.A. 78-80.

Maureen Brodoff and Ellen Wade are both lawyers who have lived in the Boston area for over twenty-five years, and have enjoyed an enduring and loving

partnership for over twenty-one of those years. Maureen gave birth to their daughter Kate over thirteen years ago, and both parents have volunteered at their daughter's schools over the years. Ellen has also coached various teams on which their daughter plays, including a Little League team. Despite having taken the legal steps available to them to secure their relationship to one another and to their daughter, they believe marriage would provide greater legal security to their family. Securing these protections is even more urgent to them since Ellen's diagnosis with breast cancer a few years ago. R.A. 80-83.

Gary Chalmers and Richard Linnell are both teachers: Gary of fifth graders, and Richard of nursing students. Both were raised in and reside in the Worcester area. Their loving commitment to one another began fourteen years ago, and they were able to adopt a daughter ten years ago. They are active in her school and community activities. Rich's mother lives with them. Despite having taken the available legal steps to secure their relationship, Gary cannot obtain a family health insurance policy through work. He and Rich have to purchase a separate policy for

Rich at considerable expense.[1] In addition, they have been advised that they cannot put their home in both of their names without incurring tax penalties which would not apply if they were married -- despite the fact that they both pay on a home equity loan used to improve the house. They wish to marry for their own security and to ensure for their daughter rights beyond her fathers' love. R.A. 84-86.

Heidi Norton and Gina Smith, together with their five and two-year old sons, live in Western Massachusetts. Their sons share the last name "Nortonsmith." Heidi works in the nonprofit sector and Gina in higher education administration. They are active in a local Quaker meeting as well as community activities ranging from adult literacy to singing in a gospel choir. Despite having jointly adopted their sons, they worry that Gina's relationship to their sons will not be respected; and despite preparation of legal documents, they worry about what will happen if they confront an emergency in an unfamiliar town. They seek marriage to make binding their love and commitment to one another and also because they want

[1] Gary is a municipal employee and under law cannot secure coverage for Rich as a dependent. Connors v. Boston, 430 Mass. 31 (1999).

their sons to grow up in a world where their parents' relationship is legally and communally respected. R.A. 87-89.

Gloria Bailey and Linda Davies, both psycho-therapists residing on Cape Cod, celebrated their thirtieth anniversary in March 2002. They have also been business partners for the last twenty-five years. They are active in their local Unitarian Universalist congregation and have extensive contact with their extended families. Despite having taken the legal steps available to them, they seek to ensure maximum protection for their relationship and each other. Gloria and Linda seek to marry so the world can see them as they see themselves -- a deeply loyal and devoted couple who are each other's mate in every way. R.A. 89-93.

Each of these individuals (hereafter, "plaintiffs") went with his or her partner to the local licensing official with blood tests and required fees in hand. Each was denied a license to marry, R.A. 93-96, and in a subsequent conversation between Hillary Goodridge and the Registrar of Vital Statistics, the Registrar confirmed that marriage

licenses are not to be issued in Massachusetts to same-sex couples. R.A. 96-97.

Summary of the Argument

Like many of their family members, colleagues and neighbors across this state, the plaintiffs each sought marriage licenses from their respective cities and towns with medical certificates and license fees in hand, only to be refused because they sought to marry a partner of the "wrong" sex. The defendants who advised the clerks to take this position cannot anchor their instruction in the marriage-licensing scheme of General Laws chapter 207 since it contains no prohibition on an individual marrying someone of the same sex. Any of the few gendered terms in c. 207 can be read gender neutrally. (pp. 12-16).

If the statutes are construed to exclude the plaintiffs, then the statutes are unconstitutional as applied. First, the right to marry the person of one's choice is protected under the liberty and due process protections of the Massachusetts Constitution, and this Court's precedents of respect for private personal decisions and expressive and intimate associations. (pp. 16-34). Under strict scrutiny in the context of the balancing test used by this Court,

none of the defendants' asserted interests to date of procreation, childrearing and conserving resources can be given any weight because they bear no relationship at all to the plaintiffs' exclusion from marriage. (pp. 34-42).

Equality principles also require that plaintiffs share in the same right to marry as that of their fellow citizens. This case presents a textbook example of infringement on a fundamental right that cannot survive traditional strict scrutiny. (pp. 42-48).

The application of the marriage laws to exclude plaintiffs because they have chosen a partner of the "wrong" sex triggers strict scrutiny as sex discrimination. (pp. 48-49). Just as barring all individuals from interracial marriage constituted racial discrimination, barring all individuals from marrying a person of the same sex constitutes sex discrimination. (pp. 49-54). There are no material differences between same-sex and different-sex couples. (pp. 55-60).

Sexual orientation classifications are implicated by defendants' application of the marriage laws because excluding individuals who wish to marry a

person of the same sex is a nearly perfect proxy for excluding gay men and lesbians. While the level of review to be accorded to sexual orientation classifications is one of first impression in this Commonwealth, there is persuasive authority in this court, other state courts, and in federal jurisprudence to treat sexual orientation as a suspect class. (pp. 61-79).

So wide of the mark are the defendants' asserted reasons for excluding the plaintiffs from marriage that they do not survive rational basis review. As a matter of logic and common sense, none of the interests is advanced by the plaintiffs' exclusion from marriage. Excluding from marriage those individuals who wish to marry a person of the same sex is both arbitrary and extremely harmful to the class of gay men and lesbians. (pp. 79-96).

Accordingly, this Court should declare that the plaintiffs are entitled to receive marriage licenses. (pp. 96-97).

Argument

I. INTRODUCTION

The right to marry the person you love and with whom you wish to share your life is one of the most

fundamental of all our human and civil rights. The desire to marry is grounded in the intangibles of love, an enduring commitment, and a shared journey through life.[2] It represents the possibility and hopefully the reality of a "shared interdependent life" with accompanying personal fulfillment as well as bright lines which help to order our society.[3]

To deny individuals the right to seek personal fulfillment through marriage is, at the most basic level, a denial of the equal citizenship of gay and lesbian people who make their homes in communities

[2] This case concerns access to the state-created regime of civil marriage and not the religious rite of marriage. The latter may be celebrated by a community of faith, but has no legal significance in and of itself. Marriage has always been a civil rather than religious matter in Massachusetts. Inhab. of Milford v. Inhab. of Worcester, 7 Mass. 48, 53 (1810)(early settlers invested no civil authority in clergy, although later authorized ministers to solemnize marriages). See also Amici Curiae Brief of Religious Coalition for the Freedom to Marry; and Amici Curiae Brief of Historians Nancy F. Cott, Michael Grossberg, et al. ("Historians' Brief").

[3] The importance of marriage to the individual and society is a recurrent theme among family law theorists. See, e.g., Jennifer Wriggins, Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender, 41 B.C. L. Rev. 265 (2000) (discussing, inter alia, Bruce Hafen, Mary Ann Glendon and Carl Schneider).

across this Commonwealth.[4] More than twenty years ago, this Court swept away any doubt that each person has an identifiable, legally protected interest in "not being treated by her government as a second-class person." Lowell v. Kowalski, 380 Mass. 663, 670 (1980). The U.S. Supreme Court recognized that interest in the first paragraph of its Romer v. Evans opinion:

> One century ago, the first Justice Harlan admonished [the Supreme] Court that the Constitution 'neither knows nor tolerates classes among citizens.' Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion). Unheeded then, those words are now understood to state a commitment to the law's neutrality where the rights of persons are at stake.

517 U.S. 620, 623 (1996); id. at 635 (invalidating state constitutional amendment making gay men and lesbians unequal to everyone else).

In the present case, the plaintiffs call upon this Court to enforce that interest, for the denial of the right to marry -- a right available to nearly every adult, a right which is also a gateway to an enormous architecture of legal rights and

[4] Recent census data demonstrates that there are at least 17,099 same-sex couple households in Massachusetts. See U.S. Census Bureau data at www.ngltf.org/issues/census2000.htm.

responsibilities, and a status universally recognized -- enshrines a second class status upon the plaintiffs, their families, and their children and denies them the basic opportunities of self-determination and fulfillment.[5]

"A prime part of the history of our Constitution ... is the story of the extension of constitutional rights and protections to people once ignored or excluded." United States v. Virginia, 518 U.S. 515, 557 (1996) ("VMI"). Defendants' reflexive exclusion of gay and lesbian people from marriage is no longer -- if it ever was -- consistent with the Constitution. "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) (comparing changed circumstances between Plessy and Brown v. Board of Education). Gay people and families are part of the

[5] As the Amici Curiae Briefs of the Boston Bar Association et al. ("Boston Bar Ass'n Brief") and of Professors of Expression and Constitutional Law, et al. ("Expression Brief") demonstrate, marriage is a unique legal and cultural institution that transforms the parties' rights and responsibilities vis-à-vis each other, the state, and third parties.

very fabric of our community. While some will always contest the full participation of gay and lesbian individuals and families in our society, it is this Court's "obligation ... to define the liberty [and equality] of all, not to mandate our own moral code." Id. at 850. The plaintiffs ask this Court to apply the promises of liberty and equal laws in the Massachusetts Constitution to ensure that they, too, have a protected right to marry the person of their choice.

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

This Court can resolve this case without deciding the constitutional issues. Comm. v. Joyce, 382 Mass. 222, 226 (1981) (statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also "grave doubts upon that score"). Accord Ebitz v. Pioneer Nat. Bank, 372 Mass. 207, 211 (1977) (ambiguity in trust instrument about the meaning of "young men" should be resolved in accord with public policy of sex equality and include young women).

Nothing in the marriage statutes dictates that marriage be restricted to a man and a woman. No

provision of the eligibility requirements in G.L. c. 207 provides, for example, that a woman may only marry a man, or that a man may not marry a man. At first blush, the proposition that the plaintiffs' marriages are permitted under the statutory law might seem unlikely. In fact, however, each of the plaintiffs meets the state requirements for marriage.

The restrictions on qualifications to marry under General Laws chapter 207 are few. Persons closely related by blood or marriage are forbidden to marry, G.L. c. 207, §§ 1-3, 8, as are persons still married to another. G.L. c. 207, § 4. Section 7 forbids under-age marriages unless permission has been obtained pursuant to §§ 24, 25. Section 28A requires all persons to take a syphilis test, and requires some women to be tested for rubella. All persons are required to pay a small fee. Id. § 19.

Because the statute's terms are "clear and unambiguous and lead[] to a workable result," this Court need look no further. Local 589, Amalgamated Transit Union v. M.B.T.A., 392 Mass. 407, 415 (1984). The plaintiffs meet each of the requirements for issuance of a marriage license. None of the plaintiffs is presently married or closely related;

each is of proper age, passed his or her blood tests, and was prepared to tender the required fee. R.A. 93-97.

New exclusions should not be imported into the marriage licensing scheme of Chapter 207. When a statutory scheme provides specific exceptions or disqualifications, those which are enumerated must be held to be the only limitations upon the statute. Brady v. Brady, 380 Mass. 480, 484 (1980).[6]

Reading the statute to impose no gender-based restrictions would be consistent with the text of the statute, would avoid constitutional problems, Martignetti v. Haigh-Farr, Inc., 425 Mass. 294, 308 (1997), and would be congruent with the intent of the legislature as manifested in the evolution of the marriage statutes over time. Explicit restrictions on

[6] Some cases addressing issues other than eligibility to marry have observed that same-sex couples may not marry. See, e.g., Adoption of Tammy, 416 Mass. 205, 207-08 (1993) (dictum noting that two women had to pursue a joint adoption rather than a step-parent adoption because they cannot marry). However, such cases are not authority for propositions that the court has not considered. Comm. v. Stasiun, 349 Mass. 38, 49 (1965). An 1810 case described marriage as the union of a man and a woman, Inhab. of Milford, 7 Mass. at 52, but it cannot be read as either proscriptive or a dispositive interpretation of the current marriage statutes.

marriage based on the race of the parties, their competency, and a past divorce have all been discarded over time.[7] The purpose of the marriage statutes is to facilitate the free choice to enter into marriage as long as the parties are two adults who are not closely related or married at present and who pass certain blood tests. Anything more finds absolutely no support in the current statutory scheme.

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

[7] The Historians' Brief describes the evolution in the marital relationship from the colonial era to the present, and demonstrates how all sex-based roles and implicit sex-based requirements have been removed from the marital relationship as a legal matter.

are still married or marrying too soon after a divorce -- that may easily be applied equally to a marriage of a same-sex couple.[8]

Because the plain meaning of the statute requires it, this Court should hold the plaintiffs be afforded marriage licenses.

III. THE RIGHT TO MARRY IS PROTECTED UNDER THE MASSACHUSETTS CONSTITUTION

A. Introduction: Protection of Individual Liberty And Equality is Enshrined in the Constitution.

The Declaration of Rights forcefully articulates the foundational principles of liberty and equality.[9] Article I of the Declaration of Rights provides:

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

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

[9] The Amici Curiae Brief of Professors of State Constitutional Law Robert F. Williams et al. ("State Constitutional Law Brief") analyzes the historical context and animating values of the Constitution, as well as its text and structure with reference to liberty and equality.

> denied or abridged because of sex, race, color, creed or national origin.

Mass. Const., Decl. of Rights, art. I (as amended by art. CVI). In addition to article I, article X guarantees that, "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. . . . " Mass. Const., Pt. 1, art. X (emphasis added).

Taken together, articles I and X embody a guarantee that the government will not interfere with, and indeed will protect, individual liberty, at least as to those "natural, essential and unalienable rights," embodying spheres of individual choice and behavior over which the majority may not exercise control.[10] Holden v. James, 11 Mass. 396, 401 (1814)

[10] Gordon Wood, Creation of the American Republic, 1776-1787 609 (1969); Willi Paul Adams, The First American Constitutions 145 (1980). Accordingly, the due process protections of Pt. 2, c. 1, § 1, art. 4 recognize that in its broad lawmaking function, the legislature must avoid those laws which are "repugnant to or contrary to this Constitution. . . ." Id.; see also Comm. v. Libbey, 216 Mass. 356, 358 (1914) (legislative restriction on individual liberty "must not be arbitrary; must be reasonable and general in its operation; and [must] have a manifest tendency to promote public health, safety and morality in some aspect").

