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COMMONWEALTH OF MASSACHUSETTS

**Supreme Judicial Court**

SUFFOLK, SS.

APPEALS COURT NO. 02-P-1162

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HILLARY GOODRIDGE et al.,  
*Plaintiffs-Appellants,*

v.

DEPARTMENT OF PUBLIC HEALTH et al.,  
*Defendants-Appellees.*

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ON APPEAL FROM A FINAL JUDGMENT  
OF THE SUPERIOR COURT

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**APPLICATION FOR DIRECT APPELLATE REVIEW**

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**REQUEST FOR DIRECT APPELLATE REVIEW**

This appeal presents the question whether the Department of Public Health's policy of limiting marriage to opposite-sex couples violates the statutes or Constitution of the Commonwealth. The Department and Commissioner of Public Health, the defendants-appellees in this case, seek direct appellate review of the Superior Court's decision finding no statutory or constitutional requirement that same-sex couples be permitted to marry and, therefore, granting summary judgment in defendants' favor.

**STATEMENT OF PRIOR PROCEEDINGS**

After plaintiffs filed their complaint and defendants answered, the parties filed cross-motions for summary judgment. After hearing, the Superior Court (Connolly, J.) granted summary judgment in defendants' favor. (A copy of the Superior Court's Memorandum of Decision is attached.) Plaintiffs filed a timely notice of appeal, the record was assembled, and the appeal was docketed in the Appeals Court on August 23, 2002.

**STATEMENT OF FACTS**

The essential, undisputed facts relevant to the legal issues raised by this appeal are that each of the

plaintiff couples sought marriage licenses and were denied them solely because both members of each couple are of the same sex, either both male or both female. Complaint, ¶¶ 122-45.

#### STATEMENT OF ISSUES

1. Whether the Superior Court correctly interpreted state marriage statutes to limit marriage to opposite-sex couples.

2. Whether the Superior Court correctly held that no provision of the Massachusetts Constitution requires that same-sex couples be permitted to marry.

These issues were raised and properly preserved in the lower court. (See the parties' memoranda in support of and in opposition to their cross-motions for summary judgment.)

#### ARGUMENT

1. THE SUPERIOR COURT CORRECTLY INTERPRETED STATE MARRIAGE STATUTES TO LIMIT MARRIAGE TO OPPOSITE-SEX COUPLES.

As this Court has long acknowledged, "marriage," within the meaning of Massachusetts statutes, is limited to unions of one man and one woman. Inhabitants of Milford v. Inhabitants of Worcester, 7 Mass. (1 Tyng) 48, 51 (1810) ("[Marriage] is an engagement, by which a single man and a single woman,

of sufficient discretion, take each other for husband and wife "); Adoption of Tammy, 416 Mass. 205, 207-08 (1993) ("the laws of the Commonwealth do not permit [a same-sex couple] to enter into a legally cognizable marriage"). See also Connors v. City of Boston, 430 Mass. 31, 37 (1999) (domestic partner is not "spouse" within meaning of health insurance statute). All of the courts in other jurisdictions that have considered, more directly, whether same-sex couples have a statutory right to "marry" have also interpreted the applicable statutes to apply only to opposite-sex couples.<sup>1</sup>

Application of the canons of statutory construction yields the same result. As this Court has often reiterated, "[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in

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<sup>1</sup>Baker v. State, 744 A.2d 864, 868-69 (Vt. 1999); Storrs v. Holcomb, 645 N.Y.S.2d 286, 287-88 (Sup. Ct. 1996), appeal dismissed, 666 N.Y.S.2d 835 (1997); Dean v. District of Columbia, 653 A.2d 307, 312-16 (D.C. 1995); Baehr v. Lewin, 852 P.2d 44, 56-57 (Haw. 1993); Singer v. Hara, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed for lack of substantial federal question, 409 U.S. 810 (1972); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (Sup. Ct. 1971).

connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Commonwealth v. Smith, 431 Mass. 417, 421 (2000) (citations omitted). Following that formula--i.e., considering the plain and ordinary meaning of the word "marriage," both when the marriage statutes were first enacted and today, and the Legislature's purpose in enacting those statutes--the Superior Court correctly concluded that the Legislature did not intend "marriage" to apply to same-sex couples. See Memorandum of Decision at 5-6 and authorities cited therein.

