

SJC-08860

**IN THE SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS**

HILARY GOODRIDGE, et al.,

Plaintiffs-Appellants,

v.

DEPARTMENT OF PUBLIC
HEALTH, et al.,

Defendants-Appellees

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

**BRIEF OF AMICI CURIAE
AGUDATH ISRAEL OF AMERICA
AND
THE UNION OF ORTHODOX JEWISH CONGREGATIONS
OF AMERICA
IN SUPPORT OF
DEFENDANTS-APPELLEES**

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PRELIMINARY STATEMENT

In its decision below, the court explored the application of the word “marriage” in Massachusetts law, looked at the construction of the marriage statutes, studied the historical purposes of the institution of marriage, and concluded that none of these warranted recognition of same sex marriage. The court also rejected plaintiffs’-appellants’ claims that there exists, under the Massachusetts Constitution and the Massachusetts Declaration of Rights, a fundamental right of same sex couples to marry. In its historical analysis, the court stated (Slip opinion at 8) that “the history of marriage . . . demonstrates a state interest in preserving a union for procreation because same sex couples . . . cannot accomplish the ‘main object’ of marriage as it is historically understood.” And in its review of the rationality of the Massachusetts Legislature’s decision to limit marriage to opposite-sex couples, the court concluded (Slip opinion at 25) that because “procreation is marriage’s central purpose, it is rational for the Legislature to limit marriage to opposite-sex couples. . .”

For the record, and as a preliminary matter, *amici curiae* Agudath Israel of America, an 80-year-old national grassroots Orthodox Jewish organization, and the Union of Orthodox Jewish Congregations of America, a 104-year-old national synagogue umbrella organization, each with constituents all across the United States, including Massachusetts, fully concur that Massachusetts’s interest in furthering the link between procreation and child-rearing is a valid public purpose sufficient to justify its refusal to recognize “same-sex marriage”. It has become manifestly clear in recent years that the decline of marriage has engendered

enormous social costs – and, more specifically, that failure to view marriage as the cornerstone of family life has had devastating impact on children. In its 1992 report to the nation, *Beyond Rhetoric: A New American Agenda for Children and Families*, the National Commission on Children noted (at page 253) as follows:

“When parents divorce or fail to marry, children are often the victims. Children who live with only one parent, usually their mothers, are six times as likely to be poor as children who live with both parents. They also suffer more emotional, behavioral, and intellectual problems. They are at greater risk of dropping out of school, alcohol and drug use, adolescent pregnancy and childbearing, juvenile delinquency, mental illness, and suicide.”

In the amici’s view, it is, or ought to be, an urgent objective of public policy not only to strengthen the institution of marriage, but to do so in a manner that promotes a sense of responsibility to children. The historical genius of marriage is not merely that it constitutes the legal union of man and woman, but that it furnishes the foundation of family. Legalizing same-sex marriages – which, by biological definition, can never have anything to do with procreation – would obscure further still the vital link between marriage and children. It would convey the message – subtly, perhaps, but surely – that child-bearing, and child-rearing, are matters entirely distinct from marriage. Massachusetts has ample reason not to convey that message.

But that is not the amici’s main purpose in this brief. Rather, it is to focus on another one of the interests advanced by Massachusetts in support of its marriage policy: preservation of the time-honored institution of marriage in its traditional form. The court below noted (Slip opinion at 7) that marriage between man and woman is “the most important civil institution, ‘the very basis of the

whole fabric of civilized society’,” and stated (Slip opinion at 20) that “[r]estricting marriage to the union of one man and one woman is deeply rooted in the Commonwealth’s legal tradition and practice”. As elaborated herein, the amici concur that the broad historical, social and moral consensus reflected in Massachusetts’s marriage laws itself furnishes a legitimate interest – indeed, a compelling one – sufficient to justify Massachusetts’s refusal to recognize same-sex marriages.

ARGUMENT

MASSACHUSETTS'S REFUSAL TO RECOGNIZE SAME-SEX MARRIAGES IS AMPLY SUPPORTED BY THE STATE'S INTEREST IN MARRIAGE LAWS THAT EMBODY A BROAD HISTORICAL, SOCIAL AND MORAL CONSENSUS

“[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth... than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.”

So stated the United States Supreme Court more than 100 years ago in *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). This case, at its core, is about whether that dictum still holds true.

