

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss  
County of Suffolk No. 01-1647-A

Superior Court

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HILLARY GOODRIDGE, *et al.*,

Plaintiffs,

vs.

DEPARTMENT OF PUBLIC HEALTH,  
*et al.*,

Defendants.

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**BRIEF OF *AMICUS CURIAE*  
MARRIAGE LAW PROJECT**

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IN OPPOSITION TO PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

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## **SUMMARY OF ARGUMENT**

Plaintiffs' Memorandum in Support of Motion for Summary Judgment has described an interesting and novel view of the Massachusetts Constitution which they believe supports the redefinition of marriage in Massachusetts. Massachusetts' marriage laws, however, are consistent with the Massachusetts Constitution and Declaration of Rights for several reasons.

First, when interpreted in light of the conditions in which it was created, the Massachusetts Declaration of Rights never contemplates a constitutional mandate to redefine marriage in exact contrast with the meaning of marriage clearly accepted throughout the existence of the Commonwealth. The Declaration of Rights and its ratifiers intended to create a government for the common good in which all individuals were equally subject to the laws, and individuals were entitled to liberty from intrusion, not a mandate for modifying social institutions at will.

Second, the recognition of a fundamental right to marry does not require redefinition of the legal status of marriage. Rather, the fundamental right to marry has only recognized marriage as a male-female union, the quality which Plaintiffs now seek to remove from the institution of marriage.

Lastly, it is inappropriate for the judiciary to accept Plaintiffs' invitation to redefine the preexisting institution of marriage. Marriage is not subject to arbitrary redefinition by the courts, as it is a preexisting institution recognized and protected by this Commonwealth for the common good. Additionally, redefining marriage through judicial mandate would violate the principles of self-government and separation of powers upon which the Massachusetts Constitution is based.

## **ARGUMENT**

## **I. THE DECLARATION OF RIGHTS MUST BE INTERPRETED IN LIGHT OF THE CONDITIONS UNDER WHICH IT WAS FRAMED**

Plaintiffs' entire case rests heavily upon a novel view of the Massachusetts Constitution based on the proposition that the Declaration of Rights must be newly interpreted so as to reflect "evolving trends of respect for gay and lesbian citizens and families in Massachusetts." Plaintiffs' Memorandum at 28. More specifically, Plaintiffs assert that the Massachusetts Constitution protects a fundamental right "to marry the partner of one's choice" and that any restrictions on that right are subject to strict judicial scrutiny. *Id.* at 23, 24. This view conflicts with the jurisprudence of the Supreme Judicial Court and would lead to a result which would be entirely unreasonable if applied consistently throughout Massachusetts law. At the same time, Plaintiffs suggest that the legal recognition of same-sex marriage is a natural and unalienable right which the drafters of the Massachusetts Constitution intended to preserve. This simply does not reflect the reality of Massachusetts constitutional law.

Massachusetts case law has firmly established that the entire Constitution, including the Declaration of Rights, must be construed with deference to the purposes and expectations of those who authored it. In this way, the Constitution provides a consistent standard by which to determine and evaluate governmental action. The SJC has explicitly directed:

The Constitution of Massachusetts . . . is to 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.

*Cohen v. Attorney Gen.*, 357 Mass. 564, 570-71 (1970), quoting *Trefey v. Putnam*, 227 Mass. 522, 523-24 (1917).

A faithful reading of the Massachusetts Constitution will reveal that an unfettered “right to marry the partner of one’s choice” is not among the ends which the Constitution was designed to accomplish, nor was traditional marriage among the evils it was hoped to remedy. Absent the finding of such a right, Plaintiffs’ claim must fail and the State’s marriage policy should be presumed constitutional under a rational basis analysis. *Harlfinger v. Martin*, 435 Mass. 38, 48 (2001)

***A. The Massachusetts Declaration of Rights was written to establish a government for the common good, not to mandate redefinition of social institutions.***

The Massachusetts Declaration of Rights was not intended as an instrument to require continuous revision of social policy. *Town of Brookline v. Sec. of Commw.*, 417 Mass. 406 (1994)(ruling that Art. 7 of the Declaration of Rights speaks to the right of the people to institute and change government and not to challenges to statutory classifications). Rather it was intended to establish Massachusetts as a free republic where the people would be “governed by the fixed laws of their own making.” Resolution of the Massachusetts Constitutional Convention, Sept. 3, 1779, *reprinted in 4 Works of John Adams* 215 (Charles F. Adams ed., 1851)

The Massachusetts Constitution refers to itself as “a social compact,” and repeatedly states that the purpose of government is to seek the “common good” of the people of the Commonwealth. This constitutional tradition placed great emphasis on direct, popular control over the legislature and government, but tempered individualism in light of the needs of the greater community. Ronald M. Peters, *The Massachusetts Constitution of 1780: A Social Compact*, 193-94 (1978).<sup>1</sup> The

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<sup>1</sup> See e.g., “Statement of Berkshire County Representatives” (1778), *reprinted in The Popular Sources of Political Authority* 374–75 (Oscar & Mary Handlin, eds., 1966) (“The larger number is of more worth than the lesser, and the common happiness is to be preferred to that of Individuals.”).