Because permitting same-sex marriages would be inconsistent with legislative intent, as inferred from the language, history, and purpose of the marriage statutes, this Court is constrained, by principles not only of statutory construction, as discussed above, but also of separation of powers, not to "engage in a judicial enlargement" of the statutory language beyond the meaning and scope intended by the Legislature. Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 540 (1996), cert. denied, 520 U.S. 1131 (1997).

Although public attitudes toward nontraditional

families have evolved since the marriage statutes were originally enacted, permitting same sex couples to marry would nevertheless constitute a fundamental change in established public policy, which should be left to the Legislature, not the courts, to accomplish. Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156, 167 (1998). "[T]he time tested wisdom of the separation of powers," Pielech, 423 Mass. at 540, requires courts "'to avoid judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions.'" Id. at 539 (citations omitted); see also Singer, 522 P.2d at 1196 n.12 (recognizing that public attitudes toward same-sex relationships are "undergoing substantial . . . change" but leaving it up to the legislature to decide whether to revise marriage laws to include such relationships). This Court recently applied these very principles in construing the word "spouse" to exclude domestic partners. Connors, 430 Mass. at 43 ("[a]djustments in . . . legislation to reflect . . . new social and economic realities must come from the Legislature . . .").

The Legislature has demonstrated its ability to respond to changing views of marriage by repealing statutory restrictions on interracial marriage, remarriage after divorce, and marriage by persons with mental disabilities. It should be permitted to do the same with respect to the opposite-sex restriction--if, when, and to whatever extent it deems appropriate.

**II. THE SUPERIOR COURT CORRECTLY HELD THAT SAME-SEX COUPLES HAVE NO RIGHT TO MARRY UNDER THE MASSACHUSETTS CONSTITUTION.**

In contending that Massachusetts' marriage statutes are unconstitutional under various provisions of the Massachusetts Constitution, plaintiffs must overcome the strong presumption that all state statutes are constitutional. See St. Germaine v. Pendergast, 416 Mass. 698, 703 (1993). To do so, they "must demonstrate beyond a reasonable doubt that there are no conceivable grounds supporting its validity." Id. As the Superior Court concluded, plaintiffs have failed to meet that heavy burden.

In seeking to invalidate the Massachusetts marriage statutes, plaintiffs are asking the Court to recognize, and deem fundamental, a constitutional right of same-sex couples to marry--a right never recognized by any state or federal court (with the exception of

one Alaska trial court) under either the federal or any state constitution.<sup>2</sup> As will be shown below, no basis for recognizing such a right can be found in the Massachusetts Constitution.

A. Same-Sex Couples Have No Right to Marry Under Articles 6 and 7 of the Declaration of Rights.

The Vermont Supreme Court relied solely on the "common benefits" provision of the Vermont Constitution in invalidating Vermont's marriage statutes. Baker v. State, 744 A.2d at 869-86. That provision has no Massachusetts analog. The Massachusetts Constitution contains no mention of "common benefits"; and Articles 6 and 7 of the Declaration of Rights, which plaintiffs

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<sup>2</sup>Although the Vermont Supreme Court found Vermont's statutory marriage scheme unconstitutional, it stopped short of recognizing a state constitutional right of same-sex couples to marry. Baker v. State, 744 A.2d at 886. The Hawaii Supreme Court, the only other court to hold that denying a marriage license to same-sex couples may be unconstitutional under a state constitution (if unjustified), declined to find a right to same-sex marriage in the Hawaii Constitution. Baehr, 852 P.2d at 55-57, but premised its decision, instead, on the equality provisions of its constitution. Id. at 63-68. On remand, the trial court held that the state had failed to demonstrate that its marriage statute furthered a compelling state interest. Baehr v. Lewin, No. 91-1394 (Haw. Cir. Ct. Dec. 3, 1996). However, while the case was on appeal, Hawaii amended its constitution to permit the Legislature to restrict marriage to opposite-sex couples, and the Hawaii Supreme Court then reversed and remanded the case to the trial court for judgment in the state's favor. Baehr v. Miike, 994 P.2d 566 (Haw. 1999).

described below as "similar" to the Vermont common benefits provision, actually have been interpreted much differently than the common benefits provision of the Vermont Constitution. As recognized by the Superior Court, Articles 6 and 7 cannot be deemed a source of plaintiffs' purported right to marry. See Memorandum of Decision at 11-14 and authorities cited therein. At best, those provisions provide no greater protection for such a right than the other provisions on which plaintiffs also rely. See Commonwealth v. Ellis, 429 Mass. 362, 371 (1999).

