COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss **County of Suffolk**	**Superior Court** **No. 01-1647-A**

HILLARY GOODRIDGE, *et al.*, **Plaintiffs,** **vs.** **DEPARTMENT OF PUBLIC HEALTH, *et al.*,** **Defendants.**	*	**MEMORANDUM OF *AMICUS CURIAE* MASSACHUSETTS FAMILY INSTITUTE, INC.**

MEMORANDUM OF *AMICUS CURIAE*
MASSACHUSETTS FAMILY INSTITUTE, INC.,
IN OPPOSITION TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

On August 20, 2001, counsel for Plaintiffs served upon counsel for Defendants its Motion for Summary Judgment in the above-captioned case, which involves a claim, based upon the Massachusetts Constitution, for the legal recognition of same-sex "marriage." By agreement of the parties, the Attorney General, counsel for Defendants, was to have until December 20, 2001, to respond pursuant to Rule 9A of the Superior Court. *Amicus Curiae*, the Massachusetts Family Institute, Inc. (MFI), joins the Attorney General in opposing the entry of summary judgment for plaintiffs and states its reasons as follows.

STATEMENT OF INTEREST

Massachusetts Family Institute, Inc., is a not-for-profit research and education corporation, organized under the laws of the Commonwealth of Massachusetts, that is dedicated to strengthening the family and restoring moral principles to the public policy and cultural arenas. Founded in 1991, MFI is a strong supporter of male-female marriages and mother-father-children families. MFI seeks to carry out its mission by a team of professional staff and volunteers made up of physicians, lawyers, and university professors. The case at bar is of the utmost interest to MFI. The family values espoused by MFI directly conflict with the plaintiffs' request for same-sex "marriage." MFI is concerned with the untold consequences same-sex "marriages" will have on society, moral principles, and the family.

SUMMARY OF ARGUMENT

In our legal tradition, marriage has always been understood to be the union, hopefully abiding, of a man and a woman. Such an understanding of marriage is deeply embedded in our culture, and the "fundamental right to marry" must be understood in that sense. Thus, there is no fundamental right to same-sex "marriage." While extrinsic criteria for marriage like race can be invidiously discriminatory, the sexually differentiated nature of marriage means that gender is intrinsic to marriage and in no way discriminatory. Properly considered, then, the Massachusetts marriage policy does not discriminate on the basis either of sex or of sexual orientation.

ARGUMENT

Plaintiffs rely on three chief lines of argument to advance their claim of a constitutional right to marriage licenses for same-sex couples. First, they argue that marriage is a fundamental right under the Massachusetts Constitution, and that the policy excluding citizens from marriage is subject to strict scrutiny. Plaintiffs' Memorandum In Support Of Motion For Summary Judgment (hereinafter "Memorandum") at 7-30. Second, they argue that exclusion of same-sex couples from marriage is a form of discrimination on the basis of sex, which is subject to strict judicial scrutiny under the Massachusetts Equal Rights Amendment. Memorandum at 40-44. Third, they argue that homosexuals are a "suspect class" for the purposes of equal protection analysis under the state Constitution. Thus they claim that the policy of denying marriage licenses to homosexuals is subject to heightened judicial scrutiny. Memorandum at 45-54. None of these three lines of argument is supported by reason or precedent.

I. THERE IS NO FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE.

In Washington v. Glucksberg, 521 U.S. 702 (1997), the Supreme Court required "a careful description of the asserted fundamental liberty interest." Id. at 721 (internal quotation marks omitted). The plaintiffs in this case properly cite a number of cases identifying a "fundamental right to marry." All of the plaintiffs' citations to cases stating that "marriage" is a "fundamental right" are cases in which marriage is assumed to require monogamy and gender diversity. At the proper level of specificity, namely, that level of specificity required by the United States Supreme Court in analyzing claims to fundamental rights in substantive due process analysis, the plaintiffs' argument fails entirely. Indeed, all of the states and the federal government include gender diversity as a

necessary element of the state's definition of marriage. (This includes Vermont, which created a new category of "civil union" rather than change its definition of marriage.) To claim that plaintiffs have a "fundamental right" to marry is therefore entirely question-begging when the plaintiffs seek to redefine marriage to exclude the requirement of gender diversity that has been included in every definition of marriage considered by the courts. *Cf.* Moore v. East Cleveland, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition" (emphasis added)).

