

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Suffolk County

No. SJC-08860

HILLARY GOODRIDGE, JULIE GOODRIDGE, DAVID WILSON,
ROBERT COMPTON, MICHAEL HORGAN, EDWARD BALMELLI,
MAUREEN BRODOFF, ELLEN WADE, GARY CHALMERS,
RICHARD LINNELL, HEIDI NORTON, GINA SMITH,
GLORIA BAILEY AND LINDA DAVIES,

Plaintiffs-Appellants,

v.

DEPARTMENT OF PUBLIC HEALTH and HOWARD KOH,
COMMISSIONER OF THE DEPARTMENT OF PUBLIC HEALTH,

Defendants-Appellees.

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

BRIEF IN SUPPORT OF APPELLEES OF *AMICI CURIAE* NATIONAL ASSOCIATION
FOR RESEARCH AND THERAPY OF HOMOSEXUALITY, INC., FOCUS ON THE
FAMILY, JEWS OFFERING NEW ALTERNATIVES TO HOMOSEXUALITY,
INTERNATIONAL HEALING FOUNDATION, MASSACHUSETTS PHYSICIANS RESOURCE
COUNCIL, CATHOLIC MEDICAL ASSOCIATION, COURAGE, NEW CREATIONS, A.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

I. THE COURT SHOULD NOT ASSUME THAT PLAINTIFFS ARE SIMILARLY SITUATED WITH OPPOSITE-SEX COUPLES THAT MARRY 2

II. MASSACHUSETTS PROPERLY DISTINGUISHES BETWEEN OPPOSITE-SEX AND SAME-SEX COUPLES IN REGARD TO MARRIAGE 6

 A. Same-Sex Relationships Are not Equivalent to Opposite-Sex Relationships Physically 8

 B. Same-Sex Relationships Are not Equivalent to Opposite-Sex Relationships Reproductively 9

 C. Same-Sex Relationships Are not Equivalent to Opposite-Sex Relationships Historically 11

 D. Same-Sex Relationships Are not Equivalent to Opposite-Sex Relationships Morally 12

III. THE SOCIAL SCIENCE LITERATURE IN SUPPORT OF SAME-SEX MARRIAGE IS CONTROVERSIAL AND FAR FROM CONCLUSIVE 13

 A. The Research Is Unreliable 14

 B. The Methodology of Research Matters 15

 C. Homosexual Parenting Results in Different Outcomes 22

 D. Same-Sex Relationships Are not as Stable, Committed and Enduring as Opposite-Sex Relationships 28

 E. Opposition to Same-Sex Marriage Is not Based on Cultural Myths or Same-Sex Stereotypes 34

F.	The Social Science Brief Uses Inconsistent Definitions	41
CONCLUSION	43
ADDENDUM—STATEMENT OF INTEREST OF INDIVIDUAL <i>AMICI CURIAE</i>	45

TABLE OF AUTHORITIES

State Cases

Commonwealth v. Green,
408 Mass. 48, 556 N.E.2d 387 (1990) 6

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430 Mass. 31, 714 N.E.2d 335 (1999) 24

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424 Mass. 398, 675 N.E.2d 398 (1997) 4

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375 Mass. 733, 379 N.E.2d 1053 (1978) 3, 4

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766 N.E.2d 903 (Ct. App. 2002) 3, 4

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345 Mass. 379, 187 N.E.2d (1963) 24

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379 Mass. 345, 398 N.E.2d 458 (1979) 6, 22

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387 Mass. 312, 439 N.E.2d 778 (1982) 3, 4

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372 Mass. 423, 362 N.E.2d 878 (1977) 6

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are non-profit organizations and individuals that are dedicated to strengthening families, preserving marriage, seeking the best interests of children, producing accurate scientific information about homosexual behavior and helping people with same-sex attraction understand that the condition is not inborn, benign or unchangeable. Statements of the individual interest of each *amicus curiae* are provided in the attached Addendum.

SUMMARY OF ARGUMENT

Plaintiffs' arguments for a constitutional right to marry are premised upon an unproven element of their claim: that they are similarly situated to opposite-sex couples who marry. To validate their argument, they rely in part upon social science evidence presented in the *amici curiae* brief of the Massachusetts Psychiatric Society, et al. ("Social Science Brief"). See Plaintiffs Brief at 70, 82-83, 105. In effect, Plaintiffs are asking this Court to take judicial notice of this controversial social science evidence as though it were established fact. The Court should not take judicial notice of disputable facts on appeal that were not established in the Superior Court. (Pages 2-6.)

Distinguishing between opposite-sex and same-sex couples in regard to marriage is not invidious or arbitrary, as argued by the Plaintiffs. Massachusetts does distinguish and should continue to distinguish between opposite-sex and same-sex couples when it comes to marriage because their relationships are not equivalent; they are not similarly situated. They are not equivalent physically, reproductively, historically or morally. No amount of social science research and no judicial or legislative fiat can change that reality. (Pages 6-13.)

Finally, the social science research relied upon in the Social Science Brief is biased and is defective in methodology. (Pages 13-22.) Moreover, notwithstanding the claims of the Social Science Brief, the extant social science research demonstrates significant differences between opposite-sex and same-sex couples in child raising outcomes and relationship commitment and duration. (Pages 22-34.) Homosexual behavior is also associated with increased incidence of HIV/AIDS, domestic violence and mental health problems. (Pages 34-41.)

I. THE COURT SHOULD NOT ASSUME THAT PLAINTIFFS ARE SIMILARLY SITUATED WITH OPPOSITE-SEX COUPLES THAT MARRY

Plaintiffs' claim for equal treatment in regard to marriage is essentially an equal protection claim. They argue that they have a right under the Massachusetts

Constitution to be treated the same as opposite-sex couples. They repeatedly rely upon equal protection cases in support of their arguments. See Plaintiffs' Brief at 30, 36, 64, 72, 80, 87, 91. In addition, they assert, without reference to any facts established in the Superior Court, that they are similarly situated to opposite-sex couples. *Id.* at 9, 66, 68, 70, 83, 105. However, Plaintiffs made no effort in the Superior Court to prove that they are similarly situated with opposite-sex couples that marry. Instead, they assumed that they are similarly situated. Plaintiffs may not present evidence to this Court on appeal that they failed to present to the Superior Court. *Stratos v. Department of Public Welfare*, 387 Mass. 312, 324 n. 12, 439 N.E.2d 778 (1982) (evidence not part of the record is not properly before the Court); *In re Custody of a Minor*, 375 Mass. 733, 736 n. 1, 379 N.E.2d 1053 (1978) (material not presented to Superior Court and not on the record "is not properly before us on review"); *J.H. Currens v. Board of Assessors of Boston*, 370 Mass. 249, 254, 346 N.E.2d 849 (1976) ("An appealing party may not by his brief attempt to place before an appellate court facts which are not stated or incorporated in the record on appeal"); *McIsaac v. Cedergren*, 54 Mass. App. Ct. 607, 609 n. 3, 766 N.E.2d

903 (Ct. App. 2002) (materials not filed and considered by judge are not part of record on appeal).