(Article X guarantees individuals the "first principles of liberty and equality").

The Declaration of Rights of the Massachusetts Constitution was intended "to announce great and fundamental principles, to govern the action of those who make and those who administer the law, rather than to establish precise and positive rules of action." Foster v. Morse, 132 Mass. 354, 355 (1882). See also Comm. v. Kneeland, 37 Mass. (20 Pick.) 206, 219 (1838). These principles can weather "radical changes in social, economic and industrial conditions." See, e.g., Cohen v. Att'y Gen., 357 Mass. 564, 570 (1970) (quoting Trefey v. Putnam, 227 Mass. 522, 523-24 (1917)).

Guiding any analysis of the Constitution is that it must be

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

Cohen, 357 Mass. at 571 (emphasis added).

Under our Constitution, there is the right to a government that respects "the sanctity of individual free choice and self-determination" for those decisions and activities that may be deemed basic, or essential, to an individual's identity and well-being. Supt. of Belchertown St. Sch. v. Saikewicz, 373 Mass. 728, 742 (1977).

B. The Right to Marry Certainly Is Protected Under the Massachusetts Constitution.

To the plaintiffs' knowledge, there has been only one other constitutional challenge to the Commonwealth's marriage laws, and there the constitutional issue was not addressed.[11] Because marriage is so centrally about an individual's love and commitment, it is embraced within the sphere of privacy and self-determination protected by the liberty and due process clauses of the Massachusetts

[11] In Inhab. of Medway v. Inhab. of Natick, 7 Mass. 88 (1810), the Court did not decide whether the Declaration of Rights rendered the state anti-miscegenation law unconstitutional because it ruled the parties before it were not encompassed by that prohibition. Id. at 89 (wife was not a mulatto where her father was a mulatto but her mother was a white woman). See also Inhab. of Medway v. Inhab. of Needham, 16 Mass. (Tyng) 157, 161 (1819) (describing anti-miscegenation law as one of "political expediency" compared to incestuous marriages which would "outrage the principles and feelings of all civilized nations").

Constitution. For all of the same reasons that highly personal decisions are already protected under the Declaration of Rights, so, too, must the plaintiffs' choice of marital partner be accorded the utmost respect under our Constitution.

1. Standards for Ascertaining Whether a Right Is Protected Under the Massachusetts Constitution.

In Moe v. Sec'y of Admin. & Fin., 382 Mass. 629 (1981), this Court confronted a state restriction (limits on state Medicaid funding) on access to a right deemed to be fundamental under the federal constitution (access to abortion), and asked whether the right was also fundamental under the Massachusetts Constitution, and if so, whether the restrictions comported with the guarantees of the Massachusetts Constitution.[12]

The Court's starting point for determining whether a right existed under the state constitution was [1] "the contour of the right asserted" under federal law as well as the applications of those principles under

[12] Consistent with much of this Court's liberty jurisprudence, Moe rejected restrictions that had been upheld at the federal level, id. at 634 because the state constitution sometimes provides broader rights than does the federal. See, e.g., Blue Hills Cemetery v. Bd. of Reg., 379 Mass. 368, 373 (1979).

state law. Id. at 646. Federal law was a starting point, but not an ending point, because there, as here, the Court was dealing with an area "in which our constitutional guarantees of due process have sometimes impelled us to go further than the United States Supreme Court." Id. at 649. It then asked [2] whether the challenged restriction burdened that right, and [3] if so, whether the state justifications or the woman's right weighed more heavily in a balancing of interests. Id. Application of this framework to the instant case reveals that the refusal to allow the plaintiffs to marry the person of their own choice impermissibly burdens, indeed wholly vitiates, their right to marry. Id. at 646, 658-59.

2. The Right to Marry Embodies the Kind of Core Personal Choice Respected Under the Federal and State Constitutions.

a. The Federal Framework Is Extraordinarily Deferential to the Right to Marry.

It is beyond question that the right to marry is fundamental, and within the rights of liberty and privacy, and as such, may not be abridged by the state without a compelling state interest. Loving v. Virginia, 388 U.S. 1, 12 (1967)(marriage is "one of the vital personal rights essential to the orderly

pursuit of happiness by free men" under due process clause of 14th Amendment); Zablocki v. Redhail, 434 U.S. 374, 384 (1978)("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."); Turner v. Safley, 482 U.S. 78, 95-96 (1987)(Zablocki applies to restrictions on prisoners' right to marry).

Before turning to Loving, Zablocki and Turner in greater detail, it is important to understand the liberty and privacy underpinnings of those rulings.

i. The Constitutional Underpinnings of the Marital Choice

Even before Loving's unequivocal declaration of marriage as a fundamental right under the 14th Amendment, a line of cases beginning with Meyer v. Nebraska, 262 U.S. 390 (1923) placed the right "to marry" as a liberty interest "essential to the orderly pursuit of happiness by free men." Id. at 399. When the California Supreme Court struck that state's miscegenation law as violative of the 14th Amendment twenty years before Loving, it aptly observed that "the right to join in marriage with the person of

one's choice" is at least as protected as the liberty rights to have offspring or send one's child to a particular school. Perez v. Sharp, 198 P.2d 17, 19 (1948) (discussing Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) and Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)).

It is now a basic predicate of the relationship between the individual and the state that the Constitution protects against unwarranted state interference with "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Casey, 505 U.S. at 851; id. at 861, 869 (affirming core of Roe v. Wade). The right to marry without the freedom to marry the person of one's choice is no right at all. Perez, 198 P.2d at 19. Direct state intrusion into these core decisions inevitably imposes an intolerable indignity on an individual.

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the

> attributes of personhood were they formed under compulsion of the State.

Casey, 505 U.S. at 851 (discussing personal choices identified above). See also Zablocki, 434 U.S. at 384-85 (all recent decisions place "the decision to marry as among the personal decisions protected by the right of privacy")(citations omitted).

The law's solicitude for family relationships reveals the "human values" at stake in these protected personal decisions. Casey, 505 U.S. at 856. The Supreme Court has described the values that define and give significance to family in general, and marriage in particular which "have played a critical role in the culture and traditions of the Nation." Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984).

> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. ...
>
> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life.

Id. at 619-20 (citations omitted). See also Smith v. Org. of Foster Families, 431 U.S. 816, 844 (1977) (acknowledging "the importance of family relationships, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ... [raising] children").[13]

These values are not limited to families made up of a man, woman, and children. While "the institution of the family is deeply rooted in this Nation's

[13] Under both the liberty protections in articles I and X, and the free speech provisions of article XVI, the denial of the right to marry to the plaintiffs unconstitutionally burdens their freedom of intimate association and free expression. See also Expression Brief; Boston Bar Ass'n Brief; R.A. 48 (Verified Complaint); and Pls' Mem. In Support of Mot. For Sum. Jmt. 58-62.

As to association, Roberts clearly protects marriage as "one of those personal affiliations deserving of constitutional protection." 468 U.S. at 619. In the few opportunities this Court has had to address the issue, it has stated that encompassed within the right of free speech is both the right to join and sustain intimate associations. Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination, 402 Mass. 716, 721 (1988).

As to the plaintiffs' free expression claim, the acts of seeking a marriage license and joining and living in marriage are powerful statements to the couples themselves as well as the outside world. These acts are certainly no less communicative than nude dancing and other types of conduct deemed expressive. Comm. v. Sees, 374 Mass. 532, 535 (1978).

As other parts of this Brief demonstrate, there is no government interest which justifies this restriction on the freedom of expression. Id. at 535.

history and tradition," Moore v. East Cleveland, 431 U.S. 494, 499, 503-04 (1977), the concept of family is broad. As the U.S. Supreme Court recently noted, "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household". Troxel v. Granville, 530 U.S. 57, 63 (2000). Accordingly, that Court has rejected previous attempts to "cut[] off any protection of family rights at the first convenient, if arbitrary boundary -- the boundary of the nuclear family," and concluded that the federal Constitution prevents the government from "standardizing its children -- and its adults -- by forcing all to live in certain narrowly defined family patterns." Moore, 431 U.S. at 502, 506.

Family relationships are afforded constitutional shelter under the due process clause of the 14th Amendment because they are both an embodiment and a reflection of what it means to be a free people: the "deep attachments and commitments" marking those relationships enable individuals "independently to define one's identity that is central to any concept of liberty." Roberts, 468 U.S. at 619. One of the

most critical of "deep attachments and commitments" is that between married partners.

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965). The profound mutual love, respect, commitment and intimacy that define the marital relationship are essential for human dignity and happiness and are valuable to society as a whole.

ii. The Cases on Marital Choice

Given the powerful foregoing principles, it is clear why the California Supreme Court struck its miscegenation law in 1948 under the 14th Amendment even though miscegenation laws were commonplace at the time, no court had ever declared a miscegenation law unconstitutional, such laws were popular, and Plessy v. Ferguson was still the law of the land.[14] As the Perez Court stated in an opinion by Justice Traynor,

[14] No state court had upheld a miscegenation challenge to that point. See, e.g., Eggers v. Olson, 231 P. 483 (Okla. 1924); Kirby v. Kirby, 206 P. 405 (Ariz. 1922). Supreme Court precedent was ominous. See Pace v.

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

Perez, 198 P.2d at 25.

More typical was the reasoning of the Virginia courts in sustaining their anti-miscegenation law:

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

Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting trial court). The Supreme Court disagreed and conclusively established, in addition to the equal protection violation, id. at 11-12; that the right to

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Alabama, 106 U.S. 583 (1883) (upholding conviction under statute punishing interracial fornication and adultery). Moreover, popular opinion overwhelming disapproved of such marriages. In one 1948 sample, 80% disapproved. The Roper Organization, sponsored by Fortune Magazine, Anti-Minority Sentiment in the U.S. Today (Sept. 1948), available at http://www.ropercenter.unconn.edu. A Gallup poll ten years later showed that 94% of people disapproved of "marriage between white and colored people." Gallup Poll News Service, Gallup Poll Social Series: Minority Rights & Relations, (June 3-9, 2002) Job #02-06-022. (tracking data from 1958 to present).

marry is fundamental under the Due Process Clause of the 14th Amendment. Id. at 12.[15]

Eleven years later, in 1978, Zablocki provided the analytical framework for evaluating infringements on the right to marry "for all individuals" by asking whether a statutory classification "interfere[s] directly and substantially with the right to marry," and if so, if it is "supported by sufficiently important state interests" and "closely tailored to effectuate only those interests." Zablocki, 434 U.S. at 383, 387-88. Notably, in striking a law forbidding

[15] The Trial Court misstated the role of history and tradition in federal constitutional analysis. R.A. 126-127. County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) ("history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry"). Nor has the U.S. Supreme Court confined its view of the liberties substantively guarded by the Due Process Clause to historical practices examined at the most specific level. Casey, 505 U.S. at 847-50 ("such a view would be inconsistent with our law"). Compare R.A. 118. Loving is proof positive that constitutional rights must be vindicated despite a history of discrimination. Loving, 388 U.S. at 9 (acknowledging that some members of the Thirty-ninth Congress passing the 14th Amendment intended for miscegenation laws to survive the 14th Amendment). As the Supreme Court has observed, "Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia." (citation omitted). Casey, 505 U.S. at 847-48 (citing examples).

marriage of parents who were delinquent in child support payments, the Court was not addressing a suspect class (as in Loving), and rejected the important state interests of providing an incentive to meet outstanding support obligations and providing a deterrent against incurring further obligations. Id. at 400-02.

Turner reaffirmed Zablocki in 1987 and invalidated on its face a Missouri regulation banning nearly all inmate marriages (except those where the birth of a child was expected) as "not reasonably related to legitimate penological objectives." Turner, 482 U.S. at 99. Applying the reasonable relationship test (as with other alleged infringements on constitutional rights in the prison context, see id. at 89), the Supreme Court concluded that each of the state's interests failed to justify the burden on the decision to marry. Id. at 98-99.[16]

[16] Concerns about love triangles leading to violent confrontations among inmates bore "no logical connection" to the marriage restriction since those triangles could arise anyway. Id. at 98. Concerns about rehabilitating women who were excessively dependent on men (primarily ex-convicts) did not account either for the exclusion of male inmates from marriage or the ban on inmate–civilian marriages. Id. at 98-99.

These cases powerfully demonstrate that the right to marry is a fundamental right. Accordingly, any direct and substantial state interference with the right must be justified under a strict scrutiny standard. Zablocki, 434 U.S. at 387-88. See also Marcoux v. Att'y Gen., 375 Mass. 63, 66 (1978) ("individual choice as to procreation and other core concerns of human existence may be circumscribed by the State only in deference to highly significant public goals").

b. The State Framework for Protecting Personal Decisions Certainly Includes Marriage.

No reported state case has applied the Loving-Zablocki-Turner framework because, to plaintiffs' knowledge, there has been no recent challenge to the application of the Commonwealth's marriage statutes. Yet, the constitutional liberty guarantees and this Court's correlative respect for individual choices in matters of core personal concern require that each individual's decision of whether and whom to marry be protected under the Declaration of Rights. Moe, 382

This Court acknowledged in passing the right of a convicted and paroled child abuser to marry in Comm. v. LaPointe, 435 Mass. 455, 461 (2001).

Mass. at 651 (A fundamental right under the federal Constitution enjoys at least a comparable measure of protection under the Commonwealth's Constitution); 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").