B. Same-Sex Couples Have No Right to Marry Under the Due Process and Liberty Provisions of the Massachusetts Constitution.

As the Superior Court recognized, separation of powers principles and the historical understanding of the term "liberty" counsel against an expansive interpretation of that term. See Memorandum of Decision at 15-22 and authorities cited therein. Accordingly, Massachusetts courts have recognized as fundamental only those rights that are deeply rooted in the Commonwealth's history and tradition but have declined to recognize rights that are not so deeply

rooted.<sup>3</sup>

As recognized by the Superior Court, restriction of marriage to unions of a man and a woman is deeply rooted in the Commonwealth's legal tradition and practice, while allowance of same-sex marriage is not. Memorandum of Decision at 18-22 and authorities cited therein. Although public disfavor of same-sex marriage appears to be abating, plaintiffs' request to reverse the Commonwealth's centuries-old legal tradition of restricting marriage to opposite-sex couples should be directed to the Legislature, not to the courts.

C. Same-Sex Couples Have No Right to Marry Under Article 16 of the Declaration of Rights.

As yet another potential source of a constitutional right to marry, plaintiffs look to

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<sup>3</sup>Compare Curtis v. School Committee of Falmouth, 420 Mass. 749, 756 (1995) ("primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"), cert. denied, 516 U.S. 1067 (1996); Aime v. Commonwealth, 414 Mass. 667, 676 (1993) ("right to be free from governmental detention and restraint is firmly embedded in Anglo-American law"); and Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 430 (1986) (right to make decisions to accept or reject medical treatment "has its roots deep in our history" and "has come to be widely recognized and respected"); with Three Juveniles v. Commonwealth, 390 Mass. 357, 364 (1983) (declining to find fundamental right to child-parent privilege where "[n]either Congress nor the Legislature of any State has seen fit to adopt a rule granting [such] a privilege").

Article 16, the Massachusetts analog of the First Amendment's protection of freedoms of expression and association. As recognized by the Superior Court, that source is equally unavailing. See Memorandum of Decision at 22-23 and authorities cited therein.

Even if state recognition of marriage could be viewed as "speech," which is doubtful, it is government speech, which is immune from judicial scrutiny. See id. at 22. Because marriage is therefore not protected speech, plaintiffs' claim of freedom of association fails as well. As further recognized by the Superior Court, id. at 23, freedom of association, in the sense encompassed by freedom of expression, is simply the "right to associate for the purpose of engaging in those activities protected by the First Amendment-- speech, assembly, petition for the redress of grievances and the exercise of religion." Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). Since marriage is not protected speech and plaintiffs claim no interference with any right to associate for political or religious purposes, Article 16 affords no basis for their purported constitutional right to marry.

D. The Marriage Statutes Do Not Discriminate  
Against Plaintiffs, Particularly on the Basis  
of Sex or Sexual Orientation.

As recognized by the Superior Court, the classification at issue here is between same-sex and opposite-sex couples, not between men and women. Memorandum of Decision at 24 and authorities cited therein. Therefore, the Equal Rights Amendment--which prohibits discrimination on the basis of sex, but not on the basis of sexual orientation and which was not intended to require same-sex marriages--is of no help to plaintiffs here. Id. at 8-9 n.6 and authorities cited therein. Furthermore, because sexual orientation is not a "suspect class," any discrimination on the basis of sexual orientation would be subject only to the minimal rational-basis scrutiny correctly applied by the Superior Court here. See Memorandum of Decision at 23-24 and authorities cited therein.

As the Superior Court concluded, the existing marriage statutes readily pass muster under such deferential scrutiny. Id. at 24-25 and authorities cited therein. Among various rational bases proffered by the defendants below, the Superior Court focused on the Commonwealth's legitimate interest in encouraging and fostering procreation within marriage, id. at 24-

25, and, like many other courts that have considered the issue, found it "rational for the Legislature to limit marriage to opposite-sex couples who, theoretically, are capable of procreation." Id. at 25 and authorities cited therein.

Finally, the Superior Court recognized that, while permitting same-sex marriage may be desirable as a matter of public policy, the decision to do so properly rests with the Legislature. Id. at 26 and authorities cited therein. This Court should reach the same conclusion.

