

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-08860

Goodridge et al.,

Plaintiffs-Appellants

v.

Department of Public Health et al.,

Defendants-Appellees

Appeal from Commonwealth of Massachusetts
Superior Court, Suffolk County

**AMICUS CURIAE BRIEF OF THE CATHOLIC ACTION LEAGUE OF
MASSACHUSETTS IN SUPPORT OF DEFENDANTS-APPELLEES**

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INTEREST OF THE AMICUS

The Catholic Action League of Massachusetts is a civil rights and antidefamation organization dedicated to safeguarding the religious freedom rights of Catholics and others, including the right of citizens and public officials to apply their moral convictions to matters of public policy. The Catholic Action League of Massachusetts successfully petitioned the Supreme Judicial Court in 1999 to find municipal domestic partnership programs in violation of Massachusetts law. Members of the organization also joined this year as signatories and worked to collect signatures on the Protection of Marriage Amendment, because it would guarantee that marriage in the Commonwealth would remain a sacred bond between one man and one woman. The Catholic Action League of Massachusetts files this Amicus brief to highlight the importance of the underlying distinction between natural sexual intercourse and what Massachusetts law describes as unnatural sexual intercourse as a material basis for distinguishing between married couples and same-sex couples under the Commonwealth's marriage law.

ARGUMENT

I. The Distinction Between Marriage as Traditionally Defined and Same-Sex Relationships is Grounded in the Biological and Moral Differences Between What the Massachusetts Legislature Characterizes as Natural and Unnatural Sexual Intercourse.

Your Amicus disagrees with the contention that "There are no material differences between same-sex and different-sex couples". Brief of Plaintiffs-Appellants at 9. Marriage's status as a fundamental social institution did not arise because married couples may seek a "'shared interdependent life' with accompanying personal fulfillment". Id. at 11. All sorts of relationships may possess these characteristics but have not garnered the same public esteem as marriage. Rather, marriage owes its unique social importance to a particular form of intimate conduct that only a man and a woman acting together are biologically capable of completing.

The General Court distinguishes between "sexual intercourse" and "unnatural sexual intercourse". G.L. c. 265, §§ 22, 22A, 23, c. 270, § 31, c. 272, § 3, c. 277, §§ 39, 79. The former term refers to "the penetration of the female sex organ by the male sex organ, with or without emission" while the latter term "must be taken to include oral and anal intercourse,

including fellatio, cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another person's body". Commonwealth v. Gallant, 373 Mass. 577, 584 (1977); see also Commonwealth v. Smith, 431 Mass. 417, 422 (2000) (concluding that the General Court intends sexual intercourse to be understood as conduct limited to "heterosexual coitus"). As employed by the legislature and as construed by the courts, the term sexual intercourse necessarily refers to the biological fact of gender since only men have "male sex organs" and women have "female sex organs".

That only a man and a woman can engage in sexual intercourse as defined in Massachusetts law indicates that a categorical distinction may be made between married couples and same-sex couples based on the presumed capacity to engage in a form of intimacy requiring the use of male and female sex organs.

The question remains on several levels, of course, whether this difference in physiological capacity between the two types of couples is "material".

It is certainly material to a claim of sex discrimination brought under the Equal Rights Amendment. Sexual intercourse is possible only

through the use of male and female sex organs, thus providing the "functional differences deriving in the main from biology" between a married couple and a same-sex couple, a finding of which avoids a charge of sex discrimination. Attorney General v. Massachusetts Interscholastic Athletic Association, Inc., 378 Mass. 342, 357 (1979). The marriage definition discriminates according to two persons' mutual capacity to engage in a particular form of conduct. Biology provides men with male sex organs and women with female sex organs. Thus, gender is not a stereotypical "proxy" for function in this case in the same way that it might be in a case where one's athletic capacity is at issue.

Moreover, a couple's categorical inability to engage in sexual intercourse as defined in Massachusetts law is material to an equal protection or due process claim alleging interference with a fundamental right. Laws remain on the Massachusetts books prohibiting myriad forms of sexual conduct except a married couple's heterosexual intercourse. Paraphrasing this Court, even if the enforcement of such laws in private, consensual circumstances involving adults were "of doubtful constitutionality",

the laws "remain[] . . . as . . . criminal statute[s] of the Commonwealth which suggests some diminution in the strength of the Commonwealth's interest in the elimination of . . . discrimination" between sexual intercourse and unnatural sexual intercourse.