As with abortion in Moe, this case implicates "but one aspect of a far broader constitutional guarantee of privacy" and "this court is no stranger" to the application of those principles. Moe, 382 Mass. at 648, 649. This Court's development of privacy doctrine generally, as well as its respect for "a private realm of family life," prohibit the plaintiffs' exclusion from marriage at issue here. Id. at 648.

This Court has long acknowledged that "[t]he right of self-determination and individual autonomy has its roots deep in our history." Brophy v. New England Sinai Hosp., 398 Mass. 417, 430 (1986). To effectuate the right of autonomy, certain kinds of decisions are protected by constitutional rights of privacy in that they are "an expression of the

sanctity of individual free choice and self determination as fundamental constituents of life." Saikewicz, 373 Mass. at 742. Although both Brophy and Saikewicz addressed an individual's right to refuse medical treatment rather than the right to marry, the critical insight was that the value of a person's life was not lessened by a decision to refuse treatment, "but by the failure to allow a competent human being the right of choice." Id.

The same concerns for "human dignity" and "choice" in Saikewicz, id. at 739, moved this Court to require use of the doctrine of substituted judgment in considering a guardian's request for sterilization of her ward. Matter of Mary Moe, 385 Mass. 555, 563-64 (1982). Citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), it held that the right of privacy means the right of the individual - whether married or single - to choose whether or not to bear or beget a child. Matter of Mary Moe, 385 Mass. at 563-64.[17]

Protections for individual liberty necessarily require respect for an individual's choice of family.

[17] These principles were also elaborated in Planned Parenthood v. Att'y Gen., 424 Mass. 586, 589 (1997) (striking two parent consent requirement for minor's abortions under articles I, X, XII).

"The existence of a private realm of family life which the state cannot enter is a cardinal precept of our jurisprudence." Custody of a Minor, 377 Mass. 876, 880 (1979)(internal citation and quotation omitted). Article X protects individuals from undue state interference with the "precious" and "basic rights" of conceiving and raising one's own child. Dept. of Pub. Welfare v. J.K.B., 379 Mass. 1, 3 (1979), cited in Care & Protection of Robert, 408 Mass. 52, 58 (1990). The constitutional respect for family autonomy and privacy extend to the plaintiffs as well. E.g. Matter of McCauley, 409 Mass. 134, 136-37 (1991) (family privacy); Adoption of a Minor, 386 Mass. 741, 750 (1982) (same). Just as at the federal level, protected "family" relationships extend beyond the traditional nuclear family. E.N.O. v. L.M.M., 429 Mass. 824, 829, cert. denied, 528 U.S. 1005 (1999) (recognizing non-traditional family of mother, de facto parent, and child); Youmans v. Ramos, 429 Mass. 774, 784, n.19 (1999); Petition of Dept. of Pub. Welf., 383 Mass. 573, 581 n.7, 582 (1981).

Other than marital choice, this Court has addressed virtually every other personal decision protected under the federal constitution and deemed it

protected under the Massachusetts Constitution.[18] Since this Court tends to construe the Declaration of Rights to be more protective of individual choice and dignity in matters of core personal concern than the federal constitution, and where it has already found protection for such choices, it is unimaginable that marriage would not also be a protected choice under the Massachusetts Constitution.[19]

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[18] This Court has often referred to the "freedom of personal choice in matters of marriage and family life." A.Z. v. B.Z., 431 Mass. 150, 162 (2000). See also Tarin v. Comm'r of Div. Of Med. Assist., 424 Mass. 743, 756 (1997) ("The rights associated with the family - the right of an individual to marry, establish a home, and bring up children - have long been protected as part of the liberty guaranteed by the due process clause") (internal quotations omitted); Opinion of the Justices, 375 Mass. 795, 806 (1978) (recognizing "fundamental matters relating to marriage" as within a zone of individual privacy into which government may not intrude absent compelling interest).

[19] At the defendants' invitation, the Trial Court characterized the plaintiffs as seeking a "new" fundamental right. R.A. 126-127. This semantic dodge should fail because the plaintiffs seek to marry the person of their choice, a right that already exists for "all individuals." Zablocki, 434 U.S. at 383.

The Trial Court was also mistaken to assume that a fundamental right must be anchored in a specific historical practice in order to be recognized under the Declaration of Rights. R.A. 118, 126-127. This Court has never required only a backward looking "history and tradition" test for ascertaining what rights are fundamental. If it did, privacy would not include procreative choice, Moe, 382 Mass. at 649, in light of the longstanding anti-abortion laws. See,

3. The Application of the Marriage Laws by the Defendants Directly and Substantially Burdens the Plaintiffs' Rights to Marry.

Because the right to marry is protected under the Massachusetts Constitution, the next question is whether the application of the marriage laws by the defendants burdens the plaintiffs' rights. Moe, 382 Mass. at 646. Each of the plaintiffs in this case appeared at his or her city or town clerk's office with blood test results and proper fees in hand seeking a marriage license. R.A. 93-96. Each was flatly denied. Id. Some were offered an embarrassed explanation; some were offered an apology; some were

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e.g., Mass. Acts & Resolves, c. 27 (1845). Nor would it include sexual intimacy. Comm. v. Balthazar, 366 Mass. 298, 302 (1974). If this state's miscegenation law, dating back to 1705 (1705 Mass Acts c. 163, and 1786 Mass. Acts & Resolves, c. 3), had not been repealed, it is inconceivable that this Court would have turned its back on persons seeking to challenge the restriction on their right to marry because of a discriminatory "history and tradition." The Trial Court's view would turn constitutional protections on their head since "the mere fact that a certain practice has gone unchallenged for a long period of time cannot alone immunize it from constitutional invalidity, even when that span of time covers our entire national existence and indeed predates it." Colo v. Treas. & Receiv. Gen., 378 Mass. 550, 557 (1979) (internal quotation omitted). In any event, historical grounding exists in the Commonwealth's solicitude for family relationships -- including "non-traditional families."

told to go to Vermont; but none were offered a marriage license. Id.

While a state may impose reasonable regulations upon the marital process, it may not "significantly interfere with decisions to enter into the marital relationship." Zablocki, 434 U.S. at 386-87. The defendants' actions in this case impose "a serious intrusion into [the plaintiffs'] freedom of choice in an area in which we have held such freedom to be fundamental." Id. at 387. See also Marcoux, 375 Mass. at 66.[20]

[20] The Trial Court below stated there was no "unconstitutional interference" with any of the plaintiffs' rights. R.A. 131. Under that reasoning, the plaintiffs in Loving, Zablocki and Turner suffered no constitutional deprivation either, a conclusion the U.S. Supreme Court obviously rejected. Direct denials of constitutional rights are actionable whether accomplished through a facially discriminatory statute or, as here, through the state's application of a statutory scheme. Buchanan v. Dir. of Div. of Employment Security, 393 Mass. 329, 335 (1984)(citing examples of unequal application of statutes).

Finally, the Trial Court suggested that any deprivation of rights suffered by the plaintiffs was insufficiently "grievous" since same-sex couples "have other means, even if less effective or more costly, or [sic] furthering their protected interests." R.A. 131. Assuming, arguendo, that this were true, which it is not, this suggestion no more vitiates the constitutional injury here than it would have for Mildred Jeter and Richard Loving who could have relocated to a state that honored their marriage.

4. The Defendants Fail the Balancing Test Required To Justify Governmental Intrusions on Private Personal Choices.

Zablocki applies strict scrutiny to state interference with the right to marry: is the interference supported by sufficiently important state interests and closely tailored to effectuate only those interests? Zablocki, 434 U.S. at 387-88. Moe and other state cases involving core personal choices have applied strict scrutiny in the context of a balancing of interests. Moe, 382 Mass. at 658-59. See also, e.g., E.N.O. v. L.M.M., 429 Mass. 824, 832-33, cert. den. 528 U.S. 1005 (1999); Saikewicz, 373 Mass. at 740. In fundamental rights cases not addressing personal choices, this Court applies traditional strict scrutiny. Cepulonis v. Sec'y of the Comm., 389 Mass. 930, 935 (1983)(strict scrutiny on infringement of prisoners' fundamental right to vote). Under either a balancing test, addressed here, or a strict scrutiny test, addressed in Part IV (A) below, the plaintiffs must prevail.

Assuming, arguendo, the legitimacy of defendants' interests (but see Part IV (D) below disputing the legitimacy of defendants' interests in this context), their asserted interests in procreation, childrearing

and conserving resources should be given no weight at all because not one is advanced by, let alone connected to, the plaintiffs' exclusion from marriage. Assuming these interests are given any weight, they are overwhelmingly outweighed by the plaintiffs' rights to marry the person of their choice.

a. Any State Interest in Biological Procreation Has No Weight Here.

The defendants claim the purpose of marriage is to further procreation and that different-sex couples are "theoretically capable of procreation on their own" whereas same-sex couples need the assistance of reproductive technology. Defs' Mem. in Oppos. To Pls' Mot. for Sum. Jmt. (Def. Mem.) at 61. The defendants' argument fails for at least four reasons. First, as discussed above, procreation is an area in which the individual's interests predominate over the state's. Matter of Mary Moe, 385 Mass. at 564 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (citation omitted). Second, many individuals in different-sex

couples are not capable of procreation, including post-menopausal women and persons who are otherwise infertile, but those individuals are permitted to marry without regard to "procreation." Third, many same-sex couples bring biological children into the world in the same way as do many different-sex couples, i.e., with access to donor insemination or reproductive technology. Indeed, three of the plaintiff couples are raising children conceived during their relationship. Finally, to the extent the defendants assume a state preference for biological parenting through intercourse, such a preference is in conflict with state policies increasing access to reproductive technologies to infertile individuals and couples. To the extent the defendants assume a biological preference at all, it is also pejorative to those families who have formed families with adoptive children, as have one of the plaintiff couples here.[21]

b. Any State Interest in Childrearing Has No Weight Here.

[21] See also Part IV D below. The Amici Curiae Brief of Charles Kindregan, Jr. & Monroe Inker ("Procreation Brief") explores these and related issues in far greater detail.

The defendants also claim "the marriage statutes were intended to ensure that children would not only be born in wedlock, but also reared by their mothers and fathers in one self-sufficient family unit with specialized roles for wives and husbands." Def. Mem. at 63. Even if childrearing sounds like a strong interest in the abstract, it should be given no weight here because the state's discrimination undermines that interest. Gay and lesbian individuals and couples are raising children and will continue to do so, as are several of the plaintiffs here.[22] Children benefit emotionally and economically when their parents are married because state laws and cultural norms support the commitment of married couples. The defendants' discrimination runs counter to the goal of promoting childrearing.

The state's respect for family privacy also undermines this asserted interest since the state cannot demonstrate an interest in any particular type

[22] The defendants' assertion of fixed gender roles in parenting is out of step with the culture and the law. Men may be nurturing and stay at home. Women may work outside of the home. Legal distinctions premised on gender roles contravene the letter and spirit of the Equal Rights Amendment. Mass. Const., am. art. CVI. Att'y. Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 378 Mass. 342, 352 (1979)(gender stereotyping disadvantages both men and women).

of parental role modeling in any family. A parent can raise his or her child as the parent wishes, absent some strong concern about the child's welfare. Custody of a Minor, 389 Mass. 755, 766 (1983). The umbrella of family privacy means the defendants cannot invoke a preferred type of parental role modeling as a basis for plaintiffs' exclusion from marriage.

c. Any State Interest in Conserving Resources Has No Weight Here.

Finally, the defendants claim that limiting economic benefits to married opposite-sex couples only "conserves the Commonwealth's scarce financial resources." Def. Mem. at 65. And it would also conserve resources to limit economic benefits to couples married ten years or more. But that distinction, like this one, is totally arbitrary and therefore fails. Fundamental rights are not allocated on a cost-benefit analysis. Zablocki even clarifies that revenue collection, i.e., adding to the state's fiscal resources, is not a basis for infringing on the right to marry. Zablocki, 434 U.S. at 400-02. The fact that no murmur of protest would arise if each of these plaintiffs married a person of a different sex shows that this interest is a sham.

Finally, it is common knowledge that married couples tend to be financially more secure than single persons, not incidentally due to their legal obligation to support one another, and are therefore less likely to seek access to government welfare programs.

d. The Plaintiffs Have the Same Needs for Self-Determination and Family Privacy as Their Non-Gay Neighbors.

Balanced against the asserted state interests for is the right to marry the person of one's choice, that is, "one of the vital personal rights essential to the orderly pursuit of happiness by free men." Loving, 388 U.S. at 12. Just as this right is central to the dignity, autonomy, and self-determination of people generally, so it is critical to the plaintiffs who share committed and loving relationships. Where marriage allows an individual to join with the person he or she loves, and thus to define one's own concept of existence and meaning, it tears at the "heart of liberty" to refuse an individual's choice of marital partner under "compulsion of the state." Casey, 505 U.S. at 851.

In Saikewicz and Brophy, even the state's interest in preserving life was insufficient to

override the individuals' right of self-determination and liberty in refusing medical treatment. The same was true with respect to pregnant women in Moe, despite the state's interest in preserving potential life. Moe, 382 Mass. at 658-59. Suffice it to say that the defendants assert no interest comparable to preserving life in excluding plaintiffs from marriage, and for all of the foregoing reasons, the plaintiffs interests overwhelmingly outweigh the defendants' asserted interests.

e. Doomsday Speculation About Polygamy Cannot Eviscerate the Plaintiffs' Right to Marry.

Unable to justify the exclusion of the plaintiffs from marriage on its own terms, the defendants below and its amici here are sure to suggest that the balance favors the status quo because, the argument goes, polygamy will inevitably follow if the plaintiffs prevail here. That suggestion is pure fear-mongering. People wishing to engage in plural marriages can already make such claims. The decision in this case will neither advance nor hinder any such claim.