The Massachusetts Declaration of Rights prohibits the State from treating unequally citizens that are in "like circumstances," those who are similarly situated. *Holden v. James*, 11 Mass. 396, 405 (1814). But Plaintiffs have the burden of proving that they are similarly situated to opposite-sex couples: "One indispensable element of a valid equal protection claim is that individuals *who are similarly situated* have been treated differently." *In re Corliss*, 424 Mass. 398, 399, 675 N.E.2d 398 (1997) (emphasis added). Plaintiffs failed to establish an essential element of their claim by moving for summary judgment without submitting evidence to prove that they are similarly situated with opposite-sex couples. They cannot prove that element on appeal. See *Stratos*, 387 Mass. at 324 n. 12; *In re Custody of a Minor*, 375 Mass. at 736 n. 1; *J.H. Currens*, 370 Mass. at 254; *McIsaac*, 54 Mass. App. Ct. at 609 n. 3.

Same-sex couples are not like racial minorities when it comes to establishing equal protection claims. It was unnecessary for African-Americans to prove that they were similarly situated with white or Anglo-Americans in cases

like *McLaughlin v. Florida*, 379 U.S. 184 (1964). As the Court explained:

[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

McLaughlin, 379 U.S. at 191-92 (citations omitted). In view of the Fourteenth Amendment, there was no reason for the Court to consider whether racial minorities were similarly situated with other races—the United States Congress and a majority of the states had already made that determination. There is no similar constitutional or legislative determination for same-sex couples. Absent such a predetermination, Plaintiffs were obligated to establish that they were similarly situated with opposite-sex couples.

There is no evidence in the record that Plaintiffs are similarly situated with opposite-sex couples. This Court should not accept the controversial representations in the Social Science Brief as evidence that Plaintiffs are similarly situated with opposite-sex couples, since the evidence was not presented to the Superior Court for

a finding of fact.¹ To do so would be to take judicial notice of disputable facts to establish an indispensable element of Plaintiffs' claim. "It is inappropriate to supply an essential element of proof by taking judicial notice of a fact at the appellate level." *Commonwealth v. Green*, 408 Mass. 48, 50, 556 N.E.2d 387 (1990) (reversing criminal conviction, even though it would have been appropriate to take judicial notice of an element of proof at trial). Moreover, the social science evidence, which is reasonably subject to dispute, is not appropriate for judicial notice. See *Nantucket v. Beinecke*, 379 Mass. 345, 352, 398 N.E.2d 458 (1979) ("Matters are judicially noticed only when they are indisputably true"). Without a finding of fact that Plaintiffs are similarly situated with opposite-sex couples, the judgment of the Superior Court must be affirmed.

II. MASSACHUSETTS PROPERLY DISTINGUISHES BETWEEN OPPOSITE-SEX AND SAME-SEX COUPLES IN REGARD TO MARRIAGE

A legislative distinction is not arbitrary, irrational or invidious if there is any reasonable basis for it. *Zayre Corp. v. Attorney Gen.*, 372 Mass. 423,

¹Respondents were not given either the opportunity to cross-examine the purported social science experts or to offer their own in rebuttal, since the matter was never tried.

441-42, 362 N.E.2d 878 (1977); *Vigeant v. Postal Telegraph Cable Co.*, 260 Mass. 335, 340-41, 157 N.E. 651 (1927). There are numerous justifiable reasons for distinguishing between opposite-sex and same-sex relationships with respect to marriage.

If a man falls in love with his mother, sister, daughter or any other close relative, he cannot marry her regardless of the depth of his sincerity or commitment. MASS. GEN. L. ch. 207, §§ 1-3, 8. The legislature's distinction between incestuous relationships and other opposite-sex relationships is justifiable on reproductive and moral grounds. Incest is not equal to other opposite-sex relationships because there is a serious risk of genetic problems in babies born through intra-familial procreation, and incest has traditionally been viewed as immoral.² As with incest, the State is justified in distinguishing between opposite-sex and same-sex couples on reproductive and moral grounds.

²If same-sex couples were given the right to marry, there would be no rational basis, apart from society's view of morality, to prohibit homosexuals from marrying a same-sex sibling, parent or child. However, the immorality of the relationship is sufficient in and of itself to justify such a prohibition. It is noteworthy that no state has legalized incest, despite the ability to prevent conception or to abort unwanted babies.

Moreover, same-sex relationships are not the equivalent of opposite-sex relationships physically or historically.

A. Same-Sex Relationships Are not Equivalent to Opposite-Sex Relationships Physically

It is clear that human physiology is designed for sexual intercourse between male and female.³ Two members of the same sex cannot have sexual intercourse, for sexual intercourse requires both male and female genitals. STEDMAN'S POCKET MEDICAL DICTIONARY 151 (coitus), 381 (sexual intercourse) (1987). In addition, sexual intercourse and anal sex are substantially different. The vagina, "the female organ of copulation," is well-suited for penetration by the male organ. Keith L. Moore, CLINICALLY ORIENTED ANATOMY 370 (2nd ed. 1985). It is a muscular tube that is readily expandable. *Id.* In addition, it has natural lubricants. In contrast, the anus has a far more limited capacity to expand because it is firmly attached to the tail bone, and is vulnerable to tears at its point of attachment. Because it is

³It is beyond rational dispute that there are only two sexes, male and female, with a few people having genital or chromosomal defects. Despite efforts to define a third or fourth or fifth sex, there is no norm for genital or chromosomal defects that could qualify as other separate sexes. Females born with genital defects may not be able to experience sexual intercourse absent surgical intervention, but they are, nevertheless, female.

surrounded by veins and arteries, any tears may lead to substantial bleeding. See *id.* at 385. Accordingly, anal sex causes physical trauma to the anus, and perhaps to the rectum as well. William G. Eckert, M.D., & Steven Katchis, *Anorectal Trauma*, 10 *The American J. of Forensic Medicine and Pathology* 3, 5 (1989) (anal sex "can cause tears and resultant bleeding or other complications"); A.J.G. Miles, et al., *Effect of anoreceptive intercourse on anorectal function*, 86 *Journal of the Royal Society of Medicine* 144, 146 (March 1993) (14 of 40 men who practiced receptive anal sex experienced frequent anal incontinence).

B. Same-Sex Relationships Are not Equivalent to Opposite-Sex Relationships Reproductively

Plaintiffs make the astonishing claims that "many same-sex couples [procreate], including four of the seven couples in this case,"⁴ Plaintiffs' Br. at 54, and that "same-sex couples and different-sex couples are similarly situated with respect to procreation." *Id.* at 66 (emphasis original). One hundred percent of same-sex couples are by definition sterile *as a couple*. Neither

⁴Although they do not explicitly say so, Plaintiffs apparently include "adoption" in their own definition of procreation, since one of the couples that allegedly "procreated" did so by adoption. Plaintiffs' Br. at 5. No dictionary defines procreation to include "adoption."

partner in a male same-sex couple can produce a child without a surrogate mother. Neither female in a same-sex couple can produce a child without a sperm donor. In either case, it is not genetic procreation *by the two partners*. The fact that a small percentage of married couples reproduce by using the egg or sperm of a third party does not make opposite-sex and same-sex couples similarly situated with respect to procreation. The prevailing paradigm for procreation is sexual intercourse between a man and a woman. That paradigm is unlikely to change in a free society.