Constitution, with only minimal limitations, protected the right of the citizens of the Commonwealth to make laws and set policies that affirmed this common good.

Plaintiffs suggest, again without authority, that the title of the Constitution, “A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts,” is a focus on individual rights. Plaintiffs’ Memorandum at 12. From a historical context, an entirely different interpretation is at least equally plausible. In 1779, the Commonwealth of Massachusetts was still embroiled in the War for Independence. Much like the national Declaration of Independence signed three years earlier, the Massachusetts Constitution should be seen as a declaration of the liberties belonging jointly to the inhabitants of the Commonwealth (*e.g.*, elected representative government), rather than as a declaration of primarily individual rights and liberties. Moreover, the Massachusetts Constitution itself explicitly declares preservation of the common good to be the purpose of government:

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: 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. 7.

This philosophy, rooted not in individual rights but in an understanding of the common good, provides a consistent framework from which the citizens of the Commonwealth are able to govern themselves in an ever-changing society.

***B. Provisions of liberty and equality contained in the Declaration of Rights have never contemplated a right to marry “the person of one’s choice.”***

In contrast, Plaintiffs’ view of the Constitution ignores the crucial need to protect the common good and instead asserts that the Declaration of Rights “demonstrates a passionate commitment to respect for individual choice,” and posits that this protection of individual choice would extend to requiring the redefinition of marriage so that an individual could marry anyone of one’s choosing regardless of the neutral marriage laws of the Commonwealth. Plaintiffs’ Memorandum at 9. While individual choice is important in a government by the people for the common good, respect for individual choice does not mean a constitutional mandate to adjust neutral laws to provide government recognition to private choices. Rather, the Declaration of Rights was to establish a “government of laws, and not of men.” Mass. Const. pt. 1, art. 30, cl. 4.

Plaintiffs claim that the Declaration of Rights requires this court to redefine marriage to include same sex couples, or as they put it, to provide the right to marry any person of “one’s choosing.” They claim that this reading of the Constitution is inherent in the “social contract theory” reflected in the Constitution and in the Constitutional provisions protecting the liberty of the people of Massachusetts. This claim does not accurately reflect the nature of Massachusetts’ Declaration of Rights. A more faithful interpretation requires an understanding of liberty, equality and natural rights as understood by the Constitution’s framers.

The understanding of civil liberty at the time the Declaration of Rights was framed was that “civil liberty is natural liberty restricted by established laws as is expedient or necessary for the good of the community.” Donald S. Lutz, *The Origins of American Constitutionalism* 73 (1988). As understood by John Adams and his contemporaries, civil and political liberty did not allow

individuals to demand privileges, rights or government recognition from the Commonwealth, rather liberty meant “*Self-direction or Self-government.*” Richard Price, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America*, 2-3 (1776), *quoted in* Willi Paul Adams, *The First American Constitutions* 156 (1980) (John Adams, drafter of the Declaration of Rights, accepted Price’s definition of liberty as his own. *See 4 Works of John Adams* 401 (Charles F. Adams ed., 1851)). Liberty meant the power one has over their own actions, “the power [one] has of providing for his own advantage and happiness.” Joseph Priestly, *First Principles of Government* 12–14 (1771), *reprinted in* Willi Paul Adams, *supra*, at 155. Liberty was not a power to demand that society as a whole or the Commonwealth recognize or privilege one’s individual choices. Nonetheless, even while claiming “spheres of individual choice and behavior over which the sovereign majority has relinquished control,” Plaintiffs’ Memorandum at 13, Plaintiffs seek government intervention, recognition and endorsement. Plaintiffs seek not liberty, but societal validation of private conduct.

Rather it was as the Declaration of Rights declares, to protect individuals’ natural right to “enjoy[ ] and defend[ ] their Lives and Liberties,” Mass. Const., pt. 1, art. 1, and to recognize “spheres of individual choice and behavior over which the sovereign majority has relinquished control,” Plaintiffs’ Memorandum at 13. It is curious, then, that Plaintiffs’ cite the Declaration of Rights’ liberty clauses to demand government recognition and control over their personal sexual and familial choices.

Plaintiffs’ also rely heavily on an understanding of equality that is not the value of equality embraced in the Massachusetts Constitution. Plaintiffs’ Memorandum at 10. The Massachusetts

Declaration of Rights establishes an equality among people under the law and in accordance with their natural rights. It was America's direct answer to Britain and Europe's aristocracy and inheritance of power, which elevated the privileged above the laws.