Attorney General v. Desilets, 418 Mass. 316, 329

(1994). How can conduct subject to criminal penalties throughout history demonstrate the pedigree of a fundamental right? The historical treatments of sexual intercourse (as defined in Massachusetts) and unnatural sexual intercourse differ radically.

Recent trends whereby state courts have overturned restrictions on "private" consensual sexual behavior¹ do not dictate a contrary demand for "public" status. It is one thing to hold that laws authorizing intrusions into the bedroom may interfere with a generalized "right to privacy". It is another thing altogether to hold that private relationships characterized by particular forms of historically disfavored sexual behavior deserve constitutionally compelled government promotion by being raised to the

¹ Jegley v. Picado, 80 S.W.3d 332, 345 n.4 (Ark. 2002) (striking down sodomy statute on privacy grounds and listing other court rulings doing same).

level of a civic institution. Unlike in the
aforementioned privacy cases, where the plaintiffs
sought to shield their relationships from public view,
the plaintiffs in this case seek with the state's aid
through its issuance of marriage certificates to make
"powerful statements to the . . . outside world . . .
no less expressive than nude dancing and other types
of conduct deemed expressive." Brief of Plaintiffs-
Appellants at 27 n.13. Preserving privacy in the
former instance has no bearing on whether ratifying
with a marriage certificate must ensue in the latter
instance.

**II. Massachusetts Law Has Understood Marriage As
Resting On An Underlying Assumption Of "Potency",
The Mutual Physical Capacity Of A Man And A Woman
To Engage In Sexual Intercourse as Defined in
Massachusetts.**

As already noted in filings before this Court,
"Impotence"—the inability to engage in sexual
intercourse—. . .historically has been a ground for
dissolution of marriage and continues to be so at
present. G.L. c. 208, § 1. The law recognizes that
sexual intimacy is at the heart of the marital
contract and acknowledges that individuals entering
marriage legitimately expect, absent disclosure to the
contrary, that a marital partner will be able to

engage in sexual relations." Brief of Monroe Inker and Charles Kindregan Amici Curiae at 12. Of course, the relevant sexual "intimacy" or "relations" deemed to be at the heart of marriage was never and is not now understood in Massachusetts law to be anything other than that coupling which utilizes male and female sex organs.²

Too much is made of the fact that proof of impotency, while necessary, is not sufficient to void a marriage in Massachusetts. Brief of Plaintiffs-Appellants at 98; Brief of Inker & Kindregan at 12-15. Rather than testifying to some lack of interest on the State's part in the correlation between the presence of male and female sex organs and a couple's assumed capacity to achieve the sexually unifying purposes of

² See supra section I. at 2-3; M. v. M., 342 Mass. 773, 774 (1961) (identifying impotency due to wife's being "incapable of copulation" because of "congenital physical deformities"); Webster's Third New International Dictionary Unabridged 441, 503 (1966) (defining copulation as "sexual union: coitus" and defining coitus as "physical union of male and female genitalia . . ."); Merrill v. Merrill, 126 Mass. 228, 229 (1879) (referring to impotency as being physically incapable of the act of sexual intercourse, a woman's being physically incapable of connection to a man); S__ v. S__, 192 Mass. 194 (1906) (indicating impotency is the inability to engage in sexual "marriage function").

marriage, the voidable doctrine may instead owe its application in the marriage context to the State's concern about marriage's permanency and stability. See Smith v. Smith, 171 Mass. 404, 405 (1898) (the public interest in encouraging permanency of marriage weighs against nullifying or dissolving ostensibly valid marriages based on claims of fraud).