In *THE CASE FOR SAME-SEX MARRIAGE*, William Eskridge, Jr. acknowledges the impact that the inability to reproduce has on the so-called "family" relationships of same-sex couples:

One feature of our experience has been an emphasis on "families we choose," anthropologist Kath Weston's felicitous phrase. Such families are fluid alliances independent of the ties imposed by blood and by law. Often estranged from blood kin, openly gay people are more prone to rely on current as well as former lovers, close friends, and neighbors as their social and emotional support system. Include children in this fluid network and the complexity becomes more pronounced. Because *same-sex couples cannot have children through their own efforts*, a third party must be involved: a former different-sex spouse, a sperm donor, a surrogate mother, a parent or agency offering a child for adoption.

William Eskridge, Jr., *THE CASE FOR SAME-SEX MARRIAGE* 81 (1996) (footnote omitted; emphasis added). While not all married couples reproduce, reproduction without the intervention of a third party is a normal experience for the average married couple, and something that strengthens and deepens the marital bond. The natural family continues to consist of people who are related by blood and by law. Same-sex couples' efforts to redefine "family" merely emphasizes that they are not similarly situated with respect to procreation.

C. Same-Sex Relationships Are not Equivalent to Opposite-Sex Relationships Historically

Throughout history, nearly every civilization has recognized that same-sex relationships are a departure from the norm. See Peter Lubin and Dwight Duncan, "Follow the Footnote or The Advocate as Historian of Same-Sex Marriage," 47 *CATH. U.L. REV.* 1271, 1324 (1998) (a critique of *THE CASE FOR SAME-SEX MARRIAGE*). The only historical cultures that supposedly accepted same-sex relationships were primitive cultures or civilizations that were in decline. See *THE CASE FOR SAME-SEX MARRIAGE* at 15-50. Even Classical Greece did not view homosexual behavior as natural. See Plato, *Laws* 636a-c (homosexual behavior "contrary to nature") (quoted in K.J. Dover,

GREEK HOMOSEXUALITY 165 (1978)). No great civilization has ever given legal recognition to same-sex relationships as being the equivalent of marriage.⁵

D. Same-Sex Relationships Are not Equivalent to Opposite-Sex Relationships Morally

Like incest, same-sex relationships have been viewed as immoral almost universally. No major world religion has ever extended "marriage" rights to same-sex couples. "An examination of the official or historic teachings of Christianity, Judaism, Islam, Hinduism and Buddhism reveals overwhelming support for the view of marriage as the union of men and women, and virtually no official endorsements of the idea of same-sex 'marriage.'" "World Religions and Same Sex Marriage, A Research Summary from the Marriage Law Project" (July 2002).⁶ It is only in primitive or declining cultures that any historical religion has approved same-sex relationships, and even then this approval did not usually extend to all of the culture-it was only certain people who departed from the

⁵Notwithstanding the behavior of one or two Roman emperors, not even William Eskridge claims that Roman law recognized homosexual marriage. THE CASE FOR SAME-SEX MARRIAGE at 23.

⁶Available at www.marriagewatch.org/publications/wrr.pdf.

norm that had same-sex relationships.⁷ Even in pre-Christian, Classical Greece, where homosexual behavior was allegedly prevalent, Plato describes homosexual behavior as "contrary to nature" and "a crime caused by failure to control the desire for pleasure." Plato, *Laws* 636a-c (quoted in K.J. Dover, *GREEK HOMOSEXUALITY* 165 (1978)). The Bible, which provides the moral compass for a large percentage of Americans, prohibits homosexual behavior unequivocally.⁸ Even in the 21st Century, the only churches to allow "commitment" ceremonies for same-sex couples are non-traditional religions or churches or denominations that no longer accept the authority of their theological heritage. See "World Religions" at 2-4.

III. THE SOCIAL SCIENCE LITERATURE IN SUPPORT OF SAME-SEX MARRIAGE IS CONTROVERSIAL AND FAR FROM CONCLUSIVE

As shown in the following sections, the research relied upon in the Social Science Brief is seriously flawed. The results are based upon defective research

⁷*Cf.* William Eskridge, *THE CASE FOR SAME-SEX MARRIAGE*, Chapter 2 (1996). Classical Greece may be an exception, but even there same-sex relationships were not considered marriages or morally good.

⁸Arguments denying that the Bible prohibits all homosexual behavior have been effectively debunked. Robert A. J. Gagnon, *THE BIBLE AND HOMOSEXUAL PRACTICE: TEXTS AND HERMENEUTICS* (2001).

methods, they draw conclusions that are contrary to the evidence and unsupported by any credible theories of sexual development in children, and many are contradicted by objective studies performed by those disinterested in homosexual advocacy. Moreover, social science is not determinative regarding morality. It can only tell us what social scientists have observed, and the subjective opinions of the social scientists themselves and the people they have interviewed.

A. The Research Is Unreliable

When research is done for the purpose of supporting a position in litigation, it is inherently suspect. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (importance of whether research was done in support of position in litigation). The authors of a meta-analysis cited in the Social Science Brief suggest that most of the research about children of homosexuals may have been done out of "a desire to produce evidence directly relevant to the questions of 'harm' that dominate judicial and legislative deliberations over child custody." Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 *American Soc. Rev.* 159, 176 (2001); see also Charlotte Patterson & R.

Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52(3) *Journal of Social Issues* 29, 45 (1996) (“the research findings can be brought to the attention of the courts in the form of *amicus* briefs”). The defective methodologies of the studies (discussed below) and the discrepancies between the evidence and the reported results support the suggestion that much of the research has been conducted for purposes of impacting litigation. Stacey and Biblarz demonstrate that the research does not support the claim that there are no differences between children raised by heterosexuals and those raised by homosexuals. Stacey & Biblarz at 176.⁹

B. The Methodology of Research Matters

Plaintiffs contend that criticisms of methodology “cannot overcome 25 years of uniform social science research,” and that “[n]othing can change that the American Academy of Pediatrics and the other experts are uniquely qualified to assess the findings and methodology of the research in their fields.” *Social Science Brief* at 37. However, uniform research with uniform defects has no value. As one review of the same-sex parenting

⁹Nevertheless, Stacey and Biblarz conclude that the differences do not matter. *Id.* at 177.

research reported, all of the studies have uniform defects:

there are *no studies of child development based on random, representative samples of such families*. Most studies rely on small-scale, snowball and convenience samples drawn primarily from personal and community networks or agencies. Most research to date has been conducted on white lesbian mothers who are comparatively educated, mature, and reside in relatively progressive urban centers, most often in California or the Northeastern states.

Stacey & Biblarz at 166 (emphasis added);¹⁰ see also Robert Lerner & Althea Nagai, *NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING* 3 (2001) (review of homosexual parenting studies "found at least one fatal research flaw" in each one, and thus, "no generalizations can reliably be made based on any of these studies").

A comparison with research into the relationship between heart disease and hormone replacement therapy ("HRT") will highlight the problem of drawing generalizations from non-random, unrepresentative samples. Millions of post-menopausal women have been taking HRT for years. An extensive medical literature reported that HRT "had consistently been associated with a 35-50%

¹⁰The authors blame these defects on "heterosexism," and do not question the over-all conclusion that the sexual orientation of a parent is irrelevant. *Id.* at 167, 179.

reduction in cardiovascular disease” David A. Grimes, M.D., & Rogerio A. Lobo, M.D., *Perspectives on the Women’s Health Initiative Trial of Hormone Replacement Therapy*, 100 *Obstetrics & Gynecology* 1344, 1344 (December 2002). However, a recent study using more reliable methods—a random, representative sample of women—found just the opposite: an *increased* risk of cardiovascular disease. *Id.* The results of the prior studies “now appears due to consistent, powerful selection biases. . . . Women using HRT in [prior] studies were healthier than those not using it.” *Id.* Because of the biases, the studies proved nothing that could be applied to the general population. *Id.* The selection biases in all of the same-sex parenting studies are at least as consistent as in the extensive medical literature on HRT prior to the Women’s Health Initiative study.

