

**COMMONWEALTH OF MASSACHUSETTS**

**SUPREME JUDICIAL COURT**

**Suffolk County**

**No. SJC-08860**

**HILARY GOODRIDGE, *ET AL.*,**

**Plaintiffs-Appellants,**

**vs.**

**DEPARTMENT OF PUBLIC HEALTH, *ET AL.*,**

**Defendants-Appellees.**

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

**BRIEF OF *AMICI CURIAE* THE COMMON  
GOOD FOUNDATION, CATHOLIC VOTE, AND  
THE AMERICAN CENTER FOR LAW AND JUSTICE  
IN SUPPORT OF DEFENDANTS-APPELLEES**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES AND AUTHORITIES.....	iv
INTEREST OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION.....	3
ARGUMENT.....	4
I. MASSACHUSETTS RECOGNIZES TRADITIONAL MARRIAGE AS THE FUNDAMENTAL CORNERSTONE OF SOCIETY.....	4
II. THE MASSACHUSETTS LEGISLATURE HAS THE RIGHT TO REGULATE THE INCIDENTS OF MARRIAGE FOR THE OVERALL BENEFIT OF SOCIETY.....	10
III. THE COMMONWEALTH’S MARRIAGE STATUTES, WHICH LIMIT MARRIAGE TO A SINGLE MAN AND A SINGLE WOMAN, ARE CONSTITUTIONAL BOTH ON THEIR FACE AND AS APPLIED.....	13
A. The Massachusetts Constitution Does Not Include Sexual Orientation as a Protected Class.....	13
B. The Marriage Statutes Do Not Mention Sexual Orientation and Apply Equally to Both Heterosexuals and Homosexuals.....	14
C. The Commonwealth’s Marriage Statutes Do Not Discriminate Based On Sex on Their Face and Apply Equally to Both Sexes.....	17

IV. CHILDREN RAISED IN HOUSEHOLDS OF SAME-SEX PARTNERS FARE DIFFERENTLY THAN CHILDREN RAISED IN HOUSEHOLDS WITH MARRIED PARENTS.....21

V. SIGNIFICANT PROBLEMS ARE ASSOCIATED WITH THE GAY LIFESTYLE AND SAME-SEX RELATIONSHIPS WHICH STATE LAW AND PUBLIC POLICY MAY LEGITIMATELY SEEK TO MINIMIZE.....26

CONCLUSION.....33

CERTIFICATE OF SERVICE.....34

## TABLE OF AUTHORITIES

<u>CASE NAMES</u>	<u>Page(s)</u>
<i>Baker v. Nelson</i> , 191 N.W.2d 185 (Minn. 1971).....	15, 16
<i>Barnes v. Glen Theatre, Inc.</i> , 501 U.S. 560 (1991).....	5
<i>Coe v. Hill</i> , 201 Mass. 15, 86 N.E. 949 (1909).....	4
<i>Commonwealth v. Brasher</i> , 359 Mass. 550, 270 N.E.2d 389 (1971).....	5
<i>Commonwealth v. Lane</i> , 113 Mass. 458 (1873).....	10
<i>Connors v. City of Boston</i> , 430 Mass. 31, 714 N.E.2d 335 (1999).....	2, 3, 10, 32
<i>Davis v. Misiano</i> , 373 Mass. 261, 366 N.E.2d 752 (1977).....	11
<i>Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati</i> (“ <i>Equality Foundation 1</i> ”), 54 F. 3d 261 (6th Cir. 1995).....	18
<i>Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati</i> (“ <i>Equality Foundation 2</i> ”), 128 F.3d 289 (6th Cir. 1997), <i>cert.</i> <i>denied</i> , 525 U.S. 943 (1998).....	18
<i>French v. McAnarney</i> , 290 Mass. 544, 195 N.E. 714 (1935).....	4, 8, 11
<i>Goodridge v. Dep’t of Public Health</i> , 2002 Mass. Super. LEXIS 153 (May 7, 2002).....	3
<i>Green v. Richmond</i> , 369 Mass. 47, 337 N.E.2d 691 (1975).....	11
<i>Inhabitants of Town of Milford v. Inhabitants of Town of Worcester</i> , 7 Mass. 48 (1810).....	4, 8, 12, 14, 17
<i>Jacobellis v. Ohio</i> , 378 U.S. 184 (1964).....	5
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	20

<i>O’Connell v. Chasdi</i> , 400 Mass. 686, 511 N.E.2d 349 (1987).....	13, 14
<i>Opinion of the Justices to the Senate</i> , 375 Mass. 795, 376 N.E.2d 810 (1978).....	14
<i>Paris Adult Theatre v. Slaton</i> , 413 U.S. 49 (1973).....	5
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	17, 20, 21
<i>Tigner v. Texas</i> , 310 U.S. 141 (1940).....	16

**UNITED STATES CONSTITUTION**

U.S. CONST. amend. I.....	14, 16
U.S. CONST. amend. VIII.....	16
U.S. CONST. amend. IX.....	16
U.S. CONST. amend. XIV.....	14, 16

**MASSACHUSETTS CONSTITUTION**

MASS. CONST. art. 1.....	13, 14
MASS. CONST. art. 16.....	13, 14

**STATUTES**

MASS. GEN. L. ch. 207, § 1 (2001).....	12
MASS. GEN. L. ch. 207, § 2 (2001).....	12
MASS. GEN. L. ch. 207, § 4 (2001).....	12
MASS. GEN. L. ch. 207, § 7 (2001).....	12
MASS. GEN. L. ch. 207, § 8 (2001).....	12

MASS. GEN. L. ch. 207, § 9 (2001).....	12
MASS. GEN. L. ch. 207, § 10 (2001).....	12
MASS. GEN. L. ch. 207, § 11 (2001).....	12
MASS. GEN. L. ch. 207, § 14 (2001).....	12
MASS. GEN. L. ch. 208, § 1 (2001).....	12
MASS. GEN. L. ch. 208, § 1A (2001).....	12
MASS. GEN. L. ch. 208, § 1B (2001).....	12
MASS. GEN. L. ch. 208, § 4 (2001).....	12
MASS. GEN. L. ch. 208, § 6B (2001).....	12