John Adams further expressed his concern that the principle of equality would be misconstrued as a means of deconstructing social institutions, "The equality of nature is moral and political only, and means that all men are independent . . . society has a right to establish any other inequalities it may judge necessary for its good," (Letter from John Adams to Abigail Adams of Feb. 4, 1794 *reprinted in 1 Works of John Adams* 462 (Charles F. Adams ed., 1851).

Americans at the time of the Declaration of Rights' framing placed great emphasis on the equal public rights of the collective people under the law against the privileged interest of their rulers. See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1972). Equality was an equal subjection to the rule of law. According to John Adams, "[A]ll are subject by nature to *equal laws* of morality, and in society have a right to *equal laws* for their government, yet no two men are perfectly equal in person, property, understanding, activity, and virtue, or never can be made so by any power less than that which created them." John Adams, *Discourses: A Series of Papers on Political History, reprinted in 6 Works of John Adams* 285–86 (Charles F. Adams ed., 1851).

Plaintiffs cite to these Constitutional provisions regarding liberty and equality in the Massachusetts Declaration of Rights, but do not explain why they should be read as mandating a change in the substantive nature of marriage and the marriage laws of the Commonwealth. In fact, the understanding of marriage reflected in Massachusetts law is consistent with these principles. The

law applies equally to all citizens of the Commonwealth, regardless of “sex, race, color, creed or national origin.” Mass. Const., pt. 1, art. 1. Any individual may marry, subject to the neutral laws of the Commonwealth on marriage, which apply to every person. In addition, the marriage law is entirely consistent with the principles of individual liberty, and imposes no limitation on the ability of any individual to enter into any personal relationship, contract, or union of their choice, with whomever they may choose.

After reviewing numerous writings of the drafters, one cannot legitimately suggest that these principles today justify, let alone mandate, a radical redefinition of marriage. While Plaintiffs are entitled to adopt any understanding of liberty and equality they wish, when ascertaining the intentions of those who drafted the Declaration of Rights, it is imperative that these terms are interpreted as they were used.

***C. The conditions under which the Declaration of Rights was framed clearly indicate that Massachusetts’ marriage law withstands constitutional scrutiny.***

When the Declaration of Rights was drafted, marriage was universally understood to be the union of a man and a woman.<sup>2</sup> This understanding of marriage has withstood constitutional scrutiny for the last two hundred and twenty-one years. In 1810, the Supreme Judicial Court expressed the definition of marriage as “an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife.” *Inhabitants of the Town of Milford v. Inhabitants*

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<sup>2</sup> Only within the past year has any nation adopted a differing definition of marriage. Notably, even this change in the legal definition of marriage came about as the result of legislative action and not judicial intervention. Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same-sex (Act on the Opening Up of Marriage), Staatsblad 2001, nr. 9.

*of the Town of Worcester*, 7 Mass. 48, 52 (1810). Since the earliest days of constitutional jurisprudence, the courts of this Commonwealth have understood marriage to be a male-female union. Despite Plaintiffs' argument to the contrary, this understanding of marriage remains unchanged today. See 1989 Mass. Acts. ch. 516, § 19, reprinted in Notes to Mass. Gen. Laws Ann. ch. 151B, §§ 1, 3 (2001) ("Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage,' so called."); see also Plaintiffs' Memorandum at 4-7.

Even more strikingly, the act of sodomy, inherent to the same-sex relationships of which Plaintiffs seek government recognition as "marriages," was illegal in the Commonwealth from its founding until 1974. *See, e.g.*, Acts and Laws Passed by the General Court of Massachusetts, ch. 14, Act of March 3, 1785; Mass. Gen. Stat. ch. 165 § 18 (1860); Mass. Gen. Laws Ann., ch. 272, § 35 (2001); *Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974). Even since 1974, section 35 remains a criminal statute of the Commonwealth, a fact this Court has noted as at least a secondary indicator of legislative sentiment. *Attorney Gen. v. Desilets*, 418 Mass. 316, 329 (1994).

Plaintiffs do not suggest that a right to same-sex "marriage" has always existed under the Massachusetts constitution. Though Plaintiffs' rely on John Adams and other patriots of his day as authority for their general discussion of liberty and equality, it is unimaginable to think that these authors of the Massachusetts constitution would have counted a judicial redefinition of marriage as among the "ends which [the constitution] was designed to accomplish," or "the benefits which it was expected to confer." *Cohen*, 357 Mass. at 571. Plaintiff's argument thus relies upon an inappropriate reinterpretation of the Massachusetts Constitution and Declaration of Rights.