Interestingly, a number of the studies cited in the Social Science Brief warn against drawing generalizations from their research. See, e.g., Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, 17 *Journal of Homosexuality* 123, 134 (1989); Charlotte J. Paterson, *Family Relationships of Lesbians*

and Gay Men, 62 *Journal of Marriage and the Family* 1052, 1061, 1064, 1065 (2000); Lawrence A. Kurdek, *Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual married, Gay Cohabiting, and Lesbian Cohabiting Couples*, 60 *Journal of Marriage and the Family* 553, 556 (August 1998). One warning is particularly pertinent:

The high proportion of gay subjects who indicated a willingness to be interviewed suggests that they were perhaps unusually interested in the issues raised in the questionnaire and thus willing to divulge their homosexuality to the researchers. Moreover, even though the questionnaire was anonymous, *the gay parents may have been particularly biased toward emphasizing the positive aspects of their relationships with their children, feeling that the results might have implications for custody decisions in the future.* Thus, all generalizations must be viewed with caution.

Mary B. Harris & Pauline H. Turner, *Gay and Lesbian Parents*, 12 *Journal of Homosexuality* 101, 111 (Winter 1985/1986) (emphasis added). Although the Social Science Brief touts the importance of the fact that the research has undergone scrutiny and been published in peer-review journals (Social Science Br. at 38), it seems obvious that the studies could not have been published without the caveats. The studies should not be used to support

generalizations that the peer review process would not have permitted.

The Technical Report of the American Academy of Pediatrics ("AAP"), quoted by the Social Science Brief, unintentionally emphasizes one of the defects in the studies, the small size of the samples involved: "None of the more than 300 children studied to date have shown evidence of gender identity confusion, wished to be the other sex, or consistently engaged in cross-gender behavior." Ellen C. Perrin, M.D., and the Committee on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341, 342 (February 2002) (emphasis added) ("Technical Report"), available at www.aap.org/policy/020008t.html (quoted in Social Science Brief at 35). With the AAP's estimate of 1 million to 9 million children at any one time having a homosexual parent, a revolutionary generalization based on studies of a total of 300 children in 25 years of multiple studies is inappropriate. The minimum number of cases for an adequate sample for a statistical test of the validity of finding no evidence of differences in a single study is 390. No BASIS at 102, Table 5.

In addition to making sweeping generalizations based upon an unreasonably small number of children, the Technical Report is relying primarily upon studies of children who "were conceived in a heterosexual relationship." Technical Report at 341. Many of these children lived for several years with a mother and a father before entering a homosexual home. See Susan Golombok, et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 *Journal of Child Psychol. Psychiatry* 551, 561 (1983)¹¹ (cited in Technical Report at 342, Social Science Brief at 28, 30, 35). Many, perhaps most, of these children are likely to have established their gender identity "while the children were still in a heterosexual household." *Id.* at 568 (emphasis added). Studies of children that have lived in both heterosexual and homosexual homes provide no information about how children raised from birth by same-sex couples will develop.

For the proposition that children of homosexuals have peer relationships that are equal to those of

¹¹Of the children in the Golombok study, "a third (12) had spent at least five years in a heterosexual home before living in a lesbian household; a further third (12) had been in a heterosexual home for at least two years; and only three children had never been so." *Id.*

children of heterosexuals, the Social Science Brief relies first upon the same sample of children who had their basic personalities formed by the time they entered homosexual homes. Social Science Brief at 30, n. 65 (citing Golombok).¹² The Social Science Brief then relies upon a study by Sharon Huggins of a total of 18 children, about which she herself said, "[t]he meanings and implications of this finding are unclear, and the small sample size makes any interpretation of these data difficult." Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, 17 *Journal of Homosexuality* 123, 134 (1989). The Brief also cites a study by Richard Green, which had so little statistical power that it had an 87 percent chance of missing differences among the children. No BASIS at 103, Table 6 (Green et al. (1986), .13 statistical power). The final

¹²Note 65 cites to a follow-up study by "Tasker & Golombok, *supra* note 54 at 88." However, there is no other cite to Tasker & Golombok in note 54 or elsewhere, so it is not clear what follow-up study is referenced. Nevertheless, in one article about their follow-up study of children reared by lesbians, Tasker and Golombok admitted that negative effects on the children's well-being "could have remained undetected because of the relatively small sample size. Therefore, although discernible trends were identified, caution is required in interpreting these results." Fiona L. Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 *American J. of Orthopsychiatry* 203, 213 (1995).

study cited observed that "the vast majority of children in the study had a father or other male living at home throughout infancy" Mary E. Hotvedt & Jane Barclay Mandel, *Children of Lesbian Mothers* in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL AND BIOLOGICAL ISSUES* 275, 283 (1982). Thus, the children in this study also had their basic personalities formed prior to entering a homosexual home, and the study provides no evidence of how the children would have fared if raised by homosexuals from birth. No number of such deficient studies can lead to a generally applicable scientific conclusion. The Court cannot take judicial notice of such disputable findings. *Nantucket*, 379 Mass. at 352 ("Matters are judicially noticed only when they are indisputably true").

C. Homosexual Parenting Results in Different Outcomes

The studies cited in the Social Science Brief almost universally report that there are no differences in child outcomes with children raised by homosexual parents.¹³

¹³One study, not cited by the Social Science Brief, reported in the "Results" section that "[t]he young adults from lesbian family backgrounds (four of seven sons and ten of fifteen daughters) were significantly more likely to report having considered the possibility of becoming involved in a same-gender sexual relationship, compared with only two of ten sons and one of eight daughters from the heterosexual family control group." Fiona L. Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 *American J. of*

Stacey and Biblarz, themselves proponents of rights for same-sex parents, challenge the intellectual honesty of the reports of "no differences." Stacey & Biblarz at 178. They observe that "[o]nly a crude theory of cultural indoctrination that posited the absolute impotence of parents might predict such an outcome, and the remarkable variability of gender configurations documented in the anthropological record readily undermines such a theory." *Id.* at 177. Instead of "no differences," as reported, some of the studies clearly show a difference when it comes to sexuality. In one of the studies, "adolescent and young adult girls raised by lesbian mothers appear to have been more sexually adventurous and less chaste" *Id.* at 171. Overall, the studies validate a concern held by many who are concerned about the best interests of children:

The sexual orientation of parents appears to have a unique (although not large) effect on children in the politically sensitive domain of sexuality. The evidence, while scanty and underanalyzed, hints that parental sexual orientation is positively associated with the possibility that children will be more likely to attain a similar orientation—and theory and common sense also support such a view.

Orthopsychiatry 203, 211 (1995). Nevertheless, the abstract stated: "The commonly held assumption that lesbian mothers will have lesbian daughters and gay sons was not supported by the findings." *Id.* at 203.

Id. at 177-78.¹⁴ A similar outcome was reported in the Technical Report:

Compared with young adults who had heterosexual mothers, men and women who had lesbian mothers were slightly more likely to consider the possibility of having a same-sex partner, and more of them had been involved in at least a brief relationship with someone of the same sex, but in each group similar proportions of adult men and women identified themselves as homosexual.