Historical context is helpful. Ending this discrimination in marriage will hardly make

legalization of multiple partner marriages inevitable any more than ending race discrimination did. This same specter of polygamy was raised by the dissent in Perez, and at oral argument in Loving, but legal claims for polygamy have not advanced in the last fifty-five years. [23]

Significant to ascertaining the validity of this fear is the fact that the plaintiffs do not challenge the structure of marriage as the union of two individuals; the fundamental right they rely upon is the "freedom to marry the person of one's choice." Perez, 198 P.2d at 31 (emphasis added). The point is not merely semantic; the exclusivity of marriage flows from the companionate vision of marriage as two people pledging themselves to one another that the courts have long embraced.[24] The entire edifice of laws

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[23] See Perez, 198 P.2d at 761 (Shenk, J., dissenting) (multiple marriages); Peter Irons & Stephanie Guitton eds., May It Please the Court, 227, 282-283 (oral arguments in Loving v. Virginia) (1993) in which Virginia Assistant Attorney General R.D. McIlwaine argued "[T]he state's prohibition of interracial marriage ... stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage, or the prescription of minimum ages at which people may marry, and the prevention of the marriage of people who are mentally incompetent."

[24] As the Historians' Brief demonstrates, lawmakers have rid marriage of its gender-based aspects, but

protecting married persons is premised on the notion of a unitive pairing of two people with an emotional and financial interdependence and reciprocal rights and responsibilities. See also Brief of Boston Bar Ass'n (showing how rights and responsibilities for married couples are built around these two assumptions).

In any event, the legal question is one of justification. The defendants may maintain exclusions that are supported by adequate justifications. In the case of multiple partner marriages, concerns for the equality of spouses, particularly in light of our ERA, as well as the connection between monogamy and the democratic state, would likely trump the interest of a man seeking to marry multiple women.[25]

IV. THE EQUALITY GUARANTEES OF THE MASSACHUSETTS CONSTITUTION FORBID THE EXCLUSION OF THE PLAINTIFFS FROM CIVIL MARRIAGE

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there has been no comparable activity regarding the number of people who participate in a marriage.

[25] Teresa Stanton Collett, Marriage, Family and The Positive Law, 10 Notre Dame J. L. Ethics & Pub. Pol'y 467, 475 (1996) (multiple marriage would undermine the companionate nature of marriage and create inequalities within marriage); Maura Strassberg, Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage, 75 N.C. L. Rev. 1501 (1997) (arguing monogamy is a foundation of the republican state).

In addition to having the right to choose their marriage partner under the due process and liberty provisions of the Constitution, and the concomitant right of privacy, the plaintiffs also have an equality right to choose that partner.

Articles I, VI, VII and X of the Declaration of Rights express core equality principles, Lavelle v. Mass. Comm'n Against Discrimination, 426 Mass. 332, 336 n.6 (1997), and "must be construed together to make an harmonious frame of government." Opinion of the Justices, 303 Mass. at 640.

Equality of opportunity despite social differences was a foundational principle of the framers of the Massachusetts Constitution.[26] The first sentence of article 1 provides in part: "All people are born free and equal and have certain natural, essential and unalienable rights. ..." Although equality in 1780 was not all that we think of today, it "represent[ed] a genuine social revolt pitting republican ideals of 'virtue,' or talent and merit, against a perceived aristocracy of privilege both

[26] See, e.g., Gordon Wood, Creation of the American Republic 70. The concept of "inherent equality" in the Declaration of Rights is discussed in detail in the State Constitutional Law Brief.

abroad and at home." Baker v. Vermont, 744 A.2d 864, 876 (Vt. 1999). Accordingly, "[t]he constitutional rule against arbitrary discrimination remains unchanged through the years, but its application may vary with changing circumstances." Opinion of the Justices, 303 Mass. 631, 647-48 (1939).

It is not only article I, but also article X that constrains the majority to treat individuals with equity and impartiality.[27] Holden, 11 Mass. at 401. Additionally, articles VI and VII provide that government cannot privilege or favor one class of citizens except for a public contribution, and that if it does so, then the people have a right to alter or abolish the government. Article VI provides in part:

> No man, or corporation, nor association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the

[27] In early judicial decisions, article I was deemed to abolish slavery in Massachusetts even absent any express reference to slavery. Inhab. of Winchendon v. Inhab. of Hatfield, 4 Mass. 123, 128 (1808) (stating that "in the first action involving the right of the master," the Supreme Judicial Court declared slavery "was no more" "by virture of the first article of the Declaration of Rights"). See also Comm. v. Aves, 35 Mass. (18 Pick.) 193, 209 (1836); John D. Cushing, The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case," 5 Am. J. Legal Hist. 118, 124-25 (1961).

> consideration of services rendered to the public; ... [28]

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

> Government is instituted for the common good, for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men .... [29]

Mass. Const., Pt. 1, art. VII.

While Article VI forbids the transmission of hereditary titles, Sheridan v. Gardner, 347 Mass. 8 (1964), it is more generally concerned with whether a particular enactment was intended, or has as one of its leading purposes, the intent to confer an exclusive privilege on any person or class. Hewitt v. Charier, 33 Mass. 353, 355 (1835). Thus, this Court has rejected absolute veterans' preferences under article VI while allowing some employment preferences

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

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

as consideration for the service rendered. See, e.g., Brown v. Russell, 166 Mass. 14, 25 (1896); Hutcheson v. Dir. of Civil Serv., 361 Mass. 480, 488-90 (1972).

Articles VI and VII were also the focus of the Justices in an advisory opinion in which the Court opined that a variety of proposed bills which would have limited married women's opportunities for public employment, but would have allowed unmarried women to continue in such jobs, were unconstitutional. Opinion of the Justices, 303 Mass. 631, 640, 643 (1939). Acknowledging that all women are citizens, this Court focused on the principle of inclusion, and condemned the bills' rendering of unmarried women as "an absolutely preferred class," id. at 649, "ir-respective of age, character and capabilities" of married women. Id. at 646.

In sum, the Declaration of Rights inveighs against invidious and arbitrary distinctions among citizens. Part A shows that the defendants' exclusion of plaintiffs from a fundamental right cannot satisfy strict scrutiny. Part B demonstrates how the defendants' application of the marriage laws contravenes the prohibition against sex discrimination, while Part C demonstrates how the

defendants' actions constitute unlawful sexual orientation discrimination. Finally, Part D shows that the exclusion of the plaintiffs from marriage lacks any rational basis.

A. The Plaintiffs Have An Equal Right to Exercise the Fundamental Right to Marry.

1. Infringements on Fundamental Rights Require Strict Scrutiny.

Statutes applied to penalize the exercise of a constitutionally protected individual right also call for heightened scrutiny. Blixt v. Blixt, 437 Mass. 649, 655-56 (2002); Zayre Corp. v. Att'y Gen., 372 Mass. 423, 433 (1977). See also Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (classifications which impinge on the exercise of a fundamental right are "presumptively invidious"). Equality principles require this to be so in order that all may enjoy those rights deemed important or fundamental. Therefore, the exclusion of gay and lesbian individuals and same-sex couples from civil marriage requires justification under the strict scrutiny standard.

3. The Defendants' Asserted Interests Fail Strict Scrutiny.

None of the three interests advanced by the defendants is compelling in this context, nor are they narrowly tailored to further those interests. The fact that both procreative decisions and child-rearing arrangements within a family are matters in which the individual's interests predominate vitiates any compelling state interest in this context. See discussion supra at III B(2)(b). Similarly, the naked wish to "conserve resources" cannot be accomplished "by invidious distinctions between classes of citizens." Plyler, 457 U.S. at 227.

The interests also fail as a matter of narrow tailoring. Excluding only individuals who wish to marry a partner of the same sex cannot advance procreation by other persons. In fact, many different- sex couples do not procreate and many same-sex couples do so, including four of the seven couples in this case. Excluding same-sex couples from marriage does nothing to further childrearing in any other family, and it harms the children the plaintiffs are raising. Finally, as to conserving resources, even if the state were to assume some new financial obligations to the plaintiffs, how is a total ban on marriage narrowly tailored to that concern? By

excluding the plaintiffs from marriage, the defendants withhold an elaborate architecture of public and private protections and a unique legal status that is far more extensive than access to a few government programs for needy persons. Strict scrutiny cannot be satisfied by these interests.

B. Defendants' Apply the Marriage Laws Based on Sex in Contravention of Article I.

The starting point for a sex discrimination analysis begins with two questions. The first is whether the classification is based on sex, and thus subject to the strictest scrutiny, and the second, whether the sex-based classification is justified under that test. Att'y Gen. v. Mass. Interscholastic Athletic Ass'n., 378 Mass. 342, 350, 354 (1979) (hereafter, MIAA); Lowell v. Kowalski, 380 Mass. 663, 667, 669 (1980). The Trial Court failed to engage in this analysis.[30]

1. The Defendants Apply A Sex-Based Classification To the Marriage Statutes.

[30] The Trial Court collapsed the sex-based discrimination at issue here into the plaintiffs' separate and distinct sexual orientation claim, and then ruled that the Equal Rights Amendment (hereafter, ERA) does not address sexual orientation discrimination. R.A. 116, n.6. As addressed in Part IV C, sexual orientation discrimination is forbidden by the first sentence of Article I.

Nothing in G.L. c. 207, the law regulating access to marriage, provides that a man may only marry a woman, or that a woman may not marry a woman. See Part II above. However, defendants use sex-based classifications to accomplish that result.

Heidi Norton was denied a license to marry Gina Smith because she is a woman. But a man can marry Gina, and if Heidi were a man, she could marry Gina. She cannot do so because of her own sex. As a factual matter, the individual's choice of marital partner is constrained because of his or her own sex. An Alaska trial court explained the discrimination as follows:

> If twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex classification can hardly be more obvious.

Brause v. Bur. of Vital Statistics, 1998 WL 88753, *6 (Alaska Super. No. 3AN-95-6562 CI, Feb. 27, 1998). See also Baehr v. Lewin, 842 P.2d 44, 60-61 (Haw. 1993) (finding application of marriage laws regulate on the basis of sex).[31]

[31] See also Amici Brief of International Human Rights Organizations discussing use of sex discrimination principles under other legal systems ("International Brief"); Anne-Marie Slaughter, Judicial Globalization, 40 Va. J. Intl. L. 1103, 1109-1119 (2000)(noting

An examination of Perez v. Sharp and Loving v. Virginia demonstrates that "sex" is the forbidden variable by which the defendants administer the marriage laws. The facile defense offered by the defendants is that men and women are equally disadvantaged, since neither can marry someone of the same sex, so there is no discrimination here. In both Perez and Loving, the courts rejected the notion that miscegenation laws effected no racial discrimination simply because both whites and persons of color were equally disabled from marrying each other. Equal application of the law to whites and blacks did not eradicate the racial classification at work even though on a group level, there was symmetry in the options of white and black persons. Critically, rather than comparing the experience of whites and persons of color as groups, the courts found that limiting an individual's choice of whom he or she could marry based on the individuals' races was racial

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importance of dialog among courts on human rights matters).

discrimination forbidden by the 14th Amendment. Perez, 198 P.2d at 25, Loving, 388 U.S. at 11-12.[32]

Just as those courts had no problem detecting a racial classification at work, so is there a sex-based classification here. The analogy to Perez and Loving is logically and analytically irrefutable. Charts illustrate the point.

[32] Other cases also reject the "equal discrimination defense." McLaughlin v. Florida, 379 U.S. 184 (1964) (discussed infra); Califano v. Westcott, 443 U.S. 76, 83-84 (1979) (rejecting position that allowing welfare benefits only when children deprived of parental support due to father's unemployment rather than mother's unemployment affected all families equally); United Bldg. & Const. Trades Council v. Camden, 465 U.S. 208, 217-18 (1984) (job preference ordinance not immune from constitutional review simply because it burdens both in-state and out-of-state residents); Hunter v. Underwood, 471 U.S. 222, 231 (1985) (invalidating provision of Alabama Constitution which disenfranchised people who committed "crimes of moral turpitude" even though the provision had been aimed at disenfranchising both blacks and poor whites).

	Choice of **same-sex** partner permitted?	Choice of **opposite-sex** partner permitted?	Choice of **female** partner permitted?	Choice of **male** partner permitted?
Men	No	Yes	Yes	No
Women	No	Yes	No	Yes[33]

	Choice of **different-race** spouse permitted?	Choice of **same-race** spouse permitted?	Choice of **white** spouse permitted?	Choice of **black** spouse permitted?
Whites	No	Yes	Yes	No
Blacks	No	Yes	No	Yes[34]

This is the exact same mode of analysis relied upon by the Supreme Court in Loving. From the perspective of each individual plaintiff, the defendants set up a sex-based classification by

[33] Robert Wintemute, Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes, 60 Modern L. Rev. 334, 345 (1997).

[34] Id. at 345, n. 45. Professor Wintemute suggests that the reason why these kinds of claims are not immediately obvious is because they involve minorities and "violations of traditional social sex roles" that are disturbing to the majority rather than any "conceptual difficulty." Id. at 338.

rejecting their choice of partner based on their own sex.[35]

In rejecting the plaintiffs' equality claims, the Trial Court also opined, as the defendants argued below, that the classification at issue in the marriage statutes is between same-sex and opposite-sex couples. R.A. 132. The fact of discrimination against couples, however, does not vitiate the constitutional injury to the plaintiffs as individuals.[36] Indeed, discrimination against couples, when based on an invidious or arbitrary

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[35] Other analyses of the sex discrimination point include Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. Rev. 197 (1994) (developing argument based on miscegenation analogy); Andrew Koppelman, Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein, 49 U.C.L.A. L. Rev. 519 (2001) (addressing critiques of the argument); and Sylvia Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187 (discussing gender norms and roles).