**LAW REVIEW ARTICLES**

David L. Chambers, <i>What if? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples</i> , 95 MICH. L. REV. 447 (1996).....	8
David Orgon Coolidge & William C. Duncan, <i>Reaffirming Marriage: A Presidential Priority</i> , 24 HARV. J.L. & PUB. POL’Y 623 (2001).....	7, 8
Charlotte J. Patterson, <i>Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective</i> , 2 DUKE J. GENDER L. & POL’Y 191 (1995).....	22
Lynn D. Wardle, <i>The Potential Impact of Homosexual Parenting on Children</i> , 1997 U. ILL. L. REV. 833, 844 (1997).....	21, 22, 23

**OTHER PERIODICALS**

P. Cameron & K. Cameron, <i>Homosexual Parents</i> , ADOLESCENCE 31 (1996).....	31
---	----

A.P.M. Coxon, <i>et al.</i> , <i>Sex Role Separation in Diaries of Homosexual Men</i> , AIDS (July 1993).....	29
Timothy J. Dailey, <i>Breaking the Ties That Bind: The APA's Assault on Fatherhood</i> , INSIGHT, No. 213 (Feb. 18, 2000).....	22, 23, 25, 26, 29, 30, 31, 32
E.L. GOLDMAN, <i>Psychological Factors Generate HIV Resurgence in Young Gay Men</i> , Clinical Psychiatric News, October 1994.....	26
R.A. Kaslow <i>et al.</i> , <i>The Multicenter AIDS Cohort Study: Rationale, Organization, and Selected Characteristics of the Participants</i> , AMERICAN JOURNAL OF EPIDEMIOLOGY 126, no.2, August 1987.....	27
Stanley N. Kurtz, <i>What is Wrong with Gay Marriage</i> , COMMENTARY, Sept. 2000.....	7
Michelangelo Signorile, <i>Bridal Wave</i> , OUT, Dec./Jan. 1994.....	32
Judith Stacey & Timothy J. Biblarz, <i>(How) Does the Sexual Orientation of Parents Matter?</i> , 66 American Sociological Review, April 2001.....	24
Judith Stacey, <i>Virtual Truth with a Vengeance</i> , CONTEMPORARY SOCIOLOGY: A JOURNAL OF REVIEWS 28, 1999.....	21
Bonnie R. Strickland, <i>Research on Sexual Orientation and Human Development: A Commentary</i> , 31 DEVELOPMENT 137 (1995).....	22
<i>Violence Between Intimates</i> , BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS (1991).....	30
 <b><u>MISCELLANEOUS</u></b> 	
AMERICAN HERITAGE DICTIONARY (2d College ed. 1991).....	4
A.P. BELL & M.S. WEINBERG, <i>HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN</i> (1978).....	28
A.P. BELL <i>ET AL.</i> , <i>SEXUAL PREFERENCE</i> (1981).....	28

BLACK’S LAW DICTIONARY (6th ed. 1990).....4

J.R. HARRIS, THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT  
THE WAY THEY DO (1998).....21

*Health Implications Associated With Homosexuality*, The Medical  
Institute for Sexual Health (1999).....30, 31

Robert Lerner, Ph.D. & Althea K. Nagai, Ph.D., *No Basis: What  
the Studies Don’t Tell Us About Same-Sex Parenting*, Marriage  
Law Project, January 2001.....21

D. MCWHIRTER and A. MATTISON, THE MALE COUPLE: HOW  
RELATIONSHIPS DEVELOP (1984).....28, 29, 30

MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1993).....12

WILLIAM B. RUBENSTEIN, LESBIANS, GAY MEN, AND THE LAW  
(1993).....32

JEFFREY SATINOVER, M.D., HOMOSEXUALITY AND THE POLITICS OF  
TRUTH (1996).....26, 27, 28, 29

## **INTEREST OF *AMICI CURIAE***

The Common Good Foundation (CGF) is a not-for-profit foundation which seeks to advance true social justice, protect human rights, and promote the Common Good. The CGF is committed to education, motivation, and ministry proceeding from the following fundamental principles: the dignity of life, primacy of the family, authentic human freedom, and solidarity with the poor and needy. Consistent with its beliefs, the CGF is concerned that altering and redefining what constitutes a valid marriage in Massachusetts will injure rather than enhance the Common Good of the People of the Commonwealth. Hence, the CGF has agreed to join as an *amicus curiae* in this matter.

Catholic Vote is an organization of lay Catholics organized pursuant to I.R.S. § 501(c)(4), among whose goals is the strengthening and preservation of the family. Catholic Vote also seeks to encourage Catholic voters to exercise their civic responsibilities by voting for candidates whose positions on issues reflect, *inter alia*, the moral teachings of the Catholic Church. Catholic Vote is concerned about the assault on the traditional family represented in this lawsuit.

Representing the Common Good Foundation and Catholic Vote and appearing on its own behalf as well is The American Center for Law and Justice (ACLJ). The ACLJ is a non-profit, public interest law firm and

educational organization dedicated to protecting First Amendment freedoms, human life, and the traditional family. ACLJ attorneys have argued and participated as *amicus curiae* in numerous cases involving constitutional and statutory issues before the Supreme Court of the United States, lower federal courts, and State courts throughout the Land. For example, ACLJ attorneys successfully argued against granting employee benefits to same-sex domestic partners of public employees in *Connors v. City of Boston*, 430 Mass. 31, 714 N.E.2d 335 (1999). In this present case, the ACLJ is very concerned about the attempted subversion of Massachusetts law and public policy regarding marriage and familial relationships as a means of furthering the gay rights and same-sex marriage agendas. The ACLJ is concerned that Plaintiffs are attempting to obtain by judicial fiat what they cannot obtain by statute. Judicial sanctioning of such an attempt would subvert Massachusetts law and public policy regarding marriage as well as undermine the will of the People of Massachusetts as expressed through their elected representatives. The ACLJ contends that courts should tread lightly when altering or redefining with what constitutes a valid marriage, and any decision to change the historic definition and

understanding of marriage, even indirectly or subtly, should follow vigorous public debate of the matter by the People's elected representatives.