Technical Report at 342.¹⁵ The viewpoint of the Technical Report and Stacey and Biblarz that homosexual parenting is a societal good, despite the differences in sexual outcomes, is a moral judgment, not a scientific conclusion. It is for the legislature, not the courts, to make controversial moral judgments. See *Mile Road Corp. v. Boston*, 345 Mass. 379, 382, 187 N.E.2d (1963) (“If the question is fairly debatable, courts cannot substitute their judgment for that of the Legislature”) (citation omitted); see also *Connors v. City of Boston*,

¹⁴In Stacey and Biblarz’ view, these differences “cannot be considered deficits from any legitimate public policy perspective.” *Id.* at 177.

¹⁵Interestingly, when homosexual advocates estimate the number of homosexuals in America, they often assert that the terms “gay” and “lesbian” encompass more than people who engage in same-sex practices or identify themselves as homosexual. See Stacey & Biblarz at 164-65. However, in attempting to minimize the impact of homosexual parents on children, advocates limit the definition to self-identification. See discussion at III. F. below.

430 Mass. 31, 42-43, 714 N.E.2d 335 (1999) ("Adjustments in the legislation to reflect these new social and economic realities must come from the Legislature").

There is a substantial body of research, not undertaken to assess the merits of homosexual parenting, that supports the proposition that children do best when raised by a mother and a father. Clinical studies observe that the triad of mother-father-child is necessary and desirable for the growth of a healthy child. "'Early triangulation' serves especially to consolidate both the self-representation and the parental representation." Richard N. Atkins, *Discovering Daddy: The Mother's Role*, in *FATHER AND CHILD* 139, 144 (Stanley H. Cath, et al., eds., 1982). The forward to *FATHER AND CHILD* notes the increased awareness of the importance of the role of both mothers and fathers in child rearing: "Our sensitivities and instruments have become honed, attuned to the role a man comes to play during the early years in modulating the intensity of the mother-child tie, inviting that child to become a separate individual in an ever-widening world. . . . Researchers have become more aware of the subtle exchanges of identity taking place and of the mother's and father's part in facilitating development. . . ." John Munder Ross, *Preface* xvii-

xviii, FATHER AND CHILD. Dr. Alfred A. Messer, a psychiatrist at Northside Hospital in Atlanta, Georgia, also notes the importance of both mothers and fathers as follows: "Children recognize the difference between maleness and femaleness as early as 14 months of age. Alfred A. Messer, *Boys' Father Hunger: The Missing Father Syndrome*, 23 *Medical Aspects of Human Sexuality* 44, 44 (January 1989). Boys establish their physical and gender role identity between the ages of 18 to 36 months. "If the young boy is deprived of his father's presence, the result can be deeply traumatic" *Id.* at 45.

The importance of having both a mother and a father does not end with the development of a child's gender identity. Children raised by a single mother, particularly a divorced mother, have poorer physical health,¹⁶ poorer mental health,¹⁷ a greater likelihood of

¹⁶Ronald Angel & Jacqueline Worobey, *Single Motherhood and Children's Health*, 29 *Journal of Health and Soc. Behavior* 38, 48-49 (1988).

¹⁷Ollie Lundberg, *The Impact of Childhood Living Conditions on Illness and Mortality in Adulthood*, 36 *Social Science and Medicine* 1047, 1050, Table 3 (1993); Ronald L. Simons, et al., *Explaining the Higher Incidence of Adjustment Problems of Children of Divorce*, 61 *Journal of Marriage and the Family* 1020, 1028 (1999); Alan Booth & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 *Journal of Marriage and the Family* 197, 205 (2001).

substance abuse,¹⁸ a higher risk of suicide,¹⁹ and a higher likelihood of committing a crime that leads to incarceration.²⁰

Stacey and Biblarz argue that it is inappropriate to extrapolate from these studies to say that children of homosexual parents can be expected to experience the same problems as the children of single mothers, since homosexual parents were not specifically included in the studies. Stacey & Biblarz at 162 & n.2. However, it is the advocates for homosexual parenting themselves who make the comparison with heterosexual, divorced mothers unavoidable. As one advocate for homosexual parenting acknowledges, "most of the research compares development of children with custodial lesbian mothers to that of children with custodial heterosexual mothers." Charlotte J. Paterson, *Family Relationships of Lesbians and Gay Men*, 62 *Journal of Marriage and the Family* 1052, 1059

¹⁸Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Use and Sexual Intercourse in Early Adolescence*, 52 *Journal of Marriage and the Family* 171, 175 & Table 2 (1990).

¹⁹David M. Cutler, Edward L. Glaeser & Karen Norberg, *Explaining the Rise in Youth Suicide*, Working Paper 7713 at 32, National Bureau of Economic Research (May 2000) (citing impact of divorce).

²⁰Linda J. Waite & Maggie Gallagher, *THE CASE FOR MARRIAGE* 134 (2000).

(2000). This is because "it has been widely believed that children living in families headed by divorced but heterosexual mothers provide the best comparison group."²¹ Since the pro-same-sex parenting studies find that children raised by homosexuals do as well as, but not significantly better than, those raised by divorced, heterosexual mothers, why would we not conclude that children raised by homosexual parents are likely to experience the same problems as children raised by divorced, heterosexual mothers? No other conclusion is plausible.

D. Same-Sex Relationships Are not as Stable, Committed and Enduring as Opposite-Sex Relationships

One of the more controversial allegations in the Social Science Brief is that "Gay and Lesbian Couples Live in Stable, Committed, Long-Term Relationships." Social Science Br. at 5. If those terms mean the same thing for same-sex couples as for married couples, the allegation cannot be supported-not even by the studies

²¹As Maggie Gallagher, co-author of *THE CASE FOR MARRIAGE*, observes: "If the problem with same-sex couples is not sexual orientation *per se*, but the negative effects of fatherlessness and/or motherlessness on children's well-being, it is hard to imagine a scholarly focus better designed to obscure the evidence." Maggie Gallagher, *Why Supporting Marriage Makes Business Sense* 10 (Corporate Resource Council 2002), available at www.corporateresourcecouncil.org/white_papers.html.

cited. The Social Science Brief cites University of Virginia Psychology Professor Charlotte Patterson for the proposition that "'many if not most' gays and lesbians live in stable, committed long-term relationships because they 'desire for an enduring love relationship with a partner of the same gender.'" *Id.* What Professor Patterson actually said was that "[m]any if not most lesbians and gay men *express the desire* for an enduring love relationships with a partner of the same gender." Charlotte Patterson, *Family Relationships of Lesbians and Gay Men*, 62 *Journal of Marriage and the Family* 1052, 1053 (2000) (emphasis added). She continues with the casual statement that "research findings suggest that many are successful in creating such relationships. Survey data suggest that 40 to 60% of gay men and 45 to 80% of lesbians are currently involved in steady romantic relationships." *Id.* Peplau and Cochran, the source for Patterson's conclusion, stated the following with regard to commitment and duration of homosexual relationships: "Little empirical work is currently available on commitment and permanence in homosexual relationships." Letitia Anne Peplau & Susan D. Cochran, *A Relationship Perspective on Homosexuality* 321, 335 in *HOMOSEXUALITY/HETEROSEXUALITY: CONCEPTS OF SEXUAL ORIENTATION* (1990). The only

study Peplau and Cochran cited for "the longevity of relationships" covered a total period of 18 months-not exactly what most heterosexual couples mean by a stable, committed, long-term relationship.