[36] Equality rights under the Massachusetts Constitution are held individually. See, e.g., Planned Parenthood v. Att'y Gen., 424 Mass. 586, 595 n.10 (1997); Williams v. Sec'y of Exec. Off. of Hum. Servs., 414 Mass. 551, 564-65 (1993). The same is true under the 14th Amendment. Adarand Contractors v. Pena, 515 U.S. 200, 230 (1995) ("long line of cases understanding equal protection as a personal right; Constitution protects persons, not groups) (emphasis in original). An equal protection claim can be brought on behalf of a class of one. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

characteristic, is unlawful as established in McLaughlin v. Florida, 379 U.S. 184 (1964). In that case, the Supreme Court unanimously invalidated a criminal statute prohibiting an unmarried different-race couple from habitually living in and occupying the same room at night where a same-race couple was not so penalized. Id. at 191, 194 (rejecting equal application defense and striking statute). The ability to identify a racial classification when the statute "treats the interracial couple made up of a white person and a Negro differently than it does any other couple", id. at 188, is no different from the ability to identify a sex-based classification when a statute is applied to treat a couple made up of a man and a man differently from a couple made up of a woman and a man.[37]

[37] This Court has employed this kind of analysis to identify marital status discrimination. In Att'y Gen. v. Desilets, 418 Mass. 316 (1994), a landlord claimed to have refused to rent to an unmarried couple not because they were unmarried but because of their presumed sexual conduct. This Court's analysis in that case can be applied here to show the defendants use "sex" as a basis for refusing the plaintiffs marriage licenses.

> If a [male-female] couple A wanted to obtain a marriage license, they would have no objection. If [male-male or female-female] couple B wanted to obtain a marriage license, they would have great objection.

In sum, by constraining each individual plaintiff's choice of partner by the individual's sex, and by restricting marriage to couples of a different sex, the controlling factor in the defendants' action is "sex" and therefore constitutes a sex-based classification under article I.

Finally, defendants are sure to raise here, as they did below, an interim report of a special study commission on the ERA to suggest a limited construction of the term "sex." That report is not legislative history and has no bearing here. It was issued after the legislature had voted to approve of the ERA a second time and just two weeks before the ratification vote on November 2, 1976. Nor was it presented to the voters. Special Study Commission on the Equal Rights Amendment, First Interim Report (October 19, 1976). The Commission's charge, and its report, was to aid the legislature in "review and formulation of state laws" if the ERA passed. Acts & Resolves 1975, c. 26 (establishing Commission). The Commission's opinion that "homosexual marriage" would

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> The controlling and discriminating difference between the two situations is the difference in the [sex] of the two couples.

Id. at 320.

be "unaffected" by passage of the ERA, id. at 21 ("An equal rights amendment will have no effect upon the allowance or denial of homosexual marriages"), is simply the impression of the special commission. Our Constitution now provides that, whatever the context, a "statutory classification based solely on sex," is suspect. Opinion of the Justices, 374 Mass. at 842.[38]

2. The Defendants' Cannot Rely on Supposed Biological Differences To Avoid The Plaintiffs' Sex Discrimination Claim.

Given the classification by sex, the question becomes one of justification. It is the defendants'

[38] Nothing in the legislative history of the ERA excepts this case from its ambit. The ballot materials submitted to the electorate in 1976 said nothing to that effect:

> The proposed amendment would provide that equality under law may not be denied or abridged on the basis of sex, race, color, creed or national origin. This amendment adds one sentence to Article I of Part of the First of the Constitution which now contains an individual statement of individual rights, including the right to enjoy and defend life and liberty and the right to acquire and protect property.

Add. 1.

No other official information about the scope of the amendment was provided to the voters by the Commonwealth, but unofficial materials did discuss the potential impact of an ERA on marriages of same-sex couples. Among the unofficial materials circulated to voters (unlike the uncirculated Interim Report) was a pamphlet of the Massachusetts Taxpayers Foundation, Inc., which stated that ERA opponents believed it would "lead[] to homosexual marriages." Add. 4.

burden to demonstrate that the sex distinction used to exclude the plaintiffs from marriage is necessary to further a compelling state interest and that the classification is narrowly tailored to advance that interest. MIAA, 378 Mass. at 354.

The defendants cannot meet this heavy burden. They did not even attempt to do so below, and instead attempted to avoid the question altogether by claiming that biological differences between same-sex couples and different-sex couples obviated the need for a sex discrimination analysis.[39] On the argument that different-sex couples can "theoretically" procreate with each other and no same-sex couple can procreate without access to reproductive technology, the defendants argued that same-sex and different-sex couples are not similarly situated. The defendants' dodge should fail because they fundamentally misunderstand equal protection law and marriage law.[40]

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[39] Below, defendants point to two cases, Comm. v. MacKenzie, 368 Mass. 613 (1975), and Lowell v. Kowalski, 380 Mass. 663 (1980), where biological differences matter concerning determination of parentage in a nonmarital context. Those cases, while valid, are simply inapposite here.

[40] As shown above, it is the individual's right to marry, and the individual's right to be free from discrimination, which is at issue here. The

The marriage laws in Massachusetts, that is, the law of marriage, annulment and divorce, as written and as interpreted by the courts, vitiate any attempt to conjure up procreation as the reason for marriage. Procreation is not and never has been the legal foundation of marriage. See Part IV D below and Procreation Brief.[41]

The defendants' procreation argument is simply a new gloss on the old definitional argument. Some other courts, like the defendants here, have attempted to evade the obvious sex-based discrimination built into the marriage laws by arguing that the prohibition of marriage for same-sex couples flows from the definition of marriage. See, e.g., Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) ("[A]ppellants are prevented from marrying ... by their own incapability of entering into a marriage as that term is defined"). But more recently, courts have rejected this reasoning

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defendants cannot simply change the comparator class to avoid analysis of its discrimination.

[41] Compare United States v. Virginia, 518 U.S. 515, 535 (1996) ("VMI")(striking exclusion of women from previously all-male military college; "[B]enign justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions.").

as "circular and unpersuasive" since it fails to address whether the prohibition itself is discriminatory and constitutionally permissible. Baehr, 852 P.2d at 61. See also Loving, 388 U.S. at 3 (rejecting idea that a marriage between a white person and person of color was not a true marriage). Resorting to procreation as the a priori definition is a canard which must fail.

The similarly situated argument fails for other reasons as well. First, same-sex couples and different-sex couples are similarly situated with respect to procreation. Both same-sex and heterosexual couples may be unable to procreate or uninterested in the prospect. Both same-sex and different-sex couples foster children, adopt children, conceive children by means of assisted conception and surrogacy, and form blended families with children from previous relationships.[42]

[42] Compare VMI, 518 U.S. at 541 (nothing in the goal of producing citizen soldiers, VMI's "'raison d'etre'" is inherently unsuitable to women). Here, the defendants' proposed raison d'etre of marriage, procreation, is not inherently unsuitable to individuals who wish to marry someone of the same sex. The Supreme Court cautioned courts to take a "hard look" at sex-based generalizations, and may not rely on "overbroad" generalizations to "perpetuate

Second, the fact that many heterosexual couples also conceive children through heterosexual intercourse is not an argument about procreation, but about a particular means of bringing children into a family, i.e., through a particular sexual act. As described above in Part III, settled law establishes these matters as core personal concerns, not state interests. Part IV D below also demonstrates that this particular act is not even required for a marriage to be valid. Individuals of different sexes may marry even if they have no procreative capacity or intent, i.e., those for whom biological reproduction is at most "theoretical." The defendants' resting their argument on this premise reflects assumptions which lack legal foundation and is "more fanciful than real." Coffee-Rich, Inc. v. Comm'r of Pub. Health, 348 Mass. 414, 424-25 (1965).

Third, this Court has been skeptical about biologically based defenses in sex discrimination cases. For example, in MIAA, a group sought to defend its exclusion of boys from girls' sports teams by reference to "functional differences deriving in the

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historical patterns of discrimination." Id. at 541, 542 (internal citations omitted).

main from biology." MIAA, 378 Mass. at 357. Ruling that being male or female is not a proxy for function, this Court rejected that rationale. Id. at 358. It reasoned that "if all high school boys outstripped all high school girls in all athletic endeavors, [then] total separation might be justifiable" because then there would be a "line drawn in truth." Id. (emphasis supplied). But that certitude about athletic prowess was lacking in MIAA, and it is lacking here as well. Defendants cannot ignore that many different-sex couples are in exactly the same position as the plaintiffs with respect to procreation, i.e., they cannot procreate without the assistance of reproductive technology, or they wish to bring children into their lives through foster care, adoption, or a prior relationship. There is no line in truth that separates all different-sex couples from all same-sex couples.

Relatedly, as MIAA also demonstrates, the defendants' claim is also premised on impermissible generalizations and stereotypes. To rely on general-izations about procreative capacity as the basis for determining who shall participate in legal rights, as defendants do here, harkens back to an era in which

women were defined by their procreative abilities and by "[t]he paramount destiny ... [of fulfilling] the ... offices of wife and mother." Bradwell v. Illinois, 83 U.S. 130, 141-42 (1872).[43] Historically, women were restricted from aspects of public life because their essential roles were those of wife and mother. See, e.g., Muller v. Oregon, 208 U.S. 412, 422-23 (1908) (upholding legislation limiting the maximum number of hours a woman could work based on her "physical structure and a proper discharge of her maternal functions"). This Court has been careful to reject such stereotypes in the past, e.g. MIAA, 378 Mass. at 359-62; Opinion of the Justices, 303 Mass. at 651-652 (laws restricting married women's employment had no relation to protecting maternal health and marital relations), and it should reject this attempted reincarnation of generalizations about procreative capacity to limit the rights of individuals.

[43] The defendants also necessarily invoke the stereotyped notion that only men and women can have children and rear them properly, a proposition at odds with this Court's acknowledgment of gay and lesbian families, and the legislature's implicit encouragement of those families by adoption and reproductive technology. See infra Part IV D.

Finally, same-sex and different-sex couples are similarly situated with respect to the mutual love and commitment expected in the marital relationship, see Amici Curiae Brief of Massachusetts Psychological Ass'n et al. ("Mass. Psychological Ass'n Brief") and in needing the structures and supports provided by civil marriage. See also Boston Bar Ass'n Brief. There is simply no "line drawn in truth," MIAA, 378 Mass. at 358 which distinguishes all same-sex couples from all different-sex couples. Strict scrutiny is required here. (See Part IV A for application of test).

C. The Sexual Orientation-Based Distinctions Cannot Survive the Heightened Scrutiny Required by The Constitution.

Separate and distinct from the defendants' use of sex-based rules in applying the marriage statutes is its use of sexual orientation-based classifications. If the concept of being gay or lesbian means anything, it includes those who wish to share their most intimate relationship with a partner of the same gender. Unlike rules preventing consanguineous or under-age marriages which operate evenly across the population and apply to everyone, rules preventing individuals from marrying others of the same sex

operate systematically to exclude the class of gay men and lesbians. By prohibiting a man from marrying a man, and a woman from marrying a woman, the defendants are essentially barring all gay and lesbian individuals from marrying the person of their choice.

Although this Court has not yet had an opportunity to address this question, governmental distinctions based on sexual orientation should be regarded suspiciously and justified by compelling state interests which are narrowly tailored.

The first sentence of Article I provides the necessary constitutional basis. In contrast to the specifically enumerated characteristics in the second sentence (the ERA) which automatically receive strict scrutiny,[44] the first sentence provides a broad equality guarantee capacious enough for according strict scrutiny discrimination claims based on other characteristics.

[44] These classifications are accorded strict judicial scrutiny without argument and without reference to federal law. King, 374 Mass. at 21 (given listing of characteristics in state ERA, "we conclude that the people of Massachusetts view sex discrimination with the same vigorous disapproval as they view racial, ethnic and religious discrimination") (footnote omitted); Lowell, 380 Mass. at 665-66 (ERA "more stringent" than 14th Amendment).

Even though the two sentences of article I are mutually reinforcing regarding equality, this Court analyzes them separately. For example, this Court opined that a proposed statute violated the first sentence of article I so there was no need to undertake a separate analysis under the ERA. Opinion of the Justices, 373 Mass. 883, 887 (1977). Similarly, in Powers v. Wilkinson, 399 Mass. 650 (1987), this Court noted that the plaintiff conceded that the ERA does not expressly address nonmarital children, id. at 657, n. 11, but then went on to address a claim under the first sentence. Id. at 656, n.10 (declining to reach claim on behalf of nonmarital children where no state action alleged). See also Planned Parenthood, 424 Mass. at 595, n.10 (rejecting equal protection argument, but noting plaintiffs had not made a claim under the ERA); MIAA, 378 Mass. at 351 (“The equal protection guaranty and a fortiori an equal rights amendment condemn discrimination whether male or female”); Moe, 382 Mass. at 663 (Hennessey, C.J., dissenting) (dif-ferentiating between the first sentence “and the related provision in the Equal Rights Amendment”).

It should be obvious that the ERA is not the sum total of equality guarantees in Article I.

1. The Protections in Article I Were Expanded by the ERA.

The classifications deemed automatically suspect are listed in the ERA. However, even a recent case of this Court demonstrates that characteristics not listed in the ERA may receive heightened review. In Doe v. Comm'r of Transititional Assistance, 437 Mass. 521 (2002), this Court noted that in "matters concerning aliens" the Declaration of Rights provides protections co-extensive with the federal rights. Id. at 408-09, citing Frost v. Comm'r of Corps. & Taxation, 363 Mass. 235, 238 & n.3 (1973). Since alienage classifications receive heightened review, see, e.g., Graham v. Richardson, 403 U.S. 365, 376 (1971); Plyler, 457 U.S. at 220, the courts are not bound to limit suspect classes to those enumerated in the ERA.