In recognizing the universal consensus regarding the definition of marriage, the SJC wrote almost two hundred years ago, in a case cited by plaintiffs (Memorandum at 14), that "Marriage is unquestionably a civil contract, ...It is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife." Inhab. of Milford, 7 Mass. 48, 1810 WL 982, *3.

Indeed, at the time the Massachusetts and United States Constitutions were adopted, marriage was understood as the union of a man and a woman. The common law which we inherited from England was clear about marriage as such a sexually diverse union: "The second private relation of persons is that of marriage, which includes the reciprocal duties of husband and wife." Blackstone's *Commentaries on the Laws of England*, Book I, chap. 15.

A. The Law Must Supply Some Definition Of Marriage.

First, it is axiomatic that the legislature has the power to supply the definition of marriage for legal purposes, and that this definition should be based on a fundamental, deeply embedded understanding of marriage in American culture. "Marriage, being intrinsic to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well-regulated governments, among the first attentions of the civil magistrate to regulate marriages; by defining the characters and relations of parties who may marry." Inhab. of Milford at *3.[1] For example, the legislature may acknowledge that shared sexual activity is intrinsic to marriage as our culture defines it, and so distinguish it from relationships such as mere friendship, by declaring null any marriage without sexual congress. *See, e.g.*, 15 Vermont Statutes Annotated §515; Le Barron v. Le Barron, 35 Vt. 365 (1862); Ryder v. Ryder, 66 Vt. 158 (1894). Such a definition is not invidiously discriminatory against those with no inclination or ability to engage in sexual activity. They are excluded from certain legal privileges, but their fundamental freedoms remain unrestrained.

Similarly, the state may impose age requirements for marriage. A person under the statutory age is excluded from marriage, but it does not follow that the statutory definition invidiously discriminates based on age.

[1] More recently, the Massachusetts SJC, in the domestic partnership case, *Connors v. City of Boston*, 430 Mass. 31 (1999), observed: "We recognize a family may no longer be constituted simply of a wage-

B. Any Definition Necessarily Includes Exclusionary Criteria.

Second, in supplying any such definition, the legislature will inevitably create exclusionary criteria. For example, every United States jurisdiction, including Massachusetts, includes monogamy as part of the definition of marriage, and thereby excludes from marriage any couple that includes someone already married. *See, e.g.,* M.G.L.A chap. 207, § 4; Fraser v. Fraser, 334 Mass. 4 (1956) (holding marriage contracted while husband was still bound by prior valid legal marriage to be null and void).

C. Intrinsic and Extrinsic Criteria For Marriage Must Be Distinguished.

Third, we must distinguish between legislated criteria of exclusion that are related intrinsically to deeply embedded cultural understandings of marriage ("intrinsic criteria"), and criteria that are only extrinsically related to such understandings ("extrinsic criteria"). Intrinsic criteria are necessary to construct any legal definition of marriage; any definition would be vacuous without them. They have an exclusionary impact on some groups, but this impact is indirect and accidental, and inevitable under any definition.

A paradigm example of an "intrinsic" criterion for marriage is monogamy. Monogamy is directly related to the deeply embedded cultural understanding of marriage statutorily recognized in all fifty states. The legislature must place some restriction on the number of people engaging in a marital relationship to avoid making the definition of marriage vacuous, and the restriction selected reflects American culture.