## INTRODUCTION

The lawsuit below, *see Goodridge v. Dep't of Public Health*, 2002 Mass. Super. LEXIS 153 (May 7, 2002), was part of the gay rights strategy to undermine the Commonwealth's legitimate preference for, and support of, traditional marriage and to obtain, through the judiciary, state-recognized legitimacy for same-sex relationships mimicking common law marriage. In this appeal, seven same-sex couples are attempting to accomplish by judicial fiat in the courts of this Commonwealth what gay rights advocates have been unable to accomplish by statute in any State or territory of the Land, *i.e.*, to have their same-sex cohabitation, presently masquerading as a form of common law marriage, declared to be lawful marriages or the lawful equivalent of marriage. Yet, as this Court noted in *Connors*, any legal adjustments to reflect changes in social arrangements which have occurred over the past few decades "must come from the Legislature \*\*\*\*" *Connors*, 430 Mass. at 43, 714 N.E.2d at 341-42. *Amici* agree that this matter is a nonjusticiable political matter whose resolution rightly resides in the State Legislature and urge this Court to so rule.

## ARGUMENT

### I. MASSACHUSETTS RECOGNIZES TRADITIONAL MARRIAGE AS THE FUNDAMENTAL CORNERSTONE OF SOCIETY

The Commonwealth of Massachusetts recognizes marriage as being fundamental to society, and Massachusetts limits marriage to its traditional, historic understanding, *i.e.*, that only two persons of the opposite sex can become “married.”

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.<sup>1</sup>

*Inhabitants of Town of Milford v. Inhabitants of Town of Worcester*, 7 Mass. 48, 52 (1810) (emphasis added). Yet, “[m]arriage is not merely a contract between the parties. It is the foundation of the family. *It is a social institution of the highest importance. The Commonwealth has a deep interest that its integrity is not jeopardized.*” *French v. McAnarney*, 290 Mass. 544, 546, 195 N.E. 714, 715

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<sup>1</sup> “Husband” is defined as “a married man.” AMERICAN HERITAGE DICTIONARY 628 (2d College ed. 1991). “Wife” is commonly defined as “a woman married to a man.” *Id.* at 1381. Husband and wife are defined as correlative of each other. BLACK’S LAW DICTIONARY 741 (6th ed. 1990).

(1935) (emphasis added); *see also* *Coe v. Hill*, 201 Mass. 15, 21, 86 N.E. 949

(1909) (“Marriage is a social institution \*\*\* in which, because the foundations of the family \*\*\* rest upon it, the Commonwealth has a deep interest to see that its integrity is not put in jeopardy, but maintained.”). As such, the Commonwealth may, as part of its police powers and for the overall good of all its citizens, enact legislation which furthers and favors the institution of marriage as traditionally understood.

“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals \*\*\*\*\*” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). There is a “substantial government interest in protecting order and morality.” *Id.* There is a “right of the Nation and of the States to maintain a decent society \*\*\*\*\*” *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 60 (1973) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)). “The State is not powerless to prevent or control situations which threaten the proper functioning of a family unit as an important segment of the total society.” *Commonwealth v. Brasher*, 359 Mass. 550, 557, 270 N.E.2d 389, 394 (1971). Hence, given the strong public policy interest in protecting and furthering the traditional family as the cornerstone of society, the Commonwealth of Massachusetts may take all reasonable steps to prefer and protect the traditional institution of marriage. That the institution of marriage is not perfect and may, in fact, exhibit some fragility (as evidenced, for example, by the divorce rate) does not negate its critical nature to society. Moreover, the very alleged fragility of marriage is a powerful argument for proceeding with great caution, lest

society's foundation crumble further. Further, if the key institution underlying Massachusetts society is fragile, then even greater protection by the Commonwealth may be required, not the creation of artificial same-sex constructs which mimic marriage, but which cannot duplicate what traditional marriage does for society.

Appellants in this matter argue that they are denied benefits which accrue to those who are lawfully married because they are unable to marry under Massachusetts law. As such, Appellants are focusing on the individualized legal benefits which flow from marriage, *whereas the Commonwealth's emphasis is on furthering and strengthening the institution of marriage which forms the cornerstone of society as a whole*. Any benefits which flow to lawfully married couples are intended to strengthen this key institution and thereby to benefit society as a whole, not to benefit the individuals within the marriage (even though they may coincidentally have such an impact). That such benefits also expand rights to individuals is an ancillary effect and not the goal. Instead, the Commonwealth's goal in furthering traditional marriage is to reinforce the foundation of Massachusetts society as a whole, a benefit which accrues to all citizens of Massachusetts, including the same-sex couples in this case. Hence, to the extent that Massachusetts society is strengthened by State law and public policy concerning marriage, Appellants in this case are already reaping a substantial benefit from the law favoring traditional marriage.

Appellants' contrary reasoning appears to boil down to this: the Commonwealth gives certain benefits to lawfully married couples that it does not give to other couples;

what the Commonwealth has done is unfair to those who may not lawfully marry; therefore, this Court should strike down Massachusetts marriage law as it exists and extend the same benefits to every couple that it now extends only to lawfully married couples.<sup>2</sup> *Such reasoning presumes that traditional marriage is no more efficacious to society than other relationships, a belief not shared historically by the Commonwealth. See, e.g., Inhabitants of the Town of Milford, 7 Mass. at 52*

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<sup>2</sup> Yet, changing the traditional concept of marriage may have numerous unintended, social consequences:

If one removes th[e] core concept [of marriage as the union of a man and a woman], \*\*\* [i]nstead of a unique community, marriage becomes one more relationship. And why should this relationship be so special? If it has no necessary connection to children, or even to sex, what makes it different from an ordinary friendship? Friendships are multiple; why limit marriage to two persons? Sexual relationships can be multiple; why promote exclusivity? Relationships can come and go, and reasonably so; why promote permanence? If marriage is a freely chosen relationship unconnected to sex, children, exclusivity or permanence, why have legal marriage at all?

David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 Harv. J.L. & Pub. Pol’y 623, 639 (2001) (hereafter, “Coolidge”) (citing Stanley N. Kurtz, *What is Wrong with Gay Marriage*, Commentary, Sept. 2000, at 35 (Kurtz argues that same-sex “marriage” opens the door to “polyamory”)). Professor David Chambers of the University of Michigan has written in support of changing the traditional concept of marriage:

“If the law of marriage can be seen as facilitating the opportunities of two people to live an emotional life that they find satisfying - rather than as imposing a view of proper relationships - the law ought to be able to achieve the same for units of more than two \*\*\*\* By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive of units of three or more \*\*\*\* *All desirable changes in family law need not be made at once.*”

Coolidge at 640 (quoting David L. Chambers, *What if? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 Mich. L. Rev. 447, 490-91 (1996)) (emphasis added).