**REASONS FOR GRANTING DIRECT APPELLATE REVIEW**


As evidenced by the above discussion, the questions presented by this appeal satisfy all three of the criteria for direct appellate review specified in Mass. R. App. P. 11(a): The questions presented are (1) "questions of first impression," (2) "questions of law concerning the Constitution of the Commonwealth," and (3) "questions of such public interest that justice requires a final determination by this Court." Accordingly, the application should be granted.

CONCLUSION

For all of the above reasons, this Court should grant direct appellate review.

Respectfully submitted,

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Commonwealth of Massachusetts  
SUFFOLK SUPERIOR COURT  
Case Summary  
Civil Docket

SUCV2001-01647  
Goodridge et al v Dept of Public Health et al

<b>File Date</b>	04/11/2001	<b>Status</b>	Disposed: appeal pending (dappen)	
<b>Status Date</b>	05/21/2002	<b>Session</b>	A - Civil A	
<b>Origin</b>	1	<b>Case Type</b>	D13 - Declaratory judgement (231A)	
<b>Lead Case</b>		<b>Track</b>	A	

<b>Service</b>	07/10/2001	<b>Answer</b>	09/08/2001	<b>Rule 12/19/20</b>	09/08/2001
<b>Rule 15</b>	07/05/2002	<b>Discovery</b>	05/31/2003	<b>Rule 56</b>	07/30/2003
<b>Final PTC</b>	11/27/2003	<b>Disposition</b>	04/10/2004	<b>Jury Trial</b>	No

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**SUCV2001-01647**  
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**SUCV2001-01647**  
**Goodridge et al v Dept of Public Health et al**

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**SUCV2001-01647**  
**Goodridge et al v Dept of Public Health et al**

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**SUCV2001-01647**  
**Goodridge et al v Dept of Public Health et al**

**Plaintiff**

Heidi Norton  
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SUCV2001-01647

Goodridge et al v Dept of Public Health et al

**Plaintiff**

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Goodridge et al v Dept of Public Health et al

**Plaintiff**  
Gloria Bailey  
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SUCV2001-01647  
Goodridge et al v Dept of Public Health et al

**Plaintiff**  
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**SUCV2001-01647**  
**Goodridge et al v Dept of Public Health et al**

**Defendant**

Dept of Public Health  
Served: 04/25/2001  
Answered: 05/11/2001  
Answered 05/11/2001

**Defendant**

Dr Howard Koh Comr  
Served: 04/25/2001  
Answered: 05/11/2001  
Answered 05/11/2001

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ENTRIES

Date	Paper	Text
04/11/2001	1.0	Complaint
04/11/2001		Origin 1, Type D13, Track A.
04/11/2001	2.0	Civil action cover sheet filed
04/25/2001	3.0	SERVICE RETURNED: Defts (in hand 4/18/01)
05/11/2001	4.0	ANSWER re: Defts Dept of Public Health and Dr. Howard Koh
08/08/2001		Case status changed to 'Needs review for answers' at service deadline review
10/18/2001		Case status changed to 'Needs discovery' at answer deadline review
12/26/2001	5.0	MOTION of Massachusetts Citizens Alliance and Massachusetts Citizens for marriage for permission to file brief as Amici Curiae (attached brief)
01/02/2002		Motion (P#5) DENIED without prejudice to refiling in accordance with Rule 9A (Regina L. Quinlan, Justice) (Dated 12/31/01) Notices mailed December 31, 2002
01/03/2002	6.0	Motion of Massachusetts Family Institute Inc for leave to file Memorandum amicus curiae in opposition to plffs motion for summary judgment (w/o opposition)
01/10/2002		Motion (P#6) After review, Motion of Massachusetts Family Institute Inc for leave to file a Memorandum of Amicus Curiae in opposition to plaintiffs motion for summary judgment is ALLOWED in the discretion of the court. See Mass Federation of Teachers v School Comm of Chelsea, 409 Mass 203, 210 n. 6 (Abrams, 1991) (Thomas E. Connolly, Justice) (Dated 1/7/02) Notices mailed January 09, 2002
01/10/2002	7.0	Memorandum of Amicus Curiae Massachusetts Family Institute Inc in Opposition to Plaintiffs' Motion for Summary Judgment 0 Ordered filed by leave of court (Connolly,J) (Dated 1/7/02)
01/10/2002	8.0	Motion of plff for leave to file brief of amicus curiae marriage law project (w/o opposition)
01/15/2002	9.0	Motion of Focus on the Family The Common Good Foundation Catholic Vote & The American Center for Law and Justice for leave of court to file brief as Amici Curiae in the above captioned matter w/o opposition
01/16/2002		Motion of Massachusetts Citizens Alliance and Mass Citizens for Marriage for Permission to file brief as Amici Curiae (w/o opposition)
01/18/2002	10.0	Motion of plffs for Summary Judgment w/opposition
01/18/2002	11.0	Cross-Motion of defts for Summary Judgment w/o opposition