As an intrinsic criterion of marriage, monogamy has an exclusionary impact on certain groups that permit or encourage polygamy. Any criterion targeting these groups directly may be deemed unacceptable. However, because the monogamy criterion for

earning father, his dependent wife and the couple's children. Adjustments in the legislation to reflect

marriage does indeed reflect a deeply embedded understanding of marriage, courts have unanimously upheld it. For example, in the recent decision Potter v. Murray City, 760 F.2d 1065 (10th Cir.1985), the Tenth Circuit upheld a novel challenge to anti-polygamy provisions in the Utah state constitution by ruling that "[m]onogamy is inextricably woven into the fabric of our society…. In light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship." 760 F.2d at 1070.[2]

Intrinsic criteria are incidentally rather than directly exclusionary, in the sense that they serve a rational legislative purpose unrelated to purposeful discrimination against any particular group. Thus, all persons marry subject to the legislature's expression of the cultural consensus codified in its legal definition of marriage. For instance, as every court to consider the question has recognized, monogamy is an intrinsic characteristic of marriage and is only indirectly exclusionary.

On the other hand, other possible criteria for legal recognition of marriage are extrinsic, not reflective of permissible legislative purposes unrelated to invidious discrimination. Such criteria are properly deemed directly exclusionary and discriminatory. For example, a statute refusing recognition to marriages involving a Muslim would purport, however implausibly, to include "non-Muslim" as a part of the definition of marriage. As the monogamy criterion excludes people because they are already married, this criterion would exclude Muslims because they are Muslims. Such a criterion is

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these new social and economic realities must come from the Legislature."

[2] The *Potter* court also points out that the original lead case upholding anti-polygamy provisions, *Reynolds v. United States*, 98 U.S. (8 Otto) 145 (1878), is still governing law for these decisions. *Potter* at 1068.

incidental to marriage and selected for the sake of its discriminatory purpose. It is extrinsic and directly exclusionary.

D. Judicial Scrutiny Extends To Extrinsic Criteria But Not Intrinsic Criteria.

Heightened judicial scrutiny extends to all extrinsic criteria for exclusion from marriage, and judges have freely exerted their powers to strike down extrinsic exclusionary criteria on the grounds of wrongful legislative interference in a fundamental right. Accordingly, the Supreme Court has rejected criteria restricting entrance into marriage on the basis of prison inmate status, delinquency in child support payments, and race. *See* Turner v. Safley, 482 U.S. 78 (1987) (Missouri regulation restricting inmates' ability to marry struck down under rational basis scrutiny); Zablocki v. Redhail, 434 U.S. 374 (1978) (striking down a statute requiring court approval prior to marriage for people with outstanding child support obligations); Loving v. Virginia, 388 U.S. 1 (1967). These cases found that (a) such criteria do not reflect deeply embedded cultural understandings of marriage, and that (b) their inclusion as criteria does not withstand judicial scrutiny on equal protection grounds.

However, judicial scrutiny does not extend to intrinsic criteria, which are only incidentally exclusionary, and judges have correctly declined to exercise their power in this arena. Thus, in the paradigm case of monogamy, courts have universally declined to strike anti-polygamy statutes, even though their exclusionary influence may impact upon groups granted explicit constitutional protection, such as sincere religious groups. Potter; Reynolds.

Thus, when an excluded group sues for inclusion in the legal definition of marriage, thereby asking the court to judicially redefine marriage, the court faces a

threshold question before it subjects the criterion in question to judicial scrutiny: Does the criterion directly reflect a deeply embedded cultural understanding of the nature of marriage itself, excluding the group only incidentally, or is the criterion extrinsic to any deeply embedded cultural understanding of marriage, selecting the group directly for the purpose of exclusion?

Moreover, in ruling whether an exclusive criterion is intrinsic or extrinsic, judges do not have discretion to make this judgment solely on the basis of their own views but must look to whether the criterion is deeply rooted in history and tradition. Because the legislature possesses the right to define marriage in accordance with such cultural norms, judges must interpret their laws in light of those norms. *See, e.g.*, Potter.

Therefore, in order to strike down a law banning same-sex marriage, the court must rule that gender diversity is only extrinsically included in the definition of marriage. It must rule that the Commonwealth is unreasonable in claiming that gender diversity is part of the definition of marriage, and that gender diversity is an extrinsic and directly discriminatory criterion of exclusion, selected for the purpose of excluding homosexuals. It must deny that including gender diversity in the definition of marriage reflects a deeply established cultural norm about the nature of marriage.