(an 1810 decision describing marriage as an institution “intended to regulate, chasten, and refine, the intercourse between the sexes \*\*\*\*\* It is an engagement, by which a single man and a single woman \*\*\* take each other for husband and wife”); *French*, 290 Mass. at 546, 195 N.E. at 715 (describing marriage as “the foundation of the family[,]” “a social institution of the highest importance”).

While it may be tempting at first blush to respond affirmatively to a plea for “fairness” in extending benefits to unmarried couples (after all, who wants to be accused of being *unfair* in applying the law), such reasoning is severely flawed. Many laws discriminate in their effects, and discrimination *per se* is not necessarily unlawful. Under Appellants’ reasoning, for example, one could legitimately challenge the “fairness” of the Commonwealth’s graduated income tax system. After all, using such reasoning, why is it not *unfair* (and discriminatory) that some citizens are required to pay taxes at a higher tax rate than other citizens, thereby paying a higher percentage of their income to the Commonwealth’s coffers? Or, yet again, why should a taxpayer with one child receive fewer personal exemptions than a taxpayer with a large family, thereby bearing a disproportionate share of the tax burden? Why is it not *unfair* (and discriminatory) to force the taxpayer with the single child to subsidize the larger family by paying a higher percentage of his income in taxes? One could also challenge the provision of welfare benefits. After all, why is it not *unfair* (and discriminatory) for one citizen of Massachusetts to receive welfare benefits from the Commonwealth’s coffers when other citizens are denied identical benefits?

Such a list of “unfairness horrors” could go on and on. This is especially true when one considers that there are always multiple policy options from which the Legislature can choose to meet society’s needs. At some point, it is the People’s representatives in the State Legislature who must choose which policy option is best for Massachusetts society as a whole, and it falls to the legislators, as representatives of the People of Massachusetts, to decide how best to serve the People’s interests and meet their legitimate needs. *This the Massachusetts Legislature has already done concerning marriage. See discussion, infra.*

This Court noted in *Connors* that the make-up of “family” has changed over the past 30-40 years, but concluded that “[a]djustments in the legislation to reflect these new social and economic realities must come from the Legislature \*\*\*\*” *Connors*, 430 Mass. at 42-43, 714 N.E.2d at 341-42. As such, the Judiciary should not second-guess the Massachusetts Legislature regarding the law and public policy concerning lawful marriage. That responsibility resides rightly and solely in the Legislature. *See discussion, infra.*

## **II. THE MASSACHUSETTS LEGISLATURE HAS THE RIGHT TO REGULATE THE INCIDENTS OF MARRIAGE FOR THE OVERALL BENEFIT OF SOCIETY**

The Massachusetts Legislature determines what constitutes a lawful marriage within the Commonwealth: “What marriages between our own citizens shall be recognized as valid in this Commonwealth is a subject within the power of the Legislature to regulate.” *Commonwealth v. Lane*, 113 Mass. 458, 462-63 (1873).

Further, “Massachusetts has a strong public interest in ensuring that its rules governing marriage are not subverted.” *Green v. Richmond*, 369 Mass. 47, 51, 337 N.E.2d 691, 695 (1975) (citing *French*, 290 Mass. at 546). *Yet, subverting the Commonwealth’s rules governing marriage is at the heart of this matter.*

Marriage is a special and unique relationship between one man and one woman. Yet, even though marriage is uniquely *heterosexual* in nature, not every heterosexual relationship constitutes a marriage or meets the standards of lawful marriage in Massachusetts. For example, the Commonwealth does not recognize so-called “common law” marriages. *Davis v. Misiano*, 373 Mass. 261, 366 N.E.2d 752 (1977). From this it follows that the Commonwealth also does not recognize as constituting lawful marriage heterosexual cohabitation which lacks the stability and mutual commitment of common law marriage. The fact that not every relationship between consenting heterosexuals merits favor from the Commonwealth helps put to rest arguments that the Commonwealth’s ban on same-sex marriage reflects the majority’s hatred of, or animus towards, homosexuals. The charge of “homophobia” has become a clever slogan to intimidate and silence those opposed to same-sex “marriage.” Appellants’ reasoning remains, nonetheless, a gross *non sequitur*.

The Commonwealth, in the interest of the overall welfare of its citizens, regulates which persons of the opposite sex may lawfully marry and under what conditions. For example, the Commonwealth has established consanguinity and affinity standards which limit who may marry whom. MASS. GEN. L. ch. 207, §§ 1-2 (2001). Although there is

no explicit “male-may-not-marry-male” or “female-may-not-marry-female” prohibition in the statute, the historic definition of the term “marriage,” *see Inhabitants of Town of Milford*, 7 Mass. at 52 (marriage involves “a single man and a single woman” who “take each other for husband and wife”); MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 713 (10th ed. 1993), automatically precludes such an understanding, thereby making its mention superfluous.

The Commonwealth regulates other aspects of marriage as well. The Commonwealth has established 18 as the age when persons may lawfully marry. MASS. GEN. L. ch. 207, § 7 (2001). The Commonwealth proscribes polygamous marriages. MASS. GEN. L. ch. 207, § 4 (2001). The Commonwealth determines what marriages are void and voidable. *See, e.g.*, MASS. GEN. L. ch. 207, §§ 8-11, 14 (2001). The Commonwealth also establishes how, and on what bases, a lawful marriage may be terminated. *See, e.g.*, MASS. GEN. L. ch. 208, §§ 1, 1A, 1B, 4, 6B (2001). As such, the Massachusetts Legislature is fully capable of amending the laws regarding marriage if and when it determines that changes are called for.

**III. THE COMMONWEALTH’S MARRIAGE STATUTES,  
WHICH LIMIT MARRIAGE TO A SINGLE MAN AND A SINGLE  
WOMAN, ARE CONSTITUTIONAL BOTH ON THEIR FACE AND  
AS APPLIED**

B. The Massachusetts Constitution does not include sexual orientation as a protected class

Appellants claim that by denying them a right to marry a person of the same sex, the Commonwealth is violating their rights of equal protection, free speech, and privacy under Articles 1 and 16 of the Massachusetts Constitution.