***D. Evolving legal trends are not a proper basis for new constitutional interpretation***

To further fill out their novel description of Massachusetts constitutional law, Plaintiffs argue that “[o]ur constitutional principles have never been viewed as static, but on the contrary are meant to be guideposts that can weather ‘radical changes in social, economic and industrial conditions.’” Plaintiffs’ Memorandum at 8, *quoting Cohen v. Attorney Gen.*, 357 Mass. 564, 570 (1970). Half of this argument is true. Constitutional principles do serve as guideposts which weather socioeconomic changes. This very function, however, precludes any suggestion of transient and evolving constitutional principles. If a constitution is to have any benefit as the “guidepost” which Plaintiffs suggest it is to be, by definition that guidepost must be “static.” An ever-moving guidepost is no guidepost at all.

It is quite a different matter to assert that the Constitution is applicable in a variety of changing social situations, than to assert that the constitution must be judicially rewritten so as to apply differently to the same situation. In context, the quotation referenced above clearly indicates that the constitution was drafted in general terms so as to provide a consistent standard for changing social and economic conditions.

The Constitution of Massachusetts is a frame of government for a sovereign power. It was designed by its framers and accepted by the people as an enduring instrument, so comprehensive and general in its terms that a free, intelligent and moral body of citizens might govern themselves under its beneficent provisions through radical changes in social, economic and industrial conditions. It declares only fundamental principles as to the form of government and the mode in which it shall be exercised. Certain great powers are conferred and some limitations as to their exercise are established.

*Cohen*, 357 Mass. at 570-71 (1970).

The whole purpose of the Constitution is to provide a general framework, rather than specific provisions, so that the people would be free to govern themselves through even radical changes in daily life. The constitution was never intended to undergo or create radical changes, but rather to be broad enough to accommodate cultural change. This was the purpose and expectation of the framers.

If and when the law needs to accommodate changing social conditions, the Constitution provides a means by which that process is to occur. Plaintiffs cite to several examples of this process as it was intended to occur—in the Legislature. See Plaintiffs’ Memorandum at 29. This is the role designated and limited to the Legislature. Mass. Const., pt. 2, c. 1, § 1, art. 4. Moreover, Article 30 of the Declaration of Rights reinforces this segregation of constitutional powers, such that there is no overlap between the powers of the executive, the powers of the legislative and powers of the judicial branch of government. Specifically with respect to the judiciary, the constitution provides, “[T]he judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.” Mass. Const., pt. 1, art. 30.

Similarly, in relying on “evolving trends” in Massachusetts law as the basis for a new constitutional interpretation, Plaintiffs would effectively elevate existing statutes and executive orders to the level of constitutional amendment. Plaintiffs argue that over the past decade Massachusetts law has given evidence of a growing recognition of gay and lesbian citizens in Massachusetts. Plaintiffs Memorandum at 28-30. Regardless of the truth of this assertion, such actions by elected officials cannot be given post facto status as constitutional amendments.

A legislature does not rewrite the constitutionality of marriage by adopting a non-discrimination statute. Plaintiffs' Memorandum at 29, citing Acts & Resolves 1989, c. 516<sup>3</sup>; Acts & Resolves 1996, c. 163, Acts & Resolves 1993, c. 282. Governor Weld did not create a fundamental right to same-sex "marriage" by implementing domestic partner benefits among state employees. Commonwealth of Mass., Exec. Order 340 (Nov. 19, 1993). Where constitutional amendment is necessary, the Constitution itself provides the means by which that is to occur, and article 48 makes no provision for amendment by either statute or executive order. Mass. Const. amend. art. 48.

If anything, the recent trends in the state of Massachusetts suggest that state officials are very sensitive to the needs of gays and lesbians. At the same time, the people of Massachusetts have not seen fit to rewrite the definition of marriage in the state. It is totally inappropriate to use the compassion of the people of Massachusetts as a constitutional hammer requiring the radical redefinition of marriage in the Commonwealth.

The Massachusetts Constitution is intended to survive radical social changes. It was never intended to produce them.

## **II. THE RECOGNITION OF A FUNDAMENTAL RIGHT TO MARRIAGE DOES NOT REQUIRE THE REDEFINITION OF THE LEGAL STATUS OF MARRIAGE**

Plaintiffs' entire discussion of the fundamental right to marry comes under the heading "Massachusetts has developed an independent constitutional jurisprudence which protects the

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<sup>3</sup> In this same Act, the Legislature explicitly rejected any inference that its adoption of a nondiscrimination ordinance indicated an intent to affirm same-sex marriages. "Nothing in this act

fundamental personal right to marry the partner of one's choosing." On numerous points, this is simply false. First of all, Massachusetts courts have developed no constitutional jurisprudence whatsoever dealing with the right to marry. Significantly, Plaintiffs cite to no Massachusetts case dealing with the fundamental right to marry. Upon conducting its own search, Amicus is persuaded that no cases are cited because no such cases exist. While amicus does not contend that the Massachusetts Constitution does not protect the right to marry, it certainly cannot be said that Massachusetts courts have developed an independent jurisprudence on this topic.