E. Gender Diversity Is Considered An Intrinsic Criterion For Marriage.

Gender diversity is properly included as an intrinsic characteristic of marriage according to a deeply embedded cultural norm. Gender diversity is thus similar to monogamy, and dissimilar to racial uniformity and non-incarceration, as an acceptable intrinsic criterion in a legal definition of marriage.

The very vocabulary we use to speak about marriage and spouses reflects our deeply held belief that marriage is irreducibly gender-diverse, as the courts in several jurisdictions have noted in consulting legal and non-legal dictionary definitions of marriage. *See, e.g.,* Jones at 589; Adams at 1123; Baker at 868. The gender diversity requirement reflects deeply held views about the nature of marriage itself in our culture. It is therefore similar to the monogamy requirement, and not similar to a requirement such as non-incarceration.

To illustrate the deeply embedded nature of the understanding of marriage as between male and female, the statutes prohibiting incestuous marriages are instructive. Massachusetts General Laws chapter 207, section 1 prohibits a man from marrying his mother, grandmother, daughter, granddaughter, sister, etc., whereas section 2 prohibits a woman from marrying her father, grandfather, son, etc., but nothing in the statutes prevents a man from marrying his father, grandfather, son, etc., nor a woman from marrying her mother, grandmother, daughter, etc. The General Court simply assumed that marriage was between a man and a woman, and thus there was no need to prohibit same-sex incestuous relationships. Obviously, no one is seriously arguing for the legalization of such relationships. The point is simply to illustrate the deeply embedded understanding of marriage that the statutes of the Commonwealth presuppose.

F. Plaintiffs' Objections To This Argument Are Off-Point.

Plaintiffs object that the notion that marriage is a "a unique union of differences" between the sexes is rejected under the SJC's ruling in Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc., 378 Mass. 342, as reflecting "archaic and overbroad generalizations about the roles and abilities of men and women." Memorandum at 65.

Here, plaintiffs conflate two arguments: (1) that the importance of complementary gender roles in marriage is “archaic,” like the suggestion that girls are no good at baseball rejected by the MIAA holding, and (2) that the notion that gender complementarity is intrinsic to marriage is “overbroad,” in the sense that many homosexual couples may find themselves in fact more complementary than many heterosexual couples. Neither argument is convincing. The first argument, relying on an analogy between marriage and high school sports, is not convincing. That gender diversity is irrelevant to one’s ability to bat, field, and run around the bases, in no way suggests that gender diversity is irrelevant to a lifelong sexual commitment ordered toward the procreation of children, and appellants’ reliance on MIAA to support that proposition is mistaken.

The second argument conflated here, that the requirement of gender diversity is “overbroad,” should also be rejected. It is certainly true that many heterosexual marriages involve deep personal incompatibilities, leading to emotional wreckage and divorce, while many homosexual relationships may involve deep personal compatibilities, leading to mutual emotional fulfillment. The Commonwealth’s claim is that, notwithstanding other compatibilities and incompatibilities, the complementarity between the sexes constitutes something objectively necessary and desirable in the marriage relationship. The fact that some marriages fail to advance the state’s goal of bolstering committed male-female sexually monogamous relations, and thereby providing a desirable and stable environment for the raising of children, does not defeat the policy. On the contrary, “if the classification of the group who may validly marry is overinclusive, it does not affect the validity of the classification.” Adams v. Howerton, 486 F.Supp.1119, 1124 (C.D.Cal. 1980). The

classification is justified by its general purpose, and is not refuted by individual failures to achieve that purpose.

G. Gender Is Relevant To Marriage In A Way That Race Is Not.

At this point, plaintiffs might cite Loving v. Virginia, 388 U.S. 1 (1967), to attack this line of argument. They might argue that the criterion of racial uniformity in marriage advanced by the Commonwealth of Virginia was based on a deeply held cultural consensus about the nature of marriage. Anti-miscegenation views were deeply ingrained in the Southern culture of segregation, but the Supreme Court still properly exerted its power in striking down the anti-miscegenation laws. Current cultural norms about gender diversity in marriage arise from similar prejudice, they claim, and the laws enforcing them should likewise be struck down.