First, Article 1 does not include sexual orientation in its protection: “Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.” MASS. CONST. art. 1. In *O’Connell v. Chasdi*, 400 Mass. 686, 511 N.E.2d 349 (1987), this Court stated: “A right is ‘secured \*\*\* by the Constitution’ \*\*\* if it emanates from the Constitution, if it finds its source in the Constitution.” *Id.* at 692, 511 N.E.2d at 352. This Court, therefore, should not now read sexual orientation protection into Article 1.

Second, this Court has declared the protection of those rights under Articles 1 and 16 to be no greater than that afforded by the U.S. Constitution: “If right of privacy may be inferred in broad language of equal protection guarantee of this article, the protection it affords would not be any greater than that provided by U.S.C.A. Const. Amend. 14.” *Opinion of the Justices to the Senate*, 375 Mass. 795, 809, 376 N.E.2d 810, 812 (1978). “If a right to privacy is implied in the right of free speech

preserved in Pt. 1, Art. 16, it is no greater than the right to privacy which has been recognized under U.S.C.A. Const. Amend. 1.” *Id.* at 809, 376 N.E.2d at 819.

**B. Massachusetts Marriage Statutes Do Not Mention Sexual Orientation and Apply Equally to Both Heterosexuals and Homosexuals**

The Commonwealth permits only single persons of the opposite sex to marry each other: “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*, 7 Mass. at 52.

The statutes on their face allow homosexuals, lesbians, and bisexuals the same right to marry as heterosexuals – the right to marry a person of the opposite sex. The law applies equally to heterosexuals, homosexuals, and bisexuals. The sexual orientation of the two persons seeking to marry is irrelevant.

If two men wanting to marry each other, or two women wanting to marry each other, seek to obtain a marriage license from the Commonwealth, the marriage statutes do not require the Commonwealth’s agent to inquire into their sexual orientation to determine whether to grant or deny the license. The license is denied them regardless of their sexual orientation based on the simple and obvious fact that they are the same sex.

In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), petitioners, both adult males seeking to marry each other, sought a license from the clerk of the court of Hennepin County, Minnesota. The license was denied on the sole ground that petitioners were of the same sex. It was “undisputed that there were otherwise no

statutory impediments to a heterosexual marriage by either petitioner.” *Id.* The sole issue was “whether a marriage of two persons of the same sex is authorized by state statutes and, if not, whether state authorization is constitutionally compelled.” *Id.* The district court refused to order the clerk to issue the license. The Minnesota Supreme Court upheld the denial of the license against challenges based on the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution. The Court stated:

The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the *Griswold* rationale, the classification is no more than theoretically imperfect. We are reminded, however, that “abstract symmetry” is not demanded by the Fourteenth Amendment \*\*\*\*\* “The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”

*Id.* at 187 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

Appellants in this matter argue that they should be allowed to marry in order to enjoy the same individualized financial, legal, and emotional benefits that flow from marriage. Two same-sex *heterosexuals* could make the same argument for the right to marry each other as Appellants are making. The fact that same-sex heterosexuals do not have a sexual relationship would not diminish their claim, just as a sexual relationship does not enhance the claim made by Appellants. The reason is that the legal benefits, which flow from marriage, are not dependent upon a sexual relationship between husband and wife.

The Commonwealth’s legitimate preference and support of traditional marriage is equally valid against a claim by same-sex heterosexuals who may seek a right to marry each other. If Appellant homosexuals and lesbians were granted the right to

marry, the Commonwealth would have to permit marriage by same-sex heterosexuals or face claims of equal protection violations. Marriage would become an utter sham.

**C. The Commonwealth's Marriage Statutes Do Not Discriminate Based On Sex on Their Face and Apply Equally to Both Sexes**

The Commonwealth limits marriage to persons of the opposite sex.

Marriage in Massachusetts has been defined as “a single man and a single woman, of sufficient discretion, [who] take each other for husband and wife.” *Inhabitants of Town of Milford*, 7 Mass. at 52. As such, the limits on marriage apply equally to men and to women. A single man may marry a single woman but not another man, and a single woman is permitted to marry a single man but not another woman. The Commonwealth does not treat one sex more favorably or less favorably than the other, *i.e.*, women are not permitted to marry women, while denying men the right to marry each other, or *vice versa*.

The Commonwealth's determination that single individuals may only marry a member of the opposite sex treats heterosexuals and homosexuals exactly the same and treats men and women exactly the same. Consequently, the Commonwealth's marriage statutes stand in sharp contrast to Colorado's Amendment 2, which, *because it withdrew legal protection from homosexuals only*, was struck down by the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996). Colorado's Amendment 2 provided:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any

statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

*Id.* at 624 (quoting Amendment 2). The Supreme Court held that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment. The Court concluded: “The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.” *Id.* at 627. Conversely, the Commonwealth’s marriage statutes do not single out homosexuals and deny them the right to marry.

Cincinnati’s Charter Amendment, which prohibited homosexuals – *as homosexuals* – from obtaining special privileges and preferences was upheld by the Court of Appeals for the Sixth Circuit in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* (“*Equality Foundation 1*”), 54 F. 3d 261 (6th Cir. 1995). It was vacated and remanded in 518 U.S. 1001 (1996), with instructions to the Sixth Circuit to reconsider its decision in light of *Romer*. The Sixth Circuit reaffirmed in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* (“*Equality Foundation 2*”), 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998). The Sixth Circuit distinguished Cincinnati’s Amendment from Colorado’s Amendment 2: “By contrast, Cincinnati’s Article XII pronounced: **NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.**” *Id.* at 296 (boldface in original). The Sixth Circuit concluded:

Accordingly, the language of the Cincinnati Charter Amendment, read in its full context, merely prevented homosexuals, as homosexuals, from obtaining special privileges and preferences (such as affirmative action preferences or the legally sanctioned power to force employers, landlords, and merchants to transact business with them) from the City.

In stark contrast, Colorado Amendment 2's far broader language could be construed to exclude homosexuals from the protection of every Colorado state law, including laws generally applicable to all other Coloradans, thus rendering gay people without recourse to any state authority at any level of government for any type of victimization or abuse which they might suffer by either private or public actors.

*Id.*

The Commonwealth's marriage statutes, like Cincinnati's Amendment, do not favor or disfavor homosexuals – homosexuals and heterosexuals are treated exactly alike without regard to sexual orientation or status. All of the Commonwealth's citizens have the same right to marry a member of the opposite sex. All of the Commonwealth's citizens are prohibited from marrying a member of the same sex. Likewise, the Commonwealth's marriage laws do not favor or disfavor individuals on the basis of sex.