2. Sexual Orientation Classifications Warrant Heightened Scrutiny Under the Massachusetts Constitution.

In addressing questions of suspect class, this Court has at times looked to the federal standards under the 14th Amendment. See, e.g., Williams v. Sec'y

of Exec. Ofc. Of Hum. Servs., 414 Mass. 551, 564 (1993); Murphy v. Dept. of Indus. Accidents, 415 Mass. 218, 226 (1993). Since no Supreme Court decision has yet addressed this claim, it is an open question under federal law.[45]

Classifications meriting heightened judicial scrutiny in the federal system include race, national origin, sex, alienage and illegitimacy. See Laurence Tribe, American Constitutional Law ch. 16 (1988). Some of the factors deemed to have relevance in determining whether a classification warrants heightened scrutiny include:

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

[45] A 9th Circuit panel found the military's anti-gay policy to discriminate unlawfully on the suspect basis of sexual orientation in Watkins v. U.S. Army, 847 F.2d 1329, 1349 (9th Cir. 1988), vacated, 875 F.2d 699 (en banc), cert. denied, 498 U.S. 957 (1990). The en banc court ordered relief for Sgt. Perry Watkins on other grounds, and declined to address the constitutional issues. Two judges of that court concurred on the suspect class grounds. Watkins, 875 F.2d at 723-731 (Norris, J., concurring), id. at 731 (Canby, J., concurring).

See Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-441 (1985), id. at 442 (denying designation because mentally retarded people have a reduced capacity to function in the everyday world); Plyler, 457 U.S. at 216, n. 14, id. at 219, n.19 (denying designation to undocumented resident aliens); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (denying designation to persons over 50 who have no pervasive history of unequal treatment, no need for protection from majoritarian political process, and have physical limitations which accrue with age); Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (plurality) (sex is suspect class); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)(denying designation to "large, diverse and amorphous" class of poor people challenging school funding where they were "unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts").[46]

[46] Where early cases looked to whether the trait defining the class was immutable, the Supreme Court has never held that only classes with immutable traits can be deemed suspect. Cleburne, 473 U.S. at 440-41; Murgia, 427 U.S. at 313; Rodriguez, 411 U.S. at 28. Classifications have been subject to heightened scrutiny based on characteristics that can change as a

Application of these factors, none of which is required in all cases, weighs in favor of finding discrimination against gay men and lesbians to be "suspect." For example, former Justices Brennan and Marshall opined:

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

Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009 (1985) (Brennan, J., and Marshall, J., dissenting, from denial of writ of certiorari).

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legal matter (alienage, legitimacy and race) or factual matter (religion, sex), but those classifications require heightened scrutiny regardless. Second, even if immutability is relevant, immutable does not mean genetic. See Hernandez-Montiel v. INS, 225 F.3d 1084, 1092 (9th Cir. 2000) (immutable means the character-istic cannot change or should not be required to change because it is fundamental to identity or conscience). The conceptual and practical difficulties of an immutability analysis, and whether sexual orientation derives from nature or nurture, need not be resolved here to decide this case. See Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and 'Don't Ask, Don't Tell," 108 Yale L. J. 485, 490-91 (1998).

3. Application of the Federal Framework Requires a Finding that Gay Men and Lesbians Are a Suspect Class.

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

A key predicate to finding a class suspect is a history of intentional discrimination or destructive stereotyping against individuals in the targeted group. Murgia, 427 U.S. at 313; Rodriguez, 411 U.S. at 28; Cleburne, 473 U.S. at 441. For example, in applying heightened scrutiny to classifications disadvantaging nonmarital children, the Supreme Court noted that nonmarital children should not be burdened by society's condemnation of irresponsible liaisons. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

By contrast, in cases involving classifications burdening groups that have not historically been subjected to purposeful discrimination, strict scrutiny is not applied. Lyng v. Castillo, 477 U.S. 635, 638 (1986) (close relatives); Murgia, 427 U.S. at 313 (persons over 50). See also Tobin's Case, 424 Mass. 250, 252 (1999) (age not a suspect class).

It is fair to infer the existence of discrimination against gay people in Massachusetts from a

variety of sources. First, various anti-discrimination laws in employment, education, public accommodations and hate crimes, see infra n.55, demonstrates underlying societal discrimination. Compare Frontiero, 411 U.S. at 687 (existence of Title VII a basis for finding sex based classifications "inherently invidious").

Second, this Court has already recognized the existence of bias against gay people. Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 413-14(2001) (reference to lesbian's sexual orientation in jury instructions might provoke juror bias); Comm. v. Plunkett, 422 Mass. 634, 641 (1996) ("juror attitudes toward homosexuality may be important" in a murder case involving two gay men). Sometimes discriminatory intent is baldly stated. Irish-American Gay, Lesbian & Bisexual Grp. of Boston v. Boston, 418 Mass. 238, 251 (1994) (parade organizers refused participation to an openly gay contingent), rev'd on other grounds, Hurley v. Irish American Gay, Lesbian, Bisexual Grp. of Boston, 515 U.S. 557 (1995). See also Mary L. Bonauto & Karen L. Loewy, Sexual Orientation Discrimination: A Plaintiff's Perspective, in Massachusetts Employment Law (MCLE forthcoming)

(discussing sexual orientation-based claims of employment discrimination).

Third, published reports in Massachusetts and elsewhere document discrimination. A recent report from the United States Surgeon General acknowledged that "our culture often stigmatizes homosexual behavior, identity and relationships."[47] According to a local 1999 Youth Risk Behavior Survey, lesbian, gay and bisexual youth are nearly three times as likely as their non-gay peers to have been involved in a physical fight at school and three times as likely to have been threatened with or injured by a weapon at school.[48] Personal safety remains a critical issue: the last thirteen annual reports of the Violence Recovery Program at the Fenway Community Health Center in Boston document a total of 2,190 bias incidents in Massachusetts involving anti-lesbian, gay, transgender and bisexual violence. In a survey conducted by the Office of Boston Mayor Kevin H. White in the early

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

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

1980's, of the 1500 gay and lesbian respondents reporting, over half had been subject to verbal abuse in Boston, nearly a quarter had been physically attacked or robbed, and twenty percent had faced job discrimination.[49]

Fourth, the very history of the exclusion of same-sex couples from marriage despite the facial neutrality of the statutory scheme demonstrates purposeful discrimination. See, e.g., New York Times Co. v. Com'r of Rev., 427 Mass. 399, 406 (1998) (An equal protection violation "need not ... be premised solely on explicit policy. As Yick Wo v. Hopkins and its progeny show, discriminatory intent may be gathered from evidence regarding the actual administration of a facially neutral law") (internal citations omitted). 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

[49] The Fenway material is available by calling (617) 927-6250. See also The Boston Project, A Profile of Boston's Gay and Lesbian Community, Preliminary Report of Findings at 6-7 (1983).

group." Ford v. Town of Grafton, 44 Mass. App. Ct. 715, 730 (internal quotations omitted), rev. den., 427 Mass. 1108, cert. den., 525 U.S. 1040 (1998). The Legislature has concurred with this discriminatory application. When it added "sexual orientation" to various non-discrimination laws in St. 1989, c. 516, it specifically provided that those amendments should not be construed to allow marriage between same-sex couples. Id., § 19.[50]

In sum, both historically and in present times, there is a substantial record of purposeful discrimination against gay and lesbian people, both by the broader community and by government itself.[51]

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

The second factor used in the suspect class analysis asks whether the characteristic which defines

[50] National examples of discrimination, as well as a relative lack of political power, are addressed in the Amici Curiae Brief of Urban League of Eastern Massachusetts et al. ("Civil Rights Brief").

[51] Comprehensive treatments of this topic include are in Patricia Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551 (1993); Developments in the Law- Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1556 (1989); Rhonda Rivera, Our Straight Laced Judges, 30 Hastings L. Rev. 799 (1979); John D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America (1988).

the group bears upon any ability to perform in or contribute to society. Frontiero, 411 U.S. at 686; Cleburne, 473 U.S. at 440-41. The lack of a relationship between the trait and ability is likely to reflect "prejudice and antipathy." Cleburne, 432 U.S. at 440. On the other hand, if a law burdens a class of people with genuinely reduced abilities, heightened scrutiny may not be appropriate. Id., at 442-43 (mentally retarded persons have reduced ability to function in the everyday world); Murgia, 427 U.S. at 313 (physical infirmities accrue with age). Compare Tobin's Case, 424 Mass. at 252 (challenge to statute terminating worker's compensation benefits at age 65; class of persons over 65 not suspect); id., at 252 n. 2 (handicapped individuals not members of a suspect class); Williams v. Sec'y of Human Servs., 414 Mass. 551, 564 (1993) (challenge to way state provides services and housing referrals to certain mentally ill persons; mentally ill not a suspect class).

As discussed in the Massachusetts Psychological Ass'n Brief, professional health organizations have established that sexual orientation, like gender, religion, race and national origin, bears no relation to ability to perform or contribute to society. Like

others in our society, gay men and lesbian women, like the plaintiffs in this case, form committed, long-term and often lifetime relationships. And like most of the plaintiffs, many gay and lesbian couples raise children together successfully, as both the legislature and this Court have long recognized. E.N.O., 429 Mass. at 833, (recognizing "the family that must be accorded respect" is that of biological mother, de facto parent and child); Connors v. Boston, 430 Mass. 31, 42 (1999) (in case involving same-sex domestic partnership benefits, recognizing that family may no longer includes just a wage-earning father, his dependent wife, and the couple's children); Adoption of Tammy, 416 Mass. 205, 214 (1993) (allowing adoption of child by her two mothers will allow child to "preserve her unique filial ties" to non-birth parent). In short, there is an utter "lack of any distinguishing characteristics", Cleburne, 473 U.S at 441, justifying applying this statutory scheme differently to gay and lesbian people as compared with all other citizens. One's sexual orientation is a significant part of one's identity, but that orientation does not determine how good an employee, citizen, partner or parent that person will be.

c. Gay People Have Historically Lacked Political Power.

The third factor sometimes considered by courts in analyzing whether strict scrutiny is appropriate under the federal model is whether the group has historically been relegated to a position of relative political powerlessness within the majoritarian, legislative political sphere. See, e.g., Rodriguez, 411 U.S. at 28; Plyler, 457 U.S. at 216 n.14. This criterion looks to the position of people in society generally, with an eye to past discrimination so that more recent progress does not vitiate the claim for strict scrutiny. See, e.g., Frontiero, 411 U.S. at 686 n.17 (women are a majority, but are still relatively politically disadvantaged).

While gay men and lesbians have recently become more visible politically in Massachusetts, many still feel the need to hide their sexual orientation to avoid the widespread discrimination and violence it engenders. The situation of some number of gay persons being trapped “in the closet” has a negative impact on the group’s ability to gain political advantage. Watkins v. U.S. Army, 875 F.2d 699, 727 (1989)(Norris, J., concurring).

Despite having made some strides toward protection in Massachusetts, those recent gains do not come close to eliminating all the vestiges of discrimination. Moreover, the political process remains daunting for gay people. Just one example speaks volumes. Although cities like Boston extended domestic partner health care benefits to unmarried partners of city workers for a time, when Boston's executive order was set aside in Connors v. Boston, 430 Mass. 31 (1999), the legislature refused to amend the municipal insurance laws (as it had for years) to allow cities and towns to provide the coverage they wished. This also now included families who had lost insurance coverage. See Sacha Pfeiffer, SJC Nullifies City Domestic Benefits Plans, Boston Globe, July 9, 1999, at A1 (noting effect of ruling on ordinances in Cambridge, Springfield and Northampton); Pamela H. Sacks, Groups Focus on Keeping Gay Marriages Off Ballot, Worcester Teleg. & Gaz., June 30, 2002 at A2 (noting that a domestic partner bill had stalled in the legislature for the last ten years).

Nor are gay people well represented in their own voices in the political sphere. Over the last thirty years, only a handful of members of the General Court

are or have been openly gay or lesbian at the time they were serving. No state-wide elected official in Massachusetts ever has been acknowledged to be gay or lesbian while serving. See New England in brief/ Massachusetts: Jacques eyes statewide office, Boston Globe, Jan. 31, 2002 at B2 (if elected, Jacques would be first openly gay person elected to state-wide office); Joanna Weiss, Senator's Quiet Coming Out Buoys Advocates for Gays, Boston Globe, June 2, 2000 at B1 (noting total of three openly gay legislators). Compare Frontiero, 401 U.S. at 686 n.17 (finding women vastly under-represented in elected offices).

d. The Conduct-Based Rulings in the Federal Cases Are Inapplicable in Massachusetts.

Given the power of the claim, it is not surprising that a number of lower federal courts have determined that sexual orientation classifications merit heightened review. They have all been reversed, however, on grounds not applicable here, i.e., that classifications based on sexual orientation are actually tied to "homosexual conduct," which constitutionally may be criminalized under federal law, citing Bowers v. Hardwick, 478 U.S. 186 (1986). See Equal. Found. of Greater Cincinnati v. Cincinnati,

860 F. Supp. 417, 434-40 (S.D. Ohio 1994), rev'd, 54 F.3d 261, 267 (1995) ("Those persons who fall within the orbit of legislation concerning sexual orientation are so affected ... because of their ... conduct which identifies them as homosexual, bisexual, or hetero-sexual.")(emphasis in original), cert. denied & jmt. vacated in light of Romer v. Evans, 518 U.S. 1001 (1996).[52] This reasoning is entirely inapplicable in Massachusetts, however, given that this Court has long made clear that private, consensual conduct between consenting adults cannot be constitutionally criminalized. Gay & Lesbian Advocates & Defenders v. Reilly, 436 Mass. 132 (2002), Comm. v. Balthazar, 366 Mass. 298, 302 (1974). Stated differently, even if Bowers remains good law under the 14th Amendment, and even if it has any relevance to an equal protection analysis (as opposed to due process), it provides no guidance to this Court construing articles I, VI, VII and X of the Declaration of Rights.

[52] See also Ben-Shalom v. Marsh, 703 F. Supp. 1372, 1378-80 (E.D. Wis. 1989), rev'd, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368-70 (N.D. Cal. 1987), rev'd, 895 F.2d 563, 573-74 (9th Cir.), reh'g denied, 909 F.2d 375 (9th Cir. 1990).