This analogy to Loving must be rejected. Racial segregation was never related to deeply rooted cultural beliefs about the nature of marriage in the way that gender diversity is so related. The rationale behind the anti-miscegenation statutes was an attitude of racial prejudice and segregation, which sought to segregate the races in all walks of life. As a particularly intimate and personal walk of life, marriage was included as an area of imposed segregation, along with restaurant access, bus seat position, and housing location. The rationale for racially segregating the sexes within marriage was the same as the rationale for segregating them in all other walks of life: a desire to impose culture-wide invidious discrimination against the minority. The Commonwealth of Virginia thus had no plausible argument that racial uniformity should be included as an intrinsic criterion of marriage. Instead, the Court found that the state included racial uniformity as a criterion for marriage because of its discriminatory view regarding the inequality of the races. This

invidious racial classification was subject to heightened scrutiny and rejected under the Fourteenth Amendment.

The Loving decision followed a long social and political debate about the merits of using race as a basis for segregating persons. This debate included, among other things, the Civil War and the enactment of the Fourteenth Amendment. The Fourteenth Amendment was both sign and cause of the social, legal, and political triumph of the anti-racist side of this debate. By invoking this Amendment against the anti-miscegenation statutes, the Court thus drew on a deep reservoir of national experience to ground its ruling. There is no similar reservoir of experience, and indeed no similar constitutional provision, to allow this Court to condemn a policy promoting gender diversity in marriage and still maintain the public's confidence that its judicial assessment of the equities is anything more than the judge's own personal preference.

Gender diversity, marriage understood as between woman and man, is an aspect of society's objective definition of marriage. It reflects deeply embedded cultural norms about marriage and the relation between the sexes. It embodies a rich and compelling view of the importance of complementarity between the sexes. To privilege the marriage relation between the sexes is neither invidious nor oppressive. Gender diversity is properly included as an intrinsic criterion in the definition of marriage, and thus is not subject to heightened judicial scrutiny.

II.THE MARRIAGE POLICY DOES NOT DISCRIMINATE ON THE BASIS OF SEX.

The state's policy of refusing marriage licenses to same-sex couples does not discriminate on the basis of sex. On its face, this seems obvious, since both male-male and female-female couples are equally denied licenses. Nevertheless, plaintiffs base their

allegation of sex discrimination heavily or exclusively on an analogy with the line of cases rejecting anti-miscegenation statutes. The lead case here again is Loving v. Virginia, 388 U.S. 1 (1967), in which the Supreme Court struck down Virginia laws nullifying and criminalizing interracial marriages. *See also* Perez v. Lippold, 198 P.2d 17 (Cal. 1948) (striking down a state interracial marriage ban); McLaughlin v. Florida, 379 U.S. 184 (1964) (striking down a statute criminalizing cohabitation of white and black persons). Appellants argue that these cases are analogous to the present case: just as a statute that forbids a black person to marry a white person because he is black involves discrimination on the basis of race, so also a statute that forbids a man to marry another man because he is male, or forbids a woman to marry another woman because she is female, involves discrimination on the basis of sex.

Proper reading of Loving shows that this analogy is faulty and must be rejected. The facts in Loving and its sister cases are off-point in such a way that the Court's rationale for finding discrimination in Loving does not apply here. In Loving, the state asserted that the interracial marriage ban did not violate equal protection because it imposed identical restrictions and penalties on both races for the same forbidden activities. On its face, it affected both races equally. To overcome this argument, the Loving Court pointed out that the anti-miscegenation laws were motivated by a pernicious doctrine of white supremacy and that they supported an invidious caste system designed to segregate and oppress the threatened minority: "the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."