Secondly, with respect to general constitutional analysis, Massachusetts has developed no independent constitutional jurisprudence applicable to civil cases. Instead, the Supreme Judicial Court has expressly adopted a federal due process analysis as the appropriate standard to be applied under the Massachusetts Declaration of Rights. *Opinion of the Justices to the Senate*, 375 Mass. 795 (1978) (applying *Roe v. Wade*, 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965)). The sole case cited to by plaintiffs in this regard involved a criminal detention and was recently distinguished from the analysis to be used in civil cases. *Commonwealth v. Brown*, 426 Mass. 475, 481-82 (1998).

The only cases relied upon by Plaintiff which deal specifically with the right to marry are cases from either the United States Supreme Court or from California. Plaintiffs complaint makes no allegations based on the United States Constitution; thus reference to federal cases are relevant only because Massachusetts due process jurisprudence applies a federal constitutional analysis. See Plaintiffs' Verified Complaint at para. 153.

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shall be construed so as to legitimize or validate a 'homosexual marriage,' so-called." 1989 Mass.

In their pleadings, plaintiffs argue that the fundamental right to marry recognized by the United States Supreme Court (*Zablocki v. Redhail*, 434 U.S. 374 (1978)) should be understood to compel this court to redefine marriage to include same-sex couples. They correctly note that marriage is a social institution of the highest importance, but fundamentally misstate the nature of the right to marry by trying to characterize it as the right to choose one’s definition of marriage. In this vein, plaintiffs assert that “[t]he choice of a marriage partner has been left to the individual with little state interference. Both case law and statutes demonstrate that the choice of a marital partner is one of the essential and unalienable rights protected by the Declaration of Rights.” Plaintiffs’ Memorandum at 14-15. No law is cited in support of this assertion, because the implication plaintiffs would draw from it is not supported by the law of this Commonwealth or any of its sister states.

***A. The fundamental right to marry presupposes the union of one man and one woman.***

The fundamental right to marry is just that—the right to enter into a marriage. This right, protected under the federal constitution (and Plaintiffs assert also under the Massachusetts Constitution), necessarily incorporates some definition of marriage. However, the Massachusetts General Laws contain no specific definition of marriage. Federal statutes contained no such definition until 1997. *See* 1 U.S.C. §7 (1997). In the absence of statute, that definition can only be understood as the male-female union recognized under Massachusetts common law.

Numerous factors point to the fact that Massachusetts common law defines marriage as a male-female union. As early as 1810, the Supreme Judicial Court articulated this understanding:

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Acts, ch. 516, § 19.

Marriage is unquestionably a civil contract, founded in the social nature of man, and intended to regulate, chasten, and refine, the intercourse between the sexes; and to multiply, preserve and improve the species. It is an engagement, by which a single man and a single woman, of sufficient discretion take each other for husband and wife.

*Inhabitants of Town of Milford v. Inhabitants of Town of Worcester*, 7 Mass. 48, 52 (1810).

Massachusetts General Laws, though not defining marriage themselves, clearly reinforce the common law understanding that marriage is a male-female union. For example, the statutory prohibitions on incest are sex-based, prohibiting men from marrying female relatives and vice versa. Mass. Gen. Laws Ann. ch. 207, §§ 1-2 (2001). More explicitly worded is the caveat contained in the 1989 amendments to Massachusetts nondiscrimination laws. To avoid precisely the suggestion raised by Plaintiffs in this case, the Legislature stated, “Nothing in this act shall be construed so as to legitimize or validate a ‘homosexual marriage,’ so-called.” 1989 Mass. Acts, ch. 516, § 19. Even the practice of the state Department of Public Health reflects this definition, as Plaintiffs experienced when they applied for marriage licenses.

The absence of statutory definition is also significant in that it emphasizes limitations upon the ability of the judiciary to redefine marriage. Marriage in Massachusetts has no statutory definition because it is not a creation of statute. Rather, Massachusetts common law has incorporated the long-standing historical, philosophical, religious and social tradition of marriage as a male-female union. In that Massachusetts common law incorporated a preexisting definition of marriage, rather than creating marriage as a new institution, marriage is not a legal construct, but is rather an independent institution not subject to redefinition by this court.<sup>4</sup> It must be restated that

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<sup>4</sup> The definition of marriage may be contrasted with statutory benefits accorded on the basis of marriage. Marital benefits *are* legal constructs which the General Court may legitimately alter or

marriage is recognized, not defined by statutory law. Only in this context can the fundamental right to marry be understood.