On one hand, when a man and a woman seek to certify their relationship as marriage, the union presumably contains the requisite functional capacities for sexual intercourse as defined in Massachusetts, solely by virtue of the presence and biological characteristics of both genders. The State has no discernible grounds for challenging the presumption of potency, a presumption that flows directly from the obvious association between each gender and its characteristic sex organs. Thus, the State's interest in discouraging the undue annulment or dissolution of marriages among ostensibly capable couples, along with its interest in not intruding without invitation into private matters to gather proof of impotency, may reasonably provide the bases for the application of the voidable, as opposed to the void ab initio, doctrine.

On the other hand, an attempted marriage between persons of the same gender requires no further inquiry to determine that the only sexual relation possible is unnatural sexual intercourse and that the couple is biologically and necessarily incapable of natural sexual intercourse.

The question now must be addressed directly: why would the categorical inability of same-sex couples to engage in sexual intercourse as defined in Massachusetts law be material to the state's interest in certifying marriage? Obviously participants in same-sex relationships cannot expect their sexual relations to include such intercourse. Nor will they likely complain about each other's mutually impotent biological condition. The State's interests countering the claim raised in this case will have to transcend the vindication of those feeling personally wronged (as in the case of a married couple legitimately expecting and not achieving potency) since this will not be an issue in the same-sex context.

The following discussion describes some public interests uniquely served by marriage as presently defined and therefore threatened by the redefinition

proposed in this case. These interests are associated with but not determined by procreation, and state policies on procreation described by the appellants do not compromise the state's interests in reserving marriage only to those relationships where sexual intercourse is naturally associated.

Any legal redefinition that removes sexual intimacy from the heart of marriage altogether or that deems unnatural sexual intercourse to be as qualified for legal and social esteem as natural sexual intercourse raises substantial policy concerns that the judiciary is ill equipped to address.

III. Unique Benefits Accrue from the State's Recognition that Sexual Intercourse as Defined in Massachusetts Constitutes the Heart of Marriage.

As already stated, it cannot be disputed that the long understood "heart" or core aspect of marriage has been sexual intimacy.³ To accept the claim before it in this case, the Court would have to reject this understanding by concluding that marriage is only about commitment, sharing, and love with sexual

³ "In the popular imagination and the law, sexual intimacy is a core element of marriage." Amici Curiae Brief of the History of Marriage, Families, and the Law at 38.

relations having no central or defining association. In the alternative, the Court would have to override centuries of legislative judgement differentiating between the preferred natural and the discouraged unnatural forms of sexual intercourse by concluding that the latter merits official promotion as the joint "heart" of marriage as much as the former.

To identify the heart of an institution is not to limit the entirety of the institution to its heart by denying other elements are included. Marriage should and does involve commitment, sharing and love but the union between a man and a woman cannot be fully explained without taking account of the biological and social reality of intercourse through the use of male and female sex organs.

Defining marriage as the union between a man and a woman makes sense when viewed as an acknowledgement of the unique capacity for sexual intercourse that couples consisting of the male and female genders possess. Raising only this private sexual community to the level of a public institution affirms the critical role that this community holds and will continue to play in the continuation and stability of

society precisely because this community is uniquely capable of sexual intercourse.

A. The potential for sexual intercourse draws men and women together into a relationship of fundamental importance to society.

By appealing to both men and women through a physical sharing that requires the presence of both sexes, the marital community as always understood is assured of including representatives of the two halves of the human community. If men are from Mars and women are from Venus, then marriage and its socially approved invitation to sexual intimacy brings the two sexes into the same orbit, thus opening the way to a peaceable concourse of great exemplary value. This collaboration of the sexes within the home is indispensable to their productive cooperation and mutual regard in the public arena. Thus, marriage promotes the civil as well as intimate intermixing of men and women. This public good can be achieved regardless of the presence of children and at all stages of life but is not furthered by the inclusion of same-sex couples.⁴

⁴ Experience shows that state sanction of same-sex relationships promotes a "two-track" response, with far more women than men enticed to formalize their

B. Sexual intercourse provides the only natural means of procreation.

Marriage also situates married couples as unique agents for the common good because of the inherent potential for procreation provided by sexual intercourse. The sexual union of one man and one woman involves, unlike a same-sex relationship, a biological difference from which comes the natural inclination toward the generation of children and the possibility to love one another precisely because each is sexually different and, in this procreative sense at the very least, complementary. While other ways of living sexually can exist—other forms of living together, other friendly relationships, and other ways of bringing children into the world, the committed relationship between a man and a woman is the only social institution that incorporates and unites all the elements mentioned at the same time and in an original way.

relationships. Laurel J. Sweet, Commitment Phobia: A Guy Thing? Study: Most Gay Civil Unions Are Women's, Boston Herald, Apr. 8, 2002, at 5 (reporting that civil union registrations in Vermont had issued to 1,180 male couples and to 2,291 female couples).