Finally, Appellants' petition for same sex marriage is not comparable to race-based restrictions on marriage. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court struck down Virginia's miscegenation statutes as a violation of the equal protection and due process clauses. Invidious racial classifications are subject to the highest level of scrutiny. The Court specifically noted that the statutes could not escape elevated scrutiny even though they applied equally to all races because the categories were racial. The Court distinguished *Loving* from cases involving categories meriting only rational basis review: "In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures." *Id.* at 9. In the *Romer* decision, the Supreme Court affirmed that distinctions based on sexual orientation are subject only to rational basis review. *Romer*, 517 U.S. at 632-33. Sexual orientation sits firmly among other rational basis categories that the state uses to define and protect marriage – age, competency, degree of familial relation, and number

of persons joined. Hence, this Court should defer to the wisdom of the Massachusetts Legislature in dealing with this matter.

#### **IV. CHILDREN RAISED IN HOUSEHOLDS OF SAME-SEX PARTNERS FARE DIFFERENTLY THAN CHILDREN RAISED IN HOUSEHOLDS WITH MARRIED PARENTS**

There is a great deal of contradictory information afoot concerning the impact on children living in same-sex couple households. For example, J.R. Harris, in her book, *THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO*, asserts that there is no meaningful difference between children raised in same-sex partner households and children with a mother and father living together. See Robert Lerner, Ph.D. & Althea K. Nagai, Ph.D., *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting*, Marriage Law Project,<sup>3</sup> January 2001, at 6 (hereafter, "Lerner") (citing J.R. HARRIS, *THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO* 51 (1998) ("[C]hildren with two parents of the same gender are as well adjusted as children with one of each kind."); Judith Stacey, *Virtual Truth with a Vengeance*, *Contemporary Sociology: A Journal of Reviews* 28, 1999, at 21 ("thus far the research on the effects of lesbian parenting on child development is remarkably positive and therefore challenging [the status quo] \*\*\*\*\*")); see also Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U.

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<sup>3</sup> This is an extensive critique of the seriously flawed social science research methodology used in the various studies purporting to establish that children are not adversely affected by living in same-sex households.

ILL. L. REV. 833, 844 (1997)<sup>4</sup> (hereafter, “Wardle”) (citing Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL’Y 191, 195 (1995) (the studies have “failed to produce conclusive evidence that children of lesbian mothers or gay fathers have significant difficulties in development” but show instead that “children of lesbian mothers \*\*\* develop normally”); Bonnie R. Strickland, *Research on Sexual Orientation and Human Development: A Commentary*, 31 Development 137, 139 (1995) (stating that “when differences do emerge, they are most likely in favor of lesbian families”)).

Yet, “[m]ost of the studies of homosexual parenting are based on very unreliable quantitative research, flawed methodologically and analytically (some of little more than anecdotal quality), and provide a very tenuous empirical basis for setting public policy.” Wardle at 844; *see also* Lerner, *supra*; Timothy J. Dailey, *Breaking the Ties That Bind: The APA’s Assault on Fatherhood*, INSIGHT, No. 213 (Feb. 18, 2000) at 12 (hereafter, “Dailey”)<sup>5</sup> (describing homosexual parenting research as “compromised by methodological flaws and driven by political agendas instead of an objective search for truth”).

In fact, “studies indicate that children raised by parents engaged in homosexual

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<sup>4</sup> This article also points out the numerous, serious procedural errors in the studies which conclude that same-sex parenting has little if any adverse impact on children.

<sup>5</sup> Dailey’s article includes an extensive discussion of the limitations of past and present research concerning homosexual parenting. *See* Dailey at 12-19.

relationships are at substantially greater risk (at least 3.5 to 7 times heightened risk) of being drawn in to homosexual behavior themselves.” Wardle at 851; *see also* Dailey at 23-24 (noting that a study in *Developmental Psychology* found that “children of lesbians became active lesbians themselves [at] a rate which is at least four times the base rate of lesbianism in the adult female population”); Dailey at 24 (“Between 1 percent and 2 percent of males report exclusive homosexual behavior over a several-year period. However, J.M. Bailey, *et al.*, found that 9 percent of the adult sons of homosexual fathers were homosexual in their adult sexual behavior \*\*\*\*”). Further,

[m]isunderstanding and misinterpretation of statistical analysis is common. For example, one study that reported that nine of twenty-five [*i.e.*, 36%] children of lesbian mothers reported same-sex attraction, but only four of twenty [*i.e.*, 20%] children of heterosexual mothers reported same-sex attraction, ignored the significant statistical fact that it is highly improbable that two random samples would produce such ratios.

Wardle at 851 (bracketed percentages added).

Judith Stacey and Timothy Biblarz, two University of Southern California sociology professors who describe themselves as “personally oppose[d to] discrimination on the basis of sexual orientation,” take issue with many of the studies which assert that there is no difference among children raised in same-sex households and those raised in traditional family households. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 *American Sociological Review*, April 2001, at 161, 170 (noting that “at least 15 intriguing, statistically significant differences in gender behavior and preference among children \*\*\* in lesbian

and heterosexual single-mother homes” were found in a 1986 study, yet the study concluded that “[n]o significant differences were found between the two types of households”; likewise in a 1997 study, “an arresting continuum of data [was] reported, but ignored”), 171 (noting that a 1997 study found that “adolescent and young girls raised by lesbian mothers appear to have been more sexually adventurous and less chaste, whereas the sons of lesbians evince the opposite pattern \*\*\*\* In other words, \*\*\* children (especially girls) raised by lesbians appear to depart from traditional gender-based norms, while children raised by heterosexual mothers appear to conform to them \*\*\*\*\*”).

The questionable nature of the research instruments casts doubt on the results of studies which assert that children are not affected by living in same-sex households, and Courts should be wary of relying on such flawed data for decisions which radically affect social mores and the institution of marriage which underlies the whole of society.