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Date	Paper	Text
01/18/2002	12.0	Joint Motion for leave to file m,emoranda of law in excess of twenty pages
01/22/2002		Motion (P#9) After review motion ALLOWED in the discretion of the court (Thomas E. Connolly, Justice) (Dated 1/17/02) Notices mailed January 18, 2002
01/22/2002	13.0	ORDER - For Good Cause Shown this Court Grants leave for Focus on the Family, the Common Good Foundation, Catholic Vote, and the American Center for Law and Justice to file a brief as amici curiae in the above-captioned matter. Further, this Court Grants the request of Amici that the copy of the brief Amici Curiae attached to the Motion for Leave to File Brief as Amici Curiae be deemed as properly filed and hereby Orders the Clerk of the Court to enter the Brief Amici Curiae as properly filed in this matter (Connolly,J) (Dated 1/17/02) Notice Sent 1/18/02
01/22/2002	14.0	Brief of Amici Curiae Focus on the Family, the Common Good Foundation, Catholic Vote, and the American Center for Law and Justice in Opposition to Plaintiffs' Motion for Summary Judgment - Filed by Leave of court (Connolly,J) (Dated 1/17/02)
01/23/2002		Motion (P#12) after review, motion ALLOWED (Connolly, J.)
01/24/2002	15.0	Motion of Massachusetts Citizens Alliance and Massachusetts Citizens for Marriage for permissin to File Brief as Amici Curiae Allowed in the discretion of the Court (Connolly J) Notice sent 1/22/02 dated 1/18/02
01/24/2002	16.0	Brief of Amici Curiae Massachusetts Citizens Alliance and Massachusetts Citizens for Marriage Filed by leave of Court (Connolly J) dated 1/18/02
03/04/2002	17.0	Assented to motion for lv to file memorandum in opposition to defts Cross Motion for Summary Judgment
03/11/2002		Motion (P#8) ALLOWED (Connolly, J.)
05/07/2002	18.0	MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT (Connolly J) Notice sent 5/8/02
05/09/2002	19.0	SUMMARY JUDGMENT MRCP 56 The complaint of plffs is Dismissed against defts with costs entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) Connolly J
05/21/2002	20.0	Plaintiffs' notice of appeal
05/21/2002		Notice to Justice Thomas Connolly of the filing of Notice of Appeal
05/21/2002		Notice of service of the filing of Notice of Appeal: Anthony E. Penski, Esquire, Judith S. Yugman, Esquire, Mass Attorney General's Office; Kenneth E. Edwards, Esquire, Boston Publice Health Commission
06/14/2002	21.0	Letter received re: no transcript ordered
08/14/2002		Notice of assembly of record on Appeal

**EVENTS**

Date	Session	Event	Result
02/27/2002	Civil A	Motion/Hearing: Rule56 Hearing To Take 2 Hours	Event not held-joint request
03/12/2002	Civil A	Motion/Hearing: Rule56	Event held--Under Advisement

Commonwealth of Massachusetts

SUFFOLK SUPERIOR COURT

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Goodridge et al v Dept of Public Health et al

I HEREBY ATTEST AND CERTIFY ON

Aug 21 2002 THAT THE

FOREGOING DOCUMENT IS A FULL,  
TRUE AND CORRECT COPY OF THE  
ORIGINAL ON FILE IN MY OFFICE,  
AND IN MY LEGAL CUSTODY

MICHAEL JOSEPH DONOVAN  
CLERK / MAGISTRATE  
SUFFOLK SUPERIOR CIVIL COURT  
DEPARTMENT OF THE TRIAL COURT

BY: [Signature]