Loving at 10. In other words, to defeat the facial equal application of the statute on Equal Protection grounds, the Loving court appealed to the statute's invidious design of segregating the races and advancing racial inequality. As a matter of law, in order to strike down a facially neutral statute on grounds of racial discrimination, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977). Thus, in the case of the interracial marriage ban, the court struck down a law forbidding racial diversity in marriage because the law's purpose and effect was to promote segregation and discrimination against the protected race.

To find this analogy on point, the Court here must hold that the law requiring gender diversity in marriage has the purpose and effect of furthering invidious discrimination against a protected gender. A gender could be "males" or "females," but not "homosexuals." Plaintiffs have a heavy burden to advance the highly implausible claim that requiring gender diversity in marriage tramples the rights and liberties of one specific gender, *i.e.,* women, in the same way that Virginia's requirement of racial uniformity in marriage trampled the rights and liberties of black people. Here, defendants can take harbor in the facial gender-neutrality of the marriage statutes. Under Loving, in order to establish gender discrimination in the face of this neutrality, plaintiffs must show that the marriage statute has an invidious purpose and effect directed at segregating or oppressing one gender or another.

Indeed, other jurisdictions have almost unanimously accepted this reasoning and rejected the Loving analogy for the case of same-sex marriage bans. The Vermont Supreme Court's rejection of the analogy is particularly persuasive: "the reliance [on

Loving] is misplaced. There the Supreme Court had little difficulty in looking beyond the extrinsic neutrality of Virginia's anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy….The evidence does not demonstrate such a purpose" behind the same-sex marriage ban. Baker v. State, 744 A.2d 864, 880 (Vt. 1999). *See also* Lawrence v. State, 41 S.W.3d 349, 357 (Tex. App. 2001) (rejecting the Loving analogy in the context of a constitutional challenge to anti-sodomy laws); State v. Walsh, 713 S.W.2d 508, 510 (Mo. 1986) (rejecting the claim of sex discrimination in a similar context); Singer v. Hara at 1192 (rejecting analogy with Loving and Perez in upholding same-sex marriage ban under a state Equal Rights Amendment); Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971), app. dismissed, 409 U.S. 810 (1972) (rejecting the analogy in upholding ban on same-sex marriage). By dismissing the appeal of Baker v. Nelson for want of a substantial federal question, the U.S. Supreme Court indirectly rejected the Loving analogy, advanced in that case, for the purposes of federal constitutional law. Courts in other jurisdictions have rejected wholesale any constitutional argument for same-sex marriage, implicitly rejecting the Loving analogy. Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995) (rejecting statutory and constitutional arguments for same-sex marriage); Matter of Cooper, 592 N.Y.S.2d 797, 187 A.D.2d 128 (1993) (deferring to the Supreme Court's dismissal of Baker v. Nelson to reject state constitutional arguments for same-sex marriage); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (dismissing constitutional arguments for same-sex marriage without comment).

The only exception is Hawaii, whose Supreme Court adopted the Loving analogy as the foundation of its reasoning in ruling that a same-sex marriage ban constitutes gender

discrimination. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). Plaintiffs here rely on the same argument that persuaded the Hawaii court. The analysis above, supported by the authorities, indicates that the Hawaii court misinterpreted Loving. This argument should be rejected.

III. HOMOSEXUALS ARE NOT A SUSPECT CLASS.

Plaintiffs' third chief line of argument asserts that homosexuals should be treated as a suspect class, and that the same-sex marriage ban discriminating against such a class is subject to strict scrutiny. We do not offer an exhaustive discussion of these claims, but we note that the court should reject this line of argument for two reasons.

First, plaintiffs rely heavily on principles of federal constitutional law to advance their argument that homosexuals constitute a suspect class: "One way that the Massachusetts courts can determine whether a classification is suspect under the state constitution is to employ the mode of analysis frequently used by courts interpreting the Fourteenth Amendment." Memorandum at 45-46. The difficulty for plaintiffs is that the Supreme Court and the federal appellate courts have consistently refused to treat homosexuals as a suspect class under the cited principles. No standing federal appellate decision treats homosexuals as a suspect class,[3] while a well-established line of appellate decisions has insisted on applying the "rational basis" test to government policies that facially discriminate against homosexuals. See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 463, 571 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 464 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir.