Implicitly acknowledging the inability of this court to redefine the myriad social, religious, historical and philosophical implications of marriage, Plaintiffs have attempted to artificially segregate the legal aspects of marriage (“civil marriage”) from its private sector significance. Plaintiffs’ Memorandum at 1, n.1. Much to the contrary, however, there have never been multiple marital systems in the Commonwealth.<sup>5</sup> Married couples in 1780 did not remarry when the Massachusetts Constitution was adopted. The adoption of state laws regulating marriage did not require couples to “opt in.” Rather, marriage has always been understood as a single institution with simultaneous legal, social, historical, philosophical and religious significance.

Finally, even if one were to assume that this court had jurisdiction to redefine the institution of marriage, because marriage has been incorporated as a common law institution any such changes are properly limited to small, incremental changes, rather than the wholesale redefinition requested by the Plaintiffs. *In re Roche*, 381 Mass. 624, 639 (1980) (referring to “the incremental process of common law development” as a means to “avoid overly broad generalizations”). Massachusetts marriage law is not a statutory provision which may be immediately discarded as unconstitutional. Rather, marriage has been incorporated into the common law as a longstanding tradition to which

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redefine. However, as supported by arguments presented elsewhere in this brief, there is no constitutional mandate which would require this court to invalidate current policies extending benefits on the basis of marriage.

<sup>5</sup> For example, many individuals obtain a civil license which is then solemnized in a religious ceremony. The two are not separate marriages, but multiple aspects of the same marriage. Even before clergy were authorized to solemnize marriages, marriage had an indisputable social and religious significance.

changes should be made only incrementally if at all. In a similar case, the Supreme Court of British Columbia recently concluded that the redefinition of marriage to include same-sex couples would be much more than an incremental change, invoking numerous questions of social concern and legal interpretation. *See Egale v. Attorney General of Canada*, 2001 BCSC 1365, at ¶¶ 89-97 (observing that marriage is so entrenched in society, and the impact of redefining marriage so uncertain, that the matter must be addressed by the legislature rather than a court).

***B. The fundamental right to marry limits only extrinsic restrictions upon that right.***

In claiming a “fundamental right to marry the partner of one’s choosing,” Plaintiffs necessarily challenge the validity of every law of this Commonwealth which limits an individual’s choice of marital partner. This has never been the purpose or function of the fundamental right to marry.

The first case to describe the right to marry was *Loving v. Virginia*, 388 U.S. 1 (1967). In that case, the criminal convictions of a couple for violating Virginia’s anti-miscegenation laws were overturned. The next important case discussing the right to marry was *Zablocki v. Redhail*, 434 U.S. 374 (1978). In that case, the Court struck down a law that did not allow individuals who were not current in their child support payments to marry. The most recent case, *Turner v. Safley*, 482 U.S. 78 (1987), invalidated a law prohibiting prisoners from marrying without approval of a prison superintendent. These cases set out the parameters of the constitutional right to marry. These parameters contrast starkly with the Plaintiffs’ description of that right.

The laws reviewed in each of these cases added extrinsic restrictions to the accepted definition of marriage. In *Loving*, that restriction was particularly odious because it employed a

racial classification. Anti-miscegenation laws were only in place in a minority of states at the time of the decision. *Loving* at 6. Similarly, the *Turner* and *Zablocki* cases involved individuals who would have otherwise been able to marry under the accepted definition of that status, but who because of another state regulation were prohibited from doing so. In contrast, plaintiffs' claim goes to the very nature of marriage. It seeks a declaration that the definition of marriage should be changed. This result would change the current constitutional jurisprudence from a right to enter into marriage as it has always understood to the right to define marriage as one likes. Unlike the right to marry cases which invalidated laws that were not widely accepted, this suit attempts to overturn the unanimous consensus on the definition of marriage in the United States. Indeed, only one country in the world defines marriage to include same-sex couples and that recent development came about through the Parliamentary process in the Netherlands.

Massachusetts law, consistent with both the nature of marriage and the Declaration of Rights, limits the freedom of every individual to marry many people they might otherwise choose to marry. Siblings do not have the right to choose to marry a sibling; parents cannot choose to marry a child or grandchild. Mass. Gen. Laws Ann. ch. 207, §§ 1-2 (2001). No individual has the right marry an underage minor, Mass. Gen. Laws Ann. ch. 207, §§ 24-25 (2001), and married persons are completely prohibited from exercising a fundamental right to marry any other person so long as they remain married. Mass. Gen. Laws Ann. ch. 207, § 4 (2001). Such laws do not take away the fundamental right to marry; rather they are appropriate limitations protecting the intrinsic nature of marriage. The same is true for the Commonwealth's requirement that marriage consist of one man and one woman.