The Social Science Brief does cite one longitudinal study of same-sex relationships, Lawrence A. Kurdek, *Relationship Stability and Relationship Satisfaction in Cohabiting Gay and Lesbian Couples: A Prospective Longitudinal Test of the Contextual and Interdependence Models*, 9 *Journal of Social and Personal Relationships* 125 (1992). However, the article did not report how long the couples were together prior to the study, and, as stated by the author, "this study is limited by its exclusive reliance on self-report measures and the unlikely representativeness of the self-selected sample." *Id.* at 139-39 (emphasis added). This caveat makes clear that the study cannot be taken as representative of "stability" in most same-sex relationships. *Cf.* Social Science Brief at 6 ("The social science research makes clear that these seven couples typify many others," citing Kurdek).

Notwithstanding the longevity of the Plaintiffs' relationships and the existence of one four-year study of questionable value, the average same-sex relationship

does not reflect stability and longevity. A study that is perhaps the most extensive investigation of the duration of same-sex relationships to date revealed that the average homosexual relationship was short, with the vast majority lasting less than 1 year. Marcel T. Saghir, M.D. & Eli Robins, M.D., MALE AND FEMALE HOMOSEXUALITY: A COMPREHENSIVE INVESTIGATION 57, Table 4.13; 225, Table 12.10 (1973). Only 15 percent of homosexual men and 17.3 percent of homosexual women surveyed had ever had relationships that lasted more than 3 years. *Id.* Only a few stayed together more than 10 years (4 out of 252 men and 1 out of 138 women). *Id.* Thus, while same-sex couples *can* have long-term relationships, very few do.

Furthermore, the concept of "committed" is apparently different for same-sex and opposite-sex couples. For married couples, "a vast majority are faithful while the marriage is intact." Robert T. Michael, et al., SEX IN AMERICA: A DEFINITIVE SURVEY 89 (1994). In fact, rates of sexual fidelity are far higher than popular expectations:

Among married people, 94 percent had one partner in the past year. Couples who were living together were almost as faithful. Seventy-five percent of people who had never married but were living together had one partner in the past year. Eighty percent of

people who were previously married and were cohabiting when we questioned them had one partner in the past year.

Id. at 101. According to a book cited in the Social Science Brief, sexual fidelity is presumed in marriage, and adultery is likely to lead to divorce. Philip Blumstein & Pepper Schwartz, *AMERICAN COUPLES* 313 (1983).

In contrast, sexual fidelity is rare among homosexual men. One survey of homosexual men in relationships reported that 65 percent had sex outside the relationship within the first year, with approximately 90 percent of the men in relationships lasting over five years being "nonexclusive." Joseph Harry, *GAY COUPLES* 115 & Table 6.1 (1984). A comprehensive study of 156 male couples found that:

[o]nly seven couples have a totally exclusive sexual relationship, and these men all have been together for less than five years. Stated another way, all couples with a relationship lasting more than five years have incorporated *some provision for outside sexual activity in their relationships.*

David P. McWhirter & Andrew H. Mattison, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 252-53 (1984) (emphasis added). Even in the self-selected sample cited in Kurdek (1992), 61 percent of the male same-sex couples were not sexually exclusive in the first year studied. Kurdek, at 130-131. Proponents of same-sex marriage such as Andrew Sullivan

concede that infidelity among homosexual men is likely, even in same-sex "marriage." Sullivan observes that "there is more likely to be greater understanding of the need for extra-marital outlets between two men than between a man and a woman." Andrew Sullivan, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 202 (1995) (emphasis added).

The promiscuity among homosexual men is not limited to pre-AIDS days. In a more recent commentary a lesbian critic of homosexual men noted the acceptability of sexual infidelity:

After a period of optimism about the long-range potential of gay men's one-on-one relationships, gay magazines are starting to acknowledge the more relaxed standards operating here, with recent articles celebrating the bigger bang of sex with strangers or proposing 'monogamy without fidelity'-the latest Orwellian formulation to excuse having your cake and eating it too.

Camille Paglia, *I'll take religion over gay culture*, Salon.com online magazine at 4 (June 1998). The concept of "monogamy without fidelity" is illustrated in a study of men who attended circuit parties in 1999. The study found that 46 percent had a "primary partner." "Among men who reported having a primary partner (n=137), 27% had multiple sex partners (oral or anal) during their most recent circuit party weekend" Gordon

Mansergh, Grant Colfax, et al., *The Circuit Party Men's Health Survey: Findings and Implications for Gay and Bisexual Men*, 91 American J. of Pub. Health 953, 955 (June 2001).

E. Opposition to Same-Sex Marriage Is not Based on Cultural Myths or Same-Sex Stereotypes

The Social Science Brief purports to present "accurate scientific information regarding some of the myths that were raised by *amici* in the Trial Court" Social Science Br. at 13, n. 31. First it attacks the evidence that same-sex relationships are more destructive than others by addressing the level of HIV in the homosexual community. It concludes that "only a minuscule proportion of the gay male population in Massachusetts has HIV." *Id.* at 14. That may be true, since Massachusetts fortunately has an unusually low number of HIV/AIDS cases. *Id.*²² Perhaps it has a low number of homosexual males as well, for more Massachusetts residents acquire HIV/AIDS through injection drug use than through male same-sex behavior,

²²The total number AIDS cases reported (7,541) is amazingly low—less than 1 percent of the total number of AIDS cases reported by the CDC. San Francisco alone has 27,923 cases of AIDS, and California has 123,819. San Francisco Department of Public Health, *HIV/AIDS Epidemiology Annual Report 2001*, 9, Table 1.1, HIV/AIDS Statistics and Epidemiology Section, www.dph.sf.ca.us/Reports/STD/HIVAIDSAnn1Rpt2001.pdf.

a trend that appears to be significantly different from the rest of the country. Massachusetts Dept. of Pub. Health, *HIV/AIDS Review 3* (Winter 2002).²³ Regardless, Massachusetts has a legitimate interest in public health issues like HIV/AIDS that extends beyond its borders. Nationwide, 63 percent of men with AIDS report having had sex with men. Centers for Disease Control-Division of HIV/AIDS Prevention, *Basic Statistics* (December 2001).²⁴ But the latest report from San Francisco is the most troubling. In San Francisco, 90 percent of all AIDS cases, and 94 percent of all cases of men with AIDS, have been diagnosed in men who have sex with men. San Francisco Department of Public Health, *HIV/AIDS Epidemiology Annual Report 2001*, 9, Table 1.1, HIV/AIDS Statistics and Epidemiology Section.²⁵ If HIV/AIDS is an epidemic-and it is-these are statistics that should be taken seriously. It is no myth that HIV/AIDS is

²³Available at www.state.ma.us/dph/cdc/aids/winter2002.pdf.