4. This Court Should Look to Other States Analyses Under Their State Constitutions.

This Court may also find persuasive the methodology and reasoning adopted by other states construing their state constitutional equality provisions. See, e.g., MIAA, 378 Mass. at 350 (looking to other states); Opinion of the Justices, 374 Mass at 838-39 (same).

In Tanner v. Oregon Health Sci. Univ., 157 Or. App. 502, 971 P.2d 435, 447 (1998), the Oregon Court of Appeals found sexual orientation to be a suspect class. Id. at 46-48. Its equal privileges and immunities clause provides that no law shall "grant[] to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Or. Const., art. I, § 20. This provision is similar in purpose and effect to articles I, VI, VII and X of the Declaration of Rights. Compare Holden, 11 Mass. at 405 (condemning notion "that any one citizen should enjoy privileges and advantages which are denied to all others under like cir-cumstances") with State v. Clark, 630 P.2d 810, 814 (1981) (clause reflects "egalitarian objections to favoritism and special privileges for a

few"). This Court, like the Oregon courts, have acknowledged an independent state constitutional jurisprudence while still looking to the federal tiered system. Compare Clark, 630 P.2d at 814 with, e.g., Murphy, 415 Mass. at 232 n.19; Marcoux, 375 Mass. at 65 n.4.[53]

In Tanner, the court held that the state constitution requires a state university to extend health and life insurance benefits to the partners of gay and lesbian employees. 971 P.2d at 448. Applying the two-part test for defining suspect classes established in Hewitt v. St. Acc. Ins. Fund Corp., 653 P. 2d 970, 977 (1982), it found that (A) sexual orientation is immutable in the sense that it is a characteristic which has historically been regarded as defining a distinct, socially-recognized group; and (B) that gay people "have been and continue to be the subject of adverse social and political stereotyping." 971 P.2d at 446-47.[54]

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[53] In Baker v. Vermont, Justice Dooley stated that the Tanner framework was consistent with Vermont law as well. Baker, 744 A.2d at 891-93 (Dooley, J. concurring).

[54] The fact that the defendants denied benefits to all unmarried people -- gay and non-gay -- was no excuse for ignoring the disparate impact on the group of gay

As to the first prong of the analysis, this Court, too, has implicitly acknowledged gay people to form a distinct group in the family-related cases of Adoption of Tammy, Adoption of Susan, Connors v. Boston, and E.N.O. v. L.M.M., as well as in the criminal case of Plunkett and the employment discrimination case of Muzzy. The legislature has done so explicitly. [55] As an appellate court in California recently ruled in a case condemning the use of peremptory challenges to remove gay jurors under the state constitution, gay people "certainly share the common perspective of having spent their lives in a sexual minority, either exposed to or fearful of persecution and discrim-ination." People v. Garcia, 77 Cal. App. 4th 1269, 1276 (2000).

As to the second prong, this Court, like other courts, should recognize that gay people "share a

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men and lesbians. Id. at 447-48. See also Namba v. McCourt, 185 Or. 579, 591-92, 612-613, 204 P.2d 569 (Or. 1949) (facially neutral law which in fact penalized aliens).

[55] See, e.g., G.L. c. 151B, § 4 (forbidding sexual orientation discrimination in employment, housing, credit and services); G.L. c. 272, § 98 (same re public accommodations); G.L. c. 76, § 5 (same re public education); G.L. c. 272, § 39 (same re hate crimes).

history of persecution comparable to that of blacks and women" and that "[o]utside of racial and religious minorities, ... no group ... has suffered such pernicious and sustained hostility." Garcia, 77 Cal. App. 4th at 1276, 1279 (internal citation and quotation omitted).[56]

The reasoning of these other courts should be persuasive to this Court in finding classifications based on sexual orientation subject to strict scrutiny under the Massachusetts Constitution.

5. The Sexual Orientation Classification Fails Strict Scrutiny.

Under the persuasive criteria established by the Supreme Court as well as by other state courts interpreting their constitutions, this Court should find that classifications based on sexual orientation are legally invidious. Article I must be construed to require the state to justify its exclusion of the

[56] At least one other California appellate court now refers to sexual orientation as a suspect class. Children's Hosp. & Med. Ctr. V. Bonta, 97 Cal. App. 4th 740, 769 (Ct. App., 1st Dist 2002) (stating sexual orientation is a suspect class). Compare Gay Law Students Assoc. v. Pac. Tel. & Tel. Co., 24 Cal. 3d 458, 469, 595 P.2d 592, 599 (1979) (discrimination against gays violates equal protection provisions of state constitution).

plaintiffs from marriage under a strict scrutiny analysis. See also Part IV A (2)(b).

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

Assuming, arguendo, that this Court rejects all of plaintiffs' above claims, it should still order relief on the grounds that the exclusion of plaintiffs from marriage lacks a rational basis. The presumption of a statute's constitutionality is hardly tantamount to a judicial rubber stamp. All legal classifications must, at a bare minimum, be "rationally related to furtherance of a legitimate state interest." Dickerson v. Att'y Gen., 396 Mass. 740, 743 (1986); Murphy v. Comm'r of Dept. of Indus. Accidents, 415 Mass. 218, 226-27 (1993).[57] As the Supreme Court has explained,

> By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose

[57] In the Trial Court, the defendants recharacterized this conventional analysis by suggesting that plaintiffs shoulder a burden of demonstrating there are no conceivable grounds supporting the application of the marriage laws. Their support was dicta from a case making a facial challenge to a statute, Animal Legal Def. Fund, Inc. v. Fisheries & Wildlife Bd., 416 Mass. 635, 642 (1993), but it acknowledged the general applicability of the Dickerson test. Id. at 641.

> of disadvantaging the group burdened by the law.

Romer, 517 U.S. at 633, id. at 635 (no rational basis for state constitutional amendment which made gay people unequal to everyone else). The exclusion of the plaintiffs from marriage fails this "conventional and venerable" test. Id. at 635.

Both prongs of [1] legitimate state interest and [2] rational relation must be satisfied. The court must "look carefully at the purpose to be served" and "the degree of harm to the affected class." English v. New England Med. Ctr., 405 Mass. 423, 428 (1989). To survive rational basis review, the Court must find that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to members of the disadvantaged class." Id. at 429.

This Court has struck laws on rational basis grounds for both reasons.[58] Some statutes were struck

[58] See, e.g., Coffee-Rich, 348 Mass. at 423-25 (law forbidding product's sale due to fears of mislabeling and consumer confusion was irrational, and concern about repackaging was "more fanciful than real"); Hall-Omar Baking Co. v. Com'r of Labor and Indus., 344 Mass. 695, 707 (1962) (arbitrary to treat sellers of different products differently), and id. at 705 (statute "inappropriate and ineffective" in addressing concerns about product uniformity); Bogni v. Perotti,

as arbitrary, even in the economic context where judicial review is "particularly" limited.[59] Town of Holbrook v. Town of Randolph, 374 Mass. 437, 442 (1978). In addition, when a connection between a claimed state interest and the classification is more imagined than real, Coffee-Rich, 348 Mass. at 424-25, this Court has not hesitated to invalidate the statute on rational basis grounds.

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224 Mass. 152, 159 (1916) (arbitrary to make it more difficult for labor organizations to secure injunctions than for others); Murphy, 415 Mass. at 230 (reducing costs and deterring frivolous appeals too attenuated from classification burdening only represented parties with a filing fee); Mansfield Beauty Acad. v. Bd. of Reg., 326 Mass. 624, 626-27 (1951) (no rational relationship between the public health and statute barring charges for materials used in connection with customers serviced at hairdressing schools); Sperry & Hutchinson Co. v. Dir. of Div. on Necessaries of Life, 307 Mass. 408, 418 (1940) (law forbidding gas stations to issue trading stamps has no real and substantial relation to state goal of preventing fraud); Opinion of the Justices, 303 Mass. at 651-53 (bills disqualifying married women from employment bear no rational connection to laws regulating marital relations or the health of mothers).

[59] This case does not implicate the judicial reluctance to second-guess the legislature in economic, tax and cash benefit programs. Those programs depend on myriad and blunt classifications to operate efficiently. See, e.g., FCC v. Beach Communications, 508 U.S. 307, 315 (1993) (rejecting challenge to distinction between two types of cable television facilities; requiring challenger to negate every conceivable reason for the distinction).

For the reasons set forth below, none of the defendants' claimed justifications for excluding the plaintiffs from marriage survives rational basis review.

1. "Procreation" Is Not A Legitimate State Interest As Applied Here and Has No Rational Relationship to the Exclusion of Plaintiffs From Marriage.

The defendants assert that procreation is the main purpose of marriage, and that all male-female couples are distinguished from same-sex couples with respect to the former's "theoretical" capacity to procreate. This resort to "procreation" is not surprising, given that it is the only basis upon which the state can even try to distinguish committed same-sex couples from committed different-sex couples (although, of course, it does not even purport to address the individual discrimination at issue here). As the South African Constitutional Court ruled recently,

> [Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms including affection, friendship, eros and charity ... They are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support

> and assistance in running the common household ... Finally, ... they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.

National Coalition for Gay & Lesbian Equality v. Minister of Home Affairs (1999) (interpreting immigration law to extend spousal protections to same-sex couples).[60]

a. Procreation Is Not A Concern of the Marriage Laws.

Rational basis analysis does not occur in a vacuum. A purported state interest in "procreation" must be examined in light of the fact that the choice of whether to beget or bear children is one for the individual -- whether married or single -- and not the state.[61] Consistent with this premise, the Commonwealth has never required an individual or those individuals in a couple to procreate in order to

[60] The opinion can be found at http://www.concourt.cog.za/judgments/1999/natcoal.pdf (Dec. 2, 1999). This international case is also discussed in the International Brief.

[61] The Supreme Court has insisted that married couples need not procreate, Griswold v. Connecticut, 381 U.S. 479 (1965), and that consummation through sexual intercourse is not essential to the freedom to marry. Turner v. Safley, 482 U.S. 78 (1987).

marry. General Laws c. 207 is utterly devoid of any procreation requirement. The Commonwealth has always licensed marriages between elderly, sterile and even impotent parties.

The other marriage related laws: annulment law -- concerning what makes a marriage invalid at the request of one party; and fault-based divorce law -- concerning when the legislature believes a marriage has failed -- show that the ability (or actuality) of biological procreation is not a concern of the marriage laws. The inability to beget or bear children biologically (i.e. sterility) has never been and is not now a ground for invalidating or ending a marriage in Massachusetts (absent fraud).[62] See generally G.L. c. 207, § 14 (annulment); G.L. c. 208, § 1 (fault-based divorce); Charles P. Kindregan, Jr. & Monroe L. Inker, 1 Mass. Prac. Family Law & Practice §

[62] Significantly, divorce and annulment have been available for reasons affecting the companionship of the couple and their commitment to one another. See, e.g., G.L. c. 208, § 1 (listing adultery, impotency, utter desertion, gross and confirmed habits of intoxication and cruel and abusive treatment as grounds for divorce). See also Historians' Brief discussing evolution of marriage to companionate model and Boston Bar Ass'n Brief which shows the law reflects assumption of companionate marriage.

21.11 (2d ed. 1996) (impotence means an inability to copulate; it does not mean sterility).

Nor is consummation a required element for a valid marriage. Franklin v. Franklin, 154 Mass. 515, 516 (1891). The same is true as to ongoing sexual relations. Reiersen v. Comm'r of Rev., 26 Mass. App. Ct. 124, 126 (1988) (marriage valid despite spouse's living on different continents with obvious cessation of sexual intimacy). Historically, a failure of sexual intimacy was a ground for a fault-based divorce, but only at the request of the dissatisfied party, and was (and is) no basis for annulling a marriage. Martin v. Otis, 233 Mass. 491, 495 (1919); S. v. S., 192 Mass. 194, 195(1906). In other words, such marriages are voidable at the instance of the aggrieved party, but are not "void ab initio" as are consanguineous and multiple marriages. G.L. c. 207, § 8.

In sum, the marriage laws show that the defendants' effort to define away the constitutional issue in this case by equating marriage with

procreation, or the ability to procreate, is unavailing and pretextual.[63]

b. The Defendants' Emphasis on Biological Parenting Is Misplaced.

One final troubling implication of the defendants' argument is the assumed superiority of biological reproduction over other methods of creating a family with children such as reproductive technology and adoption.[64] With the fog now lifting, it is clear

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[63] The only people upon whom the defendants seek to impose a "procreation" requirement are the plaintiffs. But as a trial judge observed in a recent Canadian marriage case, both same-sex and heterosexual couples bring children into their lives in all of the same ways, except that some heterosexuals also conceive children through heterosexual intercourse. The court found this was not "a rational basis for distinguishing between all heterosexual and same-sex couples" with respect to marriage. Halpern v. Canada, http://www.sgmlaw.com/userfiles/filesevent/file_1413620_halpern.pdf (July 12, 2002). (Superior Ct. of Justice, Ontario) (Opinion of LaForme, J.).

Singling out only gay men and lesbians for a procreation requirement in marriage is at least as arbitrary as other actions previously condemned by this Court, such as: excluding all married women from public employment, Opinion of the Justices, 303 Mass. 631, 646-648 (1939); or barring girls and boys from each other's sports teams, e.g. MIAA, 378 Mass. 342, 356-57 (1979); or requiring only claimants represented by counsel to pay filing fees but not pro se claimants, Murphy, 415 Mass. at 232; or singling out "In-dependents" and denying them expression as such on the ballot. Bachrach, 382 Mass. at 276.