Since the data do not confirm that same-sex parenting does not adversely affect children (and suggest, instead, that living in same-sex households may, in fact, be harmful), before a Court of this Commonwealth acts to change marriage law, the burden should fall on the advocates of changing the law to establish *by sound empirical evidence* that neither the children of this Commonwealth nor Massachusetts society as a whole will be adversely affected by any changes to Massachusetts law and public policy concerning what constitutes lawful marriage. Until it can be proven by convincing

evidence based on sound empirical research that changing Massachusetts marriage law will not harm Massachusetts society, the Commonwealth has a legitimate societal interest in preferring and furthering lawful marriage as opposed to other relationships, and the authority to promulgate policy that furthers the interests of Massachusetts society as a whole rightly resides in the Massachusetts Legislature, not in the courts of the Commonwealth.<sup>6</sup>

**V.      SIGNIFICANT PROBLEMS ARE ASSOCIATED WITH THE  
GAY LIFESTYLE AND SAME-SEX RELATIONSHIPS WHICH STATE  
LAW AND PUBLIC POLICY MAY LEGITIMATELY SEEK TO MINIMIZE**

Same-sex relationships also tend to be more destructive than other relationships, *see, e.g.*, JEFFREY SATINOVER, M.D., *HOMOSEXUALITY AND THE POLITICS OF TRUTH* (hereafter, “HOMOSEXUALITY”) 49-60 (1996), and the

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<sup>6</sup> Dailey concludes his article with this apt observation:

In *IT TAKES A VILLAGE*, Hillary Rodham Clinton refers, perhaps inadvertently, to indelible “laws of nature” when she observes that “every society requires a critical mass of families that fit the traditional ideal.” Similarly, an organism needs a critical mass of healthy cells to survive, and – as every oncologist knows – the fewer abnormal cells the better. In a free and democratic society, those who choose to cohabit in “alternative” familial arrangements such as same-sex unions have the freedom to do so. *But toleration is one thing; promotion and “celebration” are quite another. . . .* As history shows, a society that champions such unions at the expense of traditional families does so at its own peril.

Dailey at 28 (emphasis added).

Massachusetts Legislature may, in the prudent exercise of its police powers, legitimately act to minimize such effects on society as a whole. For example, “epidemiologists estimate that 30 percent of all twenty-year-old homosexual males will be HIV-positive or dead of AIDS by the time they are thirty.” HOMOSEXUALITY at 57 (citing E.L. GOLDMAN, *Psychological Factors Generate HIV Resurgence in Young Gay Men*, *Clinical Psychiatric News*, October 1994, at 5); *see also* Dailey at 23 (citing a 1997 study published in the *International Journal of Epidemiology* on the mortality rates of homosexuals which concluded that “[u]nder even the most liberal assumptions, gay and bisexual men in this [Canadian] urban centre are now experiencing a life expectancy similar to that experienced by all men in Canada in the year 1871”).

The above statistic about twenty-year-old homosexuals “means that the incidence of AIDS among twenty- to thirty-year-old homosexual men is roughly 430 times greater than among the heterosexual population at large.” HOMOSEXUALITY at 57. Data from the Centers for Disease Control (CDC) also confirm the high incidence of sexually transmitted diseases – most notably AIDS and gonorrhea – among men who have sex with other men.<sup>7</sup> Hence, there is ample evidence that same-sex relationships bring increased health risks.<sup>8</sup>

Further, there is ample evidence that homosexual relationships are highly promiscuous. The most rigorous single study – the Multicenter AIDS Cohort Study – recruited nearly 5,000 men and found that “a significant majority \*\*\* reported having 50 or more lifetime sexual partners \*\*\*\*” HOMOSEXUALITY at 55 (quoting R.A. Kaslow *et al.*, *The Multicenter AIDS Cohort Study: Rationale, Organization, and*

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<sup>7</sup> See, e.g., <<<http://www.cdc.gov/hiv/graphics/images/1238/1238-4.htm>>> (visited on 11/7/01); <<<http://www.cdc.gov/hiv/graphics/images/1238/1238-7.htm>>> (visited on 11/7/01); <<[http://www.cdc.gov/nchstp/dstd/Stats\\_Trends/1999Surveillance/Gonorrhea/sld014.htm](http://www.cdc.gov/nchstp/dstd/Stats_Trends/1999Surveillance/Gonorrhea/sld014.htm)>> (visited on 11/7/01).

<sup>8</sup> See <<[http://www.familyresearchinst.org/FRI\\_EduPamphlet3.html](http://www.familyresearchinst.org/FRI_EduPamphlet3.html)>> (visited on 11/11/02) (citing a study comparing 6,516 obituaries in homosexual newspapers with a large sample of obituaries from other newspapers from which it was determined that the median age of death for homosexuals with AIDS was 39; the median age of death for homosexuals without AIDS was 42; compared to median ages of death for heterosexuals of 75 for married men and 57 for unmarried or divorced men; the study also concluded that fewer than 2% of homosexuals survived to old age (defined as 65 or older), whereas 80% of married heterosexual men and 32% of unmarried or divorced heterosexual men survived to old age).

*Selected Characteristics of the Participants*, American Journal of Epidemiology 126, no.2, August 1987, at 310-18). Another study of homosexual pairs, itself researched and written by a homosexual couple, found the following concerning the 156 same-sex couples studied:

[O]nly seven had maintained sexual fidelity; of the hundred couples that had been together more than five years, none had been able to maintain sexual fidelity. The authors noted that “[t]he *expectation for outside sexual activity was the rule for male couples and the exception for heterosexuals.*”

HOMOSEXUALITY at 55 (citing D. MCWHIRTER and A. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 3 (1984)) (emphasis added).

Continuing in that vein, “[a] 1981 study revealed that only 2 percent of homosexuals were monogamous or semi-monogamous – generously defined as ten or fewer lifetime partners.” HOMOSEXUALITY at 55 (citing A.P. BELL *ET AL.*, *SEXUAL PREFERENCE* (1981)). Further,

a 1978 study found that *43 percent of male homosexuals estimated having sex with five hundred or more different partners and 28 percent with a thousand or more different partners. Seventy-nine percent said that more than half of these partners were strangers and 70 percent said that more than half were men with whom they had sex only once.*

HOMOSEXUALITY at 55 (citing A.P. BELL & M.S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 308-9 (1978)) (emphasis added).<sup>9</sup>

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<sup>9</sup> The Dailey article cites additional studies supporting the conclusion that promiscuity is the rule, not the exception, in homosexual relationships. *See, e.g.*, Dailey at 19-20.