²⁴Available at www.cdc.gov/hiv/stats.htm. Of the 666,026 men with AIDS, 420,264 report having had sex with men. Of that 420,264 men, 51,293 also used injection drugs. *Id.*

²⁵Available at www.dph.sf.ca.us/Reports/STD/HIVAIDSAnn1Rpt2001.pdf. Thirteen percent of all AIDS cases in San Francisco were diagnosed in men who had sex with men and had exposure through injection drug use.

substantially higher in the homosexual community than in the community at large, and that the disproportionate statistics are the result of "anal sex combined with multiple partners." Gabriel Rotello, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* 75 (1998). Unfortunately, men who have sex with men risk losing up to 20 years of life expectancy. R.S. Hogg, et al., *Modeling the Impact of HIV Disease on Mortality in Gay and Bisexual Men*, 26 *International J. of Epidemiology* 657, 659 (1997). The State has a legitimate interest in not encouraging behavior that has such a devastating impact.

It is noteworthy that although the Social Science Brief attacks the evidence of sexual promiscuity as a "stereotype" (Social Science Br. at 15), the Plaintiffs do not claim to be monogamous. Nor do they explain how the studies of same-sex relationships (cited above) that found infidelity in all or nearly all male couples are inapplicable to same-sex couples that wish to marry. If the Social Science Brief is correct in the assertion that prior studies are inapplicable, then it must be the case that same-sex couples who wish to marry are so few that they have never appeared in some of the studies.

The Social Science Brief engages in another sleight of hand by attempting to avoid the fact that there is a

great deal of violence in same-sex relationships compared to marriage. *Id.* at 16 and n. 40. It compares the amount of domestic violence against women in same-sex women couples with that against women committed by spouses, ex-spouses and men in cohabiting couples. This is an inappropriate comparison, for women are approximately 4 times as likely to be raped, robbed or assaulted by an ex-spouse or present or ex-boy/girlfriend as they are by a spouse. Ronet Bachman & Linda E. Saltzman, *Violence Against Women: Estimates from the Redesigned Survey*, National Crime Victimization Survey Special Report, Washington D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 3, Table 4, 96-0029-P, August 1995. Only 9 percent of all violence against married women in 1992-1993 and 1 percent against married men, including simple assault, was committed by a spouse. *Id.*

More importantly, the Social Science Brief appears to misrepresent the report it cites (although it is difficult to tell, since it does not cite to a page number of the 57-page report, and the report is not always consistent in its comparisons). The reported study actually found a *greater* amount of domestic violence in same-sex couples than opposite-sex couples:

The survey found that same-sex cohabitants reported significantly more intimate partner violence than did opposite-sex cohabitants. Among women, 39.2 percent of the same-sex cohabitants and 21.7 percent of the opposite-sex cohabitants reported being raped, physically assaulted, and/or stalked by a marital/cohabiting partner at some time in their lifetime. Among men, the comparable figures are 23.1 percent and 7.4 percent (exhibit 8).

Patricia Tjaden & Nancy Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, U.S. Department of Justice, National Institute of Justice and Centers for Disease Control and Prevention, 30, NCJ 181867, July 2002.²⁶ Other sources likewise report alarming levels of domestic violence in same-sex relationships. See *Ending Abuse in Lesbian, Bisexual Women's and Transgender Communities*, The Network/La Red (December 13, 2002) ("1 in 4 GLBT people are battered by a partner");²⁷ see also Anti-violence Project Press Release, *National Coalition of Anti-violence Programs*

²⁶The data is somewhat skewed because the report includes married couples within its definition of opposite-sex cohabitants. *Id.* at 29. In addition, it appears that some of the domestic violence reported by same-sex cohabitants may have been performed by someone other than the same-sex partner, e.g., most of the rapes of women in same-sex relationships were apparently perpetrated by men. *Id.* at 30 and Exhibit 9.

²⁷Available at www.thenetworkklared.org/current.htm.

Releases Annual Report on Domestic Violence (September 24, 2002) (5,046 cases of homosexual domestic violence in 2001);²⁸ David Island & Patrick Letellier, *MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE* 1 (1991) (estimating 500,000 male homosexual victims). If high levels of violence in same-sex relationships is a myth, it is a myth that is supported by research conducted within the homosexual community.

Finally, it is no myth that people who engage in homosexual activity have higher levels of depression, anxiety and drug, alcohol and tobacco abuse, even in nations and cultures where homosexual behavior is widely accepted and approved. See Gay and Lesbian Medical Ass'n Press Releases, *Ten Things Lesbians Should Discuss with Their Health Care Providers*²⁹ and *Ten Things Gay Men Should Discuss with Their Health Care Providers*³⁰ (July 17, 2002). The Gay and Lesbian Medical Association attributes these things to homophobia and discrimination. *Id.* However, even in the Netherlands, where same-sex

²⁸Available at www.avp.org/publications/media/2001/dvreport.htm.

²⁹Available at www.glma.org/news/releases/n02071710/lesbianthings.html.

³⁰Available at www.glma.org/news/releases/n02071710/gaythings.html.

marriage is legal and homosexual behavior is far more socially acceptable, homosexuals experience similar problems. A survey of approximately 6,000 sexually active persons categorized all men and women who had engaged in any same-sex activity in the prior 12 months as homosexual. Theo G.M. Sandfort, et al., *Same-sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence Study (NEMESIS)*, 58 Archives of Gen. Psychiatry 85, 86 (January 2001). Homosexuals had significantly higher levels of psychological disorders in nearly every category measured. *Id.* at 88, Table 2. Moreover, “[m]ore homosexual men than heterosexual men had 2 or more [DSM-III-R] disorders, both lifetime and in the preceding year. . . . Homosexual women were more likely than heterosexual women to have had 2 or more [DSM-III-R] disorders during their lifetime but not in the preceding year.” *Id.* at 87-88. The authors suggested that “the study might underestimate the differences between homosexual and heterosexual people” *Id.* at 89. They concluded that the “study offers evidence that homosexuality is associated with a higher prevalence of psychiatric disorders. The outcomes are in line with findings from earlier studies in which less rigorous

designs have been employed.” *Id.* at 90. The Social Science Brief cites several older studies comparing homosexual mothers with heterosexual mothers, and concludes that homosexual mothers are “indistinguishable from other mothers in psychologic functioning and mental health.” Social Science Br. at 24 and n. 55. However, it does not address the psychiatric literature, such as the Netherlands study, that has found higher levels of psychiatric disorders among homosexuals.

F. The Social Science Brief Uses Inconsistent Definitions

The Social Science Brief’s claim that homosexual men are no more likely to abuse boys than are heterosexual men raises an interesting definitional question: how should we define “homosexual”? When homosexual advocates want to argue that more than 1 percent of the population is homosexual, or that there are multiple millions of children being raised by homosexual parents, they define the term “homosexual” broadly. A broad definition not only includes self-identification as a homosexual, it includes any same-sex sexual experience, same-sex physical attraction and same-sex desire or fantasies without same-sex experience. *See, e.g., Gary Remafedi, M.D., et al., Demography of Sexual Orientation in Adolescents, 89 Pediatrics 714, 715 Table 1 (1992)*

(surveying fantasy, behavior, identification, attraction and intent); Robert T. Michael, et al., SEX IN AMERICA: A DEFINITIVE SURVEY 174 (1994) (attraction, behavior and identification); Stacey & Biblarz at 165 (broad definition includes "anyone who reports that even the idea of homoerotic sex is appealing"). The sources in the Social Science Brief that estimate there are 9-14 million children in this country with "at least one parent who is lesbian or gay," (Social Science Brief at 17 and n. 42), are relying upon a broad definition of homosexual. See Stacey & Biblarz at 164-65. However, when homosexual advocates wish to define "homosexual" narrowly, they limit the term to those who identify as "lesbian" or "gay." *Id.* All of the sources cited in regard to child molestation use this narrow definition. See sources cited in Social Science Brief at 15, n. 36. If the Social Science Brief were really trying to "provide the Court with the accurate scientific information" about these issues, it would either use a consistent definition, or acknowledge the differences. The advocates for same-sex marriage cannot have it both ways: There are either a very small number of homosexuals, and a small number of children being raised

by homosexuals, or there are a large number of homosexual child molesters.