An additional distinction between the right to marry cases and the issue at hand in this case is the fact that the plaintiffs are not challenging any statute. In each of the U.S. Supreme Court cases, the Court reviewed a particular statute or regulation. Here, plaintiffs are attacking a definition of marriage implied in the statutes and firmly embedded in the common law. This makes their claim particularly inappropriate, since it would require a court to write a new definition of marriage where the General Assembly has not felt it necessary to do so because the Commonwealth's understanding of marriage has preceded statutory law.

***C. The cases relied upon by Plaintiffs are inapposite to the proposition that the Declaration of Rights requires a radical redefinition of marriage.***

Understandably, plaintiffs are anxious to advance a different and novel reading of the right to marry. In their brief, they attempt to do so by arguing that Massachusetts courts have shown a deference to “freedom of choice in matters of marriage and family life.” Plaintiffs’ Memorandum at 14-15. In support of this contention, they cite to a number of cases from the Commonwealth and a California case dealing with an anti-miscegenation law. These cases are all inapposite. None deal with the validity of a marriage or the nature of family. One holds that requiring political candidates to file financial disclosure statements would not violate the candidate’s right to privacy. *Opinion of the Justices to the Senate*, 375 Mass. 795 (1978). Another held that individuals can freely change their names if no fraud is involved. *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178 (1977). The next holds that considering a Medicaid recipient’s child support payments as “available” income did not violate the recipient’s constitutional rights. *Tarin v. Commissioner of the Division of Medical Assistance*, 424 Mass. 743 (1997). Finally, one of the cases cited to holds that an agreement that, on separation, preembryos would be given to one of the spouses, was

unenforceable. *A.Z. v. B.Z.*, 431 Mass. 150 (2000). This seems to be odd precedent for a claimed right to redefine marriage in the Commonwealth.

The only case cited by the plaintiffs as authority for their novel “freedom of choice in marriage” to actually deal with marriage is the California case, *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948). The issue in *Perez*, though, is not the definition of marriage. Rather, it answers the question of “whether the state can restrict [the right to marry] on the basis of race alone without violating the equal protection of the laws clause of the United States Constitution.” *Id.* at 19. In fact, the majority opinion and the two concurrences dwell at length on questions of racial discrimination and prejudice that the judges correctly felt were central to the validity of the anti-miscegenation statute at issue in the case.<sup>6</sup> The court described the legal standard it was applying as “whether the rights of an individual are restricted *because of his race.*” *Id.* at 20 (emphasis added).

At no point did the court question the State’s definition of marriage, only the use of racial classifications to prevent people otherwise entitled to marry from doing so. In fact, the court’s view of marriage accepts that marriage is a status that precedes state recognition. It states, “Since the essence of the right to marry is the *freedom to join in marriage* with the person of one’s choice, a segregation statute for marriage necessarily impairs the right to marry.” *Id.* at 21 (emphasis added). This would clearly be a circular definition if marriage was not more than a mere statutory construct.

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<sup>6</sup>*Perez*, 198 P.2d at 29 (the anti-miscegenation statutes violate the 14<sup>th</sup> Amendment “by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups”); *Id.* at 30 (Carter, J., concurring)(“... it is not possible for the Legislature, in the face of our fundamental law, to enact a valid statute which proscribes conduct on a purely racial basis”).

The court also seems to implicitly accept the opposite sex nature of marriage. For instance, in describing the constitutional right to marry, the court cites to a U.S. Supreme Court opinion which describes the right as a right “to marry, establish a home and bring up children.” *Id.* at 18 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Later, when the court discusses the argument that the progeny of mixed-race marriages will be inferior, the court does not dismiss the argument as irrelevant because procreation is not linked to marriage. Instead, it notes that the argument is just not true. *Id.* at 26.

Fundamentally, plaintiffs claim is for a court-ordered redefinition of marriage. Such a redefinition would completely change the meaning of the right to marry. Indeed, no other state in the United States has ever construed the right to marry in this way. Although a plurality of the Hawaii Supreme Court speculated that the state’s marriage law might constitute sex discrimination, it specifically rejected the claim that there was a fundamental right of same-sex “marriage.” *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Likewise, a superior court judge in Alaska intimated that the state’s definition of marriage might contradict that state’s constitutional privacy provision, but characterized the right at issue as a fundamental right to “choose one’s life partner” rather than a right to marry. *Brause v. Bureau of Vital Statistics*, 1998 WL 88743, \*6 (Alaska Super. 1998). Finally, the Vermont Supreme Court declined an invitation to rule Vermont’s marriage statute unconstitutional. *Baker v. Vermont*, 744 A.2d 864, 889 (Vt. 1999).