While obviously true that not all married couples produce children, or that not all children are produced by married sexual intercourse or even by any sexual intercourse at all, the possibilities of sexual intercourse and the begetting of children by sexual intercourse are naturally joined only in the union between a man and a woman. This great confluence of physical, social, and procreative realities has given marriage its reason for being as a public institution and continues to supply its power as a normative influence on sexual and cultural mores.

A subtext of the claim before this Court holds that the State has, through its IVF insurance and adoption policies, rendered sexual intercourse superfluous, effectively unanchoring society from its historical dependence on the natural fecundity of married couples. Is it really possible for a few discrete legislative enactments to have robbed sexual intercourse of its unique capacity to advance the common good?

That such an earth-shaking development should have occurred so stealthily causes one to doubt. Every time a man and a woman fall in love and decide to share their life together, the possibility of sexual

intercourse and the potential for children rises accordingly, notwithstanding even the prevalence of contraception and abortion. Even with government-mandated insurance coverage, the costs of medically assisted production of children exclude all but the most financially well off from this "alternative" to sexual intercourse and quite frankly it is no where near as emotionally appealing. As egregious and as damaging that the sexual revolution has been, sexual intercourse within marriage still retains its foundational import in our society. Social spending patterns and levels of wealth will ebb and flow, causing fluctuations in the ability to subsidize technological alternatives to sexual intercourse as a means of procreation. However, given its role since time immemorial, sexual intercourse will always remain a constant and overriding sociological phenomenon.

The petition before this Court seeks by virtue of judicial decree not just a change in procedure at every government office that issues marriage certificates. It demands at least four justices to pronounce, explicitly or implicitly, that sexual intimacy, and in particular sexual intercourse is either irrelevant to marriage or no longer special as

the only natural and most powerful means of bringing the sexes together and transmitting new life. Such pronouncement is beyond the competency of the judiciary to reach, let alone to enforce, especially due to the lack of any evidence in the record of this case demonstrating invidiousness.

IV. Defining Marriage According to the "Theoretical" Capacity to Engage in Sexual Intercourse Is Neither Invidious Nor Arbitrary.

The appellants are correct that the distinction underlying the marriage definition refers to "a particular sexual act" for which the "theoretical" capacity resides only with couples consisting of a man and a woman. Brief of Plaintiffs-Appellants at 68. While it may be true that the capacity "to bring children into their lives", strictly speaking, is not the "line in truth that separates all different-sex couples from same-sex couples" (id.), the theoretical ability to engage in sexual intercourse as understood in Massachusetts law maps just such a line. The question is whether by relying on that biologically drawn line to define marriage, the Commonwealth is acting invidiously or arbitrarily.

A. Appellants have failed to produce any evidence of an intent to cause harm.

An invidious action is based on a desire to cause harm or resentment against another. See Merriam-Webster's Collegiate Dictionary 616 (10th ed. 1999) (defining invidious). Nowhere do the appellants cite any evidence that the Commonwealth intended to hurt or cause resentment towards anyone by acceding to the traditional custom and common law understanding of marriage. Nor do the appellants cite any evidence that those private groups generating marriage's traditional definition—such as religious institutions—harbored such intent in limiting marriage to couples consisting of a man and a woman.

To be sure, appellants assert in conclusory fashion that the Commonwealth's denial of marriage certificates is "presumptively" (id. at 53) or "inherently" (id. at 78) invidious. Such conclusion is misdrawn by analogy from cases involving clearly recognized fundamental rights⁵ or clearly enunciated

⁵ Based on the conduct's status in history: relationships centered on sexual intimacy have enjoyed the law's favor, especially through marriage, only when the intimacy involved constitutes sexual intercourse as defined in Massachusetts.

legislative findings.⁶ The appellants ask this Court to regard with extreme suspicion a centuries-old and still universally accepted tradition without any warrant from history or any showing of societal consensus that such tradition was or is the fruit of hate (as evidenced in the racial discrimination context by passage of the 13th and 14th Amendments).