Further, even “monogamous” homosexual relationships do not reduce the incidence of risky sex practices:

The journal *AIDS* reported that men involved in relationships engaged in anal intercourse and oral-anal intercourse *with greater frequency than did those without a steady partner*. Anal intercourse has been linked with a host of bacterial and parasitical sexually transmitted diseases, including AIDS.

Daily at 21 (citing A.P.M. Coxon, *et al.*, *Sex Role Separation in Diaries of Homosexual Men*, *AIDS* (July 1993) at 877-882) (emphasis added); *see also* Dailey at 21 (citing an English study that found that “most ‘unsafe’ sex acts among homosexuals occur in steady relationships”).

There is also no evidence that changing marriage laws to recognize and legitimize same-sex “marriage” would change this risky behavior. *See, e.g.*, HOMOSEXUALITY at 55 (quoting D. MCWHIRTER and A. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 3 (1984) (noting that “[t]he expectation for outside sexual activity was the rule for male couples and the exception for heterosexuals”). Dailey compares the rate of fidelity in heterosexual and same-sex relationships and concludes:

While the rate of fidelity within marriage cited by these studies remains far from the ideal, there is a magnum order of difference between the zero to 2.7 percent fidelity rate cited for homosexuals and the 75 to 90 percent cited for married couples. This indicates that *even “committed” homosexual relationships display a fundamental incapacity for the faithfulness and commitment that is axiomatic to the institution of marriage*.

Dailey at 20 (emphasis added). There is, in fact, evidence that changing marriage law

would result in an increased incidence of promiscuous sex. *See* note 2, *supra*.

One must also contend with the issues of violence in same-sex relationships and incest in same-sex parent families. The Department of Justice Bureau of Justice Statistics reports that “married women in traditional families experience the lowest rate of violence compared with women in other types of relationships.” Dailey at 22 (citing *Violence Between Intimates*, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS (1991) at 2). Further,

[i]t should be noted that most studies of family violence do not differentiate between married and unmarried partner status. Studies that do make these distinctions have found that *marriage relationships tend to have the least intimate partner violence when compared to cohabiting or dating relationships*.

Dailey at 22 (quoting *Health Implications Associated With Homosexuality*, The Medical Institute for Sexual Health (1999) at 79) (emphasis added).

Moreover, gay men

were 116 times more apt to be murdered; 24 times more apt to commit suicide; and had a traffic-accident death-rate 18 times the rate of comparably-aged white males. \*\*\* Twenty percent of lesbians died of murder, suicide, or accident – a rate 487 times higher than that of white females aged 25-44.

*See* <<[http://www.familyresearchinst.org/FRI\\_EduPamphlet3.html](http://www.familyresearchinst.org/FRI_EduPamphlet3.html)>> (visited on 11/11/02).

Concerning incest in homosexual parent families, a study in *Adolescence* found:

A disproportionate percentage – 29% – of the adult children of homosexual parents had been specifically subjected to sexual molestation by that homosexual parent, compared to only 0.6% of adult

children of heterosexual parents having reported sexual relations with their parent \*\*\*\*\* *Having a homosexual parent appears to increase the risk of incest with a parent by a factor of about 50.*

Dailey at 25 (quoting P. Cameron & K. Cameron, *Homosexual Parents*, ADOLESCENCE 31 (1996) at 772) (emphasis added).

In light of the above, the Massachusetts Legislature may – to further the health and morals of the Commonwealth – legitimately take steps to reinforce traditional marriage, the cornerstone of Massachusetts society, while declining to take steps which encourage relationships destructive to society’s interests, such as same-sex relationships. Further, the critical policy debate over same-sex marriage is not about recognizing individual exceptions or permitting same-sex marriages only in exceptional circumstances (such as, where there appear to be no such destructive tendencies). Rather, the advocates of same-sex marriage, including Appellants in this case, are seeking to establish a general policy and rule of law in Massachusetts (and, ultimately, throughout the Land) to make same-sex relationships mimicking common law marriage fully equal to lawful marriage.<sup>10</sup> The Courts of this Commonwealth are not the place to

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<sup>10</sup> The former legal director of the Lambda Legal Defense and Education Fund has confirmed that the goal of same-sex marriage advocates is to change the essential character of marriage:

Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so \*\*\*\*\* Being queer means pushing the parameters of sex, sexuality, and family, and in the process transforming the very fabric of society.

Dailey at 25 (quoting WILLIAM B. RUBENSTEIN, *LESBIANS, GAY MEN, AND THE LAW* 398, 400 (1993)). Similarly, homosexual writer and activist Michelangelo Signorile describes the goal of homosexuals as

change the marriage laws of Massachusetts. *Connors*, 430 Mass. at 43, 714 N.E.2d at 341-42 (noting that any legal adjustments to reflect changes in social arrangements which have occurred over the past few decades “must come from the Legislature \*\*\*\*\*”). Such responsibility rightly and solely resides in the Massachusetts Legislature, and no change should be made absent vigorous public debate by the People of Massachusetts via their elected representatives.

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to fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, to demand the right to marry not as a way of adhering to society’s moral codes but rather to debunk a myth and radically alter an archaic institution \*\*\*\*\* The most subversive action lesbians and gay men can undertake \*\*\* is to transform the notion of “family” entirely.

Dailey at 25 (quoting Michelangelo Signorile, *Bridal Wave*, *OUT*, Dec./Jan. 1994).

## CONCLUSION

WHEREFORE, in light of the foregoing, *Amici Curiae* the Common Good Foundation, Catholic Vote, and The American Center for Law and Justice respectfully urge this Court to dismiss this case as presenting a nonjusticiable political matter whose resolution lies solely within the ambit of the Legislature of this Commonwealth. *Amici Curiae* further urge this Court to reaffirm the strong public policy of the Commonwealth of Massachusetts favoring traditional marriage and the critical, foundational role that marriage, as traditionally defined and understood, serves in undergirding a strong society, which, in turn, benefits every citizen of the Commonwealth, including Appellants.

DATED: \_\_\_\_\_, 2002

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the \_\_\_\_ day of December, 2002, two true and exact copies of the BRIEF OF *AMICI CURIAE* THE COMMON GOOD FOUNDATION, CATHOLIC VOTE, AND THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF DEFENDANTS-APPELLEES have been forwarded to the persons listed below:

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