[64] Moreover, to the extent the state's argument is really one about advancing the begetting of children through a particular kind of physical union, it is

that the defendants are simply asserting a naked preference for certain kinds of families the state esteems over those others it would relegate to second class citizenship. The Legislature does not endorse the preference suggested by the defendants. To the contrary, it has mandated insurance coverage for couples (and single persons) with fertility issues with the result that both, neither or only one may be genetically related to the child. G.L. c. 175, § 47H; c. 176A, § 8K; c. 176G, § 4. It also allows a wide range of individuals and couples to adopt, including same-sex couples. See Adoption of Tammy, 416 Mass. 205 (1993); Adoption of Susan, 416 Mass. 1003 (1993). It is simply untenable to suggest that the Commonwealth prefers children to come into the world, or into a family, in any particular way.

c. Excluding the Plaintiffs From Marriage Fails to Further a State Interest in Procreation.

Even assuming, arguendo, that the defendants advance a state interest in procreation through the

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well known that "reproductive advances have eliminated the necessity of having sexual intercourse in order to procreate." Culliton v. Beth Israel Deaconness Med. Ctr., 435 Mass. 285, 290 (2001). See Woodward v. Comm'r of Soc. Sec., 435 Mass. 536, 546 (2002) (noting reproductive technologies long in use).

marriage laws, there is no relationship between that interest and excluding the plaintiffs from marriage. No basis exists for the necessary assumption that marriage is a zero-sum game such that allowing same-sex couples to marry will decrease the number of marriages involving procreation. The defendants cannot logically explain how the exclusion of the plaintiffs from marriage advances procreation or results in more marriages involving procreation. The connection between the claimed interest in procreation and the defendants' exclusion of the plaintiffs from marriage is not merely "too attenuated," Murphy, 415 Mass. at 230, but entirely absent.

In the same vein, while the Trial Court characterized the procreative activity of same-sex couples as "more cumbersome" (R.A. 133), it is exactly as cumbersome as the procreative activity of many married couples who rely upon reproductive technology or adoption. If committed couples are more likely to procreate, as the Trial Court seems to assume, then allowing the plaintiffs to formalize a legal commitment would advance the interest in procreation but forbidding marriage undermines it.

2. The Defendants' Discrimination Undermines Their Interest in Promoting Childrearing.

The defendants seek to justify their discrimination by suggesting the exclusion promotes their interest in childrearing by married different-sex parents who are biologically related to their children. Def. Mem. at 63. There are several fatal flaws in this reasoning.

a. The Plaintiffs Exclusion from Marriage Does Not Promote Better Childrearing In Any Other Households.

The exclusion of the plaintiffs from marriage is entirely untethered to the defendants' asserted goals of promoting positive childrearing environments. They simply cannot suggest (and have not suggested) that allowing same-sex couples to marry would undermine how children are raised in other families. No harm will befall child A raised by biological and heterosexual parents C and D if their next door neighbors, Maureen Brodoff and Ellen Wade, are able to marry and provide themselves and their daughter with the legal security of marriage. The argument fails at the outset.

Moreover, even if the defendants may have an interest in promoting two parent families, or families in which a child's parents are married to each other,

defendants cannot rely on such an interest in this case because their discrimination runs directly counter to that alleged interest. Preventing Hillary and Julie from marrying fails to advance the child rearing environment in any other household, let alone the Goodridge household which includes Hillary's and Julie's seven-year old daughter. As the Vermont Supreme Court observed, same-sex and different-sex couples are "similarly situated" with respect to marriage laws' purposes of legitimizing children and providing for their security. Baker, 744 A.2d at 882. "If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks the State argues the marriage laws are designed to secure against." Id. (emphasis in original).

b. The Legislature Has Encouraged Parenting By Gay and Lesbian Couples.

To the extent the defendants' argument is that it wishes to promote childrearing by a biologically related mother and father, this interest is contrary to legislative policy and law. As discussed above, the legislature has encouraged the birth of children by interfering with the insurance market to ensure

that reproductive technology is available to infertile individuals regardless of sexual orientation or marital status. Adoption is available to couples without regard to sexual orientation or marital status. Adoption of Tammy, 416 Mass. at 210-11 ("person" in section 1 includes joint petitioners); Adoption of Susan, 416 Mass. at 1003 (same).

The Legislature has ratified these adoption holdings. In 1999, it amended G.L. c. 210, § 1 by expanding the classes of people who could adopt, and left intact those decisions which were premised on the definition of "person" in c. 210, § 1. See 1999 Mass. Legis. Serv., c. 3, § 15 (West). The Legislature is presumed to be aware of the Court's prior construction of terms, and the Court infers from subsequent legislative activity that it intends those terms to remain so defined. See Comm. v. Smith, 431 Mass. 417, 424 (2000) (stating rule and citing cases). If the Legislature were so convinced that only heterosexually married parents who were biologically related to their children could provide a positive setting for raising children, it would have imposed restrictions on

adoption and access to reproductive technology -- not mandated broad availability.[65]

The Legislature's encouragement of lesbian and gay families is well-founded. The scientific consensus of medical and child welfare organizations like the American Academy of Pediatrics, the American Psychological Association, the American Academy of Child & Adolescent Psychiatry, and the National Association of Social Workers is that there is no systematic difference between gay and lesbian parents and other parents, or any detriment to children raised by gay and lesbian parents.[66] In light of these policy choices, the defendants' claim that they must exclude the plaintiffs from marriage to favor different-sex over same-sex parents is irrational. Accord Baker, 744 A.2d at 885.

c. Child Welfare Turns on the Child's Best Interests and Not On Biology.

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[65] A long line of cases confirms that sexual orientation by itself is not a basis for denying custody or visitation to a parent. See, e.g., Bezio v. Patenaude, 381 Mass. 563 (1980); Doe v. Doe, 16 Mass. App. Ct. 499, 503 (1983).

[66] Statements of these organizations and a thorough review of the research on gay and lesbian couples and their children are addressed in the Brief of Massachusetts Psychological Ass'n.

The relationship between the defendants' discrimination and their claimed interest in parenting by biological parenting is non-existent. The paternity statute, the divorce statute, and equitable principles address the relationship between procreation and child rearing and demonstrate that the focus of child welfare litigation is the best interests of the child.[67] So intense is the state's concern with the welfare of children that it will allow a putative father to intrude on an intact marriage and file a paternity claim where the putative father can demonstrate a significant parent-child relationship. C.C. v. A.B., 406 Mass. 679, 689(1990) (relationship is "the controlling factor"). On the other side of the biological coin, concern about a child's welfare may foreclose a man from challenging a longstanding paternity judgment even where he can conclusively prove he is not the genetic parent.

[67] See Marilyn Smith-Ray & Hon. Paula M. Carey, Paternity Challenges to Children Born During A Marriage, in Paternity And The Law Of Parentage In Massachusetts (MCLE Pauline Quirion, ed., 2002). The law imposes parental responsibilities for children regardless of the circumstances of the child's birth. See, e.g., G.L. c. 209C, § 3 (duty of support for non-marital children); Connolly v. Michell, Slip Op., Nos. 99-E-0183, -0184 (Midd. Prob. & Fam. Ct., Apr. 2002) (imposing duty of support on lesbian de facto parent).

Paternity of Cheryl, 434 Mass. 23, 34 (2001). The equitable doctrines of parens patriae and de facto parenthood also protect parent-child relationships founded in experience rather than biology. E.g. E.N.O., 429 Mass. at 827-832 (allowing contact between child and his de facto mother over objections of biological mother).

In sum, what the legislature considers optimal for children is advancing their best interests, not dictating their family forms. The disjuncture between advancing children's interests and excluding their parents from marriage is patently irrational.

3. Excluding the Plaintiffs From Marriage to Conserve Resources Is Arbitrary.

It is stunning to think that the defendants can simply pick a class of individuals and exclude them from access to a legal institution available to nearly all adults because it might "conserve resources." Yet, in arguing that marriage and its "economic benefits" should be limited to opposite-sex couples, the defendants have done precisely that. If the exclusion is permitted to stand, other characteristics which may not be accorded heightened judicial review, such as age or wealth, could also be the basis for new

exclusions from marriage, each justified by reference to the public fisc.

The proposed interest is so overbroad as to be irrational on its face. The defendants invoke the public fisc to deny all that is encompassed by civil marriage: those intangible benefits which arise from the status of being married (and cost the state nothing); those that acknowledge the couple's emotional commitment (the vast majority of which do not involve state expenditures); and those that facilitate the couple's economic interdependence (most of which do not involve the state).

Finally, assuming arguendo that the defendants have an interest in conserving resources, that interest is implicated in this case no more than is the worthwhile goal of ending world hunger. Married couples generally have lower poverty rates than unmarried persons because the resources of the spouse redound to the benefit of the family unit and there is less need to draw upon the resources of the state for basic support.[68] There is no basis for concluding that

[68] Census data from 1990 shows that far fewer married couples lived in poverty than did unmarried families. Mass. State Data Center, MISER, Univ. of Mass.,

married same-sex couples would not also be lifted out of poverty by marriage, just as are married different-sex couples.[69] Murphy, 415 Mass. at 226-27 n.16 (administrative cost rationale irrational); Romer, 517 U.S. at 635 ("conserving resources" fails to justify anti-gay discrimination).

4. The Profound Harm of Being Denied Marriage Is Another Reason Why the Defendants' Interests Fail Rational Basis Review.

Although subsections 1 through 3 above demonstrate that the defendants' asserted interests fail rational basis review, the final element of the analysis, i.e., examining the harm to the members of the disadvantaged class, English, 405 Mass. at 429, makes the case overwhelmingly. This inquiry allows the Court to assess "constitutional vulnerability" in light of "the competing values involved." Id., citing Marcoux, 375 Mass. at 65 n.4. Examining the real life impact of laws brings a measure of reality to rational

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Poverty Status in 1989 by Type and by Presence of Children, Rpt. 92-05.

[69] 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).

basis review, and ensures that it is far from "toothless." Murphy, 415 Mass. at 233.

It takes no citation to acknowledge that the opportunity to marry one's soulmate, one's closest confidante and most steadfast ally, easily ranks as one of the most joyful experiences in many people's lives. When a couple also decides to have children, marriage is a way of cementing their family relationship in fact and in law.

The plaintiffs cherish their families and share the same aspirations for their families as do their married neighbors. The harm can begin to be measured thus: if the defendants took away the marriage certificates of all married people in Boston, so that those persons could no longer call themselves married, and could no longer rely on the elaborate architecture of laws protecting married families, then they would be in a position approximating that of the plaintiffs (although no stigma attaches to a denial based on geographic residence). Where marriage is central to people's happiness and security, and where the defendants' stated interests are not rationally furthered as they claim, no legitimate public purpose

transcends the harm caused by excluding the plaintiffs from marriage. English, 405 Mass. at 429.

V. THIS COURT SHOULD DECLARE THAT THE PLAINTIFFS ARE ENTITLED TO MARRIAGE LICENSES

As a matter of remedy, this Court should declare that the plaintiffs are entitled to marriage licenses. In Comm. v. Chou, 433 Mass. 229 (2001), this Court reiterated the longstanding rules. "[I]f a statute is unconstitutional because of underinclusion, a court may either declare the entire statute void, or extend its coverage to those formerly excluded." Id. at 238. Although the defendant's sex discrimination challenge to the statute proscribing accosting or annoying persons of the opposite sex had not been properly preserved, the Court observed that if it had been, it would have simply applied the gender-specific language in a gender-neutral fashion so that a person would commit an offense by annoying either a person of either sex. Id.[70]

[70] Since the plaintiffs do not challenge the underlying laws concerning eligibility to marry in G.L. c. 207, but only the defendants' application of those laws, this is not a case that turns on invalidation or severance of a particular provision of a statute or of an entire statutory scheme. Compare ABCD, Inc. v. Comm'r of Pub. Welf., 378 Mass. 327, 338-39 (1979) (refusing to construe challenged welfare provisions as requested by plaintiffs where such

This case, like many other cases decided by this Court, can be resolved by extension principles. This Court has long remedied constitutional violations in accordance with this general rule. In Moe v. Sec'y of Admin. & Fin., the plaintiffs challenged a budget rider that limited taxpayer funding for abortions. Finding for the plaintiffs, this Court declared the plaintiff class of Medicaid eligible women to be entitled to medically necessary abortion services (and also enjoined enforcement of the offending provision). 382 Mass. 629, 660 (1981). See also In re Jadd, 391 Mass. 227, 237 (1984) (where bar admission rule discriminated against non-resident attorneys, Board was ordered to "consider Mr. Jadd's application to the bar without reference to his place of residence."); Lavelle v. Mass. Comm'n Against Discrimination, 426 Mass. 332, 337 (1997) (ruling that a respondent in a sex discrimination suit must have the same right to a jury trial as a plaintiff).[71]

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action would require "major surgery" to the statutory scheme and the "sheerest speculation" about legislative intent).

[71] A fuller discussion of these issues is presented in the Amici Curiae Brief of Professors of Remedy and Constitutional Law and Litigation.

Conclusion

For all of the above reasons, the plaintiffs submit that the judgment for the defendants should be reversed, and that a judgment should enter declaring that the exclusion of the plaintiffs from access to marriage licenses violates Massachusetts law, and that marriage licenses should issue to the plaintiffs.

THE PLAINTIFFS

Hillary and Julie Goodridge,
David Wilson and Robert Compton,
Michael Horgan and Edward Balmelli,
Maureen Brodoff and Ellen Wade,
Gary Chalmers and Richard Linnell,
Heidi Norton and Gina Smith,
Gloria Bailey, and Linda Davies

By their attorneys,

GAY & LESBIAN ADVOCATES & DEFENDERS

_____

Mary L. Bonauto, BBO #549967
Jennifer L. Levi, BBO #562298
Gary D. Buseck, BBO #067540
Bennett H. Klein, BBO #550702
Karen L. Loewy, BBO #647447
Gay & Lesbian Advocates & Defenders
294 Washington Street, Suite 301
Boston, MA 02108-4608
617.426.1350

Date: _____