There can be no question that “[t]he long tradition of marriage, understood as the union of male and female, testifies to political, cultural, religious and legal consensus.” *Storrs v. Holcomb*, 645 N.Y.S. 2d 286, 287 (Sup. Ct. Tompkins Co. 1996). That consensus is reflected in the enactment by Congress of the Defense of Marriage Act (1 U.S.C. § 7; 28 U.S.C. §1738C) (defining the terms “marriage” and “spouse” for purposes of federal law to exclude same-sex unions, and allowing states not to recognize as marriages same-sex unions treated as marriage by sister jurisdictions). It is reflected in the fact that not a single jurisdiction anywhere in the United States recognizes same-sex marriages. It is reflected in the growing movement in many states specifically to declare that same-sex marriages are offensive to their public policy. It is reflected in opinion poll upon

opinion poll, in which Americans overwhelmingly oppose the recognition of same-sex marriages.

There can further be no question that when society arrives at such a clear consensus of right and wrong, of what is morally appropriate and what is not, government has an interest in the preservation of laws that reflect the social moral consensus. For example, in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), the Supreme Court expressly found that “the law... is constantly based on notions of morality”, and that “majority sentiments about the morality of homosexuality” furnish a sufficient basis to uphold anti-sodomy laws against due process attack. In *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991), the Court concluded that a “public indecency statute furthers a substantial interest in protecting order and morality,” thereby shielding it from free speech attack.

The laws of marriage, too, are founded on notions of social morality. Indeed, as the U.S. Supreme Court noted in *Maynard v. Hill*, 125 U.S. 190, 205 (1888): “Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.” This insight led Justice Powell, concurring in *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978), to acknowledge that “[t]he State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely-held values of its people.”

Judge Ferren’s concurring/dissenting opinion in *Dean v. District of Columbia*, 653 A.2d 307 (D.C.App. 1995), makes the point well. Citing as an

example the District of Columbia’s law against “a man’s marrying his son’s wife or a woman marrying her stepfather,” Judge Ferren (in a section of his opinion joined by the two other members of the D.C. Court of Appeals panel) pinpointed social morality as a self-sufficient basis for consanguinity laws that prohibit marriages among certain relatives even though their unions pose no dangers of biological inbreeding. “The consanguinity provision... reflects taboos – indeed moral judgments about improper marriage relationships – that transcend genetic concerns.” 653 A.2d at 313.

Potter v. Murray City, 760 F.2d 1065 (10th Cir.), *cert. denied* 474 U.S. 849 (1985), teaches that the moral judgments embodied in a state’s marriage laws embody a governmental interest that is “compelling”. At issue was the First Amendment free exercise claim of a practitioner of “plural marriage” who challenged Utah’s prohibition against polygamy. The Tenth Circuit duly noted that only a compelling state interest could overcome the free exercise claim, 760 F.2d at 1068-69; and that Utah had presented no empirical evidence that “monogamy is superior to polygamy.” *Id. at 1069*. The court nonetheless rejected the First Amendment claim: “Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built. In light of these fundamental values, the State is justified, *by a compelling interest*, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.” *Id. at 1070* (citation omitted; emphasis added).

Further, there is ample jurisprudential basis to label the government’s interest in preserving social morality “compelling”. The point was well

articulated by the English jurist Lord Patrick Devlin. Commenting generally on the role of morality in a society's laws, Devlin emphasized the enormous interests at stake:

“If men and women try to create a society in which there is no fundamental agreement about good and evil, they will fail if, having based on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society, and mankind, which needs society, must pay its price.

“There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.”

Devlin, *The Enforcement of Morals* (1965) at 10,13. See generally McConnell, *The Role of Democratic Politics in Transforming Moral Convictions Into Law*, 98 Yale L.J. 1201 (1989); Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Calif. L.Rev. 521 (1989).

CONCLUSION

If “taboos” and “moral judgments about improper marriage relationship” by themselves furnish a sufficient state interest as to justify government’s refusal to accept the “marriages” of certain non-blood related relatives, as noted in *Dean, supra*, and if monogamy as “the bedrock upon which our culture is built” justified government’s refusal to accept polygamous “marriages,” as noted in *Potter, supra*, the longstanding moral consensus surrounding marriage as the solemnized union of man and woman also furnishes a sufficient state interest as to justify government’s refusal to accept the “marriages” of persons of the same gender. And, conversely, since society’s marriage laws are understood to embody distinctions between marital relationships that are morally acceptable and those that are not, any decision in this case that legalizes “same-sex marriages” will perforce send a message of profound moral revolution all across the globe.

Amici curiae Agudath Israel of America and the Union of Orthodox Jewish Congregations of America respectfully submit that Massachusetts’s interests in having its marriage law reflect the prevailing historical, social and moral consensus is substantial, indeed compelling; that the law restricting marriages to the union of a man and a woman is narrowly drawn to promote that objective; and that the decision below should accordingly be affirmed.

RESPECTFULLY SUBMITTED this 19th day of December, 2002.

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