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[3] A panel of judges on the Ninth Circuit Court of Appeals briefly held that homosexuals constituted a suspect class. However, that opinion was withdrawn. *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988*), withdrawn*, 875 F.2d 699, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

1989); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (all holding that homosexuals are not a suspect class or insular minority, and subjecting federal policies discriminating against homosexuals to the rational basis test). Moreover, the Supreme Court has also declined to treat homosexuals as a suspect class, applying rational basis scrutiny to invalidate a Colorado constitutional amendment that forbade statutes protecting homosexuals from discrimination. Romer v. Evans, 517 U.S. 620 (1996). The Supreme Court's dismissal of the appeal in Baker v. Nelson for want of a substantial federal question is also dispositive here. If discrimination against a suspect class under the Fourteenth Amendment were involved in that same-sex marriage ban, there would clearly be a substantial federal question. Furthermore, as several of the authorities cited above indicate, the Supreme Court's ruling in Bowers v. Hardwick is impossible to reconcile with any attempt to treat homosexuals as a suspect class. Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding as constitutional laws criminalizing homosexual activity). There, the court ruled that homosexual activity is not a fundamental right protected by substantive due process, and that criminal statutes singling out those who engage in homosexual conduct are subject only to rational basis review. If the conduct that defines a class can be subject to criminal sanctions under the Constitution, clearly the class itself is not subject to heightened constitutional protection. Plaintiffs' reliance of federal constitutional law to advance their claim of heightened protection is misguided, because the overwhelming weight of federal authority rests squarely against them.

Moreover, the analysis of the definition of marriage (see pp. 3-13, *above*) defeats this line of argument, even if homosexuals are treated as a suspect class *arguendo*. As we noted above, Reynolds and Potter stand for the proposition that intrinsic criteria for

marriage necessarily withstand strict judicial scrutiny, even when their exclusionary impact affects a constitutionally protected class. If the court rules that the gender diversity requirement is extrinsic and directly discriminatory, plaintiffs' arguments will advance under a fundamental rights theory, and the denomination of homosexuals as a suspect class will be irrelevant. However, if the court rules that gender diversity is a reasonable intrinsic criterion of marriage, plaintiffs' arguments fail to advance even if homosexuals are treated as a suspect class, and the designation will again be irrelevant. When the threshold question facing the court is properly framed, the question of suspect class designation no longer bears upon the legal analysis of the case.[4]

CONCLUSION

Plaintiffs claim that summary judgment is appropriate here where the only disputed issues are matters of law. However, plaintiffs fail to advance a convincing legal argument to establish their claims under the Massachusetts Constitution. Therefore, summary judgment in favor of plaintiffs should be denied.

Respectfully submitted,

AMICUS CURIAE
MASSACHUSETTS FAMILY INSTITUTE

[4] The same line of objection is fatal to plaintiffs' claims of impingement on their rights to free and expressive association. Similar arguments, more clearly grounded in explicit constitutional rights, were rejected in *Potter* and its cousins, because proffering a reasonable and legitimate definition of marriage falls within the scope of the legislature's power. Disparate impact of that definition on various groups does not *ipso facto* imply constitutionally suspect discrimination.

By its attorney,

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CERTIFICATE OF SERVICE

I, Dwight G. Duncan, certify that on this 14th day of December, 2001, I caused this Memorandum of Amicus Curiae Massachusetts Family Institute In Opposition to Plaintiffs' Motion for Summary Judgment to be mailed, first-class postage prepaid, to Mary L. Bonauto, counsel for Plaintiffs, Gay & Lesbian Advocates & Defenders, 294 Washington St., Suite 740, Boston, MA 02108-4608, and to Judith Yogman, counsel for the Defendants, Assistant Attorney General, One Ashburton Place, Boston, MA 02108.

December 14, 2001 ______________________________
Dwight G. Duncan