If such an extra-judicial record were truly unnecessary to trigger judicial suspicion, then all the appellants need do is find four justices on this Court whose individual consciences are shocked enough by the denial of marriage certificates to presume that nothing but invidiousness could explain marriage's traditional definition. To strike down considered public policy on such a basis, however, the judiciary would have to arrogate itself as the chief policymaker of the Commonwealth, substituting its sensibilities and opinion for the people's judgment.

⁶ Based on Congressional findings, for example, in implementing Title VII: here the only legislative findings at all seemingly applicable either 1) fail to denunciate marriage's limitation to opposite sex couples, as is the case with the ERA which was understood from the beginning not to apply to exclusions of same-sex relationships, or 2) expressly exclude marriage from the law's scope, as is the case with the Commonwealth's sexual orientation provisions.

B. It is rational to promote intimate relationships through marriage based on the theoretical capacity for sexual intercourse.

Absent a presumption of invidiousness arising from legislative or constitutional findings of such, the judiciary is charged only with determining under a more deferential scrutiny whether marriage is rationally limited to relationships founded upon the theoretical possibility for sexual intercourse. When determining which sexually intimate relationships to promote through the elevation to the status of a public institution, the Commonwealth may take into account the direct connection between the capacity to engage in sexual intercourse and the inherent potential for procreation, and on that basis distinguish between relationships allegedly equal in terms of "commitment" or "sharing". The Commonwealth may also take into account the utter lack of any moral consensus favoring the view that unnatural sexual intercourse deserves to be endorsed and promoted as the basis for marriage.

The actual historical and present-day consensus, evidenced by federal and state passage of "Definition of Marriage" laws across the country, lends credibility to the Commonwealth's at least implicit

rationale for accepting and promoting marriage as a union between a man and a woman: the purpose of marriage law is to endorse and promote sexual intercourse (as understood in Massachusetts) within a formalized setting because of the uniquely and publicly beneficial characteristics of this form of intimacy, and same-sex couples are not similarly situated with opposite sex couples with respect to this purpose.

Any seeming "loose fit" between the line relied upon here, the theoretical capacity to engage in sexual intercourse, and the Commonwealth's various asserted or conceivable public interests in marriage can be attributed to factors other than a desire to cause harm. Your Amicus defers to the numerous other briefs opposing the claim in this case that address the "fit" issue more comprehensively. Suffice it to say that the Court is provided with no basis in the record before it to substitute its opinion for that of the legislature or the people on the definition of marriage.

Conclusion

Your Amicus urges the Court to uphold the trial court's decision recognizing that the Commonwealth has

the authority to limit marriage certificates to couples consisting of one man and one woman by virtue of the theoretical capacity of such couples to engage in sexual intercourse.

RESPECTFULLY SUBMITTED:

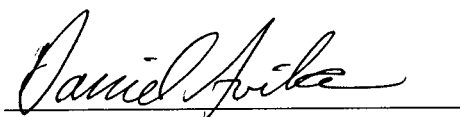
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Certificate of Service

I, Daniel Avila, hereby certify that on December 20, 2002, I served the Motion for Leave to File and the foregoing *Amicus Curiae Brief of the Catholic Action League of Massachusetts* by causing one copy of the Motion and two copies of the Brief to be mailed, first class postage prepaid, to counsel for the plaintiffs, Mary L. Bonauto, Jennifer L. Levi, Gary D. Buseck, Bennett H. Klein, Karen L. Loewy, GAY & LESBIAN ADVOCATES & DEFENDERS, 294 Washington Street, Suite 301, Boston, Massachusetts 02108-4608, and counsel for the defendants, Judith S. Yogman, Assistant Attorney General, and Anthony E. Penski, Assistant Attorney General, One Ashburton Place, Boston, Massachusetts 02108-1698.

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