### **III. IT IS INAPPROPRIATE FOR THE JUDICIARY TO ATTEMPT A REDEFINITION OF THE PREEXISTING INSTITUTION OF MARRIAGE**

***A. As a preexisting institution, marriage is not subject to arbitrary redefinition.***

As described previously, the definition of marriage being challenged by the plaintiffs in the case is not statutory. This is an indication that Massachusetts law recognizes the preexisting nature of marriage as a social, religious and legal institution which does not require a statutory definition to have a legal meaning. Thus, in this action, plaintiffs are not questioning the constitutional validity of a statute; they are asking that the understanding of marriage now accepted in Massachusetts law, which predates the enactment of the Massachusetts Constitution, be redefined. While a statute's validity can be gauged by a court, the very nature of marriage which is assumed, not created, by the law cannot be subject to arbitrary redefinition by a court. If the legal nature of marriage is to be changed in Massachusetts, that change would have to be brought about through specific legislative action rather than a court pronouncement of preference for a definition different from that presumed in Commonwealth law.

***B. The relief requested by the plaintiffs would inappropriately interfere with constitutional protections of self-government and separation of powers.***

In bypassing the legislature, plaintiffs' claim threatens crucial constitutional concepts such as separation of powers and accountability to the people. The Massachusetts constitution, possible even more than the federal constitution, derives its authority directly from the people of the Commonwealth. The Massachusetts Constitution (which predates the U.S. Constitution) comes out of a long tradition of compacts and covenants between and among the people who will be governed by them.<sup>7</sup> Of the thirteen original state constitutions, Massachusetts was the only state to submit its constitution to a vote by the people.

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<sup>7</sup>See generally Donald S. Lutz, *The Origins of American Constitutionalism* 23-34 (1988); Mass.

The attempt to take the definition of marriage out of the normal legislative process and have it reinterpreted by the courts defeats the fundamental constitutional purpose of creating a government accountable to the governed.<sup>8</sup> Massachusetts constitutional history reveals a strong commitment to self-government, deriving its governmental power and approval of its laws from the people.<sup>9</sup> The general constitutional framework established by the framers was intended to protect and perpetuate principles of self-government. It cannot be ignored that the constitution's broad principles were intended to permit "a free, intelligent and moral body of citizens [to] govern themselves under its beneficent provisions through radical changes in social, economic and industrial conditions." *Cohen v. Attorney General*, 357 Mass. 564, 570 (1970).

Plaintiffs' claim would also offend the constitutional principle of separation of powers which is recognized explicitly in the Massachusetts Constitution.<sup>10</sup> The framers of the Massachusetts

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Const. pmbl. ("The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.").

<sup>8</sup>See Mass. Const. pt. 1, art. 5 ("All powers residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."); Mass. Const., pt. 1, art. 10 ("the people of this commonwealth are not controllable by any other laws than those to which their constitutional *representative* body have given their consent") (emphasis added).

<sup>9</sup>The Massachusetts Constitutional Convention of 1780, consisting of the people's elected representatives, resolved by a vote of 250 to 1 that it would create a declaration of rights of the people of Massachusetts Bay. The Convention resolved that the government would be a "free republic" and "that it is of the essence of a free republic, that the people be governed by the FIXED LAWS OF THEIR OWN MAKING." Resolution of the Massachusetts Constitutional Convention of 1780, Sept. 3, 1779, *reprinted in 4 Works of John Adams* 215 (Charles F. Adams ed., 1851).

<sup>10</sup>Mass. Const. pt. 1, art. 30 ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the

Constitution desired a government in which people would be governed by laws of their own making, either through their elected representatives in the state legislature, or through their direct vote on a constitution, constitutional amendments or other forms of laws. The Massachusetts Constitution and its framers would never concede lawmaking powers to the judicial branch as plaintiffs request this court to do here. To do so would then leave the citizens of the Commonwealth no recourse but to amend their constitution as was done in Alaska and Hawaii when courts in those jurisdictions usurped lawmaking authority.<sup>11</sup>

## CONCLUSION

Until Appellants pressed their current challenge, whether Massachusetts' marriage statute was consistent with the Declaration of Rights of the Massachusetts Constitution had never been questioned. Now that the question has come before this Court, it has become necessary to review the history, case law, and current meaning of the Declaration of Rights to resolve this case. The common law understanding of marriage, which recognizes and regulates a unique male-female sexual community, is based on a valid public purpose and reasonably relates to supporting and contributing to the common good. In sum, the marriage statute is consistent with the Declaration of Rights, and any further policy choices should be left to the Legislature or the people of the

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legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”).

<sup>11</sup>Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 Alaska L. Rev. 213 (1999); David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Constitutionality*, 22 U. Hawaii L. Rev. 19 (2000).

Commonwealth. Plaintiffs attempt to redefine marriage should be firmly resisted by this Court as a matter of both constitutional principle and judicial prudence.

That conclusion places the question of how to address the Plaintiffs' concerns where it belongs with the People, who are the authors of this constitutional order, and with their elected representatives.

Respectfully submitted this \_\_th day of December, 2001.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent this \_\_\_\_\_  
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