CONCLUSION

Plaintiffs have failed to establish that they are similarly situated with opposite-sex couples with respect to marriage. Their attempt on appeal to rely upon controversial social science research to establish the equivalence of their relationships must fail, for the Court may not take judicial notice of disputable facts. The judgment of the Superior Court must be affirmed.

Respectfully Submitted,

NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY, INC., FOCUS ON THE FAMILY, JEWS OFFERING NEW ALTERNATIVES TO HOMOSEXUALITY, INTERNATIONAL HEALING FOUNDATION, MASSACHUSETTS PHYSICIANS RESOURCE COUNCIL, CATHOLIC MEDICAL ASSOCIATION, COURAGE, NEW CREATIONS, A. DEAN BYRD, PH.D., M.B.A., M.P.H., JOSEPH NICOLosi, PH.D., AND CHRISTOPHER WOLFE, PH.D.,

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ADDENDUM—STATEMENT OF INTEREST OF INDIVIDUAL *AMICI CURIAE*

National Associationn for Research and Therapy of Homosexuality

The National Association for Research and Therapy of Homosexuality, Inc. (NARTH), is a not-for-profit corporation registered in New York that is the only mental-health professional organization devoted entirely to providing accurate scientific information on the homosexual condition. NARTH is an association of over 650 members, including psychiatrists, psychoanalysts, psychologists, certified social workers, and other therapists with years of experience in the therapy of homosexual patients/clients.

This experience provides NARTH with a unique perspective on the comparative effects of male-female and same-sex relationships on children. The case at bar is of utmost interest to NARTH. First, NARTH believes that it is important to consider the interests of children and adolescents, who are at risk of developing same-sex attraction. Second, NARTH believes that the prevention and treatment of same-sex attraction should be a public health priority. Third, NARTH believes the Court should take into consideration the effect of its ruling not only on those same-sex couples who desire to marry but on the national health and the well-being of others who

currently experience same-sex attraction or may develop such attractions in the future.

Focus on the Family

Focus on the Family (FOTF) is a non-profit organization founded by Dr. James Dobson, an internationally renowned expert on the family. Dr. Dobson is well known through his syndicated radio programs heard daily on more than 3,000 radio stations in twelve languages in more than 95 countries. FOTF is dedicated to strengthening the family as one of the foundational institutions of civilization. Thus, FOTF is very concerned about threats to the family as posed by this lawsuit. FOTF believes that the Commonwealth of Massachusetts has the right and responsibility, in the interests of the Commonwealth as a whole, to support and strengthen marriage.

Jews Offering New Alternatives to Homosexuality

JONAH, Jews Offering New Alternatives to Homosexuality, is a non-profit international organization dedicated to educating the world-wide Jewish community about the prevention, intervention, and healing of the underlying issues causing same-sex attractions.

JONAH believes that homosexuality is a learned behavior and should not be given special legal status.

Homosexual behavior is significantly different from a religious identity, like Jewish-Americans, a racial identity, like African Americans, or a physical characteristic, like someone with a physical handicap. JONAH's concern in this case is that if the Court were to rule that same-sex couples may marry, it would be sending a false message that homosexuality is inborn, benign and unchangeable. Sending such a false message would be harmful to many homosexuals trapped in a destructive life style.

International Healing Foundation

The International Healing Foundation (IHF), established in 1990 by psychotherapist Richard Cohen, is a nonprofit, tax-exempt organization. IHF has educated, counseled, and trained more than fourteen thousand men, women, and adolescents over the past twelve years. IHF seeks to help each man, woman, and child in healing from past and present wounds, and empower them with the understanding of their value as a child of God. IHF is concerned about the false message that the Court would send to hurting people who are struggling with same-sex attraction if it were to rule that there is a right to same-sex marriage.

Massachusetts Physicians Resource Council

The Massachusetts Physicians Resource Council (MAPRC) is an association of physicians in the Commonwealth who advocate for consistent and sound medical practice as it interfaces with a number of social issues such as medical ethics, the sanctity of human life, and support for the intact nuclear family, including issues of teen pregnancy, fatherlessness, sexually transmitted disease and needle exchange programs. MAPRC believes that same-sex "marriage" is an impossibility, and that granting legal status to same-sex relationships as though they were marriages would lead to an increase in social problems that undermine the family as the foundation of society.

Catholic Medical Association

The purpose of the Catholic Medical Association is: To uphold the principles of Catholic faith and morality as related to the science and practice of medicine; To cooperate in leading the Christian Community, especially with the particular medical expertise and experience of the Catholic Physician, to understand, develop, and apply Christ's principles of Faith and Morality to modern medical science and practice; To lead the Christian Community in the work of communicating Catholic Medical

Ethics to the Medical Profession and the community-at-large; To uphold Catholic hospitals in the application of Catholic moral principles in medical practice; and To enable Catholic Physicians to know one another better and to work together with deeper mutual support and understanding.

Courage

Courage is an apostolate of the Roman Catholic Church with more than 95 Chapters world wide, over 500 persons participating in its ListServs and hundreds of persons per day receiving assistance in finding peace through fellowship, prayer and the Sacraments. Courage's goals are chastity, prayer and dedication, fellowship, support and living as good examples.

New Creations

New Creations is a ministry to ex-gays in the African-American community. Its goal is to help people leave a homosexual lifestyle through experiencing the love of Jesus Christ.

A. Dean Byrd, Ph.D., M.B.A., M.P.H.

A. Dean Byrd, Ph.D., M.B.A., M.P.H., is the Vice President of NARTH and the President of Thrasher Research Fund, Salt Lake City, Utah. Dr. Byrd has the same interest as NARTH.

Joseph Nicolosi, Ph.D.

Joseph Nicolosi, Ph.D., is the President of NARTH and the President of Thomas Aquinas Psychological Clinic, Inc. Dr. Nicolosi has the same interest as NARTH.

Christopher Wolfe, Ph.D.

Christopher Wolfe, Ph.D. is a professor of political science at Marquette University (Milwaukee, WI). Graduating with highest distinction from Boston College's doctorate of philosophy program, Professor Wolfe regularly addresses issues relating to marriage and the family, legal and political philosophy, and judicial review. Among his many publications are: SAME-SEX MATTERS: THE CHALLENGE OF HOMOSEXUALITY (C. Wolfe, ed., Spence Publishing Company, 2000); HOMOSEXUALITY AND AMERICAN PUBLIC LIFE (C. Wolfe, ed., Spence Publishing Co., 1999); THE FAMILY, CIVIL SOCIETY, AND THE STATE (editor, Rowman and Littlefield, 1998); *The Marriage of Your Choice*, First Things, pp. 37-41 (February, 1995), [reprinted in MARRIAGE AND DIVORCE (T. Roleff, ed., Greenhaven Press, 1997)]; NATURAL LAW AND PUBLIC REASON editor (R. George & C. Wolfe, eds., Georgetown University Press, 2000).